No. _____

IN THE

Supreme Court of the United States

Ramon Lopez,
Petitioner,
v.

Commissioner of Correction
Respondent

On Petition for a Writ of Certiorari to the
Supreme Court
of the State of Connecticut

PETITION FOR WRIT OF CERTIORARI

W. Theodore Koch III
Counsel of Record
Koch, Garg & Brown
8 W. Main St., Suite 2-10
Niantic, CT 06357
(860) 452-6860
ted@kgb-law.com

APRIL 11, 2022

QUESTION PRESENTED

Does the rule set forth in *Brady v. Maryland,* 373 U.S. 83 (1963), requiring that the government disclose material favorable evidence to a criminal defendant include a rule that the defense exercise due diligence in independently seeking out material favorable evidence that is in the possession of the prosecuting authority?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

State of Connecticut v. Ramon Lopez, CR-02-0182760, Judicial District of Fairfield at Bridgeport. Judgment entered December 5, 2003.

State v. Lopez, SC 17198, Supreme Court of Connecticut. Judgment entered January 2, 2007.

Ramon Lopez v. Warden, TSR-CV05-4000857-S, Judicial District of Tolland at Geographical Area #19. Judgment entered January 4, 2012.

Ramon Lopez v. Commissioner of Correction, AC 34637, Appellate Court of Connecticut. Judgment entered June 3, 2014.

Petition for certification to Connecticut Supreme Court from judgment in *Ramon Lopez v. Commissioner of Correction*, AC 34637 denied October 15, 2014.

Ramon Lopez v. Warden, TSR-CV12-4004836-S, Judicial District of Tolland at Geographical Area #19. Judgment entered May 1, 2019.

Lopez v. Comm'r of Corr., AC 43240, Connecticut Appellate Court. Judgment entered November 2, 2021

Petition for certification to Connecticut Supreme Court from judgment in *Ramon Lopez v. Commissioner of Correction*, AC 43240 certification denied, January 11, 2022.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases Cases

Statutes Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the Connecticut Appellate Court's decision in *State Lopez v. Comm'r of Corr.,* 208 Conn. App. 515, 264 A.3d 1097 (2021), appeal denied by *Lopez v. Comm'r of Corr.*, 340 Conn. 922 (2022).

OPINIONS BELOW

The Connecticut Supreme Court's denial of certification is reported at *Lopez v. Comm'r of Corr.*, 340 Conn. 922 (2022). Appendix A. The Connecticut Appellate Court's decision is available at *Lopez v. Comm'r of Corr.,* 208 Conn. App. 515, 264 A.3d 1097 (2021), Appendix B. The state habeas court's denial of the petition is reported at *Lopez v. Warden,* CV12-4004836, Appendix C. The state habeas court's denial of the petitioner's prior habeas petition is reported at Lo*pez v. Comm'r of Corr.,* 2011 Conn. Super. LEXIS 3295 * (2012), Appendix D. The Connecticut Supreme Court's denial of Petitioner's direct appeal is available at *State v. Lopez*, 280 Conn. 779, 911 A.2d 1099 (2007), Appendix E.

JURISDICTION

The Connecticut Appellate Court issued its decision on November 2, 2021. The Connecticut Supreme Court denied Petitioner's Petition for Certification on January 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides in relevant part: "no State shall....deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural Background

The Petitioner was the defendant in *State v. Ramon Lopez* CR-02-0182760, in the Fairfield Judicial District at Bridgeport. On October 1, 2003, after a jury trial, he was convicted of murder in violation of C.G.S. § 53a-54a(a); two counts of attempted murder (C.G.S. §§ 53a-49(a) and 53a-54a(a)); and, two counts of assault in the first degree (§ 53a-59(a)(5)). On December 5, 2003, the Petitioner was sentenced to 100 years of incarceration.

On direct appeal, the Petitioner claimed that the trial court improperly "(1) denied his postconviction motion for a continuance so that his substitute counsel could review the trial transcript in preparation for sentencing; (2) admitted evidence of the defendant's prior misconduct; and (3) instructed the jury on accessorial liability." in *State v. Lopez*, 280 Conn. 779, 782 (2007). The judgment of the trial court was affirmed. *Id.*

On or around December 19, 2005, the Petitioner filed a *pro se* petition for a writ of habeas corpus, commencing *Ramon Lopez, #227089 v. Warden*, CV-05-4000857, the Petitioner's first state court petition for writ of habeas corpus. On January 4, 2012, the habeas court, *Fuger, J.*, denied the Petitioner's petition for a writ of habeas corpus. On May 17, 2012, the Petitioner appealed from the judgment in *Ramon Lopez, #227089 v. Warden*, CV-05-4000857, to the Connecticut Appellate Court, where it was docketed as *Ramon Lopez, #227089 v. Commissioner of*

Correction, A.C. 34637. On June 3, 2014, in *Ramon Lopez, #227089 v. Commissioner of Correction*, A.C. 34637, the Connecticut Appellate Court affirmed the habeas court's denial of the Petitioner's petition for a writ of habeas corpus in *Ramon Lopez, #227089 v. Commissioner of Correction*, CV-05-4000857. 150 Conn. App. 905 (2014).

Mr. Lopez filed the new and operative state habeas petition below. It was denied on its merits by the habeas court, affirmed on appeal to the Connecticut Appellate Court, and the Connecticut Supreme Court denied certification.

B. Factual Background

The facts of the underlying case, as described by the Connecticut Supreme Court in the Petitioner's direct appeal are as follows:

> In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally east-west direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as "Polo," his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as "Chef" came out of Pettway's, gave Abdul-Hakeem and Rosado a "grim" look and then walked north on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth Street to the west side and joined Diamond and Chef.
>
> Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, Tony Payton, knew both men

> and was able to identify them as Boo McClain and the defendant. McClain carried a handgun and the defendant carried a shotgun. As McClain and the defendant approached Pettway's, the defendant said to the people gathered on the sidewalk, "All right freeze, nobody move," and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to Pettway's, which had a "buzzer lock." The door opened and several people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the defendant, whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to Pettway's, McClain, the defendant and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the defendant yelled, "I told you I was going to get you, Polo, I told you I was going to get you." McClain and the defendant then ran back up Stratford Avenue and reentered the white car, which turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis revealed that two separate shotguns and four separate handguns had been used in the shooting.
>
> Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul-Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip.

State v. Lopez, 280 Conn. 779 (2007). At the first habeas trial, the Petitioner presented a claim that his trial counsel was ineffective for failing to investigate and present an alibi defense. The habeas court concluded that trial counsel was not ineffective for not pursuing an alibi. In the second habeas petition, the Petitioner raised several claims. Relevant to this petition for certiorari, the Petitioner claimed that the prosecuting authority had violated his right to due process at his criminal trial because it failed to disclose relevant exculpatory information in its possession related to a robbery and assault that had occurred five days before the Pettway's shooting in the PT Barnum part of Bridgeport.

The evidence presented at the habeas trial revealed that the deceased victim and the State's key witness had been involved in the PT Barnum incident, and that one of the firearms that had been used to perpetrate the Pettway's shooting had also been fired inside of the apartment during the PT Barnum incident. The prosecuting authority had disclosed to the petitioner's counsel a firearms report from the forensic examiner listing a series of police investigation numbers for shootings that the firearms from the Pettway's incident had been connected to, which included the police number for the PT Barnum incident. However, the PT Barnum police file included a statement from the State's key witness, Manuel Rosado ("Rosado") placing him at the scene of the PT Barnum incident, potentially as a lookout, and those police materials also implicated the deceased victim from the Pettway's shooting as a perpetrator of the PT Barnum robbery. The petitioner's trial counsel, his investigator, and subsequent post-conviction counsel all testified that they had never seen anything related to the PT Barnum incident beyond the firearms report. The habeas court decided, and the Connecticut Appellate Court agreed, that merely disclosing the firearms report, and nothing more, sufficiently met the prosecuting authority's duties under *Brady v. Maryland*, 373 U.S. 83 (1963).

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

There are rules that are so basic to our fundamental concept of justice that their absence is virtually unfathomable, and their place in our system of justice is beyond serious dispute by all actors in the justice system. However, as critical and generally accepted some of these rules are, it has been necessary for this Court to weigh in on the contours and mechanics of these foundational rules. The "*Brady* rule" is one simply stated, but as the decision below makes clear, not always so

simply understood. In other words, the core of this constitutional principle is firmly established, but the contours and outer bounds of the operation of the rule in practice is seemingly in dispute.

To the extent that it has not already done so (and the Petitioner submits that this Court has already done so) this Court should speak clearly and simply to confirm the clear and simple rule that is the "*Brady* rule": **when the government is in possession of evidence that it knows is favorable to the defense, it should disclose that evidence – all of it – even where a defendant has some opportunity to seek out and discover such evidence on its own.** In some instances, rules with complex exceptions are desirable or even necessary. But in this instance, where questions of fundamental fairness in the criminal justice system are at play, a clear rule is the only workable rule.

I. THIS CASE CLEARLY DISPLAYS THE NEED FOR A CLEAR RULE REQUIRING THE PROSECUTING AUTHORITY TO DISCLOSE ALL EXCULPATORY EVIDENCE IN ITS POSSESSION.

The police, and the prosecuting authority, were aware that there had been a serious robbery, burglary, and assault incident ("the PT Barnum incident")[1] involving the victims of the crime for which the Petitioner was convicted ("the Pettway's shooting")[2] several days before the shooting in this case, and they knew that a gun used to shoot the victims in the case that the Petitioner was convicted of

[1] The robbery incident had occurred in an apartment in the "PT Barnum" apartment complex in Bridgeport, Connecticut.
[2] The Petitioner was convicted for his involvement in the shooting that occurred outside of the "Pettway's" store in the "Ave" neighborhood of Bridgeport.

was also fired during that previous incident. The police, and the prosecuting authority, knew that the State's key witness at the Petitioner's criminal trial had told the police that he had been at the scene of the PT Barnum incident, and that he arrived and left with the active perpetrators, yet that witness's parole had not been violated for his involvement. The police, and the prosecuting authority, knew that one of the individuals alleged to have actively perpetrated the PT Barnum incident was the deceased victim in the Pettway's shooting.

The significance of this information was twofold: First, and most simply, it provided impeachment evidence against Rosado, the State's key witness at the Petitioner's criminal trial who had told police he was with the participants in the PT Barnum incident. Second, and perhaps more powerfully, yet admittedly more nuanced, the information provided a framework for understanding a compelling third-party culpability theory where the Pettway's shooting could be understood as retaliation for what had occurred five days earlier at the PT Barnum apartment.

Instead of revealing the nexus to the earlier PT Barnum incident, Rosado insisted during his testimony at the Petitioner's criminal trial that he had disclosed all his misconduct to the jury,[3] that he was not receiving any favoritism from the State, and that the Petitioner's motive for the shooting was a threat levelled by the Petitioner against another individual who was not shot, but was allegedly present, at the Pettway's shooting. The jury never knew that his parole had not been

[3] During closing arguments, the prosecuting authority bolstered this pronouncement from Rosado, insisting that Rosado had revealed all his relevant conduct to the jury.

violated despite his admitted presence at the scene and fraternizing with those individuals he knew to be armed and involved in the robbery. The jury never knew that the Rosado and the deceased victim were a part of the robbery five days earlier. They never knew that the same gun was used at both the earlier robbery and the Pettway's shooting.[4]

At the habeas proceeding, the Petitioner produced all of this evidence, and much more.[5] The habeas court's analysis was simple but completely incorrect: the habeas court concluded that since the State had produced a single firearms report indicating the police numbers of various shooting incidents that the firearms used in the Pettway's shooting had been "matched" to, including the PT Barnum incident, the State had fully and completely discharged its duties under *Brady*.

Although the trial prosecutor did not deny that he had Rosado's statement about the robbery and other reports and statements detailing Rosado and Polo's involvement in the prior robbery in his possession, the habeas court did not find that the State was obligated to disclose Rosado's statement. The habeas court did not find that the State was obligated to disclose numerous other statements and reports that placed Rosado at the scene and the deceased victim as a perpetrator of the crime. The habeas court completely ignored that the State failed to disclose a

---

[4] The significance of this detail was elaborated upon by a witness presented by the Petitioner at the habeas trial, who explained that the Pettway's shooting was the fallout from an "inside job" gone wrong at the PT Barnum incident.

[5] Among other things, the Petitioner presented a new eyewitness who also had knowledge of the prior robbery incident, who named other individuals other than the Petitioner as the actual perpetrators of the shooting, as well as a partial recantation of some of the trial testimony of Rosado.

copy of the firearms report, *within the Pettway's shooting police file,* that detailed the connection between the shootings and identified a victim of one of the shootings listed in that report as a suspect in the Pettway's shooting. Instead, the habeas court was completely satisfied that the disclosing of a police identification number was enough to completely discharge the State's duties under *Brady*.

This is wrong. It had disastrous consequences for the Petitioner, who was convicted on weak evidence without the opportunity for the jury to understand the most important factual issues in the Petitioner's case. It is also wrong because it sets the stage for prosecutorial gamesmanship that runs afoul of the basic guarantees of due process that is at the heart of this Court's decision in *Brady*.

This case is a perfect vehicle to examine some of the questions related to the government's duty in disclosing material favorable evidence to the defense before trial. In particular, this case is not complicated by a personal knowledge element that some prior cases discussing the issue have encountered. In this case, the Petitioner had no knowledge or connection to the PT Barnum incident, and had not been independently provided any information about the incident or its participants. In other cases, courts have held this to be dispositive. *See e.g. Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015) (explaining that the personal knowledge "requirement speaks to facts already within the defendant's purview, not those that might be unearthed."). Second, in this case, the prosecutor at the habeas trial did not deny that he had the Rosado statement and other reports related to the PT Barnum incident in his position. In other cases, where the prosecuting authority

did not clearly have the materials in their direct possession, courts have held that the duty is lessened where the prosecuting authority is in no better position to obtain the materials than the defense.[6]

II. A CLEAR *BRADY* RULE NOT REQUIRING A BURDENSOME DUE DILIGENCE ELEMENT WOULD BE THE MOST JUST AND MOST WORKABLE RULE, AND IS COMPLETELY CONSISTENT WITH THIS COURT'S *BRADY* DECISIONS.

The State Court's application of the disclosure rule in this case runs particularly afoul of *Brady*. In *United States v. Bagley*, 473 U.S. 667, 681-682 (1985), the United States Supreme Court specifically disavowed the "specific request" standard related to the disclosure of favorable evidence. In this instance, where the prosecuting authority was in possession of clearly powerful exculpatory evidence, faulting the Petitioner's counsel for not requesting additional specific exculpatory evidence in the possession of the prosecuting authority not only violates the no specific request reasoning of *Bagley,* but it creates the problem that the United States government acknowledged in cases of incomplete disclosure:

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

Bagley, 473 U.S. at 682 (citing Brief for the United States). In the case of the Petitioner, a particularly egregiously misleading disclosure was made: without

---

[6] In *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 123 n. 8 (2d Cir. 2015), discussed *supra,* the Second Circuit discussed that information within the knowledge of officers working on the investigation team was clearly within the State's knowledge in a particular case. Here, the record establishes that the officer responsible for the PT Barnum investigation was also a member of the Pettway's investigation team.

disclosing any police reports or witness statements, the prosecuting authority made a written disclosure informing the defense that another individual had pled guilty to the PT Barnum robberies, without mentioning the involvement of Rosado and Polo.

The most workable and protective rule would not require that a Petitioner show purposeful misrepresentation or gamesmanship, but would create a circumstance where any misrepresentations and gamesmanship would run afoul of the rule. Here, by simply stating that if the government has it, they must disclose it, questions of motives and strategy will be eliminated from the equation. A Petitioner should not have to prove purposeful deception when the question is simply whether an individual received a fair trial. Of course, this has always been the rule. *Brady v. Maryland*, 373 U.S. 83, 87, 83 (1963) (reversal for failure to disclose materials favorable evidence required "irrespective of the good faith or bad faith of the prosecution.").

While the State Court's decision displays that the exact contours of the *Brady* rule may need some clarification, it certainly cannot be stated that this case involves an "open question" about the government's disclosure obligations. When this Court has spoken about the contours and mechanics of the *Brady* rule, it has at least spoken consistently with the Petitioner's position, and has arguably already stated the rule that the Petitioner requests.

In *Strickler v. Greene*, 527 U.S. 263 (1999), this Court found a *Brady* violation where the prosecuting authority had failed to disclose law enforcement notes that

would have called into question the government's key witness's confident assertion in the power of her memory. *Id.* at 273. The Fourth Circuit had earlier reversed the district court's granting of the habeas petition because the Fourth Circuit concluded that since the Petitioner "knew that [the key witness] had been interviewed by [local] police officers, the court opined that 'reasonably competent counsel would have sought discovery in state court' of the police files, and that in response to this 'simple request, it is likely the state court would have ordered the production of the files.'" *Id.* at 279 (quoting *Strickler v. Pruett*, 1998 U.S. App. LEXIS 12805 (4th Cir. 1998)). While this Court's *Strickler* decision was an examination of whether the Petitioner had sufficient "cause" to overcome the procedural default alleged by the respondent, it is clear that in *Strickler*, as in many cases, the substance of the underlying claim and the procedural default analysis are inseparable. *Strickler*, 527 U.S. at 282. In *Strickler*, this Court stated it is "reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination." *Id.* at 284 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The *Strickler* facts include additional notes held from the "open file" provided by the trial prosecutor, but those facts are not meaningfully distinguishable than the disclosure process in this case, where the prosecuting authority made specific disclosures, including information about the PT Barnum incident that contained no indication that Rosado had given a statement or that Polo had been involved. If

anything, these facts are more compelling because none of the information provided by the prosecuting authority in this case contained any indication that the PT Barnum incident was relevant, unlike in *Strickler* where the notes in question were related to the government's key witness.

This Court also spoke clearly in *Banks v. Dretke*, 540 U.S. 668, 693 (2004), that trial counsel cannot be faulted for relying upon a representation by the prosecuting authority that it had disclosed all relevant *Brady* material. This Court stated that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. This Court spoke at length in *Banks* about the need for counsel, defendants, and the public, to be allowed to rely upon the assumption that the prosecuting authority is faithfully discharging its duties to disclose material favorable evidence is critical to the functioning of the criminal justice system. *Id.* at 696-697. It is impossible to review the pattern of disclosure in this case surrounding the other incidents that the weapons were connected to and not conclude that (1) it was reasonable for defense counsel to believe that any exculpatory materials would have been disclosed by the State; and (2) the disclosures that were provided were extremely misleading especially because they mention another accused in the PT Barnum case that was not clearly connected to the Pettway's prosecution against the Petitioner. The lack of an open file policy or the lack of a clear statement from the prosecuting authority that it had

faithfully discharged all of its *Brady* requirements does not change the analysis of the circumstances in this case.

III. THE LOWER COURTS NEED GUIDANCE ON THIS IMPORTANT QUESTION.

To the extent that there is any question about the existence, or non-existence, of a "due diligence" requirement in proving a *Brady* claim, there is a split of authority as to whether a "due diligence" requirement exists, and there is a further split regarding what constitutes such due diligence. Different courts have asked the question in different ways, but the common thread is an inquiry into where the government's duty to disclose what it knows ends, and where the defense's responsibility to investigate and prepare their case ends.

Several courts agree that this Court's *Brady* line of cases does not embody a due diligence requirement.

In *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015), the Second Circuit made clear that any "due diligence" by the defense required under *Brady* is limited to instances where "the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Id.* (quoting *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). The *Lewis* Court explained further that

> the "knew" prong of this requirement is subjective, and the "should have known" prong is objective—meaning that, if a reasonable defendant in these circumstances *should have known* the relevant facts, then the prosecution's failure to disclose that evidence does not implicate *Brady*. This requirement speaks to facts already within the defendant's purview, not those that might be unearthed. It imposes no duty upon a defendant, who was reasonably unaware of exculpatory information, to take affirmative steps to seek out and uncover such

> information in the possession of the prosecution in order to prevail under *Brady*.

Lewis, 790 F.3d at 121.

The Ninth Circuit has also repeatedly and clearly rejected the due diligence arguments offered by the government to excuse the failure to disclose material favorable evidence. *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) the Ninth Circuit set forth that "[t]he availability of particular statement through the defendant himself does not negate the government's duty to disclose." *Id.* The *Howell* Court reasoned that "[d]efendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the importance of certain occurrences." *Id. See also Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) (holding that "[t]he prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence.")

In 2016, the Third Circuit decided *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263 (3d Cir. 2016), which relied upon this Court's recent decisions in *Banks v. Dretke*, 540 U.S. 668 (2004) and *Strickler v. Greene*, 527 U.S. 263 (1999) to conclude that its prior decisions embodying a "due diligence" requirement into a *Brady* claim were inconsistent with this Court's jurisprudence. The *Dennis* Court stated a clear rule, that "[o]nly when the government is aware that the defense counsel already has the material in its possession should it be held to not have 'suppressed' it in not turning it over to the defense." *Id.* at 292.

Similarly, the Sixth Circuit has read *Banks* to have eliminated any "due diligence" requirement on the part of the defense in order to establish a *Brady* claim. *United States v. Tavera*, 719 F.3d 705, 711 (6th Cir. 2013).

Even before *Banks*, the D.C. Circuit concluded that this Court's decision in *Strickler* clarified that *Brady* does not impose a due diligence requirement on the defense to independently seek out exculpatory materials. *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (D.C. Cir. 1999). The decisions of the D.C. Circuit have also been at times inconsistent.

Also predating *Banks* and *Strickler* is the Tenth Circuit's view that "[t]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge" and that "the fact that defense counsel 'knew or should have known' about the [exculpatory] information . . . is irrelevant to whether the prosecution had an obligation to disclose [the evidence]." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

At least two federal courts of appeals have expressly held that there is a due diligence requirement related to the *Brady* rule. *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc) (concluding that "[e]vidence is not suppressed [under *Brady*] . . . if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." (internal quotation marks omitted); *United States v. Parker*, 790 F.3d 550, 561-562 (4th Cir. 2015) ("[W]hen exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not

entitled to the benefit of the *Brady* doctrine.") (internal citations omitted). Precedent from several other courts appear to also take this due diligence view. *See United States* v. *Roy*, 781 F.3d 416, 421 (8th Cir. 2015) ("[t]he government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels" (quotation marks omitted)); *United States* v. *Brown*, 650 F.3d 581, 588 (5th Cir. 2011) ("evidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it" (quotation marks omitted)); *Ferguson* v. *Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) ("to prevail on a *Brady* claim, [defendant] must establish" that he "did not possess the evidence and could not have obtained it with reasonable diligence" (quotation marks omitted)); *Carvajal* v. *Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) ("[e]vidence is 'suppressed'" where it "was not otherwise available to the defendant through the exercise of reasonable diligence"; "[s]uppression does not occur when the defendant could have discovered it himself through 'reasonable diligence'").

The state courts have also struggled with the parameters of the *Brady* rule and whether it embodies a due diligence requirement. Several state high courts have rejected the due diligence requirement. *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014); *State v. Reinert*, 419 P.3d 662 (Mont. 2018); *People v. Bueno*, 409 P.3d 320 (Colo. 2018). Other high courts have adopted this requirement. *See e.g. Commonwealth v. Paddy*, 15 A.3d 431 (Pa. 2011); *State v. Kardor*, 867 N.W.2d 686

(N.D. 2015); *Lofton v. State*, 248 So. 3d 798 (Miss. 2018); *State v. Green*, 225 So. 3d 1033 (La. 2017); *Propst v. State*, 788 S.E.2d 484 (Ga. 2016).

This Court should therefore grant review to give guidance and create alignment amongst the state and federal courts on an issue of critical importance to the overarching goal of fundamental fairness in our criminal justice system. A clear and concise rule incentivizing prosecutors to disclose any and all potentially exculpatory evidence in their possession will strengthen constitutional protections for all criminal defendants in the state and federal courts. And such a rule would be entirely consistent with this Court's original decision in *Brady* and more recent decisions discussing *Brady*.

CONCLUSION

The Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

RAMON LOPEZ
Petitioner

W. Theodore Koch, III
Counsel of Record
Koch, Garg & Brown
8 W. Main St., Suite 2-10
Niantic, CT 06357
(860) 452-6860
ted@kgb-law.com

APPENDIX A

Lexis®

Document: Lopez v. Comm'r of Corr., 2022 Conn. LEXIS 16

Lopez v. Comm'r of Corr., 2022 Conn. LEXIS 16

Copy Citation

Supreme Court of Connecticut

January 11, 2022, Decided

No Number in Original

Reporter

2022 Conn. LEXIS 16 *

RAMON LOPEZ v. COMMISSIONER OF CORRECTION

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: **Lopez v. Comm'r of Corr., 208 Conn. App. 515, 2021 Conn. App. LEXIS 371, 2021 WL 5045537 (Nov. 2, 2021)**

Counsel: **[*1]** Michael W. Brown, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Opinion

The petitioner Ramon Lopez' petition for certification to appeal from the Appellate Court, **208 Conn. App. 515** (AC 43240), is denied.

Content Type:

APPENDIX B

Lexis®

Document: Lopez v. Comm'r of Corr., 208 Conn. App. 515

Lopez v. Comm'r of Corr., 208 Conn. App. 515

Copy Citation

Appellate Court of Connecticut

September 21, 2021, Argued; November 2, 2021, Officially Released.

AC 43240

Reporter

208 Conn. App. 515 * | 264 A.3d 1097 ** | 2021 Conn. App. LEXIS 371 *** | 2021 WL 5045537

RAMON LOPEZ v. COMMISSIONER OF CORRECTION

Subsequent History: Appeal denied by **Lopez** v. Comm'r of Corr., 340 Conn. 922, 2022 Conn. LEXIS 16 (Conn., Jan. 11, 2022)

Prior History: [***1] Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, Sferrazza, J.; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court.
Lopez v. Warden, 2019 Conn. Super. LEXIS 1122, 2019 WL 2369528 (Conn. Super. Ct., May 1, 2019)

Disposition: Affirmed.

Core Terms

shooting, shot, Apartments, home invasion, Street, actual innocence, criminal trial, ineffective assistance, alibi defense, charges, fired, investigator, third-party, culpability, alibi evidence, innocence, arrest, exculpatory, gunmen, gun, assailants, purported, shooters, weapon, ineffective assistance claim, convicted, bullet, faces, amended petition, credibility

Case Summary

Overview

HOLDINGS: [1]-While petitioner claimed that the state's attorney failed to disclose exculpatory connections between the evidence gathered in a home invasion and evidence obtained concerning store shootings, the essential fact that the same weapon that was used in the store shooting had previously been used in several other cases, including the home invasion, was disclosed along with information identifying the files pertinent to those earlier shootings; the State satisfied its constitutional duties under Brady; [2]-Prior habeas counsel's decision to pursue only the stronger ineffective assistance of counsel claim of lack of an alibi defense rather than the more nebulous third-party culpability claim was a reasonable exercise of professional judgment based on diligent investigation and competent understanding of the law.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN1 **Brady Materials, Brady Claims**
There are three components needed to establish a valid Brady violation. The undisclosed evidence must be favorable to the accused; it must have been suppressed by the prosecution, wilfully or inadvertently; and prejudice must have ensued. "Prejudice" means that the favorable information withheld could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. In determining whether evidence was suppressed, good faith or bad faith is irrelevant. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials >

Duty of Disclosure

HN2 **Brady Materials, Duty of Disclosure**
The State has the duty to supply to the defense favorable material that is within its possession or control and which the State knew or should have known was exculpatory. No request for such evidence is necessary to trigger the duty. Evidence which is within the knowledge of state agencies, including local police departments, is constructively within the State's possession. More like this

Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Commencement of Criminal Proceedings > Accusatory Instruments

HN3 **Commencement of Criminal Proceedings, Accusatory Instruments**
The executive branch has broad discretion as to whom to prosecute and what charges to file. Both the decision to criminally charge an individual and the choice of which crime should be charged lie within the discretion of the State and are not ordinarily subject to judicial review. There is no legal principle that the State commits misconduct if it chooses not to bring the most severe charges possible against a cooperating witness. Except for cases where non-prosecution rests on invidiously discriminatory motives, courts should avoid intruding on prosecutorial charging decisions. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures >

Suppression of Evidence

HN4 **Pretrial Motions & Procedures, Suppression of Evidence**
"Evidence" is not considered to have been suppressed within the meaning of the Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of that evidence. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN5 **Brady Materials, Brady Claims**
The Brady doctrine does not permit the defense to close its eyes to information likely to lead to the discovery of exculpatory evidence. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN6 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
The Connecticut Supreme Court adopts the two-pronged Strickland test for evaluating ineffective assistance of counsel claims. The Strickland criteria require that a defendant demonstrate, by a preponderance of the evidence, that his attorney's performance was substandard and that there exists a reasonable likelihood that the outcome of the proceedings would have been different. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN7 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
As to the performance prong of Strickland, a defendant must establish that counsel's representation fell below an objective standard of reasonableness. The standard of reasonableness is measured by prevailing, professional practices. A court must make every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances surrounding counsel's conduct from that attorney's perspective at the time of the representation. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN8 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
If it is easier to dispose of a claim of ineffective assistance of counsel on the ground of insufficient proof of prejudice, a court may address that issue directly without reaching the question of counsel's competence. In order to satisfy the prejudice prong of the Strickland test, a defendant must prove that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Reasonable probability means a probability sufficient to undermine confidence in the outcome; that is, the defendant must show that there is a reasonable probability that he remains burdened by an unreliable determination of guilt. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Postconviction Proceedings

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN9 **Effective Assistance of Counsel, Postconviction Proceedings**
On a claim of ineffective assistance on the part of habeas corpus counsel in presenting claims of ineffective assistance of trial counsel, the petitioner's burden is a multitiered application of the Strickland standard by which allegations of ineffective assistance claims are gauged. To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his habeas counsel were ineffective, and (2) that his trial counsel was ineffective. Also, the petitioner must prove that, but for the derelictions of habeas counsel, he was prejudiced in the sense that the outcome of the habeas case was suspect, and that burden demands proof of the existence of a reasonable likelihood that the outcome of the original, criminal trial would have been different. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN10 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
Effective advocates bear no general constitutional obligation to raise or argue every conceivable issue. To the contrary, a scattershot approach runs the risk of burying good arguments in a verbal

mound made up of strong and weak contentions. Habeas corpus courts must be highly deferential to attorneys' decisions to winnow out less persuasive claims in order to focus on the stronger ones. Strategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN11 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
Unsuccessful strategic decisions that are the result of the reasonable exercise of professional judgment comprise effective assistance of counsel despite an unfavorable outcome. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN12 **Review, Burdens of Proof**
Habeas corpus relief in the form of a new trial based on actual innocence requires the petitioner to satisfy the criteria set forth in Miller. The Miller criteria comprise a two-part test that requires a habeas petitioner asserting an actual innocence claim to prove, by clear and convincing evidence, that: 1) The petitioner is actually innocent of the crime for which he or she stands convicted; and 2) No reasonable fact finder would convict the petitioner of that crime after consideration of a combination of the evidence adduced at both the criminal trial and the habeas proceeding. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN13 **Review, Burdens of Proof**
The first component of the Miller criteria requires a habeas corpus petitioner to produce affirmative proof that he did not purposefully participate in the charges for which he was convicted. Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime, or that no crime actually occurred. Clear and convincing proof of actual innocence does not, however, require the petitioner to establish his or her guilt is a factual impossibility. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN14 **Review, Burdens of Proof**
Habeas corpus judges are bound by the requirement that the evidence of actual innocence be newly discovered. Newly discovered evidence is such that it could not have been discovered previously despite the exercise of due diligence. Due diligence is reasonable diligence. The query to be answered is what evidence would have been discovered by a reasonable criminal defendant by persevering application and untiring efforts in good earnest. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN15 **Review, Burdens of Proof**
In order to satisfy the affirmative evidence criterion of the Miller standard, a habeas corpus petitioner must prove, by clear and convincing evidence, that no crime occurred; that someone else committed the crime; or that the person convicted could not have committed the crime, even if the true perpetrator remains unknown. Actual innocence means factual innocence and is not equivalent to legal insufficiency of the evidence. The petitioner's burden is to prove he is actually innocent of the crime rather than merely that the State could no longer prove his guilt beyond a reasonable doubt. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN16 **Review, Burdens of Proof**
The Miller level of proof goes beyond a mere preponderance to require a habeas corpus petitioner to bear the heavy burden of demonstrating his factual innocence by clear and convincing evidence. Clear and convincing evidence is substantial and unequivocal evidence that produces a very high probability that the fact to be proven is true. More like this Headnote

Shepardize® - Narrow by this Headnote

Syllabus

The petitioner, who had been convicted of murder, two counts of attempt to commit murder, and two counts of assault in the first degree, sought a writ of habeas corpus, claiming that the state failed to disclose certain information during his criminal case, that his first habeas counsel rendered ineffective assistance, and alleging a claim of actual innocence. The habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; because the habeas court's memorandum of decision thoroughly addressed the petitioner's arguments raised in this appeal, this court adopted the habeas court's well reasoned decision as a proper statement of the relevant facts and applicable law on the issues.

Counsel: Michael W. Brown, for the appellant (petitioner).

Timothy [***2] F. Costello, senior assistant state's attorney, with whom, on the brief, were Joseph T. Corradino, state's attorney, and Emily Dewey Trudeau, assistant state's attorney, for the appellee (respondent).

Judges: Alvord, Clark and Norcott, Js.

Opinion

[**1101] **[*516]** PER CURIAM. The petitioner, **Ramon Lopez**, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected (1) his claim that the state, in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), failed to disclose certain information during the criminal case, (2) his claim that his first habeas counsel rendered ineffective assistance, and (3) his actual innocence claim. We affirm the judgment of the habeas court.

After a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) and 53a-54a (a), and two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). He was sentenced to a total effective term of 100 years of incarceration. On **[*517]** direct appeal, our Supreme Court affirmed the judgment of conviction. *State v.* ***Lopez***, 280 Conn. 779, 782-83, 911 A.2d 1099 (2007). In 2005, the petitioner brought his first habeas action claiming ineffective assistance of his criminal trial counsel. The court denied habeas relief. [***3] ***Lopez*** *v. Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000857-S (January 4, 2012). This court affirmed the denial per curiam. ***Lopez*** *v. Commissioner of Correction*, 150 Conn. App. 905, [**1102] 93 A.3d 181, cert. denied, 314 Conn. 922, 100 A.3d 853 (2014).

The petitioner filed this second petition for a writ of habeas corpus in July, 2012. The petitioner pursued claims of, inter alia, a *Brady* violation, ineffective assistance of his first habeas counsel, and actual innocence. Following a trial, the habeas court, *Sferrazza, J.*, issued a memorandum of decision denying the amended petition for a writ of habeas corpus. On May 31, 2019, the court granted the petition for certification to appeal.

On appeal, the petitioner claims that the court improperly rejected his claims of a *Brady* violation, ineffective assistance of his first habeas counsel, and actual innocence. [1] Specifically, the petitioner argues **[*518]** that "[t]he petition should have been granted on the *Brady* claim because the state's disclosure . . . was inadequate, and the authority the habeas court referenced to support its conclusion is too distinguishable to hold persuasive weight," the habeas court incorrectly concluded that the first habeas counsel was effective, and "the habeas court's conclusion that the petitioner had not proven his innocence [***4] was based upon several critical legal errors."

