CV-05-4006524	:	SUPERIOR COURT
MICHAEL C. SKAKEL	:	JUDICIAL DISTRICT OF STAMFORD
V.	:	AT STAMFORD
STATE OF CONNECTICUT	:	JULY 16, 2007

STATE'S POST-TRIAL BRIEF

Pursuant to P. B. § 5-1, the State of Connecticut hereby submits this post-trial brief regarding the Petition for New Trial filed by Michael Skakel. For reasons discussed herein, the State respectfully urges this court to deny the relief requested.

For the convenience of the Court, the State has prepared the following Table of Contents.

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Procedural History

On February 8, 2000, following a Grand Jury investigation, the state charged the petitioner, Michael Skakel, with murder pursuant to General Statutes §53a-54a (Rev. to 1975) for the October 30-31, 1975 death of Martha Moxley. The charge was originally brought to the juvenile division of Superior Court. After a hearing, the Juvenile Court (Dennis, J.) ordered the prosecution transferred to the criminal division of Superior Court. The petitioner appealed the decision transferring his prosecution to criminal court. After briefing and argument, our Supreme Court held that the transfer order was not a final judgment and dismissed petitioner's appeal. *In re: Michael S.,* 258 Conn. 621, 784 A.2d 317 (2001). Following a trial before the Honorable John F. Kavanewsky, Jr. and a jury of twelve, the petitioner was found guilty. On August 29, 2002, the court sentenced the petitioner pursuant to General Statutes §53a-35 (Rev. to 1975), to the custody of the Commissioner of Correction for a period of not less than twenty years nor more than life. T. 8/29 at 86.[1]

Evidence from Petitioner's Criminal Trial

a. Events Surrounding the Murder

Based on the evidence adduced at trial, the jury could have reasonably found the following facts:

In 1975, fifteen-year-old Martha Moxley lived on Walsh Lane in a section of Greenwich known as Belle Haven. T. 5/7 at 27, 35-36. The petitioner's family lived diagonally across the

[1] The state will refer to the transcript from petitioner's criminal trial as "T." followed by the date. All dates from the trial are 2002 unless otherwise noted. The state will refer to the transcript from the trial on the Petition for New Trial as "PT", followed by the date.

street from Martha, in a house that fronted onto Otter Rock Drive.[2] *Id*. at 32. The Skakel family consisted of the father, Rushton Skakel, and seven children, most of whom were teenagers in 1975.[3] The children's names, from eldest to youngest, were: Rushton, Jr., Julie, Thomas, John, Michael, David and Stephen. T. 5/9 at 69; *see* SE 69[4] (Skakel family photograph found at EPP/MainMenu/photographs/sailboat).

During the late summer of 1975, Martha had become acquainted with two of the Skakel sons -- Thomas, called Tommy, who was 17, and Michael, who was 15. The petitioner became infatuated with Martha. T. 5/20 at 152-55; T. 5/21 at 143. Unfortunately, so did his brother,

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[2] State's Exhibit (hereinafter SE)1, from the criminal trial, is a large aerial photograph of the section of Belle Haven which included both the victim's and the petitioner's homes. Once admitted, it was projected on a screen in the courtroom and used as an aid to testimony throughout the criminal trial. T. 5/7 at 29-31. This exhibit can be found on the evidence presentation program (hereinafter EPP), a CD Rom of which was made part of the direct appeal record in response to the State's Motion to Rectify.

A copy of the EPP was admitted during this trial when the original from the appeal could not be located. The EPP contains copies of most of the state's exhibits, with exhibit numbers from the criminal trial appearing in the lower right hand corner of the screen. The EPP was used throughout the trial to display exhibits on a screen in the courtroom that was visible to all participants. At trial, defendant did not object to this method of publication. See T. 4/26 at 80;T. 5/7 at 31.

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

[3] Petitioner's mother, Anne Skakel, was deceased. T. 5/15 at 90.

[4] The state will refer to state's exhibits from the criminal trial as SE, and the defendant's exhibits as DE.

Tommy. Friends testified they had seen Tommy "flirting" with Martha. T. 5/9 at 41, 70-71. Further, Michael had expressed concern over the attention Martha was paying to Tommy. *See* SE 81 (Martha's Diary) at EPP/MainMenu/documents/diary.

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

Martha and her companions stopped by the Skakel home a couple of times that evening, but the Skakel children, along with their tutor, Ken Littleton, their cousin, James "Jimmy" Terrien and a friend, Andrea Shakespeare, were at the Belle Haven Club for dinner. T. 5/9/02 at 42-43, 118. At about 9 p.m., Martha and her friends went to the Skakel house again. The Skakels had returned from dinner at this point. Martha, Helen Ix, Jeffrey Byrne, and the petitioner sat in a Lincoln Continental parked in the Skakel's side driveway, listening to music and talking. *See* EPP/MainMenu/BelleHaven/Skakel residence; T. 5/9 at 65-67, 95. Michael later stated that he considered the time he and Martha were in the car as a "moment of closeness" with her. T. 5/21 at 144. Soon, however, his brother Tommy joined them. T. 5/9 at 68-69.

At about 9:30, Rushton, Jr., John Skakel, and Jimmy Terrien came out of the Skakel house. They informed the teens sitting in the car that they needed the car to drive Jimmy Terrien home. T. 5/9 at 68-70, 102-5. Tommy, Martha, Helen and Jeff Byrnes got out of the car. *Id*. at 69, 102-5. Helen Ix testified that as she was leaving to go home, Tommy and Martha

[5] Jeffrey Byrne was deceased at the time of trial. T. 5/9 at 66.

were in the Skakel driveway, and the car going to the Terrien's was in the process of leaving. She stated that Tommy and Martha were engaging in flirtatious "horse play." Helen felt a little embarrassed by the flirting. She and Jeff Byrne left together. *Id*. at 69-71.

Meanwhile, at the Moxley house, Dorthy Moxley, Martha's mother, was home alone. T. 5/7 at 38. Martha's father, David Moxley, was out of town on a business trip. Her 17-year-old brother, John, was out with friends. Mrs. Moxley spent the evening upstairs in the master bedroom painting the mullions on the windows. *Id*. at 37-9.

After hearing a "commotion" outside at about 9:30 or 10:00, Mrs. Moxley decided to stop painting for the evening. She cleaned up her paint supplies and took a shower. *Id*. at 42-45.

By this time, it was about 11:00 p.m. Mrs. Moxley went downstairs to watch the news. While she was watching the news or shortly thereafter, her son John came home. Mrs. Moxley started watching a movie, but fell asleep on the sofa. *Id*. at 45-46.

When she woke up at about 1:30 or 2:00 a.m., Martha was still not home. Mrs. Moxley woke John and asked him to go out to look for his sister. *Id*. When John returned with no information, Mrs. Moxley called Helen Ix. Helen told Mrs. Moxley that she had last seen Martha at the Skakel's with Tommy. Mrs. Moxley called the Skakel house. *Id*. at 46-7.

Mrs. Moxley stated that she called the Skakel residence three or four times during the course of the night; each time the phone was answered by eighteen-year-old Julie Skakel. Mrs. Moxley testified that it did not take Julie a long time to answer the phone and she did not sound groggy or sleepy when she did, despite the fact it was then about 2:00 a.m. *Id*. at 47-48.

During one of her calls to the Skakels that night, Mrs. Moxley asked to speak to Tommy. She stated that it did not take long to bring Tommy to the phone and he did not sound sleepy when he answered. During the last phone call to the Skakels, Julie suggested Dorthy Moxley

call Jimmy Terrien's house. *Id*. at 48-49.

When Mrs. Moxley called the Terriens, Jimmy's mother answered. Mrs. Moxley explained that she was looking for her daughter, Martha. Mrs. Terrien asked for Mrs. Moxley's number and stated she would check to see if Martha was there and call her back. When Mrs. Terrien called back, she said that neither Martha nor Jimmy were there. *Id*. at 62-3.

At that point, Mrs. Moxley called everyone she thought could possibly know where Martha was. Eventually, she called the Greenwich Police, who sent an officer to the house. *Id*. at 63-64. After the officer left, Mrs. Moxley fell asleep in the library. When she awoke the next morning, she went to the Skakel's to see if Martha had fallen asleep in the motor home that was often parked in the Skakel driveway. *Id*. at 64-5.

By this time, it was after 8:00 a.m. High school students from the neighborhood who went to private school had left for school already. Yet the petitioner, who was fifteen and a private school student, answered the door. Mrs. Moxley told him who she was and that she was looking for Martha. Michael, whom Mrs. Moxley described as looking "hung over," in bare feet and dressed in a pair of jeans and a t-shirt, said Martha was not there. Mrs. Moxley asked if she could look in the Winnebago. A Skakel employee said that he would look for her. He found no sign of Martha. *Id*. at 66-68.

Mrs. Moxley returned home. At about 12:30 that day, a teenage friend of Martha's found Martha's body under a large pine tree. *Id*. at 70, 114-16. The victim was lying face down, with her pants and panties pulled down around her knees. *Id*. at 120; SE 15, 16, 17; EPP/BelleHaven/CrimeScene/Victim.

When news of the killing spread, Andrea Shakespeare was called to the office at the high school she and Julie attended and asked to accompany Julie Skakel home. T. 5/9 at 129.

When the two girls pulled down Otter Rock Drive, they could not park in the Skakel driveway because there were vehicles blocking the way. Julie parked on the street. *Id*. at 130. Upon seeing them, the petitioner, who appeared "hyper," ran up to the car and told them that Martha had been killed and "he and Tommy were the last to see her that night." *Id*. at 132.

b. Crime Scene and Autopsy Evidence

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

Dr. Harold Carver, the state's Chief Medical Examiner, interpreted the autopsy conducted in 1975 and reported in SE 53. T. 5/8 at 93-127. The autopsy revealed that the assailant struck the victim in the head at least eight or nine times with the golf club. *Id*. at 124. Additionally, the victim had been stabbed a number of times with a length of golf club shaft. One of these injuries ran in one side of the neck and out the other, dragging a length of head hair with it. Dr. Carver was of the opinion that this injury was inflicted after the blunt force injuries and at a point where the victim was either in extremis or fully deceased. *Id*. at 123-4. The witness further testified that, when the coroner, in 1975, applied an ultraviolet light to detect the presence of semen on the victim's pubic area, the results were negative. Additional analysis of internal vaginal and anal swabbings taken from the victim to detect the presence of semen or any other indication of her having engaged in sexual intercourse also proved negative. *Id*. at 101-3.

Dr Henry Lee testified to a partial crime scene reconstruction conducted by himself in 1991. T. 5/8 at 130-179. Dr. Lee explained that the golf club shaft broke into pieces as a result of "reverse bending" during the blunt force assault and that the through and through stab wound of the neck which dragged head hair with it had to have occurred subsequently. *Id*. at 144-7. The witness further explained that the victim had been dragged partly feet first and partly shoulders first from the initial assault site to her final resting place. *Id*. at 140-141. Examination of the body revealed a reddish mark at the top of the victim's inner left thigh. Autopsy pictures reveal a similar mark on her right thigh. Dr. Lee stated that these marks were consistent with bloody hands trying to push the victim's legs apart. *Id*. at 149.

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

Detective James Lunney, from the Greenwich Police Department, went to the Skakel house on the afternoon of October 31, following the discovery of the body. While he was in the house, he observed golf clubs, along with umbrellas and other things, in a barrel. The barrel was in a hallway leading to a back door. T. 5/9 at 9-12. On the following day, November 1, Lunney returned to the Skakel house and, with Rushton, Sr.'s consent, seized a golf club. It was a Tony Penna four iron. *Id*. at 13-15. That club, as well as the murder weapon, had belonged to the petitioner's mother. The club seized by Lunney bore a label near the handle which read: Mrs. R. W. Skakel. *Id*. at 17-19; SE 65; EPP/Main Menu/Photographs/Label. The handle of the murder weapon, which had been broken off below the presumed location of the identification label, was never found. *Id*. at 21.

c. The 1975 Alibi

Kenneth Littleton arrived back at the Skakel residence after work on October 31, to a

scene of "mayhem." He was directed by a person who appeared to him to be an attorney to transport the petitioner, Tommy, John, and Jimmy Terrien to a house the Skakel family owned in Windham, New York. Littleton did this the next morning, Saturday, and returned on Sunday. Julie Skakel, the sole female sibling, and the two youngest Skakel boys, Stephen and David, stayed behind. T. 5/9 at 175-76.

On November 14, 1975, Mr. Skakel brought Julie, Tommy, Michael, John, and Jimmy Terrien to the police station to give statements. T. 5/28 at 83. Mr. Skakel remained with Michael while he gave his statement. *Id*. at 109, 112-13. In his statement, Michael claimed he went with his brothers and cousin to Jimmy Terrien's house the night of the murder. SE 112 (transcript of petitioner's 1975 Police Interview). The purpose of the trip was to bring Jimmy home, and also to watch "Monty Python's Flying Circus," which was on television that night. Michael claimed that they stayed at the Terrien's until between 10:30 and 11:00 and then returned home. *Id*. Michael stated that he went to bed shortly after returning home and did not leave the house again that night. He admitted, however, that he had snuck out of the house late at night on previous occasions. *Id*.

d. The Demise of the Alibi

Although petitioner's brother, Rushton, and cousin, Jimmy Terrien (Dowdle), testified at trial that petitioner had accompanied them to Terrien's on October 30, 1975, John Skakel stated, as he had to the Grand Jury in 1998, that he could not remember who went to Terrien's. *See* T. 5/22 at 11-13, 64-65; T. 5/28 at 57-60.[6]

Another cousin of the petitioner's, Georgeann Dowdle, Jimmy's sister, testified that she

[6] Thomas Skakel did not testify at the trial or before the Grand Jury.

was home on the evening of October 30, 1975. She stated, as she had to the Grand Jury, that she heard voices in the house that night belonging to her Skakel cousins, but could not identify the voice of any particular cousin. T. 5/23 at 53-65.

Helen Ix testified that she was not sure whether Michael was in the car headed for Terrien's as she left for home. T. 5/9 at 75, 81. In her first oral statement to the police on October 31, 1975, Helen Ix said that when Rushton, Jr., Jimmy and John came out to take Jimmy home, "they all got out of the car." *Id*. at 95. On November 14, 1975, when she gave a tape recorded statement to the police, she said she, Martha, Tommy and Jeff got out of the car. *Id*. at 102-5. During that interview, she was not asked whether Michael was in the car as it left for Terrien's or not, but she did state that she did not see the car drive away. *Id*. At trial, she reiterated that she did not see the car drive away. *Id*. at 96.

Andrea Shakespeare testified that, after the car going to Terrien's had left, she and Julie exited the front door of the Skakel house. T. 5/9 at 125-6. Julie was going to drive Andrea home in another Skakel vehicle. This car was parked in the circular driveway in front of the house, rather than in the side driveway where the Lincoln had been parked. *Id.* Andrea was certain that at the time she and Julie went outside to get in Julie's car, the car going to Terrien's had already departed. *Id*. at 127. She was also certain that the petitioner was still at the house after the car left for the Terrien's. *Id*. at 127.

As Andrea and Julie were walking from the house to the car, Julie saw a figure running by and yelled "Michael, come back here." When they found no keys in the car, Andrea went back to the house to collect the them. Because the front door had locked behind them, she had to ring the bell. Tommy answered. As she went into the front entranceway and collected the car keys from a bureau near the door, she saw Ken Littleton on the stairs. *Id*. at 126-7, 140-43.

Julie Skakel testified similarly that, as she and Andrea went to the car parked in front of the house, a figure ran by to whom she called “Michael, come back here!” T. 5/29 at 19-20. As a result of Ms. Skakel’s professed inability to recall, the State was permitted to place into evidence a portion of her Grand Jury testimony stating that, as far as she could recall, her vehicle had been the only one left in the Skakel driveway at that time. *Id*. 56-58; SE. 116.

e. The Petitioner’s Admissions

i. 1975 - 1978

During the course of the trial, the jury heard more than a dozen incriminatory statements petitioner had made over the years. This evidence is summarized below.

1. The announcement made by petitioner when **Andrea Shakespeare** arrived at the Skakel home with Julie Skakel on the afternoon of October 31 (Tommy and I were the last ones to see her) has been described above.

2. In the Spring of 1976, the petitioner, Julie, and Rushton, Jr. went into a barbershop in Greenwich. Julie asked the barber, **Matthew Tucciaroni**, if he had time for a haircut. Tucharoni said he did. As he was preparing to cut the petitioner’s hair, the petitioner said, "I’m going to kill him." Julie responded, "Shut up, Michael." Michael’s reply was, "Why not? I did it before." T. 5/15 at 158-167, 172.

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

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

ii. Statements/Admissions made at Elan, 1978-1980

A number of statements of varying degrees of incriminating impact were made while petitioner attended Elan, a residential school for troubled youth in Poland Spring, Maine, where he was placed by his family in March, 1978. The context in which these statements arose is telling. Charles Seigan testified that petitioner's involvement in a homicide was first announced to the Elan community at a "general meeting." This was called as a result of Skakel's being returned to the facility after having run away. T. 5/16 at 57-8, 69. In the course of the general meeting, Joseph Ricci, director of Elan, disclosed petitioner's involvement in the murder to an assemblage of approximately ninety staff and students. This subject remained a topic through the remainder of Skakel's stay. *Id*. at 73-5.

A number of petitioner's former classmates have provided vivid descriptions of the general meeting. Angela McFillin explained that the meeting was convened because petitioner had run away, a fact that had kept the community up for two days searching for the escapee. Upon his return, Skakel was held on the dining room stage for two or three days. During part of this time he was guarded by Gregory Coleman. This was followed by the general meeting.

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[7] Zicarelli's testimony was bolstered at trial by that of Edwin Jones. Jones, a banker, stated that Zicarelli was a long term customer at the bank he worked at in the early nineties. He recalled a conversation with Zicarelli in which Zicarelli told him Michael had confessed to the murder of Martha Moxley. T. 4/28 at 16-19.

T. 5/23 at 6-14. Alice Dunn recalled director Ricci appearing to read incidents from a file; T. 5/17 at 58; and asking what happened to his neighbor, following which "we all found out about this golf club." *Id*. at 83. Defense witness Michael Wiggins testified that Ricci confronted petitioner by announcing that "we are going to get to the bottom of this, and Michael is going to tell us why he murdered Martha Moxley." T. 5/23 at 171, 193. The meeting digressed into increasingly harsh confrontation on the subject of the murder without producing any admission by petitioner. When he eventually responded, "I don't know," the meeting ended. Seigan T. 5/15 at 96; Dunn T. 5/17 at 85; Wiggins, T. 5/23 at 175. Thereafter, Skakel was required to wear a large sign that read, "Confront me on why I killed Martha Moxley." *Id*. at 177; see also Sara Peterson T. 5/23 at111; Donna Kavanaugh T. 5/23 at 207; Angela McFillin T. 5/24 at 4.

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

5. **Gregory Coleman** passed away before the trial. Consequently, his testimony at the Hearing in Probable Cause (HPC) (4/18/01 T 87-131; 4/19/01 T 2-127) was published to the jury as former testimony. T. 5/17 at 141-225. Coleman related that, after Michael was returned to Elan from a failed escape attempt, he was assigned to guard him. T. 5/17 at 134. Coleman noticed that Skakel had a stereo and albums, things Elan denied to other residents.

He made a comment about Skakel getting away with murder. The petitioner responded that he was going to get away with murder because he was a Kennedy. He explained that he had made advances to a girl who spurned him. He then drove her skull in with a golf club. The golf club broke. He said it happened in a wooded area near his house. The petitioner said he was in Elan to avoid the police investigation. Coleman also recalled the petitioner saying he returned to the body two days later and masturbated on it. *Id*. at 136-38. As part of Coleman's former testimony, the defense published the HPC cross-examination which addressed a variety of subjects. T. 5/17 at 142-225.

The state offered two prior consistent statements relating to Gregory Coleman. The witness had related in cross-examination that, on viewing a television show where brother Tommy Skakel was characterized as the main suspect, Coleman had told his wife that the murderer was not Tommy; it was Michael. *Id*. at 165-66. Elizabeth Coleman testified that, shortly after first meeting her former husband in 1986, he had recounted attending a school named Elan where he met a youth named Mike Skakel who admitted having murdered a girl with a golf club. Ms. Coleman further described an incident in the mid to late nineties where her husband had been watching television and suddenly exclaimed, "You thought you could get away with this but your time is up." Coleman explained to his wife, "This is the kid I told you about." T. 5/20 89-93.

Jennifer Pease testified in the state's rebuttal case that she had been placed at Elan in 1978 at the age of fourteen. There she met Gregory Coleman. In 1979, trusting Coleman to keep a confidence, Ms. Pease mentioned that she was thinking of escaping. With that, Coleman brought up the subject of Michael Skakel's earlier treatment for having escaped. T. 5/29 at 105. He continued, stating that he thought Skakel was sick because he had admitted

that he had beaten a girl's head in with a golf club and killed her. He further stated that Skakel thought he could get away with it because he was related to the Kennedys. *Id*. at 108.[8]

6. In smaller therapy sessions that followed the general meeting, petitioner provided more detail as to his activities on the night of the murder. **Charles Seigan** recalled two occasions in which Skakel first appeared to become annoyed at being pressed on the subject of the murder, then broke into tears, and finally admitted to being "blind drunk" and "stumbling." T. 5/16 at 78, 82, 123.

7. **Elizabeth Arnold** testified that she recalled one session in which the group discussed the murder of a girl in the petitioner's home town T. 5/17 at 3. She recalled the petitioner saying that he did not know what happened that night. He claimed that he was very drunk and that he had some sort of a blackout, and he did not know if he had killed her or if his brother had done it. She further recalled him saying that he had been running around outside that night. He also said that his brother "fucked his girlfriend." T. 5/17 at 4. When Arnold asked him how his brother could have done that to him, he said they did not actually have sex, but they were "fooling around' and his brother "stole his girlfriend." *Id*.

8. Another former resident of Elan, **John Higgins**, testified that he and the petitioner were alone one night on guard duty. T. 5/16 at 179-80. He and Skakel were sitting on the porch to the men's dormitory, talking. Skakel told Higgins he had been involved in a murder. Higgins testified he remembered the petitioner saying he was going through his garage and found a golf club. According to Higgins, Skakel also said he remembered running through the woods

[8] Coleman's testimony was further corroborated by the prior consistent statements he had given at both the juvenile hearing and during his Grand Jury testimony. See T. 5/20 at 72-79, 82-84.

with the club in his hand, and he remembered seeing pine trees. In the course of the conversation, Skakel became very emotional. As he cried, the petitioner progressed from saying "maybe I did it," to "I must have done it," to "I did it." *Id*. at 181-82.

9. **Alice Dunn** also testified to private conversations with petitioner. On one occasion, when Skakel was scrubbing floors in the kitchen, he led her to believe that he did not know if he had killed Moxley, but he did state that he had been drinking that night. T. 5/17 at 61. Another conversation occurred some months later, while the two were at a restaurant. In her Grand Jury testimony, which was admitted under *State v. Whelan*, 200 Conn. 743, 513 A.2d 86, *cert. denied*, 479 U.S. 94 (1986), Dunn testified that the petitioner said he did not know if he killed Moxley, that "nothing in his own mind was definitive, but as far as he was concerned, he might have done it. But if he did do it, he was not in his normal state." Petitioner also said it could have been either him or his brother. *Id*. at 75-76.

iii. 1981 - 1997

10. In approximately 1981, **Rushton Skakel Sr.** told his close friend and confidant, **Mildred "Cissy" Ix**[9] that Michael had said he might have done it. In a portion of Ms. Ix's Grand Jury testimony admitted under *State v. Whelan, supra*, 200 Conn. 743, the witness recalled a statement made by petitioner's father around 1981 wherein Rushton Skakel Sr. had commented that "Michael had come up to him and he said, you know, I had a lot to drink that night and I would like to see if, if I could have had so much to drink that I could have forgotten something and I could have murdered Martha." T. 5/15 at 128; SE 87.

11. In the summer of 1987, the petitioner became acquainted with **Michael Meredith**,

[9] Mildred Ix is Helen Ix's mother. She lived next door to the Skakels, had been the deceased mother's best friend, and was very close to the family. T. 5/15 at 89-90.

who had resided at Elan in 1985. T. 5/20 at 108. Meredith lived at the Skakels' Greenwich home that summer while he and Michael worked on a class action lawsuit against Elan. *Id*. at 109. Meredith testified that he knew nothing of the murder until one night when the petitioner brought up the subject. The petitioner said that he had been in a tree on the Moxley property the night of the murder masturbating while watching Martha through a window of her house. T. 5/20 at 111-12. Michael further said that while he was in the tree, he saw his brother Tommy walk through the property toward the Moxley house. Michael claimed he then climbed down from the tree without his brother seeing him. *Id*. at 113.

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

13. During the Spring of 1997, Skakel was at a party at **Gerrane Ridge's** home. T. 5/21 at 9. In a taped conversation with a friend, Ridge stated that during the course of the party the petitioner admitted that the night of the murder he had been outside smoking "pot" and "doing LSD and acid and really big-time drugs, mind, you know, altering drugs." SE 104 at 11-16; *see* EPP\MainMenu\audio\RidgeExcerpt. When he found out that Tommy had sex with

Martha, "he got so violent and he was so screwed up" that he hit her with the golf club. *Id*.

14. In 1997, the petitioner planned to write his autobiography with the help of author **Richard Hoffman**. T. 5/21 at 139. Skakel and Hoffman spent a few days together at the Skakel family home in Windham, during which time the petitioner talked about his life. *Id*. at 139-40. Hoffman recorded their conversations. *Id*. One section of the recordings concerned the night of the Moxley murder. *Id*. at 144-47. In this taped statement, petitioner contradicted both his 1975 claim that he never left the house after returning from Terrien's, and some of his Elan statements in which he claimed he had no clear recall of the night's events. Rather than reporting he was so "blind drunk" he did not know if he or his brother had killed Martha, petitioner described his activities of the night in detail. For instance, he told Hoffman he was drinking planter's punch at the Belle Haven Club, and gave an elaborate description of a bedroom in the Terrien house. See SE 108 (CD of interview); *see* EPP/Audio/RichardHoffman-Screen 22, 53-61.

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

lawn. *Id*. at Screen 96-98. He began to “chuck” rocks into the oval, saying, "Come on motherfucker, I’ll kick your ass." *Id*. at 100. As he ran home, Michael said he was worried that someone had seen him "jerking off." *Id*. at Screen 103.

Michael described how he woke the next morning (for him a school day) to Mrs. Moxley saying, "Michael, have you seen Martha?" He claimed he was still high and a little drunk from the night before. He stated he remembered thinking:

> "Oh my God, did they see me last night? And I’m like, I don’t know, I’m like, and I remember just having a feeling of panic. Like ‘oh shit.’ You know. Like my worry of what I went to bed with, like may . . . I don’t know, you know what I mean, I just had, I had a feeling of panic."

Id. at Screen 105-107.

ARGUMENT

I. STANDARDS GOVERNING A PETITION FOR NEW TRIAL

"The standard that governs the granting of a petition for new trial based on newly discovered evidence is well established. The petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial. . . . This strict standard is meant to effectuate the underlying `equitable principle that once a judgment is rendered it is to be considered final,’ and should not be disturbed by post-trial motions except for a compelling reason. . . . In determining the potential impact of new evidence, the trial court must weigh that evidence in conjunction with the evidence presented at the original trial. . . . It is within the discretion of the trial court to determine, upon examination of all the evidence, whether the petitioner has established substantial grounds for a new trial, and the judgment of the trial court will be set aside on appeal only if it reflects a

clear abuse of discretion." *Asherman v. State*, 202 Conn. 429, 434, 521 A.2d 578 (1987).

