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| CV-10-4003762 | : | SUPERIOR COURT |
| MICHAEL C. SKAKEL | : | JUDICIAL DISTRICT OF TOLLAND |
| V. | : | AT ROCKVILLE |
| COMMISSIONER OF CORRECTION | : | AUGUST 9, 2013 |

# RESPONDENT'S POST-TRIAL BRIEF

**FOR THE RESPONDENT/COMMISSIONER OF CORRECTION:**

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## I. INTRODUCTION

Although this court has informed the parties they need not include the standards governing ineffective assistance of counsel claims in their post-trial briefs, petitioner appears to have interpreted this as a license to ignore that standard's governing force. Instead of presenting a reasoned legal analysis under *Strickland*, petitioner has presented a brief completely unhinged from these principles. Further, petitioner's entire presentation seems intent on diverting this court from its role as a court of law, governed as it is by legal principles and rules of evidence and procedure. Petitioner instead attempts to lure this court into ruling on the basis of hearsay, books, police reports, rumors, and other types of information and misinformation of untested reliability. Importantly, much of what petitioner relies on to build his arguments has never been admitted in a court of law for the purposes he seeks to use it, and never would be admitted by a court adhering to its proper role.

Perhaps in recognition of the weakness of his claims, petitioner begins his brief not with a substantive discussion of Attorney Michael Sherman's performance, but with a personal attack. He contends that Sherman had a "good time" at the petitioner's expense. PB:1 But the issue is not what Sherman did in his personal time during the several years that the case wound through all layers of the judicial system. The question for this court is the care, attention, and skill that Sherman devoted to the preparation of his defense.[1] A full review of the record shows that Sherman's efforts far exceeded the standards of most non-capital defenses. He spent thousands of hours preparing the defense, challenged the state on legal issues large and small, consulted with experts, and assembled a full team of lawyers to assist in the defense, including

[1] Sherman's devotion to his client was so extraordinary that he dedicated an entire room of his house to this case, setting up a "war room" where the walls were covered with charts, photographs and other materials used to plot preparations by the defense team. HT 4/23:21-26; 4/26:127. His devotion to his former client is apparent still: while defending his work, Sherman peppered his responses in this trial with asides complimentary to his former client.

some of Connecticut's most distinguished practitioners.[2] Shorn of their personal animus, petitioner's claims consist of nothing more than second-guessing reasonable tactical and strategic decisions that were made after extensive investigation and legal research. Simply put, if this level of representation falls short of Sixth Amendment standards, countless convictions would be called into question.

Not only does petitioner seek to hold Sherman's representation to an impossibly high standard, he seeks to impose a standard on the state's evidence under which most murder verdicts would crumble. Contrary to petitioner's assertions, the evidence of his guilt is truly compelling. Unlike many murder cases upheld on appeal which have little or no physical evidence and hinge on the testimony of one or two witnesses, whose credibility may be suspect due to their own criminal involvement, here the state's case relied on petitioner's uncontested connection to the murder weapon, strong evidence of motive, substantial evidence of consciousness of guilt, and three unequivocal confessions, from three persons unassociated with each other or with the crime. In addition, the jury relied on nearly a dozen other incriminating statements the petitioner made throughout the years. The significance of these many admissions lies not only in their sheer number, but in the fact that they dovetail with each other and with evidence surrounding the crime. *See* Respondent's Pretrial Brief, (RPB) pp. 4-22.

Evidence of motive centered on the animosity between petitioner and his brother Thomas "Tommy" Skakel, (which petitioner confirmed in his testimony in this proceeding) and the brothers' infatuation with Moxley. Petitioner admitted to Geranne Ridge that he was doing LSD and other mind-altering drugs that night (which coincides with his statements to others regarding his impaired mental state, and with the evidence of his drug and alcohol problems). His drug-

[2] Attorney Sherman devoted four years to petitioner's defense; for the final two years Attorney Jason Throne spent nearly all of his time on this case; in the final year leading up to the trial, Attorneys Mark Sherman and Stephen Seeger also devoted themselves to this case. All four attorneys participated in the trial. In addition, Sherman engaged the services of other attorneys such as David Grudberg and Richard Emmanuel, with whom he consulted on legal issues, and sought the counsel of such legal luminaries as David Golub, Hugh Keefe, and Willie Dow.

addled mental state, coupled with the infuriating knowledge that his hated brother Tommy had a sexual liaison with Martha, and the fact that Martha spurned his advances, triggered the rage which led him to beat her to death with a golf club.

Further, the state had significant consciousness of guilt evidence as the petitioner gave at least three versions of his activities the night of the murder (in addition, of course, to his inculpatory admissions): 1) his 1975 police statement that after returning from Terrien's he went to bed and never left the house; 2) his statement when confronted in front of many witnesses at Elan that he was drunk and doesn't remember but that he may have killed her, or he doesn't know if he did, or it was either him or his brother; and 3) a detailed rendition of his travels after returning from Terrien's in which he admits leaving the house, being "horny", and seeking a kiss from Martha. In this version he places himself in the tree under which her body was found, masturbating, and wakes in a panic when Mrs. Moxley asks him if he knows Martha's whereabouts.

If the evidence on which the jury based its verdict is not considered compelling, than many verdicts upheld in this state must truly be on shaky ground.[3]

*Strickland* does not guarantee perfect representation; there is no requirement that counsel be prepared for every contingency or be a flawless strategist or tactician. *Harrington v. Richter*, 131 S. Ct. 770, 791 (2011). All that is required is reasonable competence. Sherman's representation more than meets this standard. He presented a defense based on a three-fold strategy: attacking the state's evidence; presenting an alibi, and presenting a third party culprit defense. This strategy failed not because of any fault of Sherman's, but because of the strength

[3] *See e.g. State v. Newsome*, 238 Conn. 588 (1996) (murder conviction upheld where only evidence identifying defendant as shooter was a *Whelan* statement of a recanting witness); *State v. Henning*, 220 Conn. 417 (1991) (felony murder conviction dependent on consciousness of guilt evidence and defendant's inculpatory statements, but lacking any physical or forensic proof, upheld); *State v. Stepney*, 191 Conn. 233 (1983) (murder conviction upheld based on circumstantial evidence: defendant had been in victim's house, his truck was seen there until late morning and victim's blood type found on defendant's trousers); *State v. Grant*, 219 Conn. 596, 602 (1991) (rejecting defendant's argument that evidence must provide jury with a rational basis for rejecting inferences consistent with innocence).

of the state's case.

## II. COLLATERAL ESTOPPEL REQUIRES THAT JUDGE KARAZIN'S FINDINGS BE GIVEN BINDING EFFECT

As argued in Respondent's Pretrial Brief, (RPB), pp. 22-59, collateral estoppel, which is grounded in principles of finality, fairness, and judicial economy, requires that the factual findings on issues litigated in the Petition for New Trial proceeding be given binding effect here. This means that the starting point in considering claims dependent on previously-litigated factual matters must be Judge Karazin's resolution of those matters. As explained in the pretrial brief, pp. 25-28, *Williams v. Commissioner*, 180 Conn. App. 94, cert. denied, 282 Conn. 914 (2007), does not control this issue. The crucial distinction between *Williams* and respondent's claim is in the nature and scope of the claimed estoppel. Respondent is not contending, as did the petitioner in *Williams*, that the resolution of the *legal claims* in the prior proceeding controls the outcome here. Rather, respondent is claiming that Judge Karazin's determination of certain factual disputes has forever resolved those disputes. To permit petitioner to place these matters once more in dispute, for no good reason other than his desire to keep the controversy alive and hope for a different result before a different decision maker, makes a mockery of the finality to which the state, the taxpayers, and the victims are entitled.[4]

## III. PETITIONER HAS FAILED TO PROVE THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE OR THAT HE WAS PREJUDICED THEREBY

### A. Petitioner has failed to prove either ineffective assistance or prejudice with regard to his claims surrounding the Morganti sketch[5]

The petitioner claims that his trial counsel was ineffective for failing to obtain the composite sketch of a man seen walking on Field Point Road by Charles Morganti, a Belle Haven security

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[4] Moreover, because the matters on which respondent relies are all factual determinations; see RPB: 34-59; and because Judge Karazin, not the Supreme Court, was the ultimate arbiter of facts, Judge Karazin's Memorandum of Decision is the controlling judgment for purposes of collateral estoppel. *See* 10/25/07 Memorandum at App. A1-A36. Further, as argued in the pretrial brief pp. 30-34, binding effect should be accorded to alternate findings actually made by Judge Karazin. See *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244 (3d Cir. 2006).

[5] The determination of this issue is subject to the binding effect of Judge Karazin's findings in his Memorandum of Decision. *See* RPB: 34-39.

guard. The petitioner asserts that the sketch would have materially assisted the defense. Yet, petitioner offers no reasoned analysis in support of this assertion.

As initial matter, the state has maintained that the sketch was among the materials made available to the defense during discovery. Although Sherman testified he has no recollection of having seen the sketch prior to trial, it may be that it was a matter of such obvious insignificance that it left no impression on him. Sherman had good reason to consider the sketch insignificant as there can be no doubt the sketch is of Carl Wold, the person Morganti saw at around 8 p.m. that evening.[6, 7]

It must be remembered that the sketch is nothing more than the image of a man Morganti saw walking on Field Point Road the night of the murder.[8] It is *not a sketch of someone seen murdering the victim or of someone who has ever been connected to the murder in any respect.* The murder took place in a residential neighborhood in which hundreds of people live. There is nothing unusual about someone walking on the streets of such a neighborhood during the evening hours.

Because neither the encounter with Carl Wold nor the sketch itself has any relevance to this case, Sherman's failure to notice it, or failure to make further efforts to obtain it if it was not

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[6] The account of the encounter contained in police reports and confirmed by Wold and Morganti's deposition testimony can leave no doubt that the man Morganti spoke with that evening was Wold. Reports given by the two men coincide as to location, clothing, and conversation. Further, in his deposition testimony, Morganti noted that Al Robbins, a regular Belle Haven security officer, immediately recognized the man in the sketch as Wold. *See* PE 212. (10/17/06 Deposition of Morganti) at 29. One police report, however, mistakenly places the Wold encounter at about ten o'clock. *See* RE F. The time contained in this report is apparently in error as another police report cites Wold and his father confirming that Wold was home by about 8 p.m. *See* RE J. The source of this error – the reporting officer's or Morganti's -- cannot be determined on this record. None of these reports were ever admitted for the truth of the matter contained therein, (and, indeed, if offered would have been inadmissible for this purpose) and the reporting officer was never called to testify to the matters he reported. Thus, the reliability of the matters contained in any of these police reports has never been tested. On this issue, as well as others, petitioner cannot carry his burden of proof by relying on matters of such untested reliability.

[7] It is obvious that Morganti prepared the sketch of the man he saw and spoke with on Field Point Road and not the person he saw from 100 yards away, in the dark, later that evening. Indeed, as Morganti noted, the second man was walking *away* from him, giving him no opportunity to view his facial features. PE 212 at 9.

[8] Obviously, this person was not Littleton, as he was at the Belle Haven club with members of the Skakel family until after 8 p.m. *See* T. 5/9 at 118(Andrea Renna: "8:30 ish"); T. 5/28 at 33 (John Skakel: "8:30 or 9:00"); T. 5/22 at 33 (James "Terrien" Dowdle: "guessing around 9:00").

among the state's disclosure, cannot be deemed ineffective assistance. "While it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility. . . ." (Internal citation and quotation marks omitted.) *Torres v. Commissioner of Correction*, 84 Conn. App. 56, 566-67 (2004).

Petitioner's claim of materiality hinges on his assertion that the *second* person Morganti saw was Littleton. Morganti told investigators that he thought he saw the same man he had encountered earlier walking through a yard on Otter Rock Drive across from the Skakel residence between 9:30 p.m. and 10:00 p.m. This assumption by Morganti could only have been based on the size of the man: Morganti said the person was walking *away* from him (removing any chance of seeing his face) and was the length of a football field away, in the dark, when he saw him. PE 212 at 9. The fact that Morganti could not see the face of this second person makes any coincidental similarities between Littleton's facial features and those in the sketch irrelevant.

Petitioner offered no evidence at this habeas trial establishing this second man was Littleton.[9] Moreover, the evidence from the criminal trial makes this assertion implausible. None of the persons who were outside the Skakel house at around this time, Helen Ix, Andrea Shakespeare Renna, Julie Skakel, Jimmy (Terrien) Dowdle, or any of the Skakel siblings, testified to having seen Littleton in a yard across the street. Further, several witnesses did testify to seeing Littleton inside the Skakel residence during this time period. *See* T. 5/9 at 125, 140-43 (Andrea Renna testifies she left the Skakels to go home about 9:45, sees Littleton in the Skakel house when she returns to the door to get the car keys); T. 5/29 at 14, 21 (Julie Skakel testifies

[9] Frederick Pagnani's testimony that the sketch resembles Littleton is of little significance. As noted previously, Morganti could not have seen the face of the second man; therefore evidence suggesting Littleton looks like the sketch does not establish that Littleton was the second man. Aside from its immateriality, Pagnani's testimony should be discounted due to his manifest motive to help his friend's brother. This eagerness revealed itself in his refusal to concede obvious differences between the picture of Littleton and the sketch, such as the eye glasses. *See* HT 4/17: 75-76. Further, according to another witness, the sketch more closely resembles Thomas Skakel; HT 4/17: 144; and may indeed resemble any number of young men.

she left to take Renna home at about 9:30, sees Littleton in the house when Renna goes back for the keys); T. 5/29 at 28-29 (Julie Skakel testifies she sees Littleton in the Skakel kitchen between 10 and 10:30 after returning from Renna's house).

Petitioner has therefore failed to establish how the sketch would have helped the third party defense Sherman presented. If Sherman offered the sketch, Morganti and Wold presumably would have testified that it was Wold whom Morganti encountered the night of the murder. Morganti's belief that he saw the same man later that night would not aid in proving that Littleton committed the murder.

Moreover, Littleton testified that at around 9:35 p.m., he went outside to the Skakel's side driveway to investigate a fracas.[10] If the jury were to assume Morganti's second sighting was of Littleton investigating the fracas, this would only corroborate Littleton. Even if, however, this evidence is assumed to impeach Littleton's testimony that he only ventured as far as the driveway, by showing that he may have crossed the street, this slight and inconsequential discrepancy does not inculpate Littleton in the murder. The person seen between 9:30 and 10:00 was walking *away* from where the victim was attacked, not toward it. At any rate, Littleton was seen in the Skakel house shortly before and after Morganti saw this individual, leaving Littleton no opportunity to somehow meet up with Moxley, attack her in her driveway, brutally beat and stab her, drag her body under a tree on the Moxley property, and return to the Skakel house in time to be seen, with nothing amiss, by members of the family shortly after 10 p.m.

### B. Petitioner has failed to prove ineffectiveness or prejudice with respect to the impeachment of Coleman

The petitioner next claims that his trial counsel was ineffective for failing to obtain additional evidence with which to impeach Gregory Coleman, whose testimony was offered on behalf of

[10] Littleton testified that he went out the front door and followed the circular driveway to the driveway on the left side of the house where the Revcon camper was parked. The Skakel car, which had been parked behind the Revcon earlier in the evening, had already left for Terrien's at this time. Finding nothing, Littleton returned to the Skakel house where an unbloodied, unruffled Thomas Skakel joined him in watching about 20 minutes of the movie, *The French Connection* between about 10:00 and 10:30 p.m. T. 5/9: 164-170.

the state at trial. Specifically, the petitioner claims that his trial counsel was ineffective for failing to locate and present the testimony of three former residents of Elan: Alton Everett James III, Cliff Grubin, and John Simpson. The petitioner contends that counsel's failure to present these witnesses prejudiced him. PB; 7. In addition, the petitioner claims that his trial counsel failed to investigate and locate additional witnesses who believed that Coleman was untruthful and failed to locate and obtain evidence regarding the supposed financial motives that Coleman and his wife, Elizabeth Coleman, had for testifying. The petitioner's claim fails because the evidence that he asserts his trial counsel should have obtained and presented at trial was either cumulative, speculative, or insignificant.

