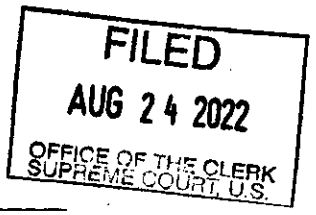
NO. 22-5506

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



KACEY LEWIS,
PETITIONER

Vs.

COMMISSIONER OF CORRECTION,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

CONNECTICUT APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. WHETHER THE PETITIONER WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL DURING HIS 2009 CRIMINAL TRIAL COURT PROCEEDINGS IN THE JUDICIAL DISTRICT OF WATERBURY? Pg. 3

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LIST OF PARTIES

KACEY LEWIS,

Petitioner

V.

COMMISSIONER OF CORRECTION,

Respondent

FOR PETITIONER: Kacey Lewis, pro se, Cheshire, Connecticut

FOR RESPONDENT: Brett R. Aiello, Office of Chief State's Attorney, Rocky Hill, Connecticut

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RELATED CASES

State v. Lewis, No. UWY-CR09-0382586-T, Connecticut Superior Court, Judgment entered March 12, 2010.

State v. Lewis, No. AC 35389, Connecticut Appellate Court, Judgment entered March 4, 2014.

Lewis v. Connecticut, No. UWY-CV11-50161132-S, Connecticut Superior Court, Judgment entered May 27, 2015.

Lewis v. Connecticut, No. AC 38283, Connecticut Appellate Court, Judgment entered September 20, 2015.

Lewis v. Warden, No. TSR-CV15-4006877-S, Connecticut Superior Court, Judgment entered May 17, 2019.

Lewis v. Commissioner of Correction, No. AC 43381, Connecticut Appellate Court, Judgment entered March 8, 2022.

NOTATION RE: TRANSCRIPTS/EXHIBITS

Throughout this petition, Petitioner refers to transcripts/exhibits that he filed on appeal in this case, printed in the Appendix to Reply Brief, in case No. AC 43381, **Lewis v. Commissioner of Correction**, (Conn. App.Ct. June 29, 2021), which are accessible through the Connecticut Appellate Court's website. The habeas court transcripts (HCT") were filed on appeal in this case on September 25, 2020. **Id.**

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OPINIONS BELOW

The opinion of the Connecitcut Appellate Court appears at Appendix A to the petition and is reported at 211 Conn. App. 77.

The decision of the Connecticut Habeas Court appears at Appendix B and is unpublished. See. **Lewis v. Warden**, No. TSR-CV15-4006877-S (Conn. Super. Ct. May 17, 2019).

JURISDICTION

On May 31, 2022, the Connecticut Supreme Court entered an Order denying Petitioner's petition for certification to appeal. A copy of that decision appears at Appendix C to the petition. No motion for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S .CONST. AMEND. SIXTH

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

U.S. CONST. AMEND. FOURTEENTH

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

CONN. CONST. ART I. SEC. 8

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf, to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great: and in all prosecutions by indictment or information to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed.

No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or and indictment of grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

CONN. CONST. ART I. SEC. 20

No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national orgin.

STATEMENT OF THE CASE

I. THE PETITIONER WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL DURILNG HIS 2009 CRIMINAL TRIAL COURT PROCEEDINGS IN THE JUDICIAL DISTRICT OF WATERBURY

A. Deprivation of Investigative Services

The United States Supreme Court "Has long recognized that when a [s]tate brings it's judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the [f]ourteenth [a]mendments due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningful in a judicial proceeding in which his liberty is at stake". State v. Wang, 312 Conn. 222, 232(2014); (quoting Ake v. Oklahoma, 470 U.S. 68,76,105 S.Ct. 1087, L.Ed. 2d 53 (1985). Elaborating upon this principle, the United States Supreme Court has explained: "[a] criminal trial is fundamentally unfair if the [s]tate proceeds against an indigent defendant without making certain that he has access to the raw materials intergal to building of an effective defense..." Id.

That is exactly what happened in this case--in the course of his criminal trial, the State of Connecticut deprived the pro se indigent defendant Kacey Lewis of the minimal tools required to prepare and present an adequate meaningful defense.

On August 12, 2009, the Petitioner asserted his right to represent himself in the trial court. Immediately thereafer, he filed a pro se motion pursuant to Connecticut Practice Book Section 44-4, asking the court to appoint him standby counsel. On August 26, 2009, the trial court, (Fasano, J.,) found the Petitioner [i]ndigent and eligible for Public Defender Services, and appointed Assistant Public Defender Leslie K. Cavanagh as standby counsel for Defendant Kacey Lewis. (Petitioner's Exhibit 2-Trial Court Transcript, Aug 26, 2009, p.7).

On September 25, 2009, the Petitioner filed a pro se motion in the trial court asking the court to appoint an investigtor for his defense. (App.P.Reply.Br. A-255, No. AC 43381, Lewis v. Commissioner of Correction, June, 29, 2021). On October 1, 2009, the trial court, (Damiani, J.,) denied the Petitioner's motion for an investigator soley on the basis that the Petitioner rejected a public defender and elected to represent himself. (Petitioner's Exhibit 3-Trial Court Transcript, Oct 1, 2009, p.2-4, No. UWY-CR09-0382586-T, State v. Lewis, Appendix E to petition at A-125-127). In the Order Denying Petitioner's motion for investigtor, the trial court did not even consider whether appointing a publically funded investigator would be reasonably necessary for the Petitioner's defense. Instead, the court concluded appointing an investigator was contingent on Petitioner forfeiting his right to represent himself and accepting a public defender. Id.

"We can conceive of no reason...why an indigent defendant should be compelled to forfeit his due process right to access basic tools of an adequate defense merely because he chooses to exercise the...right to represent himself. In the absence of any legal basis for requiring an indigent defendant to accept public defender representation to access ancillary tools of defense the only justification offered for this requirement is administrative convenience. 'we conclude that administrative efficiency does not justify denying an indigent self-represented a fair opportunity to present a defense". State v. Wang, supra. 312 Conn. at 239-242.

Although "courts have not held that a [s]tate must purchase for indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendant's to an adequate opportunity to present their claims fairly within the adversary system... Id. at 222 (quoting Ross v. Moffitt, 417 U.S. 600,612,94 S.Ct. 2437,41 L.Ed. 2d 341(1974). See also State v. Mason, 82 Ohio St. 3d 144,149,694 N.E. 2d 932(1998). In predominant part, the cases evaluating an indigent defendant's right to access to basic tools of an adequate defense involved a defendant's request for expert witnesses. Court's however, have applied the same due process analysis when evaluating a defendant's request for other ancillary defense services, including an investigator to assist in preparing a defense. See State v. Lovelace, 140 Idaho 53,65-66,90 P.3d 278(2003)('[A] defendants' request for expert or investigative services should be reviewed in light of all circumstances and measured against the standard of 'fundamental fairness' embodied in the due process clause" [emphasis added], aff'd on rehearing, 140 Idaho, 73,75,90 P.3d 298(2004); cf. English v. Missildine, 311 N.W. 2d 292,293-94(Iowa)("[f]or indigents the

right to effective counsel includes the right to public payment for reasonably necessary investigative services"). In this case, the deprivation of investigative services was harmful and clearly violated the Petitioner's constitutional rights to a fair trial under both the federal and state constitutions.