As previously expressed, the first part of the *Asherman* test requires the petitioner to establish that the evidence is truly "newly discovered." Since at least 1836, our Supreme Court has stated that "a new trial will never be granted on the ground of newly discovered evidence, if that evidence might have been adduced, on the former trial, by the use of due diligence[.]" *Lester v. State*, 11 Conn. 415 (1836); see also *Waller v. Graves*, 20 Conn. 305 (1850); *Summerville v. Warden*, 229 Conn. 397, 426, 641 A.2d 1356 (1994). "Due diligence does not require omniscience. . . . [It] means doing everything reasonable, not everything possible. . . . The petitioner for a new trial must be '"'diligent in his efforts fully to prepare his cause for trial; and if the new evidence relied upon *could have been known with reasonable diligence*, a new trial will not be granted.'"'" *Williams v. Commissioner*, 41 Conn. App. 515, 528, 677 A.2d 1 (1996), appeal dismissed 240 Conn. 547, 692 A.2d 1231 (1997).

Our Supreme Court provided substantial guidance in the application of the remaining *Asherman* factors in *Shabazz v. State*, 259 Conn. 811, 827-28, 792 A.2d 797 (2002). *Shabazz* held that "[t]he trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial. In so doing, it must determine, first, that the evidence passes a minimum credibility threshold. That is, if, in the trial court's opinion, the newly discovered evidence simply is not credible, it may legitimately determine that, even if presented to a new jury in a second trial, it probably would not yield a different result and may deny the petition on that basis. . . . If, however, the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all the original trial evidence, it probably would yield a different result or otherwise avoid an injustice, the fourth element of the *Asherman* test would be satisfied." (Citation omitted.)

As our Supreme Court noted in *State v. Shabazz*, *supra*, 259 Conn. 823:

> [W]hether a new trial should be granted *does not turn on whether the evidence is such that the jury could extend credibility to it* . . . The [petitioner] *must persuade the court* that the new evidence he submits will probably, not merely possibly, result in a different verdict at a new trial . . . . It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty – *it must be evidence which persuades the judge that a jury would find him not guilty.*

(Emphasis in original; internal quotation marks omitted.)

Petitioner has not presented this court with any such evidence. The petition for new trial should be denied.

II. PETITIONER HAS FAILED TO PRODUCE ANY CREDIBLE OR ADMISSIBLE EVIDENCE UNDER COUNT ONE WHICH WOULD ENTITLE HIM TO A NEW TRIAL

a. Evidence Relating to Bryant's Allegations

Gitano Bryant first reported his account of the murder of Martha Moxley to Crawford Mills and Neil Walker as memorialized in PE 1. Subsequently, Bryant related his story in increasing detail and with some variations (which will be addressed) to Robert F. Kennedy Jr.; PE 4 and 5; and private investigator Vito Collucci in PE 23 and 24. At a deposition taken in Miami, Florida, on August 25, 2006, Bryant asserted his fifth amendment right not to testify. Following a hearing on a Motion to Compel, a Florida court ruled, on April 10, 2007, that Bryant was within his rights in refusing to answer questions.

Bryant's account, as related to the above-named persons, can essentially be reduced to the following: He had attended Brunswick School in Greenwich for the three school years preceding the autumn of 1975. There he had made a number of friends including Crawford Mills and Neil Walker. The latter resided in Belle Haven and their friendship had enabled Bryant to become familiar with the area and a number of its teen-age residents.

During the fall of 1975, Bryant attended a public high school in Manhattan where he befriended Adolph Hasbrouck and Burton Tinsley. Hasbrouck was a husky African-American youth who was well over six feet tall. Tinsley also stood over six feet and was described by some as African-American, although Bryant claimed he was of mixed Caucasian, Indian and Asian heritage. Bryant, himself African-American, was also more than six feet in height. During the fall of 1975, Bryant, on a number of occasions, brought his new companions to Greenwich where they visited Neil Walker and also spent time with Jeffrey Byrne, a neighbor of the Walkers. According to Bryant, at some point, Hasbrouck made the acquaintance of Martha Moxley and became infatuated with her.

Bryant has claimed that on the date of October 30, 1975, the three New Yorkers entrained to Greenwich and proceeded to Belle Haven. During this trip, Hasbrouck allegedly spoke extensively about his passion for Moxley and his desire to "have his way" with her and to "go caveman" on her. Bryant explained "going caveman" to mean hitting her on the head, dragging her by the hair, and having his way sexually with her. Bryant stated that Hasbrouck had previously openly expressed these sentiments and others in front of a number of his teen-age acquaintances from Belle Haven.

Bryant alleged that on arriving in Belle Haven, at between 5:30 and 6:00 p.m., the trio went to the Walker home. There Neil supposedly came to the door and informed them that he could not go out. They then went across the street, collected Jeffrey Byrne, and proceeded to go about doing mischief. In the course of this activity, Bryant claimed they met up with and accompanied a number of other teenagers. Bryant claimed that the group, which grew to as many as fifteen youths, gathered to the rear of the Skakel home where they drank beer and smoked marijuana. As the evening continued, Bryant stated that Hasbrouck and Tinsley

continued to talk about “having their way and going caveman,” presumably on Martha Moxley. They picked up golf clubs from the Skakel lawn, which they referred to as their “caveman clubs.” At this point, Bryant allegedly became concerned about the direction the evening was taking and caught a ride to the train station with a Belle Haven family, leaving Hasbrouck and Tinsley to stay behind. Bryant claimed his companions slept over at Jeffrey Byrne’s home.

Bryant reported that he returned to Belle Haven the next day and that he learned of Martha Moxley’s murder that same day when his mother showed him an article in the New York Times. On the following Monday, he met with Hasbrouck and Tinsley who allegedly boasted that they had achieved their fantasy by “going caveman” on her (without ever identifying “her,” or, for that matter, mentioning having actually killed anyone). Bryant claimed that, upon the advice of his mother, who suggested that as a black person he would never be treated fairly in the justice system, Bryant kept his story to himself for more than twenty-six years.

Crawford Mills first met Gitano Bryant as a fellow student at the Brunswick School where they became friends. Mills described Bryant as popular, friendly, affable, and athletic. After Bryant left Brunswick in the spring of 1975, they had no contact until after college graduation. PT 4/18, at 6-9. In the nineteen eighties, Mills had begun writing a screenplay, loosely based on the Moxley murder. After completing it around 1991, he had sent a copy to Dorthy Moxley, and, he thought, to Attorney Michael Sherman and State’s Attorney Jonathan Benedict. *Id*. at 12-14.

Bryant and Mills had only met two or three times in New York City in the nineteen nineties. Then, shortly after the attack of September 11, 2001, Bryant telephoned Mills in New York and the subject of the screenplay effort came up. Bryant mentioned that he had

experience as both an entertainment attorney and in writing a number of television screenplays. He suggested that Mills send him a copy of his work and that they collaborate on the project. Mills complied. *Id*. at 16-17, 42.

After not hearing from Bryant for a lengthy period of time, Mills telephoned Bryant during the week between Christmas, 2001 and New Years Day, 2002. In this conversation, Bryant informed Mills that Michael Skakel could not have killed Martha Moxley but that he knew who did. He then related his story about "Adolph and Burr" for the first time. PT 4/18 at 17-19, 46-47. Mills also recalled Bryant stating that it was "the next day" when he'd heard his two New York friends boasting about "going caveman." Mills had vaguely recalled meeting Adolph and Burr. He remembered them both as being big, tall and African-American. Bryant insisted that Mills not divulge his identity. *Id*. at 18-19, 42.

In the few months remaining before the trial, Crawford Mills contacted "everybody": police, Sherman, prosecutors, and repeated everything Bryant had told him but did not disclose the identity of his informant. PT 4/18 20-21, 50-51. He additionally sought out Neil Walker to help in getting the word out. *Id*. at 53. Mills followed the trial through to conclusion, persisting in honoring Bryant's confidence all the way to the verdict. By coincidence, at that time he was working at NBC Studios and encountered Dorthy Moxley who was appearing on a morning news show. Mills efforts to inform the victim's mother about Bryant's allegations resulted in his prompt termination. *Id*. at 22-24, 54-55. At that, he decided to disclose Bryant's identity. When the latter still refused to go public, Mills in early July, 2002, wrote to the New York Times, and, on July 8, faxed a summary of the Bryant story to State's Attorney Benedict. PE 67; PT4/18 at 24-25, 55. Benedict, within a few days, directed Mills' communication to Attorney Sherman. PE 68. After receiving no responses, Mills, in February, 2003, contacted

Robert F. Kennedy, Jr.

Although Mills may have met Adolph and Burr at a block party in Greenwich; PT at 18; he had never seen Martha Moxley with Gitano Bryant or either of his two companions. *Id*. at 39-40. He has never met anyone who corroborates Bryant's story. *Id*. at 52. He never heard anyone say he wanted to "go caveman" or grab anyone from behind and drag them by the hair. He knew Martha Moxley but was never aware of Adolph's alleged infatuation with her and had never seen the two in the same place as one another. *Id*. at 59-60.

Neil Walker met Crawford Mills and Gitano Bryant at Brunswick School where they became good friends. Jeffrey Byrne lived across the street from Walker and when Bryant would visit they would play at the Byrne home and elsewhere in the neighborhood. In this way, Bryant became familiar with the area. PT 4/18 at 65-66. After leaving Brunswick, Bryant returned to visit a few times with two new friends, Adolph and Burr, who were both big and African-American. *Id*. at 67-68, 81. Walker vaguely recalled Bryant having attended a block party and a casual dance at Sacred Heart Academy. *Id*. at 69.

Either prior to October 30, 1975, or at some point, Mrs. Byrne had requested Walker's help in getting an African-American youth to stop hanging around her home. *Id*. at 80. In the ensuing years after 1975, his only contact with Bryant was by telephone around holidays and birthdays. The only time he saw him personally was after graduating from college in 1983. *Id*. at 70, 90. During that span, Bryant never mentioned having been to Belle Haven on the night of the murder. *Id*. at 91.

In early 2002 Walker received a telephone call from Crawford Mills who related Bryant's story and requested that he speak to Bryant. When Walker did this, Bryant related his story including mentioning that his first stop with Hasbrouck and Tinsley on the night of the murder

had been at the Walker home. Bryant also stated that it had been the next morning that he had been informed by Adolph and Burr of the previous evening's activities. PT 4.18 at 73. Bryant further told Walker to repeat his story to anybody who would listen, but to "keep my name out of it." After speaking to a number of people, Walker tried to persuade Bryant to go public, but to no avail. *Id*. at 74-75, 87-88.

Neil Walker does not recall Gitano Bryant or his two African-American friends coming to his house on the night of the murder, which was a school night for him. PT 4/18 at 82-83, 94-95. He had met Adolph about three times and was unaware of any infatuation for Martha Moxley or of ever having seen the two in the same place at the same time. He never heard Adolph express a desire to "go caveman" or " f - - the - - - out of" Martha Moxley or catch her and drag her by the hair. *Id*. at 84-85, 99.

Robert F. Kennedy Jr. and petitioner, first cousins, had become close friends beginning around 1983. Kennedy testified that he writes to petitioner in prison, visits him there, and in January, 2003 published an article decrying his cousin's conviction in the Atlantic Monthly magazine. PT 4/17 at 40-44. In February, 2003, Kennedy received a fax communication from Crawford Mills (PE 1) which induced him to quickly call Gitano Bryant. The first of five tape recorded telephone calls between the two (PE 2-11) was unannounced, but Bryant immediately picked up on the subject when his caller identified himself. PE 2 , at 10 to 11. In the first phone call, Bryant expressed his reluctance to come forward; *id*. at 12; and asked if he could get back to Kennedy. *Id*. at 13. After not hearing from Bryant, Kennedy called again. PE 4. Bryant again stated his reluctance to come public, noting that he too was a "very public figure." *Id*. at 15. (Although he failed to mention the public aspects of a multi-state, multi-million dollar import duty fraud case involving the company in which Bryant was a

principal; neither was Kennedy aware of Bryant's 1992 California felony conviction for conspiracy to commit robbery. PT 4/17 at 95-97).

Bryant thereupon related his story to Kennedy. PE 4 at 16 - 48. He stated that the trio of New Yorkers first went to the Walker home where they spoke to Neil, who could not join them. They then collected Jeffrey Byrne who remained with them, at least until Bryant departed at around 9:00 p.m. They also either saw or encountered Helen Ix, Andy Pugh, Michael Skakel, Tommy Skakel, and Julie Skakel and eventually gathered with a group of at least fifteen other youths (including the victim) somewhere to the rear of the Skakel house. *Id*. Kennedy was subsequently unable to corroborate any of this. PT 4/17 at 78-81, 103 - 105, 110. Bryant also stated that he had traveled back to Belle Haven the very next morning, but had returned home upon receiving a telephone call from his mother who had somehow already heard of the murder. PE 4 at 21.

Kennedy next located Bryant's two accused. He made an unannounced taped telephone call to Adolph Hasbrouck (PE 12 and 13) at the end of February, 2003. There, Hasbrouck, not even aware of Jeffrey Byrne's death; PT 4/17 at 90; acknowledged that he had been to Belle Haven on a number of occasions with Bryant, and knew Neil Walker and Jeffrey Byrne. Importantly, however, Hasbrouck, who was at this point unaware of Bryant's allegations, stated that he was not in Belle Haven on the night of the murder. PE 12 at 22-23. Kennedy telephoned Burton Tinsley a few days later and, again, in a recorded call was told that Tinsley recalled accompanying Bryant and Hasbrouck to Belle Haven but had never stayed the night. He remembered Neil Walker and Jeffrey Byrne (and was surprised to hear of the latter's death). When he read of the murder, he did not recognize the victim's name. He stated that he had not been to Belle Haven for at least a week prior to the crime. PE 15 at

3-7.

Between speaking to the two suspects, Kennedy had a conversation with an incredulous Daryll Fleuren, an older sister of Jeffrey Byrne. There, Kennedy expressed, having spoken to Hasbrouck, that "his [Hasbrouck's] life is just too normal and mainstream," and the story "is not right." RFK at 29-31.

Vito Collucci is a private investigator who was first retained in 2001 to assist original trial counsel Michael Sherman. Following the verdict, he was retained by successor counsel. In June 2003 he was asked by present counsel to contact Gitano Bryant who had already related his story to Crawford Mills and Robert Kennedy Jr. After six to eight telephone conversations with Bryant, arrangements were finally made to conduct a videotaped interview in Florida on August 24, 2003. Petitioner did not give the state notice of, or an opportunity to participate in, this interview. (PE 23 and 24); PT 4/15 at 102-105.

In the interview, in addition to what he had previously stated to Robert Kennedy Jr., Bryant described that his group, which included Jeffrey Byrne (after having failed to recruit Neil Walker), encountered a "revolving door" of girls that included Helen Ix and another young resident (later determined to be) Lisa (Rader) Edwards. Bryant also mentioned seeing Josh Engels, Andy Pugh, Thomas Skakel, Michael Skakel, Julie Skakel (who waved to them) and Martha Moxley. Eventually there gathered a group of as many as fifteen youths at a spot behind the Skakel home. The group became boisterous, to the point of "embarrassing" some of the girls. When Bryant decided to head back to New York, he hitched a ride to the train station from a member of a family which he knew but could not name. PE 24. When asked whether he had taken any steps to pursue any of the foregoing potential leads, Collucci responded that he had not. PT 4/18 at 155-158, 161-165; 4/19 at 21-23, 27-28. In fact,

Collucci not only failed to seek out corroboration by contacting any of the youths Bryant allegedly saw that night, he never even asked the petitioner, or his brother Tommy and sister Julie, whether they saw Bryant that night. PT 4/18 at 163; PT 4/19 at 22.

In the videotaped interview, Bryant also described the aftermath of the murder, stating that "the next morning" his mother drew his attention to an article reporting the murder in the New York Times. He went on to describe meeting with Hasbrouck and Tinsley the following Monday and hearing them boast of "going caveman," "dragging her by the hair," and "achieving their fantasy." PE 23 and 24. Collucci, having been involved in the case from at least one year prior to the trial and, having attended that proceeding, was aware that there was no evidence of sexual intercourse or of the victim being dragged by the hair. He was also aware of the testimony that the golf club had broken in the assault and the victim had been stabbed through the neck with a piece of it. Nevertheless, this was not mentioned in the boasting by Hasbrouck and Tinsley. Despite these glaring inconsistencies between Bryant's story and the evidence, Colluci made no effort to clarify these matters with Bryant. PT 4/19 26, 32-3. Nor did he address the fact that neither Crawford Mills nor Neil Walker had ever heard anyone use such language relating to Martha Moxley as "going caveman" or "f - - - the s - - - out of." Nor did he question Bryant about anyone who could put Hasbrouck and the victim together. PT 5/18 at 165; 5/19 at 19.

Collucci's efforts to corroborate Bryant's story were, instead, devoted to interviewing Hasbrouck and Tinsley. His first effort was an unannounced visit to Hasbrouck's home in Bridgeport shortly after the Bryant interview. In direct examination, Collucci testified that, with his associate Kris Steele taking notes, he spoke to Hasbrouck for approximately one hour. Collucci related that Hasbrouck, who had previously spoken to Robert. F. Kennedy in a

recorded telephone call (PE 12 and 13) and denied having been in Greenwich on the night of the murder, admitted to him that he had actually gone there on October 30 but had left in the afternoon; then conceded that he had not left until between 6:00 and 6:30 p.m. and, finally stated that he had not left until 9:00 or 9:30 p.m. On cross-examination, respondent confronted Collucci with a copy of Kris Steele's report (petitioner's pre-trial marked exhibit 26 for identification) which contains no admissions by Hasbrouck of having been in Belle Haven at any time on the date of the crime. Collucci testified that, after reading Steele's report, he directed him to rewrite it to include the alleged admissions. PT 4/18 at 151; 4/19 at 12-13. Collucci further testified that he made no effort to tape the interview, either openly or surreptitiously. PT14/19 at 8. Petitioner did not produce Steele as a witness.

Collucci further testified that, on September 3, 2003, he telephoned Burton Tinsley in Portland, Oregon. Tinsley had also previously denied having been in Greenwich in a recorded conversation with Robert F. Kennedy Jr. (PE 28). Collucci reports that, in his untaped call, Tinsley admitted having been in Belle Haven on the night of the murder. PT 4/18 at 138. Notably, both Hasbrouck and Tinsley reported in follow-up calls by the investigators, that, when they realized, on checking calendars, that October 30, 1975 was school night, they could not possibly have been in Connecticut. PT 4/18 at 139; 4/19 at 15 -16. Both Hasbrouck and Tinsley appeared at depositions where, on the advice of counsel, they declined to testify.

Esme Dick, a business acquaintance of Gitano Bryant's mother and spouse of a Brunswick School faculty member, took Bryant into her home while he attended Brunswick from seventh through ninth grades. PT 4/17 at 129. Dick testified that Bryant had visited in the fall of 1975, but without any companions. In the following years, she saw him only twice, but did keep up by telephone on the holidays. At these times Bryant would talk mainly about his

family. Bryant never told her about either his multi-state import tax litigation or his California robbery conviction. *Id*. at 133-135.

Dick recalls having two conversations about the Moxley murder with Bryant. The first was a dinner conversation with her family in 1976 in which the participants speculated upon who was responsible for the crime. Bryant opined that it was not Michael Skakel. *Id*. at 130, 137. Some time after the verdict, in a telephone call, Bryant stated that Skakel had been wrongly convicted. *Id*. at 131. Bryant provided no details in these conversations to support his opinions, although in one instance he stated that he had been at a party in Belle Haven on the night in question. However, due to the passage of time, Dick could not pinpoint when that particular conversation took place. *Id*. at 130, 137. Dick never suggested that Bryant take whatever information he might have to the authorities. *Id*. at 139.

In a deposition (PE 46), **Charles Morganti** testified that he was assigned as a Greenwich Special Police Officer to patrol Belle Haven on the night of October 30, 1975. *Id*. at 4-5. At around 10:00 p.m. he investigated a stanchion that had been knocked down at the intersection of Otter Rock Road and Walsh Lane. *Id*. at 19-20. Earlier, he had heard a group of persons in the area of the Skakel home. *Id*. at 27. This was before 8:00 p.m. and the voices sounded like those of early teens. *Id*. at 54-55.

Dr. Henry Lee, director of the state forensic laboratory testified at the original trial as to the presence of a single, dark brown, Negroid hair removed from one of two blue sheets used to cover the victim. (PE 60) Dr. Lee testified that hair is not a positive identifier. Lee also explained secondary hair transfer, whereby one's person's hair can fall off, alight on, and thereby be found on or near another person. T. 5/8 at 170-172.

At the petition hearing, Detective James Lunney testified that, in 1975, the Skakel family employed an African-American housekeeper named Ethel Jones. Jones, along with her husband and son, resided in a house to the rear of the Skakel home. PT 4/25 at 73.

At trial, Terry Melton testified that a hair recovered from one of the blue sheets had an Asian DNA profile. This indicates only that the donor may possibly have been Asian. T. 5/15 at 53-53.

While Gitano Bryant described Burton Tinsley to Vito Collucci as being of mixed race; Indian, Caucasian, "maybe some Asian"; SE 24 at 13; he had earlier stated to Robert F. Kennedy Jr. that Tinsley was of "mixed decent...Indian, black. I don't know...He has white skin, but...there could be something else." SE 10 at 4. Both Walker and Mills recall Tinsley as being African-American.

Barbara Bryant, mother of Gitano, testified that she had met her son's friends, Adolph and Burr, and had found them to be attractive, mannerly, shy and respectful. Mrs. Bryant recalled one as black and the other white. PE 43 at 23-24, 47. Her son had gotten in trouble in Connecticut in 1975 and, consequently she had imposed a curfew from which he could not vary without permission. *Id*. at 21. On October 30, 1975, he was home at the time of the murder due to his curfew. Mrs. Bryant stated that Gitano had been home by daylight due to his responsibilities. *Id*. at 29-30, 48. The first time she had ever heard of the Moxley murder, one of a group of girls in her home, referring to a newspaper article, had stated to Gitano, "Aren't you glad you had your b - - - - a - - home." *Id*. at 27-28, 45. The first Mrs. Bryant had any knowledge of her son's "involvement" was in recent years when she read an article in a news magazine. *Id*. at 51. Although Mrs. Bryant recalled being interviewed by petitioner's investigators prior to the deposition, she characterized herself as being "surprised" and she

stated the investigators had accosted her while she was under a number of medications prescribed as a result of recent surgery. *Id*. at 25-26.

Michael Udvardy and **Catherine Harkness**, investigators retained by petitioner, described their meeting with Barbara Bryant in New York City. They both stated that they set up a surveillance outside of Mrs. Bryant's apartment building and followed her up the street until they caught up with her. PT 4/23 at 65-66, 68-72. In the ensuing curbside conversation, Mrs. Bryant stated that her son had told her that he was in Belle Haven with Adolph and Burr on the night of the murder. *Id*. at 58. No effort was made to record this conversation, either openly or surreptitiously. *Id*. at 65-66.

In a statement given to Greenwich detectives in 1975 (PE J, published at PT 4/25 at 144 - 145), **Julie Skakel**, was asked whether there were many kids out at the time she took Andrea Shakespeare home (approximately 9:30 p.m.). She responded, "It was surprising because I usually ... Belle Haven is just covered with kids. But I just ... even coming back from dinner, I didn't see anybody."

Daryll Fleuren, older sister of Jeffrey Byrne, informed Robert F. Kennedy Jr that, on the night of the murder her father was on the porch when her brother got home. RE K at 2. Fleuren also stated that her mother came home at 10:00 p.m. that night and Jeff was in bed. *Id*. at 19.

Gregory Byrne, an older brother who lived outside of the residence but worked at the Byrne residence, testified in a deposition (RE H) that he arrived at the home to work at 8:00 a.m. on October 31, 1975. It was a public school holiday and Jeff was home. Gregory Byrne stated categorically that there were no African-Americans present. *Id*. at 5-7; PT 4/25 at 156-

159.

Helen (Ix) Fitzpatrick testified that she had met up with Martha Moxley and Jackie Wettenhall at about 6:30 p.m. on October 30, 1975. PT 4/19 80, 105. While she recalled not being joined by Jeffrey Byrne until toward the end of the evening, she had informed the police in 1975 that Byrne had joined them shortly after she met Martha. RE L; PT 4/19 at 91, 104. The witness testified she arrived at the Skakel home at or shortly after 9:00 p.m., remained there for fifteen to twenty minutes and left with Jeffrey Byrne, walking through the Skakel backyard to her property where Byrne headed in the direction of his home. *Id*. at 83 - 84.

Fitzpatrick further testified, on being asked whether she saw anyone while heading home, that she "didn't know." As to hearing anything, she stated "no." However, in 1975 she had informed investigating officers (RE L) that she had not seen or heard anything, other than, earlier, a man wearing a suit on Walsh Lane. *Id*. at 95-98. The witness did not testify to having seen either Gitano Bryant or his companions that night or having ever related such a sighting in any previous interview or proceeding. *Id*. at 97-102. She stated she "could not remember" having observed a group of fifteen or so teens gathered behind the Skakel house, or having joined any such group with Martha Moxley. *Id*. at 105. In a recorded interview given to Robert F.Kennedy Jr. in 2003, Fitzpatrick had stated, " I remember Tony Bryant ... I don't remember even seeing him that night ...Tony's friends weren't with us. We never saw them." RE M.

Lisa (Rader) Edwards is one of the girls mentioned by Bryant in his interviews by Robert F. Kennedy Jr. and Vito Collucci. She testified she was certain that she was not out on the night of October 30, 1975. She knew Tony Bryant but not Adolph or Burr, and did not see any of them that night. Nor did she see a large group gathered to the rear of the Skakel

home. She never saw Martha Moxley with either Bryant or his companions. PT 4/25 at 7-9.

Marjorie (Walker) Hauer, a sister of Neil Walker, was a very good friend of Martha Moxley's. Hauer stated that Martha had never confided in her as to anyone being obsessed with her and could not recall having ever met Adolph or Burr or having seen them with Martha. PT 4/24 at 88-92.

Jackie Wettenhall met up with Martha, Helen Ix, and Jeff Byrne at around dinner time on October 30, 1975. They stopped by the Skakel home twice during the evening but no one was home. At about 9:00 p.m. she left the group as they were heading back to Skakel's. Wettenhall knew Tony Bryant from school but did not know his two friends. She did not see any of them that night. Nor did she see any group of teens gathered behind the Skakel home. She never saw Martha Moxley in the presence of Tony Bryant or either of his friends. PT 4/25 at 125-129. On reviewing sections of the victim's diary (RE F) that pertained to a street fair and a dance, Wettenhall noted that amongst numerous people named therein, Moxley never mentioned seeing Tony Bryant or his two friends. *Id*. 131-135.

James Lunney was a detective in the Greenwich Police Department in 1975. In the aftermath of the Moxley murder he had occasion to interview the residents of Belle Haven. This included adults, teens and, with their parents, younger children. The police objective was to find out who was in the area on the night of the murder. None of these efforts ever brought to his attention the name Gitano or Tony Bryant nor did they direct the investigation toward African-Americans. PT 4/25 at 71-75.

b. Bryant's Statements And Those Attributed to Hasbrouck and Tinsley Should be Stricken or Disregarded as Unreliable Hearsay

The very crux of an adversary system of justice is the right of confrontation.

Consequently, because the declarant is unavailable for cross-examination, a third party declaration against penal interest must contain persuasive assurances of trustworthiness. *State v. DeFreitas*, 179 Conn. 431, 450, 426 A.2d 799 (1980). The Connecticut Supreme Court has noted four factors that must be considered when determining admissibility: "(1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; [and] (4) the availability of the declarant as a witness." (Internal quotation marks omitted.) *Id*., 451; Conn. Code Evid. § 8-6 (4). In recognizing "that the unrestricted admission of declarations against penal interest would be to invite perjury of a kind that is most difficult to ascertain. . . . To circumscribe fabrication and ensure the reliability of declarations against penal interest, there must exist circumstances . . . which clearly tend to support the facts asserted in the declarations." *State v. DeFreitas*, *supra*, 452 n.9.