We have examined the record and considered the briefs and arguments of the parties, and conclude that the judgment of the habeas court should be affirmed. In denying the petition, the court issued a thorough and well reasoned memorandum of decision, which is a proper statement of the relevant facts and the applicable law on the issues. We therefore adopt the decision as our own. See ***Lopez*** *v. Warden*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004836-S, 2019 Conn. Super. LEXIS 1122 (May 1, 2019) (reprinted at 208 Conn. App. , A.3d). "It would serve no useful purpose for this court to repeat the discussion therein contained." *Norfolk & Dedham Mutual Fire Ins. Co. v. Wysocki*, 243 Conn. 239, 241, 702 A.2d 638 (1997); see also *Shaheer v. Commissioner of Correction*, 207 Conn. App. 449, 453, 262 A.3d 152, A.3d (2021).

The judgment is affirmed.

APPENDIX

RAMON LOPEZ v. WARDEN [*]

[**1103] Superior Court, Judicial District of Tollxand

File No. CV-12-4004836-S

Memorandum filed May 1, 2019

Proceedings

Memorandum of decision on amended petition for writ of habeas corpus. *Petition denied*.

Michael W. Brown and Joshua Grubaugh, for the petitioner.

Emily D. Trudeau, assistant state's attorney, for the respondent.

SFERRAZZA, J. The plaintiff, **Ramon Lopez**, seeks habeas corpus relief from a total, effective sentence of 100 years of imprisonment, [***5] imposed after a jury trial, for the crimes of murder, two counts of

attempted murder, and two counts of assault in the first degree. Our Supreme Court affirmed the judgment of conviction on direct appeal. *State v.* ***Lopez***, 280 Conn. 779, 911 A.2d 779 (2007).

The petitioner filed a previous habeas action attacking the effectiveness of his criminal defense counsel, Attorney Lawrence Hopkins. For sentencing, Attorney Robert Berke replaced Attorney Hopkins, and Attorney Berke's representation was not the subject of the first habeas case. On January 4, 2012, Judge Fuger denied habeas corpus relief. ***Lopez*** *v. Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000857-S (January 4, 2012). The Appellate Court affirmed that decision, per curiam. ***Lopez*** *v. Commissioner of Correction*, 150 Conn. App. 905, 93 A.3d 181, cert. denied, 314 Conn. 922, 100 A.3d 853 (2014).

In the present case, the petitioner pursues claims of ineffective assistance of defense counsel and previous habeas counsel, Attorneys Thomas P. Mullany III and David Rozwaski; a *Brady* violation; see *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and a claim of actual innocence. Other grounds for relief were previously dismissed or have not been pursued and are deemed abandoned.

Because of the unusually complicated factual circumstances and scenarios presented by the evidence and the complex legal issues propounded, the court has [***6] permitted oversized briefs and granted numerous extensions of time to file such briefs. The petitioner's counsel has described the potential factual and legal issues as "numerous, complicated, [and] wide-ranging." Counsel has also noted that the record is "fairly voluminous" and acknowledged that the petitioner's third-party culpability theory is "at first counterintuitive . . . ." These observations appear apposite.

The court has reviewed the evidence in this case in great detail, including transcripts of the criminal trial and the first habeas case and police investigation and interview reports pertaining to multiple incidents. In order to set the stage properly and promote a fuller understanding of the factual and legal questions to be resolved, the court adopts a somewhat peculiar format in this memorandum and hopes that these aspirations can be attained.

First, the court provides a nonexhaustive glossary of names, aliases, and sobriquets to facilitate a comprehensive explanation of the several relationships, locations, and events that are pertinent to the court's decision.

The petitioner: **Ramon Lopez**, a/k/a "Buttafuco."

The Pettway store: Located at the northwest corner of the intersection [***7] of Stratford Avenue and Fifth Street in Bridgeport. It is variously referred to as [**1104] an all-night convenience store, a liquor store, and a grocery store.

Manual Rosado: a/k/a Kevin Anderson and "Cricket." One of the shooting victims in the Pettway store incident of February 2, 2002.

Shariff Hakeem-Abdul: a/k/a "Polo" and Lonnie Rosado. The deceased victim of the Pettway store shooting and brother of Manual Rosado.

Robert Payton (now deceased): "Rob." A friend of Manual Rosado, brother of Tony Payton, and cousin to Brad Rainey.

Tony Payton: "Tone" or "Tonny." Brother of Robert Payton and a purported witness to the Pettway store shooting of February 2, 2002. Walks with a pronounced limp.

Gary Burton: Another shooting victim of the Pettway store shooting and acquaintance of Robert Payton.

John Dawson: Purported witness to the February 2, 2002 shooting and/or aftermath.

Eddie Hilton: Purported witness to the February 2, 2002 shooting and/or aftermath.

Desiree Jones: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Keaga Johnson: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Francisco Soares: "Cisco." An acquaintance of Gary Burton and purported [***8] witness to his shooting and/or aftermath.

Kenny Soares: Brother of Francisco Soares and acquaintance of Gary Burton.

John Soares: "Jay"; "Big Jay." Acquaintance of Gary Burton and cousin to Francisco Soares and purported witness to his shooting.

John Santos: "Little Jay." Acquaintance of Gary Burton.

Michael Lockhart: a/k/a Michael Pettway; "Chef." Possibly one of the gunmen at the February 2, 2002 shooting.

Bernie Gethers: "Tank."

Lou Diamond: Possible a/k/a Troy **Lopez**. Alleged companion to Chef at Pettway store on February 2, 2002, and possible gunman.

Tajah McClain: "Kaiser"; "Kiser"; "Boo." Possible gunman at Pettway store shooting. Walks with a limp.

April Edwards: A close friend of Tony Payton and potential witness to the February 2, 2002 shooting, but never called to testify in criminal case or either habeas cases.

Michael Jackson: Purported witness to February 2, 2002 shooting and/or aftermath.

Bob Kapel (Capel): Purported witness to February 2, 2002 shooting and/or aftermath.

Jose Rivera: "Tweety." Possible associate of the petitioner.

"Pooh" or "Phoo": Possibly present at February 2, 2002 shooting.

Vincent Wilson: "Fato"; "Fatol." Brad Rainey's brother-in-law.

Brad Rainey: Possibly a/k/a [***9] Brad Payton. Cousin of Robert and Tony Payton.

Donna Jones: Purportedly heard February 2, 2002 shooting. Acquaintance of Manual Rosado.

"Weesa": Female acquaintance of Robert Payton and the petitioner.

Irell Pettway: "Country."

P.T. Barnum Apartments: Housing facility on Anthony Street, Bridgeport.

[**1105] Jerry Kollock: Convicted of January 27, 2002 home invasion at Colbert apartment at P.T. Barnum complex. Companion to Randy Armstrong.

Keisha Bowles: Kollock's girlfriend.

Randy Armstrong: "Little Biscuit"; "L B." Friend of Kollock, "Fato," and Brad Rainey. Shot in the foot on January 24, 2002, at Greens housing complex. Allegedly shot accidently by the petitioner.

Nakina Goff: Randy Armstrong's girlfriend.

Barbie Colbert: Victim of P.T. Barnum home invasion of January 27, 2002.

Davis Brown: Another victim at Colbert apartment.

Latosha DelGiudice: "Natasha"; "Tosha"; Tasha." Brad Rainey's girlfriend and Shayla DelGiudice's sister.

Lakisha Banks: Friend of Kollock.

Kiva Scutter: "Aunt Kiva." Colbert's neighbor.

Shonda Upchurch: Sister of Vincent Wilson and go-between/mediator for disputants at P.T. Barnum housing complex.

Javen Eagles: "Rat." Drifter and friend of Colbert.

Cedelice Davis: Brad Rainey's friend. [***10]

Fifi: Brad Rainey's cousin.

Marcus Mahoney: Caucasian friend of "Polo." Like a brother to Polo and possible partner in illicit drug business with him.

The court now describes the potential evidence as to three incidents from which one can reasonably glean the following details. These putative facts are derived from police investigative notes and reports, hearsay statements contained therein, as well as evidence introduced at the petitioner's criminal trial and earlier habeas trial. Consideration of information included, or logically deducible, from these sources is necessary because the petitioner's *Brady* violation claims, as well as the ineffective assistance allegations, require scrutiny of the information reasonably available to any of the petitioner's counsel and/or imputable to the prosecuting authority.

and/or imputable to the prosecuting authority.

RANDY ARMSTRONG SHOOTING

During the early hours of January 25, 2002, Armstrong was shot in the foot. His companion, Jerry Kollock, initially drove Armstrong for medical care, but they decided to stop at Armstrong's sister's home first. After she refused to join them on the trip to the hospital, Kollock and Armstrong drove to the home of Armstrong's girlfriend, Nakina Goff. Goff agreed to [***11] accompany them to the hospital.

When initially questioned by the police regarding how the injury occurred, Armstrong and Goff related a fictitious tale that the couple had just left Goff's residence on foot when unidentified gunmen emerged from a car and attempted to rob them. They stated the robbers forced Armstrong to lie on the ground. When the robbers ascertained that Armstrong had no money, they returned to their vehicle. Before departing, however, the assailants fired a shot that struck Armstrong in the foot.

Armstrong and Goff fabricated this scenario because both Armstrong and Kollock were on parole and had traveled beyond the geographic limits specified by the parole conditions. Because Goff's apartment was closer to the area permitted by the terms of their parole, Armstrong and Kollock hoped that such a minor transgression would be overlooked.

Eventually, Goff told the police a different, and presumably truer, story. Armstrong and Kollock had visited the Greens housing complex, where Kollock and others drank and ingested drugs. While intoxicated, some members of the group exuberantly fired guns in the air. Armstrong [**1106] told Goff that, as a consequence, the petitioner had accidently [***12] shot him.

Armstrong left the hospital during the afternoon of that same day, January 25, 2002. He used a cane to facilitate walking.

At around 2 o'clock that afternoon, Kollock's girl-friend, Keisha Bowles, drove Kollock and Armstrong to Goff's home. Later, Bowles and Kollock returned to pick up Armstrong so that Kollock and Armstrong could meet with their parole officers. After these appointments concluded, Bowles and Kollock dropped Armstrong off at his home.

The next day, January 26, 2002, at around 1 p.m., Armstrong and Goff argued, and Goff left from Armstrong's home to go to her own residence. Later that day, they reconciled, and she and Armstrong talked, by phone, through the night.

The following day, January 27, 2002, at around 8 a.m., Bowles arrived at Goff's home looking for Kollock. Bowles thought Armstrong might know of Kollock's whereabouts. Bowles told Goff that Kollock had taken her car the night before, never returned, and that she received a phone call from Latosha DelGiudice, the girlfriend of Brad Rainey, that Bowles' car was stranded in the East End section of Bridgeport.

When Bowles went to retrieve her car, she found that it was unlocked, the keys were missing, and [***13] the tires had been flattened. She sought out Kollock and wanted Armstrong to assist her in that endeavor. Goff called Armstrong, but Armstrong's sister answered and told Goff that Armstrong was asleep and that she had not seen Kollock.

Goff asserted that she spent the evening of January 26 to 27, 2002, at Armstrong's residence and returned to her own home around 8 a.m. that morning.

P.T. BARNUM HOME INVASION

About two hours earlier, around 6 a.m. on January 27, 2002, Barbie Colbert was asleep in her residence, which was Apartment 108 of the P.T. Barnum Apartments. Sleeping in her bed with her were three of her children, ages seven, five, and four years. Colbert's thirteen year old son was asleep on a couch in the living room, and her seventeen year old stepdaughter slept in another bedroom. Another relative, Davis Brown, was watching television in the living room.

Earlier that morning, a neighbor, Kiva Scutter, visited Colbert's apartment and had awakened Brown. Scutter then left and announced that she expected to return shortly. When she exited Colbert's

Scutter then left and announced that she expected to return shortly. When she exited Colbert's apartment, she left the front door to that apartment unlocked.

Suddenly, two armed men rushed into Colbert's apartment and demanded money. [***14] Brown recognized Jerry Kollock as one of the robbers. Brown knew Kollock's family. Brown believed that the second gunman was Randy Armstrong. Both gunmen had concealed their lower faces with masks or clothing, and Kollock shoved a semiautomatic pistol into Brown's mouth while ordering Brown to take the gunmen into Colbert's bedroom to awaken her. Brown complied.

At first, Colbert assumes Brown was joking when he roused her with the news that armed men wanted to rob them. The gunmen forced Brown onto Colbert's bed. They compelled Brown and Colbert to refrain from looking at them. Kollock struck Brown in the head four or five times, causing Brown to bleed profusely. Colbert produced a pillowcase containing $180 and offered it to the robbers. Kollock told his accomplice to search the apartment, and his companion ransacked the residence. The robbers also inquired about the whereabouts of "Rat," Vincent Wilson.

[**1107] When the gunmen first accosted Brown in the living room, Colbert's thirteen year old son awakened and arose. Kollock pointed his weapon at the boy and directed him to remain still. The boy froze, but he was in position to observe the entire episode.

One of the younger children in Colbert's [***15] bed warned, "Mommy don't move! They have guns!" As a result of the pistol-whipping of Brown and fear for their lives, Colbert screamed.

The scream and commotion brought Colbert's seventeen year old stepdaughter out of her bedroom and to the doorway of Colbert's bedroom. The girl tried to flee, and the gunmen pursued her. She tripped and fell, and Kollock's companion pushed his pistol into her mouth and then pressed it forcibly into her eye.

While so subjugated, Kollock reached underneath the teenager's underwear and probed her vagina, possibly searching for concealed drugs.

At that time, Colbert's five year old daughter ran from the bedroom toward the kitchen. She hid under a kitchen table. Kollock demanded she come out, but she bravely refused.

A third accomplice, identified by Brown as Brad Rainey, entered the apartment and urged Kollock and the other gunman to leave. Kollock or his companion then fired a shot toward the kitchen table. The bullet struck a cabinet about three feet from the table. The three intruders then exited.

Brown and the thirteen year old ran to a window and saw two cars quickly drive out of parking spaces directly in front of Colbert's apartment. Brown recognized [***16] one vehicle as belonging to Kollock's girlfriend, Bowles.

Both Colbert and her thirteen year old son also recognized Kollock. Colbert occasionally braided customers' hair, and Kollock had sought such services just a few weeks before the incident.

Kollock learned that the police suspected him to be one of the gunmen. He disposed his pistol and went underground. The police eventually captured him.

PETTWAY STORE SHOOTING

Our Supreme Court described the evidentiary scaffold that supported the jury's guilty verdicts as follows:

"In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally eastwest direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as "Polo," his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as "Chef" came out of Pettway's, gave Abdul-Hakeem and Rosado a "grim" look and then walked north [***17] on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth Street to the west side and joined Diamond and Chef.

Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, [**1108] Tony Payton, knew both

men and was able to identify them as Boo McClain and the [petitioner]. McClain carried a handgun and the [petitioner] carried a shotgun. As McClain and the [petitioner] approached Pettway's, the [petitioner] said to the people gathered on the sidewalk, "All right freeze, nobody move," and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to Pettway's, which had a "buzzer lock." The door opened and several [***18] people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the [petitioner], whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to Pettway's, McClain, the [petitioner] and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the [petitioner] yelled, "I told you I was going to get you, Polo, I told you I was going to get you." McClain and the [petitioner] then ran back up Stratford Avenue and reentered the white car, which turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis revealed that two separate shotguns and four separate handguns had been used in the shooting.

"Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul-Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received [***19] shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip." *State v.* ***Lopez***, supra, 280 Conn. 783-85.

BRADY VIOLATION CLAIMS

In his amended petition, dated July 28, 2017, the petitioner asserts that the prosecution failed to disclose to the defense or otherwise correct false or misleading testimony elicited from state's witnesses Tony Payton and Manual Rosado; failed to disclose that other suspects in the Pettway store shooting were never prosecuted; and failed to disclose the details acquired by the Bridgeport police regarding the P.T. Barnum home invasion case.

After a hearing, Judge Oliver previously dismissed the *Brady* violation claims premised on nondisclosure of possible consideration given to Manual Rosado with respect to federal charges he once faced in exchange for his cooperation with the state in the state's case against the petitioner.

Also, the petitioner's posttrial brief fails to discuss the same type of claim with respect to Tony Payton's cooperation. Therefore, the court regards that *Brady* violation allegation as abandoned.

HN1 There are three components needed to establish a valid *Brady* violation. *Lapointe v. Commissioner of Correction*, 316 Conn. 225, 262, 112 A.3d 1 (2015). The undisclosed evidence must be favorable to the accused; it must have [***20] been suppressed by the prosecution, wilfully or inadvertently; and "prejudice must have ensued." (Internal quotation marks omitted.) Id. "Prejudice" means that the favorable information withheld "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) Id., 262-63.

In determining whether evidence was suppressed, good faith or bad faith is irrelevant. *Demers v. State*, 209 Conn. 143, 149, [**1109] 547 A.2d 28 (1988). ***HN2*** The state has the duty to supply to the defense favorable material that is within its possession or control and which the state knew or should have known was exculpatory. Id., 150-51. No request for such evidence is necessary to trigger this duty. Id., 151. Evidence which is within the knowledge of state agencies, including local police departments, is constructively within the state's possession. See *Gonzalez v. State Elections Enforcement Commission*, 145 Conn. App. 458, 479, 77 A.3d 790, cert. denied, 310 Conn. 954, 81 A.3d 1181 (2013); see also *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

1

The court declines to treat the prosecutorial decision not to file charges against persons, other than the petitioner, suspected of participating in the same criminal enterprise as an accomplice, accessory, or coconspirator, as exculpatory in this case. To be clear, the petitioner makes no claim that these other persons received favorable treatment [***21] in exchange for their cooperation in the investigation and/or prosecution of the Pettway store shootings against the petitioner or anyone else. Nor does the petitioner allege that agents of the state engaged in conduct to render these other individuals

petitioner allege that agents of the state engaged in conduct to render these other individuals unavailable to the defense in his case.

Instead, the petitioner argues that "other perpetrators named by the supposed eyewitnesses of the Pettway's shooting were never seriously investigated by the police." Petitioner's Posttrial Brief, p. 10. This argument appears more in the nature of a tacit recognition by the state that the police investigation of these persons was insufficient or that the prosecution lacked confidence in its eyewitnesses.

The court rejects this type of argument as describing a valid *Brady* violation. The prosecutors' subjective belief in the relative strength or weakness of their case is, standing alone, not exculpatory evidence. Specific information available to the state that prompts that belief may comprise exculpatory evidence, but the exercise of prosecutorial discretion is, in itself, a professional conclusion and not a potentially relevant fact. As such, the *Brady* rule requires no disclosure of that type of charging decision. [***22]

Also, it would disserve the ends of justice to employ a doctrine that induces law enforcement agents to arrest and charge persons of crime when the agents feel evidence to prove the crimes, beyond a reasonable doubt, may be lacking. The state ought to be free to decline to charge others of crimes just to avoid claims, such as the petitioner propounds, by one against whom the state did prefer charges.

HN3 The executive branch "has broad discretion as to whom to prosecute and what charges to file." *State v. Santiago*, 318 Conn. 1, 25, 122 A.3d 1 (2015). "Both the decision to criminally charge an individual and the choice of which crime should be charged lie within the discretion of the state and are not ordinarily subject to judicial review." *Reynolds v. Commissioner of Correction*, 321 Conn. 750, 760-61, 140 A.3d 894 (2016), cert. denied sub nom. *Reynolds v. Semple*, U.S. , 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017). There is no legal principle "that the state commits misconduct if it chooses *not* to bring the most severe charges possible against a cooperating witness." (Emphasis added.) Id., 761.

Except for cases where nonprosecution rests on invidiously discriminatory motives, courts should avoid intruding on prosecutorial charging decisions. The petitioner has failed to prove a *Brady* violation [**1110] based on the absence of charges lodged against other persons who might fall under suspicion based on the same or [***23] similar evidence as points to a defendant who was so charged.

2

The petitioner also contends that State's Attorney C. Robert Satti, Jr., failed to disclose exculpatory connections between the evidence gathered in the P.T. Barnum Apartments home invasion and the evidence obtained concerning the Pettway store shootings. The court determines that this evidence was not suppressed regardless of its purportedly exculpatory character. "[I]t is well established that***HN4*** 'evidence' is not considered to have been suppressed within the meaning of the *Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of that* [*evidence*]." (Emphasis in original; internal quotation marks omitted.) *State v. Skakel*, 276 Conn. 633, 701, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

The following evidence pertains to the issue of suppression. The police recovered several cartridge casings from the fusillade of shots fired by the various perpetrators in the Pettway store incident of February 2, 2002. Among these were spent nine millimeter cartridges discharged from the same gun. Comparison testing disclosed that the same pistol that fired these shots was also used in five previous shootings in the Bridgeport [***24] area.

The written firearms comparison results were transmitted by the State's Attorney's office to Attorney Hopkins. This report contained the incident and case numbers for each earlier incident. In chronological order:

1. Incident number 010429-195 referencing shots fired on April 29, 2001, at or near the Marina Village area;

2. Incident number 010609-036, referencing shots fired on June 9, 2001, outside of the Pettway store;

3. Incident number 011012-294, referencing shots striking victim, Mark Mahoney, on Holley Street on October 12, 2001;

4. Incident number 011021-041, referencing shots fired on October 21, 2001, near the intersection of Roger and Stetson Streets; and

5. Incident number 020122-056, referencing the bullet fired by Jerry Kollock or accomplice into the kitchen cabinet during the P.T. Barnum Apartments home invasion of January 27, 2002, as discussed

kitchen cabinet during the P.T. Barnum Apartments home invasion of January 27, 2002, as discussed previously.

Attorney Satti testified that his office provided Attorney Hopkins with this report. A copy of this report was found in Attorney Hopkins' file, corroborating this disclosure by the state. The petitioner argues that it was a *Brady* violation for the state to fail to go beyond this disclosure and also provide, without a defense [***25] request, the entire investigation file materials generated by the police with respect to the earlier shootings.

In *State v. Skakel*, supra, 276 Conn. 633, 888 A.2d 985, a police report mentioned that a witness was asked to assist in creating a composite sketch of a person the witness recalled having seen near the crime scene during the relevant time frame. Id., 697-98. The sketch itself was never provided, only the written reference to its existence. This was the case despite the fact that the defense had made a discovery request for production of sketches in general. On appeal, the defendant argued that the drawing could have bolstered the defense's third-party culpability defense because the sketch [**1111] somewhat resembled one of the putative third-party suspects.

Our Supreme Court held that revelation of the existence of the sketch alone satisfied the constitutional burden of disclosing exculpatory material under the *Brady* rule. Id., 706. "[T]he composite drawing will not be deemed to have been suppressed by the state . . . if the defendant or the defendant's trial counsel reasonably was on notice of the drawing's existence but nevertheless failed to take appropriate steps to obtain it." Id., 702.

In *State v. Skakel*, supra, 276 Conn. 633, 888 A.2d 985, appellate counsel had contended that mere knowledge that a sketch was [***26] done was "[in]adequate notice of the exculpatory nature of the composite drawing." Id., 704-705. That is, until the defense saw the actual drawing, the defense lacked knowledge of its beneficial utility, and that other evidence misled the defense into opining that the sketch depicted someone else at whom the defense wished to point an accusatory finger. Our Supreme Court responded that "[n]either of these assertions is reason to excuse the defense's failure to have requested the drawing [specifically]." Id., 705. "We . . . decline to endorse such an approach because there simply is no reason why a defendant who is aware of such evidence should not be required to seek it at a point in time when any potential constitutional infirmity arising from the state's failure to provide the evidence can be avoided without the need for a new trial." Id., 706. "We conclude, therefore, that the facts fully support the trial court's determination that the defendant failed to establish that the state suppressed the composite drawing within the meaning of *Brady*." Id., 707.

In other words, the state must disclose the data which is potentially exculpatory but is not constitutionally obligated to connect the dots for the defense. The circumstances [***27] of the present case are more compelling that no *Brady* violation occurred than those presented in the *Skakel* case. This is because the essential fact that the same weapon that was used in the February 2, 2002 Pettway store shooting had previously been used in several other cases, including the P.T. Barnum Apartments home invasion, was disclosed along with information identifying the files pertinent to those earlier shootings. The potential for this information to help exonerate the [petitioner] speaks for itself.

HN5 The *Brady* doctrine does not "permit the defense to close its eyes to information likely to lead to the discovery of [exculpatory] evidence." *Skakel v. State*, 295 Conn. 447, 521, 991 A.2d 414 (2010). The court holds that the state satisfied its constitutional duties under *Brady* by providing to the defense the list of specific incidents/case numbers for which the firearms analyses showed that one of the weapons used on February 2, 2002, was also used in those shootings. Therefore, the petitioner has failed to meet his burden of proving his *Brady* claims.

INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL

In the fifth and sixth counts of the amended petition, the petitioner alleges various instances of ineffective assistance of trial counsel, Attorney Hopkins. These claims [***28] must be dismissed, pursuant to Practice Book § 23-29 (3), because they present the same grounds for relief denied in his earlier habeas case, namely, the ineffective assistance of defense counsel and which are not based on new facts or evidence "not reasonably available at the time of the prior petition . . . ." The addition [**1112] of new specifications of ineffective assistance against Attorney Hopkins is insufficient to state new legal grounds different from that raised by the previous habeas petition. See, e.g., *McClendon v. Commissioner of Correction*, 93 Conn. App. 228, 230, 888 A.2d 183, cert. denied, 277 Conn. 917, 895 A.2d 789 (2006).

Of course, the failure by Attorneys Mullaney and Rozwaski to assert and prove these specifications of ineffective assistance can form the basis for a claim of ineffective assistance by previous habeas counsel, and the petitioner asserts just such a claim in the present case in the eighth count.

INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL

HN6 Our Supreme Court has adopted the two-pronged *Strickland* test; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); for evaluating ineffective assistance claims. *Johnson v. Commissioner of Correction*, 218 Conn. 403, 425, 589 A.2d 1214 (1991); *Ostolaza v. Warden*, 26 Conn. App. 758, 761, 603 A.2d 768, cert. denied, 222 Conn. 906, 608 A.2d 692 (1992). The *Strickland* criteria require that the peti-tioner demonstrate, by a preponderance of the evidence, that his attorney's performance was substandard and that there exists a reasonable likelihood that the outcome of the proceedings would have been [***29] different. *Ostolaza v. Warden*, supra, 761.

HN7 As to the performance prong of *Strickland*, the petitioner must establish that habeas counsel's representation fell below an objective standard of reasonableness. *Johnson v. Commissioner of Correction*, supra, 218 Conn. 425.

This standard of reasonableness is measured by prevailing, professional practices. Id. The habeas court must make every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances surrounding counsel's conduct from that attorney's perspective at the time of the representation. Id.

HN8 If it is easier to dispose of a claim of ineffective assistance on the ground of insufficient proof of prejudice, the habeas court may address that issue directly without reaching the question of counsel's competence. *Pelletier v. Warden*, 32 Conn. App. 38, 46, 627 A.2d 1363, cert. denied, 277 Conn. 920, 632 A.2d 694 (1993). In order to satisfy the prejudice prong of the *Strickland* test, the petitioner must prove that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Levine v. Manson*, 195 Conn. 636, 640, 490 A.2d 82 (1985). Reasonable probability means a probability sufficient to undermine confidence in the outcome; *Daeira v. Commissioner of Correction*, 107 Conn. App. 539, 542-43, 946 A.2d 249, cert. denied, 289 Conn. 911, 957 A.2d 877 (2008); that is, the petitioner must show that there is a reasonable probability that he remains burdened by an unreliable determination of guilt. Id. Thus, [***30] the failure of the petitioner to establish, by a preponderance of the evidence, either the allegations against trial counsel or habeas counsel, or the requisite prejudice as to both the first habeas case and the criminal trial, will defeat a claim for habeas corpus relief in the present action.

In *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818 (1992), our Supreme Court recognized a purely statutory right to raise, in a subsequent habeas action, ***HN9*** a claim of ineffective assistance on the part of previous habeas counsel in presenting claims of ineffective assistance of trial counsel. Id., 835. However, the petitioner's burden becomes a multitiered application of the *Strickland* standard by which allegations of ineffective [**1113] assistance claims are gauged. Id., 842. To succeed in his bid for a writ of habeas corpus, the petitioner must prove *both* (1) that his habeas counsel were ineffective, and (2) that his trial counsel was ineffective. Id. Also, the petitioner must prove that, but for the derelictions of habeas counsel, he was prejudiced in the sense that the outcome of the first habeas case was suspect, and that burden demands proof of the existence of a reasonable likelihood that the outcome of the original, criminal trial would have been different. Id., 842-43. The Supreme Court [***31] described this double layered obligation as "a herculean task . . . ." Id., 843.

Although the amended petition recites sundry specifications of ineffective assistance of habeas counsel, in his posttrial brief the petitioner engages in more than a cursory discussion only as to the following alleged deficiencies of habeas counsel:

1. That habeas counsel failed to raise and litigate Attorney Hopkins' failure to pursue third-party culpability theories adequately;

2. That habeas counsel failed to raise and litigate the insufficiency of Attorney Hopkins' cross-examination of Manual Rosado;

3. That habeas counsel failed to raise and litigate Attorney Hopkins' failure to connect the Pettway store shooting of February 2, 2002, to the P.T. Barnum Apartments home invasion that occurred about one week earlier; and

4. That habeas counsel failed to litigate adequately Attorney Hopkins' failure to raise and pursue an alibi defense. (See Petitioner's Posttrial Brief, pp. 19-21, 45-50.)

At the previous habeas trial, Attorney Mullaney represented the petitioner and was joined, on the third day of the habeas trial, in that endeavor by Attorney Rozwaski. The operative, amended petition was

dated December 15, 2009, [***32] and alleged that Attorney Hopkins represented the petitioner ineffectively by:

1. Failing to present favorable and available evidence as to

a. alibi witnesses;

b. the weaknesses regarding the state's identification witnesses;

2. Failing to impeach the testimony of Gary Burton, Manual Rosado, and Tony Payton, properly.

The evidence adduced at the first habeas trial can be summarized as follows. Vincent Wilson, an incarcerated felon, testified that he and the petitioner are good friends, having first met as children. Wilson recounted that soon after the Pettway store shooting on February 2, 2002, the police interrogated him about whether he drove the getaway vehicle and whether the petitioner participated in the shootings. Wilson denied being at the scene and disclaimed any knowledge concerning the incident. Wilson stated that the police told him that Manual Rosado suggested that Wilson might have driven the getaway car.

Wilson also noted that Attorney Hopkins' investigator had interviewed him, but that Attorney Hopkins had not spoken to him personally. Wilson further avowed that he was available to testify at the petitioner's criminal trial and would have willingly done so. However, Wilson [***33] acknowledged that he did witness a verbal confrontation between the petitioner and Manual Rosado at the Pettway store a few weeks before Rosado was shot there.

Attorney Mullaney also called upon Ralph Lewis to testify. He, too, is an incarcerated felon, and he related that he had met Manual Rosado in jail. Friction between Rosado and Lewis ensued. Lewis stated that Rosado told him that Rosado faced federal charges. He also indicated [**1114] that Rosado stated he did not see who shot his brother, Polo, although the police urged him to report that he could identify his brother's killer in order to benefit himself in his federal case. However, Rosado also related that he resisted the police suggestion because he did not see who shot his brother.

Lewis first conveyed this information to an investigator in 2007, which was a few years after the petitioner's criminal trial. Lewis conceded that, despite knowing that charges were pending against his close friend, the petitioner, he never mentioned his jailhouse conversation with Rosado to anyone before 2007.

It should be noted that Rosado's statements to Lewis essentially conformed to Rosado's testimony at the petitioner's criminal trial and to his deposition [***34] testimony in the present habeas case. That is, Rosado consistently acknowledged his ignorance as to his brother's shooter, as opposed to his own assailant, who he identified as the petitioner. Rosado also maintained that he has always refused to lie to identify his brother's killer.

Attorney Mullaney also presented the testimony of the petitioner's sister, Rosa **Lopez**, at the previous habeas trial. She swore that during February 1, 2002, a Friday, she and the petitioner were together at their mother's residence and agreed to have a Super Bowl party that Sunday, February 3, 2002. A relative, Star Semedo, picked up **Lopez** and the petitioner and drove them to her home in Ansonia to plan the party. The party was to take place at Semedo's residence, and the expected attendees were Semedo, **Lopez**, the petitioner, their parents, and children. **Lopez** avowed that she and the petitioner spent the entire evening of February 1 into February 2, 2002, at Semedo's residence and only returned to Bridgeport during the afternoon of February 2, 2002. In other words, **Lopez** testified that the petitioner was in Ansonia at the time of the Pettway store shootings in Bridgeport.

Lopez attended her brother's criminal [***35] trial and expected to testify at that trial regarding this alibi. Attorney Hopkins had spoken to her before trial. When she was not called as a witness, she asked Attorney Hopkins to explain his decision. Attorney Hopkins simply informed **Lopez** that her testimony was not needed.

Star Semedo, an emergency room technician nurse, also testified at the first habeas trial. She corroborated that she lived in Ansonia on February 1, 2002; that she drove **Lopez** and the petitioner from Bridgeport to Ansonia on February 1, 2002; that she, **Lopez**, and the petitioner planned the Super Bowl party details; and that **Lopez** and the petitioner stayed at her residence in Ansonia until Semedo drove them back to Bridgeport during the day of February 2, 2002.

Semedo indicated she was available to testify at the petitioner's criminal trial, but that no one called upon her to do so. Semedo acknowledged that she was aware that she possessed alibi testimony for the

charges against the petitioner early on, but never conveyed that alibi evidence to the police or to defense counsel despite that awareness.

At the previous habeas trial, the petitioner testified consistently with this alibi scenario. He stated that he communicated [***36] these facts to Attorney Hopkins and the defense investigator, Justine Smith. He wanted and anticipated Attorney Hopkins to present **Lopez** and Semedo as alibi witnesses at his criminal trial. Attorney Hopkins declined to present the alibi defense.

The petitioner also wanted Attorney Hopkins to investigate whether Gary Burton described the shooters to the police as three black males. He urged Attorney [**1115] Hopkins to probe this topic when Attorney Hopkins cross-examined Burton, but Hopkins rejected his suggestion.

On February 2, 2002, the petitioner was arrested by the police on an unrelated attempted murder charge. The police arrested the petitioner on charges arising from the Pettway store shootings about nine months later. At the time of his arrest on February 2, 2002, the petitioner resided with his mother in Bridgeport, but he pretended to live with an uncle in Stratford to avoid detection for violating a court order or condition of parole or probation prohibiting him from living in his mother's home.

Attorney Mullaney also offered the testimony of Bridgeport Police Sergeant Giselle Doszpoj. Sergeant Doszpoj indicated that she initiated the investigation of the Pettway store shooting on [***37] February 2, 2002. She noted that the investigation files for the case had been archived, and she lacked access to their contents. She recollected that, when she interviewed Gary Burton, he thought the three shooters were possibly African American.

Habeas counsel also utilized the testimony of Bridgeport Police Detective Warren DelMonte. Detective DelMonte went to the hospital on February 2, 2002, and interviewed Manual Rosado. The habeas judge disal-lowed Detective DelMonte from testifying about the substance of his conversation with Rosado.