At the time of Petitioner's 2009 criminal trial that began on Nov 19, 2009, the Petitioner was being held in jail on a two hundred and fifty thousand dollar bond stemming from the charges of his July 21, 2009 arrest. Thusly, the Petitioner had no way to conduct his own investigation from jail. Nor did he have any way to make any attempts to locate any persons that may have been witnesses to the incident that landed him in jail.

On December 7, 2009, Diane Martell testified for the Prosecution. On direct-examination, the Prosecution presented to the jury, a theory based upon an individual named Nun No to prove an element of the first degree kidnapping charge, on which the Petitioner was convicted. In particular, the Prosecution engaged in a line of questioning eliciting testimony from Diane Martell suggesting that on July 21, 2009, at the intersection of Willow Street and Hillside Avenue, in the City of Waterbury, the Petitioner had made intimidating statements to an individual Nun No, and in some way, prevented said individual getting involved or otherwise assisting Alana Thompson, from the alleged assault and kidnapping on her, by the Petitioner.(Petitioner's Exhibit 9-Trial Court Transcript, Dec 7, 2009, a.m. session, p.77, No. UWY-CR09-0382586-T, State v. Lewis, Conn.Super.Ct.). This particular testimony was crucial to the Prosecution's case, because part of the jury instructions directed the jury that if they found that the Petitioner had prevented another person from assisting Alana Thompson, then, they could find Petitoner guilty of kidnapping in the first degree.

Clearly, investigative services in this case were reasonbly necessary, because the Petitioner was on trial representing himself, with his liberty at stake, without anyway to conduct his own investigation from jail. And no way to make any attempts to locate or interview the individual named Nun No, or to determine if this person that the Police and Prosecution referred to even existed at all.

"A defendant in jail is constitutionally entitled to conduct his own defense. If he elects to do so by rejecting the services of an attorney to conduct his defense, he cannot be confined to his jail simply to look at the four walls and appear on the day of trial to defend himself. He must be afforded reasonable access to resources..." **Milton v. Morris**, 767 F.2d 1443(9th Cir. 1985),(Hug. J., concurring).

The record in this case is void of any indication that the police or the prosecution made any attempts to locate the individual named Nun-No or otherwise bring him before the jury to tell his version of the July 21, 2009 incident. But the police report indicates that there was an individual named Nun No at the scene during the date and time the police arrested the Petitioner on July 21, 2009.(Petitioner's Exhibit-8, Waterbury Police Department Incident and Offense Report, p.3; App.P. Reply.Br. A-196, No AC 43381, **Lewis v. Commissioner of Correction**, June 29, 2021). Diane Martell, Alana Thompson, and Amanda Blouin testified that an individual named Nun No was at the intersection of Willow Street and Hillside Avenue during the date and time that Petitioner was arrested. (Petitioner's Exhibit-6, p.41-43; Exhibit-9, p.65-67; Exhibit-10, p.48-49, 55; App.P.Reply.Br. A-174-176; A-209-211; A-230-231, A-233). Id.

These factors are not insignificant, but even by themselves they fall far short of assuring an indigent defendant has a fair opportunity to present his defense within the adversary system.

B. Six Amendment Confrontation Violation

It is also quite clear from the trial court record filed on appeal in this case that a confrontation violation occurred when the trial court, (Schuman, J.,) precluded the Petitioner from showing Alana Thompson her signed-written inconsistent statement during cross-examination and precluded Petitioner from introducing Thompson's signed-written inconsistent statement into evidence during cross-examination.

The record reflects that Alana Thompson, the Petitioner's then girlfriend, wrote him a letter dated August 1, 2009; ten(10) days after the Petitioner was arrested and accused of physically assaulting and kidnapping her. In said letter, Thompson wrote that she was also arrested on July 21, 2009, by the same police officers that arrested the Petitioner on that same date. She also wrote that when she was arrested the police officers found crack cocaine on her and that the police officers told her that they wouldn't charge her with possession of the narcotics if she agreed to sign a statement against the Petitioner. It is also important to note Alana Thompson also wrote that she really did not want to write the statement and that the police officers did not charge her with possession of the narcotics that they found on her. (Appendix F, A-251-254).

Four(4) months after Alana Thompson wrote her August 1, 2009 letter, she testified for the prosecution. On cross-examination, the Petitioner questioned Thompson about the contents of her letter. Alana Thompson denied that she made a deal with the police, but testified that she did remember writing the Petitioner the letter. She also testified that she could not remember anything that she wrote because [s]he was "under the influence". When the Petitioner asked Thompson if showing her the letter would refresh her memory, Thompson stated "I'm sure you can show me, but I don't remember saying that"...(Petitioner's Exhibit 10, Trial Court Transcript, Dec 7, 2009, p.m. session, No. UWY-CR09-0382586-T, Conn.Super.Ct.).

Because Alana Thompson's testimony was diametrical to what she wrote in her letter, and she claimed a lack of memory from being "under the influence", the Petitioner moved to confront Thompson by showing her the letter that she testified she remembered writing. The trial court then precluded the Petitioner from showing Alana Thompson her letter, and precluded the Petitioner from introducing Thompson's letter into evidence.

Although the trial court later conceded, and allowed Alana Thompson's inconsistent statement into evidence, but only after Thompson was long gone, no longer subject to examination, and made unavailable as a witness, by virtue of the trial court's order, "the impeachment purpose is achieved when the witness is on the stand under oath...not after the witness is no longer available, 'in other words, the only way the petitioner could have effectively impeached [T]hompson was by confronting the witness while she was testifying on the stand with respect to her statement that she wrote and signed". Appellate Court Transcript, October 20, 2021, p. 4-5. See Appendix D at A-34 A-35. It is well established law that when a witness' testimony at trial is diametrical to their prior statement(s) or when a witness claims lack of memory about their prior statement(s), the party questioning the witness is allowed to show the witness their prior written statement(s). See. State v. Whelan, 200 Conn. 743 at 746(1986). (The witness claimed he was unable to remember anything. In an attempt to refresh his recollection the witness was shown a written statement that he had given the police); State v. Butler, 207 Conn. 619 at 622-623(1988); (The witness asserted that he had not given any statement to police. The [s]tate then showed him a two page typewritten and unsigned document titled "voluntary statement").

It is also well established law that when a witness' testimony at trial is diametrical to their prior statement(s) or when the witness claims lack of memory, the party questioning the witness is allowed to introduce the prior statement into evidence during examination. See. California v. Green, 399 U.S. 149,90 S.Ct. 1930 26 L.Ed. 489(1970); United States v. Insana,423 F.2d 1165(1970); United States v. Payne, 492 F. 2d 449,452(4th.Cir.1974); United States v. Rogers, 549 F.2d 490(1976); United States v. Thompson,708 F.2d 1294(1983); State v. Whelan, supra; and State v. Butler, supra. Here, the trial court did not follow this well established law. Any plain reading of the transcript filed on the appeal in this case makes it clear that Judge Schuman unduly shielded state witness Alana Thompson, and unduly precluded the Petitioner from effectively impeaching and discrediting Alana Thompson in the presence of the jury, while she was on the stand and testifying under oath.

The purpose of confrontation is to enhance the fair trial process "by ensuring that a witness will give [h]er statements under oath, which impresses upon [h]er the seriousness of the proceedings and importance that [s]he testify truthfully; by forcing a witness to submit to cross-examination, a practice designed to elicit the truth; and by aiding the jury in assessing the credibility of a witness by observing [h]er demeanor on the stand". (emphasis added). State v. Jarzbek, 204 Conn. 683,692-93(1987); California v. Green, supra; Mattox v. United States, 156 U.S. 237 242-243(1895). Here, no such determination by the jury of witness Alana Thompson's credibility was possible, given the trial court unduly restricted the Petitioner's cross-examination of Thompson, and Thompson was long gone, and made unavailable by the court, by the time Judge Schuman concedly allowed her inconsistent statement into evidence. (Petitioner's Exhibit 6, Trial Court Transcript, Dec 8, 2009, p.7-8; 22-37).