Clearly here, were the state afforded an opportunity to cross examine Bryant, it would be able to pursue numerous avenues of confrontation; the decades-long delay in reporting; Bryant's motivation in creating a screenplay; his demand for anonymity on the verge of trial; instances of misconduct evincing a lack of credibility; self-contradictions, and, especially, the absence of corroboration by the established evidence of the case. Cross-examination is "the greatest legal engine ever invented for the discovery of truth." (Internal quotation marks omitted.) *State v. Oquendo,* 223 Conn. 635, 668, 613 A.2d 1300 (1992); *State v. Outlaw*, 216 Conn. 492, 499, 582 A.2d 751 (1990). Given the inability of the state to pursue these and other topics, it is imperative that the court ensure that petitioner's proffer is reliable before admitting it into evidence.

Before applying Bryant's account to the criteria set out above, it should be further noted

that what has been offered by petitioner is, in part, double hearsay. This is because Gitano Bryant's claim includes statements attributed to Hasbrouck and Tinsley. As statements made out of court, not subject to cross-examination and offered for the truth of their contents, these utterances are hearsay; Conn. Code Evid. § 8-1; *State v. Miller*, 154 Conn. 622, 629, 228 A.2d 136 (1967); and inadmissible unless they also fall under some exception to the rule. Conn. Code Evid. §§ 8-2, 8-7; *State v. Lewis*, 245 Conn. 779, 802, 717 A.2d 1140 (1998). The anticipated hearsay exceptions would appear to be, as with Bryant, declaration against penal interest and the residual exception. Respondent will therefore address this second level of hearsay in the course of applying the *DeFreitas* criteria to Bryant's story.

i. Petitioner Has Failed to Establish That Either Bryant's Statements or Those Attributed to Hasbrouck and Tinsley Are Admissible under the Declaration Against Penal Interest Exception to the Hearsay Rule

1. Time and Party

A. Time

Gitano Bryant waited twenty-six years before divulging his story to anyone; he then waited until after the trial (another year and a half) before going public. A prompt disclosure is consistently considered to be indicative of trustworthiness. *State v. Bryant,* 202 Conn. 676, 699-700, 523 A.2d 451 (1987) (three statements either before or immediately after commission of crime; one, eight months later); *State v. Hernandez*, 204 Conn. 377, 392, 528 A.2d 794 (1987) (the next day), overruled on other grounds by *State v. Sawyer*, 279 Conn. 331, 904 A.2d 101 (2006); *State v. Lopez,* 254 Conn. 309, 314, 757 A.2d 542 (2000) (one and a half days); *State v. Pierre,* 277 Conn. 42, 71, 890 A.2d 474 (2006) (couple of weeks). Long-delayed declarations have not been accepted. *State v. Mayette*, 204 Conn. 571, 578, 529 A.2d

673 (1987) (three weeks); *State v. Rivera,* 221 Conn. 58 , 70, 602 A.2d 571 (1992) (seven months). The alleged boasting of Adolph and Burr, taking place only three days after the crime, was sufficiently prompt to satisfy this prong of *DeFreitas*. However, this does not cure the problem of Bryant's delay, since "each level of hearsay must itself be supported by an exception to the hearsay rule in order for that level of hearsay to be admissible." *State v. Lewis, supra*, 245 Conn. 802; Conn. Code Evid. § 8-7. The alleged boasting within three days of the offense in no way alters the fact that Bryant, who could have come forward at any time, waited a quarter century to do so.

To compare the Bryant offer to the testimony of John Higgins at trial and Gregory Coleman in the hearing in probable cause is disingenuous. The simple fact is that both of these persons were subjected to lengthy and thorough cross-examination. The triers of fact were provided an inside and out view of each witness, warts and all. That Bryant was only "discovered" in recent years ignores the facts that; he, a trained attorney and a person who had advanced well into adulthood, had harbored his secret for years; he did not come forward, rather he was brought forward and, even then, only after he had been "outed" against his ardently expressed wish. Indeed, were there any truth to what he had to say, he could have taken steps to see that the ends of justice were met at any time. The Moxley family would have had closure, and Kenneth Littleton, Thomas Skakel, and Michael Skakel could have pursued their lives out from under the microscope. Neither is the analogy to a delayed confession helpful; Bryant has not come close to making a confession. See *infra.*

B. Party

This, the second prong of the first of the criteria of trustworthiness, is even more telling than the first. "With respect to the second part of the first element of trustworthiness, [our

courts] require that the witness testifying to the statement must be one in whom the declarant would naturally confide. . . . There must be a relationship in which the two parties to the conversation had a close and confidential relationship." (Citation omitted; internal quotation marks omitted.) *State v. Lopez, supra*, 254 Conn. 317-318. Notable examples, all of which entail statements made to more than one confidant, are: *Chambers v. Misissippi*, 410 U.S. 284, 300 (1973) (confessions made to close acquaintances who, because "of their closeness could presumably be deemed persons in whom one might reasonably confide"); *State v. Defreitas*, *supra*, 179 Conn. 453; *State v. Bryant*, *supra*, 202 Conn. 699 (statements made to mother, brother, and friends); *State v. Gold*, 180 Conn. 619, 625-26, 431 A.2d 501, cert. denied, 449 U.S. 920 (1980) (spontaneous statement to friend of twenty years, friend of one year, and fellow motorcycle club member). In *State v. Pierre*, *supra,* 277 Conn. 70, the court noted a relationship where the parties had been friends for a couple of years and socialized regularly, and found that, "they shared a friendship and a relationship of trust." The cases have not looked with favor on declarations made to single witnesses who bore no confidential relationship with declarant. *State v. Hernandez*, *supra*, 204 Conn. 389 (stranger); *State v. Rivera*, *supra*, 221 Conn. 70-71 (brother of declarant but they did not get along); *State v. Lopez*, supra, 254 Conn. 318 (nine year relationship which was not close and confidential).

In the instant case, the two parties to whom Bryant initially disclosed his story are Crawford Mills and Neil Walker. These are two old junior high school classmates who had seen Bryant no more than two or three times each in the intervening twenty-six years. While they did keep up by telephone with Bryant on occasion (holidays and birthdays), there is no evidence of any depth of relationship beyond having been school chums during their early teens. There is no evidence of any sharing of troubles or confidences or any other form of

involvement in one another's lives beyond periodic casual "catching up." Clearly there is no evidence to suggest that Bryant had such a relationship with either Mills or Walker such as to allow him to feel secure in "confessing" a crime.

In generally requiring a close confidential relationship, the courts have implicitly been concerned with the declarant's motivation in making such a statement. See *State v. Rivera*, 288 Conn. 351, 369, 844 A.2d 191 (2004) (declarant made statement to uncle not in coercive atmosphere of official interrogation that could potentially motivate declarant to shift blame). The entire issue in the instant case was kindled by a September, 2001 telephone call where Crawford Mills mentioned his ongoing efforts to produce a script about the Moxley murder. Bryant, claiming experience as an entertainment attorney and script writer with connections in "show business" (a verdant area for cross-examination), suggested that the two collaborate. When nothing came of his offer for several months, Mills called Bryant for an update, only to hear his old schoolmate drop his bomb about Adolph and Burr. Contrary to petitioner's suggestion, Bryant's statement to Mills was the only one made under his own initiative. Its effect was to open the floodgates despite Bryant's fervent efforts to stay out of it. Neil Walker was not approached by Bryant, rather he was recruited by Mills to try to persuade Bryant to come forward.

Robert F. Kennedy, Jr. certainly cannot be likened to a "close confidant." He was pulled in only after Crawford Mills, following the verdict, lost all patience and went to Kennedy who had recently become a public champion of his cousin's cause. At this point, receiving an unannounced telephone call from a person of genuine public stature, Bryant lost all control of the process, at least until the time of his deposition three and one half years later when he retained counsel.

Vito Collucci's videotaped interview, taken neither under oath nor with the opposing party's participation, was merely the inevitable and apparently final step in what began as mere catching up between old schoolmates but eventually evolved into one more example of what Attorney Michael Sherman characterized as the "I Love Lucy Syndrome."[10] Petitioner's comparison of the Collucci interview to the several cases cited in his Reply Brief of 4/10/07 are inapposite. In *Laumer v. United States,* 409 A. 2d 190 (D.C.1979), declarant was found, in the course of exculpating the defendant, to have made statements to a police officer inculpating himself in a crime. It should go without saying that, in some situations, a confession or inculpating statement made to a member of the law enforcement community can be highly trustworthy. "An inculpatory statement made to a police officer may be distinctly trustworthy because the declarant may be assumed to have been immediately aware of the consequences of such a statement." *Id.* 201; see also, *United States v. Thomas,* 571 F. 2d 285, 290 (5th Cir. 1978) (statement made off record but aloud in courtroom and within hearing of U.S. magistrate and prosecutors). The Collucci statement is no more than a repeat of what had already been disclosed in a recorded interview by Kennedy. It is difficult to perceive how Collucci was acting in an official capacity comparable to a detective or federal magistrate. Moreover, Bryant's statement that he departed Belle Haven before matters deteriorated is inculpatory of nothing, as will be addressed, *infra.*

While the time interval between the crime and the alleged admissions of Hasbrouck and Tinsley falls within the *DeFreitas* guidelines, the party to whom the disclosures were made is another matter. Bryant and his companions, were, at the time, fifteen year-old, high school

[10] Sherman explained that someone with this syndrome always wants to "get into the act." PT 4/20 at 28, 35.

classmates. Bryant had only entered Hughes High school in the fall, 1975 semester, less than two months before the murder. The relationship of the trio only lasted through the end of that school year when Bryant moved on to a school in Texas (PE 24, interview to Vito Collucci). There was no association after that. There is no evidence of any sincere sharing between the three of any life concerns during the relationship's brief span. Rather, the context of the Monday-after conversation reveals, if it occurred at all (see Corroboration, *infra),* it to be no more than immature, idle boasting upon having learned of the murder.

2. Lack of Corroborating Evidence

"The corroboration requirement for the admission of a third party statement against penal interest is significant and goes beyond minimal corroboration. Third party statements exculpating an accused are suspect and the requirement of corroboration, to effect its purpose of circumventing fabrication, must be construed as requiring corroborating circumstances that clearly indicate the trustworthiness of the proffered statement." *State v. Rosado,* 218 Conn. 239, 249, 588 A.2d 1066 (1991). "[T]he trustworthiness of such proffered statements must be examined carefully." (Internal quotation marks omitted.) *State v. Bryant, supra*, 202 Conn 693. There must be a "showing that the . . . evidence was circumstantially trustworthy or bore considerable assurance of . . . reliability." (Internal quotation marks omitted.) *Commonwealth v. Drew,* 397 Mass. 65, 72, 489 N.E.2d 1233 (1986). The suggestion that the corroborating evidence need only establish a minimum threshold does not appear in this state's case law. Cases cited by petitioner as to what is adequately corroborative by other jurisdictions do not appear to advance petitioner's claim. In *People v. Barrera,* 547 N.W. 2d 261 (Mich. 1996), the declarant had made a confession to a police officer that dovetailed with numerous facts of the case. In *Alonzo v. State,* 67 S.W. 3d 346 (Tex. App. 2002), the declarant had provided the

precise location of the murder and a detailed description of the body, hardly the case in either of the two levels of hearsay in the instant matter.

The evidentiary corroboration suggested by petitioner should be looked at carefully. *State v. Bryant, supra*, 202 Conn. 693. Respondent concedes that Gitano Bryant was familiar with part of Belle Haven, as well as with some of the youths and families who resided there; further that he may have attended social functions that Martha Moxley may have attended; also, that he had brought two friends to Belle Haven a few times (although whether both or only one were African-American is unclear). This, however is no more information than anyone who attended the Brunswick School and was a friend to Neil Walker would have had. Indeed, it is information possessed by Walker and any of his circle of friends. Beyond this information and that available to anyone who gave the case's media coverage a modicum of attention, Bryant's statements provide little, if any corroborating evidence.

Esme Dick testified in the hearing that, on a prior occasion, Gitano Bryant stated, either by way of speculation or due to personal knowledge, that Michael Skakel did not murder Martha Moxley. He also stated that he was in Belle Haven at a party that night. Because of the passage of years, however, she could not recall whether that particular comment was made in a casual dinner conversation within a year of the murder or at some point "in recent years." This is important because if the statement was made on the latter occasion, it adds even less to petitioner's claim than what Bryant had said, for instance, to Neil Walker. Furthermore, it only stands to reason that, had Bryant made the statement in 1976, Dick would have immediately hustled him down to police headquarters.

Petitioner suggests corroboration from the crime scene. There was a single hair with African-American characteristics recovered. However, Dr. Henry Lee testified about the

limited value of hair as an identifier. He also described the concept of secondary hair transfer, hardly implausible in an area where petitioner's household (as well as how many others in this ultra-affluent neighborhood?) was staffed by an African-American whose family resided right on the Skakel property. There was also testimony of another hair having, possibly, an Asian DNA profile but there is no evidence of Burton Tinsley's race other than Bryant's uncertain characterization. Petitioner also mentions Dr. Lee's testimony that the victim had been dragged, and Bryant's description of Hasbrouck and Tinsley picking up golf clubs; these, of course, are amongst the case's most notorious facts; e.g. books, newspaper, television; and were in the public forum years before Bryant ever made his disclosure to Crawford Mills.

Petitioner will, of course, point out the fact that Hasbrouck and Tinsley both allegedly admitted having been in Belle Haven on the night of the murder to investigator Vito Collucci. This, respondent submits, is highly suspect. There is no conceivably more important fact that could have been derived from an interview of Adolph Hasbrouck (other than an actual confession) than his admission that he had been near the crime scene at about the time of the crime. To make sure he did not miss anything, Collucci brought a note-taker, Kris Steele, to the interview. Yet, the initial report generated of the interview included nothing whatsoever about Hasbrouck having been in Belle Haven. Only after seeing the first report did Collucci direct Steele to write a new report including the admission. This begs the question, in a proceeding where the burden is on the petitioner, "Where is Mr. Steele?" Collucci next claims that, when he called Burton Tinsley a few days later, in another unrecorded conversation, Tinsley also admitted to having been to Belle Haven on the night of the murder.

What is remarkable about these two purported admissions to Collucci is that they were made after both Hasbrouck and Tinsley had been interviewed by Robert F. Kennedy, Jr., and,

in tape recorded conversations, clearly denied having been in Belle Haven on the night of the murder. Why would they, some months later and fully aware of the nature of the inquiry, now reverse themselves? For all of what Respondent perceives as Kennedy's bias, he certainly did the court, the parties, and Hasbrouck and Tinsley a service in recording their interviews. There is no question as to what he asked, what they answered, what was the context of the questions and answers and whether the two men understood what was being asked. Nothing prevented Collucci from using a recording device on his visit to Hasbrouck's home. See General Statutes § 52-570d ("*Action for illegal recording of private telephonic communications*"); General Statutes § 53a-189 ("*Eavesdropping*"). Instead, we have a belated assertion of admissions with no idea, whatsoever, how they came about, if at all.

In terms of Bryant's accounts being corroborated or refuted by the evidence, the balance falls overwhelmingly to the side of refutation. First, Bryant presents a number of self-contradictions. Amongst these are: he informed both Crawford Mills and Neil Walker that Adolph and Burr's "boasting" took place the very next morning; he informed Kennedy and investigator Collucci that this occurred on the following Monday. He describes two tall teenagers, one black, one white-skinned. Mills and Walker recall two blacks. He informed Kennedy that, the next morning, he actually traveled back to Belle Haven and walked into the ongoing investigation; he has failed to mention this to anyone else. He has also consistently stated that it was the next morning that his mother confronted him with a New York Times article reporting the murder, a publishing impossibility.

Barbara Bryant, Gitano's mother, has testified that, wherever her son was on October 30, 1975, he was home by dark, which is more than plausible, given the fact that it was a Thursday night during school season. Her recall of a news article in 1975 is that, one of a

group that was in her home told Bryant that it was a good thing that he had been home and not in Connecticut. While petitioner's investigators have contradicted her testimony, once again, this was done without regard to taping or memorializing the conversation in a way that allows the court to determine whether Bryant appeared to be on medication, frightened, or completely clear on what she was being asked in this curbside interrogation. Moreover, due to the circumstances under which this interview took place, the witness' statements to the investigators can be given no probative effect. *State v. Whelan, supra*, 200 Conn. 143*; Sears v. Curtis, supra*, 147 Conn. 311*;* Conn. Code Evid. § 6-10 (prior oral inconsistent statement of witness admissible for impeachment only); Conn. Code Evid. § 8-5(1) (prior written or recorded inconsistent statement of witness may be admitted for substantive purposes).

Gitano Bryant has described a relationship between Adolph Hasbrouck and Martha Moxley, or at least strong feelings on the part of Hasbrouck. Neil Walker and Crawford Mills have no recollection of this. Neither does anyone from the victim's innermost circle; Marjorie Walker, Lisa Rader, Helen Ix, Jackie Wettenhall, brother, John Moxley. In discussing Hasbrouck's feelings for Martha, Bryant described the young man's boasting publicly of his desire to "have his way" and to "f - - - the s - - - out of her. " Yet no one recalls this; had Crawford Mills or Neil Walker ever witnessed this, they would assuredly have been at police headquarters before the body had been removed from the scene. Neither are any of the New York trio mentioned anywhere amongst the names of numerous young people referred to in the victim's diary.

Bryant's story is refuted by the utter lack of supporting evidence from the night in question. He begins with the claim that the trio's first stop was at the home of Neil Walker; yet Walker has absolutely no recall of that brief visit. Bryant goes on to name various people he

saw or encountered that night, yet not one of those he named has testified to seeing him; nor have a number of persons one would expect to support petitioner if they could; brother Tommy, sister Julie, petitioner himself. Bryant describes a sizeable gathering of young persons behind the Skakel home and a "revolving door" of girls, some of whom were embarrassed by the boisterous group. None of these people, even Helen Ix who would have walked right past the gathering on her way home, has provided corroboration. The only resident of Belle Haven who appears to have actually met Adolph and Burr was Neil Walker. He did not see them that night, nor has anyone else testified to seeing persons who fit their description.

The subject of eleven-year-old, long deceased Jeffrey Byrne is instructive. Bryant appears to have himself and his two friends in the company of Jeffrey Byrne throughout the evening; yet it is incontestible that young Byrne was in a Skakel automobile from 9:00 p.m. until departing with Helen Ix. Furthermore, Jackie Wettenhall and Helen Ix (in her 1975 interview) place Byrne with them from early in the evening until Wettenhall parted at 9:00 p.m. Byrne's family has reported that Jeff passed his father on the porch when he arrived home and was in bed when his mother returned at 10:00 p.m.; and there were no young male visitors present the next morning. Gitano Bryant clearly was aware that Jeffrey Byrne had passed away many years ago; his insertion of this long-deceased young man as a would-be witness should be viewed with the utmost caution.

Finally, Bryant is refuted by the evidence of the crime scene. These aspects of the case are not only persuasive on the question of corroboration of Bryant's statement but also as to corroboration of the second level of hearsay, that of Hasbrouck and Tinsley. Clearly, Hasbrouck's purported passion for Martha Moxley was sexual in nature; indeed, Bryant has

him boasting, “I got mine ... we achieved our fantasy” a few days after the murder. Yet there’s no evidence of sexual intercourse. While petitioner has correctly observed that the dragging process may have wiped any semen from victim’s clothing or body surfaces, internal examination of both the vagina and anus revealed no evidence of sexual intercourse as well.

Neither has there ever been any evidence the victim was ever dragged by her hair. Dr. Lee has testified that she was dragged feet first and shoulders first but neither Dr. Lee nor Dr. Carver nor the original autopsy protocol note any significant loss of or damage to the hair. Further, Bryant makes no mention of the precise location of the crime scene, or that it even took place on the Moxley property.

Most notable are certain unmentioned aspects of the crime. The assault with the golf club was so vicious that the shaft broke into pieces; the victim was then stabbed through the neck with a section. Yet, in their subsequent boasts to Bryant, Hasbrouck and Tinsley completely failed to mention what are two of the most sensational facets of the crime. If a person is going to brag that he went “caveman,” beat someone over the head with a golf club and dragged her by her hair, wouldn’t he at least mention that the club broke? To assure that statements “were made under circumstances guaranteeing their trustworthiness (there must be) substantial independent evidence which tends to establish the trustworthiness of the statement.” *Laumer v. United States, supra,* 409 A.2d 197. In sum, the paucity of factual corroboration for Bryant’s account on the first hearsay level and that of Hasbrouck and Tinsley on the second, provides the court with no assurance of trustworthiness whatsoever.

3. The Extent to Which The Statements are Against Penal Interest

While the alleged boasts of Hasbrouck and Tinsley are not exactly confessions, they

concededly can be construed as having been made against penal interest (whether they possess other necessary indicia of trustworthiness is another matter). However, also at issue is whether what Bryant states is against his own penal interest. He relates, in short, that he was in Belle Haven and on the Skakel property (along with, by his count, at least a dozen other teenagers), that he was aware of his companion's sinister designs, but that he left the area before any criminal activity occurred. The fact that he held a golf club is meaningless; the grip portion of the murder weapon (that bore a Skakel identification tag) was never found. "[A] statement against penal interest is one which at the time it is made so far tends to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true." *State v. Gold*, *supra*, 180 Conn. 619, 641.

If what Bryant states about himself is at all incriminating, it is at best marginally so. It really is a self-serving profession of knowledge of a crime accompanied by an alibi. Importantly, these assertions first emerged during discussions about collaborating on a screenplay on Martha's murder. These scarcely appear to be the kinds of statements the courts have been inclined to consider against one's penal interests. Of the above-cited authorities that have held that a declaration should have been admitted, each involved a statement or statements with a much greater tendency to incriminate than the self-serving proffer made here. See, e.g., *Chambers v. Mississippi*, *supra*, 410 U.S. 291-94 (admitting to having shot police officer); *State v. Rivera*, 268 Conn. 351, 368 ("'[I] killed a woman'"; "'fucked her up because she got stupid'"); *State v. Bryant*, *supra*, 202 Conn. 696 (admitting to having committed burglary); *State v. Gold*, *supra*, 180 Conn. 625-26 ("'I'm in a phone booth. I'm covered with blood'").

4. Availability of Declarant as a Witness

The minimally self-incriminating value of Bryant's recorded interview has already been discussed. This court has already ruled on the availability of the Fifth Amendment privilege to Adolph Hasbrouck (Memorandum of Decision, September 12, 2006). The parties have agreed to stipulate that the same protection is due Burton Tinsley. Hasbrouck and Tinsley, however both are accused by Bryant of having committed a crime and of having made admissions as to their complicity in it. Gitano Bryant, on the other hand, has been accused by no one. Rather, he has merely made a self-serving statement of alibi and been accorded the right to refuse to testify in a deposition by the State of Florida. While a Florida court has allowed Bryant Fifth Amendment protection thereby making him unavailable, courts are required in that context to give the Fifth Amendment privilege "liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814 (1951). It should be noted that the nature of unavailability here is one entirely manufactured by the witness; this is not a case of evidence lost by way of death, incompetence or disappearance. Insofar as "no single factor in the (test) for determining trustworthiness of third party declarations against penal interest is necessarily conclusive"; *State v. DeFreitas, supra*, 179 Conn. 454 n.11; Bryant's unavailability can hardly be said, under all the circumstances, to accord him any trustworthiness.

ii. Petitioner Has Failed to Establish That Either Bryant's Statements or Those Attributed to Hasbrouck and Tinsley Fall Within the Residual Exception to the Hearsay Rule

Hearsay statements, not falling under a recognized exception to the rule, may be admitted upon a demonstration of, "a reasonable necessity for the admission of the statement

and. . . equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions." *State v. Sharp*, 195 Conn. 651, 664, 491 A.2d 345 (1985); see also Conn. Code Evid. § 8-9. "This exception is not to be treated as a broad license to admit hearsay inadmissible under other exceptions, and is to be used very rarely and only in exceptional circumstances." *State v. Dollinger*, 20 Conn. App. 530, 540, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). The sole witness to date of the alleged activity of Hasbrouck and Tinsley is Gitano Bryant. Thus, a bar to the admission of his out-of-court statements arguably satisfies the "reasonable necessity" test, since, without them, the evidence will be lost. By the same token, however, this utter lack of corroboration, militates against any finding of trustworthiness and reliability. (See above "Party", pointing out a strong preference for declarations made to more than one person.)

Petitioner's offer should ultimately fail under the residual exception for the very same reasons that it does not satisfy the criteria of a declaration against penal interest; e.g., it is wholly lacking in guarantees of reliability and trustworthiness. It is difficult to see how Bryant's out-of-court statements would be sufficiently reliable to qualify for one hearsay exception but not for another. Bryant withheld his disclosure for more than twenty-six years. At neither level of hearsay was the disclosure made to a person who bore a close, confidential relationship to the declarant. Both levels of hearsay are lacking in factual corroboration. The extent to which Bryant's statement impacts his penal interest is minimal at best; it is but a self-serving claim of alibi. *State v. DeFreitas*, *supra,* 179 Conn. 449-52. Moreover, the respondent has had no opportunity to test Bryant through cross-examination. *State v. Oquendo, supra,* 223 Conn. 668; *State v. Outlaw*, *supra*, 216 Conn. 492.

c. Even If Petitioner Can Surmount His Hearsay Problems, the Bryant Evidence Would Not Warrant a New Trial Because it Does Not Qualify as Third Party Culpability Evidence

"Both this state and other jurisdictions have recognized that a defendant may introduce evidence which indicates that a third party, and not the defendant, committed the crime with which the defendant is charged. . . . The defendant, however, must show some evidence which *directly* connects a third party to the crime with which the defendant is charged. . . . It is not enough to show that another had the motive to commit the crime. . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Citations omitted; emphasis added.) *State v. Echols,* 203 Conn. 385, 392, 524 A.2d 1143 (1987); *State v. Harris,* 48 Conn. App. 717, 724-25, 711 A.2d 769, cert. denied, 245 Conn. 922, 717 A.2d 238 (1998).

The "admissibility of. . . evidence [of third party culpability] is governed by the rules of relevancy." *State v. Echols*, *supra*, 393. "No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience." (Internal quotation marks omitted.) *State v. Towles,* 155 Conn. 516, 523, 235 A.2d 639 (1967). "Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime." *State v. Kinsey,* 173 Conn. 344, 347-48, 377 A.2d 1095 (1977). Unless that direct connection exists, "it is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person." (Internal quotation marks omitted.) *State v. Payne,* 219 Conn. 93, 117, 591 A.2d 1246 (1991). Evidence of a possible motive is insufficient to establish relevancy. See *State v. John,* 210 Conn. 652, 670-71, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84,

107 L. Ed. 2d 50 (1989). Moreover, "[t]he trial court's ruling on the relevancy of third party inculpatory evidence will be reversed on appeal only if the court has abused its discretion or an injustice appears to have been done." *State v. Payne, supra*, 117; *State v. Harris*, *supra*, 48 Conn. App. 725-26.

Applying these precepts to the proposed Bryant evidence, it is apparent petitioner has failed to raise the possibility that Hasbrouck and Tinsley committed this crime above the realm of speculation. Nothing, other than Bryant's out-of-court, uncorroborated statements, links either person with this homicide. Importantly, none of the scores of people interviewed at the time of the homicide, and none of the witnesses who testified at the hearing on this petition, could place either man in Belle Haven the night of the crime. Nor did anyone come forward who had ever seen either man with Martha Moxley, or ever heard either man make the type of statements Bryant attributes to them. Indeed, there is no evidence either man even knew Moxley.

No one corroborates Bryant's claim that the duo spent the night at Jeff Byrne's house. Jeff's sister, Darryll Fleuren, remembered that her father was on the porch when Jeff came home that night; if he had been in the company of two young men from New York that surely would have been brought to the attention of the police during the numerous interviews of Jeff and his family.

Further, as discussed *supra*, neither Bryant's statements, nor those attributed to Hasbrouck and Tinsley, fit with the crime scene and autopsy evidence.