As Judge Karazin found, there is little in the testimony of Everett James and Cliff Grubin that is not cumulative to the testimony of other Elan residents at trial.[11] Both James and Grubin testified that they had never heard the petitioner confess to the murder. PE 215 at 15; PT 4/24: 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, the testimony of James and Grubin is cumulative and is not likely to have led to an acquittal at trial. Accordingly, the decision of the petitioner's trial counsel not to present the testimony of James and Grubin did not constitute deficient performance. *See Sekou v. Warden*, 216 Conn. 678, 690, 583 A.2d 1277 (1990) (failure to pursue unmeritorious claims not conduct falling below reasonably competent representation).

As for John Simpson, his testimony partially impeaches and partially supports Coleman.[12] 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. PE 213 at 25. Further, he recalled that he was

[11] As argued in the Pretrial Brief, pp. 40-49, Judge Karazin's findings must be given controlling effect in this proceeding. See App.: A8

[12] Judge Karazin determined that Simpson offered only "minimal impeachment evidence regarding Coleman." Pretrial Brief at 45; App.: A9.

writing the nightly reports, a task which required attention to detail and would thus have kept him from focusing on the others' conversation. PE 213 at 23-24, 49. 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 in the prior proceeding, 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 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.

For these reasons, Judge Karazin found that "[t]he evidence offered to impeach Coleman is far from convincing, in view of the case presented by the state at trial." App. : A-10. In addition, Judge Karazin concluded that "when the limited impeachment value of the new evidence is considered in view of the strong evidence of guilt presented at trial, it is apparent that it would not lead to an acquittal on retrial." *Id*.

But while he provided only minimal impeachment of Coleman, Simpson did testify regarding two inculpatory statements by petitioner. First, Simpson testified that, rather than sticking to his 1975 alibi where he professed to know where he was and what he did that night, or corroborating his later claims to Hoffman and others that he had sneaked out of his house and masturbated in a tree on the Moxley property, the petitioner told Simpson that he had been drinking and partying and "there were. . . times that I may not, you know, remember . . . . but I certainly don't remember doing anything like that." PE 213 at 21.

Second, the petitioner apparently told Simpson he was a suspect in the murder. See PE 213 at 21, 48. Yet as Detective James Lunney testified in the original trial, the petitioner was not a serious suspect during that time period. T. 5/29 at 166. It is significant that petitioner thought of himself as a suspect when the police did not consider him so. See *State v. Henning*, 220 Conn. at 422-23; T. 6/3 at 129-30. Sherman cannot be found ineffective in failing to present such potentially detrimental testimony.

It is well established that "even the best criminal defense attorneys would not defend a particular client the same way." *Johnson v. Commissioner of Correction*, 222 Conn. 87, 96, 608 A.2d 667 (1992), *quoting Strickland v. Washington*, 466 U.S. at 689. "[T]he petitioner must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Johnson*, *supra*, 96, *quoting Strickland, supra*, 689. In this case, while calling James, Grubin and Simpson as witnesses could have provided the defense with some advantage, there were disadvantages to calling them as witnesses as well.[13] Accordingly, the petitioner cannot show that the performance of his trial counsel was deficient because he failed to present their testimony. *Strickland v. Washington,* 466 U.S. at 687; *Johnson v. Commissioner of Correction*, 36 Conn. App. at 701.

Nor can he be found ineffective for failing to present the supposed testimony of police officers from the Rochester area. First, petitioner's failure to offer testimony from these officers leaves this court without a basis on which to judge the value of their supposed testimony.[14] *Thomas v. Commissioner of Correction*, 141 Conn. App. 465, 472 (without the testimony of

[13] Grubin's testimony in particular was problematic as he was open to impeachment with the statement he made to petitioner's investigator. Contrary to his testimony at the new trial proceeding that he had no contact with petitioner after Elan, he told petitioner's investigator he had many conversations with petitioner during and after their time at Elan. During these conversations, petitioner told Grubin his brother Tommy murdered Moxley. In relating this to petitioner's investigator, however, Grubin stated that he would never repeat this information in a court of law. *See* App.:A9.

[14] The officers' supposed statements as reported by Vito Colucci are, of course, hearsay. Colucci clearly would not have been able to testify in their stead at the criminal trial. By offering Colucci's testimony at this proceeding rather than the officers, petitioner has failed to provide this court with any legitimate basis for determining: 1) that these witnesses were available at the time of trial, 2) the substance of their testimony or 3) their credibility.

witness at the habeas trial, "the habeas court could not evaluate him as a witness, nor could it assess the likely impact of his testimony.") *cert. denied*, 308 Conn. 939 (2013); *see also Townsend* v. *Commissioner of Correction*, 116 Conn. App. 663, 668, *cert. denied*, 293 Conn. 930, 980 A.2d 916 (2009); *Andrews* v. *Commissioner of Correction*, 45 Conn. App. 242, 247-48, *cert. denied*, 242 Conn. 910, 697 A.2d 364 (1997); *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 622–24, *cert. denied*, 248 Conn. 905, 731 A.2d 309 (1999); *Taft* v. *Commissioner of Correction*, 47 Conn. App. 499, 504–505 (1998).

Second, even if this court were to assume these officers would have been available during the criminal trial and would have testified that they had a negative view of Coleman's credibility, this is not be the type of evidence likely to change the outcome of a criminal trial. Evidence that police officers had a dim view of a drug user's credibility would hardly have impressed the jury; the jury would probably assume as much. "A defense attorney is not obligated to track down each and every possible witness or to personally investigate every conceivable lead. *Sullivan v. Fairmen*, 819 F.2d 1382, 1391 (7th Cir. 1987)." *U.S. v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002).

As for liens on property owned by Elizabeth and Greg Coleman, petitioner failed to establish that a reasonably competent defense attorney would have researched the out-of-state land records of a state's witness and his spouse. In order to prevail on his claim, the petitioner must show that the errors that he alleges were "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. at 687. "Flawless representation is not required. The right to counsel is the right to effective assistance and not the right to perfect representation." (Citations omitted.) *Johnson v. Commissioner of Correction*, 36 Conn. App. at 701. Searching out-of-state land records on the "off chance" the witness owns property, and the *possibility* the records will reveal liens is not required in order to function as the counsel guaranteed by the Sixth Amendment. Indeed, it would be unreasonable to *require* such a search be made by defense attorneys lest they be held incompetent.

Further, petitioner presented no evidence raising the supposed financial motive for Coleman's testimony above rank speculation. Demonstrating that a witness has debts is not the same as establishing that the witness is testifying in the hope of a reward. Moreover, Jennifer Pease's testimony from the criminal trial deflates any assumption that because the Colemans had liens on their property they would have been willing to testify falsely to collect a reward. Pease testified that Coleman reported petitioner's confession to her when they were both still students at Elan.[15] This prior consistent statement – made to a trusted teenage friend long before any such motive could have arisen – demolishes whatever probative value the lien evidence may have had.

In addition to the speculative and insignificant nature of the petitioner's proposed evidence, the extensive impeachment evidence considered by the jury, and the strong corroboration of Coleman at trial, makes it impossible for petitioner to carry his burden of proof.

Sherman's cross examination of Coleman at the hearing in probable cause extended over 130 pages.[16] He attempted to impeach Coleman with his prior incarcerations and criminal history, allegedly inconsistent statements, the possible effects of drug and alcohol abuse on his memory, his previous admission to mental hospitals, his injection of heroin shortly before testifying before the Grand Jury, television shows he had seen profiling this case, the fact that he was suffering from methadone withdrawal during the first day of his HPC testimony, whether he was expecting a deal in exchange for his testimony, the fact that he had asked Inspector

[15] 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: 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: 108.

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

Garr for $1200 to help him transition out of prison, his delay in reporting the confession to authorities, and whether he was expecting any benefits from testifying.[17]

It is axiomatic, however, that the jury was free to credit Coleman's testimony despite the myriad ways in which Sherman attempted to impeach him. *See State v. Weinberg*, 215 Conn. 231, 244-245 (1990) (jury free to credit witness despite her paranoid schizophrenia and hallucinations). And, in this case, the jury had good reason to do so, as Coleman's testimony was substantially corroborated by other witnesses and evidence.[18]

Not only is the evidence that petitioner suggests impeaches 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). The tape recorded statement of Gerranne Ridge is particularly compelling. *See* PE 67 (transcript). Ridge's taped statement is highly credible because it was recorded without her knowledge while she was speaking to a trusted friend on the telephone. Ridge had no idea that her friend was taping their conversation or that he would provide the tape to the police. Consequently, the circumstances under which the statement was obtained eliminate any suggestion that it was the result of coercion or that Ridge had a motive to fabricate. In the recorded statement, Ridge described the petitioner's detailed admission of his commission of the crime.[19] Ridge's statement, therefore, not only corroborated Coleman's testimony, it

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[17] *See* T. 5/17:142-96; T. 5/20: 9-32, 49-60.

[18] In addition to Jennifer Pease's testimony discussed *supra*, Greg Coleman was also corroborated by his wife. Elizabeth Coleman testified that Greg told her about Skakel's confession in 1986, the year they met. T. 5/20: 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: 92-93.

[19] In her taped statement, when she begins to tell her friend what petitioner told her during a party at her house in 1997, Ridge attempts to omit names and refers to the petitioner as "John Doe": "Um, John Doe was um watching

provides some of the strongest evidence of the petitioner's guilt.

In addition to the three direct confessions, the state presented evidence of other inculpatory statements that the petitioner made to eleven additional witnesses, many of whom where unconnected to each other. *See* RPB, Section II.E.2. 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 Ridge's statement, as well as evidence of petitioner's infatuation with Martha, and Tommy's flirtatious behavior that evening. The petitioner's claim to Meredith, Pugh, Ridge and Hoffman that he masturbated in a tree on the Moxley property, coincides with his statement to Coleman that he masturbated on the body,[20] and with bloody smears on the victim's thighs which Dr. Henry Lee described as consistent with hands trying to push her legs apart. *See* T. 5/8: 149; T. 6/3: 17-18, 93-94, 112-13, 132-33.

In order to prevail on his claim, the petitioner must show that but for his trial counsel's failure to present additional evidence to impeach Coleman's testimony, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. Here, given the degree to which Coleman's testimony was corroborated by the testimony of other witnesses, and the overall strength of the state's case, the petitioner cannot meet this burden.

**C. Petitioner has failed to prove either deficient performance or prejudice for failing to obtain additional evidence with which to impeach John Higgins**

The petitioner next claims that his trial counsel was ineffective for failing to obtain additional testimony from Charles Seigen with which to impeach John Higgins. Specifically, the petitioner

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this particular girl through her bedroom window, changing. And he was up in a tree masturbating, 'cause he liked her. She went and had sex with his brother Tommy that same night, while he was outside smoking pot and doing LSD and acid and really big-time drugs, mind, you know, altering drugs. After he found out that, that his, that John Doe's brother had sex with this girl, he got so violent and he was so screwed up, he did that to her." PE 67.

[20] In fact, this detail provided by Coleman may have convinced the jury to credit him despite Sherman's impressive cross examination. Coleman had no connection to Ridge, Meredith, Pugh or Hoffman, the other persons to whom petitioner mentioned masturbating that evening.

claims Sherman should have elicited Seigen's opinion of Higgins' character for truthfulness.

During his habeas testimony, Seigen indicated that he had maintained a relationship with Higgins decades after leaving Elan. The nature of that relationship apparently fluctuated, although he did enter into a business relationship with Higgins,- - an arrangement that ended in 2000. HT 4/18: 107. At one point Seigen said he formed his negative view of Higgins' credibility two days ago, although at another juncture he stated that if asked in 2002 he would have reported that he found Higgins untrustworthy. *Id*.: 121, 130.

Petitioner has failed to prove either deficient performance or prejudice. Sherman testified, and Seigen confirmed, that Seigen would not speak to Sherman prior to trial. HT 4/16: 91-92, 203; HT 4/17: 125, 4/18: 113. Nor would he meet with the investigator Sherman hired to investigate Higgins, Seigen and Kranick - three "Elan witnesses" from the mid-west. HT 4/26: 94. Because of Seigen's refusal to meet with Sherman or his investigator despite numerous attempts, Sherman had no way of knowing how Seigen would answer if asked his opinion of Higgins' credibility.

Further, Sherman had good reason to fear that, if asked, Seigen would vouch for his friend's credibility. Seigen was the person, after all, who called *Unsolved Mysteries*, and the Greenwich police to report that Higgins' had heard petitioner confess to this murder. HT 4/18: 115-116. Sherman, therefore, had reason to believe Seigen felt Higgins' information was trustworthy.

Because Sherman had no reason to know Seigen's opinion of Higgins' credibility may have been favorable to his client, he cannot be found ineffective in failing to elicit it.

Even if Sherman can be faulted for failing to ask Seigen for his opinion, petitioner has failed to prove prejudice. Failure to present evidence of such minimal value cannot overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Santiago v. Commissioner of Correction*, 90 Conn. App. at 425, Moreover, Sherman did ask several other Elan witness' for their opinion of Higgins' character for truthfulness; thus he did present negative opinion evidence to the jury. T. 5/23: 129, 178; 5/24:

18-31.

It must also be remembered that Higgins' testimony related to only one of three direct confessions by the petitioner. Higgins' testimony was also corroborated by the testimony of numerous other witness to whom the petitioner made inculpatory statements.[21] When the high degree to which Higgins' testimony is corroborated by the testimony of other witnesses is considered, along with the overall strength of the state's case, it is clear that the petitioner cannot meet his burden of showing that he was prejudiced by his trial counsel's failure to elicit Seigan's opinion evidence. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, 466 U.S. at 691.

**D. Petitioner has not carried his burden of proving deficient performance or prejudice with regard to the testimony of Denis Ossorio**

Sherman testified that he asked his client, his client's siblings and his client's cousins if there was anyone else who could testify in support of the alibi defense. As both Sherman and Throne testified, no one supplied the name Denis Ossorio; no one indicated there was a nonfamily member watching *Monty Python* with them at Terrien's house that night; no one stated that cousin Georgann Dowdles' boyfriend could verify the presence of Michael Skakel at the Terrien house between 9:30 and 11:00 p.m. that night [22, 23] HT 4/16: 232-234; HT 4/23: 11-

[21] In addition, Higgins testimony, like Coleman's, provided significant details that corresponded to other evidence in the case. For instance, petitioner told Higgins there was a party of some kind or another at his home, he was running around outside, got a golf club from his garage, and remembers running through pine trees. *See* T. 5/16: 179-82.

[22] Although petitioner testified in this proceeding that he gave Attorney Sherman two names, Denis Ossorio and Ian Kean, as boyfriends of Georgann's who could verify his presence at the Terrien residence, his self-serving testimony must be rejected. HT 4/30: 109; see *Purdy v. Zeldis*, 337 F3d 253, 259 (2d Cir. 2003)("in most instances a convicted felon's self-serving testimony is not likely to be credible.") It is simply preposterous to suggest that both Sherman and Throne, who dedicated years of their professional lives to the preparation of this case and who continue to exhibit extraordinary loyalty to their former client, would ignore such information.