Having said that, the jury in this case never had the opportunity to observe witness Alana Thompson's demeanor and hear her give explanations for the inaccuracy in her prior written statements in a letter that she signed on August 1, 2009 and her trial testimony that she offered to the jury of December 7, 2009. "...When the declarant is available for cross-examination the jury has the opportunity to observe [her] as [she] repudiates or varies [her] former statement. The cross-examination to which recanting witness will be subjected is likely to be meaningful because the witness will be forced either to explain the discrepancies between the earlier statements and [her] present testimony, or to deny that the earlier statement was made at all." Whelan, 200 Conn. at 750.

As a matter of common sense, this would have aided the jury in this case in assessing state witness Alana Thompson's credibility and casted light on which story of Thompson's was true and which was false. The trial court, (Schuman, J.,) ensured the impossibility of the jury to observe Thompson's demeanor and asses her credibilty, thereby violating the Petitioner's Sixth Amendment rights to grapple effectively with the incriminating evidence presented to the jury at his criminal trial in the Judicial District of Waterbury. "The right to confrontation is fundamental to a fair trial under both the federal and state constitutions". State v. Cassidy, 236 Conn. 112 122-23,672 A.2d 899, cert.denied; 591 U.S. 910,117 S.Ct. 273,136 L.Ed. 196(1996); overruled in part on other grounds. 254 Conn. 290,295-96, 755 A.2d 588(2000). "...Generally speaking, the confrontation clause guarantess an opportunity for effective cross-examination..." Delaware v. Fensterer, 474 U.S. 15,22(1985).

This Court should grant this petition and review the decisions below.

C. Brady Violations

i. The Prosecution's Suppression of Material Exculpatory Evidence, i.e., Photographs of Alana Thompson

It became evident during trial that the Prosecution did have in their possession, photographs of Alana Thompson that were taken of her on July 21, 2009, around or about twelve (12) hours after the Petitioner was arrested and accused of physically assaulting and kidnapping her. According to the Police and Prosecution, the Petitioner brutally assaulted Alana Thompson on July 21, 2009, as their narrative reads: "Lewis was repeatedly punching the [w]hite female in the head and face...[a]nd dragging [t]he white female on the ground..." (Petitioner's Exhibit 8, p.2, para. 2). (App.P.Reply.Br. A-196-198, No AC 43381, Lewis v. Commissioner).

Two of the Detectives that investigated the case for the Prosecution, Richard Innaimo and Robert Liquindoli both testified for the Prosecution. The trial court transcripts filed on appeal in this case reflects that on continued cross-examination of Detective Robert Liquindoli, the Petitioner asked the Detective if there was a picture taken of Alana Thompson at her booking when he arrested her on July 21, 2009, and the Detective testified "There was a booking photo taken by the desk personnel." (Petitioner's Exhibit-6 Trial Court Transcript, Dec 8, 2009, a.m. session, p.116-118; App.P.Reply.Br. A-185-A-186). Also, on cross-examination of Detective Richard Innaimo, the Petitioner asked the Detective was a picture taken of Alana Thompson when he arrested her for warrants, and when she was booked at headquaters, and the Detective testified "Thats correct, I believe so." (Petitioner's Exhibit-17 Trial Court Transcript, Dec 8, 2009, p.m. session, p.8-9; App.P.Reply.Br. A-308 A-309). See also state habeas court Record No. 137.00, amended petition, p. 54-56; state appellate, AC 43381, App.P.Reply.Br. A-66 A-67.

"The government is reasonably expected to have possession of evidence in the hands of investigators who are part of the "prosecution team". United States v. Gil, 297 F.3d 93,106(2nd Cir.2002)(quoting Kyles v. Whitley, 514 U.S. 419-506,115 S.Ct. 1553; 131 L.Ed. 490(1995).

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonably probability" of a different result is accordingly shown when the government's evidentirary suppression "undermines confidence in the outcome of the trial". United States v. Bagley, 473 U.S. 667-678, 87 L.Ed. 481,105 S.Ct.3375(1985). Materiality under Bagley is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict". See. Kyles v. Whitley, 514 U.S. 419-506,115 S.Ct. 1553, 131 L.E.d. 490(1995).

The United States Supreme Court has long recognized that "the prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its orgins to early 20th century strictures against misrepresentation and is of course most prominently associated with [t]he court's decision in Brady v. Maryland, 373 U.S. 83,10 L.Ed. 2d 215, 83 S.Ct. 1194(1963). Id. at 86. Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt of to punishment, irrespective of good faith or bad faith of the prosecution".

Id. 373 U.S. at 87. In United States v. Agurs, 427 U.S. 97,49 L.Ed. 342, 96 S.Ct. 2392(1976), However, it became clear that a defendant's failure to request favorable evidence did not leave the government free of all obligation. There, the court distinguished three situations in which a Brady claim might arise:

> first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was pejured. 427 U.S. at. 103-104;
>
> second, where the government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence. Id. at 104-107; and;
>
> third, where the government failed to volunteer exculpatory evidence never requested, or requested only in a general way.

The court found a duty on the part of the government even in the last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial". Id. at 108. In the third prominent case on the way to current Brady law, United States v. Bagley, supra., the court disavowed any difference between exculpatory and impeachment evidence for Brady purposes, and it abandoned the distinction between the second and third Augurs circumstances; i.e, the "specific-request" and "general-or-no-request" situations. Bagley held that regardless of request, favorable evidence is material, and constitutional error results from it's suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". 473 U.S. at 682.

To grasph the significance of the Prosecution's Nondisclosure in this case, one must understand the presentation of the Prosecution's case to the jury. At trial, the Prosecution presented a parade of witnessess that collectively testified they saw the Petitioner "punch Alana Thompson

in the head and face and drag her on the ground by the hair".

The Nondisclosed photographs of Alana Thompson count as material exculpatory evidence because the photographs were taken of Alana Thompson within hours from the time the Petitioner was arrested and accused of brutally assaulting and kidnapping Thompson.

In the state habeas court, the Petitioner testified that had the photographs of Alana Thompson been disclosed, the photographs would not have shown any injury on Thompson at all, therefore, the Nondisclosed material would have been an illustration clearly diametrical to the collective testimony presented by the parade of the Prosecution's witnesses. As, such, the Nondisclosed photographs of Thompson would have induced reasonable doubt at trial, when the jury would not have found a single scratch on Alana Thompson, let alone any injuries that would be consistent with being punched in the head and face repeatedly or dragged on the ground. (state habeas court Record No. 137.00, p.56; appellate court, AC 43318, App.P.Reply.Br. A-68)(Petitioner's Sworn-Notarized Amended Petiton).