In light of the discredited nature of Bryant's claims, and the total lack of evidence connecting either Hasbrouck or Tinsley to this homicide, the Bryant evidence would not be admitted in any supposed retrial. Therefore, it could not possibly lead to a new verdict and

should not be considered by this court.

d. If Considered, the Bryant Evidence Is So Lacking in Credibility it Does Not Meet the *Shabazz* Threshold; This Court Should Find it of So Little Value That it Is Unlikely to Result in a Different Verdict on Retrial

The sole evidence supporting the claims of Count One of the Petition are the several declarations of Gitano Bryant. Respondent has argued above that all of Bryant's statements (as well as those claimed to have been made by Hasbrouck and Tinsley) are hearsay, not qualifying for admission under any recognized exception to the rule. Consequently Count One should be dismissed for a lack of evidence.

The fourth prong of the standards of recovery in a General Statutes § 52-270 Petition for New Trial is that the allegedly new evidence is "likely to produce a different result." *Asherman v. State,* 202 Conn. 429, 434, 521 A.2d 578 (1987). More specifically, in determining whether a new trial should be granted, "[i]t is not sufficient for [petitioner] to bring in new evidence from which a jury *could* find him not guilty - it must be evidence which persuades the judge that a jury *would* find him not guilty." (Emphasis in original.) *Lombardo v. State,* 172 Conn. 385, 391, 374 A.2d 1065 (1977). Consequently, the court must "always consider the newly discovered evidence in the context of the evidence presented in the original trial. In doing so it must determine, first, that the evidence passes a minimum credibility threshold. That is, if in the trial court's opinion, the newly discovered evidence simply is not credible, it may legitimately determine that, even if presented to a new jury in a second trial, it probably would not yield a different result and may deny the petition on that basis." *Shabazz v. State,* 259 Conn. 811, 827, 792 A.2d 797 (2006).

Even if Bryant's statements are deemed admissible, they are so clearly devoid of credibility that this Court should disregard them. They are merely claims of information of a

crime accompanied by an alibi. In the context of all of the evidence, they are minimally against his interest, if at all. The statements were made to two former junior high school classmates with whom Bryant had maintained, at best, only casual contact over the years. Although Bryant supposedly acquired his fund of information within days of the offense, he, a trained lawyer, kept it to himself for over a quarter of a century. On finally disclosing his story, he insisted upon anonymity and persisted in this even beyond petitioner's conviction. He never came forward voluntarily, rather, only did so when Crawford Mills broke his promise and informed on him to Robert Kennedy, Jr.

As noted previously, corroboration for Bryant's claim is virtually nil. In general, while Bryant professed some knowledge of the geography of part of Belle Haven, this is information that would be possessed by anyone who had ever visited the homes of Neil Walker and Jeffrey Byrne. At the same time, Bryant never provided any information about the crime scene or even the location of the Moxley home. His knowledge of certain social events in Greenwich prove nothing; anyone who had attended Brunswick School would know as much. Of all the persons in Bryant's circle of Greenwich acquaintances of the time, none other than Walker and, possibly, Mills recall his two companions and no one, even Martha Moxley's closest friends, have any recollection of any association between Martha and any of the three New Yorkers.

More specifically, no one puts Martha Moxley in the company of Bryant and his companions on the night of October 30, 1975 (or for that matter, on any other occasion). Importantly, between Jackie Wettenhall and Helen Ix, the victim's activities are fully accounted for until 9:30 p.m. Indeed, no one has any recall of even seeing Bryant and his companions in Belle Haven on the night of the murder; not Neil Walker who was allegedly invited to join

Bryant and his friends; not anyone else who testified in the hearing (Lisa Rader, Helen Ix, Jackie Wettenhall, Charles Morganti); not any other person named by Bryant (Andy Pugh, Josh Engels, Julie, Thomas or Michael Skakel); nor any of the plentitude of other residents interviewed by Detective James Lunney. The question remains: who are those fifteen people who were supposedly gathered in the Skakel backyard?

The alleged Monday morning boasting by Hasbrouck and Tinsley is consistent only with facts that had been in the media for years prior to the trial: the victim was beaten in the head, dragged, and a golf club was the weapon used. Yet, nothing was alleged regarding the breaking of the club or the stabbing of the victim. There was no evidence of the achieving of a sexual fantasy or goal. There was no evidence of her being dragged by the hair; indeed, to suggest that the fantasy of those two hormone-enraged fifteen-year-olds was to merely beat Martha on the head and drag her "caveman style" verges on the farcical. In sum, Gitano Bryant's story, devoid of any genuine corroboration, simply lacks credibility and would, therefore, never be capable of producing a different result in a new trial.

Proposed Findings of Fact and Conclusions of Law
For Section II[11]

The following, while not an exhaustive list of the factual findings and conclusions of law which demonstrate that petitioner has failed to carry his burden of proof on Count One of his petition, are some of the important findings that would support this determination:

1) Gitano Bryant's out-of-court statements, as well as all out-of-court statements attributed to Tinsley and Hasbrouck, are inadmissible hearsay. They do not qualify for admission under either the penal interest exception or the residual hearsay exception. See e.g. Conn. Code Evid. §§ 8-6 (4), 8-9; *State v. DeFreitas*, 179 Conn. 431, 450, 426 A.2d 799 (1980).

2) Even if petitioner can surmount the hearsay problems with this evidence, it cannot form the basis for relief in a petition for new trial because it would not be admissible on retrial, and hence not likely to produce a different result as required under the *Asherman* test. Petitioner has failed to establish a direct connection between Bryant, Hasbrouck, and Tinsley and this homicide as required under the third party culpability doctrine. See e.g. *State v. Echols*, 203 Conn. 385, 392, 524 A.2d 1143 (1987).

3) If there is any need to consider Gitano Bryant's allegations further, this court, as the trier of fact, should find them not credible. Bryant's allegations lack sufficient reliability to meet the threshold credibility determination entrusted to this court under *Shabazz*. Thus, even if Bryant's allegations are admissible, their lack of credibility alone furnishes a sufficient basis on which to deny relief.

    a. No one, other than Gitano Bryant, and to a limited extent, his mother, has placed Gitano Bryant and his companions in Belle Haven on Oct. 30, 1975. Importantly, none of the persons Bryant said he saw that night (Michael, Tommy and Julie Skakel, Josh Engles, Neil Walker, Andy Pugh, Lisa Radar Edwards, Helen Ix, Jackie Wettenhall, Margie Walker) have corroborated his claim. Nor has the petitioner been able to identify or produce any of the "15 or so" youths supposedly congregating in the Skakel back yard that night with Bryant and his two friends. In addition, no one during the countless police interviews conducted in 1975 reported seeing Bryant, Hasbrouck and Tinsley, or persons fitting their description.

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[11] Although the finding system has been abolished in Connecticut, the state submits these proposed findings of fact and conclusions of law as requested by the Court. They are not, however, to be considered a substitute for the more complete fact statements recounting the facts from the criminal trial, the trial on this petition, or those relating to each particular count or claim. Similarly, the conclusions of law listed herein are offered in addition to, and not in lieu of, the legal arguments presented throughout this brief.

b. No evidence corroborates petitioner's claim that Hasbrouck and Tinsely spent the night at the Byrne house. Darryl Fleuren, Jeff Byrne's older sister, told Kennedy in a taped interview that her father was on the porch when Jeff came home that night. Common sense would tell you that if he came home with two young men from NY who stayed overnight, that fact would have been reported to the police during one of the numerous interviews conducted of Jeff and his family. Gregory Byrne in his deposition, likewise, stated that he was at the house early the next morning, saw and spoke to Jeff, but did not see Hasbrouck or Tinsley.

c. Bryant's account is inconsistent with the physical evidence in the case. The crime scene and autopsy evidence contains no indication the victim was drug by her hair or sexually assaulted. (Although the evidence does support petitioner's claim to Coleman that he masturbated on the body). In additon, Bryant's account fails to include the fact that the golf club broke and the victim was stabbed through the neck with the shaft.

III. PETITIONER HAS FAILED TO PROVE HE IS ENTITLED TO A NEW TRIAL UNDER COUNT TWO

In order to secure a new trial under the second count, petitioner must establish that the evidence he offered to impeach state's witness Gregory Coleman was newly discovered, material, noncumulative, and likely to produce an acquittal on retrial. As argued below, he proved none of this.

a) Petitioner Has Failed to Prove That the "Newly Discovered Evidence" Relating to Greg Coleman Could Not Have Been Produced Prior to Trial with Due Diligence

i. Facts Relating to Lack of Diligence

While testifying at the Probable Cause Hearing, Coleman named three persons as possibly present when petitioner bragged he had murdered Moxley. These possible witnesses were: John Simpson; Alton "Everett" James, and Cliff Grubin.[12] T. 5/17/02 at 156.

As to the efforts made to find these persons prior to trial, Attorney Michael Sherman testified that he directed his investigator, Vito Collucci, to find all three of these men. PT 4/19 at 177. Collucci contradicted Sherman, stating that he was only asked to find James. PT 4/18 at 144-45. In addition, Collucci recalled being so directed by Attorney Jason Throne, an associate of Sherman's, rather than by Sherman himself. *Id*.

Collucci originally testified that he was unsuccessful in finding James. He admitted on cross examination, however, that in searching for James he had not contacted Elan, or any of the numerous trial witnesses who had attended Elan around the same time as the petitioner and Coleman. PT. 4/18/07 at 155-57.

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[12]At the Probable Cause Hearing, this name was transcribed as "Cliff Rubin." In addition, Coleman identified James as "Everett" James, while his correct name is Alton Everett James, III. T. 5/17/02 at 156.

During the hearing, when shown a memorandum he had written prior to trial, Colucci changed his testimony and recalled that he had found James prior to trial. He stated that he advised Throne of the information he obtained. PT 4/19/07 at 5-6.

Sherman stated that although Collucci found an address for James in Virginia, "we just couldn't connect – couldn't connect on the phone with him in some way." PT 4/19/07 at 177.

Colucci further testified that, after the verdict, he had been asked by replacement counsel to find John Simpson and Cliff "Rubin." He was unable to find either man. PT 4/18/07 at 145-48.

In connection with the petition for new trial, petitioner's investigator, Keith Weeks, testified that he was able to find Grubin and Simpson. He found John Simpson by contacting Sara Peterson, an Elan alumna who had testified for the defense at the criminal trial. Peterson gave him information that put him in touch with Patricia Solio, who had been engaged to Simpson at one point. Solio told Weeks Simpson had attended Pennsylvania State University. PT 4/19/07 at 121-24, 138-40.

Once he had that information, Weeks enlisted the help of a graduate of Penn State to access to the alumni website. There were four "John Simpsons" on the website. By estimating his age and graduation date using the dates he attended Elan, Weeks was able to find the correct Simpson's address and phone number. *Id*. at 124-5. Weeks characterized Simpson as the "most difficult person I have ever had to locate." *Id*. at 126.

As for Cliff "Rubin", Weeks testified that he first looked on an internet message board for persons who had attended Elan. After going through several screens of postings, he found a person who posted under the name "Cliff Grubin," and indicated he attended Elan in 1978-80. *Id*. at 127.

Although Weeks tried many other avenues of locating Grubin, he ultimately contacted him through the e-mail address listed on the Elan message board. Weeks admitted on cross examination that he could have found Grubin through that e-mail address without pursuing the other leads that ultimately proved fruitless. *Id*. at 137-8. A week after he sent an e-mail he got a response from Grubin. *Id*. at 130.

ii. Petitioner Has Failed to Prove That He Could Not Have Found Simpson, Grubin and James Prior to Trial by the Exercise of Due Diligence

"When a [petitioner] seeks a new trial for newly discovered evidence, he must have been 'diligent in his efforts fully to prepare his cause for trial, and if the new evidence relied upon *could have been known with reasonable diligence*, a new trial will not be granted.' (Emphasis in original; internal quotation marks omitted.) *Williams v. Commissioner of Correction,* 41 Conn. App. 515, 528-29, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997)." *State v. Roberson*, 62 Conn. App. 422, 427, 771 A.2d 224 (2001).

The *Roberson* decision is instructive in evaluating Sherman's efforts to locate the three men named by Coleman. In *Roberson,* as here, the defense attorney knew the name of the "new" witness prior to trial. The trial attorney's efforts to locate the witness consisted of checking a telephone book and the city assessor's office. *Id*., 428. The attorney indicated he was unsure if he also examined motor vehicle records. *Id*. The Appellate Court characterized his efforts as a "scant search". *Id*. It upheld the trial court's determination that petitioner had not shown the "new" evidence could not have been discovered prior to trial through the exercise of due diligence. *Id*.

As outlined above, Sherman testified only that he asked Collucci to find these potential witnesses if he could. Collucci produced some documents showing his efforts to find James,

but stated he had not been asked to find Simpson or Grubin. Although Collucci was successful in obtaining an address for James, Sherman asserted only a vague problem "connecting" as the reason the defense did not contact James. If the search undertaken in *Roberson* is scant and insufficient to establish due diligence, the efforts of Sherman and Collucci are something less than that.

Importantly, all three of these potential witnesses could have been found prior to trial by the same methods employed to find them after trial. Weeks testified that he found John Simpson through information provided by Sarah Peterson, who had testified for the defense at trial. PT 4/19/07 at 139. Sarah Peterson was obviously known to the defense prior to trial, and nothing prevented the defense from enlisting her help in finding Simpson. Yet neither Sherman nor Collucci testified that they asked Peterson, or any of the other former Elan residents who were witnesses, for information about Simpson or Grubin. In addition to the many Elan witnesses available to the defense, the petitioner himself may have had information about his former classmates, including, perhaps, in the case of James and Grubin, their correct names. The failure of defense counsel to inquire of persons likely to have helpful information demonstrates a lack of due diligence. *Malaspina v. Itts*, 3 Conn. Cir. 651, 655, 223 A.2d 54 (1966) ("[L]ack of diligence is shown by a failure to make inquiry of persons who were likely to know the facts in question. . . . 39 Am. Jur. 169, New Trial, § 161." [Internal quotation marks omitted.]).

Furthermore, as for Grubin, Weeks testified that he found him through an on-line message board for former Elan residents. Although Weeks stated that the particular posting he located indicated Grubin posted in February of 2005; PT 4/19 at 127; Grubin may have been posting to that or similar boards for some time, making it feasible to find him by the same

means in 2002.[13] Even if the message board would not have led to Grubin in 2002, Weeks was able to locate his father in California using national data banks. Presumably, a similar search in 2002 would have led to similar results.

Thus, as to both Simpson and Grubin, the same methods used to locate them after trial were available to the defendant before trial. Where the alleged new evidence could have been discovered before trial by the same diligence used to discover it after trial, due diligence has not been shown. *In re James*, 55 Conn. App. 336, 346, 738 A.2d 749, cert. denied, 252 Conn. 907, 743 A.2d 618 (1999) ("This alleged new evidence could have been discovered before trial by the same means and by the same diligence as it was discovered after the trial. The failure to discover the evidence before trial constitutes a lack of due diligence."); *Malaspina v. Itts*, *supra*, 3 Conn. Cir. ("the new evidence could have been discovered before the trial by the same means and by the same diligence as it was discovered after the trial. . . . [T]he failure to discover the evidence before trial constitutes a lack of due diligence."); *Bridgewater Quality Meats v. Heim*, 729 N.W. 2d 387, 394 (S.D. 2007) ("'A new trial applicant will be denied relief, if the same effort to find the evidence expended after trial, would have produced it before trial.'"); *George v. Estate of Baker*, 724 N.W.2d 1, 12 n. 8 (Minn. 2006) ("'A motion for new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto.'")

While the failure of the defense to find Simpson and Grubin, and to pursue contact with

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[13] A witness from the criminal trial testified she had "chatted" on line with a former Elan resident and was posting messages about Elan, establishing that such practices existed in 2002. See T. 4/29/02 at 109,115-18, 145-48.

James, may be attributable to a lack of diligence, it may also reflect a tactical decision. Such a decision may reflect a conclusion reached after consultation with the petitioner that pursuing these witnesses was unlikely to lead to useful evidence. In either event, petitioner has failed to prove this evidence is "newly discovered" as required by the first prong of *Asherman*.

b) Petitioner Has Failed to Prove That the "Newly Discovered Evidence" Relating to Greg Coleman Is Material, Noncumulative, and Likely to Result in a Different Verdict on Retrial

i. Facts relating to Simpson, Grubin and James

At the hearing, petitioner presented live testimony of Grubin, and deposition testimony of James and Simpson. Neither Grubin nor James offered any material, noncumulative evidence regarding Coleman. Simpson's testimony, while partially impeaching Coleman, is not so material as to warrant a new trial. Importantly, Simpson also supports Coleman to some degree. In addition, Simpson and Grubin supplied new inculpatory statements by the petitioner.

A. Alton Everett James, III

James testified that he attended Elan from late 1978 until late 1979. He remembered guarding the petitioner on more than one occasion. In fact, he stated that he recalled guarding him "many times." Exh. 48 at 28. He recalled Skakel was guarded after trying to escape, for some time after that, and then repeatedly as he continued to get into trouble. Exh. 48 at 28-29. He explained that he and fellow residents would guard in "shifts", and not for a constant 24 hour period. Exh. 48 at 29.

He stated that he had no specific recollection of guarding the petitioner with Coleman, although he considered it likely that he and Coleman would have guarded Skakel together at

some point. Exh. 48 at 16. James did not consider Coleman a "likable character" and considered it unlikely that Skakel would confess to him. Exh. 48 at 17. James described his relationship with Skakel as friendly, noting that they came from "similar backgrounds." Exh. 48 at 23. James indicated that he and Skakel spent a lot of time together while at Elan. *Id*.

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

B. Cliff Grubin

Cliff Grubin testified that he attended Elan from September or October 1978 until June of 1980. T. 4/24/07 at 7. He recalled a general meeting that occurred shortly after he arrived at Elan. *Id*. He stated that petitioner was confronted repeatedly at the meeting about "the killing of this woman." *Id*. at 8. Despite being "pummeled" in a boxing ring, Grubin asserted that Skakel never confessed. *Id*. Grubin stated that he and the petitioner were friends at Elan. *Id*. Grubin did not recall ever guarding the petitioner with Coleman. *Id*. at 9.

He did recall Skakel wearing a sign that said, "Confront me on why I killed this woman." *Id*. at 10. He recalled John Higgins and Coleman as the "primary confronters." *Id*. Grubin stated that he never heard the petitioner confess to the murder. *Id*. at 11.

Grubin stated that he lived in a trailer with Coleman during the "re-entry" phase of the program. During this time period, Coleman characterized himself as a "good liar." *Id.* at 13.

On cross examination, Grubin claimed that he only remembered one time he asked petitioner about his involvement in the murder. *Id*. at 17. He claimed that petitioner expressed "concern about one of his brothers." *Id*. at 17. Grubin denied that he had told petitioner's

investigator in 2005 that petitioner confessed to him "several times" that his brother Tommy was the actual killer. *Id*. at 18. He also denied telling the investigator that he would never repeat that revelation, and would never affirm it in testimony. *Id*.

At that point, the state read into the record petitioner's response to interrogatories addressed to petitioner's investigator, Keith Weeks. The interrogatory response indicated that Weeks interviewed Grubin in Ibiza Town, Spain on August 30, 2005. Grubin told Weeks that he and Skakel were "great friends" while at Elan. *Id*. at 20. Grubin stated that he did not guard Skakel with Coleman, and in fact did not guard Skakel at any time. *Id.* at 21. The state read the final paragraph as follows:

> Grubin told me he knows who killed Martha Moxley. Grubin explained that he and Michael Skakel discussed the murder several times while at Elan and after they left Elon. (sic). Grubin said Skakel talked to him about it in private. Skakel confessed to Grubin several times that his brother Tommy Skakel killed Martha Moxley.
>
> Grubin told me he will never say this again and will not testify to it. Grubin explained that he believes Skakel is protecting his brother and it is up to Michael Skakel to come forward and tell the truth. In Grubin's mind it is Skakel's business and not his to get into.

T. 4/24/07 at 21.

C. John Simpson

In his deposition, John Simpson testified that he attended Elan from October 1978 until February of 1980. Exh. 47 at 9-10. Simpson stated that Coleman and Grubin were both in his "peer group," which in Elan meant that they had all arrived at Elan at about the same time. He stated that he and Grubin were "pretty good friends." Exh. 47 at 14. Simpson stated that he knew Skakel but Skakel was not in his peer group, having arrived at Elan quite a bit earlier. Exh. 47 at 14.

Simpson testified that Skakel was the subject of a large general meeting while he was

there. Skakel's general meeting involved three or four of the "houses" at Elan because it was the second time he had run away. Exh. 47 at 16. He recalled Skakel being placed in the boxing ring. He never heard Skakel confess. Exh. 47 at 17-19.

Simpson said that after he and Skakel finished the program at Elan and were working as staff members, they shared a hotel room with another former resident named Jeff Weintraub. Simpson recalled having a "couple of beers" with Skakel one day and asking him about the murder. Simpson stated that petitioner had "related the story of Martha Moxley and what had happened in Greenwich and how he had been a suspect of it." Simpson claimed that when he asked Skakel straight out, he "went through all of it, you know, about the golf club and how she had been killed and all that." Skakel claimed he did not kill her, but stated that "we were drinking and partying that night. There were, you know, times that I may not, you know, remember. . . but I certainly don't remember doing anything like that." Exh. 47 at 21.

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

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

> And I said, “But Greg, that unto – “he didn’t say anything. How could you say yes, he just admitted it? And Greg said, “Well it was his reaction, the fact that he didn’t say no.” And I was, like, “Well that doesn’t – “that doesn’t mean that he said that he had killed the girl.”

Exh. 47 at 23-24.

Importantly, Simpson admitted that he is deaf in his left ear, and both Skakel and Coleman were to his left. Exh. 47 at 26. He explained that his deafness made it “unlikely” he would hear someone sitting to his left and speaking in a conversational tone. Exh. 47 at 26. He also stated, however, that how well he would hear would depend on “what other outside noises are going on.” Exh. 47 at 26.

Simpson also stated that he thought Coleman was envious of Skakel. He described his relationship with Grubin as “good friends” and confidants, but did not think Coleman and Skakel were in any sense friends. Exh. 47 at 27. He described Coleman as a nice guy, but as someone who did not like Skakel. Exh. 47 at 28.

On cross examination, Simpson stated that he may have guarded Skakel at other times, and with persons other than Coleman. The conversation he described on direct occurred, he believed, days before the three house general meeting convened to address Skakel’s second escape attempt. Exh. 47 at 44. Simpson indicated that he was aware of Skakel’s being implicated in a murder prior to that occasion.

In addition to acknowledging his deafness, Simpson also stated that he was not paying attention to Coleman and Skakel because he was doing the nightly report, which had to be completed with “great detail.” Exh. 47 at 49.

Simpson also stated that when Skakel attempted to run away the first time, he was given a “house meeting,” which was a more nurturing-type meeting. Simpson said a house

meeting was not a "standard" consequence for running away. That leniency was mentioned during the general meeting. Exh. 47 at 52.

ii. Petitioner Has Failed to Establish That Any Evidence Offered to Impeach Coleman Warrants a New Trial

Consideration of petitioner's evidence under Count Two in light of the evidence at trial reveals that it is, for the most part, cumulative. Even if not cumulative, however, it is not material and not likely to result in an acquittal on retrial.

Starting with James and Grubin, neither man offers much of benefit to petitioner that is not cumulative of other Elan testimony at trial. "Cumulative evidence is additional evidence of the same kind as that submitted at trial, submitted to prove the same point. 58 Am.Jur. 2d 337, New Trial § 349 (2002)]." *Morant v. State*, 68 Conn. App. 137, 148, 802 A.2d 93 (2002), cert. denied, 260 Conn. 914, 796 A.2d 558, overruled in part on other grounds, *Shabazz v. State*, *supra*, 259 Conn. 830 n.13. "A new trial is not required if the evidence is merely cumulative or duplicative. . . . Where essentially the same evidence is submitted with somewhat more detail, it is, ordinarily, nonetheless cumulative." (Citation omitted.) *Ginsburg v. Cadle Co.,* 61 Conn. App. 388, 392, 764 A.2d 210, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

Both James and Grubin testified that they had never heard the petitioner confess to the murder. Exh. 48 at 15; PT 4/24/ at 11. That testimony echoes the testimony of several defense witnesses at trial. See T. 5/23 at 119-123 (Sarah Peterson); T. 5/23 at 175, 187 (Michael Wiggins); T. 5/23 at 209 (Donna Kavanaugh); T. 5/24 at 15 (Angela McFillin). As such, it is cumulative and not likely to lead to an acquittal on retrial.

In addition, both men acknowledged that they were friendly with petitioner at Elan, with

James stating they came from “similar backgrounds” and Grubin describing their relationship as “great friends.” Although Grubin claimed he had not had any contact with petitioner since Elan, his statement to Weeks contradicted that assertion. PT 4/24/07 at 13. Grubin told Weeks that he talked to Skakel several times *after they left Elan.* PT 4/24/07 at 21.

Grubin’s credibility is further undermined by his admission to Weeks that he would not testify truthfully if asked what petitioner told him about the murder. In fact, when asked on cross examination, Grubin insisted petitioner merely expressed concern for one of his brothers. This stands in stark contrast to his statement to Weeks that Skakel told him several times, in private, while at Elan and afterward, that his brother Tommy killed Moxley.

As for John Simpson, his testimony partially impeaches and partially supports Coleman. While he did not hear Skakel brag to Coleman that he killed Moxley, he stated that both men were to his left, and he is deaf in his left ear. Further, he recalled that he was writing the nightly reports, a task which required attention to detail and would thus have kept him from focusing on the others’ conversation.

In addition, while Simpson claimed Coleman did not repeat Skakel’s confession when Simpson asked, there are many explanations for this which would not undermine Coleman’s testimony. First, it may be that Simpson and Coleman are relating two different events. As James related in his testimony, he and his fellow residents had many of opportunities to guard Skakel. Because they guarded in pairs, and for shifts, it may be that Coleman was guarding Skakel with someone else when the conversation he described took place. Coleman was, after all, uncertain about who was with him on that night.

Even if Simpson and Coleman are referring to the same event, Coleman may not have wanted to share petitioner’s revelation with Simpson, deciding instead to downplay the actual

exchange. Or Simpson could be mistaken in the reply he remembers Coleman making. In any event, Simpson, by his own admission, was unlikely to hear what petitioner actually said to Coleman.

While providing only minimal impeachment evidence regarding Coleman, Simpson did testify to two inculpatory statements by petitioner. Rather than sticking to his 1975 alibi where he professed to know where he was and what he did that night, or corroborate his later claims to Hoffman and others, again with an apparently clear recollection, that he snuck out of the house and masturbated in a tree on the Moxley property, Skakel asserted that he had been drinking and partying and "there were. . . times that I may not, you know, remember . . . . but I certainly don't remember doing anything like that." Exh. 47 at 21.

Petitioner's statements to Simpson, in addition to contradicting both his 1975 and later versions of what he remembers from the night of the murder, are significant for another reason. Petitioner apparently told Simpson he was a suspect. See Exh. 47 at 21. Yet as retired Detective Lunney testified in the original trial, Michael Skakel was not a suspect during that time period.[14] T. 5/29 at 166. As the state argued in summation at trial, it is significant that the administrators of Elan were confronting Skakel about his responsibility for this murder at time when the police did not consider him a serious suspect. T. 6/3 at 129-30. Given the fact that Elan's *modus operandi* was to confront students on whatever issues brought them to Elan, and that it got its information largely from parents and other caregivers, Elan's awareness of

[14] Although Lunney's testimony in the present hearing was less categorical, allowing that Michael was not as much of a suspect as his brother during the late 1970s; PT 4/25 at 75-76; it is unclear how or why he would have been considered a suspect since investigators, as late at the 1990s, seemed wiling to assume the time of death was shortly after 9:30, and accepted Michael Skakel's alibi for that time period. See Exh. 54, Kenneth Littleton profile. In addition, few of petitioner's inculpatory admissions were known by investigators until the mid-1990's.

petitioner's involvement could only have come from his family. *Id*.