A more productive witness was Kiaga Johnson. As noted previously, she was a friend of Gary Burton and saw the shootings. She indicated she observed three assailants and described them as including a black male, a Hispanic male, and a male with olive toned skin color. At the 2010 habeas trial, she opined that the petitioner's skin color seemed different from any of the assailants. However, she acknowledged that the attackers' faces were partially concealed and that there may have been additional shooters besides the three she noticed.

As mentioned previously, Attorney Rozwaski appeared as habeas counsel on March 11, 2011, the third day of the previous [***38] habeas trial. On that day, Attorney Berke testified that he took over the petitioner's criminal case after the jury returned its verdict. Attorney Berke had his investigator, John McNichols, look into the petitioner's alibi claim and contact Rosa **Lopez** and Star Semedo in particular. Attorney Berke spoke to Semedo by phone. Semedo told Attorney Berke that the petitioner and his sister stayed overnight at her Ansonia residence but not on the evening and night of the Pettway store shootings on February 1 into February 2, 2002.

At the first habeas trial, Attorney Hopkins testified that he had experience handling many criminal defense cases, including serious felony allegations, before representing the petitioner. He related that he hired Justin Smith as his investigator. Attorney Hopkins employed his customary approach of meeting with his client, engaging in preliminary discussions with the prosecutor, obtaining discovery, and developing a sense of the strengths and weaknesses of both sides of the case.

The petitioner denied any involvement in the Pettway store shootings. Attorney Hopkins decided that the critical defense tactic would be to try to discredit the credibility and reliability [***39] of the two eyewitnesses that identified the petitioner as one of the assailants, namely, Manual Rosado and Tony Payton.

Attorney Hopkins opted to eschew an alibi defense based on reasons both general and particular. After discussing the alibi evidence with the petitioner, Attorney Hopkins concluded that such evidence would prove more detrimental than beneficial. He regarded the alibi defense as [**1116] generally a "bad idea" that seldom produced favorable results. Attorney Hopkins felt that unless the alibi evidence was "entirely solid," any deficiencies in that evidence create a very negative view of the defendant in the minds of jurors. That negative view may taint other, stronger defense arguments. Attorney Hopkins' "instinct" was to avoid using alibi evidence "like the plague."

This court's more than forty-five years of experience in the field of criminal law litigation finds Attorney Hopkins' general view of the ineffectiveness of an alibi defense as not lacking some experiential basis. Of course, each case presents unique circumstances, and the utility of presenting alibi evidence must be evaluated with those specific features in mind. But, any chink in the armor of the alibi defense arising [***40] at trial, exposes the defense to claims of contrivance and, inferentially, a consciousness of guilt. Also, strong alibi evidence often induces the prosecution to reevaluate the charges against an accused, so that "solid" alibi cases seldom reach the trial stage.

accused, so that "solid" alibi cases seldom reach the trial stage.

In particular, Attorney Hopkins was concerned that the petitioner was a convicted felon who had tried to use false alibi evidence in a previous criminal case. Also, Attorney Hopkins presumed, erroneously, that

the petitioner's arrest on February 2, 2002, was for the Pettway store shootings. Instead, that arrest pertained to unrelated charges. This mistake led Attorney Hopkins to reckon that if the petitioner had a legitimate alibi, he and his family members would have immediately informed the police of his true whereabouts for the evening of February 1 into February 2, 2002. So while Attorney Hopkins' general apprehension about using the alibi as a defense may have been professionally understandable, his decision particularly and arrived at purposely to disregard such evidence in the petitioner's particular case was based on a nonexistent factual foundation.

Because Attorney Hopkins harbored this negative opinion, he never pursued [***41] that line of defense at the petitioner's criminal trial, despite his client's imploring him to do so and his knowledge of the availability of the prospective testimony of Rosa **Lopez** and Star Semedo. That is not to say, of course, that such alibi evidence was reasonably likely to produce a different outcome had such evidence been presented, but it does establish that Attorney Mullaney, as habeas counsel, was warranted in alleging this deficiency in the earlier habeas case.

Attorney Mullaney also introduced evidence that Attorney Hopkins failed to challenge the reliability of Manual Rosado's identification of the petitioner, as having shot him, by calling Latosha DelGiudice as a defense witness. Ms. DelGiudice, also a convicted felon, testified at the first habeas trial that she visited Rosado at the hospital some hours after he was shot. At that time, Rosado accused her of setting him up and blamed her boyfriend, Brad Rainey, for the incident. She indicated that Rosado never mentioned the petitioner at that time.

Along a similar vein, Attorney Mullaney proffered the testimony of Lakesha Bowles, the girlfriend of Jerry Kollock, who disclosed that she received several phone calls from Manual [***42] Rosado on February 2, 2002, wherein Rosado also accused her of assisting in arranging the Pettway store attack. Bowles was under federal indict-ment at the time of her habeas testimony.

Attorney Mullaney called Attorney Norm Pattis as a criminal defense expert to demonstrate the substandard nature of Attorney Hopkins' representation. Attorney Pattis is a very experienced lawyer whose background includes expertise in [**1117] the field of criminal defense work. Attorney Pattis opined that the putative alibi testimony of Rosa **Lopez** and Star Semedo would have enhanced rather than detracted from Attorney Hopkins' attempt to discredit the identification testimony of Manual Rosado and Tony Payton. This was the case because evidence that an individual was elsewhere is completely compatible with misidentification.

Attorney Pattis stated that Attorney Hopkins' failure to interview the alibi witnesses departed from the minimum exercise of reasonable legal assistance ordinarily expected of competent defense counsel. This expert doubted whether any lawyer can accurately assess the usefulness of potential witnesses without ever interviewing those individuals.

At the previous habeas trial, the petitioner confirmed [***43] that his arrest, for the charges he stands convicted for the present case, came about nine months after the Pettway store shootings. He also stated that he never attempted to utilize a false alibi defense in any other case.

Judge Fuger denied habeas corpus relief; ***Lopez*** *v. Commissioner of Correction*, supra, Superior Court, Docket No. CV-05-4000857-S; and the Appellate Court affirmed his decision, per curiam. ***Lopez*** *v. Commissioner of Correction*, supra, 150 Conn. App. 905, 93 A.3d 181. Judge Fuger specifically found that the testimony of Rosa **Lopez** and Star Semedo lacked credibility. "This court . . . finds that the alibi evidence is not worthy of belief and that [Attorney Hopkins] cannot be held to be ineffective for failing to present a defective alibi defense." ***Lopez*** *v. Commissioner of Correction*, supra, Superior Court, Docket No. CV-05-4000857-S.

Consequently, the habeas court determined that the petitioner had failed to meet his burden of proving either prong of the *Strickland* standard with respect to Attorney Hopkins' refusal to offer alibi evidence at the petitioner's criminal trial. Id. "[D]efense counsel made the correct strategic judgment in not pursuing this alibi and calling these missing witnesses in order to establish an alibi defense that may well have led a jury to conclude that the petitioner was lying to escape a finding of guilty." [***44] Id.

1

The petitioner now contends that habeas counsel rendered ineffective assistance by his strategic decision

to press Attorney Hopkins' failure to present alibi evidence as the principal ground in the previous habeas case and that Attorney Mullaney's unsuccessful attempt to do so was, itself, constitutionally infirm. The court rejects this contention.

Attorney Mullaney had available to him the evidence that was available to Attorney Hopkins bearing on a third-party culpability defense. Attorney Mullaney also utilized the services of an investigator, Jacqueline Bainer, who thoroughly briefed him as to the results of her findings concerning evidence of third-party culpability. In particular, Bainer sought and obtained evidence concerning the possibility that the Pettway store shootings of February 2, 2002, were retaliation for the P.T. Barnum Apartments home invasion which occurred about one week earlier. The gist of this putative defense appears to be that Brad Rainey sought revenge against Manual Rosado and his brother, Polo, for having botched the home invasion of Colbert's apartment by firing a gun at a young child and groping the vagina of a teenage girl.

It should be recalled that [***45] three victims of that home invasion, namely, Colbert, her thirteen year old son, and Davis Brown, all positively identified Jerry Kollock as one of the perpetrators and possibly the person who fired the shot that lodged in the [**1118] kitchen cabinet. A firearms expert determined that round was discharged from one of the handguns used in the Pettway store shootings.

Brown also identified the second gunman as Randy Armstrong, Kollock's frequent companion, and the person whom the petitioner had accidently shot in the foot two days before the home invasion. Brown also named Brad Rainey as the third accomplice who urged the gunmen to leave Colbert's apartment and make their getaway.

On the other hand, after Jerry Kollock's arrest, Kollock told Bainer that his cohorts were Polo and Manual Rosado, with Rosado being the lookout. To complicate matters further, Bridgeport Police Sergeant Larose received information that Robert Payton (deceased) was the second gunman.

Bainer also uncovered evidence that the petitioner and Robert Payton had a "beef" stemming from a dispute between the mother of the petitioner's child and Rosado's sister. Robert Payton, who was killed in a later incident, was one of the [***46] persons at the Pettway store on February 2, 2002, who managed to escape into the relative safety of the store unscathed.

Investigator Bainer urged Attorney Mullaney to raise an ineffective assistance claim in the first habeas case based on Attorney Hopkins' failure to obtain the information she uncovered and present a third-party culpability defense, in addition to the lack of an alibi defense which Attorney Mullaney did litigate. This third-party culpability claim is premised on speculation that Brad Rainey and Tank Gethers harbored great resentment against Polo, Manual Rosado, and Robert Payton for having botched the home invasion, coupled with Manual Rosado's initial failure to identify the petitioner as the person who shot him to the police and Latosha DelGiudice. Despite Bainer's earnest discussions with Attorney Mullaney on this point, Attorney Mullaney deliberately chose to confine the ineffective assistance specifications to the allegations recited above, i.e., primarily the failure by Attorney Hopkins to present an alibi defense.

Attorney Mullaney testified at the present habeas trial, and he recounted that, in his judgment, the petitioner had a strong claim of ineffective assistance [***47] based on Attorney Hopkins' decision to forgo an alibi defense. Attorney Mullaney exercised that professional judgment and experience by opting to avoid muddying the habeas case with weaker claims such as the convoluted, third-party culpability argument. Attorney Mullaney's experience persuaded him that third-party culpability defenses often fail because the evidence relies on a good deal of conjecture and innuendo, as in the petitioner's case. The court agrees with Attorney Mullaney's assessment that Attorney Hopkins' failure to present an alibi defense, based on the known and available testimony of Rosa **Lopez** and Star Semedo, was a much stronger claim than the third-party culpability claim suggested by Bainer's investigation.

It must be observed that the petitioner, at the habeas on a habeas trial, never presented a legal expert who criticized habeas counsel's representation. The petitioner did proffer the testimony of Attorney Kenneth Simon, but that expert confined his opinions to an evaluation of Attorney Hopkins' performance in the criminal case.

HN10 Effective advocates bear no general constitutional obligation to raise or argue every conceivable issue. *Tillman v. Commissioner of Correction*, 54 Conn. App. 749, 757, 738 A.2d 208, cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999). To the contrary, [***48] a scattershot approach "runs the risk of burying good arguments . . . in a verbal mound made up of strong and [**1119] weak contentions." (Internal quotation marks omitted.) Id. Habeas courts must be "highly deferential" to attorneys' decisions to winnow out less persuasive claims in order to focus on the stronger ones. *Spearman v. Commissioner of Correction*, 164 Conn. App. 530, 539, 138 A.2d 378, cert. denied, 321 Conn. 923, 138 A.2d 284 (2016).

"[S]trategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Arroyo v. Commissioner of Correction*, 172 Conn. App. 442, 467-68, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235

(2017); see also *Bree v. Commissioner of Correction*, 189 Conn. App. 411, 207 A.3d 539 (2019).

In the present action, the credible evidence discloses that Attorney Mullaney retained the services of an investigator who diligently researched the shootings where the same handgun was used that predated

the Pettway store incident of February 2, 2002. Bainer and Attorney Mullaney had frank discussions about the evidence Bainer's investigation produced. Attorney Mullaney made the tactical decision to restrict the earlier habeas claims to Attorney Hopkins' refusal to present available alibi evidence.

This court finds that Attorney Mullaney's tactical decision in this regard falls well within the realm of reasonable, professional advocacy for habeas counsel in [***49] his position. As described previously, Attorney Hopkins misunderstood the charges for which the petitioner was arrested on February 2, 2002, believing those charges to pertain to the Pettway store shootings of that date. He erroneously concluded that the lack of protest to the police by the petitioner's family based on an alibi for the evening of February 1 into February 2, 2002, cast doubt on the efficacy of an alibi defense and would jeopardize the petitioner's entire criminal case. Attorney Hopkins also feared that the petitioner had tried to employ a false alibi in a previous criminal matter. Attorney Mullaney felt that the petitioner could have successfully refuted any assertion that the petitioner had previously attempted to use a fictitious alibi.

Previous habeas counsel also assessed that Attorney Hopkins had three alibi witnesses, including the petitioner, who could establish a viable alibi defense and were available to testify at the petitioner's criminal trial. Attorney Mullaney also stated that the alibi evidence would not have undermined the defense that Attorney Hopkins did pursue, namely, that Tony Payton and Manual Rosado had misidentified the petitioner as one of the [***50] shooters in the Pettway store attack.

On the other hand, the petitioner's present denigration of Attorney Mullaney's decision not to add a claim that Attorney Hopkins should have also pursued a thirdparty culpability defense appears counterintuitive and abstruse.

The petitioner submits that Attorney Hopkins, and derivatively, habeas counsel, ought to have attempted to demonstrate that the Pettway store shootings were prompted by the excesses engaged in during the P.T. Barnum Apartment home invasion of the week before. Specifically, that Polo, Manual Rosado, and, possibly, Robert Payton, were targeted by Tank Gethers and Brad Rainey, affiliates of Polo, Rosado, and Payton, in retribution for having fired a weapon, with a nexus to Rainey and Gethers, during the home invasion; and for molestation of the teenage stepdaughter of Colbert, an untoward act which would incite unwanted attention and notoriety to the home invasion. To be clear, the peti-tioner contends that the Pettway store shootings were not, as one [**1120] might otherwise suppose, the actions of rival drug dealers or gang members, but rather one with internecine character.

Just who participated in the P.T. Barnum Apartments home invasion [***51] was in dispute, as mentioned earlier. Davis Brown identified Kollock, Armstrong, and Rainey as the perpetrators. Kollock told Bainer that his accomplices were Polo and Manual Rosado. Brad Rainey, a/ k/a Brad Payton, was the cousin of Tony and Robert Payton. The court also notes that Attorney Hopkins lacked the benefit of the information later revealed by Marcus Mahoney.

In addition to this scenario, the petitioner points to the testimony of the first habeas trial of Latosha DelGiudice. In her testimony, Latosha DelGiudice related that, when she visited Manual Rosado in the hospital, he accused her boyfriend, Brad Rainey, of using her to set him and his brother up for the attack. She further testified at the first habeas trial that Rosado never mentioned the petitioner at all.

The court finds this third-party culpability evidence and the inferences sought to be drawn from it to be tangled, tenuous, and conjectural. By comparison, the evidence regarding Attorney Hopkins' failure to present alibi evidence appears clear, concise, internally consistent, and not laden with suppositions and surmise. The court concludes that Attorney Mullaney's decision to pursue only the stronger ineffective [***52] assistance claim of lack of an alibi defense rather than the more nebulous third-party culpability claim was a reasonable exercise of professional judgment based on diligent investigation and competent understanding of the law.

HN11 Unsuccessful strategic decisions that are the result of the reasonable exercise of professional judgment comprise effective assistance despite an unfavorable outcome. *Stephen S. v. Commissioner of Correction*, 134 Conn. App. 801, 809-10, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Therefore, the court determines that the petitioner has failed to prove the deficient performance component of the *Strickland* test regarding the representation at the first habeas trial by Attorneys Mullaney and Rozwaski regarding the failure to raise Attorney Hopkins' failure to investigate and present a third-party culpability defense.

2

The petitioner also alleges that Attorneys Mullaney and Rozwaski rendered ineffective assistance by inadequately proffering evidence of Attorney Hopkins' failure to pursue the alibi defense. To reiterate, no legal expert testified in the present habeas case that previous habeas counsel were deficient in any manner.

Specifically, the petitioner complains that his habeas attorneys "inadequately" challenged Attorney Hopkins' testimony about his misunderstanding [***53] that an alibi defense is an affirmative defense; that habeas counsel should have "better developed" Attorney Hopkins' misinterpretation of the charges for which the petitioner was arrested on February 2, 2002; and that Attorney Norm Pattis was a poor choice of an expert witness to demonstrate Attorney Hopkins' deficiencies. The court rejects these claims because the petitioner has failed to prove the prejudice prong of the *Strickland* criteria, i.e., that there exists a reasonable likelihood that the outcome of the first habeas case would have been favorable but for these purported deficiencies.

As elaborated previously, Judge Fuger denied habeas corpus relief because he found the testimony of the alibi witnesses, Rosa **Lopez** and Star Semedo, lacked credibility. That dispositive finding, affirmed per curiam by the Appellate Court, bears [**1121] no relation to the decision to call Attorney Pattis as an expert witness. Nor did Attorney Hopkins' erroneous view of the law or the basis for the petitioner's arrest on February 2, 2002, contribute to that finding. The adverse decision by Judge Fuger hinged on the witnesses' nonbelievability, which determination cannot be attributed to the deficiencies alleged [***54] by the petitioner on the part of his former habeas counsel.

3

The final allegation of ineffective assistance by habeas counsel, as set forth in the petitioner's posttrial brief, is that previous habeas counsel ought to have attacked Attorney Hopkins' cross-examination of Manual Rosado more vigorously. Again, no legal expert decried habeas counsel's representation on this issue. The petitioner's posttrial brief contains little discussion as to this claim, and the court treats it as abandoned. In sum, the court denies the amended petition on the ground of ineffective assistance of habeas counsel.

ACTUAL INNOCENCE CLAIM

HN12 Habeas corpus relief in the form of a new trial based on actual innocence requires the petitioner to satisfy the criteria set forth in *Miller v. Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108 (1997).

The *Miller* criteria comprise a two part test which requires a habeas petitioner asserting an actual innocence claim to prove, by clear and convincing evidence, that:

1. The petitioner is actually innocent of the crime for which he or she stands convicted; and

2. No reasonable fact finder would convict the petitioner of that crime after consideration of a combination of the evidence adduced at both the criminal trial and the habeas proceeding. *Miller v. Commissioner of Correction*, supra, 242 Conn. 746-47; see [***55] also *Gould v. Commissioner of Correction*, 301 Conn. 544, 557-58, 22 A.3d 1196 (2011).

HN13 The first component of the *Miller* criteria requires the petitioner to produce affirmative proof that he did not purposefully participate in the charges for which he was convicted. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred." (Emphasis in original.) *Gould v. Commissioner of Correction*, supra, 301 Conn. 563. "Clear and convincing proof of actual innocence does not, however, require the petitioner to establish his or her guilt is a factual impossibility." Id., 564.

Before embarking on this analysis, the court must confront a preliminary question. In the *Gould* case, our Supreme Court recognized, in a footnote, that the court has never decided whether the affirmative evidence of innocence must be newly discovered. Id., 551 n.8. The Supreme Court acknowledged, however, that the Appellate Court has imposed such a requirement. Id.

Indeed, the Appellate Court has consistently and repeatedly demanded that affirmative proof of actual innocence be newly discovered. *McClain v. Commissioner of Correction*, 188 Conn. App. 70, 88, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019), *Corbett v. Commissioner of Correction*, 133 Conn. App. 310, 315, 34 A.3d 1046 (2012); *Vasquez v. Commissioner of Correction*, 128 Conn. App. 425, 444, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011); *Gaston v. Commissioner* [**1122] of Correction, 125 Conn. App. 553, 558-59, 9 A.3d 397 (2010), cert. denied, 300 Conn. 908, 12 A.3d 1003 (2011); *Weinberg v. Commissioner of Correction*, 112 Conn. App. 100, 119, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009); *Grant v. Commissioner of Correction*, 103 Conn. App. 366, 369, 928 A.2d 1245, cert. denied, 284 Conn. 921, 933 A.2d 723 (2007); *Johnson v. Commissioner of Correction*, 101 Conn. App. 465, 469-70, 922 A.2d 221 (2007); *Batts v. Commissioner of Correction*, 85 Conn. App. 723, 726-27, 858 A.2d 856, cert. [***56] denied, 272 Conn. 907, 863 A.2d 697 (2004); *Clarke v. Commissioner of Correction*, 43 Conn. App. 374, 379, 682 A.2d 618 (1996), appeal dismissed, 249 Conn. 350, 732 A.2d 754 (1999); *Williams v. Commissioner of Correction*, 41 Conn. App. 515, 530, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997). This court is, of course, bound by these holdings of the Appellate Court.

The Appellate Court has stressed that ***HN14*** habeas judges are bound by the requirement that the evidence of actual innocence be newly discovered. *Thompson v. Commissioner of Correction*, 172 Conn. App. 139, 158, 158 A.3d 814, cert. denied, 325 Conn. 927, 169 A.3d 232 (2017). "[E]ven though the final resolution of the newly discovered evidence standard has yet to be addressed by the Supreme Court, it is beyond argument that insofar as any Superior Court considering a [claim] of actual innocence in a habeas petition, the matter is *closed*." (Emphasis added.) Id.

Newly discovered evidence is "such that it could not have been discovered previously despite the exercise of due diligence . . . ." *Skakel v. State*, 295 Conn. 447, 466-67, 991 A.2d 414 (2010). Due diligence is reasonable diligence. Id., 506. The query to be answered is "what evidence would have been discovered by a reasonable [criminal defendant] by persevering application and untiring efforts in good earnest." (Internal quotation marks omitted.) Id., 507.

The petitioner avers that Manual Rosado's habeas deposition contained inconsistencies when compared to his criminal trial testimony; that evidence linked the P.T. Barnum Apartments home invasion incident to the Pettway store shootings; that [***57] Latosha DelGiudice's previous habeas trial testimony regarding Rosado's failure to mention the petitioner as his assailant; and the present habeas trial testimony of Marcus Mahoney constitute clear and convincing evidence of the petitioner's actual innocence. The court disagrees.

1

First, the evidence connecting the weapon used at the P.T. Barnum Apartments home invasion with one also discharged during the Pettway store shootings cannot be fairly characterized as newly discovered.

The state provided Attorney Hopkins with a copy of the firearms analysis that ascertained that some rounds fired during the Pettway store shootings were discharged from the same pistol that either Kollock or Polo fired during the P.T. Barnum Apartments home invasion. Indeed, Attorney Mullaney's investigator used that report to investigate the five previous incidences in which that weapon was used. Therefore, potentially favorable, alternative explanations for the motivation for the Pettway store shootings, and by whom harbored, were available for production at the petitioner's criminal trial in the exercise of reasonable diligence. The petitioner has alleged just such a claim in his specifications of ineffective [***58] assistance by defense counsel and previous habeas counsel.

Consequently, the court cannot afford relief based on the claim that this was [**1123] newly discovered evidence of the petitioner's actual innocence, standing alone.

2

Contrary to the petitioner's assessment, the court finds that Manual Rosado's criminal trial testimony and his later habeas deposition testimony were, as to essential details, significantly consistent and trustworthy; principally, as to who shot him. Any discrepancies go to credibility or the absence of it. It must be kept in mind that, under the *Miller* criteria, newly discovered evidence that merely weakens the prosecution case, even that which severely weakens it, fails to comprise affirmative evidence of

prosecution case, even that which severely weakens it, fails to comprise affirmative evidence of innocence.

In *Gould v. Commissioner of Correction*, supra, 301 Conn. 544, 546-47, 22 A.3d 1196, our Supreme Court reversed a habeas court's determination of actual innocence based on the total recantation of the only witness who positively identified the defendants as the perpetrators of a murder of a shopkeeper. Her recantation stated that she was not at the scene when the shooting occurred, in direct contradiction to her trial testimony. The fact that the habeas court credited her recantation was irrelevant as to the claim of actual innocence. This was [***59] so because her revised story did not prove the defendants did not commit the murder but only that she was ignorant of who did. Such renunciation by a witness failed to constitute affirmative evidence of innocence. Id., 557-59.

HN15 In order to satisfy the affirmative evidence criterion of the *Miller* standard, the petitioner must prove, by clear and convincing evidence, that no crime occurred; that someone else committed the crime; or that the person convicted could not have committed the crime, even if the true perpetrator remains unknown. Id., 563. Actual innocence means factual innocence and is not equivalent to legal insufficiency of the evidence. Id., 560. The petitioner's burden is to prove he is actually innocent of the crime rather than merely that the state could no longer prove his guilt beyond a reasonable doubt. Id., 561. "Although the postconviction evidence [the petitioner] presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove [his] innocence." (Internal quotation marks omitted.) Id.

The petitioner's proof in the present case focuses on Rosado's initial failure to tell the police and others that [***60] the petitioner shot him; the nature and substance of threats conveyed to him before the shooting, and that he accused Brad Rainey of being behind the Pettway store shooting. None of these inconsistencies demonstrates that no shootings occurred, that someone else shot Rosado instead of the petitioner, or that the petitioner could not have been his assailant.

Thus, the putative inconsistencies by Rosado when comparing his criminal trial testimony to his habeas deposition cannot form the foundation of the petitioner's actual innocence claim. That is not to say that such inconsistencies are irrelevant to that claim when considered in conjunction with newly discovered evidence that satisfies the *Miller* test, but such supposed discrepancies, standing alone, fail to meet that test.

3

Next, the petitioner relies on the testimony of Latosha DelGiudice presented during the first habeas trial. There, she avowed that, about five or six hours after Rosado was shot, she snuck into the hospital to visit him. She related that Rosado voiced his suspicions that Brad Rainey, the [**1124] father of Latosha's child, enlisted her to set up Rosado to be shot at the Pettway store. This accusation by Rosado was predicated on [***61] phone conversations he had with Latosha DelGiudice shortly before the shooting. She swore that Rosado never mentioned the petitioner at all.

First, such evidence is not proof of the petitioner's innocence. Rosado may have been mistaken or correct in his conjecture that Brad Rainey lurked behind the Pettway store shootings. However, witnesses counted the number of gunmen ranging from two to five. Rainey could have been the moving force behind the attack without exonerating the petitioner; that is, the petitioner could have shot Rosado while acting in concert with Rainey. At least four handguns and two shotguns were fired during the Pettway store shooting. Rosado's suspicions about Rainey do not exculpate the petitioner, although such evidence could be used to impeach Rosado's credibility.

Also, if Rosado suspected Latosha DelGiudice of complicity in the attack, Rosado would have good reason to withhold from her, and indirectly from Brad Rainey, and the petitioner, his complete knowledge of what happened. He was shot and his brother killed and vengeance was on his mind.

But more significantly, even if one assumes, arguendo, that Latosha DelGiudice's testimony that Rosado failed to remark [***62] to her that the petitioner was the person that shot him and that Rosado harbored a belief that Brad Rainey was also responsible for the attack, is evidence of the petitioner's actual innocence, her testimony was vulnerable to counterattack by the admission of testimony of other potential witnesses.

The petitioner offered and the court admitted exhibit 43, which consists of several documents prepared by the Bridgeport police during the investigation of the Pettway store shootings.

Shayla DelGiudice is Latosha's sister and gave the police a statement on February 8, 2002, that she visited Rosado at the hospital during his thirteen hour stay there. Latosha had also mentioned that she

and her sister visited Rosado at the hospital during Latosha's second trip there. Shayla stated that Rosado told her that the petitioner shot him.

Also, Shayla DelGiudice's boyfriend, Daniel Vereen, also spoke to Rosado at the hospital. Vereen corroborated that Rosado named the petitioner as his shooter at that time.

While one never knows for certain whether a witness will later testify in accordance with the substance of what the police recorded the witness as saying at an earlier time, the possibility that the [***63] benefit of Latosha DelGiudice's testimony would be devastatingly undermined by the testimony of her sister and Vereen looms large. Therefore, the court assigns diminished weight to the existence of Latosha DelGuidice's testimony, even if regarded as evidence of actual innocence.

4

The testimony of Marcus Mahoney, during the present case, is clearly newly discovered. Mahoney first revealed his knowledge about the P.T. Barnum Apartments home invasion and the Pettway store shootings, to anyone in an official or quasi-official capacity, years after the petitioner's conviction. This revelation occurred when Mahoney agreed to speak with the petitioner's habeas investigator while he was confined at Webster Correctional Institution.

Mahoney presently serves a prison term and has several felony convictions in his past. From early adolescence, he has regularly [**1125] used street drugs, including blunts, heroin, and ecstasy. He, Polo, and Robert Payton engaged in the sale of illicit drugs together in the Pettway store area of Bridgeport. Mahoney and Polo were so close that Mahoney regarded Polo as his brother.

To recapitulate, Brad Rainey was Robert and Tony Payton's cousin and father of Latosha DelGiudice's [***64] child. Latosha DelGiudice and Manual Rosado also sold drugs, cooperatively.

Mahoney testified that Rainey had a long-standing feud with the Rosado brothers and their associates. In the fall of 2001, Rainey shot Mahoney, striking him five times. The gun used by Rainey was the very same weapon used in the P.T. Barnum Apartments home invasion and at the Pettway store shooting. Mahoney has been shot two or three other times, including in the presence of Manual Rosado.

The gun in question appears well traveled. Besides the three incidents mentioned herein, it was also traced to at least two other shootings in 2001. Although Mahoney's testimony was sketchy on this point, it appears that the weapon belonged to Tank Gethers and/or Rainey, but kept in a garage to which Mahoney and Polo had access.

Mahoney stated that he knew the petitioner but had no significant dealings with him.

Mahoney, Polo, Manual Rosado, Tank Gethers, and Kollock believed that Barbie Colbert was a major drug dealer at the P.T. Barnum Apartments complex. They decided her apartment would make a lucrative target to rob. Mahoney and Polo surveilled her residence, and the group conceived a plan to conduct the robbery. That plan [***65] entailed Kollock and Polo entering Colbert's apartment with guns drawn to induce the occupants to relinquish money and/or drugs. The handguns were to be used as "props" and not to be fired. The guns were supplied by Gethers.

In the early hours of January 27, 2002, Kollock, Polo, and Rosado left to execute the robbery. They returned around 7 a.m. The loot garnered was divided among the conspirators. However, Polo revealed that the robbery got out of hand, resulting in a shot fired at a young child and a teenage girl sexually assaulted.

Gethers was outraged by these departures from the plan. The gun could now be linked to that shooting and possibly traced to him. The assault would also heighten scrutiny by the police and/or the victim's associates.

Mahoney avowed that he was at the Pettway store on February 2, 2002, when Polo was killed. He heard someone shout, "Oh, shit!" He saw three gunmen whose faces were partially obscured by bandanas. Mahoney believed the three masked men to be Brad Rainey, Tank Gethers, and an individual he only knows as "K." Bullets began to whiz by, and Mahoney quickly ran across the street from the Pettway store, jumped a fence, and hid by or in his car. He recollected [***66] that Tank held a pump type shotgun.

Mahoney was uncertain as to what the result of the attack was. He phoned Polo, Manual Rosado, and Robert Payton, but no one returned his calls at first. Eventually, Robert Payton called Mahoney and

informed him that Polo was dead and Manual Rosado wounded and in the hospital. Robert Payton cautioned Mahoney to stay away from the hospital and remain quiet about what had transpired.

About thirteen hours later, Rosado left the hospital and, along with Robert Payton went to Mahoney's residence. Tank Gethers drove up and an argument between Mahoney and Gethers ensued because Mahoney [**1126] told him he knows who was responsible for the shooting. Gethers threatened Mahoney. Mahoney left the area, spending two or three months in Boston.

Mahoney testified that he did not see the petitioner, Tony Payton, or April Edwards at or near the Pettway store at the time of the shootings.

After he returned to Bridgeport, Mahoney learned that the police arrested the petitioner for his involvement in the Pettway store shootings. Despite believing the petitioner was innocent, Mahoney refrained from communicating his knowledge to the authorities. He attributed his silence to self-preservation, [***67] a reluctance to be labeled as a "rat," and a desire to avoid involvement in the case, generally.

When interviewed by the petitioner's habeas investigator years later, Mahoney decided to tell what he believed he knew about the incident because he regretted that an innocent man was convicted of his close friend's murder when the real culprit was Brad Rainey.

The issue for the court to adjudicate, then, is whether Mahoney's exculpatory testimony, in combination with all the other evidence adduced, including the testimony of Latosha DelGiudice and the evidence connecting the P.T. Barnum Apartments home invasion with the Pettway store shootings, along with the original criminal trial evidence, establishes clear and convincing proof that no reasonable jury would convict the petitioner, if it received such evidence, and that the petitioner is factually innocent of the crimes. The petitioner faces a "heavy burden" to prevail under the *Miller* standard. (Internal quotation marks omitted.) *Gould v. Commissioner of Correction*, supra, 301 Conn. 567.

Contrary to the petitioner's position, the court finds the testimony of Manual Rosado identifying the petitioner as his assailant to be very credible. He has steadfastly maintained that identification.

Rosado's identification [***68] was corroborated by Tony Payton. Tony Payton observed the events unfold from a relatively safe vantage point and did not labor under the confusion, stress, and/or fear that the fusillade must have engendered in the minds and memories of those more exposed to its dangers. His supposed motives to lie appear very shallow.

The racial classifications and skin color testimony of the witnesses appears to the court to be particularly unuseful. Given the lack of reason for neutral witnesses to reflect upon and recollect the precise skin tones of persons firing bursts of bullets at targets unknown to them, at night, in a poorly lit area, it is entirely unsurprising that these witnesses' reports vary.

Gary Burton, a victim, thought the assailants were three black men, possibly. One of his female companions perceived the attackers to be composed of one black male, one Hispanic male, and one olive toned male. Of course, the shooters' lower faces were concealed. Therefore, the court attributes little significance to which of the witnesses' diverse descriptions of skin color comport with the petitioner's complexion or not.

Furthermore, through information received by the police as contained in exhibit [***69] 43, it is now the case that two individuals, Shayla DelGiudice and Daniel Vereen, said that they heard Rosado name the petitioner as his shooter very soon after the event while at the hospital.

Rosado has persistently denied knowing who killed his brother, Polo, and has refused to speculate on that question, nor has he stated he personally recognized any shooter besides the petitioner. If Rosado were of a mind to frame the petitioner, it [**1127] seems incongruous that his mendacity would stop there and allow his brother's killer to remain unidentified.

Also, Rosado's identification of the petitioner as the person who shot him is not negated by his suspicion that Brad Rainey played some role in the event. As noted previously, evidence was adduced that the petitioner had engaged in menacing conduct toward Rosado and Robert Payton at the Pettway store before February 2, 2002. The petitioner's proof fails to dispel the possibility that Rosado's antagonists, Rainey and the petitioner, acted in concert.

It is clear that the same handgun fired at the P.T. Barnum Apartments home invasion was also used in the Pettway store shooting. But it is also apparent that weapon was well traveled. Gethers, and/or [***70] Rainey may have used the weapon, but it was also used to facilitate crimes by other persons.

Mahoney's testimony is fraught with circumstances that expose his credibility and/or reliability to

derogation. His testimony conflicts with that of Tony Payton as to whether Payton and April Edwards were near the Pettway store during the shooting. No other eyewitness corroborated Mahoney's testimony as to the core issue of the identities of the shooters.