~~Also, the facts in this case demonstrate that the jury was troubled~~ by the Prosecution's witnesses, given they acquitted the Petitioner on the two counts accusing him of assaulting two police officers: Robert Liquindoli and Thomas Cavanagh, even when the same five(5) witnesses collectively testified that they saw the Petitioner physically assault Alana Thompson, were the same five(5) witnesses that collectively tesified that the Petitioner assaulted Liquindoli and Cavanagh. It is conceivable that the reason for the different outcome in the jury's verdict is that the Prosecution did Disclose and Introduce photographs of Detective Robert Liquindoli as inculpatory evidence, alleging that the photographs depicted injuries to Linquindoli's eye, allegedly caused

by the Petitioner. At trial, the Prosecution presented a parade of witnesses, including Detective Robert Liquindoli, that collectively testified that the Petitioner "punched Robert Liquindoli in the face". (Petitioner's Exhibit-9, p. 83-84; Exhibit-10, p.67,103-104; Exhibit-6, p. 55,93,133-134). Notwithstanding this collective testimony, the jury acquitted the Petitioner of the two counts accusing him of assaulting Robert Liquindoli and Thomas Cavanagh. Whereas, the jury returned a verdict of guilty in the count accusing him of kidnapping Alana Thompson.

In the state appellate court, the Petitoner argued that "had the photographs of Thompson been disclosed, they would have effectively eliminated the prosecutions key arguments, in other words, believing their story that the petitioner punched Alana Thompson [in] the head and the face and dragged her on the ground by the hair trying to put her in a car". (Appellate Court Transcript, October 20, 2021, p.24; Appendix D at A-54. Court's are required to "evaluate the materiality of withheld evidence in light of the entire record in order to determine if "the omitted evidence creates a reasonable doubt that did not otherwise exist". Augurs, 427 U.S. at 112. "What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict". Id. at 113. The Petitioner reiterates, had the photographs of Alana Thompson been disclosed they would have effectively eliminated the key arguments of the Prosecution--believing the story they told to the jury, quoted in the passage above. Thus, "the omitted evidence create[d] a reasonable doubt that did not otherwise exist". Id. at 112.

The Prosecution's suppression of material exculpatory evidence in this case deprived the Petitioner of his constitutional rights to a fair trial.

ii. The Prosecution's Tardy Disclosure of Material Impeachment Evidence, i.e., Criminal Records of State Witnesses, Diane Martell, Alana Thompson, and Amanda Blouin

On August 31, 2009, the Petitioner filed a pro se motion in the trial court, pursuant to Connecticut Practice Book Section 40-13, wherein he specifically asked the Prosecution to disclose the criminal records of the state's witnesses. Said motion was properly addressed to the Clerk's Office, 400 Grand Street, Waterbury, Connecticut and to the Office of the State's Attorney, 400 Grand Street, Waterbury, CT, and set forth, in relevant part, as follows:

> "Pursuant to section 40-13, in accordance with section 41-5, the Defendant hereby request that the Prosecuting authority disclose promptly to the Defendant any and all statements of witnesses in possession of the Prosecuting authority, and/ or his or her agents, including, any and all records of felony convictions of the witnesses known to the Prosecuting authority, and any record of felony or misdemenor charges pending against the witnesses known to the prosecuting authority..."

The trial court record in this case reveals that the Petitioner, who represented himself in the trial court, was brought before the trial court several times, where he argued for the Prosecution to disclose criminal records of state witnesses. The record also reveals that the Prosecution never requested a time extension to respond to the Petitioner's Discovery request. Instead, the Prosecution engaged in improper delay tactics; requiring the Petitioner to file serial Discovery motions seeking an Order of compliance. Thereafter, on November 18, 2009; the eve of trial, the Prosecutor, John Connelly finally disclosed Uncertified criminal records of state witnesses Diane Martell and Alana Thompson. With respect to state witness Amanda Blouin, the Prosecution disclosed this witness' Uncertified criminal record during the trial. The Petitioner contends that the Prosecution's Disclosure on the eve of trial constitutes a tardy Brady Disclosure of material impeachment evidence had a substantial injurious effect in determining the jury's verdict in this case.

"Disclosure of critical information on the eve of trial is unsafe for the prosecution: when such a disclosure is first made on the eve of trial, or when the trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case". United States v. Gil, supra, 297 F.3d 93 at 106. In this case, part of the Prosecution's tardy disclosure on the eve of trial, was a seven page document identifiable as Diane Martell's criminal record, which shows that Diane Martell has a criminal conviction for "False Statements", in violation of Connecticut General Statutes Section 53a-157b.

On December 7, 2009, Diane Martell testified for the Prosecution. During cross-examination, Diane Martell was questioned about her false statements conviction, and she testified that she had no memory of her conviction for false statements. When she was asked if she was shown a copy of her record of Arrests and Convictions would refresh her memory, she testified that being shown a copy of her record would not refresh her memory. (Petitioner's Exhibit-10, p.33-34)(App.P.Reply.Br. A-225-226).

Essentially the jury never learned that Diane Martell has a record of conviction for falsely reporting an incident to the police. However, Diane Martell's conviction for "False Statements" counts as material impeachment evidence, because "Evidence is favorable to the accused if it either tends to show that the accused is not guilty or if it impeaches a government witness". United States v. Gil, 297 F.3d 93,101(2d Cir.2002) see also Strickler v. Green, 527 U.S. 263,281-82,144 L.Ed 2d. 286,119 S.Ct. 1936(1999); In Re United States (Coppa), 276 F.3d 132,139(2d Cir.2001). See Petitioner's Exhibit 21- Diane Martell's Record of Arrest and Conviction for False Statements, App.P.Reply.Br. A-372-393, No AC 43381,

Lewis v. Commissioner of Correction, (Conn.App.Ct. June 29, 2021).

Diane Martell was an important prosecution witness, and the state relied heavily on her testimony to convict the Petitioner of first degree kidnapping. It is important to note that the prosecution did know about Diane Martell's "False Statements" conviction, and the state did everything they could to make sure that this impeachment evidence was not presented to the jury. The U.S. Supreme Court, as long ago as Mooney v. Holohan, 294 U.S. 103, 112(1935), made it clear that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice". This was reaffirmed in Pyle v. Kansas, 317 U.S. 213,215-216,87 L. Ed. 214,63 S.Ct. 177(1942).

In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173,3 L. Ed. 2d 1217 (1959), the court said: "The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears". In Giglio v. United States, 405 U.S. 150,92 S.Ct. 763,31 L.Ed. 2d 104(1972), the court concluded the credibility of a government witness was an important issue, and the jury was entitled to know about any agreements as to a future prosecution. Here, the jury was entitled to know about Diane Martell's "False Statements" conviction because the conviction is relevant to her credibilty as a witness.

Had the Prosecution made a timely Disclosure of the criminal records of their witnesses as the Petitioner requested, it is conceivable that Petitioner would have succeeded at assimilating the impeachment information into his case. A timely Disclosure would have afforded Petitioner meaningful opportunity to obtain a Certified copy of Diane Martell's criminal record for effective use at trial. A Certified copy of Martell's False Statement's conviction would have been an effective tool for disciplining Martell during cross-examination, because the likelihood is

that once she was confronted head on with a Certified copy of her record, Diane Martell would have abandoned her lack of memory and denial of recollection position, and she would have been compelled to admit in the presence of the jury that she has a criminal coviction for falsely reporting an incident to the police. See. Petitioner's Exhbit 21- Diane Martell's Record of Arrest and Conviction for False Statements, p.1-22; App.P.Reply.Br. A-372-393, NO. AC 43381, Lewis v. Commissioner of Correction, (Conn.App.Ct. June 29, 2021).