In light of the limited impeachment value of Simpson's testimony, petitioner has not proven it is either material or likely to result in an acquittal on retrial. As our Supreme Court has noted, "[n]ew trials [typically] are not granted upon newly discovered evidence which discredits a witness unless the evidence is [both] vital to the issues and. . . and strong and convincing. . . . . The rule restricting the right to a new trial when one is claimed on the basis of newly discovered evidence merely affecting the credibility of a witness is necessary because scarcely has there been an important trial . . . [after which a] diligent search would not have discovered evidence [to impeach] some witness. . . . Without such a rule, there might never be an end to litigation." (Citation omitted; internal quotation marks omitted.) *Adams v. State*, 259 Conn. 831, 839, 792 A.2d 809 (2002); *accord State v. Roberson*, 62 Conn. App. 422, 429, 771 A.2d 224 (2001) ("Where claimed newly discovered evidence would merely affect the credibility of a witness, it is not a ground for a new trial unless it is reasonably probable that on a new trial there would be a different result." [Internal quotation marks omitted.]); *Turner v. Scanlon*, 146 Conn. 149, 164, 148 A.2d 334 (1959)("While the newly discovered evidence does tend to discredit the plaintiff's testimony, it cannot be said that the trial court abused its discretion in concluding that the evidence in all probability would not, if offered in a new trial, produce a different result, and that no injustice had been done."); *Smith v. State*, 139 Conn. 249, 251, 93 A.2d 296 (1952) ("A new trial will not ordinarily be granted because of the discovery of additional impeaching or discrediting testimony."); *Shields v. State*, 45 Conn. 266, 270 (1877) ("[A] new trial will not be granted on the mere after-recollection of a former witness.").

Furthermore, Coleman's testimony at trial was corroborated by both his widow,

Elizabeth Coleman, and a fellow Elan resident, Jennifer Pease. Elizabeth Coleman testified that Greg told her about Skakel's confession in 1986, the year they met. T. 5/20/02 at 91. She stated he related to her how Mike Skakel, who he had met at Elan, told him he had murdered a girl with a golf club. Mrs. Coleman further stated that Greg explained that when he replied that Skakel was acting like he could get away with murder, Skakel said he would because he was related to the Kennedys. *Id*.

Mrs. Coleman also related another time, in the mid 1990s, when her husband was watching television. The show was about the unsolved Moxley homicide. Mrs. Coleman, who was in the kitchen, heard her husband say: "You thought you could get away with this, but your time is up." Then he asked his wife to get a pen and paper so he could write down the number listed on the show. He told her this was the "kid" from Elan he had told her about that had murdered a girl. T. 5/20/02 at 92-93.

Jennifer Pease testified that when she was a resident of Elan in 1979, she met Greg Coleman. She stated that one night during that summer, Coleman was her "personal overseer" – a resident assigned to guard her because she was considered a flight risk. She confided in Coleman that she was considering running away. She explained that she was taking a risk by confiding in him, but she trusted Coleman. T. 5/29/02 at 106.

Coleman advised her not to run away because she would only get in trouble like Michael Skakel had. *Id.* at 104-5. Coleman then told her that he thought Skakel was sick. When Pease asked what he meant by that, Coleman told her Skakel had beat some girl's head in and killed her with a golf club. Pease asked how he knew that, and Coleman responded that Michael had told him. When Pease asked why Skakel was not at another Elan facility where juveniles sent by the court generally went, Coleman explained it was because Skakel was

related to the Kennedy family. T. 5/29/02 at 108.

Not only is the evidence offered to impeach Coleman far from convincing, its significance shrinks in light of the strong case presented by the state at trial. Coleman's testimony, it must be remembered, was only one of three direct confessions admitted below. See T. 5/17 at 133-38 (Gregory Coleman); T. 5/16 at 179-182 (John Higgins); T. 5/21 at 32 (Gerranne Ridge). In addition, the state presented inculpatory statements petitioner made to eleven additional witnesses, many of whom where unconnected to each other. See Evidence from Petitioner's Criminal Trial (e), *supra*. What is significant about these admissions, in addition to their impressive number, is that for the most part, they dovetail with other evidence in the case. For instance, petitioner's statement to Elizabeth Arnold that his brother stole his girlfriend the night of the murder coincides with evidence of petitioner's infatuation with Martha and Tommy's flirtatious behavior that evening.

Petitioner's claim to Meredith, Pugh, and Hoffman that he masturbated in a tree on the Moxley property, coincides with his statement to Coleman that he masturbated on the body, and the condition of the victim's body when found. It also provides an excuse for the presence of his semen on the victim's effects or at the crime scene if any were ever found. See T. 6/3 at 17-18, 93-94, 112-13, 132-33.

Thus, when the limited impeachment value of the new evidence is considered in view of the strong evidence of guilt presented at trial, it is apparent that it would not lead to an acquittal on retrial.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION III[15]

The following, while not an exhaustive list of the factual findings and legal conclusions which demonstrate petitioner has not carried his burden under Count Two, are some of the important findings that would support this determination:

1) Petitioner has not proven that Sherman exercised due diligence in trying to locate Simpson, Grubin and James. *State v. Roberson*, 62 Conn. App. 422, 427, 771 A.2d 224 (2001).

2) The failure of defense counsel prior to trial to inquire of persons likely to have helpful information demonstrates a lack of due diligence. See e.g. *Malaspina v. Itts,* 3 Conn. Cir. 651,655, 223 A.2d 54 (1966).

3) Petitioner has not proven that Simpson, Grubin and James could not have been found prior to trial by the same diligence used to find them after trial. Hence, due diligence has not been shown. See e.g., *In re James*, 55 Conn. App. 336, 346, 738 A.2d 749, cert. denied, 252 Conn. 907, 743 A.2d 618 (1999).

4) Petitioner has not proven that the testimony of James and Grubin is non-cumulative. A new trial is not warranted for evidence which is merely cumulative. See e.g. *Ginsburg v. Cadle Co.,* 61 Conn. App. 388, 392, 764 A.2d 210, cert. denied 256 Conn. 904, 772 A.2d 595 (2001).

5) Petitioner has not established that any evidence offered to impeach Coleman is material and likely to lead to an acquittal on retrial. New trials are typically not granted upon newly discovered evidence which discredits a witness unless the evidence is both vital to the issues and strong and convincing. See e.g. *Adams v. State*, 259 Conn. 831, 839, 792 A.2d 809 (2002).

6) Petitioner's trial counsel did not use due diligence in attempting to find Simpson, Grubin or James.

7) Petitioner has not demonstrated that the proposed new evidence could not have been produced prior to trial in the exercise of due diligence.

8) The testimony of James and Grubin is largely cumulative of that offered at trial and therefore not sufficient to warrant a new trial.

9) Grubin was not a credible witness. In his statements to Weeks, Grubin said that

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[15] See fn. 11 *supra*.

Michael Skakel told him several times, while at Elan and after, that his brother Tommy killed Martha. He further stated that he would not repeat that information again and would not testify to it. Grubin also told Weeks he and Skakel were "great friends."

10) Simpson's testimony revealed two additional incriminating statements by petitioner. This additional evidence against petitioner more than offsets the minimal impeachment value of Simpson's testimony.

11) The testimony of Simpson partially impeaches and partially corroborates Coleman. In light of the strength of the state's evidence against the petitioner, and the limited impeachment value of the evidence, it is not material and likely to lead to an acquittal on retrial.

IV. PETITIONER HAS NOT ESTABLISHED THAT THE PROFILE REPORT OF LITTLETON IS NEWLY DISCOVERED, MATERIAL, OR LIKELY TO PRODUCE AN ACQUITTAL ON RETRIAL

a) It Is Undisputed That Petitioner's Trial Counsel Knew of the Profile Reports Yet Failed to Request a Copy of Them in a Timely Manner. This Evidence Is Therefore Not "Newly Discovered"

In the sixth count of petitioner's Revised Substituted Petition for New Trial, he alleges that the state suppressed two profile reports prepared during the course of the investigation of this homicide. These reports summarized the results of the investigation with regard to Kenneth Littleton and Thomas Skakel as suspects.[16] He contends that information contained in these reports was exculpatory and material and that he is entitled to a new trial on this basis.

The alleged suppression of these reports was an issue in petitioner's appeal. The Supreme Court summarized the record with regard to this claim as follows:

> On May 13, 2002, John F. Solomon, a former supervisory inspector with the office of the state's attorney in the judicial district of Fairfield, testified outside the presence of the jury concerning issues that were raised in a motion then pending before the court. During his testimony, Solomon referred to a copy of a report that he had prepared in connection with the investigation of the victim's murder. Solomon characterized that report, which he wrote in 1992, as a profile of Littleton summarizing why, at the time the report was written, Littleton was considered a suspect. Immediately after Solomon referred to the report, the defendant's trial counsel requested a copy, to which the court responded: ""Not right now. You are talking about examining the witness."" At that same proceeding, the state elicited testimony from Solomon indicating that he had prepared a similar profile of Thomas Skakel, who, at one time, also was a suspect in the victim's murder.
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> The defendant failed to renew his request for those reports before the conclusion of the trial, and his original motion for a new trial, which was timely filed on June 12, 2002, did not refer to the two reports. The defendant did raise the issue, however, in his amended motion for a new trial, which was filed on August 26, 2002, claiming that the state had withheld the profiles of Littleton and Thomas Skakel in violation of its obligation under *Brady* to disclose exculpatory evidence. At the August

[16] A third report, prepared at the same time, summarized the results of the investigation of Michael Skakel as a suspect.

> 28, 2002 hearing on the defendant's amended motion for a new trial, the state asserted that the defendant's claim was time barred because it had not been raised until long after the expiration of the five day period for the filing of such motions prescribed by Practice Book § 42-54, and just prior to the sentencing hearing that also was scheduled to commence on that same day. The state also maintained that the two reports were internal office documents and, therefore, exempt from discovery under Practice Book § 40-14 and the work product doctrine, and that it had turned over to the defendant all of the factual information contained in the reports prior to trial, in accordance with the court's discovery order. After reviewing the two reports in camera, the trial court rejected the defendant's claim, concluding that: (1) the defendant had failed to renew his request for the reports during trial; (2) the claim otherwise was untimely because it had not been made within the five day period specified by Practice Book § 42-54, and the defendant had proffered no justification for the untimely claim; and (3) the reports appeared to be work product that is exempt from discovery under Practice Book § 40-14. The court also noted that it had no reason to question the state's representation that the state had provided the defendant with all of the data contained in the two reports during pretrial discovery. Because the discovery documents containing those data had not been filed with the court, however, the court also observed that it had not conducted an independent review of the documents to confirm the accuracy of the state's representation. The court further indicated that, in light of that fact, its rejection of the defendant's claim did not rest on the state's contention that the defendant previously had been provided with all of the factual information contained in the two reports. Finally, at the conclusion of the hearing and after the court had denied the defendant's amended motion for a new trial, the defendant requested permission to file with the court the 1806 pages of documents that the state had turned over to him during pretrial discovery. The trial court granted the defendant's request, and the documents were marked for identification only.

State v. Skakel, 276 Conn. 633, 707-710, 888 A.2d 985 cert. denied, U.S. , 127 S. Ct. 578 (2006).

Based on the above, the Supreme Court held that petitioner was aware of the profile reports during trial, yet failed to make a timely request for them. *Id*., 710. It concluded that "the trial court acted within its discretion in rejecting the defendant's claim on the ground that the defendant had failed to raise it in a timely manner under Practice Book § 42-54. Even though the defendant became aware of the two reports during trial, he did not raise a *Brady* challenge to the state's failure to provide him with the reports until two and one-half months after the five day limitation period of Practice Book § 42-54 had expired." *Id*.

In light of the criminal trial record regarding when petitioner became aware of the reports, and his untimely request for them, this evidence cannot be considered "newly discovered." Further, in this proceeding, Sherman admitted that he had met with John Solomon, the Littleton report's author, extensively prior to trial and Solomon told him about the profile reports. PT 4/19 at 154, 195-96. Sherman admitted he did not specifically request the reports in his discovery requests. PT 4/19 at 196. Because this evidence was known to petitioner at trial, and petitioner failed to pursue a copy of the reports with due diligence, the state is entitled to judgment on count six as a matter of law. *See Joyce v. State's Attorney*, 84 Conn. App. 195, 200, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A.2d 578 (2004); *State v. Roberson*, *supra*, 62 Conn. App. 428*; Williams v. Commissioner*, *supra*, 41 Conn. App. 529.[17]

b) Facts Relating to the Profile Reports

Although petitioner included allegations relating to the Tommy Skakel profile report in his Amended Petition, none of his evidence at trial focused on that report. As to the Littleton report, he questioned three witnesses – Frank Garr, John Solomon and Michael Sherman – in relation to his claim that the report contained exculpatory, material evidence.

Garr and Solomon testified that the reports were prepared in 1991 or 1992, shortly after the investigation was rejuvenated. PT 4/23/07 at 8; PT 4/24 at 186. Solomon stated that he was the principal author of the Littleton profile, while Garr wrote the Tommy and Michael Skakel reports. PT at 4/23/07 at 8; PT 4/24/07 at 98. Both men stated that the information in the reports came from the multitude of police reports, taped interviews, and other evidence that had been compiled in the case at that time. PT at 4/23/07 at 9, 16; PT 4/24 at 186-87.

Solomon stated that he had met with petitioner's trial attorney for about an hour and a half prior to the criminal trial. PT 4/23/07 at 13.

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[17] It should be noted that, during the course of discovery on this action, the state provided petitioner's counsel with copies of these profile reports.

Garr stated that, at the direction of the State's Attorney, he did not give the profile reports to Sherman during the discovery phase of the criminal trial, but did give them to petitioner's counsel prior to the hearing before this Court. PT 4/23/07 at 100-102, 176-77.

Petitioner's original attorney, Michael Sherman, testified that he knew about the profile reports prior to trial because Solomon had told him about them. PT 4/19/07 at 154. He recalled speaking with Solomon several times prior to trial. PT. 4/19/07 at 195. He also stated that Solomon was convinced Littleton was the true killer. *Id*. Despite knowing about the profiles prior to trial, Sherman admitted he never specifically asked for them in the course of discovery. PT. 4/19/07 at 196.

Sherman also acknowledged that when Solomon was on the stand during the trial, he had the Littleton report with him. Sherman asked for a copy of it, but when the court stated, "Not right now. You are talking about examining the witness," he did not pursue it further. PT 4/19/07 at 204; see T. 5/13 at 77.

Although Sherman maintained on direct that the profile of Littleton was "exculpatory" the only information he claimed not to have prior to trial was the conclusions and opinions of the author. For example, Sherman claimed his alibi defense would have been enhanced if he had the Littleton report which proclaimed, "[i]t has been established" that Michael Skakel was among the youths who went to Terriens the night of the murder. PT 4/19/07 at 151-152. He claimed that he would have put Garr and Solomon on the stand to examine their conclusion that it had been so "established." PT 4/19/07 at 152. He asserted that this information would have given the defense an "independent observation, independent conclusion" by two investigators that petitioner went to Terrien's. PT 4/19/07 at 152. He stated that although the investigators may have tried to explain that they changed their view, they would be "married to the statement." PT 4/19/07 at 154.

Sherman similarly claimed that he would have used the opinion of the report's author that the murder probably occurred shortly after 9:30, while dogs were reportedly barking in the

neighborhood. PT 4/19/07 at 158.

He also stated that he did not have the time lapse summary chart prepared by Solomon prior to trial. That document lists numerous unsolved female homicides in areas frequented by or associated with Littleton. PT 4/19/07 at 19. He stated that if he had had this document prior to trial, he would have investigated these homicides to the extent he could. PT 4/19/07 at 160. While stating that he would not have assumed the burden of proving Littleton was responsible for any of these murders, he would have argued that the fact a "prime law enforcement officer" had done all this work trying to link Littleton to these crimes established reasonable doubt. *Id*. at 161.

On cross examination Sherman admitted that the state provided him with the contents of Exhibits B,C,D, which contain the over 1800 pages of discovery, prior to trial. PT 4/19/07 at 197-202 (Criminal trial exhibits B, C, D are remarked as Respondent's Exhibits N, O, P.) He also acknowledged that in addition to the documents copied for him, the state provided him access to photographs, tapes, videos and other things stored at the State's Attorney's Office. Sherman admitted that he had police reports and statements asserting that petitioner was in the car as it headed to Terrien's. PT at 208. All that he was lacking in this regard was the conclusion or opinion of the author of the profile that this fact was "established." *Id*. at 208. Sherman opined that he would have been able to admit the author's opinion at trial. *Id*. at 212.

Sherman also admitted that he was aware, through the pre-trial discovery provided, that Solomon had investigated the possibility that Littleton was a serial murderer. *Id*. at 228 Although Sherman did not think he was provided the time lapse chart prior to trial, he admitted that he was given investigatory reports regarding the many female homicides that Solomon attempted to link to Littleton. PT 4/19/07 at 228-29; PT 4/19/07 at 6-12. Solomon also admitted that he spoke with Solomon prior to trial about his investigation of Littleton as a possible serial murderer. PT 4/19/07. In fact, Sherman recalled Solomon talking at length about a "great many number of crimes he believed Littleton may have been responsible for." PT 4/19/07 at

13-14.[18]

c) The Only Information Sherman Identified as "New" Within the Profile Reports Was the Opinion and Conclusions of the Author; as Such it Would Be Inadmissible or of Little Value on Retrial

As the preceding fact statement makes clear, although Sherman stated he would have liked to have had the "focused" time lapse data, he had the information contained in that chart, both from the reports given him indicating the state was investigating a possible connection between Littleton and several unsolved female homicides, and from his extensive discussions with Solomon. Thus, petitioner cannot claim that anything in that chart is "newly discovered."

The only evidence identified by Sherman as "new" within the profile reports was certain conclusions and opinions of the author. Although Sherman claimed he would have cross examined Solomon and Garr on the conclusion that 1) petitioner went to Terrien's, and 2) the death occurred shortly after 9:30, the opinions Garr and Solomon held on these matters in 1991 or 1992 would be either inadmissible or of little value.

Under Connecticut Code of Evidence §7-1, a non-expert witness "may not testify in the form of an opinion unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." The testimony Sherman says he would have elicited from Garr and Solomon regarding the alibi – that in 1991 or 1992 they believed (or at least Solomon, the author believed) that petitioner went to Terrien's, is nothing more than an opinion based on an assessment of the credibility of witness statements. Neither Garr nor Solomon have any first-hand knowledge of the facts surrounding the murder. Thus, their opinions or conclusions as

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[18] The defense was most likely aware of Solomon's investigation of Littleton as a possible serial killer much earlier than Sherman's conversations with Solomon. Levitt testified that Solomon met with representatives of Sutton Associates, a private investigation firm hired by Rushton Skakel to investigate this homicide in 1991. During that meeting, Solomon gave all the "serial killer stuff" to Sutton to investigate. According to Levitt, Solomon did so in the hopes that if the father knew he was focusing on Littleton, he would let him interview Tommy Skakel. See T. 4/20 at 150-51.

to the facts surrounding the murder would be inadmissible as lay opinion evidence. See *Turbert v. Mather Motors, Inc.*, 165 Conn. 422, 434, 334 A.2d 903 (1973) (Officer's conclusion as to cause of the accident properly excluded as lay opinion evidence).

Similarly, the opinion of Garr and Solomon, (or at least the author Solomon) that the murder occurred shortly after 9:30 is once again an opinion or conclusion derived from an assessment of the evidence. Neither man has any personal knowledge of the timing of the homicide. As lay opinion evidence, this too, would be inadmissible. See *Johnson v. Caughren*, 55 Wash. 125, 127, 104 P. 2d 170 (1909) (Lay opinion should not be admitted where jury is just as capable of drawing inferences from evidence as is the witness).

Even if the court permitted petitioner to present the conclusions contained in the profile report, however, this evidence would be of little worth. It is plain that whatever conclusions were drawn by the author were derived from the state of the investigation in 1991 or 1992. As Garr indicated, much of the evidence presented at trial, including several damning admissions by the petitioner, was not known to the state until after 1996. The jury would be likely to assign little weight to an opinion held prior to the development of significant evidence.

Further, as the state argued at trial, the jury could have found the petitioner guilty even if it believed his alibi. See T. 6/3 at 20, 92-95. The murder could have occurred during the 9:30-10:30 time period, or later at a time when petitioner claims to have returned from Terrien's. The state was never able to pinpoint the time of death precisely, leaving open the possibility that, as petitioner told Hoffman, he returned from Terrien's, snuck out of the house and then went in search of Martha. See T. 6/3 at 92-95. Thus, even if the jury assigned value to the investigator's opinion on this matter, it would be unlikely to change the verdict.

Finally, as argued throughout, the strength of the state's case makes it unlikely that anything other than the most convincing evidence would alter the verdict in this case. This evidence is, at best, of marginal value.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION IV[19]

The following, while not an exhaustive list of the factual findings and conclusions of law which demonstrate petitioner has not carried his burden under Count Six, are some of the important findings that would support this determination:

1) Because it is undisputed that petitioner knew of the profile reports prior to trial, and because the Supreme Court has determined that he failed to make a timely request for them, this evidence cannot be considered "newly discovered." *See e.g., State v. Skakel,* 276 Conn. 633, 707-710, 888 A.2d 985 cert. denied, U.S. , 127 S. Ct. 578 (2006); *Joyce v. State's Attorney*, 84 Conn. App. 195, 200, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A.2d 578 (2004).

2) Petitioner failed to prove that the profile reports and time lapse chart was newly-discovered evidence such that it was not known, or could not have been discovered at or prior to trial by the exercise of due diligence. See e.g., *Joyce v. State's Attorney*, 84 Conn. App. 195, 200, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A.2d 578 (2004).

3) The only new information Sherman identified in either the profile reports or the time lapse chart was the opinions of the author. As lay opinion evidence not rationally based on the witness' perception, this evidence would be inadmissible in a retrial. See e.g., Conn. Code Evid. §7-1; *Turbert v. Mather Motors, Inc.,* 165 Conn. 422, 434, 334 A.2d 903 (1973).

4) Petitioner failed to carry his burden under *Asherman* that the evidence offered under the sixth count is newly discovered, not cumulative, material and likely to lead to an acquittal on retrial.

5) Sherman was aware of the profile reports prior to trial. Further, it is reasonable to infer that he was aware of the content of the Littleton report, or at least the most important features of the report, from his discussions with its author, John Solomon, prior to trial.

6) Sherman failed to exercise due diligence to obtain copies of the profile reports and time lapse chart prior to trial.

7) Sherman was aware of Solomon's attempts to connect Littleton to unsolved female homicides prior to trial, both through the discovery provided, and the through his discussions with Solomon.

8) Petitioner failed to identify any information in the time lapse summary that had not been provided to him prior to trial.

9) The only information petitioner identified in the profile reports that had not been provided to him prior to trial was the opinions of the author.

10) As lay opinion evidence, the opinions of the author would be inadmissible in any

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[19] See fn. 11, *supra*.

subsequent retrial.

11) Even if admitted, however, the opinions would be of little value to the jury, based as they were on the state of the evidence in 1991 or 1992. Much of the incriminating evidence against the petitioner was unknown to the investigators at that time, making any opinion formed at that time entitled to little or no weight.

12) Further, as the state argued in its summation at trial, the jury could have accepted petitioner's alibi and still voted to convict. The time of death did not preclude the jury from finding that petitioner went to Terrien's as he claimed, and snuck out of the house later in search of Martha, as he told Hoffman. Therefore, Solomon's 1991 or 1992 opinion that petitioner went to Terrien's, even if accepted by the jury, would not preclude a guilty verdict. Indeed, in light of the abundant evidence of guilt presented at trial, Solomon's insignificant opinion is immaterial and not likely to result in an acquittal on retrial.

13) In light of the strength of the state's evidence against the petitioner, and the inadmissible or inconsequential nature of the evidence claimed in the sixth count, it is not material and not likely to lead to an acquittal on retrial.

V. NONE OF THE EVIDENCE OFFERED BY PETITIONER WHICH DOES NOT RELATE TO THE SPECIFIC ALLEGATIONS IN COUNTS ONE, TWO, OR SIX OF HIS AMENDED PETITION SHOULD FORM THE BASIS FOR RELIEF

The State of Connecticut hereby renews its objection to the consideration of any evidence, offered under Count Nine or otherwise, that is not relevant to the express allegations in Counts One, Two, and Six, the remaining counts of the petition. Not only is evidence such as that regarding the relationship between Garr and Levitt, the composite sketch, and the Tommy Skakel affidavit properly excluded, it cannot legitimately form a basis for relief.[20]

Such evidence should be stricken from this proceeding because 1) it is not relevant to any of the allegations contained in Counts One, Two, or Six of the petition; 2) by failing to plead the allegations he is now suggesting petitioner has deprived the state of adequate notice; 3) petitioner should be held to his response to the state's Request to Revise which limited Count Nine to a compilation of Counts One through Eight; and 4) petitioner cannot add new claims at this juncture because the limitation period for a petition for new trial has expired.

Examination of the Amended Petition for New Trial dated May 1, 2006, reveals that none of the nine counts contained therein allege any facts regarding the relationship between Garr and Levitt, or the timing and circumstances under which Levitt wrote *Conviction*. Nor

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[20] While petitioner is apparently offering the Garr/Levitt evidence under Count Nine, it is not clear whether he is including the composite sketch in Count Six or Nine, and whether he is making any claim at all regarding the Tommy Skakel affidavit. This Court's April 25, 2007 order places the composite sketch under Count Six, but petitioner did not include it or the Thomas Skakel affidavit in his Summary of the Counts from his Trial Management Memorandum. Further, during the hearing, petitioner expressly offered the sketch under Count Nine in response to the state's objection. PT 4/19 at 221-224. If petitioner is alleging that the sketch is newly discovered evidence under Count Six, then the state contends that paragraphs 1-60 of the Fifth Count should be disregarded except as they relate to his allegations concerning the profile reports in the Sixth Count. If he is raising it under Count Nine, then the state objects to its consideration for the reasons expressed in this section. If considered, however, as argued *infra*, the sketch is not newly discovered, was not suppressed, and is not material or likely to lead to an acquittal or retrial. As for the Tommy Skakel affidavit, no claim relating to that affidavit was ever pleaded, and the state objects to its consideration as argued herein. Nevertheless, if considered, it provides no cause for relief.

does it contain any allegations, other than those specifically withdrawn by petitioner, relating to the composite sketch produced by Morganti. Further, nothing in the petition concerns or references the Tommy Skakel affidavit. Nevertheless, over the state's objection, petitioner presented evidence regarding all of these matters at trial. *See* PT 4/19/07 at 220-227 (Court hears state's objection and permits inquiry into the sketch to continue but notes that it may not "make it into the final decision"); 4/20/07 at 1 (State notes that by inquiring into matters concerning the Tommy Skakel affidavit, the state was not waiving its objection to any such allegations forming the basis for relief); 4/20/07 at 55-74 (argument on state's April 16 Memorandum Objecting to the Admission of Any Evidence under Count Nine Not Specifically Pleaded in the Remaining Counts of the Petition and court's ruling permitting the testimony).

Simple rules of pleading should preclude any consideration of this evidence. Although the modern trend, which Connecticut follows, is to construe pleadings broadly and realistically rather than narrowly and technically, the pleadings must nevertheless provide sufficient notice of the facts claimed and the issues to be tried. *Covey v. Comen*, 46 Conn. App. 46, 49-50, 698 A.2d 343 (1997). Further, because a party may not allege one cause of action and recover on another, facts found but not averred cannot be made the basis for a recovery. *Id*. at 50.

"'The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . What is in issue is determined by the pleadings and these must be in writing. . . . Once the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein.'" (Citations omitted.) *Wright v. Hutt*, 50 Conn. App. 439, 449-50, 718 A.2d 969, cert. denied, 247 Conn. 939, 723 A.2d 320 (1998).