Mahoney bore a grudge against Brad Rainey. Mahoney testified that Rainey shot him five times because Rainey believed Mahoney had issued a threat to "get" Rainey previously. Mahoney acknowledged that the assailants wore bandanas concealing their lower faces and that, upon hearing bullets whiz by, he immediately fled the scene by running away from the locus of the gunfire. Mahoney claimed to regard Polo as his brother but allowed Polo's real killers to remain at large for years while the petitioner languished in prison for a shooting Mahoney knew he did not commit. These circumstances place great strain on the believability or accuracy of Mahoney's testimony, given years later.

Keeping in mind that ***HN16*** the *Miller* level of proof goes beyond a mere preponderance [***71] to require a petitioner to bear the heavy burden of demonstrating his factual innocence by clear and convincing evidence, the petitioner has failed to carry that burden. Clear and convincing evidence is substantial and unequivocal evidence that produces a very high probability that the fact to be proven is true. *State v. Thompson*, 305 Conn. 412, 425, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); see *Gould v. Commissioner of Correction*, supra, 301 Conn. 560.

For these reasons, the amended petition for habeas corpus relief is denied.

Footnotes

1 The petitioner also claims on appeal that the court abused its discretion in dismissing several related claims prior to the habeas trial. Prior to trial, a good cause hearing was held relating to several counts of the fourth amended petition. At the hearing, the petitioner sought to present evidence that would show that, at his criminal trial, a witness had falsely testified about an alleged cooperation agreement or similar understanding. However, the habeas court, *Oliver, J.*, dismissed the claims. The petitioner urges us to conclude that there was good cause to support these claims, and, therefore, the habeas court erred in dismissing them. Subsequently, the petitioner added claims involving the same alleged false testimony to his seventh amended petition. At the outset of trial, the habeas court, *Sferrazza, J.*, dismissed those claims. On appeal, the petitioner argues that the claims were improperly dismissed.

Additionally, the petitioner claims on appeal that the prosecutor at the petitioner's criminal trial was improperly exempted from the habeas court's order sequestering the witnesses. The petitioner argues that the habeas court abused its discretion "by allowing the prosecutor from the criminal trial, who was alleged in the amended petition to have violated the petitioner's constitutional rights, to participate closely in the habeas trial over the petitioner's objection" because exempting the prosecutor from the sequestration order "violated the petitioner's statutory and constitutional rights."

After a careful review of the record, as well as the parties' briefs and relevant law, we are convinced that these claims lack merit and that the habeas court acted properly when it dismissed the claims and excluded the prosecutor from the sequestration order.

* Affirmed. ***Lopez*** *v. Commissioner of Correction*, 208 Conn. App. , A.3d (2021).

Content Type: Cases

Terms: ramon lopez

Narrow By: Court: State Courts>Connecticut

Date and Time: Apr 08, 2022 08:10:23 a.m. EDT

Print

APPENDIX C

DOCKET NO.: CV 12-4004836	:	SUPERIOR COURT
RAMON LOPEZ	:	J. D. OF TOLLAND
V.	:	AT ROCKVILLE
WARDEN	:	MAY 1, 2019

MEMORANDUM OF DECISION

The plaintiff, Ramon Lopez, seeks habeas corpus relief from a total, effective sentence of one hundred years imprisonment, imposed after a jury trial, for the crimes of murder; two counts of attempted murder; and two counts of assault first degree. Our Supreme Court affirmed the judgment of conviction on direct appeal, *State* v. *Lopez,* 280 Conn. 779 (2007).

The petitioner filed a previous habeas action attacking the effectiveness of his criminal defense counsel, Attorney Lawrence Hopkins. For sentencing, Attorney Robert Berke replaced Attorney Hopkins, and Attorney Berke's representation was not the subject of the first habeas case. On January 4, 2012, Judge Fuger denied habeas corpus relief, *Lopez* v. *Commissioner,* Superior Court, Tolland Judicial District, d.n. CV 05-000857 (January 4, 2012). The Appellate Court affirmed that decision, per curiam, *Lopez* v. *Commissioner,* 150 Conn. App. 905 (2014); cert. denied, 314 Conn. 922 (2014).

In the present case, the petitioner pursues claims of ineffective assistance of defense counsel and previous habeas counsel, Attorneys Thomas P. Mullany, III, and David Rozwaski; a *Brady* violation; and a claim of actual innocence. Other grounds for relief were previously dismissed or have not been pursued and are deemed abandoned.

Because of the unusually complicated factual circumstances and scenarios presented by the evidence and the complex legal issues propounded, the court has permitted oversized briefs and granted numerous extensions of time to file such briefs. Petitioner's counsel has described

the potential factual and legal issues and as "numerous, complicated, [and] wide-ranging." Counsel has also noted that the record is "fairly voluminous" and acknowledged that the petitioner's third-party culpability theory is "at first counterintuitive." These observations appear apposite.

The court has reviewed the evidence in this case in great detail, including transcripts of the criminal trial and the first habeas case and police investigation and interview reports pertaining to multiple incidents. In order to set the stage properly and promote a fuller understanding of the factual and legal questions to be resolved, the court adopts a somewhat peculiar format in this memorandum and hopes that these aspirations can be attained.

First, the court provides a nonexhaustive glossary of names, aliases, and sobriquets to facilitate a comprehensive explanation of the several relationships, locations, and events that are pertinent to the court's decision.

The petitioner: Ramon Lopez, a/k/a "Buttafuco."

The Pettway store: Located at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. It is variously referred to as an all-night convenience store, a liquor store, and a grocery store.

Manual Rosado: a/k/a Kevin Anderson and "Cricket." One of the shooting victims in the Pettway store incident of February 2, 2002.

Shariff Hakeem-Abdul: a/k/a "Polo" and Lonnie Rosado. The deceased victim of the Pettway store shooting and brother of Manual Rosado.

Robert Payton (now deceased): "Rob." A friend of Manual Rosado, brother of Tony Payton, and cousin to Brad Rainey.

Tony Payton: "Tone" or "Tonny." Brother of Robert Payton and a purported witness to the Pettway store shooting of February 2, 2002. Walks with a pronounced limp.

Gary Burton: Another shooting victim of the Pettway store shooting and acquaintance of Robert Payton.

John Dawson: Purported witness to the February 2, 2002, shooting and/or aftermath.

Eddie Hilton: Purported witness to the February 2, 2002, shooting and/or aftermath.

Desiree Jones: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Keaga Johnson: Friend of Gary Burton and purported witness to his shooting and/or aftermath.

Francisco Soares: "Cisco." An acquaintance of Gary Burton and purported witness to his shooting and/or aftermath.

Kenny Soares: Brother of Francisco Soares and acquaintance of Gary Burton.

John Soares: "Jay;" "Big Jay." Acquaintance of Gary Burton and cousin to Francisco Soares and purported witness to his shooting.

John Santos: "Little Jay." Acquaintance of Gary Burton.

Michael Lockhart: a/k/a Michael Pettway; "Chef." Possibly one of the gunmen at the February 2, 2002 shooting.

Bernie Gethers: "Tank."

Lou Diamond: Possible a/k/a Troy Lopez. Alleged companion to Chef at Pettway store on February 2, 2002, and possible gunman.

Tajah McClain: "Kaiser;" "Kiser;" "Boo." Possible gunman at Pettway store shooting. Walks with a limp.

April Edwards: A close friend of Tony Payton and potential witness to the February 2, 2002, shooting, but never called to testify in criminal case or either habeas cases.

Michael Jackson: Purported witness to February 2, 2002, shooting and/or aftermath.

Bob Kapel (Capel): Purported witness to February 2, 2002, shooting and/or aftermath.

Jose Rivera: "Tweety." Possible associate of petitioner.

"Pooh" or "Phoo": Possibly present at February 2, 2002, shooting.

Vincent Wilson: "Fato;" "Fatol." Brad Rainey's brother-in-law.

Brad Rainey: Possibly a/k/a Brad Payton. Cousin of Robert and Tony Payton.

Donna Jones: Purportedly heard February 2, 2002, shooting. Acquaintance of Manual Rosado.

"Weesa": Female acquaintance of Robert Payton and petitioner.

Irell Pettway: "Country"

P.T. Barnum Apartments: Housing facility on Anthony Street, Bridgeport.

Jerry Kollock: Convicted of January 27, 2002, home invasion at Colbert apartment at P. T. Barnum complex. Companion to Randy Armstrong.

Keisha Bowles: Kollock's girlfriend.

Randy Armstrong: "Little Biscuit;" "L B". Friend of Kollock, "Fato," and Brady Rainey. Shot in the foot on January 24, 2002, at Greens housing complex. Allegedly shot accidently by petitioner.

Nakina Goff: Randy Armstrong's girlfriend.

Barbie Colbert: Victim of P. T. Barnum home invasion of January 27, 2002.

Davis Brown: Another victim at Colbert apartment.

Latosha DelGiudice: "Natasha;" "Tosha;" Tasha." Brad Rainey's girlfriend and Shayla DelGiudice's sister.

Lakisha Banks: Friend of Kollock.

Kiva Scutter: "Aunt Kiva." Colbert's neighbor.

Shonda Upchurch: Sister of Vincent Wilson and go-between/mediator for disputant's at P. T. Barnum housing complex.

Javen Eagles: "Rat." Drifter and friend of Colbert.

Cedelice Davis: Brad Rainey's friend.

Fifi: Brad Rainey's cousin.

Marcus Mahoney: Caucasian friend of "Polo". Like a brother to Polo and possible partner in illicit drug business with him.

The court now describes the potential evidence as to three incidents from which one can reasonably glean the following details. These putative facts are derived from police investigative notes and reports, hearsay statements contained therein, as well as evidence introduced at the petitioner's criminal trial and earlier habeas trial. Consideration of information included, or logically deducible, from these sources is necessary because the petitioner's *Brady* violation claims, as well as the ineffective assistance allegations, require scrutiny of the information reasonably available to any of the petitioner's counsel and/or imputable to the prosecuting authority.

Randy Armstrong Shooting

During the early hours of January 25, 2002, Armstrong was shot in the foot. His companion, Jerry Kollock, initially drove Armstrong for medical care, but they decided to stop at Armstrong's sister's home first. After she refused to join them on the trip to the hospital, Kollock and Armstrong drove to the home of Armstrong's girlfriend, Nakina Goff. Goff agreed to accompany them to the hospital.

When initially questioned by police regarding how the injury occurred, Armstrong and Goff related a fictitious tale that the couple had just left Goff's residence on foot when unidentified gunmen emerged from a car and attempted to rob them. They stated the robbers forced Armstrong to lie on the ground. When the robbers ascertained that Armstrong had no

money, they returned to their vehicle. Before departing, however, the assailants fired a shot that struck Armstrong in the foot.

Armstrong and Goff fabricated this scenario because both Armstrong and Kollock were on parole and had traveled beyond the geographic limits specified by the parole conditions. Because Goff's apartment was closer to the area permitted by the terms of their parole, Armstrong and Kollock hoped that such a minor transgression would be overlooked.

Eventually, Goff told the police a different, and presumably truer, story. Armstrong and Kollock had visited the Greens housing complex, where Kollock and others drank and ingested drugs. While intoxicated, some members of the group exuberantly fired guns in the air. Armstrong told Goff that, as a consequence, the petitioner had accidently shot him.

Armstrong left the hospital during the afternoon of that same day, January 25, 2002. He used a cane to facilitate walking.

At around two o'clock that afternoon, Kollock's girlfriend, Keisha Bowles, drove Kollock and Armstrong to Goff's home. Later, Bowles and Kollock returned to pick up Armstrong so that Kollock and Armstrong could meet with their parole officers. After these appointments concluded, Bowles and Kollock dropped Armstrong off at his home.

The next day, January 26, 2002, at around one pm, Armstrong and Goff argued, and Goff left from Armstrong's home to go to her own residence. Later that day, they reconciled, and she and Armstrong talked, by phone, through the night.

The following day, January 27, 2002, at around eight am, Bowles arrived at Goff's home looking for Kollock. Bowles thought Armstrong might know of Kollock's whereabouts. Bowles told Goff that Kollock had taken her car the night before, never returned, and that she received a

phone call from Latosha DelGiudice, the girlfriend of Brad Rainey, that Bowles' car was stranded in the East End section of Bridgeport.

When Bowles went to retrieve her car, she found that it was unlocked, the keys were missing, and the tires had been flattened. She sought out Kollock and wanted Armstrong to assist her in that endeavor. Goff called Armstrong, but Armstrong's sister answered and told Goff that Armstrong was asleep and that she had not seen Kollock.

Goff asserted that she spent the evening of January 26 to 27, 2002, at Armstrong's residence and returned to her own home around eight am that morning.

P. T. Barnum Home Invasion

About two hours earlier, around six am on January 27, 2002, Barbie Colbert was asleep in her residence, which was Apartment 108 of the P. T. Barnum Apartments. Sleeping in her bed with her were three of her children, ages seven, five, and four years. Colbert's thirteen year old son was asleep on a couch in the livingroom, and her seventeen year old step-daughter slept in another bedroom. Another relative, Davis Brown, was watching television in the livingroom.

Earlier that morning, a neighbor, Kiva Scutter, visited Colbert's apartment and had awakened Brown. Scutter then left and announced that she expected to return shortly. When she exited Colbert's apartment, she left the front door to that apartment unlocked.

Suddenly, two armed men rushed into Colbert's apartment and demanded money. Brown recognized Jerry Kollock as one of the robbers. Brown knew Kollock's family. Brown believed that the second gunman was Randy Armstrong. Both gunmen had concealed their lower faces with masks or clothing, and Kollock shoved a semi-automatic pistol into Brown's mouth while ordering Brown to take the gunmen into Colbert's bedroom to awaken her. Brown complied.

At first, Colbert assumes Brown was joking when he roused her with the news that armed men wanted to rob them. The gunmen forced Brown onto Colbert's bed. They compelled Brown and Colbert to refrain from looking at them. Kollock struck Brown in the head four or five times, causing Brown to bleed profusely. Colbert produced a pillowcase containing $180 and offered it to the robbers. Kollock told his accomplice to search the apartment, and his companion ransacked the residence. The robbers also inquired about the whereabouts of "Rat," Vincent Wilson.

When the gunmen first accosted Brown in the livingroom, Colbert's thirteen year old son awakened and arose. Kollock pointed his weapon at the boy and directed him to remain still. The boy froze, but he was in position to observe the entire episode.

One of the younger children in Colbert's bed warned, "Mommy don't move! They have guns!" As a result of the pistol-whipping of Brown and fear for their lives, Colbert screamed.

The scream and commotion brought Colbert's seventeen year old step-daughter out of her bedroom and to the doorway of Colbert's bedroom. The girl tried to flee, and the gunmen pursued her. She tripped and fell, and Kollock's companion pushed his pistol into her mouth and then pressed it forcibly into her eye.

While so subjugated, Kollock reached underneath the teenager's underwear and probed her vagina, possibly searching for concealed drugs.

At that time, Colbert's five year old daughter ran from the bedroom toward the kitchen. She hid under a kitchen table. Kollock demanded she came out, but she bravely, refused.

A third accomplice, identified by Brown as Brad Rainey, entered the apartment and urged Kollock and the other gunman to leave. Kollock or his companion then fired a shot toward the

kitchen table. The bullet struck a cabinet about three feet from the table. The three intruders then exited.

Brown and the thirteen year old ran to a window and saw two cars quickly drive out of parking spaces directly in front of Colbert's apartment. Brown recognized one vehicle as belonging to Kollock's girlfriend, Bowles.

Both Colbert and her thirteen year old son also recognized Kollock. Colbert occasionally braided customer's hair, and Kollock had sought such services just a few weeks before the incident.

Kollock learned that the police suspected him to be one of the gunmen. He disposed his pistol and went underground. The police eventually captured him.

Pettway Store Shooting

Our Supreme Court described the evidentiary scaffold that supported the jury's guilty verdicts as follows:

"In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally east-west direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as "Polo," his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as "Chef" came out of Pettway's, gave Abdul-Hakeem and Rosado a "grim" look and then walked north on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and

walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth Street to the west side and joined Diamond and Chef.

Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, Tony Payton, knew both men and was able to identify them as Boo McClain and the defendant. McClain carried a handgun and the defendant carried a shotgun. As McClain and the defendant approached Pettway's, the defendant said to the people gathered on the sidewalk, "All right freeze, nobody move," and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to Pettway's, which had a "buzzer lock." The door opened and several people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the defendant, whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to Pettway's McClain, the defendant and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the defendant yelled, "I told you I was going to get you, Polo, I told you I was going to get you." McClain and the defendant then ran back up Stratford Avenue and reentered the white car, which turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis revealed that two separate shotguns and four separate handguns had been used in the shooting.

Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul-Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip," *State* v. *Lopez,* supra, 783-785.

Brady Violation Claims

In his amended petition, dated July 28, 2017, the petitioner asserts that the prosecution failed to disclose to the defense or otherwise correct false or misleading testimony elicited from state's witnesses Tony Payton and Manual Rosado; failed to disclose that other suspects in the Pettway store shooting were never prosecuted; and failed to disclose the details acquired by the Bridgeport police regarding the P. T. Barnum home invasion case.

After a hearing, Judge Oliver previously dismissed the *Brady* violation claims premised on nondisclosure of possible consideration given to Manual Rosado with respect to federal charges he once faced in exchange for his cooperation with the state in the state's case against the petitioner.

Also, the petitioner's posttrial brief fails to discuss the same type of claim with respect to Tony Payton's cooperation. Therefore, the court regards that *Brady* violation allegation as abandoned.

There are three components needed to establish a valid *Brady* violation, *LaPointe* v. *Commissioner,* 316 Conn. 225-62 (2015). The undisclosed evidence must be favorable to the accused; it must have been suppressed by the prosecution, wilfully or inadvertently; and "prejudice must have ensued," *Id.* "Prejudice" means that the favorable information withheld

"could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Id.,* 26-63.

In determining whether evidence was suppressed, good faith or bad faith is irrelevant, *Demers* v. *State,* 209 Conn. 143, 149 (1988). The state has the duty to supply to the defense favorable material that is within its possession or control and which the state knew or should have known was exculpatory, *Id.,* 150-51. No request for such evidence is necessary to trigger this duty, *Id.,* 151. Evidence which is within the knowledge of state agencies, including local police departments, is constructively within the state's possession, *Gonzalez* v. *State Elections Enforcement Commission,* 145 Conn. App. 458, 479 (2013); *Giglio* v. *United States,* 405 U.S. 150, 154-55 (1972).

1.

The court declines to treat the prosecutorial decision not to file charges against persons, other than the petitioner, suspected of participating in the same criminal enterprise as an accomplice, accessory, or coconspirator, as exculpatory in this case. To be clear, the petitioner makes *no* claim that these other persons received favorable treatment in exchange for their cooperation in the investigation and/or prosecution of the Pettway store shootings against the petitioner or anyone else. Nor does the petitioner allege that agents of the state engaged in conduct to render these other individuals unavailable to the defense in his case.

Instead, the petitioner argues that "other perpetrators named by the supposed eyewitnesses of the Pettway's shooting were never seriously investigated by the police," Petitioner's Posttrial Brief, p. 10. This argument appears more in the nature of a tacit recognition by the state that the

police investigation of these persons was insufficient or that the prosecution lacked confidence in its eyewitnesses.

The court rejects this type of argument as describing a valid *Brady* violation. The prosecutors subjective belief in the relative strength or weakness of its case is, standing alone, not exculpatory *evidence.* Specific information available to the state that prompts that belief may comprise exculpatory evidence, but the exercise of prosecutorial discretion is, in itself, a professional conclusion and not a potentially relevant fact. As such, the *Brady* rule requires no disclosure of that type of charging decision.

Also, it would disserve the ends of justice to employ a doctrine that induces law enforcement agents to arrest and charge persons of crime when the agents feel evidence to prove the crimes, beyond a reasonable doubt, may be lacking. The state ought to be free to decline to charge others of crimes just to avoid claims, such as the petitioner propounds, by one against whom the state did prefer charges.

The executive branch "has broad discretion as to whom to prosecute and what charges to file," *State* v. *Santiago,* 318 Conn. 1, 25 (2015). "Both the decision to criminally charge an individual and the choice of which crime should be charged lie within the discretion of the state and are not ordinarily subject to judicial review," *Reynolds* v. *Commissioner,* 321 Conn. 750, 760-761 (2016). There is no legal principle "that the state commits misconduct if it chooses *not* to bring the most severe charges possible against a cooperating witness," Id., 761 (emphasis added).

Except for cases where nonprosecution rests on invidiously discriminatory motives, courts should avoid intruding on prosecutorial charging decisions. The petitioner has failed to

prove a *Brady* violation based on the absence of charges lodged against other persons who might fall under suspicion based on the same or similar evidence as points to a defendant who was so charged.

2.

The petitioner also contends that State's Attorney Robert Satti failed to disclose exculpatory connections between the evidence gathered in the P. T. Barnum Apartments home invasion and the evidence obtained concerning the Pettway store shootings. The court determines that this evidence was not suppressed regardless of its purportedly exculpatory character. "[I]t is well established that 'evidence' is not considered to have been suppressed within the meaning of *the Brady doctrine if the defendant or his attorney either know, or should have known, of the essential facts permitting him to take advantage of that evidence," State* v. *Skakel,* 276 Conn. 633, 701 (2006), (emphasis in original).

The following evidence pertains to the issue of suppression. The police recovered several cartridge casings from the fusillade of shots fired by the various perpetrators in the Pettway store incident of February 2, 2002. Among these were spent nine millimeter cartridges discharged from same gun. Comparison testing disclosed that the same pistol that fired these shots was also used in *five* previous shootings in the Bridgeport area.

The written firearms comparison results *were* transmitted by the State's Attorney's office to Attorney Hopkins. This report contained the incident and case numbers for each earlier incident. In chronological order:

1. Incident number 010429-195 referencing shots fired on April 29, 2001, at or near the Marina Village area;

2. Incident number 010609-036, referencing shots fired on June 9, 2001, outside of the Pettway store;

3. Incident number 011012-294, referencing shots striking victim, Mark Mahoney, on Holley Street on October 12, 2001;

4. Incident number 011021-041, referencing shots fired on October 21, 2001, near the intersection of Roger and Stetson Streets; and

5. Incident number 020122-056, referencing the bullet fired by Jerry Kollock or accomplice into the kitchen cabinet during the P. T. Barnum Apartments home invasion of January 27, 2002, as discussed above.

Attorney Satti testified that his office provided Attorney Hopkins with this report. A copy of this report was found in Attorney Hopkins file, corroborating this disclosure by the state. The petitioner argues that it was a *Brady* violation for the state to fail to go beyond this disclosure and also provide, *without* a defense request, the entire investigation file materials generated by the police with respect to the earlier shootings.

In *State* v. *Skakel,* supra, a police report mentioned that a witness was asked to assist in creating a composite sketch of a person the witness recalled having seen near the crime scene during the relevant time frame, Id., 697-698. The sketch *itself* was never provided, only the written reference to its existence. This was the case despite the fact that the defense had made a discovery request for production of sketches in general. On appeal, the defendant argued that the drawing could have bolstered the defense's third party culpability defense because the sketch somewhat resembled one of the putative third party suspects.

Our Supreme Court held that revelation of the *existence* of the sketch *alone* satisfied the constitutional burden of disclosing exculpatory material under the *Brady* rule, Id., 706. "[T]he composite drawing will not be deemed to have been suppressed by the state . . . if the defendant or the defendant's trial counsel reasonably was on notice of the drawing's existence but nonetheless failed to take appropriate steps to obtain it," Id., 702.

In *State* v. *Skakel,* appellate counsel had contended that mere knowledge that a sketch was done was "[in]adequate notice of the exculpatory nature of the composite drawing," Id., 704-705. That is, until the defense saw the *actual* drawing, the defense lacked knowledge of its beneficial utility, and that other evidence misled the defense into opining that the sketch depicted someone else at whom the defense wished to point an accusatory finger. Our Supreme Court responded that "[n]either of these assertions is reason to excuse the defense's failure to have requested the drawing [specifically]," Id., 705. "We . . . decline to endorse such an approach because there simply is no reason why a defendant who is aware of such evidence should not be required to seek it at a point in time when any potential constitutional infirmity arising from the state's failure to provide the evidence can be avoided without the need for a new trial," Id., 706. "We conclude, therefore, that the facts fully support the trial court's determination that the defendant failed to establish that the state suppressed the composite drawing within the meaning of *Brady,"* Id., 707.

In other words, the state must disclose the *data* which is potentially exculpatory but is not constitutionally obligated to connect the *dots* for the defense. The circumstances of the present case are more compelling that no *Brady* violation occurred than those presented in the *Skakel* case. This is because the essential fact that the same weapon that was used in the

February 2, 2002, Pettway store shooting had previously been used in several other cases, including the P. T. Barnum Apartments home invasion, was disclosed along with information identifying the files pertinent to those earlier shootings. The potential for this information to help exonerate the defendant speaks for itself.

The *Brady* doctrine does not "permit the defense to close its eyes to information likely to lead to the discovery of [exculpatory] evidence," *Skakel* v. *State,* 295 Conn. 447, 521 (2010). The court holds that the state satisfied its constitutional duties under *Brady* by providing to the defense the list of specific incidents/case numbers for which the firearms analyses showed that one of the weapons used on February 2, 2002, was also used in those shootings. Therefore, the petitioner has failed to meet his burden of proving his *Brady* claims.

Ineffective Assistance of Defense Counsel

In the fifth and sixth counts of the amended petition, the petitioner allege various instances of ineffective assistance of trial counsel, Attorney Hopkins. These claims must be dismissed, pursuant to Practice Book § 23-29(3), because they present the same grounds for relief denied in his earlier habeas case, namely the ineffective assistance of defense counsel and which are not based on new facts or evidence "not reasonably available at the time of the prior petition." The addition of new specifications of ineffective assistance against Attorney Hopkins is insufficient to state new *legal* ground different from that raised by the previous habeas petition. *McClendon* v. *Commissioner,* 91 Conn. App. 228, 230 (2006); cert. denied, 277 Conn. 917 (2006).

Of course, the failure by Attorney Mullaney and Rozwaski to assert and prove these specifications of ineffective assistance can form the basis for a claim of ineffective assistance by

previous habeas counsel, and the petitioner asserts just such a claim in the present case in the eighth count.

Ineffective Assistance of Habeas Counsel

Our Supreme Court has adopted the two-pronged *Strickland* test for evaluating ineffective assistance claims. *Johnson* v. *Commissioner,* 218 Conn. 403, 425 (1991); *Ostolaza* v. *Warden,* 26 Conn. App. 758, 761 (1992). The *Strickland* criteria requires that the petitioner demonstrate, by a preponderance of the evidence, that his attorney's performance was substandard and that there exists a reasonable likelihood that the outcome of the proceedings would have been different. *Id.*

As to the performance of *Strickland,* the petitioner must establish that habeas counsels' representation fell below an objective standard of reasonableness. *Johnson* v. *Commissioner, supra.*

This standard of reasonableness is measured by prevailing, professional practices. *Id.* The habeas court must make every effort to eliminate the distorting effects of hindsight and to reconstruct the circumstances surrounding counsel's conduct from that attorney's perspective at the time of the representation. *Id.*

If it is easier to dispose of a claim of ineffective assistance on the ground of insufficient proof of prejudice, the habeas court may address that issue directly without reaching the question of counsel's competence. *Pelletier* v. *Warden,* 32 Conn. App 38, 46 (1993). In order to satisfy the prejudice prong of *Strickland* test, the petitioner must prove that there exists a reasonable probability that, but for counsels' unprofessional errors, the result of the proceedings would have been different. *Levine* v. *Manson,* 195 Conn. 636, 640 (1985). Reasonable probability means a

probability sufficient to undermine confidence in the outcome. *Daeira* v. *Commissioner*, 107 Conn. App. 539, 542-43 (2008), cert, denied, 289 Conn. 911 (2008); that is, the petitioner must show that there is a reasonable probability that he remains burdened by an unreliable determination of guilt. *Id.* Thus, the failure of the petitioner to establish, by a preponderance of the evidence, either the allegations against trial counsel or habeas counsel, or the requisite prejudice as to both the first habeas case and the criminal trial, will defeat a claim for habeas corpus relief in the present action.

In *Lozada* v. *Warden,* 223 Conn. 834 (1992), our Supreme Court recognized a purely statutory right to raise, in a subsequent habeas action, a claim of ineffective assistance on the part of previous habeas counsel in presenting claims of ineffective assistance of trial counsel. *Id.,* 835. However, the petitioner's burden becomes a multi-tiered application of the *Strickland* standard by which allegations of ineffective assistance claims are gauged. *Id.,* 842. To succeed in his bid for a writ of habeas corpus, the petitioner must prove *both* (1) that his habeas counsel were ineffective, and (2) that his trial counsel was ineffective. *Id.,* (emphasis added). Also, the petitioner must prove that, but for the derelictions of habeas counsel, he was prejudiced in the sense that the outcome of the first *habeas* case was suspect, *and* that burden demands proof of the existence of a reasonable likelihood that the outcome of the original, *criminal* trial would have been different. *Id.,* at 842-43. The Supreme Court described this double layered obligation as "a herculean task." *Id.,* 843.

Although the amended petition recites sundry specifications of ineffective assistance of habeas counsel, in his posttrial brief the petitioner engages in more than a cursory discussion only as to the following alleged deficiencies of habeas counsel:

1. that habeas counsel failed to raise and litigate Attorney Hopkins' failure to pursue third-party culpability theories adequately;

2. that habeas counsel failed to raise and litigate the insufficiency of Attorney Hopkins' cross-examination of Manual Rosado;

3. that habeas counsel failed to raise and litigate Attorney Hopkins' failure to connect the Pettway store shooting of February 2, 2002, to the P. T. Barnum Apartments home invasion that occurred about one week earlier; and

4. that habeas counsel failed to litigate adequately Attorney Hopkins' failure to raise and pursue an alibi defense. (See the Petitioner's Posttrial Brief, pp. 19 to 21 pp. 45 to 50).

At the previous habeas trial, Attorney Mullaney represented the petitioner and was joined, on the third day of the habeas trial, in that endeavor by Attorney Rozwaski. The operative, amended petition was dated December 15, 2009, and alleged that Attorney Hopkins represented the petitioner ineffectively by:

1. failing to present favorable and available evidence as to

    a. alibi witnesses;

    b. the weaknesses regarding the state's identification witnesses;

2. failing to impeach the testimony of Gary Burton, Manual Rosado, and Tony Payton, properly.

The evidence adduced at the first habeas trial can be summarized as follows. Vincent Wilson, an incarcerated felon, testified that he and the petitioner are good friends, having first met as children. Wilson recounted that soon after the Pettway store shooting on February 2, 2002, the police interrogated him about whether he drove the getaway vehicle and

whether the petitioner participated in the shootings. Wilson denied being at the scene and disclaimed any knowledge concerning the incident. Wilson stated that the police told him that Manual Rosado suggested that Wilson might have driven the getaway car.

Wilson also noted that Attorney Hopkins' investigator had interviewed him, but that Attorney Hopkins had not spoken to him personally. Wilson further avowed that he was available to testify at the petitioner's criminal trial and would have willingly done so. However, Wilson acknowledged that he did witness a verbal confrontation between the petitioner and Manual Rosado at the Pettway store a few weeks before Rosado was shot there.

Attorney Mullaney also called upon Ralph Lewis to testify. He, too, is an incarcerated felon, and he related that he had met Manual Rosado in jail. Friction between Rosado and Lewis ensued. Lewis stated that Rosado told him that Rosado faced federal charges. He also indicated that Rosado stated he did not see who shot his *brother,* Polo, although the police urged him to report that he could identify his brother's killer in order to benefit himself in his federal case. However, Rosado also related that he resisted the police suggestion because he did not see who shot his brother.

Lewis first conveyed this information to an investigator in 2007 which was a few years *after* the petitioner's criminal trial. Lewis conceded that, despite knowing that charges were pending against his close friend, the petitioner, he never mentioned his jailhouse conversation with Rosado to anyone before 2007.

It should be noted that Rosado's statements to Lewis essentially *conformed* to Rosado's testimony at the petitioner's criminal trial and to his deposition testimony in the present habeas case. That is, Rosado consistently acknowledged his ignorance as to his *brother's* shooter, as

opposed to his *own* assailant, who he identified as the petitioner. Rosado also maintained that he has always refused to lie to identify his brother's killer.

Attorney Mullaney also presented the testimony of the petitioner's sister, Rosa Lopez, at the previous habeas trial. She swore that during February 1, 2002, a Friday, she and the petitioner were together at their mother's residence and agreed to have a Super Bowl party that Sunday, February 4, 2002. A relative, Star Semedo, picked up Lopez and the petitioner and drove them to her home in Ansonia to plan the party. The party was to take place at Semedo's residence, and the expected attendees were Semedo, Lopez, the petitioner, their parents, and children. Lopez avowed that she and the petitioner spent the entire evening of February 1 / 2, 2002, at Semedo's residence and only returned to Bridgeport during the afternoon of February 2, 2002. In other words, Lopez testified that the petitioner was in Ansonia at the time of the Pettway store shootings in Bridgeport.

Lopez attended her brother's criminal trial and expected to testify at that trial regarding this alibi. Attorney Hopkins had spoken to her before trial. When she was not called as a witness, she asked Attorney Hopkins to explain his decision. Attorney Hopkins simply informed Lopez that her testimony was not needed.

Star Semedo, an emergency room technician nurse, also testified at the first habeas trial. She corroborated that she lived in Ansonia on February 1, 2002; that she drove Lopez and the petitioner from Bridgeport to Ansonia on February 1, 2002; that she, Lopez, and the petitioner planned the Super Bowl party details; and that Lopez and the petitioner stayed at her residence in Ansonia until Semedo drove them back to Bridgeport during the day of February 2, 2002.

Semedo indicated she was available to testify at the petitioner's criminal trial, but that no one called upon her to do so. Semedo acknowledged that she was aware that she possessed alibi testimony for the charges against the petitioner early on, but never conveyed that alibi evidence to the police or to defense counsel despite that awareness.

At the previous habeas, the petitioner testified consistently with this alibi scenario. He stated that he communicated these facts to Attorney Hopkins and the defense investigator, Justine Smith. He wanted and anticipated Attorney Hopkins to present Lopez and Semedo as alibi witnesses at his criminal trial. Attorney Hopkins declined to present the alibi defense.

The petitioner also wanted Attorney Hopkins to investigate whether Gary Burton described the shooters to the police as three black males. He urged Attorney Hopkins to probe this topic when Attorney Hopkins cross-examined Burton, but Hopkins rejected his suggestion.

On February 2, 2002, the petitioner was arrested by the police on an *unrelated* attempted murder charge. The police arrested the petitioner on charges arising from the Pettway store shootings about nine months later. At the time of his arrest on February 2, 2002, the petitioner resided with his mother in Bridgeport, but he pretended to live with an uncle in Stratford to avoid detection for violating a court order or condition of parole or probation prohibiting him from living in his mother's home.

Attorney Mullaney also offered the testimony of Bridgeport police Sergeant Giselle Doszpoj. Sergeant Doszpoj indicated that she initiated the investigation of the Pettway store shooting on February 2, 2002. She noted that the investigation files for the case had been archived, and she lacked access to their contents. She recollected that, when she interviewed Gary Burton, he thought the three shooters were possibly African-American.