Ultimately, the value of Diane Martell's testimony would have been substantially reduced and her credibility would have been destroyed; the Prosecution's key witness, thereby, would have weaken the state's case. "And because Diane Martell was an important witness to the prosecution and the jury never learned that she [i]s a convicted liar, there's a reasonable probability that a timely disclosure of her criminal record would have resulted in a different outcome at the Petitioner's trial". See. Appendix D to this petition, Appellate Court Transcript, October 20, 2021, p.7; A-37. The Prosecution's Tardy Disclosure of material impeachment evidence in this case violated the Petitioner's constitutional rights to a fair trial.

This Court should grant this petition and review the decisions below.

II. THE PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON HIS DIRECT APPEAL

The United States Supreme Court has recognized that a criminal defendant has a constitutional right to the effective assistance of counsel on appeal. See. Evitts v. Lucey, 469 U.S. 387,396,83, L.Ed. 2d 821,105 S.Ct. 830(1985)(noting the sixth amendment right to counsel during a criminal defendant's first appeal as of right recognized in Douglas v.

California, 72 U.S. 353, 9 L.Ed. 2d 811,83 S.Ct. 814(1963)(encompasses the right to effective assistance of counsel during that appeal).

In Evitts, Justice Brennan explained that: "In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawfull.... a first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney". Evitts, 469 U.S. at 836.

In this case, Petitioner claims that his court appointed appellate counsel, Christopher Duby's legal representation fell below the objective standard of reasonableness when counsel failed to correct substantial errors and omissions in the record and failed to raise plain error and significant obvious errors in the record, constituting ineffectiveness that resulted in prejudice to Petitioner on his direct appeal. See. The Petitioner's Amended Petition, p.78-97; App.P.Reply.Br. A-90-109,. NO. AC 43381, Lewis v. Commissioner of Correction, Conn.App.Ct. June 29, 2021.

"In order to prevail on a claim of ineffective assistance of counsel within the framework established by the Supreme Court in Strickland v. Washington, 466 U.S. 688,80 L.Ed. 2d 674,104 S.Ct. 2052 ("Strickland"), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness", id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different". id. at 694. In Mayo v. Henederson, 13 F.3d 528,533 (2d Cir.1994), the United States Court of Appeals for the second circuit explained that: "Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel". Id.at. 533.

"In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made". Mayo, 13 F.3d at.533(quoting Jones v Barnes, 463 U.S. 745,754,77 L.Ed. 2d 987,103 S.Ct. 3308(1983). However, a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. As the seventh circuit has held:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, [the court] must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which where raised. Generally, only when ignored issues are clearly stronger than thos presented, will the presumption of effective assistance of counsel be overcome.

Mayo, 13 F.3d at 533; (quoting Gray v. Greer, 800 F.2d 644,646(7th Cir. 1985): Fagan v. Washingtion, 942 F.2d 1155,1157(7th Cir.1991)("His lawyer failed to raise either claim, instead raising weaker claims.... no tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had".); Matire v. Wainwright, 811 F.2d 1430,1438 (11th Cir. 1987)(ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious fifth amendment issue" raising instead a "weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so lone as the "failure to raise the state... claim fell outside the wide range of professionally competent assistance". Claudio v. Scully, 982 F.2d 798, 803,805(2d Cir.1992), cert.denied, 124 L.Ed 256,113 S.Ct.

2347(1993)(quoting Strickland, 466 U.S. at 690).

"In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct". Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices. See Lockhart v. Fretwell, 122 L.Ed. 2d 180,113 S.Ct. 838,844(1993). Counsel is not required to forecast changes in the governing law. See. Horne v. Trickey, 895 F.2d 497,500(8th Cir.1990)(ineffectiveness not established by claim that 'counsel should have realized that the Supreme Court was planning a significant change in the existing law, and that the failure to anticipate this change rises to the level of constitutional ineffectiveness").

However, the attorney's omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it. In Claudio, supra, the court ruled that "no reasonably competent attorney should have missed" the omitted claim, "even though the appellate division ultimately rejected it". 982 F.2d at 805; see also Orazio v. Dugger, 876 F.2d 1508,1513-14(11th Cir.1989)(counsel's failure to raise claim on appeal constituted ineffective assistance despite the fact that three.... appellate court decisions had rejected the precise claim at issue).

Strickland's 'performance and prejudice prongs "partially overlap when evaluating the performance of appellate counsel". Miller v. Keeney, 882 F.2d 1428,1434(9th Cir.1989). The sixth amendment does not require an attorney to raise every nonfrivolous issue on appeal. Jones v.Barnes, supra. Consequently, appellate counsel engage in a process of "winnowing out weaker arguments on appeal and focusing on' those more likely to prevail". United States v. Cook, 45 F.3d 388(10th Cir.1995);(quoting

Smith v. Murray, 477 U.S. 527,536,91 L.Ed. 2d 434 106 S.Ct. 2661(1985);

The weeding out of weak claims to be raised on appeal "is the hallmark of effective advocacy". Tapia v. Tansy, 926 F.2d 1554,1564(10th Cir. 1991). Because "every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibilty before the court". Miller, 882 F.2d at 1434. Consequently, "appellate counsel will... frequently remain above an objective standard of competence... and have caused her client no prejudice... for the same reason--because she declined to raise a weak issue". Id.; see also McBride v. Sharpe, 25 F.3d 962,973(11th Cir.1994) (counsel's actions were not deficient in part because counsel omitted a weak issue to avoid "cluttering the brief with weak arguments"), cert. denied, 115 S.Ct. 489(1994); Bond v. United States, 1 F.3d 631,635 n.2 (7th Cir.1993)("counsel's strategy--including the decision not to pursue a plethora of issues on appeal--ordinarily do not violate the sixth amendment's guarantee of effective assistance of counsel".)

Conversely, an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a "Dead-Bang Winner", even though counsel may have presented strong but unsuccessful claims on appeal. Page v. United States, 884 F.2d 300,302(7th Cir.1989). Although courts have not defined the term "Dead-Bang Winner". [the court] concluded it is an issue which was obvious from the trial record. Matire, 811 F.2d at 1438. (counsel's failure to raise issue which "was obvious on the record, and must have leaped out upon even a casual reading of [the] transcript" was deficient performance), and one which would have resulted in a reversal on appeal. By omitting an issue under these circumstances, counsel's performance is objectively unreasonable because the omitted issue is obvious from the trial record. Cook, 45 F.3d at 395.

Additionally, the omission prejudices the defendant--because had counsel raised the issue, the defendant would have obtained a reversal on appeal. Id. In this case, the Petitioner's court appointed appellate counsel, Christopher Duby, presented a weak-single--insufficient evidence claim on direct appeal, which had the least likelihood of succeeding, while ignoring strong claims--plain error and substantial obvious error in the record. (Petitioner's Exhibit 34, Brief by Christopher Duby, Esq.).

A. Appellate Counsel Ignored Substantial Error in Trial Record

(1) As discussed above at 3-7, the trial transcripts reveal that the court, (Damiani, J.,) denied the Petitioner's pro se motion seeking an investigator for his defense soley on the basis that the Petitioner rejected a public defender and elected to represent himself. The trial transcripts also reveal that the pro se Defendant properly preserved this issue for appeal. see Appendix E to this petition at A-125-127.