Although a variance between pleadings and proof may not be fatal because only material variances, those that disclose a departure from the allegation in some matter essential to the charge or claim, warrant the reversal of a judgment; *Covey v. Comen*, *supra*, 46 Conn. App. 50 n. 7; petitioner's attempt to add entirely new claims is not a mere variance. Rather,

it is an attempt to introduce foreign claims, dependent on facts never pleaded. As such, it should not be countenanced. *Schaller v. Roadside Inn*, *Inc*., 154 Conn. 61, 65, 221 A.2d 263 (1966) (A variance which alters the basic nature of a complainant's cause of action cannot be condoned; a plaintiff may not allege one cause of action and recover on another).[21]

Petitioner may contend that although the facts related to the sketch, the Garr/ Levitt claim, and the Tommy Skakel affidavit were never specifically pleaded they are included in the Ninth Count of the petition. In the original petition, that count stated, *inter alia*, that "[b]ased on information and belief, the Petitioner is conviction (sic) entitled to a new trial based upon newly discovered evidence, *including but not limited to* the information previously alleged in the First Count Through the Eighth Count." See Petition dated 8/25/05 (emphasis added). In its Request to Revise dated October 25, 2005, the State asked that the Ninth Count be deleted because, by attempting to incorporate the allegations in Counts One through Eight, it was "duplicative and unnecessary." Further, the state asked it be deleted because it improperly attempted leave the door open to "new, unspecified allegations. Connecticut Practice Book § 10-35(2). . ." The objection continued: "[f]urther, by alluding to additional unspecified allegations, plaintiff is apparently attempting to permit the addition of future claims. Any claims, other than those premised on DNA evidence, not contained in the present petition, however, would be barred under General Statutes § 52-582."[22]

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[21] Practice Book § 10-62 permits an amendment to the pleadings at any stage of the trial where there is a material variance between allegation and proof. This provision, however, pertains "*only* to a request to amend a complaint." (Emphasis added.) *Ahern v. Fuss & O'Neill, Inc.,* 78 Conn. App. 202, 214 n.7, 862 A.2d 1224, *cert. denied* 266 Conn. 903, 832 A.2d 64 (2003). For reasons discussed *infra*, petitioner, who has never moved to amend his petition to include new allegations, is precluded from doing so now due to the expiration of the statute of limitations.

[22] Section 52-582 provides: "No petition for new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was (continued...)

Petitioner objected to the Request to Revise by stating: "The Petitioner's allegations in the Ninth Count are proper. The Petitioner alleges in this count that even if each individual piece of newly discovered evidence is insufficient to warrant a new trial, then the new evidence collectively require[s] a new trial. Further, it is proper to reallege facts from the previous counts in support of subsequent counts. Thus, the Petitioner's pleading is not inappropriate, repetitious or cumulative. . . ." On March 28, 2006, this court sustained petitioner's objection to the state's request to revise Count Nine.

Petitioner should be bound by his response to the Request to Revise and prohibited from raising new claims never included in the pleadings. Not only did his original complaint fail to provide notice of any allegation concerning Garr and Levitt, the Tommy Skakel affidavit, or, after the withdrawal of Count Five, the composite sketch, he affirmatively disavowed any unspecified additional claims in his response.

Although petitioner argued in this proceeding that the state should have either moved to strike or requested more information under Count Nine, neither action was warranted or required under the circumstances. Petitioner argued that he did not include the Garr/Levitt allegations in his petition because he did not have a good faith basis for them at the time he filed the petition. PT 4/20 at 68-69. Therefore, by his own admission, petitioner could not have asserted them in response to a request for more information had one been made. Any such request for more information would have been futile.[23] Petitioner made no such claim

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[22](...continued)
not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence."

[23] Petitioner's concession that he lacked a good faith basis at the time he filed the petition presents another problem. Petitioner claims that all he had prior to filing the petition were "rumors" that Garr and Levitt had a book deal. PT 4/20 at 68-69. Nothing suggests that petitioner's store of information increased between the filing of the petition and Garr's deposition, or between the deposition and trial. Yet, petitioner did not refrain from probing Garr about this matter in his deposition, or pursuing this claim at trial.

regarding the Tommy Skakel affidavit and composite sketch. Nor could he as the facts surrounding those claims were well-known prior to the filing of the petition. Petitioner, therefore, provided no reason for his failure to specifically plead these allegations.

Nevertheless, the effect of a statute of limitations is to cut off the opportunity to bring new claims that are not extant within three years of sentencing. Therefore, because he did not have enough information to assert a claim regarding Garr and Levitt by August 29, 2005, he lost the right to assert it. Similarly, where he had all the pertinent information regarding the composite sketch and Tommy Skakel affidavit at the time he initiated this lawsuit, yet failed to assert any claim addressing these topics, these claims are time-barred.

This Court should not permit petitioner to circumvent the statute of limitations by inserting "including but not limited to" in his petition and thus keeping the door open to new claims. Because the attempt to do so was improper, the state properly requested that Count Nine be deleted. See P.B.§ 10-35 (Party may request a pleading be revised by deleting any "unnecessary, repetitious, scandalous, impertinent, immaterial, or otherwise improper allegations in an adverse party's pleading"). The state was not obligated to request petitioner revise something that was not a claim but rather an accumulation of claims from prior counts and an attempt to keep the door open to new claims. There was no claim, other than those in previous counts which were subject to their individual requests to revise, to be revised, and the addition of new claims was barred. Deletion was therefore appropriate.

Moreover, once petitioner asserted in his response that the Ninth Count was proper because it was a compilation of counts One through Eight, and this court declined to order the requested deletion, there was no reason for the state to move to strike. A Motion to Strike is based on either the alleged legal insufficiency of a pleading, improper joinder of causes of action, the failure to join or give notice to any interested person, or the absence of a necessary party. P.B. § 10-39. Count Nine did not suffer from any of those defects; its flaw was that it was cumulative and improper in that it attempted to leave to door open to further allegations. Both

of those defects were appropriately addressed in the state's request to revise. *Gamlestaden PLC v. Backstrom*, judicial district of Stamford, Docket No. CV__ 0130060 (May 17, 1995, *Karazin, J.*) (Defendant's "request to revise is the proper vehicle for the deletion of repetitious pleadings.") In light of this court's rejection of those grounds, there was no reason for the state to reassert them in a subsequent motion that was not designed to deal with those types of defects.

Further, in light of petitioner's response, there was no reason for the state to attempt another revision. Petitioner asserted: "The Petitioner alleges in this count that even if each individual piece of newly discovered evidence is insufficient to warrant a new trial, then the new evidence collectively requires a new trial. Further, it is proper to reallge facts from the previous counts in support of subsequent counts. Thus, the Petitioner's pleading is not inappropriate, repetitious or cumulative. . . ." Given this interpretation of the count, there was no further revision necessary. Although the state maintained that the count was cumulative and unnecessary, those grounds were asserted and rejected by this court. There was no reason to seek further revision at that point because the state had already requested revisions to Counts One through Eight. Count Nine, as petitioner construed it in his response, added nothing new.

For all these reasons, the state hereby requests the court strike all evidence relating to these unpleaded claims. As previously noted, facts not averred cannot form the basis for relief. Further, as argued throughout, these new claims are barred by the three year statute of limitation contained in General Statues § 52-582.[24] As new claims which do not relate back to the claims in the amended petition, they cannot be advanced at this late date.

Support for this assertion is found in *Alswanger v. Smego*, 257 Conn. 58, 64, 776 A.2d 444 (2001). In *Alswanger*, our Supreme Court explained that a "cause of action is that single

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[24] Petitioner was sentenced for the conviction at issue on August 29, 2002. The time limit for bringing a petition for new trial, therefore, expired on August 29, 2005.

group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief." Further, it is "proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but where an entirely new and different factual situation is presented, a new and different cause of action is stated . . . . Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims . . . ." (Internal quotation marks omitted.) *Id.,* 65. The court concluded in *Alswanger*, that because the new allegations would have forced the defendants to gather different facts, evidence and witnesses to defend the amended claim, it did not relate back to the original claim and was outside the period of limitation.

Similarly, in *Mayle v. Felix*, 545 U.S. 644 (2005), the United States Supreme Court held that a claim in a habeas petitioner's amended petition, filed after the applicable statute of limitation, did not relate back to the original petition because it did not arise out of the same "conduct, transaction, or occurrence" as the claim originally pled. Relation back, the Court explained, relies on the existence of a "common 'core of operative facts' uniting the original and newly asserted claims." *Id*., 659. In *Felix*, the Court determined that a claim challenging statements made in a pretrial interrogation, and one challenging the admission of the videotaped testimony of a prosecution witness, did not share such a common core of facts.

The same can be said here. The facts surrounding petitioner's claim involving Garr and Levitt, the Tommy Skakel affidavit, and the composite sketch obviously depend on different facts, evidence and witnesses than those included in Counts One, Two, Six, and Nine as defined by petitioner. As such, any evidence offered under Count Nine not relevant to the previous counts of the petition should be stricken and cannot form the basis for relief.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION V[25]

The following, while not an exhaustive list of the factual findings and legal conclusions that support the argument advanced in Section V, are some of the important findings that support the state's position:

1) The evidence and allegations petitioner presented relating to Garr and Levitt, the composite sketch, and the Tommy Skakel affidavit should be stricken and/or disregarded by the court because

   a) they are not relevant to any of the allegations contained in Counts One, Two, or Six of the petition;

   b) by failing to plead the allegations he is now suggesting petitioner has deprived the state of adequate notice;

   c) petitioner should be held to his response to the state's Request to Revise which limited Count Nine to a compilation of Counts One through Eight; and

   d) petitioner cannot add new claims at this juncture because the statute of limitation for a petition for new trial expired on August 29, 2005, four days after he filed his original petition.

See e.g. General Statutes §52-582.

2) Petitioner cannot recover on the basis of any of these new allegations because they were never properly pled. *Covey v. Comen*, 46 Conn. App. 46, 49-50, 698 A.2d 343 (1997).

3) The evidence concerning these new allegations should be stricken from the record as irrelevant to the allegations in the petition. *Wright v. Huttl,* 50 Conn. App. 439, 449-50, 718 A.2d 969, cert. denied, 247 Conn. 939, 723 A.2d 320 (1998).

4) Petitioner failed to provide the state with adequate notice as to the nature of these new allegations.

5) Petitioner should be held to his response to the State's Request to Revise wherein he limited Count Nine to a compilations of Counts One Through Eight.

6) Because petitioner so limited Count Nine, and because the state had already tried, unsuccessfully, to have petitioner's improper attempt to allow expansion of the petition removed from the pleadings, the state was not required to move to strike the Ninth Count. A motion to strike is not designed to address a pleading that suffers from the defects of Count Nine. See e.g. P.B. §10-39.

7) No claim not specifically pleaded by August 29, 2005 can form the basis for relief

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[25] See fn. 11, *supra*.

herein. Inasmuch as none of these allegations were properly pleaded by that date, and because they do not relate back to the allegations that were included in the original petition, the evidence and allegations regarding Garr/Levitt, the composite sketch, and the Tommy Skakel affidavit should be stricken and/or disregarded by this court. *Alswanger v. Smego*, 257 Conn. 58, 64, 776 A.2d 444 (2001); *Mayle v. Felix*, 545 U.S. 644 (2005).

VI. PETITIONER HAS NOT PROVEN THAT ANY EVIDENCE OFFERED UNDER COUNT NINE IS "NEWLY DISCOVERED" OR MATERIAL AND LIKELY TO LEAD TO AN ACQUITTAL ON RETRIAL

Petitioner's claim under Count Nine remains unformed and unarticulated. Because petitioner never pleaded any facts relating to Garr and Levitt, or how any alleged agreement between the two adversely impacted his criminal trial, the state remains uncertain of the contours of his claim. Similarly, petitioner has never articulated the significance of the composite sketch (outside of the withdrawn allegations in Count Five) or the Tommy Skakel affidavit. As argued previously, because the petitioner has never put the state on notice as to what exactly he is claiming under Count Nine, this court should disregard all evidence ostensibly offered under that Count that does not directly relate to Counts One, Two and Six. Further, any expansion of Count Nine beyond the incorporation of Counts One through Eight is barred by the statute of limitations.

Nevertheless, if this court were to consider the evidence proffered under this count, none is sufficient to warrant a new trial. In light of Sherman's testimony that he had been told by certain authors prior to trial that Garr had a "book deal" and because he failed to seek a ruling from the court when he asked Garr about it during trial, petitioner cannot establish that this evidence is "newly discovered."

Further, petitioner failed to produce a shred of evidence that Garr had an expectation of financial gain from Levitt's book prior to the conviction in this case. Therefore, petitioner failed to establish that Garr was influenced by any sort of financial motive in his preparation and investigation of this case.

As to the composite sketch and the Tommy Skakel affidavit, both of these matters were known to counsel at trial. Therefore, neither is newly discovered. Even if petitioner were to surmount *Asherman's* first prong, however, he has not shown how either is material or likely to result in an acquittal.

a. Petitioner Has Not Proven That Any Evidence Relating to Garr, Levitt or the Writing of *Conviction* Is "Newly Discovered" or Material and Likely to Lead to an Acquittal on Retrial

i. Facts

A. Pre-trial and Trial (2002)

On or about May 21, 2001, petitioner's original attorney, Michael Sherman, filed a Motion for Discovery and Inspection. In paragraph 13 of that motion he requested "[e]vidence that any officer, investigator, witness or other agent of the state, did have, or now has, a pecuniary or other interest in the development and/or outcome of this case, including, but not limited to, any contract, agreement, or on-going negotiations, which relate to the preparation of any book, or the making of any movie, or which relate to contracts or agreements pertaining to future employment based upon such person's knowledge of this case, whether such person's interest is, or has been, negotiated directly or indirectly, via any family member, friend, corporation, or other business entity, in which said person, family member, or friend, has an interest." Exh. 78, p. A199-200.

On August 15, 2001 the Court (Kavanewsky, J.) ruled on this request as follows:

> THE COURT: All right; my thinking is that information regarding the pecuniary interest of a witness in the outcome of the case, a witness, is relevant for impeachment purposes, to show possible bias or motive. But, I don't see the same rationale applying to non-witnesses.
>
> So your –
>
> MR. SHERMAN: Excuse me, may I ask the court, how about rebuttal witnesses?
>
> THE COURT: Witnesses, I am including chief and rebuttal witnesses in the same group. I don't think Mr. Benedict would have an objection to that if there is a rebuttal witness later disclosed that has such claims. So, I am denying the request in its present form, granted as amended to witnesses in both chief and rebuttal only. That's my ruling as to number 13.

T. 8/15/01 at 10. (Resp Exh S); PT 4/25 at 147-152.

During the course of the trial, Inspector Frank Garr testified outside the presence of the jury. At the close of defendant's examination of Garr, the following exchange occurred. ,

MR. SHERMAN: Have you got a book deal?

MR. BENEDICT: Objection, irrelevant.

MR. SHERMAN: Nothing further.

THE COURT: Anything further?

T. 5/10/02 at 156.

B. The Petition Hearing

At the hearing on the petition for new trial, the petitioner presented three witnesses concerning the relationship between Garr and Levitt and the circumstances under which Levitt wrote *Conviction*: Leonard Levitt, Frank Garr and Michael Sherman.

Leonard Levitt testified that he began covering the Moxley homicide as a reporter in about 1982. PT 4/20 at 148. He convinced the Stamford Advocate, a newspaper for which he was freelancing, to file a Freedom of Information request for the Greenwich Police Department's file. *Id*. at 149. As a result, he received the police investigatory file, with some redactions. *Id*. In about 1991, he began thinking of writing a book about the case. *Id*. at 150. He stated that his association with Garr did not begin until late in 1995. *Id.*

Their association began when Levitt had an article published in Newsday which recounted the findings of Sutton Associates, a private investigation firm hired by Rushton Skakel. *Id*. at 150-51. Levitt reported that both Tommy and Michael Skakel had given Sutton Associates a different account of their activities the night of the murder than they had told the police in 1975. Shortly after Levitt's article on the Sutton report was published, Garr called him. *Id*. at 151. Garr did not have access to the Sutton Report at that time, and was interested in the new information Levitt had obtained. *Id*. at 152; PT 4/24 at 199. Garr and Levitt eventually became friends. PT 4/24 at 103, 119.

Levitt stated that his interest in writing a book about the case continued. He made some inquiries prior to the Grand Jury being impaneled in 1998. He believed he may have drafted a book proposal in 2000. PT 4/20 at 94. He stated that although it is always hard to get a book

published, he was also ambivalent about writing about the case until he knew how the whole thing would end. He wanted to tell a complete story. PT 4/20 at 152-53.

Levitt stated that he undoubtedly told Garr about his interest in writing a book at some point in their association. In addition, he stated that he had asked Garr to help him in that endeavor. Garr's response was always consistent, however, saying he could not help him in any way until after the case was over. PT 4/20 at 95-96, 152-55. Further, Levitt stated there were no conversations between he and Garr regarding compensation until after the conviction. PT 4/20 at 147,153.

Petitioner's counsel asked Levitt numerous questions about a passage in his book in which he stated that at the lowest ebb, he and Garr made a "pact" to tell their story. PT 4/20 at 100. In the book, Levitt also wrote about another time when he promised that when the case was over, no matter which way it went, he would tell their story, his and Garr's. PT 4/20 at 104.

Levitt explained that the lowest ebb was probably the period after Mark Fuhrman's book was published and Fuhrman and Dominick Dunne were appearing on television shows saying disparaging things about the official investigation. He stated that he did not think about dividing the books profits with Garr at the time he vowed to tell their story. *Id*. at 146. After the conviction, it seemed fair to him to share the proceeds with Garr. Levitt was explicit in his testimony in saying that money never came up until after the conviction. *Id*. at 147. Levitt stated that although he likes to make money for his work, money was the "last thing [he] was interested in" with this book. PT 4/20 at 139.

Garr testified that he considered Levitt's use of the word "pact" to be literary license. In his view, all he ever said prior to trial was he would talk about helping with the book after the case was over. *Id*. at 116.

Levitt stated that prior to sentencing, Garr never shared any information from the state's file with him. Even though Levitt tried to get information from Garr all the time, he never got

anything. PT 4/20 at 154-58.

Levitt stated that they never worked together on the case, but rather Garr worked on it as a detective, and he as a reporter. *Id*. at 156. Levitt said he was always pushing Garr for information but never got anything out of him. *Id*. at 157. Even during the trial, Levitt said that Garr never gave him access to the state's files or evidence. *Id*. at 158.

After the trial, Levitt did begin working on his book. In February 2003, Garr and Levitt entered into an agreement where Levitt agreed to give Garr 50% of the profit from his book. Levitt explained that he was paying Garr for his time and his insights. *Id*. at 146.

Petitioner's counsel also asked Levitt about a passage he wrote saying that Garr had threatened, cajoled, and harassed witnesses. Levitt explained that what he meant was that Garr told witnesses if they did not come voluntarily, the state would subpoena them. *Id*. at 110. Garr explained in his testimony that many of the witnesses in this case were recalcitrant. PT 4/20 at 203. He allowed that he might be guilty of harassment, by which he meant he was persistent in his efforts to secure their testimony. *Id* He stated unequivocally, however that he never told a witness what to say or encouraged them not to tell the truth. PT 4/24 at 203-4.

Garr testified that he did not write a single sentence in Levitt's book. PT 4/24 at 105. He further stated that he had no power to make changes to the book, although he did point things out to Levitt that he thought were inaccurate. PT 4/24 at 114. Garr stated that during the time Levitt was writing the book, they would meet after work, before work, or on the weekends to discuss it. PT 4/24 at 202. Sometimes Levitt would show him drafts that he would review. *Id.* Garr testified that he never worked on the book during his regular work day. *Id*. at 202-3.

He agreed that prior to trial he was aware Levitt hoped to write a book, and he may well have told Levitt that he would try to help him when the case was over. PT 4/24 at 128. He stated that he never gave Levitt information from the state's file prior to sentencing. Garr explained that in his mind the case was over following Skakel's sentencing in August 2002.

Id. at 207. To his way of thinking, there was no further investigation to be done at that point, the entire investigation having been "aired out" in the course of the criminal trial. *Id*. at 207-8.

Garr explained that while he had told Levitt prior to trial that he would help him with his book when all was said and done, he had no expectation of a financial reward at that time. *Id*. at 206.

Petitioner's counsel questioned Sherman about a passage in Mark Fuhrman's book where Fuhrman contacted Garr and asked for his help in writing his book. Fuhrman wrote that Garr would not help him, or even meet with him. Fuhrman also stated that Garr remarked he had been thinking of writing a book. T. 4/24 at 71-73.

Garr stated that he could not recall saying the words Fuhrman attributed to him. He explained that he could not imagine saying anything like that but if he said it, it was intended to politely "blow off" Fuhrman. PT 4/25 at 29-31.

Michael Sherman offered his opinion that, prior to trial, he had "pretty good information" from three persons – Tim Dumas, Mark Fuhrman, and Dominick Dunne, all of whom had written books about the case – that Garr had a "book deal." PT 4/19 at 174. Sherman admitted, however, that Levitt never made any such assertion. *Id*. at 175. Moreover, later in his testimony, Sherman explained that his information regarding the alleged "book deal" was merely rumors circulated by the persons he named. He admitted he had no "hard evidence" of any such deal. PT 4/24 at 27. Nevertheless, he filed the discovery requested, quoted *supra*. *Id*.

Sherman stated that he did ask Garr whether he had a book deal when Garr was on the stand. *Id*. Sherman recalled that he got what he perceived to be a "really bad glare" from Judge Kavanewsky. *Id*. at 188. He explained that he did not seek a ruling from the court when the state objected because of what he perceived as the court's reaction to his question. PT 4/24 at 58, 62-64.

He admitted, however, that he never attempted to make an offer of proof to Judge

Kavanewsky regarding the rumors he had heard, or the passage in Fuhrman's book where Fuhrman claimed Garr said he was thinking of writing a book. PT 4/24 at 64. Sherman also admitted he did not pursue the issue further at trial. *Id*.

Sherman claimed that if he had known about the "pact" Levitt mentioned in his book he would have made Garr's alleged financial motive a "central theme" of his case. PT 4/24 at 44. He admitted, however, that "pact" does not necessarily have financial connotations. *Id*. at 46.

Sherman further testified that he spoke to the state's witnesses prior to trial, and felt that Garr's treatment of some witnesses was "heavy handed." *Id*. at 33. He claimed he was aware that Garr "threatened and cajoled" witnesses. *Id*. at 39. He asserted that if he had the information about a "pact" (which to his way of thinking implied a financial motive on Garr's part) he would have "blown it up as big as I could." *Id.* at 41. He admitted that nothing prevented him at trial from calling witnesses who felt Garr was being difficult, and bringing that to the jury's attention. *Id*. at 49.

Sherman also stated that he is aware if petitioner loses his bid for a new trial in this proceeding, the next step may be a habeas corpus petition where, in Sherman's words, he "become[s] the villain." *Id*. at 50.

ii. Petitioner Has Not Established That Any Evidence Relating to Garr and Levitt Is "Newly Discovered"

Petitioner has not established that any evidence regarding Garr and Levitt was unknown or undiscoverable through the exercise of due diligence at or prior to trial. As the evidence produced at the hearing revealed, Sherman had heard "rumors" of a book deal involving Garr. As brought out on cross, all three of the persons named as possible sources for those rumors – Tim Dumas, Dominick Dunne and Mark Fuhrman – attended the criminal trial in 2002. PT 4/24 at 53. Nothing prevented Sherman from inquiring further to see if any of those persons had concrete information regarding an alleged book deal.

Further, Judge Kavanewsky granted petitioner's discovery request regarding information

of potential pecuniary gain by state's witnesses. Therefore, it is apparent that if petitioner had requested a ruling from the court when he asked Garr if he had a book deal, the court would have overruled the state's objection. Based on the uncontroverted evidence in this proceeding, however, Garr's answer would have been "no."

Petitioner's failure to elicit this testimony at trial constitutes either a lack of due diligence or a strategic decision. Petitioner may not have pursued the issue at trial because he knew, or knew it was likely, that Garr did not have a book deal. Rather than press for an answer, he may have preferred that the question remain unanswered, but suggestive.

iii. Petitioner Has Not Established That Any Evidence Regarding Garr and Levitt Is Material and Likely to Result in an Acquittal on Retrial

Try as he might, petitioner failed to produce a shred of evidence that, at the time of the trial, Garr had any expectation of financial gain from a book his friend Levitt might one day write. Both Garr and Levitt were clear about this. In fact, both men were clear that Levitt's interest in writing the book , and Garr's agreement to help him, was not about money. Rather, both men felt that the true story of this case needed to be told. They felt there was a lot of misinformation in the media and they wanted the public to know the truth. See PT 4/20 at 139, 153; PT 4/25 at 29.

As Garr explained, he wanted to help Levitt if he could because he felt his book would be the most accurate. PT 4/25 at 29.

Garr's willingness to help his friend write a book so that the truth would be told is hardly a nefarious motive. Importantly, both Garr and Levitt confirmed that Garr never supplied Levitt information from the state's files prior to trial– a fact that obviously frustrated Levitt. In fact, Levitt said he was surprised after trial to find out how much information Garr had withheld from him. PT 4/20 at 157.

Levitt's decision to split the proceeds 50/50 with his friend was not made until after the trial. Levitt explained that he paid Garr for his time in reviewing drafts, and his insights. While

reasonable minds could differ as to whether a 50/50 split was overly generous, given the fact that Garr did not write a word of the book, it was nevertheless a decision Levitt was entitled to make. More, because Levitt's decision to share profits with Garr was not made until after trial, it could not have affected Garr's performance of his duties prior to and during the trial.

Although petitioner questioned both men extensively about a passage in Levitt's book in which he proclaimed that he and Garr made a "pact" to tell their story, petitioner never produced any evidence that the pact was anything more than an agreement to tell their story. There are, after all, many ways in which a reporter and investigator could tell their story. As Sherman conceded on cross, a pact does not necessarily have financial connotations. The passage is more accurately interpreted as reflecting the desire of both men to see that the truth be made public.

As to the other source of numerous questions by petitioner, Levitt's statement that Garr had "threatened, cajoled and harassed" witnesses, Levitt explained he was referring to the fact that Garr had told some witnesses if they did not come to testify voluntarily, the state would subpoena them. Garr explained that he might be guilty of "harassment" in that he was persistent in dealing with recalcitrant witnesses.

Sherman's testimony that he would have made Garr's financial motive a centerpiece of his case is meaningless in view of the fact there is no evidence of a financial motive. Further, Sherman admitted that he had spoken to the state's witnesses prior to trial and was aware that some considered Garr difficult. If he had evidence Garr had "threatened" any witness he was certainly free to produce it at trial.

Finally, as argued with regard to all of petitioner's allegedly new evidence, the strength of the state's case renders any such evidence immaterial. If petitioner had presented this evidence at trial, Garr's acknowledgment that he told his friend if he wrote a book he would try to help him, but he could not do anything until the case was over, is hardly the type of evidence that would have so swayed the jury as to lead it to acquit.

b. Petitioner Has Not Proven That Any Evidence Related to the Composite Sketch Is "Newly Discovered" or Material and Likely to Lead to an Acquittal

i. Facts

In count five of the Revised Substitute Petition for New Trial, dated May 1, 2006, petitioner alleged that the state suppressed a composite sketch of a man seen walking in Belle Haven the night of the murder. Petitioner further alleged that this sketch, which he claims to have seen for the first time after the verdict, resembles Kenneth Littleton, a person who was present at the Skakel house the night of the murder and who the petitioner, at trial, suggested as a third party suspect. Petitioner alleged that the sketch is "newly discovered"[26] evidence, that would likely have produced a different verdict had it been available during trial. Petition at 21-27.

After the state filed a Motion for SummaryJudgment, petitioner withdrew Count Five. Nevertheless, petitioner introduced evidence at the hearing regarding the sketch, alleging it was part of a "pattern of nondisclosure" by the state. PT at 4/19 at 221. The state objected to this evidence at trial, and renews its objection here. PT at 4/19 at 220 - 227; see *supra,* Section V. Nevertheless, even if this court were to consider petitioner's claim concerning the sketch, it does not warrant a new trial.