[23] In light of the fact none of the persons who testified they were at Terriens that night ever indicated they had seen Georgann Dowdle's "beau" or that he had actually watched television with them, and the fact that Georgann Dowdle admitted she never saw her Skakel cousins that night and, while hearing their voices, could not identify the voice of any particular Skakel cousin, there is no basis on which to find Sherman ineffective for not discovering the identity of the "beau." Under these circumstances, Georgann's cryptic reference in her Grand Jury testimony to being in her mother's library with her beau did not give any reason to believe the beau ever saw Michael Skakel, or that he would know who he was if he had. Importantly, Georgann stated she never ventured out, and, as indicated,

13; 4/26: 115-119.

Under these circumstances, there is no basis on which to find Sherman ineffective. "It is well settled that '[d]efense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial.'". . . *Toccaline v. Comm'r of Correction*, 80 Conn. App. 792, 817, 837 A.2d 849, 864 (2004); *see also United States v. Farr,* 297 F.3d 651, 658 (7th Cir. 2002) (Defense counsel is not ineffective in failing to track down and interview witnesses where his client never supplied him with the alleged witnesses' names, addresses and the specific information those witnesses might have); *Battle v. Delo*, 19 F.3d 1547, 1555 (8th Cir. 1994) *opinion adhered to as modified on reconsideration,* 64 F.3d 347 (8th Cir. 1995)(rejecting capital defendant's argument that counsel was ineffective in not tracking down potential witness who was mentioned twice in police reports; once by her first name and once by an incorrect last name: "A first name, or an incorrect last name, in a police report can hardly be the basis for an ineffective assistance claim when [the defendant] himself did nothing to assist counsel in locating those who could have helped his defense.").[24]

Against this backdrop, Denis Ossorio's testimony must be rejected. It is simply implausible

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stated she did not see her cousins. The bottom line of her testimony was that she could not verify Michael Skakel's presence at the house that night, and never volunteered any information leading one to believe her beau could. *See* T. 5/23: 57-65. "An ineffective assistance of counsel claim cannot rest upon counsel's alleged failure to engage in a scavenger hunt for potentially exculpatory information with no detailed instruction on what this information may be or where it might be found." *United States v. Farr,* 297 F.3d 651, 658 (7th Cir.2002)

[24] *Gaines v. Commissioner*, 306 Conn. 664 (2012) (defense counsel ineffective in not investigating alibi witness) is not to the contrary. In *Gaines*, counsel acknowledged that his client had given him the name of the potential witness as his next door neighbor, one of only two persons he knew in the Bridgeport area, and the sister of a state's witness. In addition, petitioner denied being present at the shooting but told his attorney he could not account for his whereabouts as he was not arrested until five months after the shooting. Under these circumstances, the court held it was incumbent on the attorney to at least interview the neighbor. Here, by contrast, petitioner, his siblings, and cousins supplied the police with the alibi shortly after the murder, without ever mentioning Ossorio, and testified at the Grand Jury without mentioning Ossorio. Giving a detailed alibi and supplying the names of those who were present certainly suggests that all the persons who were there have been revealed. Sherman would have no reason to go looking for others who may have been present when there was never any indication anyone else could verify Michael Skakel's presence at Terrien's that evening. *See Williams v. Commissioner*, 142 Conn. App. 744, 753-75 (2013).

that no one would have mentioned him as an alibi witness. After all, Ossorio did not state that he merely heard the voices of the Skakel cousins, as had his girlfriend, Georgeann Dowdle. Instead, he claimed he watched television with them. HT 4/18: 74-76. His testimony is, therefore, in stark contrast with the criminal trial testimony of Rushton Skakel, Jr. When Sherman asked him who watched *Monty Python* with him at Terrien's that night, he stated, "Jimmy Dowdle, my brother John and my brother Michael." T. 5/22: 64.[25] Ossorio also claimed that now, more than 38 years later, he could recall which of the Skakel boys were there that night, what television show they watched, and the approximate time he left – all without the assistance of any prior statements, testimony, or reports to refresh his recollection. HT 4/18: 74-76.

Ossorio's testimony is also open to suspicion in that he never contacted the police in 1975 and never came forward during the 2002 criminal trial, despite living in the area and, by his own admission, following the trial. *Id*. at 78-79.

Furthermore, although both Throne and Sherman stated they would have presented additional alibi testimony if they had been aware of it, petitioner has not proven prejudice from the absence of Ossorio's testimony at trial. Sherman did present petitioner's brothers and cousins, Jimmy "Terrien" Dowdle and Georgeann Dowdle, in support of the alibi. Further, he examined Helen Ix extensively, trying to establish that petitioner was in the car leaving for Terrien's as she left for home. *See* T. 5/9: 75-83, 93-116. In light of the evidence presented, the jury may well have credited petitioner's alibi witnesses, but found that the murder occurred *after* petitioner returned from Terrien's.

As the state's summation emphasized, the jury could credit the petitioner's own statements to Hoffman and others that he left the house after returning from Terrien's and went looking for

[25] At the criminal trial, the state asked John Skakel whether he saw Georgeann Terrien or her mother at the house that night. He stated he could not recall seeing either of them. T. 5/28: 40. Sherman asked Jimmy (Terrien) Dowdle if his sister, Georgeann, was at the house when they were watching *Monty Python*. He stated she was, but added that she was in another section of the house and did not watch the show with them. T. 5/22: 16. None of the alibi witnesses mentioned seeing Georgeann Dowdle's boyfriend that evening.

Martha. *See* T. 6/3: 92 (defendant's statements throw his alibi to the wind); s*ee also* T. 6/3: 94-95 (jury does not have to be unanimous as to time). The time of death could not be pinpointed: Dr. Wayne Carver testified his findings were consistent with a time of death anywhere from 9:30 p.m. to 1:00 a.m.[26] This allows a wide swath of time in which petitioner, having returned from Terriens about 11:00 p.m., could have killed Moxley. Petitioner, therefore, has failed to carry his burden of proving either ineffective assistance or prejudice.

**E. Petitioner has not carried his burden of proving Sherman was ineffective in not presenting a third party culpability defense regarding Tony Bryant or Thomas Skakel**

The petitioner next claims that his trial counsel was ineffective for failing to obtain and present evidence that the murder was committed by two individuals identified by Gitano Bryant or, alternatively, that the murder was committed by his brother, Thomas Skakel. The petitioner's claim fails because he cannot show that there was evidence available to counsel that would have been admissible as third party culpability evidence, or that, if presented, was persuasive enough to have affected the verdict. In addition, petitioner cannot overcome Sherman's reasonable decision not to present competing defenses.

**1. The law governing the admissibility of third party culpability evidence**

"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). "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).

[26] Petitioner's expert at trial, Dr. Jachimczyk, did attempt to corral the time of death into the time provided by the Terrien alibi. T. 6/28: 131. Yet his opinion relies to some extent on the dogs barking in the neighborhood and other non-scientific evidence. *Id.*: 134, 145-46. On mischief night, in a neighborhood filled with children and teens, barking dogs is hardly a basis on which to draw such conclusion. *See* T. 6/3: 95-97.

**2. Petitioner has not proven deficient performance or prejudice for failing to obtain and present evidence that the murder was committed by the individuals identified by Gitano Bryant**

The petitioner claims that his trial counsel was ineffective for failing to obtain and present evidence that the murder was committed by two individuals identified by Gitano Bryant. The petitioner's claim fails for three reasons. First, petitioner failed to prove that counsel knew of Bryant or Bryant's accusations prior to trial. Second, even if the information had been available to the petitioner's counsel prior to trial, it was insufficient to serve as the basis for a viable third-party culprit defense. Third, Sherman reasonably concluded, as a matter of strategy, not to "lay out the buffet table" as to possible third party suspects.

In an out-of-court statement to petitioner's investigator, Bryant claimed that he and two friends, Adolf Hasbrouk and Burton Tinsley, were in the Belle Haven neighborhood the night of the murder. PE 192 at 15. According to Bryant's statement, they went about the neighborhood "doing mischief." *Id*.: 16. In the course of this activity, Bryant claimed they met up with and accompanied a number of other teenagers.[27] Bryant claimed that the group, which grew to as many as fifteen youths, gathered at the rear of the Skakel home, where they drank beer and smoked marijuana. *Id*. at 16-19, 28. As the evening continued, Bryant stated that Hasbrouck and Tinsley began to talk about "having their way and going caveman," presumably on Martha Moxley. They picked up golf clubs from the Skakel lawn. *Id*.: 35-36. Bryant stated that some of the girls became uncomfortable with the direction the conversation was taking and left. *Id*. at 37. Bryant claimed he became concerned and caught a ride to the train station with an unidentified Belle Haven family, leaving Hasbrouck and Tinsley behind. *Id*. at 34, 44. According to Bryant, he later learned his companions slept over at Jeffrey Byrne's home. *Id*.: 48-49.

Bryant reported that 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

[27] One person Bryant claimed to see that night, Lisa Radar Edwards, testified at the new trial proceeding that she did not see Bryant that night PT 4/25:6-8. Bryant also claimed he knew John Moxley, a fact Martha's brother refuted at the new trial proceeding. PT 4/25: 27; PE 192: 8.

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. *Id*.: 40-46.

As Sherman testified in both this proceeding and the petition for new trial proceeding, he was never provided with Bryant's name prior to trial nor was he provided with the details of Bryant's accusations. PT 4/19: 179, 190-93; HT 4/16: 135-145. Therefore, there is no basis on which to find him ineffective.

But even if Sherman had learned of Bryant's identity and his accusations, he would not have had a sufficient basis on which to raise a viable third-party culprit defense. When the information provided by Bryant is considered, it is apparent that it fails 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. Petitioner has never produced a single witness who corroborates Bryant's claim he and his friends were in Belle Haven the night of the murder. This fact alone makes his account incredible.[28]

It must remembered that Bryant told Colucci they were gathered in the Skakel backyard with about fifteen other teens, smoking "pot" and being boisterous. Yet, despite years in which to research this allegation, petitioner has failed to produce a single witness who was among these fifteen youths. Bryant even claimed Tommy and Michael Skakel joined his group and he waived at Julie Skakel. PE 192: 37-38. None of these persons has ever testified to seeing Bryant, *not even the petitioner in this proceeding*.[29] Indeed, Sherman testified that neither the petitioner nor any family member ever told him they had seen Tony Bryant or his friends that night. HT 4/17: 130-31. And, of course, none of the scores of people interviewed at the time of the homicide,

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

[29] Michael Skakel testified that he did not see Bryant that night. HT 4/25: 136.

and none of the witnesses who testified at the hearing on the petition for new trial, placed Bryant or his friends in Belle Haven the night of the crime. Nor has anyone come forward who has 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.

In light of the implausible and uncorroborated nature of Bryant's claims, and the complete lack of evidence connecting either Hasbrouck or Tinsley to the crime, the Bryant evidence would have been inadmissible as third party culpability evidence at the petitioner's criminal trial. *See State v. Payne,* 219 Conn. at 117; *State v. John,* 210 Conn. at 670-71.

Further, in this proceeding, respondent presented evidence casting serious doubt on Bryant's overall credibility. Attorney Richard Alexander testified that in 1990 or 1991, Bryant represented himself to be an attorney admitted in Maryland and the District of Colombia when he applied for a job with the Texas law firm of Johnson & Gibbs. He was hired on the condition that he pass the Texas bar examination. HT 4/25: 64-65. When the results of the examination were released, Bryant did not tell the firm he had failed. Members of the firm researched Bryant's claims of being a licensed attorney elsewhere and found them to be false. When confronted with the firm's discovery of his omissions and falsehoods, Bryant claimed there was a mix-up, and that his Maryland bar license was in storage at his grandmother's house. HT 4/25: 71-72. Bryant had no response when confronted with the firm's discovery that he was not admitted in the District of Colombia. *Id*. Bryant never produced proof of admission in either jurisdiction, and was fired. This, coupled with Bryant's robbery conviction in California, provides ample reason to doubt his unsupported accusations. *See* HT 4/19: 153.

Sherman, therefore, cannot be ineffective in failing to present Bryant's wholly implausible rendition. Further, petitioner failed to produce Bryant as a witness in these proceedings or proof that he would have been available to testify in 2002.[30]

[30] During the course of the petition for new trial proceeding, Bryant invoked his Fifth Amendment privilege and refused to testify. Petitioner presented no evidence he would have done otherwise in 2002. Further, although Judge Karazin found Bryant's out-of-court statement to Colucci admissible as a statement against penal interest, on

Moreover, Sherman testified that as a matter of strategy, he did not want to offer competing theories of possible third party culprits. He acknowledged that such a strategy could weaken the overall credibility of both defenses in the jury's view. HT 4/17: 131-32. Further, with this defense in particular, Sherman said he would not have presented it due to both its implausibility as well the danger it would introduce a racial element to the case. HT 4/26: 109. Sherman's reasonable strategic decision not to present Bryant's unrealistic accusations should not now be second-guessed. Petitioner has therefore failed to prove either deficient performance or prejudice with regard to the Bryant accusations.

**3. Petitioner has not proven deficient performance or prejudice for failing to obtain and present evidence that the murder was committed by Thomas Skakel**

The petitioner contends that his trial counsel was ineffective in that he failed to present evidence the murder was committed by his brother, Thomas Skakel. He argues that Sherman should have used the information in the Tommy Skakel warrant application, the Sutton report, and the profile report, in addition to the evidence of Tommy flirting with Martha, to build a third-party culpability defense. PB at 14-15. Petitioner's claim fails because the information petitioner suggests Sherman should have relied on to build a third-party defense was either already before the jury or inadmissible. Further, even assuming Sherman could have introduced some of the additional evidence petitioner suggests, it fails to establish the requisite direct connection needed to qualify as a third party culprit defense. Finally, Sherman had sound strategic reasons for not presenting multiple defenses.

As mentioned, much of the evidence petitioner faults Sherman for not presenting was already before the jury. The jury heard testimony regarding Tommy and Martha "flirting" in the driveway, the word "Tom" written on one of Martha's shoes, the fact that the police had applied

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appeal, two justices disagreed while two other justices did not rule on admissibility because they found his statements incredible and uncorroborated. *Skakel v. State*, 295 Conn. 447, 484 n. 23, 523 (2010). Moreover, as Justices Zarella and McLachlan found, even if portions of Bryant's statement were arguably against his interest, the statements he attributes to Hasbrook and Tinsley certainly are not, and therefore would not be admissible in any court proceeding. *Id*.

for a warrant for Tommy Skakel, and, of course, the fact that Martha's body was found across the street from the Skakel's, and the murder weapon came from the Skakel house. *See* e.g. T. 5/9: 71; T. 5/8: 9-10; T. 5/8: 68.

All of this was known to the jury, yet none of this directly connects Tom Skakel to the murder. Indeed, none of this suggests Tom Skakel had any motive to harm Moxley. To proffer Tom Skakel as the murderer would do nothing more than contrast Martha and Tom's warm relationship with petitioner's burning jealousy.