At the time appellate counsel filed the brief on behalf of Petitioner on direct appeal, on December 28, 2012, it was settled law that "[A] criminal trial is fundamentally unfair if the [s]tate proceeds against an indigent defendant without making certain that he has access to the raw materials integral to building of an effective defense". Ake v. Oklahoma, supra., as discussed above at 5-6, an indigent defendant's right to access to basic tools of an adequate defense include investigative services. Thusly, appellate counsel's failure to raise this fourteenth amendment issue on appeal in this case causes counsel's performance to fall below the wide range of competence required of attorney's in criminal cases. The trial court's erroneous ruling was obvious on the record and must have leaped out upon even a casual reading of the transcript. See. Trial Transcript Appendix E to this petition A-125-127.

(2) The trial court transcripts also reveal that a confrontation violation occurred when the court, (Schuman, J.,) precluded the Petitioner from showing state witness Alana Thompson her signed-written inconsistent statement during cross-examination and precluded Petitioner from introducing Thompson's signed-written inconsistent statement into evidence during cross-examination, and then later conceded, allowing state witness Alana Thompson's inconsistent statement into evidence, but only after Thompson was long gone, no longer subject to examination, and made unavailable as a witness, by virtue of the the trial court's Order, as discussed above at 8-11. See. also (Petitioner's Exhibit 10, Trial Court Transcript, Dec 7, 2009, a.m. session, p.95-98; App.P.Reply.Br. at A-239-A-242)(Petitioner's Exhibit 6, Trial Court Transcript, Dec 8, 2009, a.m. session, p.7-8; 22-37; App.P.Reply.Br. A-153-154, A-155-160).

At the time appellate counsel Christopher Duby filed the brief on behalf of Petitioner on direct appeal, it was well established law that when a witness' testimony at trial is diametrical to their prior out of court statements or when a witness claims lack of memory about their prior out of court statements, the party questioning the witness is allowed to show the witness their prior written statements, as discussed above at 9. It was also well established law at the time appellate counsel filed the brief on behalf of Petitioner on direct appeal that when a witness' testimony at trial is diametrical to their prior statements or when the witness claims lack of mermory, the party questioning the witness is allowed to introduce the prior inconsistent statement into evidence during the examination of the witness, as discussed above at 10. Because this is obvious on the trial record, appellate counsel's failure to raise this six amendment issue on appeal causes counsel's performance to fall below the wide range of competence required.

B. Appellate Counsel Failed to Raise Brady Violations

(i) The trial court transcripts demonstrate that the Prosecution withheld photographs of Alana Thompson that count as material exculpatory evidence, and the Prosecution's suppression of this material exculpatory evidence deprived the Petitioner of his constitutional rights to a fair trial, as discussed above at 12-16. The Petitioner raised arguments in the trial court about this suppressed evidence, so the trial record was preserved for appellate review. See (Petitioner's Exhibit 6, p.116-118); (Robert Liquindoli testifying that photograph was taken of Alana Thompson on 7/21/2009), See also, (Petitioner's Exhibit 17, p.8-9);(Richard Innaimo testifying that a photograph was taken of Alana Thompson on 7/21/2009).

At the time appellate counsel filed the brief on behalf of Petitioner on direct appeal in December 2012, it was settled law that constitutional error results by the prosecution's suppression of evidence favorable to defendant "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". United States v. Bagley, supra. 473 U.S. at 678.,Noted above at page 13. Because this Brady violation is obvious from the trial record, and the claim is not frivolous or weak or amenable to being winnowed out of an otherwise strong brief, counsel's failure to raise the Brady violation of direct appeal, causes his representaion of the Petitioner to fall below "an objective standard of reasonableness".

(ii) The trial record shows the Prosecution made a tardy disclosure of material impeachment evidence that had a substantial injurious effect in determining the jury's verdict. Discussed above at 17-20.

At the time appellate counsel filed the brief on behalf of Petitioner on direct appeal it was well established law that "Evidence is favorable to the accused if it either tends to show that the accused in not guilty

or if it impeaches a government witness". United States v. Gil, 297 F.3d 93,101(2d Cir.2002) see also Strickler v. Green, 527 U.S. 263,281-82,144 L.Ed 2d 286,119 S.Ct. 1936(1999); In Re United States (Coppa), 276 F.3d 132,139(2d Cir.2001), as noted above at 18. Also, it was settled law at the time that appellate counsel filed the brief on behalf of Petitioner that:(1) the credibilty of a government witness is an important issue for the jury to know about;(2) the presentation of known false evidence to the jury is incompatible with "rudimentary demands of justice" and(3); "The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears". Above at 19. (quoting Giglio v. United States, supra; Mooney v. Holohan, supra; and Napue v. Illinois, supra.) Attorney Christopher Duby had available to him all information necessary to raise the Brady violation on direct appeal, by failing to do so, his legal representation of the Petitioner fell below "an objective standard of reasonableness".

C. The Petitioner was prejudiced by his appellate counsel's deficient performance

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the".... Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. Mayo, 13 F.3d at 534;(quoting Fretwell, 113 S.Ct. at 844. There is a reasonable probability that had appellate counsel raised the constitutional claims on direct appeal and briefed the claims appropriately, the outcome of the Petitioner's direct appeal would have been different. Appellate counsel's lack of compentency contributed significantly to the affirmance of Petitioner's conviction,

thereby depriving Petitioner of a fair appeal, and causing an unreliable conviction to stand. Having said that, it should go without saying that the Petitioner was prejudiced by his appellate counsel's deficient performance on direct appeal.

III. THE STATE HABEAS COURT ABUSED ITS DISCRETION WHEN DISMISSING AND DENYING THE CLAIMS RAISED IN PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Historical facts constitute a recital of external events and the credibility of their narrators. Accordingly, the habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. The application of the habeas courts factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. see Gaines v. Commissioner of Correction, 306 Conn. 664,677 51 A.3d 948(2012).

In the state habeas court's memorandum of decision dismissing and denying the Petitioner's claims raised in his amended petition for writ of habeas corpus, the court, (Newson, J.,) concluded that "Grounds I, II, III, IV, V, and VI are procedurally defaulted and are DISMISSED. and the remaining Ground VII of the petition is DENIED". (Appendix B at A-28). In its factual findings, the state habeas court found that "The petitioner, other than his own self-serving and conclusory testimony that appellate counsel was 'ineffective', offered no evidence to explain the reasoning why these issues were not raised on appeal, or to establish that he was prejudiced in any way". And that the petitioner's appellate counsel "Attorney Duby was actually present in court, but the petitioner chose not to call him as a witness before resting his case". (Appendix B A-22-23). The state habeas court's memorandum of decision is most notable for what it fails to address, that is, Petitioner attempted to call his appellate counsel Christopher Duby to the witness stand on the first day

of the habeas court trial on August 22, 2018. However, the court precluded Petitioner from doing so. Instead, the court allowed Attorney Duby to leave that day. See. Habeas Court Transcript, Aug 22, 2018, p. 105-110, No. TSR-CV15-4006877-S, Lewis v. Warden,(Conn.Super.Ct. Aug 22, 2021); filed on appeal to Connecticut Appellate Court, No. AC 43381, Lewis v. Commissioner of Correction,(Conn.App.Ct. September 25, 2020).("HCT 4").