Habeas counsel also utilized the testimony of Bridgeport Police Detective Warren DelMonte. Detective DelMonte went to the hospital on February 2, 2002, and interviewed Manual Rosado. The habeas judge disallowed Detective DelMonte from testifying about the substance of his conversation with Rosado.

A more productive witness was Kiaga Johnson. As noted above, she was a friend of Gary Burton and saw the shootings. She indicated she observed three assailants and described them as including a black male, a Hispanic male, and a male with olive-toned skin color. At the 2010 habeas trial, she opined that the petitioner's skin color seemed different from any of the assailants. However, she acknowledged that the attackers' faces were partially concealed and that there may have been additional shooters besides the three she noticed.

As mentioned above, Attorney Rozwaski appeared as habeas counsel on March 11, 2011, the third day of the previous habeas trial. On that day, Attorney Berke testified that he took over the petitioner's criminal case after the jury returned its verdict. Attorney Berke had his investigator, John McNichols, look into the petitioner's alibi claim and contact Rosa Lopez and Star Semedo in particular. Attorney Berke spoke to Semedo by phone. Semedo told Attorney Berke that the petitioner and his sister stayed overnight at her Ansonia residence but *not* on the evening and night of the Pettway store shootings on February 1 / 2, 2002.

At the first habeas trial, Attorney Hopkins testified that he had had experience handling many criminal defense cases, including serious felony allegations, before representing the petitioner. He related that he hired Justin Smith as his investigator. Attorney Hopkins employed his customary approach of meeting with his client, engaging in preliminary discussions with the

prosecutor, obtaining discovery, and developing a sense of the strengths and weaknesses of both sides of the case.

The petitioner denied any involvement in the Pettway store shootings. Attorney Hopkins decided that the critical defense tactic would be to try to discredit the credibility and reliability of the two eyewitnesses that identified the petitioner as one of the assailants, namely Manual Rosado and Tony Payton.

Attorney Hopkins opted to eschew an alibi defense based on reasons both general and particular. After discussing the alibi evidence with the petitioner, Attorney Hopkins concluded that such evidence would prove more detrimental than beneficial. He regarded the alibi defense as generally a "bad idea" that seldom produced favorable results. Attorney Hopkins felt that unless the alibi evidence was "entirely solid," any deficiencies in that evidence create a very negative view of the defendant in the minds of jurors. That negative view may taint other, stronger defense arguments. Attorney Hopkins "instinct" was to avoid using alibi evidence "like the plague."

This court's more than forty-five years experience in the field of criminal law litigation finds Attorney Hopkins general view of the ineffectiveness of an alibi defense as not lacking some experiential basis. Of course, each case presents unique circumstances, and the utility of presenting alibi evidence must be evaluated with those specific features in mind. But, any chink in the armor of the alibi defense arising at trial, exposes the defense to claims of contrivance and, inferentially, a consciousness of guilt. Also, strong alibi evidence often induces the prosecution to reevaluate the charges against an accused, so that "solid" alibi cases seldom reach the trial stage.

In particular, Attorney Hopkins was concerned that the petitioner was a convicted felon who had tried to use false alibi evidence in a previous criminal case. Also, Attorney Hopkins presumed, erroneously, that the petitioner's arrest on February 2, 2002, was for the Pettway store shootings. Instead, that arrest pertained to unrelated charges. This mistake led Attorney Hopkins to reckon that if the petitioner had a legitimate alibi, he and his family members would have immediately informed the police of his true whereabouts for the evening of February 1 / 2, 2002. So while Attorney Hopkins' general apprehension about using the alibi as a defense may have been professionally understandable, his decision particularly and arrived at purposely to disregard such evidence in the petitioner's particular case was based on a nonexistent factual foundation.

Because Attorney Hopkins harbored this negative opinion, he never pursued that line of defense at the petitioner's criminal trial, despite his client's imploring him to do so and his knowledge of the availability of the prospective testimony of Rosa Lopez and Star Semedo. That is not to say, of course, that such alibi evidence was reasonably likely to produce a different outcome had such evidence been presented, but it does establish that Attorney Mullaney, as habeas counsel, was warranted in alleging this deficiency in the earlier habeas case.

Attorney Mullaney also introduced evidence that Attorney Hopkins failed to challenge the reliability of Manual Rosado's identification of the petitioner, as having shot *him*, by calling Latosha DelGiudice as a defense witness. Ms. DelGiudice, also a convicted felon, testified at the first habeas trial that she visited Rosado at the hospital some hours after he was shot. At that time, Rosado accused her of setting him up and blamed her boyfriend, Brad Rainey, for the incident. She indicated that Rosado never mentioned the petitioner at that time.

Along a similar vein, Attorney Mullaney proffered the testimony of Lakesha Bowles, the girlfriend of Jerry Kollock, who disclosed that she received several phone calls from Manual Rosado on February 2, 2002, wherein Rosado also accused her of assisting in arranging the Pettway store attack. Bowles was under federal indictment at the time of her habeas testimony.

Attorney Mullaney called Attorney Norm Pattis as a criminal defense expert to demonstrate the substandard nature of Attorney Hopkins' representation. Attorney Pattis is a very experienced lawyer whose background includes expertise in the field of criminal defense work. Attorney Pattis opined that the putative alibi testimony of Rosa Lopez and Star Semedo would have enhanced rather than detracted from Attorney Hopkins attempt to discredit the identification testimony of Manual Rosado and Tony Payton. This was the case because evidence that an individual was elsewhere is completely compatible with misidentification.

Attorney Pattis stated that Attorney Hopkins' failure to interview the alibi witnesses departed from the minimum exercise of reasonable legal assistance ordinarily expected of competent defense counsel. This expert doubted whether any lawyer can accurately assess the usefulness of potential witnesses without ever interviewing those individuals.

At the previous habeas trial, the petitioner confirmed that his arrest, for the charges he stands convicted for the present case, came about nine months after the Pettway store shootings. He also stated that he never attempted to utilize a false alibi defense in any other case.

Judge Fuger denied habeas corpus relief, *Lopez* v. *Commissioner,* supra, and the Appellate Court affirmed his decision, per curiam, *Lopez* v. *Commissioner,* supra. Judge Fuger specifically found that the testimony of Rosa Lopez and Star Semedo lacked credibility. "This

court . . . finds that the alibi evidence is not worthy of belief and that [Attorney Hopkins] cannot be held to be ineffective for failing to present a defective alibi defense," Id., p.6.

Consequently, the habeas court determined that the petitioner had failed to meet his burden of proving either prong of the *Strickland* standard with respect to Attorney Hopkins' refusal to offer alibi evidence at the petitioner's criminal trial, Id. "[D]efense counsel made the correct strategy judgment in not pursuing this alibi and calling these missing witnesses in order to establish an alibi defense that may well have led a jury to conclude that the petitioner was lying to escape a finding of guilty," Id.

1.

The petitioner now contends that *habeas* counsel rendered ineffective assistance by his strategic decision to press Attorney Hopkins' failure to present alibi evidence as the principal ground in the previous habeas case and that Attorney Mullaney's unsuccessful attempt to do so was, itself, constitutionally infirm. The court rejects this contention.

Attorney Mullaney had available to him the evidence that was available to Attorney Hopkins bearing on a third-party culpability defense. Attorney Mullaney also utilized the services of an investigator, Jacqueline Bainer, who thoroughly briefed him as to the results of her findings concerning evidence of third-party culpability. In particular, Bainer sought and obtained evidence concerning the possibility that the Pettway store shootings of February 2, 2002, were retaliation for the P. T. Barnum Apartments home invasion which occurred about one week earlier. The gist of this putative defense appears to be that Brad Rainey sought revenge against Manual Rosado and his brother, Polo, for having botched the home

invasion of Colbert's apartment by firing a gun at a young child and groping the vagina of a teenage girl.

It should be recalled that three victims of that home invasion, namely Colbert, her thirteen year old son, and Davis Brown, all positively identified Jerry Kollock as one of the perpetrators and possibly the person who fired the shot that lodged in the kitchen cabinet. A firearms expert determined that that round was discharged from one of the handguns used in the Pettway store shootings.

Brown also identified the second gunman as Randy Armstrong, Kollock's frequent companion, and the person whom the petitioner had accidently shot in the foot two days before the home invasion. Brown also named Brad Rainey as the third accomplice who urged the gunmen to leave Colbert's apartment and make their getaway.

On the other hand, after Jerry Kollock's arrest, Kollock told Bainer that his cohorts were Polo and Manual Rosado, with Rosado being the lookout. To complicate matters further, Bridgeport Police Sergeant Larose received information that Robert Payton (deceased) was the second gunman.

Bainer also uncovered evidence that the petitioner and Robert Payton had a "beef" stemming from a dispute between the mother of the petitioner's child and Rosado's sister. Robert Payton, who was killed in a later incident, was one of the persons at the Pettway store on February 2, 2002, who managed to escape into the relative safety of the store unscathed.

Investigator Bainer urged Attorney Mullaney to raise an ineffective assistance claim in the first habeas case based on Attorney Hopkins' failure to obtain the information she uncovered and present a third-party culpability defense, in addition to the lack of an alibi defense which

Attorney Mullaney did litigate. This third-party culpability claim is premised on speculation that Brad Rainey and Tank Gethers harbored great resentment against Polo, Manual Rosado, and Robert Payton for having botched the home invasion, coupled with Manual Rosado's initial failure to identify the petitioner as the person who shot him to the police and Latosha DelGiudice. Despite Bainer's earnest discussions with Attorney Mullaney on this point, Attorney Mullaney deliberately chose to confine the ineffective assistance specifications to the allegations recited above, i.e. primarily the failure by Attorney Hopkins to present an alibi defense.

Attorney Mullaney testified at the present habeas trial, and he recounted that, in his judgment, the petitioner had a strong claim of ineffective assistance based on Attorney Hopkin's decision to forego an alibi defense. Attorney Mullaney exercised that professional judgment and experience by opting to avoid muddying the habeas case with weaker claims such as the convoluted, third-party culpability argument. Attorney Mullaney's experience persuaded him that third-party culpability defenses often fail because the evidence relies on a good deal of conjecture and innuendo, as in the petitioner's case. The court agrees with Attorney Mullaney's assessment that Attorney Hopkins' failure to present an alibi defense, based on the known and available testimony of Rosa Lopez and Star Semedo, was a much stronger claim than the third-party culpability claim suggested by Bainer's investigation.

It must be observed that the petitioner, at the habeas on a habeas trial, never presented a legal expert who criticized *habeas* counsel's representation. The petitioner did proffer the testimony of Attorney Kenneth Simon, but that expert confined his opinions to an evaluation of Attorney Hopkins' performance in the criminal case.

Effective advocates bear no general constitutional obligation to raise or argue every conceivable issue, *Tillman* v. *Commissioner,* 54 Conn. App. 749, 757 (1999). To the contrary, a scatter-shot approach "runs the risk of burying good arguments in a verbal mound made up of strong and weak contentions," Id. Habeas courts must be "highly deferential" to attorney's decisions to winnow out less persuasive claims in order to focus on the stronger ones, *Spearman* v. *Commissioner,* 164 Conn. App. 530, 539 (2016).

"Strategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable . . . , *Arroyo* v. *Commissioner,* 172 Conn. App. 442, 467-468 (2017); See, also *Bree* v. *Commissioner,* 189 Conn. App. 411 (2019).

In the present action, the credible evidence discloses that Attorney Mullaney retained the services of an investigator who diligently researched the shootings where the same handgun was used that predated the Pettway store incident of February 2, 2002. Bainer and Attorney Mullaney had frank discussions about the evidence Bainer's investigation produced. Attorney Mullaney made the tactical decision to restrict the earlier habeas claims to Attorney Hopkins' refusal to present available alibi evidence.

This court finds that Attorney Mullaney's tactical decision in this regard falls well within the realm of reasonable, professional advocacy for habeas counsel in his position. As described above, Attorney Hopkins misunderstood the charges for which the petitioner was arrested on February 2, 2002, believing those charges to pertain to the Pettway store shootings of that date. He erroneously concluded that the lack of protest to the police by the petitioner's family based on alibi for the evening of February 1 / 2, 2002, cast doubt on the efficacy of an alibi defense and would jeopardize the petitioner's entire criminal case. Attorney Hopkins also feared that the

petitioner had tried to employ a false alibi in a previous criminal matter. Attorney Mullaney felt that the petitioner could have successfully refuted any assertion that the petitioner had previously attempted to use a fictitious alibi.

Previous habeas counsel also assessed that Attorney Hopkins had three alibi witnesses, including the petitioner, who could establish a viable alibi defense and were available to testify at the petitioner's criminal trial. Attorney Mullaney also stated that the alibi evidence would not have undermined the defense that Attorney Hopkins did pursue, namely that Tony Payton and Manual Rosado had misidentified the petitioner as one of the shooters in the Pettway store attack.

On the other hand, the petitioner's present denigration of Attorney Mullaney's decision not to add a claim that Attorney Hopkins should have also pursued a third-party culpability defense appears counterintuitive and abstruse.

The petitioner submits that Attorney Hopkins, and derivatively, habeas counsel, ought to have attempted to demonstrate that the Pettway store shootings were prompted by the excesses engaged in during the P. T. Barnum Apartment home invasion of the week before. Specifically, that Polo, Manual Rosado, and, possibly, Robert Payton, were targeted by Tank Gethers and Brad Rainey, affiliates of Polo, Rosado, and Payton, in retribution for having fired a weapon, with a nexus to Rainey and Gethers, during the home invasion; and for molestation of the teenage step-daughter of Colbert, an untoward act which would incite unwanted attention and notoriety to the home invasion. To be clear, the petitioner contends that the Pettway store shootings were *not,* as one might otherwise suppose, the actions of rival drug dealers or gang members, but rather one with internecine character.

Just who participated in the P. T. Barnum Apartments home invasion was in dispute, as mentioned earlier. Davis Brown identified Kollock, Armstrong, and Rainey as the perpetrators. Kollock told Bainer that his accomplices were Polo and Manual Rosado. Brad, Rainey, a/k/a Brad Payton, was the cousin of Tony and Robert Payton. The court also notes that Attorney Hopkins lacked the benefit of the information later revealed by Marcus Mahoney.

In addition to this scenario, the petitioner points to the testimony of the first habeas trial of Latosha DelGiudice. In her testimony, Latosha DelGiudice related that, when she visited Manual Rosado in the hospital, he accused her boyfriend, Brad Rainey, of using her to set him and his brother up for the attack. She further testified at the first habeas trial that Rosado never mentioned the petitioner at all.

The court finds this third-party culpability evidence and the inferences sought to be drawn from it to be tangled, tenuous, and conjectural. By comparison, the evidence regarding Attorney Hopkins' failure to present alibi evidence appears clear, concise, internally consistent, and not laden with suppositions and surmise. The court concludes that Attorney Mullaney's decision to pursue only the stronger ineffective assistance claim of lack of an alibi defense rather than the more nebulous third-party culpability claim was a reasonable exercise of professional judgment based on diligent investigation and competent understanding of the law.

Unsuccessful strategic decisions that are the result of the reasonable exercise of professional judgment comprise effective assistance despite an unfavorable outcome, *Stephen S.* v. *Commissioner,* 91 Conn. App. 288, 296 (2006). Therefore, the court determines that the petitioner has failed to prove the deficient performance component of the *Strickland* test regarding the representation at the first habeas trial by Attorneys Mullaney and Rozwaski

regarding the failure to raise Attorney Hopkins' failure to investigate and present a third-party culpability defense.

2.

The petitioner also alleges that Attorneys Mullaney and Rozawski rendered ineffective assistance by inadequately proffering evidence of Attorney Hopkins' failure to pursue the alibi defense. To reiterate, no legal expert testified in the present habeas case that previous habeas counsel were deficient in any manner.

Specifically, the petitioner complains that his habeas attorneys "inadequately" challenged Attorney Hopkins testimony about his misunderstanding that an alibi defense is an affirmative defense; that habeas counsel should have "better developed" Attorney Hopkins' misinterpretation of the charges for which the petitioner was arrested on February 2, 2002; and that Attorney Norm Pattis was a poor choice of an expert witness to demonstrate Attorney Hopkins' deficiencies. The court rejects these claims because the petitioner has failed to prove the prejudice prong of the *Strickland* criteria, i.e. that there exists a reasonable likelihood that the outcome of the first habeas case would have been favorable but for these purported deficiencies.

As elaborated above, Judge Fuger denied habeas corpus relief because he found the testimony of the alibi witnesses, Rosa Lopez and Star Semedo, lacked credibility. That dispositive finding, affirmed per curiam by the Appellate Court, bears no relation to the decision to call Attorney Pattis as an expert witness. Nor did Attorney Hopkins' erroneous view of the law or the basis for the petitioner's arrest on February 2, 2002, contribute to that finding. The adverse decision by Judge Fuger hinged on the witnesses' nonbelievability which determination

cannot be attributed to the deficiencies alleged by the petitioner on the part of his former habeas counsel.

3.

The final allegation of ineffective assistance by habeas counsel, as set forth in the petitioner's posttrial brief, is that previous habeas counsel ought to have attacked Attorney Hopkins' cross-examination of Manual Rosado more vigorously. Again, no legal expert decried habeas counsel's representation on this issue. The petitioner's posttrial brief contains little discussion as to this claim, and the court treats it as abandoned.

In sum, the court denies the amended petition on the ground of ineffective assistance of habeas counsel.

Actual Innocence Claim

Habeas corpus relief in the form of a new trial based on actual innocence requires the petitioner to satisfy the criteria set forth in *Miller* v. *Commissioner,* 242 Conn. 745 (1997).

The *Miller* criteria comprises a two-part test which requires a habeas petitioner asserting an actual innocence claim to prove, by clear and convincing evidence, that:

1. The petitioner is actually innocent of the crime for which he or she stand convicted; and

2. No reasonable fact finder would convict the petitioner of that crime after consideration of a combination of the evidence adduced at both the criminal trial and the habeas proceeding, *Miller* v. *Commissioner,* 242 Conn. 745-747 (1997); *Gould* v. *Commissioner,* 301 Conn. 544, 557-58 (2011).

The first component of the *Miller* criteria requires the petitioner to produce affirmative proof that he did not purposefully participate in the charges for which he was convicted. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred," *Gould* v. *Commissioner, supra,* at 563 (emphases in original). "Clear and convincing proof of actual innocence does not, however, require the petitioner to establish his guilt is a factual impossibility." *Id.*

Before embarking on this analysis, the court must confront a preliminary question. In the *Gould* case, our Supreme Court recognized, in a footnote, that court has never decided whether the affirmative evidence of innocence must be newly discovered, *Id.,* at 551, fn.8. The Supreme Court acknowledged, however, that the Appellate Court has imposed such a requirement.

Indeed, the Appellate Court has consistently and repeatedly demanded that affirmative proof of actual innocence be newly discovered, *McClain* v. *Commissioner,* 188 Conn. App. 70, 88 (2019), *Corbett* v. *Commissioner,* 133 Conn. App. 310, 315 (2012); *Vasquez* v. *Commissioner,* 128 Conn. App. 425, 444 (2011); *Gaston* v. *Commissioner,* 125 Conn. App. 553-558-59 (2010); *Weinberg* v. *Commissioner,* 112 Conn. App. 100, 119 (2009); *Grant* v. *Commissioner,* 103 Conn. App. 366, 369 (2007); *Johnson* v. *Commissioner,* 101 Conn. App. 465, 469-70 (2007); *Batts* v. *Commissioner,* 85 Conn. App. 723, 726-27 (2004); *Clarke* v. *Commissioner,* 43 Conn. App. 374, 379 (1996), appeal dismissed, 249 Conn. 350 (1999) ; *Williams* v. *Commissioner,* 41 Conn. App. 515, 530 (1996), appeal dismissed, 240 Conn. 547 (1997). This court is, of course, bound by these holdings of the Appellate Court.

The Appellate Court has stressed that habeas judges are bound by the requirement that the evidence of actual innocence be newly discovered, *Thompson* v. *Commissioner,* 172 Conn. App. 139, 158 (2017). "[E]ven though the final resolution of the newly discovered evidence standard has yet to be addressed by the Supreme Court, it is beyond argument that insofar as any Superior Court considering a claim of actual innocence in a habeas petition, the matter is *closed.*" *Id.* (Emphasis added).

"Newly discovered evidence" is "such that it could not have been discovered previously despite the exercise of due diligence," *Skakel* v. *State,* 295 Conn. 447, 466-67 (2010). Due diligence is reasonable diligence. *Id.* The query to be answered is "what evidence would have been discovered by a reasonable [criminal defendant] by persevering application and untiring efforts in good earnest." *Id.*

The petitioner avers that Manual Rosado's habeas deposition contained inconsistencies when compared to his criminal trial testimony; that evidence linked the P. T. Barnum Apartments home invasion incident to the Pettway store shootings; that Latosha DelGiudice's previous habeas trial testimony regarding Rosado's failure to mention the petitioner as his assailant; and the present habeas trial testimony of Marcus Mahoney constitute clear and convincing evidence of the petitioner's actual innocence. The court disagrees.

1.

First, the evidence connecting the weapon used at the P. T. Barnum Apartments home invasion with one also discharged during the Pettway store shootings cannot be fairly characterized as new-discovered.

The state provided Attorney Hopkins with a copy of the firearms analysis that ascertained that some rounds fired during the Pettway store shootings were discharged from the same pistol that either Kollock or Polo fired during the P. T. Barnum Apartments home invasion. Indeed, Attorney Mullaney's investigator used that report to investigate the five previous incidences in which that weapon was used. Therefore, potentially favorable, alternative explanations for the motivation for the Pettway store shootings, and by whom harbored, were available for production at the petitioner's criminal trial in the exercise of reasonable diligence. The petitioner has alleged just such a claim in his specifications of ineffective assistance by defense counsel and previous habeas counsel.

Consequently, the court cannot afford relief based on the claim that this was newly-discovered evidence of the petitioner's actual innocence, standing alone.

2.

Contrary to the petitioner's assessment, the court finds that Manual Rosado's criminal trial testimony and his later habeas deposition testimony were, as to essential details, significantly consistent and trustworthy; principally, as to who shot him. Any discrepancies go to credibility or the absence of it. It must be kept in mind that, under the *Miller* criteria, newly-discovered evidence that merely weakens the prosecution case, even that which severely weakens it, fails to comprise *affirmative* evidence of innocence.

In *Gould* v. *Commissioner,* supra, our Supreme Court reversed a habeas court's determination of actual innocence based on the total recantation of the only witness who positively identified the defendants as the perpetrators of a murder of a shopkeeper. Her recantation stated that she was not at the scene when the shooting occurred in direct contradiction

to her trial testimony. The fact that the habeas court credited her recantation was irrelevant as to the claim of actual innocence. This was so because her revised story did not prove the defendants did not commit the murder but only that she was ignorant of who did. Such renunciation by a witness failed to constitute *affirmative* evidence of innocence, Id., 557-559.

In order to satisfy the affirmative evidence criterion of the *Miller* standard, the petitioner must prove, by clear and convincing evidence, that no crime occurred; that someone else committed the crime; or that the person convicted could not have committed the crime, even if the true perpetrator remains unknown, Id., 563. Actual innocence means factual innocence and is not equivalent to legal insufficiency of the evidence, Id. 560. The petitioner's burden is to prove he is *actually* innocent of the crime rather than merely that the state could no longer prove his guilt beyond a reasonable doubt, Id., 561. "Although the postconviction evidence the petitioner presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove his innocence," Id., 561.

The petitioner's proof in the present case focuses on Rosado's initial failure to tell the police and others that the petitioner shot him; the nature and substance of threats conveyed to him before the shooting, and that he accused Brad Rainey of being behind the Pettway store shooting. None of these inconsistencies demonstrate that no shootings occurred, that someone else shot Rosado instead of the petitioner, or that the petitioner could not have been his assailant.

Thus, the putative inconsistencies by Rosado whom comparing his criminal trial testimony to his habeas deposition cannot form the foundation of the petitioner's actual innocence claim. That is not to say that such inconsistencies are *irrelevant* to that claim when

considered in *conjunction* with newly-discovered evidence that satisfies the *Miller* test, but such supposed discrepancies, standing alone, fail to meet that test.

3.

Next, the petitioner relies on the testimony of Latosha DelGiudice presented during the first habeas trial. There, she avowed that, about five or six hours after Rosado was shot, she snuck into the hospital to visit him. She related that Rosado voiced his suspicions that Brad Rainey, the father of Latosha's child, enlisted her to set up Rosado to be shot at the Pettway store. This accusation by Rosado was predicated on phone conversations he had with Latosha DelGiudice shortly before the shooting. She swore that Rosado never mentioned the petitioner at all.

First, such evidence is not proof of the petitioner's innocence. Rosado may have been mistaken or correct in his conjecture that Brad Rainey lurked behind the Pettway store shootings. However, witnesses counted the number of gunmen ranging from two to five. Rainey could have been the moving force behind the attack without exonerating the petitioner; that is, the petitioner could have shot Rosado while acting in concert with Rainey. At least four handguns and two shotguns were fired during the Pettway store shooting. Rosado's suspicions about Rainey do not exculpate the petitioner, although such evidence could be used to impeach Rosado's credibility.

Also, if Rosado suspected Latosha DelGiudice of complicity in the attack, Rosado would have good reason to withhold from her, and indirectly from Brad Rainey, and the petitioner, his complete knowledge of what happened. He was shot and his brother killed and vengeance was on his mind.

But more significantly, even if one assumes, arguendo, that Latosha DelGiudice's testimony that Rosado failed to remark to *her* that the petitioner was the person that shot him and that Rosado harbored a belief that Brad Rainey was also responsible for the attack, is evidence of the petitioner's actual innocence, her testimony was vulnerable to counterattack by the admission of testimony of other potential witnesses.

The petitioner offered and the court admitted Exhibit 43, which consists of several documents prepared by the Bridgeport police during the investigation of the Pettway store shootings.

Shayla DelGiudice is Latosha's sister and gave the police a statement on February 8, 2002, that she visited Rosado at the hospital during his thirteen hour stay there. Latosha had also mentioned that she and her sister visited Rosado at the hospital during Lathosha's second trip there. Shayla stated that Rosado told her that the petitioner shot him.

Also, Shayla DelGiudice's boyfriend, Daniel Vereen, also spoke to Rosado at the hospital. Vereen corroborated that Rosado named the petitioner as his shooter at that time.

While one never knows for certain whether a witness will later testify in accordance with the substance of what the police recorded the witness as saying at an earlier time, the possibility that the benefit of Latosha DelGiudice's testimony would be devastatingly undermined by the testimony of her sister and Vereen looms large. Therefore, the court assigns diminished weight to the existence of Lathosha DelGuidice's testimony, even if regarded as evidence of actual innocence.

4.

The testimony of Marcus Mahoney, during the present case, is clearly newly-discovered. Mahoney first revealed his knowledge about the P. T. Barnum Apartments home invasion and the Pettway store shootings, to anyone in an official or quasi-official capacity, years after the petitioner's conviction. This revelation occurred when Mahoney agreed to speak with the petitioner's habeas investigator while he was confined at Webster C. I.

Mahoney presently serves a prison term and has several felony convictions in his past. From early adolescence, he has regularly used street drugs, including blunts, heroin, and Ecstasy. He, Polo, and Robert Payton engaged in the sale of illicit drugs together in the Pettway store area of Bridgeport. Mahoney and Polo were so close that Mahoney regarded Polo as his brother.

To recapitulate, Brad Rainey was Robert and Tony Payton's cousin and father of Latosha DelGiudice's child. Latosha DelGiudice and Manual Rosado also sold drugs, cooperatively.

Mahoney testified that Rainey had a long-standing feud with the Rosado brothers and their associates. In the fall of 2001, Rainey shot Mahoney, striking him five times. The gun used by Rainey was the very same weapon used in the P. T. Barnum Apartments home invasion and at the Pettway store shooting. Mahoney has been shot two or three other times, including in the presence of Manual Rosado.

The gun in question appears well-traveled. Besides the three incidents above, it was also traced to at least two other shootings in 2001. Although Mahoney's testimony was sketchy on this point, it appears that the weapon belonged to Tank Gethers and/or Rainey, but kept in a garage to which Mahoney and Polo had access.

Mahoney stated that he knew the petitioner but had no significant dealings with him.

Mahoney, Polo, Manual Rosado, Tank Gethers, and Kollock believed that Barbie Colbert was a major drug dealer at the P. T. Barnum Apartments complex. They decided her apartment would make a lucrative target to rob. Mahoney and Polo surveilled her residence, and the group conceived a plan to conduct the robbery. That plan entailed Kollock and Polo entering Colbert's apartment with guns drawn to induce the occupants to relinquish money and/or drugs. The handguns were to be used a "props" and not be fired. The guns were supplied by Gethers.

In the early hours of January 27, 2002, Kollock, Polo, and Rosado left to execute the robbery. They returned around seven am. The loot garnered was divided among the conspirators. However, Polo revealed that the robbery got out of hand resulting in a shot fired at a young child and a teenage girl sexually assaulted.

Gethers was outraged by these departures from the plan. The gun could now be linked to that shooting and possibly traced to him. The assault would also heighten scrutiny by the police and/or the victim's associates.

Mahoney avowed that he was at the Pettway store on February 2, 2002, when Polo was killed. He heard someone shout, "Oh, shit!" He saw three gunmen whose faces were partially obscured by bandanas. Mahoney believed the three masked men to be Brad Rainey, Tank Gethers, and an individual he only knows as "K." Bullets began to whiz by, and Mahoney quickly ran across the street from the Pettway store, jumped a fence, and hid by or in his car. He recollected that Tank held a pump type shotgun.

Mahoney was uncertain as to what the result of the attack was. He phoned Polo, Manual Rosado, and Robert Payton, but no one returned his calls at first. Eventually, Robert Payton

called Mahoney and informed him that Polo was dead and Manual Rosado wounded and in the hospital. Robert Payton cautioned Mahoney to stay away from the hospital and remain quiet about what had transpired.

About thirteen hours later, Rosado left the hospital and, along with Robert Payton went to Mahoney's residence. Tank Gethers drove up and an argument between Mahoney and Gethers ensued because Mahoney told him he knows who was responsible for the shooting. Gethers threatened Mahoney. Mahoney left the area, spending two or three months in Boston.

Mahoney testified that he did not see the petitioner, Tony Payton, or April Edwards at or near the Pettway store at the time of the shootings.

After he returned to Bridgeport, Mahoney learned that the police arrested the petitioner for his involvement in the Pettway store shootings. Despite believing the petitioner was innocent, Mahoney refrained from communicating his knowledge to the authorities. He attributed his silence to self-preservation, a reluctance to be labeled as a "rat;" and a desire to avoid involvement in the case, generally.

When interviewed by the petitioner's habeas investigator years later, Mahoney decided to tell what he believed he knew about the incident because he regretted that an innocent man was convicted of his close friend's murder when the real culprit was Brad Rainey.

The issue for the court to adjudicate, then, is whether Mahoney's exculpatory testimony, in combination with all the other evidence adduced, including the testimony of Latosha DelGiudice and the evidence connecting the P. T. Barnum Apartments home invasion with the Pettway store shootings, along with the original criminal trial evidence, establishes clear and convincing proof that no reasonable jury would convict the petitioner, if it received such

evidence, and that the petitioner is factually innocent of the crimes. The petitioner faces a "heavy burden" to prevail under the *Miller* standard, *Gould* v. *Commissioner,* supra, 567.

Contrary to the petitioner's position, the court finds the testimony of Manual Rosado identifying the petitioner as his assailant to be very credible. He has steadfastly maintained that identification.

Rosado's identification was corroborated by Tony Payton. Tony Payton observed the events unfold from a relatively safe vantage point and did not labor under the confusion, stress, and/or fear that the fusillade must have engendered in the minds and memories of those more exposed to its dangers. His supposed motives to lie appear very shallow.

The racial classifications and skin color testimony of the witnesses appears to the court to be particularly unuseful. Given the lack of reason for neutral witnesses to reflect upon and recollect the precise skin tones of persons firing bursts of bullets at targets unknown to them, at night, in a poorly lit area, it is entirely unsurprising that these witnesses' reports vary. Gary Burton, a victim, thought the assailants were three black men, possibly. One of his female companions perceived the attackers to be composed of one black male, one Hispanic male, and one olive-toned male. Of course, the shooters' lower faces were concealed. Therefore, the court attributes little significance to which of the witnesses diverse descriptions of skin color comport with the petitioner's complexion or not.

Furthermore, through information received by the police as contained in Exhibit 43, it is now the case that two individuals, Shayla DelGiudice and Daniel Vereen, said that they heard Rosado name the petitioner as his shooter very soon after the event while at the hospital.

Rosado has persistently denied knowing who killed his brother, Polo and has refused to speculate on that question, nor has he stated he personally recognized any shooter besides the petitioner. If Rosado were of a mind to frame the petitioner, it seems incongruous that his mendacity would stop there and allow his brother's killer to remain unidentified.

Also, Rosado's identification of the petitioner as the person who shot him is not negated by his suspicion that Brad Rainey played some role in the event. As noted above, evidence was adduced that the petitioner had engaged in menacing conduct toward Rosado and Robert Payton at the Pettway store before February 2, 2002. The petitioner's proof fails to dispel the possibility that Rosado's antagonists, Rainey and the petitioner, acted in concert.

It is clear that the same handgun fired at the P. T. Barnum Apartments home invasion was also used in the Pettway store shooting. But it is also apparent that that weapon was well-traveled. Gethers, and/or Rainey may have used the weapon, but it was also used to facilitate crimes by other persons.

Mahoney's testimony is fraught with circumstances that expose his credibility and/or reliability to derogation. His testimony conflicts with that of Tony Payton as to whether Payton and April Edwards were near the Pettway store during the shooting. No other eyewitness corroborated Mahoney's testimony as to the core issue of the identities of the shooters.

Mahoney bore a grudge against Brad Rainey. Mahoney testified that Rainey shot him five times because Rainey believed Mahoney had issued a threat to "get" Rainey previously. Mahoney acknowledged that the assailants wore bandanas concealing their lower faces and that, upon hearing bullets whiz by, he immediately fled the scene by running *away* from locus of the gunfire. Mahoney claimed to regard Polo as his brother but allowed Polo's real killers to remain

at large for years while the petitioner languished in prison for a shooting Mahoney knew he did not commit. These circumstances place great strain on the believability or accuracy of Mahoney's testimony given years later.

Keeping in mind that the *Miller* level of proof goes beyond a mere preponderance to require a petitioner to bear the heavy burden of demonstrating his factual innocence by clear and convincing evidence, the petitioner has failed to carry that burden. Clear and convincing evidence is substantial and *unequivocal* evidence that produces a very high probability that the fact to be proven is true, *State* v. *Thompson,* 305 Conn. 412, 425 (2012); see, *Gould* v. *Commissioner,* supra, 560.

For these reasons, the amended petition for habeas corpus relief is denied.

Sferrazza, J.