As for the other information petitioner faults Sherman for not presenting, petitioner has failed to establish that it would have been admissible.[31] Petitioner offers no basis on which evidence of Tommy's temper and childhood neurological injury would have been admitted under our rules of evidence. *See* Conn. Evid. Code §§ 4-3, 4-4, 4-5. Not only would this information have been irrelevant, Sherman had no non-hearsay evidence to offer. Obviously, Sherman could not merely present a report containing this information; he would have to produce a witness who could testify to these matters. Yet, without a waiver from Thomas, surely none of his treating doctors or therapists would testify. Therefore, petitioner has failed to establish that Sherman had any admissible evidence available to him in 2002. Just as critically, petitioner has failed even now to produce any such evidence. As with many other claims petitioner has raised, he failed to call the witnesses at the habeas trial that he faults Sherman for not producing at the criminal trial. *See Thomas v. Commissioner*, 141 Conn. App. at 472.

Similarly, petitioner has failed to establish how Sherman would have admitted evidence of Thomas' supposed lies about his homework assignment. Plainly, he could not call Thomas with

[31] In fact, petitioner does not even argue that this information was admissible, instead choosing to fault counsel for failing to investigate the information in the profile reports, Sutton report and Thomas Skakel warrant application which he claims "could have reasonably led to the discovery of admissible evidence." PB at 15. This is just not good enough. In order to prevail, petitioner must present the evidence he claims Sherman should have presented, and establish that this evidence would have been admissible in 2002. It is not enough to allege merely the possibility that admissible evidence could have been discovered; the time to produce that evidence was during the habeas trial. If petitioner, who has had eleven years since the verdict to investigate this claim, failed to produce any admissible evidence, his claim that Sherman should have done so falls flat.

the aim of bringing this out on cross. Attorney Margolis was clear that his client would invoke the Fifth Amendment if called to testify. HT 4/17: 144. Petitioner has not suggested another avenue for introducing evidence on this collateral matter.

Further, Thomas' statement to Sutton investigators and to Sherman and Throne regarding his consensual sexual contact with Moxley the night of the murder is not against Thomas' penal interest and does not directly connect Thomas to the murder. Importantly, there is no indication in the evidence to suggest that anything happened between Martha and Tommy that would have caused him to lose his temper. The evidence available to Sherman was that Martha acquiesced to Tom's romantic advances. Indeed, even evidence of an argument between the victim and a third person shortly before the murder fails to establish the requisite connection for a third party claim. *See State v. Boles*, 223 Conn. 535, 548-49 (1992). [32]

Even if Thomas' statement were somehow admissible, however, this evidence would have been highly damaging to the defense. As noted previously, it corroborated the state's evidence of motive, as well as state's witnesses Ridge, Coleman, and Arnold. Petitioner told both Ridge and Arnold that his brother had a sexual liason with his girlfriend that night. To Ridge, petitioner went even further, stating that he was so "violent" and "screwed up" that when he found out about it, he hit her with a golf club. PE 67; T. 5/21: 32; HT 4/17: 150. Thus, petitioner has failed to prove Sherman was ineffective in not offering this damaging evidence. *See Crocker v. Commissioner of Correction*, 126 Conn. App. 110, 131-32, cert. denied, 300 Conn. 919 (2011) (Court declined to second-guess counsel's decision not to introduce statement which risked inculpating client.)

[32] In addition, petitioner failed to present the Sutton investigators who may have been able to testify to Thomas' statements. Once again, petitioner is attempting to carry his burden of proof with inadmissible hearsay evidence. Further, he has failed to establish that Sutton's agents would have been available to Sherman in 2002; petitioner has produced no evidence that his father would have waived his privilege and allowed the investigators to testify. Finally, even if Sherman could have produced the investigators as witnesses, such a tactic involved risk: not only was Thomas' statement to them prejudicial to the petitioner as explained above, waiving the privilege may have enabled the state to introduce *petitioner's* statements to the investigators and other information inimical to the defense.

Finally, as with the Bryant accusations, Sherman had a sound strategic reason for not presenting competing third-party culprit defenses. As Sherman testified, he did not believe it was in his client's interest to "lay out the buffet table." HT 4/17: 151-52. Sherman reasonably chose to present his strongest third-party defense and to eschew diluting it with evidence that was insufficient to connect Thomas to the murder. *See Williams v. Commissioner of Correction*, 142 Conn. App. 744, 755 (2013) (Attorney's choice of one defense over another possible defense was a reasonable strategic decision.)

**F. Petitioner has not carried his burden of proving Sherman's presentation of his third party defense constituted ineffective assistance of counsel or that he was prejudiced thereby [33]**

Petitioner claims Sherman was ineffective with regard to his presentation of his third party defense in three ways: 1) he did not make effective use of the information contained in the tape recorded interview of Dr. Kathy Morall and Littleton; 2) he deprived petitioner of the use of the materials in the profile report and crime lapse data by not obtaining them prior to trial; and 3) he "sabotaged" the third party claim in his closing argument. PB at 16. Petitioner failed to carry his burden of deficient performance or prejudice with regard to any of these allegations.

First, with regard to the tapes of the Morall interview, Sherman testified that he reviewed the tapes prior to trial. HT 4/30: 118. Indeed, Sherman used portions of the taped interview at trial in an attempt to convince the jury that Littleton had admitted to the crime. See T. 5/13: 115-18; *see* PE 58. In addition, Sherman cross examined Littleton on alleged inconsistencies between what he had said to Dr. Morall and statements he had made on other occasions or during his

[33] This claim, which is presented on pp. 16-22, of petitioner's post-trial brief, is not properly before the court as it was not included in his Petition. Respondent therefore objects to its consideration and incorporates the arguments advanced in its July 1, July 9, and July 12 e-mails regarding another claim never properly presented in this proceeding. See Court Exh. IV (J) (P), and (R). Holding petitioner to the claims he actually raises in his petition is crucial lest the entire pleading process becomes meaningless. "[I]t is axiomatic that a petitioner is bound by his petition.... 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.... While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations ... it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised.' (Internal quotation marks omitted.)" *Greene v. Comm'r of Correction*, 131 Conn. App. 820, 822 (2011).

testimony. See e.g. T. 5/13: 12-15, 16-20. The mere fact that habeas counsel has identified other possible inconsistencies which could have been explored is not enough to establish counsel was not functioning as the counsel required by the Sixth Amendment. Simply because Sherman chose to develop some inconsistencies and habeas counsel may have highlighted others does not mean either approach is constitutionally deficient.

This is especially so where, as here, the avenues of further cross-examination suggested by habeas counsel are largely collateral and inconsequential. For example, counsel faults Sherman for not cross examining Littleton on the description he gave Dr. Morall of his brief trip outside to check on a "fracas." At trial, Littleton testified that he went outside at about 9:35 or so "in response to Nanny Sweeny's request that I investigate some noise out by where the revcon camper was parked, I went out the front door and went over to the driveway area where the revcon camper was parked. And it was a cold still night with no wind and I heard some rustling in the leaves. I was spooked and returned to the house." T. 5/13/02 at 27-28. When asked if he considered it suspicious, Littleton replied "yes" and stated: "Because there was no wind and the noise sounded like, sounded like an animal or people to me. I didn't have a flashlight." *Id.* at 28. Despite the minor variations of language, the portion of the Morall tape that petitioner suggests he should have used in cross does not materially differ from this testimony. Further, it must be remembered that as an alleged prior inconsistent statement, if Sherman had asked Littleton about his statement to Morall, the jury would be limited to considering any inconsistency on the issue of credibility; petitioner would not get the benefit of the jury's substantive use of the out of court statement. See T. 5/13: 15-16. (Court gives limiting instruction on use of inconsistent statements from Morall interview).

With regard to the other inconsistency suggested by counsel, concerning who went to Windham the next day, what vehicle they took, and whether or not Rushton Skakel, Jr. drove, Littleton's memory was apparently faulty during his interview with Morall. Nevertheless, had Sherman attempted to impeach Littleton with his statements to Morall, the state could have

easily brought out the fact that he had no opportunity to review his prior statements to refresh his recollection before the Morall interview. Further, these inconsistencies do not concern matters central to the issues before the jury. In addition, under cross examination, Littleton admitted that his memory, other than for the night of the murder, is "less clear" stating "other than the fact we drove up to Windham and I will leave it at that." T 5/13: 30.

While petitioner faults Sherman for not introducing Littleton's statements to Morall regarding his sex drive and preferences in women; PB at 19; he has suggested no basis on which these statements would be admissible. Matters related to character and propensity are inadmissible except in a few carefully delineated circumstances not present here. See Conn. Code of Evid § 4-4 (evidence of character is inadmissible for the purpose of proving that a person acted in conformity with the character trait on a particular occasion); §4-5 (Evidence of other crimes, wrongs or acts is inadmissible to prove the bad character, propensity, or criminal tendencies of that person).[34]

Finally, although Sherman did not question Littleton about any hope of collecting a reward, he did question Mary Baker, Littleton's ex-wife on this. T. 5/14: 46. She denied any such expectation. *Id*.[35] Further, the state asked Littleton whether, aside from asking David Moxley if

[34] Similarly, petitioner has suggested no basis on which Sherman could have properly cross examined Littleton on what habeas counsel has characterized as "Littleton's history of violence as a child." PB at 18;see Conn. Code of Evid §§4-4, 4-5. The only incident petitioner points to is Littleton's statements to Morall and a polygraph agent that, once at age twelve, he and a friend "swatted" or "whacked" a few frogs in a pond while golfing. DVD#5 at 15:00, DVD #6 at 9:55. Not only would it have been improper for Sherman to attempt to cross examine Littleton on such an irrelevant and inadmissible matter, doing so would risk exposing the context in which these statements were made. Littleton reveals his singular experience with frogs as a point of contrast with the cruelty to small animals in which Michael Skakel engaged. Littleton discusses an incident on a golf course, following the murder, in which Michael bashed a chipmunk's head in with a golf club and "crucified" it with golf tees on the 17th hole, and then bashed in the head of a squirrel and stuffed it in the eighteenth hole. Even more disturbing is Littleton's description of Michael the day after Moxley's body is found, engaging in what he calls "the indiscriminate killing of small living objects." DVD #6 at 9:54:29-55. Littleton states that "Michael just went nuts." *Id*.; see also DVD#6 9:57 (describing Michael as "chasing after small little animals and just blasting the shit out of them"). It would have been foolhardy for Sherman to proceed down a road that may have led to the jury's exposure to such prejudicial information.

[35] Impeaching Baker was, in many ways, more important to the defense than impeaching Littleton. Littleton admitted that he had told Morall he made admissions to Baker. It was not until the time of trial that Littleton realized Baker had lied to him when she told him he had made admissions during an alcoholic blackout. T. 5/13 : 150-51. Therefore, Baker's testimony that she made up the story about Littleton's supposed admissions was much more damaging to the defense than Littleton's testimony, and impeachment of Baker was therefore more valuable. *See* T. 5/13: 165-68.

he would pay for a sodium pentothal test, he had ever asked anyone for money with regard to his participation or cooperation in the investigation. Littleton answered: "no." T 5/13: 147.

As to the profile reports (PB: 20-22, 26-27) petitioner contends that Sherman was remiss in not using the information contained in those reports in his defense.[36] In particular, petitioner suggests Sherman should have cross-examined Littleton on an allegedly inconsistent statement in the report and should have attempted to introduce the opinions expressed by the authors of the reports. PB at 21.

Neither of these was a viable option. The reports are not a prior statement of Littleton's so they present no basis on which to cross examine him as to inconsistencies. Even if they are determined to reflect such statements, however, the only inconsistency suggested by petitioner – how and by whom the decision was made to travel to Windham a day and a half after the murder – was thoroughly explored at trial. See T. 5/13: 17, 20, 23, 175.

As to the opinions expressed by the investigators who authored the reports in 1991 or 1992, petitioner has again suggested no basis on which their opinions would be admitted. Indeed, such opinion evidence would be irrelevant, of no assistance to the jury, and clearly inadmissible. See Conn Code of Evid. § 7-1.

With regard to his blanket assertions as to the importance of the information in the profile reports; PB at 26-27; petitioner suggests that counsel can be ineffective in failing to uncover information which, although not itself admissible leads to admissible evidence; PB at 27, n 46. While that may be true in certain circumstances, in order to carry his burden under *Strickland,* petitioner must establish what admissible evidence could have been uncovered. It is not enough now, more than a decade after the verdict, to assert the *possibility* of evidence being discovered. Petitioner's burden at the habeas trial was to *produce that evidence* so that it may be evaluated under *Strickland* and in light of the evidence admitted during the criminal trial. This

[36] Sherman testified in this proceeding and during the petition for new trial hearing that he had all the information contained in the profile reports and crime lapse data prior to trial. HT 4/17:10405; PT 4/19: 195-212.

he has failed to do.

Finally, petitioner's complaint with Sherman's closing argument is really a disagreement over the best way to approach a third party claim. Sherman chose to maintain credibility with the jury by not arguing that the evidence proved Littleton murdered Moxley, as it clearly did not, but rather to emphasize Littleton's alleged admission and argue it was more reliable than the evidence of petitioner's admissions. While another equally competent defense attorney may have launched a more aggressive attack on Littleton, petitioner has failed to demonstrate how Sherman's reasonable, and legally correct, argument was constitutionally deficient or prejudicial.

**G. Petitioner has failed to prove that the Morall report was suppressed, exculpatory or material as required to establish a *Brady* violation; further petitioner has failed to prove that Sherman was ineffective in not renewing his requests for the report or that he was prejudiced thereby**

Petitioner was permitted, over respondent's objection, to amend his petition and add a third count, alleging that the state suppressed Dr. Kathy Morall's report in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and paragraph 357 of the First Count alleging that "[t]rial counsel failed to pursue a *Brady* claim, or make any other pertinent claim, concerning the document submitted by the State under seal on or about April 24, 2002, namely a psychological crime profile report authored by Dr. Kathy Morall, and failed to make an adequate record for appellate counsel." ¶ 357, p. 64 Fourth Amended Petition dated May 17, 2013.

Before responding directly to petitioner's claims, it may be beneficial to clear up the confusion surrounding this issue. As Court's Exh I and the pertinent pleadings from the criminal trial reveal[37], Sherman was aware prior to trial that Littleton had participated in a police-

[37] See State's 3/28/02 *Motion in Limine;* Defendant's 4/16/02 *Supplemental Discovery Motion for Exculpatory Evidence;* State's 4/19/02 *Motion for a Protective Order;* Defendant's 4/23/02 *Response and Objections to State's Motion In Limine;* Defendant's 4/23/02 *Memorandum of Law in Support of Defendant's Response to State's Motion in Limine re: Admissibility of Third Party Culprit Evidence*; State's 4/29/02 *Notice of Disclosure; Order* 5/6/02 (Kavanewsky, J.).

sponsored psychiatric interview. The record from the criminal trial also reveals that Sherman requested, pursuant to *Brady*, a copy of any report generated from this interview.[38]

Thus, any suggestion that Sherman was remiss in not requesting the report under *Brady* finds no support in the record. In addition to his written request, Sherman argued before Judge Kavanewsky on April 26, 2002 that he was entitled to the material the state submitted *in camera.*[39] T. 4/26: 9, 43-45. Further, having been afforded an opportunity to read the Morall report during the habeas proceeding, Sherman testified that he was aware of all of the information in the report prior to the 2002 trial. HT:4/30:114. When asked specifically as to different types of information included in the report—Littletons' psychiatric history, suicide attempt, prior hospitalizations, illegal drug use, arrests and misconduct -- he indicated he knew all of this information prior to trial. HT 4/30: 115-116.