The state habeas court also denied the Petitioner's oral motion for sequestration of subpoenaed witness Christopher Duby.(HCT 4, p.31, line 17); allowed and encouraged subponaed witness Christopher Duby to come in and out the courtroom, whenever he wished, during the presentation of evidence, over the Petitioner's objection.(HCT 4, p.71, lines 2-14); and then Ordered a six month hiatus, for the second trial date, over the Petitioner's objection. See. Appendix to Petitioner's Brief, A-60-63, No. AC 43381, Lewis v. Commissioner of Correction,(Conn.App.Ct. October 6, 2020).("Pet.App."). "Ultimately, Petitioner declined to call Attorney Duby as a witness, on Feb 28 2019, when the trial resumed". See. Petitioner's Brief, n.7 at 18 ("Pet.Br."). Id. "It is conceivable to think that Petitioner's ultimate choice not call Attorney Duby as a witness was a painstaking decision that Petitioner was forced to make, as a result of the Habeas Court's Aug 22 2019 decision(allowing Attorney Duby to remain in the courtroom during the presentation of evidence), coupled with the Habeas Court's Unusual and Significant time gap(six months) in the scheduling of the second trial date on Feb 28 2019". Id. In point of fact, at oral argument hearing in the Appellate Court on October 20, 2021, the Petitioner gave the court a detailed explanation why he did not call his appellate counsel Christopher Duby as a witness on Feb 28, 2019, the second day of the Habeas Court-Trial, ultimately deciding "...it was my position it wouldn't be wise to call him because he had sat through the

whole trial on the first day of trial and seen all the testimony and the evidence that was presented... had I called him, he would have been able to fashion his testimony to that of an earlier witness in this case, it was me, not only that, he would have been able to consider over six months period that he had to get his story correct and think about all of the documents that was introduced into evidence..." See. Appellate Court Transcript, October 20, 2021, p.1-3; Appendix D to this petition at A-31-33. Curiously, the habeas court's memorandum of decision omits this crucial--highly relevant occurrence of the court proceedings. Yet, the fact that the Petitioner did not call Attorney Duby as a witness on Feb 28, 2019 appears to be the theme in the habeas court's memorandum of decision. Definitely an important factor the court considered in it's May 17, 2018 decision dismissing and denying Petitioner's claims in his amended petition for writ of habeas corpus. (Appendix B to this petition at A-23, para. 1, A-26, para.3).

On August 22, 2018 at the Habeas Trial, Petitioner was sworn in to offer testimony in support of his claims. See. Habeas Court Transcript, Aug 22, 2018 ("HCT 4") at 15-16. The court,(Newson, J.,) found the Petitioner's testimony "self-serving and conclusory" Appendix B at A-22, para. 3; and that Petitioner offered no other evidence that his appellate counsel was 'ineffective' to explain why these issues were not raised on appeal". Appendix B at A-22, para.3, A-23, para.1. However, during the presentation of his case, the Petitioner introduced 32 documents into evidence as full exhibits. See. List of Exhibits of Habeas Trial, Appendix to Petitioner's Reply Brief ("App.P.Reply.Br.") at A-507-508. see also HCT 4, pages, 15-18,24-25,32-53,72,90-101,115-142. The Petitioner's documentary evidence introduced at habeas trial refutes the habeas courts finding that Petitioner offered no-evidence, other than his own "self-

serving conclusory testimony". Although it is well established that when analyzing a claim of ineffective assistance, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washingtion, 466 U.S. 668,690, 104 S.Ct. 2052, L.Ed. 2d 674(1984). Nowhere is it said, though, that such a presumtion is irrebuttable. As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel. Sanders v. Commissioner of Correction, 83 Conn. App. 543,550,851 A.2d 313(2004).

It is not as though the only way the Petitioner could have proved that his appellate counsel's performance was deficient and caused the Petitioner prejudice was by calling counsel to testify at the Habeas Trial, because the documentary items Petitioner presented in case, by themselves, prove that his appeallate counsel Christopher Duby's performance was constitutionally deficient and counsel's deficient performance caused prejudice to Petitioner on his direct appeal. For example, the Petitioner's Exhibit ("Pet.Exh".) No.3, Appendix E to this petition was introduced as a full exhibit at the habeas trial; the trial court transcript that shows the trial court denied the Petitioner's motion seeking investigator for his defense. Pet.Exh. 32, letter from Attorney Christopher Duby to Court Reporter Janet Salereno show that Petitioner's appellate counsel requested the trial court transcripts in this case on October 15, 2012, two months before appellate counsel filed brief on behalf of Petitioner on December 28, 2012. (App.P.Reply.Br. A-430-431). Pet.Exh. 32 proves Christopher Duby did have available to him the trial court transcripts. Pet.Exh. 3 proves that Attorney Christopher Duby ignored an important and arguable constitutional violation that is obvious from even a cursory reading of the record.

Pet.Exh. 34, the brief filed on behalf of the Petitioner on his direct appeal proves the Petitioner's court appointed appellate counsel, Christopher Duby, presented a weak-single--insufficient evidence claim on direct appeal, which had the least likelihood of succeeding, while ignoring strong claims--plain error and substantial constitutional error obvious in the record. (App.P.Reply.Br. A-433-A-435). In the same way, Pet.Exh. No's 10 and 6 show that a contitutional confrontation violation occured at Petitioner's 2009 criminal trial. Above at 26. Because this six amendment violation is obvious from the record, the omission of this meritorious claim prejudiced the Petitioner on his direct appeal. "We have no trouble concluding that the failure of [petitioner's] lawyer to raise the confrontation clause claim on direct appeal was ineffective assistance of appellate counsel..." Clemmons v. Delo, 124 F.3d 944-954 (1997).

Even in the absence of appellate counsel's testimony at the state habeas trial, Petitioner's documentary evidence introduced at the habeas trial in this case was sufficient to rebut presumption that appellate counsel's assistance was reasonable and sufficient to establish that Petitioner was prejudiced by appellate counsel's ineffectiveness. Because had the fourteenth amendment violation--depriving Petitioner of investigative services and the six amendment Confrontation Clause violation been brought to the attention of the Connecticut Supreme Court and Connecticut Appellate Court on direct appellate review, there is a reasonable probability that the Connecticut Appellate Court's would have vacated the Judgment and remanded.

The documentary evidence introduced by the Petitioner at his habeas trial refutes the habeas courts finding that the Petitioner "failed to present any evidence, other than his own self-serving claims, to show the 'cause' for failing to raise these issues on appeal... and failed to

establish prejudice". Appendix B, A-24, para. 1.

"Where a procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State". Kimmelman v. Morrison, 477 U.S.365, 379, 106 S.Ct. 2574, 91 L.Ed. 2d 305,54(1986)(qouting Murray v. Carrier, 477 U.S. 478,488, 106 S.Ct. 2639,2646,91 L.Ed. 2d 397(1986). Although the U.S. Supreme Court have not identified with precision exactly what constitutes cause to excuse a procedural default, the U.S. Supreme Court has acknowledged that in certain circumstances counsel's ineffectiveness will suffice. Edwards v. Carpenter, 529 U.S. 466,451,120 S.Ct. 1587,146 L.Ed. 518, 68(2000). Petitioner may collaterally raise federal constitutional claims in habeas corpus proceedingeven though he has failed to appeal his federal constitutional claims if he alleges and proves that he did not deliberately bypass direct appeal. 154 Conn. 363.

The Petitioner in this case alleged and proved in the state habeas court that his court appointed appellate counsel Christopher Duby was ineffective when failing to raise the constitutional claims on direct appeal, so the state habeas court erred in its decision concluding that the Petitioner's claims "are procedurally defaulted". Additionally, the record in this case adequately demonstrates that the prosecution suppressed exculpatory material evidence and failed to make a timely disclosure of material impeachment evidence, in violation of Brady v. Maryland, 373 U.SS 83(1963), as discussed above at 12-20. see also App.P. Reply.Br. A-63-A-75; Amended Petition, p. 51-63. The Petitioner's evidence presented in the state habeas court in support of his Brady claims remain undisputed. There is nothing in the state habeas court's memorandum of decision that addresses the Petitioner's second Brady claim discussed above at 17-20. Notwithstanding, the claim was properly before the state habeas court. App.P.Reply.Br. A-69-A-75; Petition, p.57-63.