Copies mailed to:
Ramon Lopez w/ petcert/apfeco
Atty Michael Brown w/ petcert/apfeco
Atty Emily Trudeau
Reporter of Judicial Decisions
OCPD - CSU (Hartford)
Judge Sferrazza
by: Kathryn Stalkpole, Asst. Clerk
5/1/2019
KS

APPENDIX D

Lexis®

Document: Lopez v. Comm'r of Corr., 2011 Conn. Super. LEXIS 3295

Lopez v. Comm'r of Corr., 2011 Conn. Super. LEXIS 3295

Copy Citation

Superior Court of Connecticut, Judicial District of Tolland At Somers

December 30, 2011, Decided; January 4, 2012, Filed

CV054000857

Reporter

2011 Conn. Super. LEXIS 3295 * | 2012 WL 234150

Ramon Lopez (#227089) v. Commissioner of Correction

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Affirmed by **Lopez** v. Comm'r of Corr., 150 Conn. App. 905, 93 A.3d 181, 2014 Conn. App. LEXIS 251 (Conn. App. Ct., May 1, 2014)

Prior History: State v. **Lopez**, 280 Conn. 779, 911 A.2d 1099, 2007 Conn. LEXIS 1 (2007)

Core Terms

Street, habeas corpus, trial defense counsel, Murder, alibi defense, shooting, convictions, ineffective, innocence, witnesses, Star, criminal trial, writ petition, sentence, wounded

Case Summary

Overview

Petitioner inmate, convicted of murder and other crimes, filed a petition for a writ of habeas corpus on grounds his trial counsel was ineffective for failing to adequately investigate his claim of alibi and to present testimony to support it. The habeas court held that as the alibi evidence petitioner presented at the hearing on his habeas petition was not worthy of belief, his attorney was not ineffective for failing to present a defective alibi defense, but made the correct strategic judgment in not pursuing that defense.

Outcome

The petition was denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Bench Trials

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview

Criminal Law & Procedure > Habeas Corpus > Review > General Overview

HN1 **Trials, Bench Trials**
Any fact finder, whether it be the judge in a bench trial or the jury is limited to using only the evidence lawfully placed before it. It is improper in resolving issues of fact to consider matters that are outside the record of trial, engage in speculation, or supposition. While "truth" should be a concrete concept, when deciding what facts are true for the purposes of resolving a habeas petition, the court is limited to considering only the properly admitted evidence before it in finding that truth.
More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

HN2 **Review, Burdens of Proof**
A petition for a writ of habeas corpus is an application for extraordinary judicial relief in which, contrary to the criminal trial court, the burden rests with the petitioner. In a habeas corpus proceeding, the petitioner is not innocent and has, in fact been already proven guilty beyond all reasonable doubt. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > ... > Exceptions to Default >

Actual Innocence & Miscarriage of Justice > Proof of Innocence

HN3 **Review, Burdens of Proof**
While the person who has been accused of a crime is entitled to a presumption of his or her innocence, the petitioner in a habeas corpus petition is not. A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. The presumption of innocence, however, does not outlast the judgment of conviction at trial. Consequently, even though Connecticut courts have recognized that a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial, the burden of proving entitlement to the grant of a writ rests with the petitioner. Thus, in the eyes of the law, the petitioner does not come before the court as one who is innocent, but on the contrary as one who has been convicted by due process of law. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

HN4 **Jurisdiction, Cognizable Issues**
Issuance of a writ of habeas corpus is a remedy whose most basic traditions and purposes are to avoid the grievous wrong of holding a person in custody in violation of the federal Constitution and thereby protect individuals from unconstitutional convictions and help guarantee the integrity of the criminal process by ensuring that trials are fundamentally fair. Moreover, when a court reviews a petition for habeas corpus, it must decide whether the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Governments > Courts > Common Law

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN5 **Fundamental Rights, Criminal Process**
A criminal defendant has an absolute constitutional right to persist in a plea of not guilty, even in the face of what some might think to be seemingly insurmountable obstacles and overwhelming evidence. He or she has an absolute right to hold the government to its justifiably high burden of proof and take the matter to a jury of his or her peers. The Constitution of the United States, the Bill of Rights, and the Constitution of the State of Connecticut collectively guarantee the fundamental right of a person to plead not guilty and have his or her case decided before a jury of his or her peers. The common law has interpreted these constitutional guarantees as requiring that the government seeking to deprive a person of freedom must first prove that person's guilt beyond all reasonable doubt. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN6 **Criminal Process, Assistance of Counsel**
All criminal defendants are entitled to the representation of counsel. The Sixth Amendment to the United States Constitution, U.S. Const. amend. VI, provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him and to have the assistance of counsel for his defense. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Constitutional Law > Bill of Rights > State Application

HN7 **Criminal Process, Assistance of Counsel**
The right of confrontation and right to counsel under the Sixth Amendment, U.S. Const. amend. VI, is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Governments > Courts > Common Law

HN8 **Burdens of Proof, Prosecution**
"Beyond a reasonable doubt" is accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN9 **Counsel, Effective Assistance of Counsel**
It is not, and never has been, for the trial defense counsel to make the decisions that a client must make. The defendant decides how to plead, whether to testify, whether to waive the right to trial by jury, etc. Nevertheless, effective representation is crucial. Because a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction. Consequently, an attorney who fails to offer his or her client proper counsel at critical junctures in the trial may well be providing ineffective representation. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN10 **Criminal Process, Assistance of Counsel**
Any claim of ineffective assistance of counsel must satisfy both prongs of the test set forth by the United States Supreme Court in Strickland v. Washington, before the court can grant relief. Specifically, the petitioner must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, U.S. Const. amend. VI. If, and only if, the petitioner manages to get over the first hurdle, then the petitioner must clear the second obstacle by proving that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. The petitioner must show both deficiency and prejudice. A failure to prove both, even though counsel's trial performance may have been substandard, will result in denial of the petition. More like this Headnote

Shepardize® - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

General Overview

HN11 **Criminal Process, Assistance of Counsel**
A criminal defendant is entitled to the representation of trained and competent legal counsel. Notwithstanding, the Sixth Amendment, U.S. Const. amend. VI, guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Habeas Corpus > Review > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues >

Ineffective Assistance of Counsel

HN12 **Habeas Corpus, Review**
Trial of a habeas petition is not an opportunity for a new counsel to attempt to relitigate a case in a different manner. A habeas court may not indulge in hindsight to reconstruct the circumstances surrounding the challenged conduct, but must evaluate the acts or omissions from trial counsel's perspective at the time of trial. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

General Overview

Evidence > Inferences & Presumptions > Presumptions

HN13 **Counsel, Effective Assistance of Counsel**
A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances to 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. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel >

Tests for Ineffective Assistance of Counsel

HN14 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**
Under Strickland, in order for the court to grant relief, it is not enough to show deficient performance on the part of trial defense counsel, a petitioner must also show that he was prejudiced by that deficient performance. Insofar as prejudice is concerned, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. To mount a successful collateral attack on his conviction, the petitioner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal. In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction. More like this Headnote

Shepardize® - Narrow by this Headnote

Judges: **[*1]** S.T. Fuger, Jr., Judge.

Opinion by: S.T. Fuger, Jr.

Opinion

Memorandum of Decision

The petitioner, **Ramon Lopez**, inmate #227089, alleges in his petition for a Writ of Habeas Corpus initially filed on December 13, 2005 1 and amended for the final time on December 15, 2009, that his conviction of: one count of intentional Murder in violation of CGS §53a-54a; two counts of attempted Murder in violation of CGS §53a-49 and 53a-54(a); and two counts of Assault in the 1st degree in violation of CGS §53a-59(a)(5) is unconstitutional under both the United States Constitution and the Constitution of the State of Connecticut and that as a result he is entitled to have his convictions and sentence set aside. The petitioner was convicted of these charges following a trial to the jury in the Judicial District of Fairfield on October 2nd, 2003. On December 5th, 2003, the petitioner was sentenced to a total effective sentence of one hundred (100) years to serve. The petitioner's criminal convictions were affirmed by the Connecticut Supreme Court at *State v.* ***Lopez***, 280 Conn. 779, 911 A.2d 1099 (2007). While there are several claims embodied within this petition, it is clear, based upon the conduct of the case by his habeas counsel, the evidence **[*2]** presented to the habeas trial court, and the arguments of counsel, that this habeas petition focuses upon the petitioner's allegation that his trial defense counsel, Atty. Lawrence Hopkins, was ineffective in his representation by failing to investigate

and present the petitioner's alibi defense.

During the trial on the merits of this habeas petition the Court received testimony from the petitioner, his sister, Ms. Rose **Lopez**, Mr. Vincent Wilson, Mr. Elijah Lewis, Ms. Star Semedo, Police Sergeant Griselie Doszpoj and Detective Warren Delmonte of the City of Bridgeport Police Department, Ms. Kiaga Johnson, Atty. Lawrence Hopkins, **[*4]** Atty. Robert Berke, the petitioner's trial defense counsel.[2] Additionally, Atty. Norman Pattis testified as an expert witness. Finally, the Court received the transcripts of the criminal trial testimony, as well as other pieces of documentary evidence into evidence.

It should not be necessary for this Court to comment upon the methodology used for the findings of fact, however, it is important to keep this in mind when considering the resolution of this petition. First and foremost, ***HN1*** any fact finder, whether it be the **[*5]** judge in a bench trial or the jury is limited to using only the evidence lawfully placed before it. It is improper in resolving issues of fact to consider matters that are outside the record of trial, engage in speculation, or supposition. While "truth" should be a concrete concept, when deciding what facts are true for the purposes of resolving a petition, the Court is limited to considering only the properly admitted evidence before it in finding that truth. Consequently, it must be reiterated that the following findings of fact are derived from the evidence adduced at the habeas trial.

Findings of Fact

1. The petitioner was a defendant in a criminal case proceeding in the Judicial District of Fairfield at Bridgeport under Docket No. CR02-182760 in which he was charged with one count of intentional Murder in violation of CGS §53a-54a; two counts of attempted Murder in violation of CGS §§53a-49 and 53a-54(a); and two counts of Assault in the 1st degree in violation of CGS §53a-59(a)(5).

2. On October 2nd, 2003, the jury returned its verdict of guilty as to all counts.

3. In its decision,[3] the Supreme Court found that a jury could reasonably have concluded that the following facts were **[*6]** true. "In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally east-west direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as 'Polo,' his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as 'Chef,' came out of Pettway's, gave Abdul-Hakeem and Rosado a 'grim' look and then walked north on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth Street to the west side and joined Diamond and Chef. Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. **[*7]** Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, Tony Payton, knew both men and was able to identify them as Boo McClain and the defendant. McClain carried a handgun and the defendant carried a shotgun. As McClain and the defendant approached Pettway's, the defendant said to the people gathered on the side-walk, 'All right freeze, nobody move,' and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to Pettway's, which had a 'buzzer lock.' The door opened and several people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the defendant, whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to Pettway's, McClain, the defendant and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the defendant yelled, 'I told you I was **[*8]** going to get you, Polo, I told you I was going to get you.' McClain and the defendant then ran back up Stratford Avenue and reentered the white car, which turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis revealed that two separate shotguns and four separate handguns had been used in the shooting. Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip."

4. The petitioner was represented throughout the merits of this trial by Attorney Lawrence Hopkins. His

counsel for sentencing was Attorney Robert Berke [4].

5. The petitioner asserts that he, his sister and Ms. Star Semedo were in Ansonia at the time of the shootings and that he could not have been guilty of the crimes. This court finds that this assertion and the "alibi" are not worthy of belief and that even had the evidence been presented at trial, there is no reasonable probability that the result would have been different.

6. Additional facts will be discussed, as necessary, in subsequent portions of this decision.

Discussion

The petitioner now comes before this Court seeking to have this court set aside his convictions of guilty to the charges of one count of intentional Murder in violation of CGS §53a-54a; two counts of attempted Murder in violation of CGS §53a-49 and 53a-54(a); and two counts of Assault in the 1st degree in violation of CGS §53a-59(a)(5) and order that his case be returned to the docket for a new trial. It is important to understand that this instant proceeding is an action seeking the issuance of a writ of habeas corpus. This case having been tried and appealed to the Connecticut Supreme Court is now in the "court of last resort." ***HN2*** A petition for a writ **[*10]** of habeas corpus is, therefore, an application for *extraordinary* judicial relief in which, contrary to the criminal trial court, the burden rests with the petitioner.[5]

In this case, there is little doubt that a bloody shooting resulting in two men being wounded and a third killed took place. It is the identification of the petitioner as one of the shooters that he claims to be in issue. The petitioner alleges that he was in possession of a viable alibi that could, indeed should have, been presented to the jury through his own testimony, **[*11]** the testimony of his sister and Ms. Star Semedo. The petitioner has alleged that his trial defense counsel was ineffective in the manner in which he represented the petitioner at trial because he failed to adequately investigate this claim of alibi and to present this testimony. Notwithstanding, the Court disagrees and will deny the petition for a writ of habeas corpus.

At the outset, one must understand that there is a critical difference between the legal status of a person who has been accused of a crime as opposed to one who has been convicted of a crime. ***HN3*** While the person who has been accused of a crime is entitled to a presumption of his or her innocence, the petitioner in a habeas corpus petition is not. "It is undoubtedly true that '[a] person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).' *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 859, 122 L.Ed.2d 203 (1993) . . . The presumption of innocence, however, does not outlast the judgment of conviction at trial." *Summerville v. Warden*, 229 Conn. 397 at 422-23, 641 A.2d 1356 (1994). **[*12]** Consequently, even though our courts have recognized that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial," *Summerville v. Warden*, 229 Conn. 397 at 422, 641 A.2d 1356 (1994), the burden of proving entitlement to the grant of a writ rests with the petitioner. "Thus, in the eyes of the law, [the] petitioner does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law." *Summerville v. Warden, infra*, at 422.

The writ of habeas corpus is an ancient and time-honored component of our Anglo-American jurisprudence. "We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: 'the most celebrated writ in the English law.' 3 Blackstone Commentaries 129. It is a writ antecedent to statute, and throwing its root deep into the genius of our common law . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative **[*13]** remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."[6] *Fay v. Noia*, 372 U.S. 391 at 399, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). When the United States achieved independence from England, the writ was embodied in our law as well. "Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, §9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, §14, 1 Stat. 81-82, habeas corpus was early confirmed by Chief Justice John Marshall to be a 'great constitutional privilege.' *Ex parte Bollman and Swartwout*, 8 U.S. 75, 4 Cranch 75, 95, 2 L. Ed. 554." *Fay v. Noia, infra* at 400 (1963).

HN4 Issuance of a writ of habeas corpus is a remedy whose "most basic traditions and purposes are to

avoid the grievous wrong of holding a person in custody in violation of the federal constitution and thereby protect individuals from unconstitutional convictions and help guarantee the integrity of the criminal process by ensuring that trials are fundamentally fair." *O'Neal v. McAninch*, 513 U.S. 432, 442, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995). **[*14]** Moreover, when a court reviews a petition for habeas corpus, "it must decide whether the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter." *Coleman v. Thompson*, 501 U.S. 722 at 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). So, the writ of habeas corpus "has been for centuries esteemed the best and only sufficient defense of personal freedom." *Lonchar v. Thomas*, 517 U.S. 314, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996).

Ineffective Assistance of Trial Defense Counsel

HN5 A criminal defendant, of course, has an absolute Constitutional right to persist in a plea of not guilty, even in the face of what some might think to be seemingly insurmountable obstacles and overwhelming evidence. He or she has an absolute right to hold the government to its justifiably high burden of proof and take the matter to a jury of his or her peers. The Constitution of the United States, the Bill of Rights, and the Constitution of the State of Connecticut collectively guarantee the fundamental right of a person to plead not guilty and have his or her case decided before a jury of his or her peers. Our common law has interpreted these Constitutional **[*15]** guarantees as requiring that the government seeking to deprive a person of freedom must first prove that person's guilt *beyond all reasonable doubt*. 7 Moreover, ***HN6*** all criminal defendants are entitled to the representation of counsel. The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense." ***HN7*** The sixth amendment right of confrontation and right to counsel is made applicable to the states through the due process clause of the fourteenth amendment. See *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), respectively. The Sixth Amendment right to counsel is necessarily the right to an effective counsel. Notwithstanding, our Constitutions do not require that a criminal defendant receive *perfect* representation.

HN9 It is not, and never has been, for the trial defense counsel to make the decisions that a client must make. The defendant decides how to plead, whether to testify, whether to waive the right to trial by jury, etc. Nevertheless, effective representation is crucial. "Because a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the 'right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction.' *Copas v. Commissioner of Correction*, 234 Conn 139, 154, 662 A.2d 718 (1995)." See *Baillargeon v. Commissioner of Correction*, 67 Conn.App. 716 at 721, 789 A.2d 1046 (2002). Consequently, an attorney who fails to offer his or her client proper counsel at critical junctures in the trial may **[*17]** well be providing ineffective representation.

HN10 Any claim of ineffective assistance of counsel must satisfy *both* prongs of the test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, reh. denied 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984), before the Court can grant relief. Specifically, the petitioner must *first* show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *infra* at 687. If, and only if, the petitioner manages to get over the first hurdle, then the petitioner must clear the second obstacle by proving "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, *infra* at 687. In short, the petitioner must show both deficiency and prejudice. **[*18]** A failure to prove both, even though counsel's trial performance may have been substandard, will result in denial of the petition.

As already noted, ***HN11*** a criminal defendant is entitled to the representation of trained and competent legal counsel. Notwithstanding, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. See *Bell v. Cone*, 535 U.S. 685 at 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674; *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)." *Yarborough v. Gentry*, 540 U.S. 1, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). This court sincerely doubts that any defense attorney has ever conducted the perfect criminal trial.

HN12 Trial in this Court of a habeas petition is not an opportunity for a new counsel to attempt to re-litigate a case in a different manner. A habeas court "may not indulge in hindsight to reconstruct the circumstances surrounding the challenged conduct, but must evaluate the acts or omissions from trial counsel's perspective at the time of trial." *Beasley v. Commissioner of Corrections*, 47 Conn. App. 253, 264, 704 A.2d 807 (1979), cert. den., 243 Conn. 967, 707 A.2d 1268 (1998). ***HN13*** "A fair assessment of an attorney's **[*19]** performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances to 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." *Henry v. Commissioner of Correction*, 60 Conn.App. 313 at 317, 759 A.2d 118 (2000). Here, the evidence at the habeas trial establishes that the petitioner may have had a viable alibi defense to this charge. The viability of that alibi depends in large part upon the credibility of the three witnesses who could be called upon to establish that alibi. Notably, the petitioner, his sister, Rosa, and a family friend, Star Semedo.

At this point, the court needs to comment upon the credibility of the petitioner and his witnesses. All three of these witnesses have an easily discernible vested interest in the outcome of this case. The petitioner's interest and to a somewhat lesser extent his sister's are so obvious that detailed explanation should be unnecessary. Ms. Semedo's interest in **[*20]** the outcome, while a bit more attenuated is still palpably visible. She is a longtime friend of the petitioner and his sister. She is also the mother of the petitioner and his sister's niece and nephew.

At the habeas trial, the petitioner essentially presented the alibi defense that he said should have been used at his criminal trial. Rosa **Lopez** testified that she and the petitioner were at their home in Bridgeport on Friday evening, February 1, 2002. They were discussing a Super Bowl party that they thought might take place on Sunday February 3, 2002 8 with themselves and their father. Sometime in the early evening hours, Ms. Star Semedo called to invite them up to her home in Ansonia where the three of them stayed the night, leaving in the mid morning hours of February 2, 2002 to return to Bridgeport. This is the essence of the alibi and, if said alibi evidence is believed, then it would be a good defense to the charges levied against the petitioner as he could not both be in Ansonia with his sister and a friend and shooting three men in Bridgeport at the same time.

Atty. Pattis, testifying as an expert witness opined that the failure of a trial defense counsel to investigate and present a client's alibi if viable would be deficient performance. This court clearly agrees with that opinion, however, this court also finds that the alibi evidence is not worthy of belief and that an attorney cannot be held to be ineffective for failing to present a defective alibi defense. Moreover,***HN14*** under *Strickland*, in order for the court to grant relief, it is not enough to show deficient performance on the part of trial defense counsel, a petitioner must also show that he was prejudiced by that deficient performance.

Insofar as prejudice is concerned, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *infra* at 694. "To mount a successful collateral attack on his conviction, a prisoner must demonstrate a miscarriage **[*22]** of justice or other prejudice and not merely an error which might entitle him to relief on appeal. *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417, reh. denied, 369 U.S. 808, 82 S. Ct. 640, 7 L.Ed.2d 556 (1962); *D'Amico v. Manson*, 193 Conn. 144, 156-57, 476 A.2d 543 (1984); see also *Bowers v. Warden*, 19 Conn.App. 440, 441, 562 A.2d 588, cert. denied, 212 Conn. 817, 565 A.2d 534 (1989). In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Internal quotation marks omitted.) *Bunkley v. Commissioner of Correction*, 222 Conn. 444, 460-61, 610 A.2d 598." *Summerville v. Warden*, 229 Conn. 397 at 419, 641 A.2d 1356 (1994).

There are numerous problems with this alibi evidence. First, nobody ever approached the police or the prosecutors to inform them that they had the wrong man on trial. While the petitioner did tell Atty. Hopkins about this alibi, it never went any further than that. Neither Ms. Semedo not Ms. **Lopez** tried to speak with Atty. Hopkins about this alibi. Rosa **Lopez** testified at the habeas trial that the first she heard about her brother being arrested for murder was several **[*23]** months later when she read about it in the newspaper. This, however, conflicts with the fact that the police were at her house the morning of the murder executing a search warrant and arrested the petitioner. Rosa **Lopez** also said that the Super Bowl party for her father was her idea and her mother's. This conflicts with the evidence that her mother had but recently thrown her father out of the house and the petitioner's statement that they could not hold the party at the house where they lived as a result. A glaring problem with the habeas testimony is not the lack of consistency between the testimony of Ms. Semedo and Ms. **Lopez**, but the uncanny similarity. Despite testifying that they had not collaborated on their alibi stories, both Ms. **Lopez** and Ms. Semedo offered a very similar description of their activities in Ansonia: to wit (in the words of Ms. **Lopez**) "*We ate food, watched TV. We just goofed around mainly*," and (in the words of Ms. Semedo) "*We goofed around, we ate, we watched TV*." This almost identical description of events gives lie to the assertion that

the women did not collaborate and rehearse their story. Even Atty. Pattis, the petitioner's own expert admitted that he **[*24]** was troubled by the inconsistencies in the testimony.

Atty. Berke, in preparation for sentencing interviewed Ms. Semedo who gave a vague statement about this purported alibi. Unlike her testimony at the habeas trial some eight years later, when Ms. Semedo talked to Atty. Berke, she could not recall the dates she was with the petitioner and made reference to the petitioner babysitting her children at the time of the incident. Interestingly, this latter statement is corroborated in part by the fact that there were two children, with the surname "Semedo" present at the house when the police executed the search warrant on February 2, 2002, as was Rosa **Lopez**.[9] While the evidence from Atty. Berke was hearsy, it does serve as a prior inconsistent statement of Ms. Semedo that this court feels further undermines her credibility.

The petitioner initially told **[*25]** Atty. Hopkins that his alibi witnesses were Ms. Semedo and his mother, Rosa Ortiz. This caused grave concern to Mr. Hopkins because the petitioner had previously used an alibi defense that had failed in which the star witness was his mother, Rosa Ortiz. That is one of the reasons that Atty. Hopkins elected to forgo using the sketchy alibi evidence. Of course, that problem was gone by the time of the habeas trial, because the petitioner now says that it was his sister Rosa **Lopez**, not his mother Rosa Ortiz.

Given the weakness of this potential alibi testimony and its doubtful propensity to induce reasonable doubt in the minds of the jury, this Court finds that the reliability of the petitioner's conviction has not been undermined. Indeed, had Attorney Hopkins gone forward with this alibi defense as the petitioner says he wanted, the likelihood of conviction would have gone up, not down. A rejected alibi is generally fatal to a criminal defendant's chances for acquittal.

This Court is aware of the "fact that in many cases an order for a new trial may in reality reward the accused with complete freedom from prosecution because of the debilitating effect of the passage of time on the state's **[*26]** evidence." *Summerville v. Warden, supra*. Furthermore, this Court understands that there is a strong societal interest in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility." *Id*.

Keeping this in mind, it is clear that this is a case in which the trial defense counsel made the correct strategic judgment in not pursuing this alibi and calling these missing witnesses in order to establish an alibi defense that may well have led a jury to conclude that the petitioner was lying to escape a finding of guilty.

The Petition for a Writ of Habeas Corpus is denied.

S.T. Fuger, Jr., Judge

Footnotes

1 The Court feels compelled to address what on its face appears to be an inordinately long period of time between the filing of the pro se petition in December 2005 and the release of this Memorandum of Decision. Habeas Corpus petitions are privileged matters that should be tried expeditiously, and based upon this Court's extensive experience administering and adjudicating the habeas docket between 2002 and 2010, that goal is normally met. Notwithstanding there are cases that "push the envelope," so to speak, of which the instant case seems to be an example. Many habeas petitioners, even though asserting their innocence or wrongful conviction, realize that the best chance for prevailing in a habeas matter lies in the first habeas petition. While subsequent petitions challenging the representation of habeas counsel, may be possible, these petitions almost invariably prove to be unavailing because **[*3]** the ultimate issue in any habeas petition is whether the petitioner is burdened with an unreliable conviction. In the instant case, there were delays attendant upon the initial appointment of counsel with the petitioner being represented throughout the course of this matter by five attorneys. Actual trial in this matter commenced on December 17, 2009 and continued on divers days thereafter until December 2, 2011. Almost all of the delays encountered in this trial process were the result of petitioner requesting time to locate and subpoena witnesses to appear on his behalf. Given the lengthy time that had ensued between initial trial day and final trial day, the parties were permitted to

file post-trial briefs, the last of which was received on December 2, 2011, thereby starting the 120-day period in which this Court was to render a Memorandum of Decision.

2 Notably, the following persons did *not* testify at the habeas trial: Det. Llanos, Det. Nandori, Carl Alexander, Michael Holbrook, Michael Cabral, Francisco Soares, John Soares, Donna Jones and Kepal Petuay. The petitioner alleged that they would have produced favorable evidence, had they testified and that Atty. Hopkins was ineffective for not calling these witnesses. In the absence of direct evidence from these persons, this habeas court cannot determine if what they might have said would have led to an acquittal of the petitioner. Consequently, any claim of ineffectiveness for failing to interview, interrogate or subpoena these witnesses for trial is deemed abandoned.

3 *State v.* ***Lopez***, 280 Conn. 779, 911 A.2d 1099 (2007).

4 There does not appear to be any challenge to the representation of Attorney Berke, consequently, this Court concludes that his representation is presumptively constitutionally valid and acceptable to the petitioner as he raised **[*9]** no challenge to Attorney Berke when he had the chance to do so.

5 This may seem to be difficult for a layman to accept, given the oft-repeated phrase that "one is innocent until proven guilty." However, in a habeas corpus proceeding, the petitioner is not innocent and has, in fact been already proven guilty beyond all reasonable doubt. Moreover, a habeas petitioner has more likely than not had the opportunity to have at least one appellate court review the case to determine of there have been any errors of law that were made by the trial court. Given that a habeas petition is often called the "court of last resort" it should not be unexpected that the burden of showing an irregularity must now rest with the petitioner.

6 Edward I reigned in England in the late 13th century AD.

7 "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion **[*16]** in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. ***HN8*** It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt.'" *In re Winship*, 397 U.S. 358 at 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

8 Super Bowl XXXVI between the St. Louis Rams and the New England Patriots was indeed on February 3, 2002. The Patriots **[*21]** were victorious over the Rams by the score of 20 to 17, with the winning field goal being kicked in the final few seconds of the game.

9 Had the petitioner been in Ansonia with Ms. Semedo and Ms. **Lopez** as he claimed at the habeas trial, it is inconceivable that Ms. **Lopez** would have remained mute and allowed her brother to be taken into custody for a murder that she knew he could not have committed. This tends to further undermine the credibility of the petitioner's alibi.

Content Type: Cases

Terms: Ramon Lopez

Narrow By: Court: Federal>2nd Circuit or State Courts>Connecticut

Date and Time: Apr 08, 2022 12:08:58 p.m. EDT

APPENDIX E

Lexis®

Document: State v. Lopez, 280 Conn. 779

State v. Lopez, 280 Conn. 779

Copy Citation

Supreme Court of Connecticut

September 20, 2006, Argued ; January 2, 2007, Officially Released

(SC 17198)

Reporter

280 Conn. 779 * | 911 A.2d 1099 ** | 2007 Conn. LEXIS 1 ***

STATE OF CONNECTICUT v. **RAMON LOPEZ**

Subsequent History: Subsequent appeal at, Decision reached on appeal by State v. **Lopez**, 2009 Conn. Super. LEXIS 820 (Conn. Super. Ct., Feb. 24, 2009)

Writ of habeas corpus denied **Lopez** v. Comm'r of Corr., 2011 Conn. Super. LEXIS 3295 (Conn. Super. Ct., Dec. 30, 2011)

Writ of habeas corpus denied **Lopez** v. Warden, 2019 Conn. Super. LEXIS 1122, 2019 WL 2369528 (Conn. Super. Ct., May 1, 2019)

Prior History: [***1] Amended information charging the defendant with one count of the crime of murder, and two counts each of the crimes of attempt to commit murder and assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before Harper, J.; verdict and judgment of guilty, from which the defendant appealed to this court.

Disposition: Affirmed.

Core Terms

shooting, trial court, shooters, kill, Street, quotation, marks, sentencing, wound, continuance, defense counsel, beyond a reasonable doubt, misconduct, witnesses, sentencing hearing, trial transcript, inferred

counsel, beyond a reasonable doubt, misconduct, witnesses, sentencing hearing, trial transcript, inferred, shotgun, gun, circumstances, accessory, bullet, credibility, innocent, charges, procedural history, intended victim, cooperate, deprived, murder

Case Summary

Procedural Posture

Defendant appealed from the judgment of conviction, rendered after a jury trial in the Superior Court in the judicial district of Fairfield (Connecticut), of murder in violation of Conn. Gen. Stat. § 53a-54a(a), two counts of attempted murder in violation of Conn. Gen. Stat. §§ 53a-49(a) and 53a-54a(a), and two counts of assault in the first degree in violation of Conn. Gen. Stat. § 53a-59(a)(5).

Overview

The court agreed with defendant that, as new defense counsel had been appointed after trial and before sentencing, the trial court, as a general rule, should have allowed counsel an opportunity to review the trial transcript before holding a sentencing hearing. However, it concluded that there was no need to determine whether the trial court abused its discretion in denying a motion for a continuance on the basis of the record before it because, even if it did, defendant had made no claim that he was prejudiced in any way by the denial. One of the shooting victim's testimony was admissible under Conn. Code Evid. R. 4-5(b) on the issue of motive where he testified that, two to three weeks before the shooting, defendant had had an angry confrontation with an eyewitness during which he displayed a gun and that he also threatened the victim with the gun. The testimony tended to show that defendant harbored hostility toward the eyewitness and the victim. The court concluded that the evidence was sufficient to support the conclusion beyond a reasonable doubt that defendant had been one of the shooters. The jury reasonably could have found that defendant intended to kill a bystander.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Reviewability > General Overview

HN1 **Appeals, Reviewability**
See Conn. Gen. Stat. § 51-199(b). More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Definitions > General Overview

HN2 **Murder, Definitions**
See Conn. Gen. Stat. § 53a-54a(a). More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

HN3 **Attempt, Elements**
See Conn. Gen. Stat. § 53a-49(a). More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN4 **Aggravated Offenses, Elements**
See Conn. Gen. Stat. § 53a-59(a). More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN5 **Postconviction Proceedings, Motions for New Trial**
See Conn. Gen. Prac. Book, R. Super. Ct. § 42-54. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Continuances

HN6 **Abuse of Discretion, Continuances**
It is well settled that the determination of whether to grant a request for a continuance is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. A reviewing court is bound by the principle that every reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. The role of an appellate court is not to substitute its judgment for that of a trial court that has chosen one of many reasonable alternatives. Therefore, on appeal, an appellate court must determine whether the trial court's decision denying the request for a continuance was arbitrary or unreasonable. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures >

Continuances

HN7 **Pretrial Motions & Procedures, Continuances**
The Supreme Court of Connecticut has identified several factors that a trial court may consider when exercising its discretion in granting or denying a motion for continuance. These factors include the likely length of the delay; the impact of delay on the litigants, witnesses, opposing counsel, and the court; the perceived legitimacy of the reasons proffered in support of the request; and the likelihood that the denial would substantially impair the defendant's ability to defend himself. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

HN8 **Imposition of Sentence, Evidence**
A sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissible at trial. Consistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures >

Continuances

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

HN9 **Pretrial Motions & Procedures, Continuances**
When new defense counsel has been appointed after trial and before sentencing, the trial court, as a general rule, should allow counsel an opportunity to review the trial transcript before holding a sentencing hearing. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN10 **Postconviction Proceedings, Motions for New Trial**
Courts have held that the ability to raise claims on appeal that could not be raised in a motion for a new trial because of lack of access to a trial transcript renders the denial of access harmless. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN11 **Postconviction Proceedings, Motions for New Trial**
It is well established that a motion for a new trial is not the proper vehicle for raising new, unpreserved claims of error. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

HN12 **Sentencing, Imposition of Sentence**
Although review of the trial transcript generally is an important component of a new counsel's preparation for sentencing, a denial of the opportunity to do so does not rise to the level of complete denial of counsel and does not necessarily render the entire process fundamentally unfair. Moreover, the effect of the impropriety on the outcome of the proceeding may be readily ascertained after the fact. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

HN13 **Appeals, Legality Review**
Structural errors at sentencing involve a very limited class of cases including deprivation of counsel during the sentencing hearing itself, abdication of judicial role by authorizing a probation officer to determine the manner of restitution, and in absentia sentencing. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Relevance > Exclusion of Relevant Evidence >
Confusion, Prejudice & Waste of Time

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN14 **Abuse of Discretion, Evidence**
The rules governing the admissibility of evidence of a criminal defendant's prior misconduct are well established. Although evidence of prior unconnected crimes is inadmissible to demonstrate the defendant's bad character or to suggest that the defendant has a propensity for criminal behavior such evidence may be admissible for other purposes, such as to prove knowledge, intent, motive, and common scheme or design, if the trial court determines, in the exercise of judicial discretion, that the probative value of the evidence outweighs its prejudicial tendency. That evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material. In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. Reversal is required only when an abuse of discretion is manifest or when injustice appears to have been done. More like this Headnote

Shepardize® - Narrow by this Headnote

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN15 **Conduct Evidence, Prior Acts, Crimes & Wrongs**
See Conn. Code Evid. R. 4-5(a). More like this Headnote

Shepardize® - Narrow by this Headnote

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN16 **Conduct Evidence, Prior Acts, Crimes & Wrongs**
See Conn. Code Evid. R. 4-5(b). More like this Headnote

Shepardize® - Narrow by this Headnote

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN17 **Conduct Evidence, Prior Acts, Crimes & Wrongs**
It is not essential that the state prove a motive for a crime. But it strengthens its case when an adequate motive can be shown. Evidence of prior misconduct that tends to show that the defendant harbored hostility toward the intended victim of a violent crime is admissible to establish motive.
More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct >

Tests for Prosecutorial Misconduct

HN18 **Prosecutorial Misconduct, Tests for Prosecutorial Misconduct**
In analyzing claims of prosecutorial misconduct, courts engage in a two step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance and (2) whether that misconduct deprived a defendant of his due process right to a fair trial. Put differently, misconduct is misconduct, regardless of its ultimate effect on the fairness of the trial; whether that misconduct caused or contributed to a due process violation is a separate and distinct question.
More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct >

Tests for Prosecutorial Misconduct

HN19 **Prosecutorial Misconduct, Tests for Prosecutorial Misconduct**
In cases involving incidents of prosecutorial misconduct that were not objected to at trial, it is unnecessary for the defendant to seek to prevail under the specific requirements of State v. Golding and, similarly, it is unnecessary for a reviewing court to apply the four-prong Golding test. The reason for this is that the touchstone for appellate review of claims of prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by the Supreme Court of Connecticut in State v. Williams. In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, the Supreme Court of Connecticut, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the

in other jurisdictions, has focused on several factors. Among them are the extent to which the misconduct was invited by defense conduct or argument, the severity of the misconduct, the frequency of the misconduct, the centrality of the misconduct to the critical issues in the case, the

strength of the curative measures adopted, and the strength of the state's case. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct >

Tests for Prosecutorial Misconduct

HN20 Prosecutorial Misconduct, Tests for Prosecutorial Misconduct
It is the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and the Supreme Court of Connecticut continues to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time. Moreover, defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument. Accordingly, counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error. Put differently, prosecutorial misconduct claims are not intended to provide an avenue for the tactical sandbagging of trial courts, but rather, to address gross prosecutorial improprieties that have deprived a criminal defendant of his right to a fair trial. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN21 Closing Arguments, Fair Comment & Fair Response
A party may comment on opposing party's failure to call witness during closing argument. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN22 Closing Arguments, Evidence Not Admitted
Counsel may comment upon facts properly in evidence and upon reasonable inferences to be drawn from them. Counsel may not, however, comment on or suggest an inference from facts not in evidence. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Trials > Witnesses > Credibility

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct >

Prohibition Against Improper Statements

HN23 **Witnesses, Credibility**
The prosecutor may not express his own opinion, either directly or indirectly, as to the credibility of witnesses. Such expressions of personal opinion are a form of unsworn and unchecked testimony. These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. The jury is aware that he has prepared and presented the case and consequently, may have access to matters not in evidence which the jury may infer to have precipitated the personal opinions. While the prosecutor is permitted to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence >

General Overview

Evidence > Weight & Sufficiency

HN24 **Standards of Review, Substantial Evidence**
The standard of review applied to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction a court applies a two-part test. First, it construes the evidence in the light most favorable to sustaining the verdict. Second, it determines whether upon the facts so construed and the inferences reasonably drawn therefrom the finder of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. The jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, but each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence >

General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Weight & Sufficiency

HN25 **Standards of Review, Substantial Evidence**
It does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. In evaluating evidence, the finder of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. The finder of fact may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence >

General Overview

Evidence > Weight & Sufficiency

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN26 Standards of Review, Substantial Evidence
Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the finder of fact, would have resulted in an acquittal. On appeal, the appellate court does not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. It asks, instead, whether there is a reasonable view of the evidence that supports the finder of fact's verdict of guilty. The court does not sit as a thirteenth juror who may cast a vote against the verdict based upon a feeling that some doubt of guilt is shown by the cold printed record. Rather, it must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor, and attitude. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections >

Fair Identification Requirement

HN27 Due Process Protections, Fair Identification Requirement
When determining whether a witness had sufficient time to observe a defendant to ensure a reliable identification, the Supreme Court of Connecticut has stated that a good hard look will pass muster even if it occurs during a fleeting glance. In particular, the court has recognized that a view of even a few seconds may be sufficient for a witness to make an identification and that it is for the trier of fact to determine the weight to be given that identification. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Murder > Attempted Murder > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN28 Aggravated Offenses, Elements
A verdict of guilty of attempted murder requires a finding of the specific intent to cause death. Conn. Gen. Stat. §§ 53a-49, 53a-54a, and 53a-3(11). A verdict of guilty of assault in the first degree in violation of Conn. Gen. Stat. § 53a-59(a)(5) requires a finding of the specific intent to cause physical injury. Conn. Gen. Stat. §§ 53a-59(a)(5) and 53a-3(3). Because direct evidence of the accused's state of mind is rarely available, intent is often inferred from conduct and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted, and the events leading to and immediately following the death. Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN29 **Accessories, Aiding & Abetting**
See Conn. Gen. Stat. § 53a-8(a). More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Accessories > General Overview

HN30 **Criminal Law & Procedure, Accessories**
Under the common design theory, all who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of, or in furtherance of, the common design. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN31 **Inchoate Crimes, Conspiracy**
Under the Pinkerton doctrine, a conspirator may be held liable for criminal offenses committed by a coconspirator if those offenses are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions >

Elements of Offense

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN32 **Particular Instructions, Elements of Offense**
The failure to instruct the jury adequately on each essential element of the crime charged may result in a violation of the defendant's due process rights implicating the fairness of his or her trial.
More like this Headnote

Shepardize® - Narrow by this Headnote

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN33 **Trials, Jury Instructions**
The Supreme Court of Connecticut's standard of review for claims of instructional impropriety is well established. Individual jury instructions should not be judged in artificial isolation but must be viewed in the context of the overall charge. The pertinent test is whether the charge, read in its

viewed in the context of the overall charge. The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rule of law. Thus, the whole charge must be considered from the standpoint of its effect on the jurors in guiding them to the proper verdict and not critically dissected in a

microscopic search for possible error. Accordingly, in reviewing a constitutional challenge to the trial court's instruction, the court must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. More like this Headnote

Shepardize® - Narrow by this Headnote

Counsel: Kent Drager, senior assistant public defender, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were Jonathan C. Benedict, state's attorney, and, on the brief, C. Robert Satti, Jr., senior assistant state's attorney, for the appellee (state).

Judges: Borden, Norcott, Katz, Palmer and Zarella, Js. In this opinion the other justices concurred.

Opinion by: BORDEN

Opinion

[*782] [**1106] BORDEN, J. The defendant, **Ramon Lopez**, appeals 1 from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a), 2 [***3] two counts of attempted murder in violation of General Statutes §§ 53a-49 (a) 3 and 53a-54a (a), and two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5) [***2] . 4 The defendant claims that the trial court improperly: (1) denied his postconviction motion for a continuance so that his substitute counsel could review the trial transcript in preparation for sentencing; (2) admitted evidence of the defendant's **[*783]** prior misconduct; and (3) instructed the jury on accessorial liability. In addition, the defendant claims that the prosecutor engaged in numerous acts of misconduct, thereby depriving him of his right to a fair trial, and that there was insufficient evidence to establish his guilt beyond a reasonable doubt on any of the charges. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In the early morning hours of February 2, 2002, several people were gathered inside and outside of Pettway's Variety Store (Pettway's) at the northwest corner of the intersection of Stratford Avenue and Fifth Street in Bridgeport. Stratford Avenue runs in a generally east-west [***4] direction and has one-way traffic heading east. Fifth Street runs in a generally north-south direction and ends at Stratford Avenue. The three victims, Shariff Abdul-Hakeem, also known as "Polo," his brother, Manuel Rosado, and Gary Burton, were standing outside the store. Lou Diamond and a man known as "Chef" came out of Pettway's, gave Abdul-Hakeem and Rosado a "grim" look and then walked north on Fifth Street. Shortly thereafter, Diamond and Chef, who had covered the lower parts of their faces with some type of cloths, turned around and walked back down Fifth Street toward Pettway's. At the same time, a third unidentified person carrying a gun ran from the east side of Fifth [**1107] Street to the west side and joined Diamond and Chef.

Meanwhile, a white car had come down Fourth Street, the next street to the west of Fifth Street, turned east onto Stratford Avenue and stopped on the north side of that street. Two men got out of the rear driver's side door and the car then crossed Stratford Avenue and parked on the south side of the street. Although two men wore cloths over their lower faces, an eyewitness, Tony Payton, knew both men and was able to identify them as Boo McClain and the defendant. [***5] McClain carried **[*784]** a handgun and the defendant carried a shotgun. 5 As McClain and the defendant approached Pettway's, the defendant said to the people gathered on the sidewalk, "All right freeze, nobody move," and he cocked the shotgun. The people on the sidewalk then rushed toward and started banging on the door to

Pettway's, which had a "buzzer lock." The door opened and several people were able to get inside the store. Rosado, who was standing outside the store facing Fifth Street, turned toward Fourth Street to see the reason for the commotion. He saw the defendant, whom he had known for about one year before the shooting and with whom he had been incarcerated, aiming a gun at him. As Rosado dove for the door to

Pettway's, McClain, the defendant and the three men who were approaching Pettway's down Fifth Street opened fire on the crowd. After the shooting, the defendant yelled, "I told you I was going to get you, Polo, I told you I was going to get you." McClain and the defendant then ran back up Stratford Avenue and reentered the white car, which turned around and sped back up Fourth Street. At the same time, Diamond and Chef ran back up Fifth Street. A later ballistics analysis [***6] revealed that two separate shotguns and four separate handguns had been used in the shooting.

Abdul-Hakeem received bullet wounds in his left calf and left buttock. The bullet that hit his left buttock exited from the right side of his abdomen, and Abdul-Hakeem died several hours after the shooting as the result of uncontrollable bleeding from the wound. Rosado received shotgun wounds to his legs. Burton was wounded when a bullet hit him in the ribs and another bullet grazed his hip. Additional facts will be set forth as necessary.

[*785] The defendant was charged with the murder of Abdul-Hakeem, the attempted murder of Rosado and Burton, and assault in the first degree with respect to Rosado and Burton. He was found guilty of all charges after a jury trial. After the verdict, the defendant filed a motion to dismiss his trial counsel on the ground [***7] that counsel had failed to perform his duties properly. On November 10, 2003, the trial court granted the motion and appointed new counsel for the defendant. On that date, the trial court also rescheduled the sentencing hearing from November 14, 2003, to December 12, 2003.

On November 14, 2003, substitute counsel for the defendant filed a motion for a continuance of the sentencing hearing until February 6, 2004, so that he could review the trial transcript, which was not going to be available until January 20, 2004. In the motion, defense counsel stated that he needed to review the transcript in order to address the defendant's complaints against his trial counsel. The trial court held a hearing on the motion, at which defense counsel argued that he needed to review the transcript in order to determine whether he should file a motion for a new trial. When the trial court responded that [**1108] the time for filing a motion for a new trial had passed, 6 the defendant argued that the court could grant a request to file an untimely motion. The trial court then stated that the purpose of a sentencing hearing was not to review the adequacy of trial counsel. Rather, the court stated, "[t]he purpose [***8] of a sentencing hearing is to allow the parties to be heard with respect to what constitutes an appropriate sentence . . . based on factors, including the circumstances of the offense, the attitude of the victim [in] the case of a homicide, the family, and the history of **[*786]** [the defendant], including the social and criminal background." The court further noted that the presentencing investigation report would be available to counsel and that he could discuss all relevant matters with the victim's advocate and the defendant. The court concluded that, although "a transcript of the trial may be necessary on appeal of [the defendant's] conviction or for a proceeding before a habeas court, it is not necessary for effective representation of [the defendant] at a sentencing hearing." Accordingly, the trial court denied the defendant's motion for a continuance.

[***9] Thereafter, the trial court rendered judgment in accordance with the verdict and sentenced the defendant to sixty years imprisonment on the murder charge, twenty years imprisonment on the attempted murder charges, and twenty years imprisonment on the assault in the first degree charges, for a total effective sentence of 100 years imprisonment. This direct appeal followed.

I

The defendant first claims that the trial court improperly denied his motion for a continuance of the sentencing hearing. He contends that, by doing so, the court effectively deprived him of his constitutional right to counsel during critical postverdict proceedings and, therefore, he is entitled to a new sentencing hearing. We conclude that there is no need to decide whether the trial court abused its discretion in denying the defendant's motion for a continuance because, even if the denial was improper, it was harmless. We further conclude that the defendant was not deprived of his constitutional right to counsel.

HN6 "It is well settled that [t]he determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of [***10] discretion. . . . A reviewing court is bound by the principle that [e]very reasonable **[*787]** presumption in favor of the proper exercise of the trial court's discretion will be made. . . . Our role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives. . . . Therefore, on appeal, we . . . must determine whether the trial court's decision denying the request for a continuance was arbitrary or unreasonabl[e]." (Citations omitted; internal quotation marks omitted.) *State* v. *Delgado*, 261 Conn. 708, 711, 805 A.2d 705 (2002).

HN7 "We have identified several factors that a trial court may consider when exercising its discretion in granting or denying a motion for continuance. . . . These factors include the likely length of the delay . . . the impact of delay on the litigants, witnesses, opposing counsel and the court . . . the perceived

the impact of delay on the litigants, witnesses, opposing counsel and the court . . . the perceived legitimacy of the reasons proffered in support of the request . . . [and] the likelihood that the denial would substantially impair the defendant's ability [**1109] to defend himself . . . ." (Citation omitted; internal quotation marks omitted.) Id., 714. [***11]

HN8 "A sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial." (Internal quotation marks omitted.) *State* v. *Eric M.*, 271 Conn. 641, 649, 858 A.2d 767 (2004). "Consistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance." (Internal quotation marks omitted.) Id., 649-50.

In the present case, the defendant requested a continuance of approximately three months. As we have indicated, the reason proffered for the continuance was that the newly appointed defense counsel needed to **[*788]** review the trial transcript in order to determine whether there were legitimate grounds for a motion for a new trial. In addition, the defendant now claims that the continuance was required so that defense counsel could review the facts and circumstances of the crime and the weight of the evidence against the defendant to determine whether those considerations militated in favor of a light sentence.

[***12] We agree with the defendant that, ***HN9*** when new defense counsel has been appointed after trial and before sentencing, the trial court, as a general rule, should allow counsel an opportunity to review the trial transcript before holding a sentencing hearing. See *State* v. *Brodene*, 493 N.W.2d 793, 795 (Iowa 1992) (failure to provide new counsel with trial transcript before sentencing was improper); 26 J. Moore, Federal Practice (3d Ed. 1997) § 632.10 [2] [b], p. 632-50 ("[i]f a defendant's request for new counsel is granted, the court should postpone sentencing until counsel has had an opportunity to review the transcript of the trial"); see also *People* v. *Stark*, 8 Cal. App. 4th 1605, 23 Cal. App. 4th 1059, 1083, 11 Cal.Rptr.2d 207 (1992) (trial court properly denied request to discharge counsel just prior to sentencing because lengthy delay would have been required to allow new counsel to review trial transcript); *Blake* v. *State*, 273 Ga. 447, 449, 542 S.E.2d 492 (2001) (same). 7 [***15] We conclude, however, that in the present case there is no **[*789]** need to determine whether the trial court abused its discretion in denying the motion for a continuance [***13] on the basis of the record before it because, even if it did, the defendant has made no claim that he was prejudiced in any way by the denial. See *United States* v. *Sullivan*, 694 F.2d 1348, 1349 (2d Cir. 1982) (per curiam) (trial court improperly denied defendant's application for adjournment of sentencing hearing until new counsel could review trial transcript, but impropriety was harmless in absence of specific claim of prejudice). With respect to any preserved claims of evidentiary error or prosecutorial misconduct that the defendant could have raised in a motion for a new trial if defense [**1110] counsel had had the opportunity to review the trial transcript, he may raise those claims in this appeal. 8 Other ***HN10*** courts have held that the ability to raise claims on appeal that could not be raised in a motion for a new trial because of lack of access to a trial transcript renders the denial of access harmless. See *State* v. *Brodene*, supra, 795; 9 [***16] see also *State* v. *Washington*, 275 Kan. 644, 677, 68 P.3d **[*790]** 134 (2003). Moreover, the defendant has not identified any arguments that defense counsel would have made at the sentencing hearing [***14] if the trial transcript had been available to him. 10 See *United States* v. *Sullivan*, supra, 1349; see also *State* v. *Washington*, supra, 677 (trial court properly denied new counsel opportunity to review trial transcript before sentencing when defendant was not prejudiced by denial). It is clear, therefore, that any impropriety was harmless.

[***17] The defendant claims, however, that the trial court's denial of his motion for a continuance constituted effective deprivation of counsel at a critical stage of the proceeding and was structural error, precluding harmless error analysis. In support of this argument, the defendant points out that defendants have a constitutional [**1111] right to be represented by counsel at all critical stages of criminal proceedings, including the sentencing **[*791]** stage; see *Consiglio* v. *Warden*, 153 Conn. 673, 675-76, 220 A.2d 269 (1966); and that the complete denial of counsel at a critical stage constitutes structural error and is not susceptible to harmless error analysis. See *Neder* v. *United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Cases involving structural error "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair . . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function [***18] as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." (Citations omitted; internal quotation marks omitted.) Id.

As we have indicated, however, courts in other jurisdictions have concluded that a denial of a continuance under these circumstances may be harmless if the defendant has made no specific claim of prejudice; see *United States* v. *Sullivan*, supra, 694 F.2d 1348; see also *State* v. *Washington*, supra, 275 Kan. 677; 11 [***20] and the **[*792]** defendant [**1112] has cited no specific authority for his argument to the contrary. We agree with these courts that, ***HN12*** although review of the trial

transcript generally is an important component of new counsel's preparation for sentencing, a denial of the opportunity to do so does not rise to the level of complete denial of counsel 12 and does not *necessarily* render the entire process fundamentally unfair. Moreover, the effect of the impropriety on the outcome of the proceeding may be readily ascertained after the fact. Cf. *State* v. *Murray*, 254 Conn. 472, 499, 757 A.2d 578 (2000) (improper substitution of alternate juror after [***19] deliberations have begun is structural error because reviewing court cannot assess effect of impropriety on outcome of trial). Accordingly, we **[*793]** reject the defendant's claim that the improper denial of a continuance under these circumstances constitutes structural error "affecting the framework within which the trial proceeds . . . ." (Internal quotation marks omitted.) *Neder* v. *United States*, supra, 527 U.S. 8. Rather, it is "simply an error in the trial process itself"; (internal quotation marks omitted) id.; which does not require reversal if it reasonably could not have materially affected the outcome of the proceeding.

II

The defendant next claims that the trial court improperly admitted evidence that he previously had threatened Robert Payton, who was at Pettway's at the time of the shooting. The defendant contends that this evidence of prior misconduct improperly was admitted to suggest that the defendant had a bad character and a propensity for criminal behavior. We disagree.

The following additional facts and procedural history are relevant to this claim. During Rosado's testimony at trial, the prosecutor asked that the jury be excused so that he could make an offer of proof with respect to testimony about the defendant's prior misconduct. After the jury was excused, the prosecutor indicated that, two to three weeks before the shooting, Rosado had witnessed [***21] a confrontation between the defendant and Robert Payton. The prosecutor argued that Rosado's testimony about the confrontation was relevant to the defendant's identity and his motive. The defendant argued that the prejudicial value of the testimony outweighed its probative value and that it was irrelevant because there was no evidence that Payton had been an intended victim. The court allowed the evidence.

After the jury returned to the courtroom, Rosado testified that he had been at Pettway's two to three weeks before the shooting. As Rosado approached the **[*794]** store, he saw the defendant, who was holding a gun, and Robert Payton. They appeared to be having an argument. As Rosado entered the store, he held the door open for Payton. The defendant turned to Rosado and, gesturing with the gun, said, "[W]hat, you want this too?" The defendant was wearing a green army camouflage jacket and brown Timberland boots.

Rosado further testified that, on the night of February 2, 2002, shortly before the shooting, he had seen Robert Payton get out of a van that had driven down and parked on Fifth Street. Rosado walked over to the van and Payton asked him if he had a gun, because "Chef and them are [***22] out here." When the shooting started moments later, Payton was inside the store. [**1113] Rosado testified that, when he had seen the defendant that night, he was again wearing a green camouflage jacket and brown Timberland boots.

HN14 "The rules governing the admissibility of evidence of a criminal defendant's prior misconduct are well established. 13 Although evidence of prior unconnected crimes is inadmissible to demonstrate the defendant's bad character or to suggest that the defendant has a propensity for criminal behavior . . . such evidence may be admissible for other purposes, such as to prove knowledge, intent, motive, and common scheme or design, if the trial court determines, in the exercise of judicial discretion, that the probative value of the evidence outweighs its prejudicial tendency. . . . That evidence tends to prove the commission of other crimes **[*795]** by the accused does not render it inadmissible if it is otherwise relevant and material . . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [***23] [when] injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *State* v. *Ellis*, 270 Conn. 337, 354-55, 852 A.2d 676 (2004).

HN17 "It is not essential that the state prove a motive for a crime. . . . But it strengthens its case when an adequate motive can be shown." (Citation [***24] omitted.) *State* v. *Hoyeson*, 154 Conn. 302, 307, 224 A.2d 735 (1966). Evidence of prior misconduct that tends to show that the defendant harbored hostility toward the intended victim of a violent crime is admissible to establish motive. Id.; see also *State* v. *Camera*, 81 Conn. App. 175, 184, 839 A.2d 613, cert. denied, 268 Conn. 910, 845 A.2d 412 (2004).

In the present case, Rosado's testimony that, two to three weeks before the shooting, the defendant had had an angry confrontation with Robert Payton during which he displayed a gun, and that he also threatened Rosado with the gun, tended to show that the defendant harbored hostility toward Payton and Rosado. This evidence of the defendant's hostility toward Payton and Rosado was bolstered by Rosado's testimony that, moments before the shooting, Payton had asked him whether he had a gun, because "Chef *and them* are out here," together with the evidence suggesting that Chef and the defendant were acting in concert that night. (Emphasis added.) We conclude, therefore, that Rosado's testimony was

acting in concert that night. (Emphasis added.) We conclude, therefore, that Rosado's testimony was admissible on the issue of motive.

The defendant claims, however, that, even if he [***25] was hostile to Robert Payton, and even if it is assumed **[*796]** that he was one of the shooters, 14 the evidence was inadmissible because there was no evidence to support a finding that he had any intent to kill or injure Payton. He points out that Rosado testified that Payton had been inside Pettway's when the shooting [**1114] had started and there was no evidence that any of the shooters had attempted to shoot Payton personally. We are not persuaded. Rosado's testimony established that the shooters converged toward the corner and started shooting at the crowd gathered outside Pettway's within moments of Payton's arrival. The fact that Payton managed to get inside the store before the shooters reached the corner and fired their guns does not preclude a finding that he was an intended victim. The jury reasonably could have inferred that, in the darkness and confusion, the shooters did not know that Payton was no longer in the line of fire or, even if they did, that he was not the only intended victim. As we have indicated, the jury reasonably could have inferred from the defendant's statement to Rosado, "[W]hat, you want this too," that the defendant was also hostile to Rosado, who was shot during [***26] the attack. 15

[***27] The defendant also claims that the evidence should have been excluded because it was more prejudicial **[*797]** than probative. In support of this argument he contends that "the prosecutor, engaging in blatant misconduct, argued to [the jury] that the armed threat evidence showed the kind of person the defendant was and that his criminal propensities could be used in finding the defendant guilty as charged." 16 We do not agree with this characterization of the prosecutor's argument to the jury. Rather, the prosecutor argued that Rosado's eyewitness identification of the defendant at the scene of the shooting was not the *only* evidence that the defendant was the shooter because the evidence also showed that the defendant had a motive to kill Robert Payton and Rosado. Accordingly, we reject this claim.

[***28] Because we conclude that the trial court did not abuse its discretion in admitting Rosado's testimony about the confrontation between the defendant and Robert Payton as evidence of motive, we need not address the defendant's claims that the evidence was inadmissible to establish the defendant's identity and intent.

[**1115] III

The defendant next raises several unpreserved claims of prosecutorial misconduct that he claims deprived **[*798]** him of his due process right to a fair trial. He claims that the prosecutor improperly: (1) elicited testimony from Tony Payton suggesting that his brother, Robert Payton, had been killed as a result of the prosecution of this case; (2) elicited testimony from Tony Payton suggesting that he was in danger from the defendant because he had agreed to testify in this case; (3) argued facts not in evidence when he argued to the jury that the fact that five eyewitnesses did not identify the defendant as a shooter did not exclude him as a shooter; and (4) vouched for the credibility and veracity of Tony Payton and Rosado. We conclude that the prosecutor did not engage in any acts of misconduct.

HN18 "[I]n analyzing claims of prosecutorial misconduct, we engage in a two [***29] step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his due process right to a fair trial. Put differently, misconduct is misconduct, regardless of its ultimate effect on the fairness of the trial; whether that misconduct caused or contributed to a due process violation is a separate and distinct question . . . .

HN19 "[I]n cases involving incidents of prosecutorial misconduct that were not objected to at trial . . . it is unnecessary for the defendant to seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), 17 and, similarly, it is **[*799]** unnecessary for a reviewing court to apply the four-prong *Golding* test. The reason for this is that the touchstone for appellate review of claims of prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). As we stated in that [***30] case: In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 572-73, 849 A.2d 626 (2004).

[***31] Although unpreserved claims of prosecutorial conduct are reviewable under *Williams*, ***HN20***

it is "the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made [**1116] suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time. . . .

Moreover as the Appellate Court has observed, defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument. . . . Accordingly, we emphasize that counsel's failure to object at trial, while not by itself **[*800]** fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . . Put differently . . . prosecutorial misconduct claims [are] not intended to provide an avenue for the tactical sandbagging of our trial courts, but [***32] rather, to address gross prosecutorial improprieties that . . . have deprived a criminal defendant of his right to a fair trial." (Citations omitted; internal quotation marks omitted.) Id., 576.

A

We first address the defendant's claim that the prosecutor improperly elicited testimony from Tony Payton that his brother had been killed as a result of the prosecution of this case. The following additional facts and procedural history are relevant to this claim. The prosecutor asked Tony Payton whether it was his testimony that Robert Payton, was at the scene of the shooting on February 2, 2002. Tony Payton responded in the affirmative. The prosecutor then asked Tony Payton whether Robert Payton was still alive and Tony Payton responded, "No, he's deceased because of this case." The prosecutor then stated, "I just want to know if he's alive or not, no need to explain, thank you." The defendant did not object to the question or to the response and did not ask the trial court for a limiting instruction.

The defendant now claims that that the prosecutor improperly elicited Tony Payton's statement and that it constituted improper evidence of bad character and criminal propensity. Specifically, [***33] he claims that the jury could have inferred from Tony Payton's statement that the defendant had murdered Robert Payton. We disagree. Although it is not entirely clear from the context of this exchange why the prosecutor asked Tony Payton whether Robert Payton was still alive, it is reasonable to conclude that he was attempting to forestall any **[*801]** speculation by the jury or comments by the defendant as to the reasons for the state's failure to call Robert Payton as a witness. See *State* v. *Malave*, 250 Conn. 722, 740, 737 A.2d 442 (1999) (***HN21*** party may comment on opposing party's failure to call witness during closing argument), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000). The prosecutor's question was not posed in such a way as to necessarily elicit Tony Payton's comment that his brother's death was connected to this case and the prosecutor immediately diminished the effect of that response by stating that no explanation for his death was required. Moreover, because Tony Payton did not specify the particular manner of his brother's death, it would have been pure conjecture for the jury to infer from his ambiguous statement that the [***34] defendant had caused Robert Payton's death. Accordingly, we conclude that this incident did not constitute prosecutorial misconduct.

B

The defendant also claims that the prosecutor improperly elicited testimony from Tony Payton that he feared retaliation by the defendant and his friends as a result of testifying in this case. The following additional facts and procedural history are relevant to this claim. On cross-examination, Payton testified that he did [**1117] not tell the police what he knew about the shooting until June, 2002, when he was taken into federal custody on charges unrelated to this case. During redirect examination, outside the presence of the jury, the prosecutor indicated that he wanted to question Payton about the reasons that he did not come forward earlier, including his general fear of retaliation for cooperating with the police. The trial court allowed the testimony, on the condition that the prosecutor would not attempt to insinuate that Payton's fear of testifying was directly connected to the defendant.

[*802] When redirect examination of Tony Payton resumed, the prosecutor asked him if concern for his safety was the reason for his failure to cooperate with the police [***35] in their investigation of this case in the months after the shooting. Payton responded that it was. The prosecutor then asked him whether he had talked to any of his fellow inmates about his cooperation with the state in this case after he had been taken into federal custody in June, 2002. Payton stated that he had not. The prosecutor then asked, "And would you just explain that generally, please?" Payton stated, "Because, you know, anybody you know you tell something like that, maybe word would get out, some of his friends or friends' friends might want to try to do something." The defendant did not object to the prosecutor's question or to the response.

The defendant now claims that, by asking the defendant why he had not spoken to his fellow inmates about his cooperation with the state in this case, the prosecutor violated the trial court's order that he avoid any suggestion that Tony Payton's fear of testifying was directly connected to the defendant. He contends that the jury must have understood Payton's response to mean that the defendant or friends acting on the defendant's behalf intended to retaliate against him. We disagree. The prosecutor carefully asked Payton to explain [***36] *generally* his reluctance to talk to fellow inmates about his cooperation

with the state, and could not have anticipated a response specifically related to the defendant. In any event, Payton's response *was* nonspecific. The defendant does not dispute that, after defense counsel had attempted to impeach Payton's testimony on the ground that he did not give a statement to police until months after the shooting, the prosecutor was entitled to elicit testimony about his general fear of cooperating in a criminal investigation. Nor does he dispute that, as a general matter, incarcerated witnesses are reluctant **[*803]** to cooperate in an investigation *both* because there is a widespread antipathy toward "snitches" in prison *and* because there is a widespread belief that the associates of the specific subject of the investigation *might* retaliate against the "snitch." There was no suggestion that the defendant in the present case or his associates had, in fact, threatened Payton. Rather, Payton stated that if word got out that a person was giving information in an investigation against "anybody," then "his" -- i.e., "anybody's" -- friends, might retaliate. Accordingly, we reject this [***37] claim.

C

We next address the defendant's claim that the prosecutor improperly commented on facts not in evidence when he stated during closing argument to the jury that the fact that five of the seven eyewitnesses could not specifically identify the defendant as one of the shooters did not exclude the defendant as a shooter. The following facts and procedural history are relevant to this claim. During closing argument, the prosecutor pointed out that seven eyewitnesses to the shooting had testified during trial, and only two of them had identified the defendant as one of the shooters. The prosecutor then asked, [**1118] "But did they ever exclude him? Did they ever exclude him in court? Did they ever stand up on the witness stand and say that man over there is not the one I saw that night? Didn't do that." During rebuttal, the prosecutor again referred to "[t]he witnesses who did not exclude the defendant. Who didn't sit in this courtroom and say, that's not the man over there." The defendant did not object to the prosecutor's comments.

HN22 "Counsel may comment upon facts properly in evidence and upon reasonable inferences to be drawn from them. . . . Counsel may not, however, comment on or [***38] suggest an inference from facts not in evidence." (Citation omitted; internal quotation marks omitted.) **[*804]** *State* v. *Prioleau*, 235 Conn. 274, 320, 664 A.2d 743 (1995).

The defendant claims that, because the prosecutor never asked the five witnesses who had failed to identify the defendant as the shooter whether they could exclude the defendant as one of the shooters, he improperly relied on facts not in evidence in arguing that the witnesses had not excluded the defendant as a shooter. We disagree. The prosecutor merely commented that the actual state of the evidence did not preclude a conclusion that the defendant had been a shooter. Put another way, the prosecutor did not rely on a fact not in evidence when he drew the jury's attention to the fact that the testimony of the witnesses who could not specifically identify the defendant was not inconsistent with the testimony of the two witnesses who did identify him. Because the jury reasonably could have made that inference on its own, it was not misconduct for the prosecutor to point it out. Accordingly, we reject this claim.

D

We next address the defendant's claim that the prosecutor improperly vouched for the [***39] credibility and veracity of Tony Payton and Rosado when he told the jury that the government would punish them if they committed perjury. The following additional facts and procedural history are relevant to this claim. Payton testified at trial that he had made a plea deal with federal prosecutors that required him to cooperate with the state in this case in exchange for the possibility of a reduced sentence on pending federal charges. He also testified that, under the plea agreement, if he committed perjury in this case, he could receive additional jail time in the federal case. The defendant did not object to the admission of this testimony. Rosado testified at trial that there were a number of federal charges pending **[*805]** against him, but that he had not entered into any plea agreement with the federal government.

During closing argument, the prosecutor argued that Tony Payton would receive the benefit of his plea agreement only if he testified truthfully and that, if he lied, he could receive additional time in prison. 18 He also argued that Rosado's pending charges provided an incentive for him to [**1119] testify truthfully. The defendant did not object to the prosecutor's comments.

[***40] ***HN23*** "The prosecutor may not express his own opinion, either directly or indirectly, as to the credibility of witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony. . . . These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. . . . The jury is aware that he has prepared and presented the case and consequently, may have access to matters not in evidence . . . which the jury may infer to have precipitated the personal opinions." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 541-44. "While the prosecutor is permitted to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses." *State* v. *Oehman*, 212 Conn. 325, 336, 562 A.2d 493 (1989).

(1989).

[*806] The defendant claims that the prosecutor improperly suggested that the government would know if Tony Payton and Rosado were lying and had vouched for their credibility and veracity when he argued to the jury that, if they lied, they might [***41] receive more severe sentences in the cases pending against them. We disagree. First, the defendant makes no claim that the trial court improperly admitted Payton's testimony about the provisions of the plea agreement requiring him to be truthful. 19 If that evidence was admissible for the purpose of rebutting the defendant's suggestion that the pending charges against him provided an incentive for him to testify in favor of the state, then the prosecutor's argument to the jury that it could make that inference **[*807]** could not be improper. See *State* v. *Rowe*, 279 Conn. 139, 152, 900 A.2d 1276 (2006). Second, the prosecutor did not suggest to the jury that he had personal knowledge that the witnesses had not lied. Cf. *State* v. *Payne*, 260 Conn. 446, 454, 797 A.2d 1088 [**1120] (2002) (prosecutor improperly vouched for credibility of witness when, on basis of personal knowledge of facts not in evidence, he directly contradicted testimony that state wanted witness to lie). Nor did he suggest that the government had means of determining whether the witnesses were lying that were unavailable to the jurors. Rather, he left the ultimate evaluation of the witnesses' [***42] credibility to the jury. Accordingly, we reject this claim.

[***43] IV

The defendant next claims that there was insufficient evidence to establish his guilt beyond a reasonable doubt on any of the charges. Specifically, he claims that the evidence was insufficient to establish: (1) his identity as one of the shooters; (2) that he had injured or attempted to kill Burton; (3) that he had injured or attempted to kill Rosado; and (4) that he had killed or intended to kill Abdul-Hakeem. We disagree.

The following additional procedural history is relevant to this claim. At the close of evidence, the defendant made a motion for acquittal on the ground that, reviewing the evidence in the light most favorable to the state, a reasonable juror could not conclude that the defendant was guilty beyond a reasonable doubt of any of the charges. The defendant specifically argued that the circumstances under which Rosado had cooperated with the state's investigation of this matter rendered his testimony unreliable. The state argued that Rosado's credibility was an issue for the jury. The trial court concluded that the jury reasonably could find the defendant guilty beyond a reasonable doubt on each of **[*808]** the five counts of the information and denied the motion for [***44] acquittal.

HN24 "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, [***45] ***HN25*** it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

[*809] "Finally, [a]s we have often noted, ***HN26*** proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable [**1121] doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of [***46] fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Gary*, 273 Conn. 393, 405-406, 869 A.2d 1236 (2005); see also *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) ("[W]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." [Internal

quotation marks omitted.)).