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[38] On April 16, 2002, Sherman requested, pursuant to *Brady*, the reports of any psychological interviews of Littleton, which would tend to inculpate him or imply his presence at the scene of the crime, *including any interviews arranged by the Greenwich Police Department since the date of the murder. See Supplemental Discovery Motion for Exculpatory Evidence*, 4/16/02 at 2. Further, in his 4/23/02 Memorandum, Sherman refers to information he anticipates in response to his supplemental *Brady* claim as excerpts from a 1975 video interview between Greenwich police and Littleton where Littleton supposedly makes admissions to a state-retained psychologist. *Memorandum of Law*, 4/23/02, at 15. Sherman may not have realized at the time that the interview arranged by the Greenwich police took place in 1992. Given this confusion, he may not have realized that he had already been given access to these tapes. See Court Exh I (State's Letter of March 5, 2002 and attached list). Despite this confusion, it is apparent that Sherman was well aware the Littleton interview was arranged by the police. Nevertheless he, as well as the state, seemed to presume the need for a hearing pursuant to *State v. D'Ambrosia*, 212 Conn. 50 (1989) prior to disclosure of materials related to that interview. See *Defendant's Response and Objections to State's Motion in Limine*, and accompanying *Memorandum,* 4/23/02; Court Exhibit A from the criminal trial.

[39] On April 24, 2002, the state submitted the Morall document marked as "Court's Exhibit A," and asked the court to conduct an *in camera* review. Included in that submission was a document indicating it was submitted pursuant to *State v. D'Ambrosia*. The court, in accepting the submission, asked if it related to "some discovery motions that have been going back and forth in recent days," and also the state's motion for a protective order. The state indicated it did. T. 4/24: 139. On April 26, 2002, the court heard argument regarding the state's submission. At the outset, the court clarified that it was reviewing the submission under General Statutes § 54-86c(b) for exculpatory information. T. 4/26/02 at 2. Later, the court indicated it would also review the material to see if it was otherwise discoverable. T. 4/26: 8. Sherman argued that he was entitled to the report. The state, perhaps not realizing it had already made the Morall tapes available to the defendant, indicated it had disclosed the tapes of the crime interview, but not the psychiatric portion of the interview. The court indicated it would take the matter under consideration for a later ruling. T. 4/26: 9. Prior to a ruling by the court, however, the state provided defendant with copies of three VHS tapes (no. 1-3), covering the psychiatric portion of the Morall interview. *See* State's 4/29/02 *Notice of Disclosure.*On May 6, 2002, the court (Kavenewsky, J.) entered the following written order: The court, having reviewed State's Exhibit A in camera pursuant to CGS § 54-86c(b), determine[s] that no material or information therein is exculpatory to the defendant. Said exhibit shall remain under seal."

The fact that Sherman was aware of all the material in the Morall report is not surprising -- the record reveals that the state provided him with all of the tapes of the interview prior to trial. See Court Exh. I; State's 4/29/02 *Notice of Disclosure*. The only other source for the information contained in Morall's report was the police reports given to her prior to the interview. See HT 4/30: 101. Inasmuch as the state provided Sherman with both the police reports and the tapes prior to trial, the petitioner cannot establish that any of the information in the Morall report was suppressed under *Brady.*

Further, the state's *in camera* submission and Judge Kavanewsky's ruling regarding the report further defeats petitioner's *Brady* claim. Petitioner has suggested no basis on which this court can overturn Judge Kavanewsky's ruling.

Finally, petitioner has not argued in his brief that Sherman should have renewed his request for the report following Littleton's testimony. Any such contention is therefore abandoned. *Raynor v. Commissioner*, 117 Conn. App. 788, 796-97 (2009) (petitioner abandoned issue not sufficiently briefed in post-trial brief), *cert. denied*, 294 Conn. 926 (2010). Even if considered, however, petitioner has not suggested any material change in circumstances which would have caused Judge Kavanewsky to alter his earlier ruling. In any event, it is of no consequence since the record clearly shows Sherman had all the information in the report and made ample use of that information in his cross examination of Littleton. *See* T. 5/13: 2-57; 94-118.

**H. Petitioner has not carried his burden of proving deficient performance or prejudice due to Sherman's failure to suppress the tapes obtained from Hoffman**

Petitioner contends Sherman was ineffective for not moving to suppress the tapes the state obtained in 1999, during the pendency of the grand jury, from Richard Hoffman, a ghost writer assisting petitioner in writing his autobiography. Petitioner has failed to carry his burden of proving either ineffective assistance or prejudice.

First, as to the claim of deficient performance, petitioner has failed to prove what specific actions a reasonably competent criminal defense attorney would have taken that would have resulted in the suppression of the tapes. Although petitioner speculates that Sherman could

have filed a motion to intervene in the grand jury proceedings; PB at 29; he has provided no authority indicating this highly unusual move would have met with any success. Even if there were a vehicle for him to intervene, however, petitioner has not identified the basis for a suppression claim.

The audio recording of petitioner describing his activities the night of the murder and the next morning was given to Inspector Frank Garr by Richard Hoffman in response to an interstate summons. *See* General Statutes §54-82i. The summons directed Hoffman to appear before a Connecticut Grand Jury and bring with him records, tapes, and other materials being used in the preparation of the autobiography he was "ghost writing" with Michael Skakel. PE 108.

Petitioner argues that this summons lacked prior judicial oversight, and therefore, in order to satisfy the Fourth Amendment, the state was required to provide Hoffman a post-service opportunity to contest; see PB at 30, n. 49. Petitioner's argument fails as the record makes clear that the interstate subpoena process employed provided both prior judicial oversight and an opportunity to contest the summons after service.

As the copy of the interstate summons admitted into evidence indicates, two judicial authorities, one in Connecticut and one in Massachusetts, approved the summons. See PE 108. Judge George Thim attested that the information supplied in the application by the state's attorney established that Richard Hoffman was a material and necessary witness and that the records described in the application were material and necessary to the ongoing Grand Jury investigation. As Exhibit 108 reveals, it was left for a Judge of the Superior Court of Massachusetts to sign the actual Interstate Summons.

Also included within that exhibit is an application by the State's Attorney to a Massachusetts court for an order requiring Richard Hoffman to appear before a Massachusetts court and show cause, if any there be, for why he should not be required to appear before the Connecticut Grand Jury with the records described in the application. The summons, therefore, clearly advised Hoffman that he could contest the summons in a Massachusetts court if he so chose.

As Frank Garr explained, it was up to the Massachusetts officer who accompanied him to Hoffman's residence to serve the documents on Hoffman. HT 4/19: 12-13. The return of service, which the officer presumably filled out, reads: "Then and there I made service of the within Order by reading the same in the presence and hearing, leaving a true and attested copy hereof in the hands at the last usual abode of Richard Hoffman, 3 Gladstone Street, Cambridge, Massachusetts, 02140." PE 108.

The final document in PE 108 is a waiver, whereby Hoffman could waive his opportunity to contest the summons if he so chose. Hoffman testified that he may have been asked to sign something saying he turned them over voluntarily, "but I don't recall." HT 4/18: 91. Nevertheless, whether he signed the written waiver or not, Hoffman's actions, in voluntarily turning over the material to Garr, and later voluntarily appearing before the Grand Jury, indicate he did in fact waive his opportunity to contest the summons. See HT 4/19: 14-18, HT 4/18:92.

Moreover, although Hoffman testified that he did not read the summons or receive a copy, it is doubtful that is the case. Not only was the Massachusetts officer required to attest in his return that he read the summons to Hoffman and left him a copy, but, as a practical matter, part of the purpose of a summons is to supply the witness with information as to when and where he or she should appear. That purpose is not served if the witness is not given a copy of the subpoena so that the information he or she needs is available. Further, Hoffman obviously knew when and where to appear to testify because he did appear before the Grand Jury. HT 4/18; 92. In addition, he knew what materials were sought in the summons as he left the officers upstairs, went to basement to retrieve them, and returned with the requested information. Therefore, despite Hoffman's testimony to the contrary, which may have been due to an understandable lack of recall some 14 years after service, the record reasonably suggests he was aware of the contents of the summons.

Further, petitioner's claim of "trickery" should be rejected. Garr denied coercing or deceiving Hoffman; he testified that Hoffman gave the material to him voluntarily. HT 4/19: 12-18.

Sherman corroborates this testimony as Hoffman informed him he turned the material over voluntarily. HT 4/16: 193, 202; HT 4/17: 164. The voluntary nature of Hoffman's surrender is further supported by the uncontested fact that, after giving Garr the material, Hoffman invited him to stay and have coffee. HT 4/18: 102-4; HT 4/19: 16.

In addition, although the summons required Hoffman to bring the materials when he testified, Garr believed, correctly, that he could take the materials with him if Hoffman surrendered them voluntarily. HT 4/19: 17, 18. Moreover, even if Hoffman felt that he was given no choice in the matter, petitioner has suggested no legitimate claim, or vehicle for presenting a claim, that would have succeeded in preventing Hoffman from bringing the materials with him to the Grand Jury. The most that could be said, therefore, is that the state had access to the tapes sooner than they would have otherwise. Because the state's access to the tape recordings was inevitable, however, petitioner has not established a meritorious fourth amendment claim that Sherman should have raised. *See State v. Badgett*, 200 Conn. 412 (1986) (inevitable discovery).

In addition, petitioner has presented no authority in support of his claim that the presence of a contract and confidentiality agreement confers a reasonable expectation of privacy on petitioner regarding conversations he had with a third party. Courts have long held, under the "third party doctrine" that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland,* 442 U.S. 735, 743-44 (1979). Petitioner plainly cannot establish a reasonable expectation of privacy in his conversations with Hoffman.[40]

In any event, petitioner cannot rely on the confidentiality agreement and contract to establish an expectation of privacy, (i.e. "standing") where, as here, Sherman was unaware of

[40] The fact that Hoffman recorded his conversations with petitioner is of no moment. Whether Hoffman merely listened attentively, or took notes, or, as here, recorded the conversation does not change the analysis. Once petitioner made statements to Hoffman he took the risk that Hoffman would reveal them to others, including law enforcement.

the existence of these agreements. HT 4/17: 165; HT 4/18: 191; HT 4/26: 119. Moreover, as Sherman testified, Hoffman told him he gave the tapes and other materials to Inspector Garr voluntarily. HT 4/17: 164; HT 4/26: 119. Therefore, Sherman had no information on which to build the argument petitioner suggests he could have made.

Finally, even if Sherman had somehow succeeded in getting the tapes suppressed, there would have been no legitimate basis on which to prevent Hoffman from testifying to the conversations he had with petitioner. Petitioner's conversation with Hoffman regarding his activities the night of the murder would have been admitted at trial regardless of whether the tape recordings were admitted. Conn. Evid Code § 8-3 (1). Under such circumstances, petitioner cannot establish prejudice.

Further, as Sherman testified, he knew the jury was going to hear the "masturbating in a tree" story from Michael Meredith and Andy Pugh. Because he could not prevent the jury from hearing the story all together, Sherman saw some benefit in petitioner telling the story in his own voice through the tapes. HT 4/17: 166. In Sherman's estimation, this was beneficial because it functioned as petitioner's direct testimony, without the risk of cross-examination. Sherman also felt there was some benefit to letting the jury hear his client's voice; he felt it humanized his client and would give the jury a sense of getting to know him. HT 4/27: 120-21. In addition to all else, therefore, Sherman's reasonable strategic decision precludes a finding in petitioner's favor.

**I. Petitioner has not carried his burden of proving ineffectiveness or prejudice with regard to the book deal allegations**

The petitioner next claims that his trial counsel was ineffective for failing to obtain and present evidence regarding an alleged "book deal" between Inspector Frank Garr, the lead investigator for the State's Attorney's Office at the time of the petitioner's trial, and Leonard Levitt, a freelance writer who reported on the trial. Petitioner's claim founders on the lack of any evidence such a deal existed at the time of trial. Indeed, as Judge Karazin found, there was "no evidence that, at the time of trial, Garr had any expectation of financial gain from a book Levitt might one day write." App. :A19. As argued previously, petitioner is not entitled to a second bite

at the apple with regard to this important factual finding; *see* RPB, pp. 49-54.

In any event, the evidence from this proceeding lends further support to Judge Karazin's finding. Timothy Dumas, one of the persons Sherman thought had told him of the deal prior to trial, testified he had no such knowledge. HT 4/24: 3. Further, Sherman testified that after hearing rumors, he investigated them -- calling his media and publishing contacts -- and was unable to verify them. HT 4/16: 132-33; HT 4/17: 128.

Plainly, Sherman's memory of having heard rumors is not the type of evidence on which to find the existence of a book deal, especially where his memory has been proven faulty with regard to at least one supposed source of the rumors.[41]

Having failed to prove the existence of Garr's financial interest at the time of trial, petitioner has failed to show Sherman was ineffective in not attempting to present evidence on this point. Indeed, on the present state of the record, Sherman's unsubstantiated rumors do not even provide the requisite good faith basis an ethical attorney would need to introduce the issue at trial.[42]

Moreover, the petitioner has failed to prove prejudice. Indeed, he offers no suggestion as to how the supposed deal affected his trial in any way. Importantly, as Judge Karazin found and the Supreme Court affirmed on appeal, petitioner produced no evidence of wrongdoing on Garr's part. *Skakel v. State*, 295 Conn. 447, 508 and n. 44 (2010). Accordingly, petitioner has failed to carry his burden of proof on this claim.

**J. Petitioner has not carried his burden of proving ineffective assistance or**

[41] Petitioner speculates that Mark Fuhrman could have confirmed the rumors Sherman heard, yet he failed to produce Fuhrman as a witness in this proceeding. Given the inaccuracy of Sherman's memory as to Dumas, it cannot be assumed Sherman is correct in his recollection of Fuhrman's opinion either.

[42] As Levitt made clear in his testimony in this proceeding and the previous one, he wrote every word of the book *Conviction*; Garr wrote nothing. Therefore, petitioner's invitation to this court to base its decision on passages Levitt wrote should be rejected. The book is, of course, hearsay not fitting within any exception and not admitted for substantive purposes. Moreover, the book obviously reflects Levitt's perspective and cannot be taken as reflecting Garr's. Further, Garr denied making the statement about stopping the Skakels at the end of the book – an obvious literary flourish to provide a dramatic ending. HT 4/19: 9-10. But even if Garr made such a statement, a law enforcement officer's dedication to justice includes a desire to see that those who are guilty not escape justice. After decades in which petitioner eluded justice, it is understandable that one convinced of his guilt would be ready to keep fighting for justice in the event of a new trial.

**prejudice with regard to the few instances in which the Sutton investigation was mentioned at trial**

As petitioner acknowledges, "the substance of the Sutton reports were not entered into evidence, and none of the Sutton investigators testified at trial." PB at 35. The only evidence admitted at trial regarding Sutton came from the few instances in which witnesses testified to their contact with Sutton investigators – obviously a matter not covered by any privilege.[43] Further, as the undisputed evidence at this hearing reveals, a Sutton employee leaked the Sutton reports to author Dominick Dunne and the press prior to the Grand Jury proceedings. HT 4/17: 138. The substance of the reports were published in the press and in Mark Fuhrman's book before the Grand Jury convened. HT 4/19: 34-35; 4/25: 75. Therefore, the reports had lost whatever confidentiality they may have possessed *prior to the time* Sherman represented petitioner.[44] Nevertheless, petitioner contends Sherman was ineffective for not demanding the state "return the privileged materials and prohibit the state from using any of the information contained within the privileged reports in their investigation and at trial." PB at 35. Shortly thereafter, however, petitioner contends that it would have been in his interest to have the substance of the reports introduced and the Sutton investigators testify at trial because otherwise the jury was left to speculate as to the purpose of their investigation. PB at 35. Petitioner has not carried his burden of proving ineffectiveness or prejudice with regard to these allegations.