IV. THE CONNECTICUT APPELLATE COURT ERRED IN ITS DECISION DISMISSING THE PETITIONER'S APPEAL

On appeal, Petitioner alleged the habeas court abused its discretion when dismissing and denying the claims raised in his amended petition for writ of habeas corpus, and argued that the claims raised in his petition were not procedurally defaulted, because his court appointed appellate counsel Christopher Duby was ineffective when counsel failed to raise the claims on Petitioner's direct appeal. (Pet.Br. 26-33).

The Connecticut Appellate Court concluded that the habeas court did not abuse its discretion and agreed with the habeas court that "the Petitioner offered no evidence to prove cause and prejudice by overcoming the presumption that Duby provided adequate representation". (Appendix A, p.97,para.3). Ultimately, the appellate court concluded that the habeas court "properly dismissed the claims alleged in grounds I through VI of the petitioner's amended petition on the grounds of procedural default". (Appendix A, p.98, para.1). Additionally, the Appellate Court concluded that "the petitioner [did] not provide the type of legal analysis necessary to prevail on appeal" with respect to his claim that the habeas court erred by denying ground VII of his amended petition alleging that his court appointed appellate counsel Christopher Duby provided ineffective assistance of counsel on his direct appeal. (Appenix A, p.100, para.2).

In its decision dismissing the Petitioner's appeal, the court also noted "We acknowledge the petitioner's status as a self-represented party, but it is not the responsibility of this court to comb the record for the petitioner and to invent arguments on his behalf". (Appendix A, p.101, para.2). "Notwithstanding the inadequacies of the petitioner's principal brief, on the basis of our review of the record, we conclude that the petitioner has not demonstrated that the habeas court's finding that

he failed to provide evidence beyond his self-serving conclusory testimony that Duby provided ineffective assistance is clearly erroneous. The petitioner failed to call Duby as a witness, and he presented no expert testimony to demonstrate that Duby's representation fell below 'an objective standard of reasonableness... Because the petitioner failed to present the habeas court with evidence that Duby's representation was ineffective, we conclude that the court did not err by denying ground VII of the amended petition..." (Appendix A, p.101, para.3).

The Petitioner respectfully contends the Connecticut Appellate Court erred in its decision dismissing his appeal because the court failed to count consider or weigh the documentary evidence the Petitioner presented in the habeas court. Although the court noted that it reviewed the record, it appears the court simply adopted the habeas court's conclusions without independently reviewing the record as required under **De novo Review.** Such review is independent and Plenary, as the Latin term suggests. Thus, a reviewing court looks at the matter anew, as though the matter had come to the court for the first time. See BLACK'S LAW DICTIONARY 435(6th ed.1990)(defining "de novo" as "anew" and "afresh"). **De novo** Review is "traditionally associated with appellate assessments of a trial court's legal conclusions". Pierce v. Underwood, 487 U.S. 552, 558,101 L.Ed. 2d 490,108 S.Ct. 2541(1988).

As noted above at 31, the Petitioner introduced 32 documents into evidence at the habeas trial as full exhibits. There is nothing in the Connecticut Appellate Court's decision indicating that the court reviewed, weighed or considered any of these documents when reviewing Petitioner's claims or when rendering its decision dismissing Petitioner's appeal. The documentary evidence introduced by the Petitioner at his habeas trial refutes the Appellate Court's conclusions that Petitioner "failed to provide evidence beyond his self-serving conclusory testimony that Duby

provided ineffective assistance..." "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review....[When] the legal conclusions of the court are challenged, [the reviewing court] must determine whehter they are legally and logically correct...and whether they find support in the facts that appear in the record....To the extent that factual findings are challenged, [t]he appellate court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous..." Boyd v. Commissioner of Correction, 130 Conn.App. 291,291,21 A.3d 969(2011); Smith v. Commissioner of Correction, 122 Conn.App. 637,641,999 A.2d 840(2010), cert.denied, 300 Conn. 901,12 A.3d 574(2011).

In light of substantial documentary evidence presented by Petitioner at the habeas trial in this case, the habeas courts conclusions that the Petitioner offered no-evidence, other than his own self-serving conclusory testimony is clearly an erroneous factual finding. And because the Connecticut Appellate Court adopted habeas courts erroneous factual finding when rendering its decision dismissing the Petitioner's appeal, the Connecticut Appellate Court erred when rendering its March 8, 2022 decision. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". United States v. United States Gypsum, Co., 333 U.S. 364,395,92 L.Ed. 746,68 S.Ct. 525(1948); accord City of Bessemer City, 470 U.S. at 573-74. A trial court "would necessarily abuse its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence". Cooter & Gell v. Hartmarx Corp., 489 U.S. 384,405 110 L.Ed. 2d 359,110 S.Ct. 2447(1990). A trial court "abuses its discretion if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact". Milanese v. Rust-Oleum Corp., 244 F.3d

104,110(2d Cir.2001).

REASONS FOR GRANTING THE PETITION

This petition presents important constitutional questions because the Petitioner alleges that he was deprived of his rights to a fair trial during his 2009 criminal trial court proceedings in the Judicial District of Waterbury. In particular, petitioner alleges he was deprived of his rights to present a defense. Although "[S]tate and Federal Rulemakers have broad latitude under the constitution to establish rules excluding evidence from criminal trials". Holmes v. South Carolina, 547 U.S. 319-324 S.Ct. 1727, 164 L.Ed. 2d 503(2006);(quoting United States v. Sheffer, 523 U.S. 303(1998); Crane v. Kentucky, 476 U.S. 683(1986). "This latitude, however, has limits. Whether rooted directly in the Due process clauses of the fourteenth Amendment or the compulsory process or Confrontation clauses of the Sixth Amendment, the Constitution gurantees criminal defendant's a meaningful opportunity to present a complete defense". Holmes, 547 U.S. at 324. Additionally, Article First, section eight of the Connecticut Constitution essentially encompassess the "right to a fair opportunity to defend against the [s]tates accusations". State v, Shaw, 312 Conn. 85,102-1-3(2014). Here, the State deprived the pro se Defendant of these constitutional rights in several ways including but not limited to Deprivation of investigative services, in violation of the fourteenth amendement, as discussed above 3-7, deprivation of his six amendment confrontation rights, as discussed above 8-11, deprivation of his rights to a fair trial by the State's suppression of material exculpatory evidence as discussed above at 12-16; and State's Tardy Disclosure of Material Impeachment evidence, above at 17-20, and by the deprivation of the effective assistance of appellate counsel, in violation of his rights under the sixth amendment, above at 20-29.

V. CONCLUSION

WHEREFORE, and for the foregoing reasons, this Court should grant the petition and review the decisions below.

RESPECTFULLY SUBMITTED,
THE PETITIONER

8/24/2022
Date

Kacey Lewis

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PROOF OF FILING AND SERVICE

I hereby declare under the penalty of perjury that on August 24, 2022, I deposited envelopes into the U.S. Mail, with postage prepaid, containing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI, properly addressed to this courts clerk's office and to the following counsel of record:

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