As the state argued in its Motion for Summary Judgment, it is clear the sketch was known to petitioner at trial. Hence, it was not suppressed and cannot be considered "newly discovered" or part of a pattern of nondisclosure. In his appeal from the judgment of conviction to the Connecticut Supreme Court, petitioner claimed that the state had suppressed this same composite sketch. *See State v. Skakel*, 276 Conn. 633, 693-707, 888 A.2d 985, cert. denied, 127 S. Ct. 578 (2006). He argued that the state's alleged failure to disclose this sketch

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[26] Although petitioner uses the term "newly discoverable" evidence throughout his petition, this is a misstatement of the first part of his burden of proof. In order to prevail, he must establish that the evidence is newly *discovered*; *Asherman v. State*, 202 Conn. 429, 434, 521 A.2d 578 (1987); not newly *discoverable*, whatever that might mean.

deprived him of his right to a fair trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. *Id*. at 693-4.

In rejecting the petitioner's claim, our Supreme Court examined the record with regard to what the defendant/petitioner knew about the sketch and when he knew it. In particular, the court noted that:

> On May 21, 2001, the defendant filed a pretrial motion for disclosure and production, requesting, inter alia, that the state disclose any ""[i]nformation and/or material which is exculpatory in nature,"" including ""[p]hotographs, composite sketches or other media replications that depict the likeness or physical attributes of [any] alleged perpetrator of this crime."" . . . The state, which had indicated that it was adopting an open file policy for purposes of the case, did not object to this particular request, and, on August 15, 2001, the trial court issued an order requiring that the state comply with this and all other discovery requests to which the state had not objected. In accordance with its open file policy and the court's order pertaining to discovery, the state provided the defendant with numerous reports and documents relating to the investigation of the case.
>
> One such report states that, on October 31, 1975, investigating officers searching the general vicinity of the murder scene were approached by special officer Charles Morganti, Jr. Morganti informed the officers that he had been on special duty patrol of the Belle Haven neighborhood the previous evening when, at about 10 p.m., he observed a white male walking in a northerly direction on Field Point Road. Morganti then observed the man turn onto Walsh Lane. Morganti approached the individual and asked him where he was going. The individual replied that he lived on Walsh Lane and that he was going home. Morganti further reported to the officers that he observed the man again, a few minutes later, walking northbound on Otter Rock Drive, just north of the Walsh Lane intersection. . . .
>
> A second such report reflects the fact that Morganti was interviewed by the police again the following day. That report states that Morganti had agreed to ""appear at the [d]etective [b]ureau for the purpose of putting [together] a composite picture of the subject that he had observed on Field Point [Road] near Walsh [Lane] on Thursday, [October 30, 1975].""
>
> Another police report indicates that, on November 5, 1975, the police interviewed Carl Wold, a resident of Walsh Lane in the Belle Haven neighborhood. Wold informed the police that, at about 7:20 p.m. on October 30, 1975, he went out for his nightly walk. According to Wold, he walked east on Walsh Lane, turned right onto Field Point Road and then turned south toward Field Point Circle. . . . He recalled having a short conversation with an officer at the Field Point police booth and, later, on his way home, being stopped by a special police officer on Field Point Road, just south of the Walsh Lane intersection. This officer had inquired of Wold where he was headed, and Wold responded that he was returning to his home on Walsh Lane. Wold further stated that he returned home at about 8 p.m. and remained there for rest of the evening. . . . Wold denied walking on Otter Rock Drive that evening. . . .

Approximately nineteen years later, on October 8, 1994, Inspector Frank Garr of the office of the state's attorney interviewed Morganti again. . . . The written report of that interview reflects that Morganti informed Garr that James F. Murphy, a private investigator who had been retained by the Skakel family, had contacted him and questioned him about the ""incident involving the individual [that Morganti had] stopped on Field Point Road, in Belle Haven"" on the evening of October 30, 1975. Morganti also told Garr that he saw that person walking north on Field Point Road at approximately 8 p.m. that evening. Morganti further stated that he was replacing a fallen road stanchion just north of the residence of Cynthia Bjork on Otter Rock Drive sometime between 9:30 and 10 p.m. that evening when, from a distance of approximately one hundred yards, he observed the same individual ""walking in a northerly direction through the front yard of a residence on Otter Rock Drive, across from the Skakel residence."" . . . The report also states that, at the time of the original police investigation of the victim's murder, ""Morganti reported the entire episode to the [police] investigators and assisted in the making of a composite sketch of the individual. A complete investigation into the matter was instigated, and it was determined that the individual was ... Carl Wold."" The report further states that Garr, who was accompanied by Murphy and, apparently, Morganti, then proceeded to the location on Otter Rock Drive where Morganti recalled having observed the individual for a second time on the evening of October 30, 1975. . . .

Following the jury verdict and shortly before sentencing, the defendant, on August 26, 2002, filed an amended motion for a new trial and request for an evidentiary hearing, . . . claiming, *inter alia*, that the state had violated his rights under *Brady* by failing to make a timely disclosure of a composite drawing of the individual who Morganti had observed on the evening of October 30, 1975. . . . In support of his claim, the defendant asserted that the state had not provided him with a copy of that drawing until August 21, 2002, and that the drawing was significant because it tended to buttress his third party culpability defense. In particular, the defendant asserted that the composite drawing bore a strong resemblance to Littleton, a former suspect in the victim's murder whom the defendant, in support of his third party culpability defense, had identified as a likely perpetrator. The defendant further maintained that, although the state had concluded that Wold was the person who Morganti had observed near the crime scene at or near the time of the victim's murder, discrepancies in Wold's and Morganti's statements as to when Morganti saw Wold cast doubt on the state's conclusion.

The trial court heard argument on the defendant's motion on August 28, 2002, the same day that the sentencing hearing commenced. At the hearing on the defendant's motion, defense counsel represented that, despite the state's open file policy in the case, the composite drawing was not among the materials that the state had made available to the defendant's trial counsel prior to trial. . . . Defense counsel further represented that the state had provided the defendant's trial counsel with 1806 pages of discovery in connection with the case. . . .

> During the argument, the trial court asked the defendant's trial counsel whether he had received, prior to trial, the 1975 investigative report that refers to Morganti's willingness to participate in the creation of a composite drawing, and the 1994 investigative report that refers to a completed composite drawing. The defendant's trial counsel answered in the affirmative with respect to both reports. At the conclusion of the argument, the court denied the defendant's motion for a new trial and for an evidentiary hearing on that motion. . . .

State v. Skakel, 276 Conn. at 694-99 (footnotes omitted). [27]

In the trial on this petition, Frank Garr testified that when the case was re-opened in 1991, he had crime scene photographs and other related matters re-photographed or redeveloped because they were "showing their age." PT 4/23 at 32. The Morganti sketch was among the matters reproduced. *Id*.

Garr further stated that following Skakel's arrest in 2000, his attorney, Michael Sherman, and his associates, Jason Throne and Mark Sherman, came to the State's Attorney's Office several times for purposes of examining the state's file. *Id*. at 33. On at least one occasion, they were given a prosecutor's office in which to work. *Id*. at 33. On a separate occasion, they were given a conference room. They were given complete privacy when conducting their review of the state's file. *Id*. at 34.

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[27] In setting forth these facts, the Supreme Court had available to it the August 28, 2002 transcript of the hearing on petitioner's post-verdict motions, and copies of the 1975 and 1994 reports which were appended to petitioner's August 26, 2002 *Memorandum, Submission, and Offer of Proof in Support of His Motion for a New Trial Based on the State's Failure to Disclose a Composite Drawing, The Littleton and Thomas Skakel Profile Reports and to Have the Drawing and Report Marked for Identification or as a Court Exhibit and for a Hearing.* Because these items are part of the file in *State v. Skakel*, S. C. 16844 and *State v. Skakel*, CR00-135-792-T, this court may take judicial notice of them. *Hryniewicz v. Wilson*, 51 Conn. App. 440, 444, 722 A.2d 288 (1999)(in ruling on a motion for summary judgment, court may take judicial notice of documents, even unsworn documents, contained in the court file of a prior action between the parties). For the convenience of this court, the state attached copies of the 8/28/02 transcript and the reports considered by the Supreme Court in resolving petitioner's appellate claim to its Motion for Summary Judgment. See Appendix A, B, C, D to Motion for Summary Judgment.

Garr stated that between the time of the arrest and the beginning of trial (when everything was transferred to the Norwalk courthouse for trial) the state kept its file in a five shelf metal cabinet in the office. *Id*. at 34. The cabinet was kept locked; Garr had the key.. *Id*. at 35. Garr stated that when Sherman and his associates came to view the file, the cabinet was unlocked and "completely available to them." *Id*. at 35.

Garr explained that the Morganti sketch was kept with other photographs and things in a 8" by 11" cardboard box in the cabinet. *Id*. at 36. When petitioner's new counsel requested the sketch after the verdict, Garr retrieved it from that box. *Id*. at 36.

Garr also testified that in addition to the over 1800 pages of police reports and related documents that he copied and delivered to Sherman, he also delivered a box of photographs and other things. To the best of his recollection, the sketch was in that box. *Id*. at 49.

Attorney Sherman testified that, although he had all the police reports referring to the sketch, he did not have the sketch prior to trial. PT 4/19 at 169. He also offered his opinion that the sketch looks like Kenneth Littleton. PT 4/19 at 168. Sherman stated that if he had the sketch at trial, he would have passed it to the jury. PT 4/19 at 172.

Former Inspector John Solomon, who Sherman met with prior to trial, and who Sherman believed was fully convinced Littleton was the killer, stated that he knew Littleton in 1975. He stated that he had never told anyone the sketch looked like Littleton. PT 4/23 at 22, 41; 4/19 at 195.

ii. Because the Composite Sketch Was Known to Petitioner Prior to Trial, it Is Not Newly Discovered and Cannot be Considered Part of a "Pattern of Non-Disclosure"

As petitioner's trial counsel conceded, he received, prior to trial, the 1975 and the 1994 reports referring to the creation of the composite sketch. Our Supreme Court relied on this

representation in holding that the sketch was not suppressed.

In so doing, it stated that it was willing to presume, for purposes of appeal, that the state did not provide a copy of the sketch to counsel prior to trial. *State v. Skakel,* 276 Conn. at 701[28]. The court recognized, however, that despite this assumption, the sketch would not be suppressed as that term is understood in *Brady* if the defendant or his counsel, "reasonably was on notice of the drawing's existence but nevertheless failed to take appropriate steps to obtain it." *Id*. at 702.

In light of trial counsel's admission that he had the pertinent reports prior to trial, the Supreme Court affirmed the trial court's finding that the defendant had actual notice of the existence of the sketch. *Id*. at 702. Consequently, the court concluded that "the defendant was obliged to supplement his general *Brady* request with a specific request for that particular piece of evidence." *Id*. at 703.

The Supreme Court rejected defendant's argument that although he knew of the drawing's existence prior to trial, he could not have know of its exculpatory value until he had a chance to compare it with a picture of Littleton from that time period. *Id*. at 704-5. The court found that "the defendant had a duty to request the composite drawing because it was *potentially* exculpatory, . . . the defendant could not wait until the completion of the trial to ascertain the value of the drawing to his defense; rather he was obligated to obtain that evidence and to evaluate its utility prior to trial." *Id*. at 705 (emphasis in original).[29]

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[28] The state maintains that the sketch was among the materials made available to the petitioner prior to trial.

[29] For the same reason, the court rejected petitioner's claim that he could not know the exculpatory value of the evidence prior to trial because the 1994 report indicated that the police (continued...)

The court also rejected petitioner's claim that "he could not be faulted for failing to make a specific request for the composite drawing, despite references to the drawing in the reports he did receive, because he was entitled to conclude that, in light of the state's open file policy, the state would have produced the drawing if it existed." *Id*. at 705. In response to this contention, the court noted that it was unaware of any case where "a defendant had notice of the existence of potentially exculpatory evidence but nevertheless was excused by the court from taking reasonable steps to obtain it." *Id*. at 706. It declined to endorse such an approach because "there is simply 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*.

Further, the court rejected petitioner's argument that he reasonably believed his responsibility to obtain *Brady* material ended with the state's announcement of an open file policy. The court noted that this argument was belied by the record, which indicated that long after the announcement of such a policy, the petitioner filed two supplemental discovery requests, one of which involved Littleton, the person petitioner believes Morganti may have seen that evening. *Id*. at 706-7. The court found it "apparent" in light of those requests, that "defendant knew of his continuing responsibility to identify and seek exculpatory material under *Brady* despite the state's open file policy." *Id*. at 706-7.

Because petitioner knew of the sketch prior to trial, it cannot be considered "suppressed" or part of a "pattern of non-disclosure" as petitioner suggests. Further, in light

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[29](...continued)
believed the person Morganti saw was Carl Wold. *Id*. at 705.

of the undisputed fact that petitioner had knowledge of the sketch prior to trial, and the Supreme Court's conclusion that he was obligated to specifically request it, if, as he claims, it was not among the materials made available to him by the state, the sketch is not "newly discovered" evidence such as would entitle petitioner to a new trial. *See Joyce v. State's Attorney*, 84 Conn. App. 195, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A,2d 578 (2004) (affirming grant of summary judgment on petition for new trial where it was undisputed that the evidence claimed to be newly discovered was known to petitioner's attorneys during the underlying criminal trial); *see also Williams v. Commissioner*, 41 Conn. App. at 529 (in light of uncontroverted testimony from petitioner's trial counsel that he knew of the witness prior to trial, petitioner failed to demonstrate that testimony could not have been discovered by the exercise of due diligence); *State v. Roberson*, 62 Conn. App. at 428 (petitioner did not exhibit due diligence where he knew of witness prior to trial and performed only "scant search" in attempting to locate him).

iii. Petitioner Has Not Shown That the Composite Sketch Is Material and Likely to Lead to an Acquittal on Retrial

As noted previously, petitioner's claim that the composite sketch is exculpatory rests on his contention that it resembles Ken Littleton as he appeared in 1975. Nevertheless, petitioner failed to produce sufficient, credible evidence to support this contention. Sherman's opinion that the picture resembles Littleton is not entitled to much weight in light of his evident interest in helping a former client and in forestalling a habeas corpus action where his representation would be questioned. Further, Sherman did not know Littleton in 1975 and hence has no personal knowledge of his appearance at the time.

John Solomon, on the other hand, did know Littleton in 1975. Further, he firmly believed

that Littleton was the killer. Yet, despite the great lengths to which he went trying to find evidence again Littleton (i.e. the attempt to link him to unsolved female homicides), Solomon never said the sketch resembled Littleton.

Therefore, the weight of the evidence does not favor the petitioner on this point. Petitioner has failed to establish that the sketch resembles Littleton.

Nevertheless, even if this Court assumes the sketch resembles Ken Littleton, petitioner has not proven that it is material and likely to lead to an acquittal on retrial.

The fact that the petitioner never requested a copy of the sketch until after the verdict is a reflection of its insignificance. As the police reports appended to the State's Motion for Summary Judgment make clear, Special Officer Morganti and Carl Wold are reporting the same meeting, although one is apparently mistaken as to time. By comparing Morganti's description of the encounter and of the person he spoke with that night, with Wold's account of the meeting and his description of what he wore that night, it is apparent the person Morganti saw on Field Point Road was Carl Wold.[30] The two accounts dovetail as to location, words spoken, and description of the walker.

As to Morganti's sighting of a man later that evening, the evidence indicates it was neither Wold, nor, contrary to petitioner's suggestion, Littleton. Wold's statements to the police in 1975 indicate he did not leave the house again after returning home at about 8:00 p.m. This information was corroborated by Wold's father in 1975 and by Wold in his deposition. Exh. 45, at 14-15.

Littleton's actions are similarly accounted for during the 10:00 p.m. time period when Morganti saw a man on Otto Rock Drive. Andrea Shakespeare observed Littleton in the house when she returned to the door to get the keys shortly before 10:00 p.m. Tommy Skakel saw

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[30] Both Morganti and Wold corroborated this in their respective depositions. See Exh. 45 and 46.

him shortly after 10:00 p.m. upstairs watching a movie. T. 5/29 at 126-7, 140-43; T. 5/9 at 169. Julie Skakel also reports seeing Littleton at around this time. T. 5/29 at 28. None of these persons, in 1975 or now, have any apparent reason to protect Littleton.

Further, it must be remembered that although Morganti thought he saw the same person in his earlier and later sightings, he was not certain. See Exh. 46 at 9. In addition, the man on Otto Rock Drive was about 100 yards away from Morganti, heading away from him in a poorly lit area. Exh. 46 at 9. In light of the accounts of Littleton's actions around 10:00 p.m., the lack of credible evidence that the sketch resembles Littleton, and the obvious difficulty of identifying anyone from a distance of 100 yards, particularly when the person is walking away from the observer, the evidence does not reasonably support an inference that the person Morganti saw was Littleton.

Even if it did, however, there is not a shred of evidence linking the person Morganti saw to the murder. The person was seen in a yard across the street from the Skakel's on Otto Rock Drive, heading away from Walsh Lane and the scene of the crime. The sighting of this individual is therefore meaningless. It is certainly not the type of evidence required to overturn a conviction. No rational jury would vote to acquit on this basis, especially in view of the abundant evidence of guilt produced at trial.

c. Petitioner Has Not Proven That Any Evidence Related to the Tommy Skakel Affidavit Is "Newly Discovered" or Material and Likely to Lead to an Acquittal on Retrial

Petitioner's amended petition contains no facts or allegations relating to the arrest warrant affidavit prepared for Tommy Skakel. Nevertheless, petitioner adduced some evidence regarding the affidavit at the petition hearing, and apparently plans to claim it was withheld from the defense and reveals a "pattern of nondisclosure" by the state.

As argued *supra*, this court should not consider any allegations not included in the amended petition. If considered, however, petitioner's allegations are not supported by the

record. Rather, the record reveals that the state was not required to provide petitioner with a copy of the affidavit prior to trial because it was not included in the trial court's discovery orders. In addition, it was work product of the state and hence not subject to discovery. Further, as Sherman testified in this hearing, all of the information contained in the affidavit came from police reports and other investigatory material that was provided to him prior to trial.

Finally, petitioner did receive a copy of the affidavit during the trial. Hence it cannot be considered suppressed as that term is used in *Brady*[31] and its progeny.

i. Facts

On May 21, 2001, petitioner filed a Motion for Discovery and Inspection (Exhibit 78) in which he requested *inter alia*:

> The names, addresses, and criminal records of all persons, other than the Defendant, who were at any time considered suspects, or who were detained, questioned and/or arrested in relation to this case, together with any materials and information which caused them to be suspected, including, but not limited to, any oral and/or written statement, report, narrative, affidavit in support of a warrant, or any other document. This request would include information and/or evidence that someone other than the Defendant was the focus and/or target of the state's investigation, in particular, Ken Littleton, Frank Wittine, Thomas Skakel, and/or Edward Hammond. *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988).

Exh. 78 at A200-201.

On August 15, 2001, the court (Kavanewsky, J.) issued the following order with regard to this request:

> THE COURT: All right; and number 20. It relates to information concerning people who at any time were considered suspects, evidence that someone other than the defendant was the focus of and target of the State's investigation and then in particular you list Ken Littleton, a Frank

[31] *Brady v. Maryland*, 373 U.S. 83 (1963).

Witeen (ph).

I will tell you what my order is. My thinking is this. You are going to get exculpatory information. I think in number 20, you may be asking for something more, something that is not necessarily exculpatory information. You cite a case, the Miller case and Guiker (ph). It is my understanding that the Court found in that case that the State's withholding of exculpatory material regarding the arrest of a person other than the defendant for similar crimes was sufficient to undermine confidence in the outcome of the case.

So, what I am going to do is to deny the request in its present form. I am going to grant it only as to the names and addresses of persons, if there are any, who have been previously arrested for this offense and I am not aware of any.

MR. SHERMAN: Suspected.

THE COURT: Or similar offenses, okay. Arrested for this offense or similar offenses.

T. 8/15/01 at 11-12; Exh. S.

Later in the same proceeding, the court returned to the issue covered in defendant's discovery request:

THE COURT: And, number 93 relates to any phone calls, information concerning phone calls to the police from CIs as part of the investigation.

I am going to grant it as amended to exculpatory information or disclosure statement of a witness. You know, we have been talking about the suspect issue. And, I want to go back just for a second just so my order is clear because there have been several requests, Mr. Sherman, that you have directed concerning suspect and I have made my rulings on those.

But, I think one of the first was number 20 which I granted it as to the names and addresses, if there are any, who have been previously arrested for this or similar offenses. If then you go on to ask for information by State law enforcement officers concerning suspects and there are others concerning suspects.

When I say similar offenses, I am talking about similar to the extent

> that they would be deemed exculpatory to the defendant, all right. So, exculpatory is the touch stone as to that type of information in number 20. So, we will go back to number 20, to the extent that it is exculpatory.

T. 8/15/01 at 21-22; Exh. S.

During petitioner's criminal trial, petitioner asked Thomas Keegan, a retired police chief from the Greenwich Police Department, why the police had sought the psychological and school records of Thomas Skakel shortly after the murder. T. 5/8 at 29. The state objected and the court excused the jury.

Outside the presence of the jury, the defendant argued that his question was relevant because it went to the integrity of the investigation. The defendant also argued that he had reason to believe Chief Keegan had sought an arrest warrant against Tommy Skakel. Defendant stated that it had not been provided to him. T. 5/8 at 30-31.

The court interjected that the defense had not put the state or the court on notice of any third party culpability claim with regard to Tommy Skakel. *Id*. at 31. When the defendant responded that he was not trying to point the finger at his brother, the court then questioned the relevance of his question. *Id*. Defendant responded again that it was relevant to the integrity of the investigation, and to whether the police believed that Michael Skakel was the killer. *Id*. at 32.

The state indicated that in 1975 or 1976, the Greenwich Police Department did prepare an arrest warrant affidavit for Thomas Skakel, but State's Attorney Donald Browne would not forward it to a judge because he did not believe it contained probable cause. *Id*. at 33. The state then argued that any evidence concerning the application is irrelevant because it is only offered to show that at some point some police officer thought Thomas Skakel was responsible for the murder. *Id*. at 33.

After some further argument, the court concluded the question was not relevant and informed the defendant to make a motion if there was something else he believed he was entitled to receive from the state. *Id*. at 34-35.

Later on in Keegan's testimony, after a side bar discussion with the court, the defendant returned to the issue of the Tommy Skakel warrant. At that time, Keegan testified, in front of the jury, that he had sought an arrest warrant for Tommy Skakel in 1976. *Id*. at 67.

On redirect, Keegan stated that the State's Attorney's Office never applied for a warrant on the basis of the affidavit he submitted. *Id*. at 68.

On recross, Keegan agreed that he believed there was probable cause for the arrest of Tommy Skakel in 1976. *Id*. at 72.

On further re-direct, Keegan clarified that after an officer prepares an affidavit containing the information that he believes constitutes probable cause for an arrest, it is presented to a prosecutor. In the case of the Tommy Skakel warrant, the State's Attorney's Office rejected the affidavit for lack of probable cause. Had the State's Attorney's Office concurred with the conclusion on probable cause, they would have presented the application to a judge. Because it did not, the Tommy Skakel warrant was never proffered to a judge. *Id*. at 73-75.

After the luncheon recess, before the jury returned to the courtroom, the state asked to address the court to clarify its position with regard to the Tommy Skakel affidavit. The state indicated that it did not believe the unsigned warrant application was covered by any of the court's discovery orders. *Id*. at 84. Further, because it was never presented to a judge, it was in the nature of work product and not subject to discovery. In addition, any exculpatory information contained in the affidavit had been provided counsel through the regular course of discovery. The state indicated that it nevertheless had decided to give a copy of the

application to defense counsel as soon as it could be located. *Id*. at 84-5.

During the course of further argument, defense counsel indicated that he had been told of the affidavit's existence by a witness prior to trial. *Id*. at 86. Further, although petitioner had apparently filed an additional discovery request for warrant applications, whether presented to a judge or not, the court indicated it felt the state's response, referring to the court's August 15, 2001 ruling and all disclosures to date, was not unfair. *Id*. at 88. The court then stated if petitioner had information on the Tommy Skakel application, it did not understand why it did not pursue relief from the court. *Id*. The court observed that the defense had not "really pursued due diligence in bringing this, . . . to the attention of the court." *Id*. at 89. In fact, the court mentioned a motion hearing held two weeks earlier that would have been an opportune time for the defense to raise this issue instead of waiting until the midst of a witness' testimony. *Id*. at 91.

On May 13, 2002, the state put on the record that it had located the affidavit of Thomas Keegan for the arrest of Tommy Skakel and it was delivering a copy to counsel. The state further indicated that it was unnotarized. *Id*. 5/13 at 90.

In his testimony before this Court, Sherman confirmed that he knew about the warrant application prior to the 2002 trial. He stated that former Inspector John Solomon told him about it during one of their pre-trial conferences. PT at 4/19 at 166. Sherman explained that he did not specifically request the unsigned warrant affidavit for Tommy Skakel because "[he'd] rather have the - the officer on the stand when [he] asked." *Id*. at 166-67. As Sherman explained further, he "ambushed" the detective. *Id*. at 169; see also PT 4/19 at 213.

Sherman conceded that he was given the warrant affidavit during the trial. *Id*. at 213. Sherman also agreed that an affidavit represents the officer's opinion that the information he

gathered constitutes probable cause. *Id*. at 215-6. He acknowledged that a warrant is usually presented to a prosecutor for review. Only if the prosecutor agrees that it contains probable cause is it presented to a judge. *Id*. He acknowledged that the Tommy Skakel affidavit was never endorsed by a prosecutor. *Id*. at 216.

On cross examination, Sherman conceded that the affidavit contained no new evidence that he had not previously received. PT. 4/20 at 1-2, 3, 5. He admitted that the only thing the affidavit gave him that he did not previously have was the opinions of the officers. *Id*. at 2, 4-5. As to what he would have done differently if he had the affidavit prior to trial, he stated he would have "spent a lot more time going into the background of the investigation by the two officers who signed that report, who signed that affidavit or presented that affidavit." *Id*. at 3.

On redirect, Sherman stated that if he had the affidavit sooner he may have asked other officers if they contributed to the affidavit. *Id*. at 22-23. He stated, however, that he saw no reason to recall Keegan after receiving the affidavit because "I believe I went through the history of the affidavit and the machinations that led up to the non signing of it and the preparation of it while he was on the stand in the State's case. I may well have called him as my own witness as well later on but I did not. " *Id*. at 23.

ii. It Is Undisputed That the Tommy Skakel Affidavit Was Provided Petitioner During Trial. Therefore, it Was Not Suppressed, Is Not "Newly Discovered," and Cannot Be Considered Part of a "Pattern of Nondisclosure"

As the preceding fact statement makes clear, the Tommy Skakel affidavit was known to petitioner prior to trial and was given to him during the trial. Moreover, Sherman testified that he had all of the information contained in the application prior to trial. Under these circumstances, any claim that the affidavit is "newly discovered" is specious.

Further, the petitioner cannot rightly claim that the affidavit was suppressed. "[E]vidence 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.' *United States v. Zackson,* 6 F. 3d 911, 918 (2d. Cir. 1993) (quoting *United States v. LeRoy*, 687 F.2d 610 618 (2d Cir. 1982) *cert. denied*, 459 U.S.1174 (1983))." *United States v. Payne*, 63 F. 3d 1200, 1208 (2d Cir. 1995) *cert. denied*, 516 U.S. 1165 (1996). Because, by his own admission, Sherman knew of the affidavit and had all the information contained in it prior to trial, he cannot claim that he did not have the information in time to make use of it.

Moreover, the trial court found that the state had not violated its discovery orders. Therefore, the production of the affidavit does not support a "pattern of nondisclosure" as petitioner suggests. T. 5/8 91. Further, because it did not contain any information that petitioner did not already have, petitioner cannot claim prejudice.

iii. Petitioner Has Not Proven That the Tommy Skakel Affidavit Is Material and Likely to Lead to an Acquittal on Retrial

Although Sherman had all the information in the affidavit prior to trial, he claimed he did not have the opinions of the officers who signed the warrant. As argued earlier with regard to the profile reports, the officers' opinions would be either inadmissible or of negligible value. As lay opinions offered on a matter for which they did not have personal knowledge, they would not be admissible in any subsequent retrial. Conn. Evid. Code § 7-1. Further, because petitioner never raised, or represented he would raise on retrial, a defense of third party culpability centered on Tommy Skakel, this evidence would be objectionable on relevancy grounds as well. Conn. Code Evid. § 4-2.