It is axiomatic that the "burden of proving the facts essential to the privilege is on the person asserting it. . . . This burden includes, of course, the burden of proving the essential element that the communication was confidential. *State v. Hanna,* 150 Conn. 457, 466, 191 A.2d 124, 130 (1963). Here, given the fact that the report was in the public domain prior to the time Sherman began representing petitioner, petitioner has failed to establish how Sherman could

[43] *See* T. 5/7/02 at 108-9 (John Moxley); T. 5/15/02 at 149 (Attorney Emanuel Margolis);T. 5/20/02 at 166-69 (Andy Pugh); T5/22/02 at 35-38 (James "Terrien" Dowdle); T. 5/28/02 at 65 (John Skakel); T. 5/29/02 at 54 (Julie Skakel).

[44] Sherman testified he was retained by the petitioner in July 1998. HT 4/26: 124-25. By that time Levitt's articles and Fuhrman's book had already been published. *Id*.

prevail on a claim of confidentiality. Even more basically, however, petitioner ignores the fact that whatever privilege may have existed with regard to the report was not the petitioner's to assert – it belonged to his father, Rushton Skakel, who had hired Sutton Associates. HT 4/26: 87. Sherman could not assert a privilege that his client did not possess.

Further, because the reports were in public domain, there was no way to prevent the state from learning about their contents, even assuming Sherman was in a position of asserting a privilege. Plainly, the state could not be prevented from reading newspapers or Fuhrman's book. Therefore, petitioner cannot show that Sherman's failure to attempt to retrieve the state's copy of the Sutton report prejudiced him; the state had access to the same information in published reports. Moreover, at the time the state received a copy of the report from Dominick Dunne it had no reason to believe it was subject to any privilege. The state had already been contacted by Sutton in their (fruitless) attempt to obtain information about the state's ongoing investigation. HT 4/19: 30-31. Therefore, the state already knew that Mr. Skakel was conducting his own private investigation. Moreover, the Sutton investigators assured the state that they would share the results of their investigation with law enforcement, regardless of what the investigation uncovered. HT 4/25: 77.

Therefore, petitioner has failed to prove Sherman was ineffective in failing to assert a privilege that was not his to assert, or that had he asserted it he would have been able to establish the confidentiality of already-published material. Further, even if he had succeeded in retrieving the state's copy of the Sutton report, he could not require the state to ignore information already made public.

In addition, petitioner has not sustained his burden of proving prejudice. As mentioned, the only evidence regarding Sutton produced at trial concerned witnesses' testimony about their contacts with Sutton Associates. Obviously, their testimony, based on their personal knowledge, implicates no privilege or claim of confidentially. *See State v. Morowitz,* 200 Conn. 440, 451, 512 A.2d 175, 182 (1986) (Victim's testimony of defendant's prior assault was based on

personal knowledge independent of the erased records).

Further, petitioner's claim that Sherman should have put on evidence regarding the purpose of the Sutton investigation ignores the fact the jury heard evidence on this point. Andy Pugh testified that petitioner told him Sutton's purpose was "to try clear their name (sic)".T. 5/20: 166. Moreover, petitioner misconstrues the nature of the inference the state, in summation, was asking the jury to draw from the Sutton investigation. The state's summation emphasized the correlation between the Sutton investigation and the urgency with which petitioner seemed to want to get his masturbating-in-a-tree story disseminated. In particular, the state remarked on Pugh's testimony that after petitioner had shared the "tree story" with him, he urged Pugh to talk to Sutton investigators. The jury could reasonably conclude that petitioner was concerned about providing an explanation should his semen or DNA be found on the victim's effects. T 6/3/02 at 11-12, 17, 94, 110, 113. Thus, the state did not argue that Sutton was hired to cover up the crime, but that petitioner was trying to provide an explanation should his semen or DNA be discovered.

**K. Petitioner has not carried his burden of proving ineffective assistance or prejudice with regard to the decision not to present an expert such as Ofshe**

The petitioner complains that Attorney Sherman should have consulted an expert regarding the "coercive nature of the environment at Elan" and the "culture of snitching" at the school in order to attack the testimony of several witnesses who attended Elan School at the same time as petitioner, and testified that he made admissions - with varying degrees of specificity – about the Martha Moxley murder. PB at 42. He contends that Sherman's representation was deficient in failing to offer expert testimony regarding false confessions to blunt the impact of that testimony. *Id*.

In support of this claim, petitioner presented testimony from Dr. Richard Ofshe, a purported expert on false police confessions.[45] From his "limited" review of the trial testimony; 4/1/13

[45] Dr. Ofshe also claimed that he had developed expertise in the culture of high-stress organizations, principally the Synanon organization in California. He admitted, however, that he had not conducted studies in this area for approximately fifteen years. HT 4/22: 39.

Petitioner's Expert Witness Disclosure, Attachment A ("Ofshe letter") at 4. Ofshe opined that the petitioner did not "admit to other Elan students that he murdered Martha Moxley, but rather adopted a 'compromise strategy,'" which involved "a shift from repeated flat-out denials of his having any involvement in the death [of] Martha Moxley to his subsequent response that he might have killed Martha but didn't have any memory of doing so." HT 4/22:50. According to Ofshe's understanding of the evidence, the petitioner's "initial position was affirmative, that he had nothing to do with [the murder] … and that the shift was to acknowledge [Elan's] … accusations against him by saying, you may be right, and that the end statement was, I have no memory of having done anything like that." HT 4/22: 56. Ofshe proffered that, had he been retained by trial counsel, he would have testified that the petitioner's vague statements that he had no memory of killing Martha Moxley were in the nature of opinions, made simply to satisfy those in authority at Elan, and thus should not be considered admissions of any sort. Ofshe letter at 6; T. 4/22: 53.

Dr. Ofshe candidly noted that he had reviewed only a "limited number of pages of the factual testimony and trial record." Ofshe letter at 4. Unfortunately for the petitioner's claim, when confronted with other portions of trial testimony that he had not reviewed, and in which Elan witnesses testified that the petitioner had specifically admitted his involvement in the murder, Ofshe was forced to admit that his "compromise strategy" was inapt. Importantly, when confronted with the trial testimony of Gregory Coleman and John Higgins, both of whom testified that the petitioner made *specific* detailed admissions regarding the Moxley murder, Ofshe admitted, that these statements could not be explained as part of a "compromise strategy". HT 4/22: 60-66.

Thus, petitioner posits an utterly untenable strategy to attack the Elan witnesses. Dr. Ofshe's opinion about the "compromise strategy" would pertain only to the petitioner's non-specific statements to certain Elan witnesses in which he professed to have no memory of whether he had committed the murder, leaving unexplained the petitioner's direct admissions.

What Ofshe failed to grasp was that the witnesses who offered such testimony were presented by the *defense* to establish that petitioner had *not* made any admissions. See T. 5/23:111-124 (Sarah Peterson); T. 5/23: 173-75 (Michael Wiggins); T. 5/23: 209 (Donna Kavanaugh); T. 5/24: 10-14 (Angela McFillin).[46] Sherman presented these witnesses to illuminate some of the more horrific aspects of Elan and to demonstrate to the jury that even when confronted aggressively by the administration, he did not admit to the murder. *See* HT 4/26:90.[47] As Sherman explained, the Elan witnesses he presented were the best vehicle for conveying this message to the jury. *Id*.:90-91.

Further, jurors do not need expert testimony to explain what their common sense tells them – any statements made under such coercive circumstances are likely to be unreliable. Expert testimony is generally admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. *State v. Iban C.*, 275 Conn. 624, 634 (2005) *accord* Conn. Evid. Code § 7.2. Where, however, the expert does not have skill or knowledge *on the particular subject at issue* which is beyond the ken of the average juror, it is error to admit his or her testimony. *State v. George*, 194 Conn. 361, 372-3 (1984), *cert. denied* 469 U.S. 1191 (1985). As the Second Circuit noted in *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008): "testimony is properly characterized as 'expert' only if it concerns matters that the average juror is not capable of understanding on his or her own. *See United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir.) [cert. denied, 513 U.S. 932 (1994)] ('A district court may commit manifest error by admitting expert testimony where the evidence impermissibly mirrors the testimony offered by fact witnesses, or the subject matter of the expert's testimony is not beyond the ken of the average juror.')[.]" *Id*. Jurors need no

[46] In fact, in its summation, the state agreed the "petitioner admitted nothing in that awful general meeting," and that he never confessed in front of a hundred witnesses. T. 6/3: 122-23.

[47] The statements offered by the state as admissions all occurred in non-coercive conversations with fellow residents. *See* RPB: 13-15; (Coleman, Higgins) 18-19 (Mickey, Arnold, Dunn).

assistance from experts in understanding how brutal tactics may lead to unreliable statements. Had the defense offered testimony on this issue at trial, the trial court would most likely have rejected it, because, as in *State v. George*, *supra*: "the proffered testimony [would be] merely a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence." *State v. George*, 194 Conn. At 372.

Thus, because Ofshe's suggested testimony would have been properly excluded at trial, petitioner cannot establish that Sherman was ineffective in not offering it, or that he was prejudiced by this omission. *See Alvarez v. Comm'r of Correction*, 79 Conn. App. 847, 850 (petitioner, who failed to establish that contested evidence was admissible at trial, failed to show he was prejudiced by counsel's failure to offer that evidence), *cert. denied* 266 Conn. 933 (2003).

In addition to failing to establish that Ofshe's testimony would be admissible under our principles governing expert testimony in general, petitioner failed to establish that the type of expertise Ofshe claims was recognized and admissible in Connecticut courts in 2002.[48] *See Ledbetter v. Commissioner*, 275 Conn. 451, 461-62 (2005)(Counsel cannot be faulted for failing to advance novel legal theory which has never been accepted by the pertinent courts.)

In his testimony, Dr. Ofshe could recall no judicial proceeding in which he was allowed to testify as he proffered here: about the reliability of admissions made in non-police interrogations. HT 4/22:40. Nor does petitioner cite any such authority. One reported case rejected just such testimony. In *State v. Lamonica*, the First Circuit Court of Appeal in Louisiana upheld a trial court's refusal to allow Dr. Ofshe's testimony. There, like here, the admissions in question were made not in response to law enforcement interrogation, but in response to questions asked by members of the defendant's church. 44 So. 3rd 895, 902 (2010). The Court of Appeal noted

[48] Petitioner's reliance on *United States v. Hall*, 974 F. Supp. 1198, 1206 (C.D. Ill 1997) is inapt; Hall concerned police interrogation.

that, in contrast to extensive studies that had been done regarding *police* interrogations, the testimony that Dr. Ofshe proffered in *Lamonica* was subject to "no methodology about false confessions that could be tested, or that would permit an error rate to be determined." *Id*. at 906. The court concluded: "[w]e find the area of research on false confessions caused by high-control groups to be vague and speculative, at best, and such research does not satisfy the standard of *Daubert*, particularly in light of the fact that Dr. Ofshe had not studied or worked on any cases in this particular area for more than ten years." *Id*., citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

This case precisely mirrors the circumstances of *Lamonica*. Dr. Ofshe posited that the petitioner engaged in a "compromise strategy" in order to deflect accusations about the Moxley homicide posed by members of a high-stress organization, one that Dr. Ofshe had never studied. Ofshe offers no evidence of scientific research that would support expert opinion testimony regarding the veracity of statements made under those circumstances. Therefore, because petitioner has not established that the type of expertise Ofshe claims would have been recognized by Connecticut courts in 2002, he has failed to prove Sherman was ineffective in not proffering it.

Finally, Sherman testified that he did consider offering expert testimony, and consulted Dr. Elizabeth Loftus and others in this regard. HT 4/18: 63-66. He concluded that expert testimony was unnecessary with regard to the Elan witnesses he intended to offer to demonstrate petitioner had not confessed even when brutalized. HT 4/26: 89-93. And, as for state's witnesses Higgins and Coleman, he took the position that the admissions they offered never occurred.[49] *Id*. As previously discussed, Ofshe's testimony would have been of no benefit in refuting these witnesses as they did not fit within his "compromise strategy" theory. Therefore,

[49] As part of his attack on the credibility of these witnesses, Sherman pointed out the "culture of snitching" at Elan and questioned them on whether they had reported petitioner's admissions to the administration. *See* HT 4/26: 91; T. 5/17: 196; T. 5/16: 218-219.

offering Ofshe's testimony would have been of little benefit, and would have actually undercut Sherman's strategy contesting the occurrence of these admissions. Sherman's considered judgment on this matter must be upheld.

Our courts afford trial counsel great latitude in determining the appropriate strategy to challenge the state's evidence. Indeed, as the United States Supreme Court recently recognized: "From the perspective of [petitioner's] defense, there were any number of hypothetical experts . . . whose insight might possibly have been useful. An attorney can avoid activities that appear 'distractive from more important duties' . . . . Counsel was entitled to formulate a strategy that was reasonable at the time and balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter,* 131 S. Ct. 770, 789 (2011)(citations omitted). Our Appellate Court recently applied this principle in a case involving trial counsel's decision not to call an expert regarding false confessions. *See Wright v. Commissioner of Correction*, 143 Conn. App. 274, 12 (2013). There, the court affirmed the habeas court's determination that counsel did not render ineffective assistance by failing to call an expert on false confessions, noting that "there is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment …." *Id*., quoting *Boyd v. Commissioner of Correction*, 130 Conn. App. 291, 298, 21 A. 3rd 969, cert. denied, 302 Conn. 926, 28 A. 3rd 337 (2011); *see also* Michael T. v. Commissioner, 307 Conn. 84, 101 (2012).

**L. Petitioner has not carried his burden of proving ineffective assistance or prejudice with regard to the admission of pictures of petitioner's size at 15**

Petitioner faults his attorney for not introducing a photograph of Michael Skakel at 15 during the criminal trial. Petitioner has failed to carry his burden of showing either ineffective assistance or prejudice with regard to this claim.

During the criminal trial, the size of the perpetrator was not a significant issue. Obviously, it does not take much strength to kill someone with a golf club – anyone who can swing a club is capable of causing injury or death. Further, as for the strength it would take to drag the body

under the tree, Dr. Henry Lee testified that the drag path indicated the perpetrator changed his hold on the body, dragging it both feet first and head first. This is consistent with someone resting and changing position. T. 5/8: 138-141. Again, the evidence does not suggest only a person of a certain stature could commit the crime. Given the opportunity to rest and change holds, an athletic teenage boy would certainly be capable of dragging a teenage girl's body under a tree. Nevertheless, to the extent a certain amount of strength was needed, petitioner certainly had it. His best friend at the time, Andy Pugh, testified that at 15 Skakel was "very strong" and the best athlete in the neighborhood. T. 5/20: 156-57.

Although petitioner faults Sherman for introducing a 1977 Skakel family photograph rather than one from 1975, Sherman was dependent on his client to provide a suitable photograph. As Sherman testified, the photograph he introduced was the one his client or a family member gave him. HT 4/17: 179-82; 4/18: 3-4. Importantly, in his testimony, petitioner admitted that he failed to supply Sherman with a picture of himself at 15, explaining that he did not have one. HT 4/25: 145.