A

We first address the defendant's claim that there was insufficient evidence to establish his identity as one of the shooters. Specifically, the defendant claims that Rosado's identification of the defendant as the shooter was unreliable because: Rosado had seen the shooter whom he identified as the defendant for only two or three seconds; the shooter had been masked; Rosado told the police on the night of the shooting that he did not recognize any of the shooters; Rosado changed his story only after talking to another witness; and Rosado's identification was based only on his belief [***47] that the defendant was "the kind of guy he associated with guns and shooting" and on the fact that the defendant wore the same type of clothes as the shooter. The defendant also claims that Tony Payton's identification of the **[*810]** defendant was unreliable because Payton admitted that he had learned the shooters' names from another person after the shooting; 20 the evidence showed that Payton had been too far away from the shooting to see clearly and his view had been blocked by a utility pole; 21 and Payton testified that he had seen the defendant shoot Abdul-Hakeem in the chest with a shotgun, which did not happen.

[***48] ***HN27*** "[W]hen determining whether a witness had sufficient time to observe a defendant to ensure a reliable identification, we have stated that a good hard look will pass muster even if it occurs during a fleeting glance. . . . In particular, we have recognized that a view of even a few seconds [**1122] may be sufficient for a witness to make an identification . . . and that it is for the trier of fact to determine the weight to be given that identification." (Citations omitted; internal quotation marks omitted.) *State* v. *Morgan*, supra, 274 Conn. 801-802.

[*811] We conclude that the evidence was sufficient to support the conclusion beyond a reasonable doubt that the defendant was one of the shooters. As we have indicated, Rosado testified that he had known the defendant for about one year before the shooting and had been incarcerated with him. In addition, he had seen the defendant two weeks before the shooting, at which time the defendant was wearing the same clothes as on the night of the shooting. Under these circumstances, the jury reasonably could have concluded that a look lasting a few seconds was sufficient for Rosado to ascertain the defendant's identity, even though the [***49] defendant was masked from the nose down. The fact that Rosado did not identify the defendant immediately after the shooting does not affect our conclusion. The jury reasonably could have concluded that Rosado was afraid of retaliation. In addition, Rosado testified that he did not come forward immediately because he was afraid that his presence during the shooting would constitute a violation of parole, and that he gave a statement to the police within one or two days of the shooting after his parole officer assured him that there would be no violation if he did nothing wrong.

Moreover, the jury was not compelled to credit the defendant's evidence that Tony Payton had been too far away from the shooting to see clearly and that his view had been blocked, rather than Payton's testimony that he was able to see the defendant. We also reject the defendant's claim that Payton's testimony was unreliable because he had been told the shooters' names after the shooting. The evidence showed only that Payton did not know the defendant's name at the time of the shooting, not that he was unable to recognize him.

Finally, we are not persuaded by the defendant's argument that Tony Payton had no [***50] credibility because his testimony that the defendant had shot Abdul-Hakeem in the chest was inconsistent with evidence that Abdul-Hakeem **[*812]** had not received a shotgun injury, but had been killed by a bullet wound to his left buttock. The evidence showed that shotgun pellets were removed from the back of Abdul-Hakeem's leather jacket by the pathologist during an autopsy. Thus, there was only a minor inconsistency in the evidence, which reasonably could be explained by the frightening, fast moving and chaotic nature of the incident. Accordingly, we reject this claim.

B

We next address the defendant's claim that the evidence was insufficient to establish that he intentionally had injured or attempted to kill Burton. The following facts and procedural history are relevant to this claim. Burton testified that he had grown up and gone to high school in Bridgeport but now lived in New Britain. On the evening of February 2, 2002, he went with Desiree Jones and Keaga Johnson to a bar in Bridgeport called Barons. At the bar he met several high school friends, Francisco Soares, John Soares and "Little Jay." At some point, Burton and the others decided to leave Barons and go to a club called GQ's, [***51] and to stop on the way at Pettway's for cigarettes. Burton drove in his car with Jones and Johnson, and Francisco Soares, John Soares and Little Jay drove in a van. Burton parked his car on the south side of Stratford Avenue across from Pettway's and the van parked on the west side of Fifth Street [**1123] next to Pettway's. Burton then went into Pettway's with Francisco Soares. Tony Payton testified that he saw his brother, Robert Payton, get out of the van with Francisco Soares, who was a friend of Robert Payton's. Burton saw three or four men outside of Pettway's whom he

recognized from the street, but he did not know their names. Burton left the store before Francisco Soares and waited for him on the corner. He then heard someone say, "[D]on't nobody move." He turned west toward Fourth Street to see who was talking and **[*813]** saw three men approaching. One of the men reached into his jacket and pulled out a shotgun. The other two men carried handguns. The next thing that Burton remembered was falling to the ground. He then heard eight to ten shots. He felt a sharp pain on the left side of his chest and thought that he might have fallen on a rock. After the shooting stopped, he got up and walked [***52] back to his car. As he walked he heard Jones, who had moved into the driver's seat of the car, and others around him saying that he had been shot. Burton checked himself and discovered that he was bleeding. He then got into the car and told Jones how to get to the nearest hospital. At the hospital, Burton was told that a bullet had fractured one of his ribs and that a second bullet had grazed his hip. He was in the hospital for two days and stayed home from work for about one month.

During closing argument, defense counsel argued that the evidence had established that Burton was "an innocent victim, an innocent bystander and had no axe to grind with any of these people because he didn't know them well enough." The prosecutor stated that the defendant was "[f]iring at the area of Rosado, [Robert] Payton and [Abdul-Hakeem]," and that "Burton got caught in the crossfire." At the sentencing hearing, the prosecutor argued that the defendant had "the purpose of shooting specific individuals . . . one being the murder victim [Abdul-Hakeem], and the other being . . . Rosado." He further argued that "the injury to . . . Burton was occasioned by the fact that this defendant along with [***53] the others were firing at the individuals, and he was an innocent individual who was struck."

The defendant claims that, on the basis of the evidence presented at trial, the jury reasonably could not have found that the defendant injured or attempted to kill Burton. He argues that there was no evidence that Burton's injuries were caused by a bullet rather than **[*814]** "things like shards of cement or glass." He further argues that the evidence was insufficient to establish that the defendant actually had injured Burton or intended to kill him. 22 We are not persuaded.

[***54] The defendant's claim that the evidence was insufficient to establish beyond a reasonable doubt that Burton had been wounded by a bullet requires little discussion. Burton testified unequivocally that he had received and had been treated for two bullet wounds, and the defendant has provided no authority for the proposition that expert medical testimony is required under these circumstances. Accordingly, we reject this claim.

The defendant's claim that the evidence did not establish that he had the requisite intent for intentional assault or attempted murder requires a lengthier [**1124] analysis.***HN28*** "A verdict of guilty of attempted murder requires a finding of the specific intent to cause death. See General Statutes §§ 53a-49, 53a-54a and 53a-3 (11). A verdict of guilty of assault in the first degree in violation of § 53a-59 (a) (5) . . . requires a finding of the specific intent to cause physical injury. See General Statutes §§ 53a-59 (a) (5) and 53a-3 (3) . . . ." (Citation omitted.) *State* v. *Murray*, 254 Conn. 472, 479, 757 A.2d 578 (2000). "Because [***55] direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the **[*815]** events leading to and immediately following the death. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citation omitted; internal quotation marks omitted.) *State* v. *Gary*, supra, 273 Conn. 407.

We conclude that the evidence was sufficient to support a conviction of attempted murder. The evidence showed that the defendant was hostile toward Robert Payton and that that hostility extended to Payton's associates. The evidence also showed that, on the night of the shooting, Burton was associating with a group of people that included Payton. The defendant and the other shooters drew their weapons, pointed them at Burton and the others standing outside of Pettway's and fired. We conclude that, [***56] on the basis of this evidence, the jury reasonably could have found beyond a reasonable doubt that the defendant intended to kill Burton. 23 Indeed, although defense counsel characterized Burton as an "innocent bystander" in closing arguments, he never argued to the jury or to the trial court that there was insufficient evidence to support a finding that the defendant intended to kill Burton. Instead, defense counsel focused almost exclusively on the defendant's claim that the evidence was insufficient to establish that he was one of the shooters.

The foregoing analysis also establishes that the jury reasonably could have found that the defendant had the intent to cause physical injury to Burton. See *State* v. *Murray*, supra, 254 Conn. 483 ("one cannot intend to cause death without [***57] necessarily intending to cause a physical injury"). Even if we were to assume that the evidence did not establish that the defendant directly **[*816]** had injured Burton, the jury reasonably could have found him guilty as an accessory pursuant to General Statutes § 53a-8. 24 Accordingly, we conclude that the evidence was sufficient to support a conviction of intentional assault.

intentional assault.

We recognize that the prosecutor argued to the jury that "Burton got caught in the crossfire," and, at [***58] the sentencing hearing, the prosecutor characterized Burton as an "innocent" victim of the attack on Abdul-Hakeem and Rosado. Those statements, however, are not necessarily [**1125] inconsistent with a finding that the defendant intended to kill Burton. The jury reasonably could have concluded that, although Burton was "innocent" in the sense that he had done nothing to provoke the attack and the defendant had no preexisting hostility toward him, Burton's appearance at Pettway's with Robert Payton, Rosado and Abdul-Hakeem on the night of the shooting provided a reason for the defendant to form an intent to kill him. Moreover, even if we were to assume that the prosecutor ultimately came to believe that Burton was an unintended victim, that view of the evidence was not the only reasonable one. 25 The **[*817]** trial court instructed the jury that arguments and statements by the attorneys were not evidence and that, "[i]f the facts as [the jurors] remember them differ from the way the lawyers have stated them, your memory of them controls." The court also instructed the jury that, to find the defendant guilty of attempted murder, it must find that he "had the intent to cause the death of . . . Burton [***59] . . . ." "In the absence of any indication to the contrary, we presume that the jury followed the court's instruction[s]." (Internal quotation marks omitted.) *State* v. *Alston*, 272 Conn. 432, 446, 862 A.2d 817 (2005). Accordingly, we reject this claim.

[***60] C

We next address the defendant's claim that the evidence was insufficient to support his convictions of intentional assault and attempted murder with respect to Rosado. The following additional facts and procedural history are relevant to this claim. Rosado testified that, when he saw the defendant "aiming [his gun] towards [him]," he ran for the door of Pettway's. He further testified that, as he ran, "I got hit in my right leg. When I got hit in my right leg, it spun me around. When it spun me around, I got hit in my back leg and dove in the store." The first shot hit Rosado below his right knee, and the second shot hit him in his left calf. When the shooting stopped, Francisco Soares and "Kenny" 26 pulled Rosado out of Pettway's and laid him on the sidewalk in front of the store. Rosado was taken to the hospital by ambulance. The ambulance personnel cleaned his wounds and gave him pain medication. Rosado was taken to the emergency room and was released four or five hours later.

[***61] The defendant claims that this evidence was insufficient to establish that Rosado was injured by a firearm and not in some other manner, such as being stepped **[*818]** on during the general rush to the door of Pettway's, or to establish that the defendant intended to injure or kill Rosado. As with the previous claim, the defendant's claim that Rosado did not suffer a gunshot wound is easily disposed of. Rosado's unequivocal testimony that he was shot, that ambulance personnel cleaned his wounds [**1126] and treated him for pain, and that he was in the hospital for four or five hours, was sufficient to support a finding beyond a reasonable doubt that he was wounded by gunfire. To the extent that the defendant claims that Rosado's testimony should not have been credited, he had every opportunity at trial to explore whether something other than a bullet had caused the injuries.

We also reject the defendant's claim that the fact that, although the shooters had "the full opportunity to kill anyone they wanted to kill," 27 Rosado was not wounded in a vital body part and apparently was hit by "the outer edge of a shotgun spray" establishes that the defendant did not aim at Rosado and, therefore, precludes [***62] a finding beyond a reasonable doubt that the defendant intended to injure or kill Rosado. We rejected a virtually identical claim -- raised by the same defense counsel -- in our recent decision in *State* v. *Gary*, supra, 273 Conn. 411 (fact that defendant did not shoot intended victim did not preclude jury from finding that defendant had aimed gun at intended victim and had intended to kill him). As we noted in *Gary*, the fact that the defendant did not kill, or, in that case, even injure, his intended victim did not preclude the jury from finding an intent to kill. Id. The evidence in the present case showed that the defendant had a motive to kill Rosado, aimed a shotgun at him and fired. We conclude that this evidence was sufficient to support **[*819]** a finding beyond a reasonable doubt that the defendant had intended to kill Rosado.

D

We next address the defendant's [***63] claim that there was insufficient evidence to support his conviction of murder. Specifically, the defendant claims that there was insufficient evidence to support a finding that the defendant or the other shooters had intended to kill Abdul-Kareem because, although, according to one witness, the defendant had the opportunity to kill whomever he wanted to kill, the gunshot wound to Abdul-Kareem's left buttock did not kill him immediately and it did not appear to be a fatal wound. The defendant does not identify the evidence on which he relies in support of his claim that Abdul-Hakeem "did not even appear to be seriously hurt" when the shooters left the scene. 28 Even if we were to assume the accuracy of that account, however, we are not persuaded.

[***64] The defendant engages yet again in the faulty logic that, because the jury *may* infer intent to kill from conduct designed to ensure that the intended victim actually was dead, the jury may *not* infer intent to kill if the intended victim was alive when the defendant left the scene, regardless of the other

intent to kill if the intended victim was alive when the defendant left the scene, regardless of the other circumstances of the crime. Nothing in our case law governing sufficiency of the evidence claims related to mental states supports such a conclusion. The evidence in the present case established that the defendant aimed his shotgun at Abdul-Hakeem and fired it; shotgun pellets penetrated Abdul-Hakeem's

leather jacket; the defendant yelled, "I **[*820]** told you I was going to get you, Polo, I told you I was going to get you"; the [**1127] defendant was acting in concert with the other shooters, one or more of whom shot Abdul-Hakeem twice; and Abdul-Hakeem ultimately died of the wound to his left buttock. This evidence was more than sufficient to support a finding beyond a reasonable doubt that the defendant and his confederates intended to kill Abdul-Hakeem. Accordingly, we reject this claim.

V

The defendant next claims that the trial court improperly instructed the jury on the principles [***65] of accessory liability pursuant to § 53a-8. Specifically, he contends that the trial court's inclusion of language pertaining to theories of joint criminal enterprise 29 [***66] and conspiracy 30 in its jury instructions was improper because it had allowed the jury to find the defendant guilty as an accessory without finding that he had the intent required for commission of the substantive offense. See *State* v. *Diaz*, 237 Conn. 518, 536, 679 A.2d 902 (1996) (inclusion of common design language in instruction on accessory liability for murder was improper because state is not required to prove specific intent to kill under common design theory); see also *State* v. *Martinez*, 278 Conn. 598, 611-19, 900 A.2d 485 (2006) (accessorial liability and conspiracy are distinct theories of criminal liability).

[*821] The following additional procedural history is relevant to this claim. During its charge to the jury, the trial court read the text of § 53a-8. See footnote 24 of this opinion. The court then gave the following instructions: "If a person did any of those things specified in [§ 53a-8], he is, in the eyes of the law, just as guilty of the crime charged as though he had directly committed it or directly participated in its commission. Everyone is a party to a crime who actually does some act forming part of it or who assists in its actual commission or the commission of any part of it or who directly or indirectly [***67] counsels or procures anyone to commit the crime or to do any act which is a part of it. *If there is a joint criminal enterprise, each party to it is criminally responsible for all acts done in furtherance of it.*" (Emphasis added.) Shortly thereafter, the court instructed the jury that "[w]here accessory liability is charged, it is not necessary that the state prove the identity of the actual perpetrator, as long as to such person the state proves all the elements of the crime charged. *In order to find a person who is an accessory under the statute, it is not necessary to show agreement in words or writing, but such an agreement may be inferred from all the circumstances*. Whether someone who is present at the commission of a crime is an accessory to it depends on the circumstances surrounding his presence and his conduct while there." (Emphasis added.) The defendant challenges the emphasized portions of the jury charge.

The defendant concedes that this claim was not preserved, but contends that he should prevail under *State* v. *Golding*, supra, 213 Conn. 239-40. [**1128] Because the record is adequate for review, and because the claim implicates the defendant's [***68] due process right to a fair trial; see *State* v. *Anderson*, 212 Conn. 31, 36, 561 A.2d 897 (1989) (***HN32*** "the failure to instruct the jury adequately on each essential element of the crime charged may [result] **[*822]** in a violation of the defendant's due process rights implicating the fairness of his [or her] trial" [internal quotation marks omitted]); we review the claim. 31 We conclude, however, that he cannot prevail on the claim.

[***69] ***HN33*** "Our standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rule of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 714, 756 A.2d 799 (2000).

We agree with the defendant in the present case that the trial court should not have included in its instructions language pertaining to theories of conspiracy and joint criminal enterprise when the [***70] defendant was charged only as a principal or an accessory. As in *State* v. *Diaz*, supra, 237 Conn. 536-37, however, we conclude that, although the trial court's instructions were improper, they reasonably could not have misled the **[*823]** jury and were harmless beyond a reasonable doubt. The trial court repeatedly and forcefully instructed the jury that, in order to convict the defendant as an accessory, it must find that the defendant acted with the intent required for the commission of the crime. 32 Although the court used some language derived from principles governing joint criminal enterprise and conspiracy, it never suggested to the jury that, under those theories, the jury [**1129] was not required to find that the defendant had the criminal intent required by the substantive offenses with

required to find that the defendant had the criminal intent required by the substantive offenses with which he was charged. Thus, there was no reasonable possibility that the jury was misled to believe that, if it found that the defendant had entered into a criminal agreement with his confederates or was engaged in a joint criminal enterprise, there was no need for it to find that he had the criminal intent

required for murder, attempted murder or assault. If anything, the court's instructions [***71] may have made it *more* difficult for the jury to convict the defendant by suggesting that, in *addition* to finding that the defendant had the specific intent to commit the offenses, the jury had to find that he had entered into an agreement or a joint criminal enterprise with his confederates. Accordingly, we reject this claim.

[***72] The judgment is affirmed.

In this opinion the other justices concurred.

Footnotes

1 The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b), which provides in relevant part: ***HN1*** "The following matters shall be taken directly to the Supreme Court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years . . . ."

2 General Statutes § 53a-54a (a) provides in relevant part: ***HN2*** "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

3 General Statutes § 53a-49 (a) provides in relevant part: ***HN3*** "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

4 General Statutes § 53a-59 (a) provides in relevant part: ***HN4*** "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

5 Burton testified that he had seen three men approaching Pettway's from the direction of Fourth Street, one of whom carried a shotgun and two of whom carried handguns.

6 Practice Book § 42-54 provides: ***HN5*** "Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict

in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period."

7 But see *United States* v. *Butz*, 517 F. Supp. 1167, 1169 (S.D.N.Y. 1981) (when trial transcript was not available at sentencing but new counsel had sufficient information to be familiar with case, and sentencing court promised to correct sentence if transcript proved helpful, court did not abuse discretion in holding sentencing hearing before transcript could be prepared); *State* v. *Washington*, 275 Kan. 644, 677-80, 68 P.3d 134 (2003) (trial court properly denied new counsel opportunity to review trial transcript before sentencing when defendant could raise claims of trial error on appeal and new counsel had other sources for relevant information, but case was remanded for new sentencing hearing because new counsel's lack of knowledge of statutory provisions governing sentencing at sentencing hearing constituted ineffective assistance of counsel).

8 With respect to any unpreserved claims of error that the defendant claims he would have raised in a motion for a new trial, ***HN11*** it is well established that a motion for a new trial is not the proper vehicle for raising new, unpreserved claims of error. See *State* v. *Whipper*, 258 Conn. 229, 244, 780 A.2d 53 (2001), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 848 A.2d 445 (2004); *State* v. *Gebhardt*, 83 Conn. App. 772, 780-81, 851 A.2d 391 (2004). Accordingly, new counsel for the defendant properly could not have raised such claims in a motion for a new trial even if the continuance had been granted.

9 The court in *Brodene* stated that "[a]ny error in not providing [a trial transcript] can be ignored . . . because a transcript was later furnished in connection with this appeal. We can cure any error, and do so, by excusing the new counsel from any preservation of error requirements in preparing and presenting the posttrial motions." *State* v. *Brodene*, supra, 493 N.W.2d 795. Under our practice, claims of evidentiary error and prosecutorial misconduct, like those raised by the defendant in the present case, may be raised on appeal if they were raised during trial regardless of whether they were raised again in a motion for a new trial. Accordingly, there is no need for this court to excuse the failure to raise the claims in a motion for a new trial. Any such claims that were *not* raised during trial could not have been raised in a motion for a new trial. See footnote 8 of this opinion.

10 To establish harm, a defendant could show that the trial transcript contained information that was otherwise unavailable to the defendant or his counsel that would have allowed counsel to argue that the sentencing information provided by the government was inaccurate and that the sentencing court relied on this inaccurate information; *United States* v. *Katalinich*, 113 F.3d 1475, 1484 (7th Cir. 1997); that the defendant was a minor participant in the crime; *United States* v. *Beltran*, 109 F.3d 365, 370 (7th Cir.), cert. denied, 522 U.S. 852, 118 S. Ct. 145, 139 L. Ed. 2d 92 (1997); that the defendant was remorseful; see *United States* v. *Leasure*, 122 F.3d 837, 840-41 (9th Cir. 1997), cert. denied, 522 U.S. 1065, 118 S. Ct. 731, 139 L. Ed. 2d 668 (1998); that the defendant had been candid with the government; see *United States* v. *Ming He*, 94 F.3d 782, 795 (2d Cir. 1996); or that the defendant had a mental disease or defect that,

although it did not excuse the crime, justified a reduced sentence. See *State* v. *Washington*, supra, 275 Kan. 678. We do not suggest that this list is exclusive. The defendant in the present case states in his brief that the prosecutor made "several substantial factual errors" in his

summation of the evidence at the sentencing hearing that "were not noted by new defense counsel, because he did not know that they were errors." The defendant further states that page limitations on the brief prevented him from identifying *any* of these errors but, in any event, there was no need to do so because the denial of the motion for a continuance was structural error and not susceptible to harmless error review. Accordingly, we conclude the defendant has abandoned this claim of prejudice.

11 See also *United States* v. *Stevens*, 223 F.3d 239, 244 (3d Cir. 2000) (***HN13*** structural errors at sentencing involve "'very limited class of cases'" including "deprivation of counsel during the sentencing hearing itself . . . abdication of judicial role by authorizing a probation officer to determine the manner of restitution . . . and in absentia sentencing" [citations omitted]), cert. denied, 531 U.S. 1179, 121 S. Ct. 1157, 148 L. Ed. 2d 1018 (2001); compare *United States* v. *Beltran*, 109 F.3d 365, 371 (7th Cir.) (trial court's reliance on information that was not disclosed to defendant until immediately before sentencing hearing is generally improper, but impropriety is harmless if it could not have changed result), cert. denied, 522 U.S. 852, 118 S. Ct. 145, 139 L. Ed. 2d 92 (1997); *United States* v. *Katalinich*, 113 F.3d 1475, 1484 (7th Cir.) ("[t]o succeed in challenging a sentence, a defendant must demonstrate that the information before the court was inaccurate and that the court relied on this inaccurate information"), cert. denied, 522 U.S. 905, 118 S. Ct. 260, 139 L. Ed. 2d 187 (1997); *United States* v. *Berndt*, 127 F.3d 251, 260 (2d Cir. 1997) (trial court improperly failed to give defendant opportunity to comment on information used in sentencing, but impropriety was harmless when defendant failed to establish that it could have changed result); *United States* v. *Garcia*, 78 F.3d 1457 (10th Cir.) (same), cert. denied, 517 U.S. 1239, 116 S. Ct. 1888, 135 L. Ed. 2d 182 (1996); *United States* v. *Ming He*, 94 F.3d 782, 795 (2d Cir. 1996) (when government debriefed defendant who was cooperating witness in separate matter in absence of defendant's attorney, trial court's improper reliance on defendant's lack of candor as sentencing factor was subject to harmless error analysis); *United States* v. *Prescott*, 920 F.2d 139, 146-47 (2d Cir. 1990) (trial court's denial of continuances to develop mitigating evidence was harmless absent showing that denial substantially impaired defendant's opportunity to secure fair sentence); *United States* v. *Kramer*, 711 F.2d 789, 797-98 (7th Cir.) (trial court did not abuse discretion in denying defendant access to presentence reports reviewed by court in camera when defendant made no showing that information in reports could have affected result), cert. denied, 464 U.S. 962, 104 S. Ct. 397, 78 L. Ed. 2d 339 (1983); *State* v. *Borders*, 255 Kan. 871, 886-87, 879 P.2d 620 (1994) (trial court properly denied continuance to allow defendant to present additional mitigating evidence at sentencing hearing when defendant failed to demonstrate that he had any additional evidence to submit); *State* v. *Woldegiorgis*, 53 Wn. App. 92, 94-95, 765 P.2d 920 (1988) (same), review denied, 112 Wn.2d 1012 (1989); see also *United States* v. *Dowlin*, 408 F.3d 647, 668-69 (10th Cir. 2005) (when court unconstitutionally relied on judicial fact-finding in enhancing sentence, impropriety is reviewed for harmless error); *United States* v. *Leasure*, 122 F.3d 837, 840 (9th Cir. 1997), cert. denied, 522 U.S. 1065, 118 S. Ct. 731, 139 L. Ed. 2d 668 (1998) (improper denial of right of allocution is reviewed for harmless error).

12 To the extent that the defendant contends that the denial of his motion for a continuance deprived him of effective assistance of counsel, he must establish prejudice to prevail on that claim. See *United States* v. *Gonzalez-**Lopez***, __ U.S. __, 126 S. Ct. 2557, 2563, 165 L. Ed. 2d 409 (2006)

409 (2000).

13 Subsection (a) of § 4-5 of the Connecticut Code of Evidence provides: ***HN15*** "Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person."

Subsection (b) of § 4-5 of the Connecticut Code of Evidence provides: ***HN16*** "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

14 We address the defendant's claim that there was insufficient evidence to establish his identity as one of the shooters in part IV A of this opinion.

15 The defendant states in his brief that Rosado "specifically denied that the defendant had threatened him or had any reason for shooting at him or at [Abdul-Hakeem]." The portion of the trial transcript cited by the defendant does not support this claim. When defense counsel asked Rosado, "[Y]ou didn't know of any reason or difficulties that he had with you or your brother, *is that right*," Rosado responded, "No." (Emphasis added.) Defense counsel then asked, "So . . . you wouldn't be aware of any reason he would have to shoot either one of you, is that a fair statement?" The state's attorney objected to the question, but Rosado responded, "Yeah, that's not a fair statement, no." Defense counsel then withdrew the question and the trial court ordered the response stricken from the record. Defense counsel then asked Rosado whether he had told police shortly after the shooting that he was not aware of any reason for the shooting, and Rosado responded that he did not know why it happened.

16 In support of this claim, the defendant points to the following portion of the prosecutor's closing argument: "I'd submit to you, ladies and gentlemen [that] identification, [is] clearly the issue here. Why [should Rosado] name the defendant? Why name him? Why put him in here? Why say that it's this particular individual as opposed to somebody else? If . . . Rosado wants to get out from under the so-called problem with the parole officer, he could just give any name.

"But, he gives a name, and don't forget the following testimony from . . . Rosado . . . Rosado says about a week before, and there's no contradiction to this, the defendant is with a gun and [Robert] Payton. They're discussing something, but what does the defendant do? Remember that? He shows him the gun, shows . . . Rosado the gun and says, you want some of this? That might not be the way that you work in your business, whether it's teaching, whether it's counseling, whether it's working in a nursing home, maybe that's not the way that you talk.

"But now in the mind of . . . Rosado, is that a threat made by the defendant to him?"

17 Under *State* v. *Golding*, supra, 213 Conn. 239-40, "a defendant can prevail on a claim of

constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original.)

18 The prosecutor stated: "[A]s part of his [plea] agreement, and again, you might recall it came out on cross-examination, he has a possibility of getting less time in jail, but for what? For testifying? No, that's one factor, but for testifying truthfully.

"So therefore, if the jury has to make a determination on credibility on what [Tony] Payton has said, you have to think about the other side of this. If he's lying to anybody, it doesn't matter to you, to anybody, his plea agreement is gone and he can get up to ten years.

"The same holds true for . . . Rosado also. [Defense counsel] touched on this. If he lies, that's going to affect him. And [defense counsel] agreed there is no plea agreement, no deal with . . . Rosado. There's no evidence he's hoping for anything."

19 He does claim, however, that "this same prosecutor's office has previously been severely criticized . . . for trying to make a similar vouching argument," and cites *Bond* v. *Commissioner of Correction*, 87 Conn. App. 50, 59-60, 863 A.2d 757, cert. denied, 273 Conn. 912, 870 A.2d 1079 (2005). See also *Bond* v. *Warden*, Superior Court, judicial district of Danbury at Danbury, Docket No. 020345928S, 2003 Conn. Super. LEXIS 1628 (May 28, 2003). In *Bond*, the prosecutor attempted to admit into evidence a plea agreement between a witness and the federal government requiring the witness to testify truthfully, and defense counsel objected on the basis of relevance. *Bond* v. *Commissioner of Correction*, supra, 60. In the presence of the jury, the prosecutor stated that he "'knew that [the witness] would testify truthfully based on [his] personal knowledge gained from working on the case.'" Id. Defense counsel did not object to this remark. Id. The trial court stated that the truthfulness of the witness would be decided by the jury and the prosecutor could not vouch for his credibility. Id. The court sustained the defendant's objection and struck the evidence pertaining to the plea agreement. Id. The defendant later filed a petition for writ of habeas corpus in which he claimed that his attorney had been ineffective when he failed to object to the prosecutor's statement regarding his personal knowledge of the witness' truthfulness. Id., 59. The Appellate Court rejected this claim, concluding that, in light of the trial court's critical statements to the prosecutor, defense counsel had made a strategic decision not to object to the remark. Id., 60.

Thus, contrary to the defendant's argument in the present case, the trial court in *Bond* did not criticize the prosecutor for pointing to testimony pertaining to the provisions of a plea agreement requiring the witness to be truthful. Rather, the court criticized the prosecutor for vouching for the truthfulness of a witness on the basis of his personal knowledge. Whether the trial court properly excluded evidence pertaining to the plea agreement between the witness and the federal government was not at issue in *Bond*.

20 Tony Payton testified that he had recognized the defendant at the time of the shooting

Tony Payton testified that he had recognized the defendant at the time of the shooting because he had seen him many times in the neighborhood, but that he did not know his name or street name. He also testified that he had recognized one of the shooters as McClain. After the shooting, he heard rumors that someone named "Kaiser" had been involved, but he did not know that that was McClain's street name until April Edwards told him so two months after the shooting.

21 Tony Payton testified that he was on his way to Pettway's on the night of the shooting when a man on the other side of the street, whom he did not recognize, told him to "watch out, there [are] some guys riding around in a white car, I don't know what they [are] up to." Payton then decided to avoid the street and to cut through the backyards of the houses on the south side of Stratford Avenue. When he arrived at the area near the intersection of Stratford Avenue and Fifth Street, he hid next to a house on the south side of Stratford Avenue for a period of time. He testified that he was able to see all of Fifth Street and the area in front of the door to Pettway's from his hiding place. When he was asked to point out his location on a police sketch of the area, he pointed to an area to the southeast of Pettway's, near a utility pole. The defendant argues that, if Payton had been hiding in that area, his view of Pettway's and Fifth Street would have been blocked by the utility pole.

22 The defendant also contends that he could not be found guilty of attempted murder under a theory of transferred intent. See *State* v. *Hinton*, 227 Conn. 301, 316-18, 630 A.2d 593 (1993) (doctrine of transferred intent does not apply to attempt crimes). Because the state did not prosecute the defendant under a theory of transferred intent, and the jury received no instructions on the doctrine, we need not address this issue.

23 The jury also reasonably could have concluded that, even if the defendant's hostility toward Robert Payton's associates did not extend to Burton, the defendant wanted to eliminate witnesses to the shooting.

24 General Statutes § 53a-8 (a) provides: ***HN29*** "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

As we discuss in part V of this opinion, the trial court instructed the jury on the principles of accessory liability.

25 In his main brief, the defendant contends only that the evidence presented at trial was insufficient to support a finding that he intended to kill Burton. In his reply brief, he contends for the first time that it was unethical and a violation of due process for the prosecutor to put

forward factually inconsistent theories during the presentation of evidence and at the sentencing hearing. See *Smith* v. *Groose*, 205 F.3d 1045 (8th Cir. 2000). As we have indicated, however, the prosecutor's suggestion that Burton was an innocent bystander was not necessarily inconsistent with his claim that the defendant intended to kill Burton. In any event, "[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 373 n.36, 857 A.2d 808 (2004), cert. denied, 541 U.S. 1029, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). Accordingly, we decline to address this claim.

26 "Kenny" apparently was John Soares' nickname.

27 The defendant relies on Tony Payton's testimony that "whoever [the defendant] wanted he had, he could have got everybody."

28 Rosado testified that, immediately after the shooting, Abdul-Hakeem was lying on the ground near the door to Pettway's and a man named "Country" then dragged him toward the van. Rosado also testified that, after he and Abdul-Hakeem were taken to the hospital, he was initially told that his brother was going to live. The medical examiner's report indicates that Abdul-Hakeem "lost pulses" after he was brought to the emergency room, and was declared dead at 4:21 a.m.

29 ***HN30*** Under the common design theory, "[a]ll who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of, or in furtherance of, the common design." (Internal quotation marks omitted.) *State* v. *Cox*, 126 Conn. 48, 59, 9 A.2d 138 (1939) .

30 ***HN31*** Under the *Pinkerton* doctrine, "a conspirator may be held liable for criminal offenses committed by a coconspirator if those offenses are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy." *State* v. *Diaz*, 237 Conn. 518, 526, 679 A.2d 902 (1996), citing *Pinkerton* v. *United States*, 328 U.S. 640, 647-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

31 The state contended at oral argument before this court that, because the trial court had held multiple charging conferences with the defendant and the state, review of this claim is precluded by *State* v. *Cruz*, 269 Conn. 97, 106-107, 848 A.2d 445 (2004) (*Golding* review is not available for unpreserved claims of induced instructional error). In *Cruz*, however, the defendant actually requested the instruction that he later claimed to be improper. Id., 102. The state does

not suggest that the defendant in the present case requested the challenged instruction. Accordingly, we conclude that *Cruz* is not applicable here.

32 The court instructed the jury that it could convict the defendant as an accessory only if it found that he possessed the following: "the mental state required for the commission of an offense"; "the mental state required, that is the criminal intent required by the statute for the commission of the crime"; "a criminality of intent and an unlawful purpose in common with the actual perpetrator"; "criminal and common intent [with the perpetrator]"; "the same criminal intent required for the crime for which he is an accessory"; "the intent to commit the crime of murder . . . where, as here, he [is accused of being] an accessory by aiding the commission of that crime"; "the same mental state required for the commission of the underlying crime and . . . the same unlawful purpose in common with the person who actually commits that crime"; and "the same criminal intent and unlawful purpose necessary to be guilty of the crime as does the actual perpetrator, that is, the principal."

Content Type: Cases

Terms: ramon lopez

Narrow By: Court: State Courts>Connecticut

Date and Time: Apr 08, 2022 08:13:04 a.m. EDT