Even if admitted, however, the opinions of the officers would be of little value. Although two members of the Greenwich police department may have believed they had probable cause for Tommy Skakel's arrest, the State's Attorney's Office did not concur. Moreover, the officers' opinions were based on the state of the investigation in 1976. Obviously, the evidence changed dramatically between then and the time of trial, making any such opinion of little or no value.

Finally, as with all petitioner's claims, once it is examined in light of the strength of the state's case, it cannot be found material or likely to result in an acquittal on retrial.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION VI[32]

The following, while not an exhaustive list of the factual findings and legal conclusions which demonstrate petitioner has failed to carry his burden on the Garr/Levitt, composite sketch, and Tommy Skakel affidavit issues, are some of the important findings that would support this determination.

The Garr/Levitt allegations:

1) Petitioner has not proven that the evidence related to Garr, Levitt and the writing of *Conviction* is "newly discovered" or material and likely to lead to an acquittal on retrial.

2) Sherman heard "rumors" prior to trial that Garr had a "book deal" but failed to follow up on that information to find out if it could be confirmed.

3) Sherman failed to ask the court for a ruling when he questioned Garr on the stand as to whether he had a book deal. Based on the court's earlier ruling on petitioner's discovery request, it is apparent that if petitioner had pressed for a ruling, the court would have required Garr to answer the question.

4) Nevertheless, based on the undisputed evidence presented in this proceeding, Garr's answer would have been "No."

5) Plaintiff's failure to elicit this testimony at trial constitutes either a lack of due diligence or a strategic decision.

6) Petitioner failed to produce a shred of evidence that prior to or during trial, Garr had any expectation of financial gain from a book Levitt might one day write.

7) Garr did not provide Levitt with any information from the state's files prior to or during the trial.

8) While Garr agreed, prior to trial, that he would help his friend write his book someday, Garr consistently told Levitt he could not help him until the case was over. To Garr's way of thinking, the case was over after sentencing.

9) Levitt was motivated to write *Conviction* so that the public would know the truth about the case. Garr agreed to help him because he hoped it would be more accurate than other accounts of the case which had already been published.

10) Levitt was entitled to split the proceeds from the book with his friend in what ever way

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[32] See fn. 11, *supra*.

he saw fit.

11) Levitt did not decide to share the proceeds from the book with Garr until after the trial.

12) The "pact" to tell their story, mentioned in Levitt's book, had no financial connotations. Rather it simply reflected the desire of both men that the truth about the case be told.

13) When Levitt wrote in *Conviction* that Garr had "threatened, cajoled and harassed" witnesses, what he meant was that Garr told recalcitrant witnesses if they did not appear voluntarily, the state would subpoena them.

14) Garr explained that what he meant when he said he might be guilty of harassment is that he was persistent.

15) In light of the strength of the state's case, and petitioner's inability to produce any evidence of a financial motive or agreement at the time of trial, petitioner's evidence relating to Garr and Levitt is not material or likely to result in an acquittal on retrial.

16) In light of the strength of the state's case, and petitioner's inability to produce any evidence that Garr did or said anything improper as a result of his agreement to help his friend when the case was over, petitioner's evidence relating to Garr and Levitt is not material or likely to result in an acquittal on retrial.

The Composite Sketch

1) The composite sketch was known to petitioner at trial. Hence it cannot be considered suppressed or "newly discovered". See e.g. *State v. Skakel,*, 276 Conn. at 693-703; *Joyce v. State's Attorney*, 84 Conn. App. 195 (2004).

2) Petitioner was legally obligated to specifically request this sketch prior to trial if, as claimed, it was not among the materials made available to him by the state. His failure to do so demonstrates a lack of due diligence. See e.g. *State v. Skakel,*, 276 Conn. at 693-703; *State v. Roberson*, 62 Conn. Spp. at 428.

3) Petitioner failed to prove that the composite sketch is material and likely to lead to an acquittal on retrial.

4) Petitioner failed to prove that the sketch resembles Littleton in 1975.

5) The person Morganti spoke to during the evening of Oct. 30, 1975, who reported he was heading home, was Carl Wold.

6) The person Morganti saw a few minutes later (or sometime later) on Otto Rock Drive was neither Wold nor Littleton.

7) Littleton's whereabouts are accounted for during the time period of the second sighting by Andrea Shakespeare, Julie Skakel, and Tommy Skakel.

8) Morganti's identification of the man on Otto Rock Drive as the same individual he confronted earlier is uncertain and unreliable. That identification was made from 100 yards away, in an area that was not well-lit. Further, the person Morganti saw was walking away from him at the time.

9) Morganti's sighting of a man on Otto Rock Drive is meaningless. Not a shred of evidence has ever connected that person to this homicide.

10) In light of the strength of the state's case and the relative worthlessness of this evidence, petitioner has failed to prove that the composite sketch evidence is material and likely to lead to an acquittal on retrial.

The Tommy Skakel Affidavit

1) The Tommy Skakel arrest affidavit was known to petitioner prior to trial and given to him during trial.

2) Sherman received all of the information contained in the affidavit prior to trial in the course of discovery.

3) The affidavit was therefore not suppressed and is not newly discovered. *See e.g. United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993); see also citations and arguments with regard to count six.

4) Inasmuch as the trial court found the state had not violated its discovery orders, and the affidavit was not suppressed, it can not be used to support an alleged "pattern of nondisclosure" by the state. See citations and arguments with regard to count six.

5) Petitioner failed to prove that evidence regarding the affidavit is material and likely to lead to an acquittal on retrial.

6) Sherman claimed the only information he did not have prior to receiving the affidavit was the opinions of the officers who prepared it. As lay opinions offered on a matter for which they did not have personal knowledge they would be inadmissible. Conn. Code Evid. § 7-1.

7) Sherman claimed the only information he did not have prior to receiving the affidavit was the opinions of the officers who prepared it. As opinions embracing the ultimate issue they would be inadmissible. Conn. Code Evid. § 7-3.

8) Because petitioner never raised, or represented he would raise, a defense of third party culpability centered on Tommy Skakel, this evidence would be properly excluded on

relevancy grounds as well. Conn. Code Evid. § 4-2.

9) Even if admitted, however, this evidence is of little or no value. The State's Attorneys Office refused to endorse the affidavit in 1976. Further, the officer's opinions were based on the state of the evidence in 1976. The evidence against petitioner had changed dramatically since that date. Their opinions in 1976, therefore, are essentially worthless.

10) In light of the strength of the state's case and the relative worthlessness of this evidence, petitioner has failed to prove that the affidavit evidence is material and likely to lead to an acquittal on retrial.

VII. PETITIONER IS NOT ENTITLED TO AN ADVERSE INFERENCE FROM THE FIFTH AMENDMENT INVOCATION OF HASBROUCK, TINSELY, AND BRYANT. IF ANYTHING, RESPONDENT IS ENTITLED TO AN ADVERSE INFERENCE AGAINST PETITIONER FROM BRYANT'S INVOCATION

In *State v. Dennison*, 220 Conn. 652, 660, 600 A.2d 1343 (1991) our Supreme Court stated: "It is firmly established that [n]either [the state nor the defendant] has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him . . . . The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness takes the Fifth. In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross examination." (Citations omitted; internal quotation marks omitted.) Accordingly, [our Supreme Court has] held that a witness may not be called to the stand in the presence of the jury merely for the purpose of invoking his privilege against self-incrimination. . . . . Such testimony is not relevant, and could be prejudicial." (Citations omitted.) *Id*., 660-61.

Although the present action follows civil procedure, the interests involved are more in line with a criminal proceeding than a traditional civil lawsuit. Further, although part of *Dennison's* rationale relies on the risk of unduly impacting a jury – a concern not present in a court trial such as this– the remainder of *Dennison's* reasoning does apply to the present action. In particular is *Dennison's* observation that an invocation lacks evidentiary value

because it cannot be effectively questioned or cross-examined. Thus, under *Dennison*, these witnesses' reliance on the Fifth Amendment should be deemed irrelevant and disregarded.

If this court looks primarily to the civil rather than criminal case law for guidance, however, no adverse inference may be drawn against the state. The prevailing rule in Connecticut is that a trier may draw an adverse inference against a *party* for his or her invocation of the Fifth. *Olin Corporation v. Castells*, 180 Conn. 49, 53-54, 428 A.2d 319 (1980). In fact, when it is the plaintiff who refuses to answer relevant questions, dismissal may be appropriate. As our Supreme Court noted in *Pavlinko v. Yale-New Haven Hospital*, 192 Conn. 138, 146, 470 A.2d 246 (1984): "Having been haled into court by the plaintiff the defendants had a right to resort to discovery in order to prepare their defense. . . . [t]he effect of [the plaintiff's assertion of the privilege] was to severely limit the scope of the inquiry and thus to make the defendants the innocent victims of the plaintiff's self-created predicament."

Although the Second Circuit has recognized that an adverse inference may be taken against a nonparty witness under certain circumstances, the considerations that support that inference are absent in this case. In *Libutti v. United States*, 107 F.3d 110, 123 (2d Cir. 1997), the court suggested the following nonexclusive factors to guide a trial court in determining if the inference is appropriate: 1) the nature of the relevant relationships; 2) the degree of control of the party over the non-party witness; 3) the compatibility of the interest of the party and nonparty witness in the outcome of the litigation; and 4) the role of the nonparty witness in the litigation.

Applying these factors to the present case, it is apparent that Bryant, Hasbrouck and Tinsely have no relationship to the State of Connecticut – the party against whom petitioner seeks to draw an inference. They are not, as has been found significant in other cases, current

or former employees of a party; see *Brinks, Inc. v. New York*, 717 F.2d 700, 710 (2d Cir. 1983)(holding that ex-employees refusal to testify could be considered admissions of their former employer); or the chair of a corporation which administers the party's property. *Rosebud Sioux Tribe v. A &P Steel, Inc.*, 733 F.2d 509, 522-23 (8th Cir.), cert. denied, 469 U.S. 1072 (1984). In fact they have no relationship to the state outside of what any citizen may have.[33]

As to the degree of control the State has over the witnesses', it is apparent there is none. Nor are the interests of the State and the non -party witnesses aligned. The State's primary interest is in upholding a just conviction; the witnesses have no particular reason to share that interest other than what members of the general public have. Indeed, Bryant is more closely aligned with the petitioner than the State. He provided petitioner with an out- of-court statement implicating Hasbouck and Tinsely in the crime for which petitioner was convicted. It is that statement which it the cornerstone of petitioner's attempt to secure a new trial. Further, Bryant agreed to a videotaped interview with petitioner's investigator but consistently refused to meet with respondent. Moreover, because Bryant does not inculpate himself in this crime – he conveniently gives himself an alibi – his invocation appears to be the product of his reluctance to repeat his story under oath. If an inference should be drawn against any party for Bryant's invocation, therefore, it should be drawn against petitioner.

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[33] *Bridgeport v. Kaspar Group*, *Inc*., 278 Conn. 466, 899 A.2d 523 (2006), on which petitioner relies in his Memorandum of Law in Support of the Admission of the Deposition Transcripts of Gitano Bryant, Adolph Hasbrouck and Burton Tinsley, dated April 16, 2007, follows *Brinks* in permitting an adverse inference against a party where the witness is closely aligned with that party. In *Kaspar Group*, the nontestifying witness had been a 99 percent shareholder of the defendant. *Id*., at 480, n. 8. Because, as argued *infra*, these witnesses are not aligned with the state, *Kaspar Group* does not advance petitioner's cause.

As to Hasbrouck and Tinsley, they are obviously operating out of self-preservation in refusing to answer questions. Their silence hurts the state as it deprives the state of evidence which would contradict Bryant's account. It is important to note that neither man, in out-of-court statements to persons working on petitioner's behalf, corroborates Bryant's story.

Finally, Hasbrouck and Tinsley have no "role" in this litigation outside of the fact that petitioner has named them as responsible for the crime for which he is convicted.[34]

Libutti emphasized that the "overarching concern is whether the adverse inference is trustworthy under all the circumstances and will advance the search for the truth." *Id*., 124. Here, where there is no credible corroboration for Gitano Bryant's hearsay statements implicating Hasbrouck and Tinsely, the inference petitioner seeks to draw would be unreliable in the extreme. It is far more reasonable to infer that Hasbrouck and Tinsley, who relied on the advice of counsel in invoking the Fifth Amendment, were simply acting as any well-advised person would in order to prevent himself from being embroiled in a controversy of which he had no part.

Bryant's invocation is more suspect as he instigated this controversy by his out-of- court statements and portrayed himself as a witness to certain alleged events. His refusal to repeat his claims under oath is one reason, among many, to doubt his original account. Again, if there is an inference to be drawn here, it is against the petitioner.

A further problem is posed by the fact petitioner intends to offer not just the *fact* that

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[34] This fact separates this case from *Joyner v. Warden*, Superior Court, judicial district of Tolland, Docket No. ___ 0931706, Westlaw, 1997 WL 600400 (September 19, 1997, Rittenband, J.) on which petitioner relies. See Petitioner's Memorandum at 14. The *Joyner* court found, "for all practical purposes", the attorney whose misconduct was at issue in the habeas corpus proceeding, to be a defendant in the action. *Id*., *8. (Copy of the *Joyner* opinion has been provided by the petitioner).

these witnesses invoked the Fifth Amendment, but the specific questions asked at their depositions. As Judge Winters noted in dissenting from *Brinks v. New York*, *supra*, 717 F.2d 716:

> Obviously, the posing of fact-specific questions is designed to suggest to the [trier] that but for the privilege the answer in each case would have been "yes." However, since the privilege may be invoked as to any answer `which would furnish a link in the chain of evidence needed to prosecute the claimant,' . . .and `[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . or an explanation of why it cannot be answered might be dangerous,' . . . assertion of the privilege in response to specific questions . . . is permissible whether the answer is `yes' or 'absolutely not'. Nevertheless, the self-evident purpose of such questioning is to suggest that the answer would be 'yes'. Otherwise, the questions would never be asked. This practice inevitably invites [the trier of fact] to give weight to questions rather than answers. Moreover, it leaves the examiner free, once having determined that the privilege will be invoked, to pose those questions which are most damaging to the adversary, safe from any contradiction by the witness no matter what the actual facts. (citations and footnote omitted).

Judge Winter's concern in *Brinks* is answered by Connecticut's approach to adverse inferences. Connecticut does not permit the drawing of a specific inference such as petitioner is apparently seeking. That is, any inference that Hasbrouck and Tinsley, and perhaps even Bryant, would have been forced to give incriminating responses to the questions posed but for the privilege, is inconsistent with Connecticut law on the nature of the inference drawn from a refusal to testify. In *In re Samantha C.,* 268 Conn. 614, 638, 847 A.2d 883 (2004), in which a party refused to testify in reliance on a nonconstitutional privilege, the court explained that an adverse inference "does not supply *proof* of any particular fact, rather it may be used only to weigh the facts already in evidence." (Emphasis in original). Thus, even if this court were inclined to draw an adverse inference from the refusal of these men to testify, it would not supply proof of any particular fact as petitioner apparently suggests.

For these reasons, the State of Connecticut objects to any adverse inference being drawn against the state due to the independent invocation of the Fifth Amendment by Hasbrouck, Tinsley, and Bryant. If anything, this Court should draw an inference against petitioner from Bryant's invocation.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION VII[35]

The following, while not an exhaustive list of the factual findings and legal conclusions which support the state's argument in Section VII, are some of the important findings that support the state's position.

1) Petitioner is not entitled to an adverse inference against the state from the Fifth Amendment invocation of Hasbrouck, Tinsley, and Bryant.

2) Under the rule of *State v. Dennison*, 220 Conn. 652, 660, 600 A.2d 1343 (1991), these witness' reliance on the Fifth Amendment should be deemed irrelevant and disregarded.

3) In civil practice, an adverse inference is generally only available against a party who invokes his or her Fifth Amendment privilege. See e.g. *Olin Corporation v. Castells,* 180 Conn. 49, 53-54 (1980).

4) Although the Second Circuit has recognized that an adverse inference may be taken against a nonparty witness, none of the factors which make such an inference reliable are present with regard to these persons and the State of Connecticut. See e.g. *Libutti v. United States*, 107 F.3d 110, 123 (2d Cir. 1997).

5) If anything, Bryant is more closely aligned with the petitioner than the state and, under the *Libutti* factors, if an inference is warranted from Bryant's invocation, it should be drawn against the petitioner.

6) Even if an adverse inference may be drawn, it does not supply proof of any particular fact. Instead, it may only be used to weigh facts already in evidence. See e.g. *In re Samantha,* 268 Conn. 614, 638 (2004).

[35] See fn. 11, *supra*.

VIII. THIS COURT ERRED IN HOLDING THAT PETITIONER WAS ENTITLED TO A FIFTH AMENDMENT PRIVILEGE IN THESE PROCEEDINGS. AT THE LEAST, THE STATE IS ENTITLED TO AN ADVERSE INFERENCE AGAINST PETITIONER

This court erred in allowing petitioner to assert a Fifth Amendment privilege during the discovery phase, and also during the trial on this petition. See PT 4/25 AT 164-70.[36] Petitioner should not have been permitted to maintain his Fifth Amendment privilege in this post-conviction proceeding once the direct appeal was final. In as much as the direct appeal became final with the denial of certiorari on November 13, 2006, petitioner's Fifth Amendment claim was not viable after that date.

Even if, however, petitioner retained a Fifth Amendment privilege, the State's offer, made at the time it sought to depose Skakel, to agree not to use petitioner's testimony in a retrial of his criminal conviction should have been sufficient to compel petitioner to answer questions at a deposition and at trial.

At the least, the state is entitled to an adverse inference against the petitioner in light of his refusal to testify.

a. Facts

The petitioner, sentenced on August 29, 2002 for the crime of Murder, General Statutes §53a-54a, filed the original complaint in this civil matter on August 25, 2005. On January 24, 2006, the Connecticut Supreme Court unanimously affirmed petitioner's murder conviction. The United States Supreme Court denied petitioner's petition for writ of certiorari on November 13, 2006.

On August 30, 2006, the state requested permission to depose the plaintiff, Michael

[36] The state is including this contention in this brief in order to preserve the issue for appeal.

Skakel. (Motion #133) Thereafter, petitioner filed a Motion for a Protective Order. (Motion #144) The state agreed that the Motion to Depose be held without disposition until a final resolution of the appeal in the United States Supreme Court. Following the denial of certiorari, the state asked for a ruling on its motion. This court, after briefing by the parties, held the following:

1. The deposition of Michael C. Skakel may be taken by the state.

2. Michael C. Skakel may assert his Fifth Amendment privilege concerning answering questions and producing documents if he determines that it is appropriate and desirable by him.

3. The issue of the adverse inference if any, to be drawn based on case law is reserved to the trier of fact at the time of trial.

Memorandum of Decision re: Motion for Permission to Depose Michael C. Skakel, Motion #133 and Motion for Protective Order filed by Michael C. Skakel Pleading #144, p. 2.

During the trial on this petition, the state indicated, as it had in its motion to depose, that it intended to ask petitioner about matters raised in his petition of which he has personal knowledge. Specifically, the state sought to question petitioner about who, if anyone, he saw during the evening/night hours of October 30, 1975. This information was relevant to the allegations in petitioner's First Count, particularly in light of Bryant's claim that he saw petitioner, petitioner's brother Tommy, and sister Julie that night. The other area of inquiry concerned the conversation between petitioner and Coleman described in Coleman's probable cause testimony. T. 4/25 at 164-69.

Petitioner's counsel represented that if questioned on these matters, her client would assert the Fifth Amendment. *Id*. at 169-70. In light of this court's ruling upholding the invocation of the Fifth Amendment, and petitioner's assertion through counsel, petitioner did not testify. T. 4/25 at 164-70.

b. Because His Conviction Has Become Final, Petitioner Has No Fifth Amendment Privilege Regarding Crimes for Which He Is Already Convicted, in This, a Collateral Proceeding

As our Supreme Court has recognized, "[t]he weight of authority permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and to refuse to testify about the subject matter which formed the basis of his conviction." *Martin v. Flanagan*, 259 Conn. 487, 496 n.4, 789 A.2d 979 (2002) (collecting authorities); *see also United States* v. *Duchi*, 944 F.2d 391, 394 (8th Cir. 1991). Once the appeal is final, however, the Fifth Amendment must give way to other legitimate interests. *See Mangarella* v. *Nevada*, 117 Nev. 130, 134-36, 17 P.3d 989 (Nev. 2001) (compelling sex-offender probationer whose conviction was final to answer questions in polygraph did not violate his privilege against self-incrimination); *cf. Martin* v. *Flanagan*, supra, 496 n.4 (defendant retained his privilege against self-incrimination *until* conviction became final). Otherwise, in a jurisdiction like Connecticut that places no temporal or numeric limit on the number of post-conviction proceedings a petitioner may bring, the privilege would extend forever. *See State ex rel. Henderson* v. *Fabian*, 715 N.W.2d 128, 131 (Minn.App. 2006) (extending Fifth Amendment privilege against self-incrimination to post-conviction collateral attacks would extend privilege almost indefinitely), reversed on other grounds by *Johnson* v. *Fabian*, __ N.W.2d __ (Minn. 2007). Indeed, other states have cogently concluded that once a defendant exhausts his appeal he no longer possesses a Fifth Amendment privilege for purposes of post-conviction collateral proceedings. *State* v. *Click*, 768 So.2d 417, 421 (Ala. 1999), cert. denied, 531 U.S. 834, 121 S. Ct. 92 (2000); *see also State* v. *Barone*, 986 P.2d 5, 20-21 (Or. 1999), cert. denied, 528 U.S. 1086, 120 S. Ct. 813 (2000); *Lewis* v. *Dept. of Corrections*, 839 A.2d 933, 934-35 (N.J. Super. Ct. App. Div. 2004). These courts rely to some extent on the fact that post-conviction

proceedings are voluntarily commenced by a petitioner; they are not criminal actions commenced by the state. Therefore, they are not "compelled" proceedings withing the meaning of the Fifth Amendment. *State* v. *Click*, supra, 768 So.2d 421. Allowing the petitioner to invoke the privilege in a proceeding he initiated leaves the state at a disadvantage in defending against the allegations he has raised. For these reasons, this court erred in holding that petitioner retained a Fifth Amendment privilege in these proceedings.

c. To the Extent Petitioner Retains a Privilege, the State's Offer of Use Immunity Was Sufficient to Compel His Testimony

If this court properly determined that petitioner retained a Fifth Amendment privilege in these proceedings, however, the state's offer not to use petitioner's testimony, or evidence derived therefrom, in any subsequent retrial on the charge of murder should have been sufficient to compel his testimony. The extension of such "use and derivative use" immunity is sufficient to compel testimony over a claim of the privilege. *Kastigar v. United States*, 406 U.S. 441, 454 (1972).

d. The State Is Entitled to an Adverse Inference Against Petitioner

In *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), the United States Supreme Court recognized the prevailing rule that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Therefore, because petitioner invoked the Fifth Amendment and declined to testify, an adverse inference is warranted.

As the court reasoned in *Bean v. Calderon,* 166 F.R.D. 452, 455 (E.D. Calif. 1996), where, as here, petitioner has invoked the court's process to overturn what would otherwise be a final state conviction, "[i]t is not at all untoward to hold that petitioner must establish the facts

that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in [the collateral proceeding], an adverse inference may be drawn."

In *Bean*, the court held that the government may depose the petitioner in a habeas action on any matter related to the assertions in the petition. *Id*., 457. The court further held that if petitioner asserts the Fifth Amendment, "the assertion of the privilege may be cause for the court to draw an adverse inference." *Id*.; *accord State ex rel. Myers v. Sanders*, 206 W. Va. 544, 550, 526 S. E. 2d 320, 326 (1999); *Nichols v. State*, 2001 WL 55747, *16 (Tenn.Crim.App. 2001) (petitioner has no basis to invoke Fifth Amendment privilege in post-conviction petition and court may draw adverse inference from unjustified dependence on privilege), judgment aff'd., *Nichols v. State*, 90 S.W.3d 576, 607-608 (Tenn. 2002) (court of appeals erred in addressing Fifth Amendment issue; however, error did not affect result).

The *Bean* court analogized the situation before it to one in which a defendant in a criminal trial claims insanity – a defense on which he bears the burden of proof. The court reasoned that just as a claim of insanity is deemed a Fifth Amendment waiver as to what the defendant has told the examining psychiatrist, so too has petitioner waived the privilege with regard to the factual matters that he has put in issue by his petition. *Id*., 455.

Also, in recognition that it is the petitioner, not the state, who has put certain factual matters in dispute, *Bean* reasoned that petitioner should not be shielded from having to defend the allegations he himself has made. *Id*., 455; see also *State ex rel. Myers v. Sanders*, *supra*, 206 W.Va. 550 ("it is improper for petitioner to raise these verified, factual assertions and then be able to hide behind the Fifth Amendment, with no adverse impact.").

Several of the counts of Skakel's Amended Petition entail factual claims of which he

would be expected to have personal knowledge. For example, petitioner alleges that Gaetano Bryant and two other teens were in Belle Haven the night of the murder. He further contends that they had previously hit golf balls in the Skakel yard, and that "all of them" picked up a golf club the night of the murder. Bryant contends that he, Hasbrouck, and Tinsley congregated in the Skakel backyared and that he saw petitioner that night. These assertions and others are matters of which petitioner is likely to have personal knowledge.

In the Second Count, petitioner has made various allegations concerning a conversation he had with Greg Coleman. Petitioner claims Coleman lied in his testimony. He further claims that a person who was present with Coleman and the petitioner contradicts Coleman's testimony. Obviously, petitioner is also a witness to this conversation and therefore someone who would be expected to offer testimony regarding the nature of the conversation. Because petitioner is likely to have personal knowledge of these and other allegations he has raised, his refusal to testify entitles the state to an adverse inference.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR SECTION VIII[37]

The following, while not an exhaustive list of the factual findings and legal conclusions which support the state's argument in Section VIII, are some of the important findings that support the state's position.

1) This court erred in permitting petitioner to invoke his Fifth Amendment privilege in these proceedings.

2) Inasmuch as petitioner's appeal became final on November 13, 2006, petitioner's Fifth Amendment privilege was no longer viable after that date. See e.g. *State v. Click*, 768 So. 2d 417, 421 (Ala. 1999) cert. denied 531 U.S. 834 (2000).

3) To the extent petitioner retained a Fifth Amendment privilege, the state's offer of use and derivative use immunity was sufficient to compel his testimony. See e.g. *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

4) In any event, the state is entitled to an adverse inference against petitioner from his invocation of the Fifth Amendment in this collateral proceeding. See e.g. *Bean v. Calderon*, 166 F.R.D. 452, 455 (E.D. Calif. 1996).

[37] See fn. 11, *supra*.

CONCLUSION

For all of these reasons, the State of Connecticut respectfully urges this Court to deny the petition and the relief requested therein.

Respectfully submitted,

THE STATE OF CONNECTICUT

BY_____

SUSANN E. GILL
Senior Assistant State's Attorney
Juris. Number 409671
Office of the State's Attorney
1061 Main Street
Bridgeport, Connecticut 06604
Telephone: (203) 579-6506
Facsimile: (203) 382-8401

JONATHAN C. BENEDICT
State's Attorney
for the Judicial District of Fairfield

CERTIFICATION

I hereby certify that a copy of this Post Trial Brief was hand-delivered to Attorney Hubert J. Santos and Attorney Hope C. Seeley, 51 Russ Street, Hartford, Connecticut 06106, telephone number (860) 249-6548, fax number (860) 724-5533 on July 16, 2007.

SUSANN E. GILL
Senior Assistant State's Attorney