Further, Sherman had no basis on which to object to the two photographs the state introduced. These photos (PE 53 and 62), which Andy Pugh testified portrayed the Skakel family as it appeared in the mid-70's, were not introduced to show petitioner's stature at the time of the crime. *See* T. 5/20: 145-151. Rather, they were used by state's witness Matthew Tuccaroni to identify the three young people in his barber shop in the Spring of 1976. T. 5/15: 158-168, 185-86, 194-95. Therefore, Sherman had no reason to object to the introduction of these pictures, as they were appropriate to the purpose for which they were introduced.

Nevertheless, contrary to petitioner's arguments, Sherman did introduce evidence of petitioner's size at the time of the crime. When Julie Skakel testified, Sherman asked her to identify Michael in the 1977 family photograph. He then inquired whether petitioner was of the same stature in 1975. Julie Skakel replied that he was smaller and thinner. T. 5/29: 65-66.

Finally, although petitioner faults Sherman for not introducing a photograph of him at 15, he

failed to provide one to Sherman in 2002, and has failed, even now, to produce a suitable photograph. HT 4/25: 145-46.[50] Sherman can hardly be held ineffective for not introducing a photograph of his client at a given age when his client is unable to produce such a picture. Further, as indicated above, the perpetrator's size was not a crucial issue at trial.

**M. Petitioner has not carried his burden of proving ineffectiveness or prejudice with regard to the selection of two jurors**

Petitioner contends that Sherman rendered ineffective assistance in selecting two jurors, Laura Copeland and Brian Woods. Petitioner's claim fails as he has not proven either ineffective assistance or prejudice.

Sherman testified that he exercised his reasonable professional judgment in the selection of both jurors. He felt both were fair-minded and would make good jurors. He noted that Laura Copeland had some experience in judging the credibility of substance abusers which he felt might be helpful. As for Brian Woods, he was familiar with Mr. Woods and felt he would be a good juror for the defense, stating that he has selected police officers and lawyers to be jurors in other cases if he felt they could be fair to the defendant. *See* HT 4/26: 96-97; HT 4/16: 178; HT 4/17: 169.

Although petitioner's witness, Michael Fitzpatrick, disagreed with Sherman's decisions, Fitzpatrick did not have the benefit of seeing either juror. He admitted, nevertheless, that part of selecting jurors is assessing how they relate to you as the defendant's representative. HT 4/24: 15-17. Someone who, on paper, might seem to be an excellent choice, may reasonably be rejected because he or she refuses to make eye contact or otherwise conveys some deep uneasiness. Conversely, someone who may seem a questionable choice on paper may

[50] Petitioner, who was born on September 19, 1960, turned 15 shortly before the murder in October 1975. At the habeas hearing, petitioner introduced yearbook photographs from the Brunswick School's 1974, 1975 and 1977 yearbooks. HT 4/19: 146-50. None of these would have depicted petitioner in the fall of 1975. As Neil Walker explained, yearbooks come out at the end of the school year, so the 1975 yearbook would have been published in the spring or early summer of 1975. It would contain pictures for the entire school year, which means fall of 1974 through spring of 1975. Therefore, pictures of the petitioner contained therein depicted him as he appeared at age 13 or 14. The 1974 yearbook would have pictures of petitioner at age 12 or 13, and pictures in the 1977 yearbook would depict petitioner in the fall of 1976 through spring of 1977. *See* HT 4/19: 164-66. Therefore, none of the pictures petitioner produced at this hearing depict him as he appeared in the fall of 1975.

nevertheless appear engaged, responsive, and receptive. Selecting jurors is the quintessential area in which it must be recognized that two attorneys may make different choices without either being ineffective.

Even if Sherman's choice in selecting these jurors is criticized, petitioner cannot prove prejudice. In order to do so, he would have to establish that if Sherman had not agreed to these two jurors, the two jurors selected in their stead would have been more favorably disposed to petitioner and, not only would they have voted to acquit, but they would have succeeded in changing the guilty votes of the ten other jurors. Obviously, petitioner cannot even approach meeting his burden on this claim.

**N. Petitioner has failed to prove either ineffectiveness or prejudice with regard to his claims as to the reason his family sent him to Elan**[51]

The evidence from both the criminal trial and this trial establishes that petitioner's father, perhaps at the urging of Thomas Sheriden, sent him to Elan. Petitioner testified to this fact in this proceeding; HT 4/25/13 at 94, 147; and while at Elan he told both Dorothy Rogers and Greg Coleman that his family had sent him to Elan to avoid the police investigation. In fact, his statement to Rogers went further, admitting as he did that his family thought he was responsible for the homicide.[52] T. 5/16: 138.

Despite this evidence, and his own testimony to the contrary, petitioner asserts in his brief that he was sent to Elan to resolve a pending drunk driving charge. PB at 53-54. He then claims that the state "knew full well that the Petitioner was not placed in Elan as a result of this investigation", while asserting "the Greenwich police knew. . . [petitioner was at Elan] "for treatment relative to his drunk driving charge." PB at 54. Petitioner has failed to produce one iota of evidence that reasonably supports either assertion. Further, petitioner's testimony and prior statements are to the contrary.

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[51] Respondent objects to the consideration of this claim which was never properly pled or raised by petitioner, for the reasons included in Respondent's e-mails of July 1, July 9, and July 12; Court Exh IV (J), (P), (R).

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

In his testimony explaining his placement in Elan, petitioner placed greater emphasis on his failure in school than on his drunk driving arrest: "Well, I've had a DWI at 16; that was one incident, but when my father flew up three days after I was convicted, he – I meant convicted after I was kidnapped, his reasoning for me being in Elan was, if you only did better in school, I wouldn't have to send you to this damn place." HT 4/25: 147. In response to a follow-up question, as to whether his father sent him to Elan due to poor grades, petitioner answered, "He always – yeah, absolutely, I failed and – yeah, yeah." *Id*.

The police reports cited on p. 54 of petitioner's brief are not to the contrary. Before considering their contents, however, it must be recognized that these reports are hearsay and have never been admitted for their truth. Moreover, petitioner has not suggested, and respondent is not aware, of any basis under which these reports could be so admitted. Even taking these reports at face value, they do not prove that petitioner was sent to Elan by the court to resolve his drunk driving charges. Indeed, such an inference would be unwarranted; remanding a juvenile to a place like Elan for conviction on minor traffic charges (which apparently did not include a plea to drunk driving) would seem an unlikely sanction. It is even more unlikely that a New York Court (sitting on a Sunday) would remand a juvenile to a Maine facility. And it borders on preposterous to assume the New York court arranged for a private jet to transport petitioner.

Further, the state's argument at trial, properly understood, allowed for the fact that the petitioner's father may have had concerns in addition to his son's involvement in the murder which contributed to his decision to send him to Elan. As the state argued:

> Clearly, the defendant had a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort but why exactly so drastic a resort.
>
> You heard from Rogers and Coleman he was hiding from the police is probably part of it. It is likely also, if it was a private juvenile justice system, basically a family's response is what can we do to make sure this doesn't happen again.

T. 6/3/02 at 130.

Thus, while the state did not mention the drunk driving allegations (which it could not properly do as the police reports indicate there was no conviction, and any conviction was unlikely to be admissible), the state did suggest to the jury other factors that may have contributed to the decision to send petitioner to Elan. Further, the state's additional argument that the ongoing investigation and the father's awareness of petitioner's responsibility for the murder contributed to the decision to send him to Elan; T. 6/3: 130; is based on the evidence – from Coleman and Rogers, as well as the father's revelation to Mildred "Cissy" Ix that Michael admitted to him he may have killed Moxley. *See* T. 5/15: 128.

Sherman cannot be found ineffective, therefore, for failing to object to argument reasonably based on the evidence. Moreover, petitioner is simply wrong in asserting that the jury was not given "an alternative view to consider" as to why his father sent him to Elan. Under questioning by Sherman, Julie Skakel testified that her brother Michael is dyslexic, and that this contributed to the "problems he had with his father education wise and everything else." T. 5/29: 91-92. She explained that "Michael has great difficulty in school listening and it was perceived as more of a behavioral problem than a learning difficulty." *Id*. at 92.

Sherman also elicited from Julie Skakel testimony that the day the chauffeur Larry Zicarelli drove Michael into the city, "that occurred" because Michael had slept with one of his mother's dresses.[53] *Id.* at 93. Julie also testified that Michael did not adjust well to their mother's death two years before the murder. *Id*.

Sherman questioned Julie Skakel as to why her brother was sent to Elan. T. 5/29: 93-94. In doing so, he asked leading questions (presumably to prevent an unexpected and potentially prejudicial response). Sherman asked her if that was due to problems he was having in various schools, and to a problem he had in Windham. Julie answered yes to each question. *Id.* at 94. When the state asked Julie if her father sent Michael to Elan, she stated she did not know who

[53] Zicarelli testified that Michael jumped out of his car on the Triboro Bridge and had to be forced back into the car. Michael told Zicarelli, "he had done something very bad and he either had to kill himself or get out of the country." T. 5/16: 15-23. He also told Zicarelli if he knew what he had done, Zicarelli would never talk to him again. *Id*.

sent him. *Id*. at 95-96.

The state then asked her a series of questions about the turbulent relationship (which she had admitted earlier in her testimony) between Michael and their father. Julie Skakel admitted that Michael's daily drinking, and his use of drugs, probably contributed to the turbulent relationship. T. 5/29: 96-97.

When Sherman attempted to follow these questions by asking Julie if Michael was sent to Elan to hide from the Martha Moxley investigation, the court sustained the state's objection, and struck Julie's negative response. T. 5/29: 97.

Thus, Sherman did elicit an alternate view of why Michael may have been sent to Elan. Yet, as Sherman noted in his habeas testimony, he did not want to go too far into the possible reasons, as this could open the door into prior misconduct and other prejudicial issues. HT 4/16: 110. While he alluded to the problem in Windham, he obviously did not want to elicit the specifics as it would be highly prejudicial for the jury to discover petitioner not only had a drunk driving charge, but, according to the police reports, had attempted to run over a police officer who signaled him to stop.

Further, in this proceeding, when asked by petitioner why he had not put Skakel family friend and lawyer Tom Sheridan on the stand to explain why Michael had been sent to Elan, Sherman responded he would not risk putting Sheridan on the stand for any reason, describing him as a "loose cannon." *Id*. When asked to expand on this, he said he was afraid of the prejudicial information – such as psychiatric issues, misconduct and out-of-control behavior -- Sheridan might reveal about the petitioner. HT 4/18: 53-54. Obviously, he did not want to open the door to this evidence.

Given Sherman's justifiable reluctance to call Sheridan, it is unclear who Sherman could have called for this purpose. When petitioner's father was asked by the state why petitioner was sent to Elan, he claimed he did not remember. T.5/15: 80. And, as Sherman pointed out, anyone called for this purpose would have been cross-examined, and that may have "opened

doors" the defense did not want opened. HT 4/16: 110.

Again, as with numerous other claims petitioner has raised, he has failed to present the evidence he faults Sherman with omitting. Petitioner has presented no evidence, other than his own testimony, as to the reasons he was sent to Elan. And, as discussed extensively by both Sherman and Throne, a reasoned decision was made by the petitioner in consultation with his lawyers not to testify during the criminal trial. Therefore, petitioner has not presented this court with a witness or the evidence he claims Sherman should have introduced at trial. [54]

**O. This court cannot aggregate errors**

As petitioner candidly acknowledges, "Connecticut appellate courts have rejected the idea that a finding of prejudice under *Strickland* can be premised upon the cumulative effect of trial counsel's deficiencies." PB at 56. Inasmuch as this court is bound by the precedent petitioner cites, there is no occasion to revisit this issue in this proceeding.

Nor would such reconsideration be wise. Although petitioner criticizes the controlling decisions for citing to cases where our Supreme Court has rejected aggregating errors on direct appeal rather than habeas; PB at 56; this distinction does nothing to advance his argument. In fact, because a petitioner's burden is higher in habeas, and the state's interest in finality greater, there is less justification for the aggregation of errors in habeas than direct appeal.

Further, if any particular error fails to meet the prejudice threshold of *Strickland,* then it is

[54] Another potential claim identified by the court in its June 25 (Court Exh IV (a)) e-mail has not been briefed by the petitioner and therefore must be considered abandoned. *Raynor v. Commissioner*, 117 Conn. App. at 796. Even if considered, however, the claim that Sherman should have objected or responded to the suggestion in summation that Elan did not receive information on the murder from the police, is fully refuted by the record. First, the formulation of the claim relies on a misinterpretation of the state's argument. In summation, the state questioned why the administration of Elan was accusing petitioner of murder when the police were not. Thus, the jury was asked to consider where Elan got information petitioner was responsible for the murder, not simply general information pertaining to the murder. In this regard, Detective Lunney's testimony that petitioner was not a police suspect during the time he was in Elan is significant. T. 5/29: 166. Lunney also answered "none whatsoever" when asked if the Greenwich police had provided details of the investigation to Elan. *Id.*: 166-167. Even if considered substantively (despite their hearsay nature and untested reliability), the police reports noted by the court do not contradict Lunney's testimony. There is no indication in any of those reports that the police shared information with Elan. Indeed, given that police officers are in the business of collecting rather than sharing information, assuming they shared information with Elan, when the police reports do not support this assumption and Lunney testified to the contrary, is unwarranted.

not the type of error with which the Sixth Amendment is concerned. Although a reviewing court can go straight to prejudice in resolving a claim if it is more easily disposed of on this basis, a court cannot grant relief on a claim unless both prongs of *Strickland* are met. This is as it should be as a defendant is not entitled to either a perfect trial or flawless representation. It is only when an attorney commits an error which is not only professionally unreasonable but also prejudicial that the petitioner's Sixth Amendment rights are implicated. Put another way, errors, even those that might be found unreasonable, do not implicate the Sixth Amendment unless they are also prejudicial. *Strickland v. Washington*, 466 U.S. at 691. Any other standard could result in relief being granted where none of the errors meet the Sixth Amendment's high threshold for prejudice. Moreover, adopting the approach petitioner suggests, will invite the "piling on" of claims, hoping to create the impression of unfairness where none truly exists.

## IV. PETITIONER HAS NOT CARRIED HIS BURDEN OF PROVING AN ACTUAL CONFLICT WHICH PREJUDICED HIS DEFENSE[55]

Petitioner claims that the fee agreement he entered into with Sherman on December 5, 2001 created an actual, or alternatively, a potential, conflict of interest. In this regard, he argues that "[c]ounsel's own personal financial concerns" created the alleged conflict. PB at 40. He further contends that, in order to obtain Skakel's informed consent to continued representation despite the alleged conflict, Sherman was obliged to disclose the IRS liens on his property. PB at 40. As for the prejudice component of his burden, petitioner contends that Sherman neglected to hire experts or conduct additional investigation due to his own financial interests. PB at 41.

Petitioner has failed to carry his burden on all aspects of this claim. Petitioner has failed to establish that either the fee agreement itself, or the agreement coupled with Shermans' tax liens, created an actual or potential conflict. Even if it did, however, petitioner cannot establish

[55] In his petition, petitioner has expressed this allegation in two ways: first as a straightforward *Strickland* claim, and then as a conflict claim under *Cuyler v. Sullivan,* 446 U.S. 335 (1980). Petitioner has not briefed the claim under *Strickland* and therefore this basis is abandoned. *Raynor v. Commissioner*, 117 Conn. App. at 796. Even if analyzed under *Strickland,* however, the claim fails for the reasons discussed herein.

that absent the "conflict" there is a reasonable probability the outcome of the trial would have been different. Further, because the nature of the alleged conflict implicates Sherman's personal interests and does not involve the unique risks of joint representation, petitioner is not entitled to the lesser standard of prejudice formulated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Nevertheless, even under this lesser standard, petitioner cannot establish the alleged conflict adversely affected the representation he received.

**A. Petitioner has not established that the fee agreement he entered into with his counsel created a conflict of interest**

**1. Facts pertaining to the petitioner's claim**

As mentioned previously, Sherman's representation of the petitioner extended over four years. For most of that time, their fee agreement provided for an hourly rate plus expenses. While billing in this manner, Sherman provided his client with detailed monthly billing records. PE 120. During the entire time Sherman was billing in this manner, his client never complained about the expenses or the time for which he billed. HT 4/18: 32-36. Further, as the billing records show, although petitioner was consistently behind in paying Sherman what was owed under the agreement, Sherman continued to work diligently on the case, putting in hours and incurring expenses despite the fact that his client was in arrears in payment. HT 4/18: 36-43; 65-66.

In the Fall of 2001, at a time when petitioner owed Sherman nearly $200,000, petitioner's representatives indicated they were running out of money. *Id*.: 33. Petitioner paid a portion of the arrearage, but insisted on changing their fee agreement from time-plus-expenses to a flat fee. *Id*.: 36-43. Sherman did not want to do this, but felt he had no choice. *Id*. Accordingly, on December 5, 2001 Sherman and petitioner entered into a new fee agreement. This agreement contemplated a $450,000 lump sum payment "which will satisfy the payment for ALL future legal services required to defend you in this criminal case." *See* PE 102. The December 5 letter states that the proposal is being made in recognition of petitioner's "limited resources." The agreement also contemplated that the lump sum would cover the petitioner's $61,615.79

arrearage, the outstanding $36,000 bill of David Grudberg, and the outstanding bill of Vito Colucci. *See* PE 102.

Both Sherman and Throne testified that they and their colleagues, Mark Sherman and Stephen Seeger, continued to work hard, putting in time and incurring expenses to prepare for trial, after this agreement was reached. In fact, both testified that their time and efforts increased during the approximately four months remaining before trial.[56] HT 4/18: 62-68; HT 4/26: 127-29; HT 4/23: 21-26.

**a. Petitioner failed to prove the existence of a conflict**

Before discussing the jurisprudence governing fee arrangements and conflicts, it is important to keep in mind that Skakel was represented in fee negotiations by Attorney Thomas A. Reynolds, III of the Chicago law firm of Winston & Strawn. HT 4/18: 24-30; HT 4/26: 84-87, 126. Thus, even if the agreement is subject to criticism in some respects or viewed as unwise, it was an "arm's length agreement" which petitioner entered into under the advice of independent counsel. Skakel's voluntary and counseled acceptance of the flat fee proposal is evidence he waived any alleged conflict. *See, e.g., State v. Williams*, 203 Conn. 159, 167, 523 A.2d 1284 (1987) ("Just as the right to assistance of counsel may be waived in favor of self-representation . . . so may a defendant waive the right to conflict-free representation."); *see* HT 4/26: 30 (DuBois: The presence of counsel for the client changes the power dynamics and creates a presumption that the client knowingly consents to any conflict.)

Even had Skakel not been represented, however, petitioner's evidence falls far short of establishing an actual conflict. "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of conduct." *United States v. Perez*, 325 F.3d 115, 125 (2d Cir. 2003). An attorney has a potential conflict of interest if 'the

[56] Jury selection began on April 2, 2002.

interests of the defendant may place the attorney under inconsistent duties *at some time in the future*.' *United States v. Kliti*, 156 F. 3d 150, 153 n.3 (2d Cir. 1998)." *Id.* (emphasis added).

Although petitioner argues alternatively that the agreement created either an actual or a potential conflict; see PB at 39, 41; it is clear petitioner must prove an actual conflict in order to prevail. As the United States Supreme Court noted in the landmark case of *Cuyler v. Sullivan*, 446 U.S. at 350, "the possibility of conflict is insufficient to impugn a criminal conviction." "To demonstrate an actual conflict of interest, the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party." (Emphasis in original; internal quotation marks omitted.) *Whyte v. Commissioner of Correction,* 53 Conn. App. 678, 689, 736 A.2d 145, cert. denied, 250 Conn. 920, 738 A.2d 663 (1999). "A mere 'theoretical division of loyalties' is not enough. (Internal quotation marks omitted.) *United States v. Feyrer.* [333 F.3d 110, 116 (2d Cir. 2003)]." *Santiago v. Commissioner of Correction*, 87 Conn. App. 568, 585, 867 A.2d 70 (2005).

Further, although ethical standards and professional norms may be useful in assessing a claimed conflict, they are only guides. *Phillips v. Warden*, 220 Conn. 112, 134, 595 A.2d 1356 (1991). It is clear that "an ethical violation alone is not sufficient to establish a constitutional violation." *Anderson v. Commissioner of Correction*, 127 Conn. App. 538, 551, 15 A.3d 658 (2011). Nevertheless, if ethical norms are consulted, they lend no support to petitioner's claim. Rule 1.5 of the Rules of Professional Conduct, which governs fees, does not prohibit or even caution against a "flat fee" arrangement. Further, as the respondent's expert witness, Attorney Mark Dubois, Connecticut's former Chief Disciplinary Counsel, testified, reasonable "flat fee" arrangements are permissible under Connecticut professional norms. As DuBois further opined after reviewing the December 5 flat fee agreement and the circumstances surrounding it, "there is nothing improper" in the agreement either under ethical norms or conflict jurisprudence. HT

4/26: 26.[57] Moreover, DuBois testified that the presence of IRS liens on Sherman's property does not affect the propriety of the fee arrangement. No ethical canon or rule of law requires lawyers to reveal their personal financial situation to clients prior to entering into a fee agreement. Sherman, therefore, was not obligated to discuss his IRS liens with Skakel.

Nevertheless, according to DuBois, if there was due diligence to be done on the client's behalf, such as researching the land records to see if there were liens, that responsibility fell on Attorney Reynolds – he was the one charged with protecting Skakel's interests with regard to the fee agreement. HT 4/26: 30.

It is clear, therefore, that the mere existence of "flat fee" compensation agreement does not create a conflict of interest, even when Sherman's IRS liens are considered. Nevertheless, as

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[57] DuBois' opinion is well-supported by case law. For instance, the Fifth Circuit Court of Appeals rejected a claim that the state trial court's refusal to grant defendant's requests for experts and funding for those experts created a conflict because his attorney was forced to choose whether to use his own money for these expenses or forego them. *Yohey v. Collins*, 985 F. 2d 222, 227-28 (5th Cir. 1993). The court held that although Yohey called this a conflict "it is not an attorney conflict of interest as the law recognizes." *Id*. at 227. The court found instead that it represented "a straight ineffective assistance of counsel claim concerning whether his counsel erroneously failed to use his own money to aid in funding Yohey's defense." *Id* at 228.

Similarly, in *Williams v. Calderon*, 52 F.3d 1465, 1472-73 (9th Cir. 1995), the court could "discern no conflict of constitutional dimension" from the "fact that payment for any investigation or psychiatric services could have come from counsel's pocket" despite petitioner's contention that this forced counsel to choose between his client's interest and his own. *Id.* The court reasoned that all petitioner alleged was "the same theoretical conflict that exists between an attorney's personal fisc and his client's interest in any *pro bono* or underfunded appointment case. Such arrangements, without more, do not require Sixth Amendment scrutiny." *Id*. at 1473.

In a case alleging that petitioner's failure to pay legal fees created a financial conflict because his attorney had reason to be "concerned with his own financial interest throughout the trial" the Eleventh Circuit Court of Appeals held that such a claim raises the mere possibility of a conflict. Without more, it does not make out a Sixth Amendment claim because "courts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client." *Caderno v. United States,* 256 F. 3d 1213, 1219 (11th Cir. 2001).

Finally, the Supreme Court of California rejected a claimed conflict arising from a fee arrangement materially indistinguishable from that alleged here. *People v. Doolin,* 45 Cal. 4th 390 (2009). In *Doolin*, the defendant claimed that his attorney's compensation agreement "created an inherent and irreconcilable conflict of interest because both counsel's compensation and the costs for investigative and expert services were covered by a lump sum fee." *Id*. at 412. Doolin claimed the agreement "created a financial disincentive for counsel to adequately investigate and prepare his case." *Id.*

California's High Court recognized that, under the agreement, Doolin's lawyer "could maximize his own compensation by cutting expenses for investigative and expert services." The court nevertheless observed that "[t]his theoretical possibility . . . is qualitatively no different from other flat fee agreements that have been held acceptable." *Id*. at 416. Further, while "some attorneys might conceivably take advantage of the agreement's terms to increase their income at the expense of their client's interests . . ." the court would nevertheless "assume attorneys are not so unethical as to neglect their client's interests to advance their own." *Id.* at 416.

argued in Respondent's Pre-Trial Brief, pp. 98-106, even if it is deemed evidence of a conflict or deficient performance, petitioner must prove *Strickland* prejudice, rather than the more forgiving standard applicable to some types of conflicts under *Cuyler v. Sullivan, supra,* in order to prevail. *See Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002) (Although the Circuit Courts of Appeals have "invoked the *Sullivan* standard not only where there is a conflict rooted in obligations to *former* clients. . . but even when the representation of the defendant somehow implicates counsel's personal or financial interests. . . the language of *Sullivan* itself does not clearly establish, or indeed even support, such an expansive application."); *see* Note, *Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant's Burden in Concurrent, Successive and Personal Interest Conflicts*, 60 Washington & Lee L. Rev. 965 (2003).[58]

Applying the *Strickland* standard to the evidence in this case reveals that petitioner has not carried his burden. Petitioner has failed to establish that had he not entered into this particular fee agreement and had Sherman not had liens on his property, the result of the proceeding would have been different. Nevertheless, even if prejudice is assessed under *Sullivan*,

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[58] Since *Mickens*, there has been a significant shift away from applying the *Sullivan* standard in any context other than that of multiple, concurrent representation. *See* e.g. *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) (finding that the Supreme Court has never applied the *Sullivan* exception to conflicts arising from attorney's personal interests: "The *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation."); *Moss v. United States*, 323 F.3d 445, 460 (6th Cir.) ("in the wake of *Mickens*, no court has applied the *Sullivan* presumption to a case of successive representation"), *cert. denied* 540 U.S. 879, 124 S.Ct. 303, 157L.Ed.2d 144 (2003); *Smith v. Hofbauer*, 312 F.3d 809, 817 (6th Cir. 2002) (refusing to extend *Sullivan* to ineffective assistance of counsel claims based on attorney's conflict of interest arising from anything other than joint representation), *cert. denied,* 540 U.S. 971 (2003); *Tueros v. Grenier*, 343 F.3d 587, 597 (2d Cir. 2003) (*Sotomayer*, J.) ("Reserving *Sullivan's* limited presumption of prejudice to remedy the structural flaw that occurs when a lawyer is placed in the untenable situation of being required to serve two masters is a reasonable line to draw."); *Montoya v. Lytle,* 53 Fed. Appx. 496, 498 (10th Cir. 2002) (unpublished opinion) ("The Supreme Court . . . has never extended the [*Sullivan*] standard to cases involving successive. . . representation"), *cert. denied,* 538 U.S. 1042 (2003).

Even before *Mickens,* several courts recognized that *Strickland* rather than *Sullivan* governs conflict claims other than those arising from concurrent, or in some instances, successive, representation. *See e.g. Caban v. United States*, 281 F.3d 778, 782 (8th Cir. 2002) (recognizing the "current trend" among the circuits to limit application of the `almost per se rule of prejudice') *citing Williams v. Calderon,* 52 F.3d 1465, 1472-73 (9th Cir. 1995) (refusing to extend [*Sullivan*] treatment to an alleged conflict between a pro bono client and his attorney's financial interests); *United States v. Zackson*, 6 F.3d 911, 919-22 (2d Cir. 1993) (refusing to extend *per se* treatment to alleged conflict arising from attorney's time constraints); *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (*en banc*).

petitioner has failed to carry his burden of proof.

**2. Alternatively, even if the prejudice inquiry is governed by *Sullivan*, petitioner cannot prevail**

Under Sullivan, petitioner is entitled to a limited presumption of prejudice only if he demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra,* 446 U.S., at 350, 348. (footnote omitted). In order to carry his burden under *Sullivan*, petitioner must make the following showing:

> Once a defendant has established that there is an actual conflict, he must show that a lapse of representation ... resulted from the conflict.... To prove a lapse of representation, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.... (Citations omitted; internal quotation marks omitted.) *United States v. Stantini,* 85 F.3d 9, 16 (2d Cir.1996).

*State v. Vega*, 259 Conn. 374, 387 (2002).

Proof of causation – that the alternative defense strategy was not undertaken *because* of the alleged conflict – is particularly important. This is so lest the *Sullivan* exception swallow the *Strickland* rule. If the alleged alternate strategy was eschewed for some other reason, such as a legitimate strategy decision, or even neglect or ignorance, it is no different than a run-of-the-mill ineffectiveness claim and is appropriately analyzed under *Strickland*. It is only where a petitioner establishes that his counsel's performance was adversely affected by an actual conflict (and not some other factor) that he is entitled to *Sullivan's* limited presumption of prejudice. *See Winkler v. Keane*, 7 F.3d 304, 309-10 (2d Cir. 1993) (petitioner failed to establish that unethical contingency fee agreement caused an actual lapse in representation where counsel had legitimate reasons, not occasioned by the fee agreement, for his actions at trial).

Applying this framework to petitioner's conflict claim, it clearly fails. Petitioner has not proven a viable alternate defense strategy not undertaken due to the alleged conflict. As indicated earlier, Sherman's monthly statements prove that he continued to devote time, energy and resources to petitioner's defense even during the many months in which his client was

significantly in arrears. PE 120; HT 4/18: 36-68. During this time, he hired three sets of investigators, one in Connecticut, one in the Midwest, and one in the Boston area. HT 4/18: 58. He consulted with numerous experts, including Dr. Howard Zonana, Dr. Sharee Richards, and others with expertise in areas related to this case. HT 4/18: 63-66. He also consulted with Dr. Elizabeth Loftus, who, like petitioner's expert, Richard Ofshe, specialized in the area of false confessions. *Id*.: 63. Sherman's diligence and loyalty to his client never flagged, regardless of cost, and regardless of his own personal circumstances. As Sherman testified, and Throne confirmed, all decisions in this case were made in the best interest of the client. Personal financial concerns played no part. HT 4/23: 21-26; HT 4/18: 65-68; HT 4/26: 127-29, 131, 169-72. Petitioner has therefore failed to prove a conflict or prejudice caused by that conflict.

## V. CONCLUSION

For all of the foregoing reasons, the State of Connecticut/Commissioner of Correction asks this Court to deny the relief requested and dismiss the petition.

Respectfully submitted,

COMMISSIONER OF CORRECTION

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**CERTIFICATION**

I hereby certify that a copy of this document was mailed to counsel for the petitioner, Attorney Hubert J. Santos and Attorney Jessica Santos, 51 Russ Street, Hartford, Connecticut 06877, Telephone No. (860) 249-6548, Facsimile No. (860) 724-5533, on August 9, 2013.

_____

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| CV-10-4003762 | : | SUPERIOR COURT |
| MICHAEL C. SKAKEL | : | JUDICIAL DISTRICT OF TOLLAND |
| V. | : | AT ROCKVILLE |
| COMMISSIONER OF CORRECTION | : | AUGUST 9, 2013 |

# RESPONDENT'S POST-TRIAL BRIEF

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