APPELLATE COURT

STATE OF CONNECTICUT

A.C No. 29137

RICHARD LAPOINTE

Petitioner-Appellant

v.

WARDEN, STATE PRISON

Respondent-Appellee

BRIEF OF PETITIONER-APPELLANT

FOR THE PETITIONER-APPELLANT

W. James Cousins, Esq.

3 Strawberry Ridge Road

Ridgefield, CT 06877

(203) 341-3429

Fax (203) 454-1284

Juris No. 408509

PHV Paul Casteleiro, Esq.
200 Washington Street
Suite 500 - 5th Floor
Hoboken, NJ 07030
(201) 656-1696
Fax (201) 656-4688
Juris No. 424441

To Be Argued by:
Paul Casteleiro, Esq.

TABLE OF CONTENTS

TABLE OF CONTENTS, (Ctn'd)

STATEMENT OF ISSUES INVOLVED

1. Did the trial court, in granting the respondent's motion for dismissal, apply the correct standard, in failing to consider the petitioner's proofs as true and/or in the light most favorable to the petitioner? Pages 24 to 34

2. Did the trial court err in concluding the petitioner was not deprived of his right to due process of law at his criminal trial when the State' failed to disclose a note written by the lead investigator, memorializing a conversation he had with the State's lead fire investigator / expert, in which he indicates the fire investigator / expert stated the fire in the victim's apartment was 30-40 minutes "poss," referring to the "burn time," of the fire in the decedent's apartment?

Pages 24 to 29

3. Did the habeas court err in concluding the petitioner was not deprived of his right to effective assistance of counsel at his first habeas trial and his criminal trial?

Pages 30 to 34

4. Did the habeas court err in concluding the petitioner was not deprived of effective assistance of counsel during his first habeas trial when his attorney failed to raise the claim that the State's suppression of the note containing the fire investigator/expert's opinion of the fire's burn time deprived him of his right to due process of law?

Pages 30 to 32

5. The habeas court concluded that the failure of the petitioner's criminal trial counsel and first habeas counsel to present the testimony of an arson expert concerning the fire's "burn time" did not render the results unreliable, was the court's conclusion contrary to the record in the case? Pages 30 to 32

6. Did the habeas court err and deprive the petitioner of a fair trial in failing to address the petitioner's claim that no prior habeas counsel was ineffective in relying exclusively on an expert's opinion testimony to prove petitioner's claim that criminal trial counsel was ineffective? Pages 32 to 33

7. Did the habeas court err and deprive the petitioner of a fair trial in failing to address claims of the petitioner that he was deprived of his right to effective assistance of counsel at his criminal trial? Pages 32 to 34

8. Were the habeas court's findings of fact regarding the testimony of the petitioner's arson expert contrary to the record in the case? Pages 30 to 32

9. The habeas court concluded the petitioner's ex-wife did not support his alibi for the 6:15 to 7:00 P.M. time period on the day of the murder, was that finding erroneous? Pages 26 to 27

TABLE OF AUTHORITIES

Cases Cited

TABLE OF AUTHORITIES, (Ctn'd)

STATEMENT OF PROCEEDING AND FACTS

The petitioner maintained that his first habeas trial counsel was ineffective in failing to recognize and/or offer proofs which would have established petitioner's entitlement to issuance of the writ of habeas corpus on: (1) his due process claim that the State suppressed exculpatory evidence; and (2) his Sixth Amendment claim that criminal trial counsel deprived him of his right to effective assistance of counsel. In addition, the petitioner maintained habeas trial counsel was ineffective in failing to raise other instances where criminal trial counsel was ineffective. [A152 to A225]

On May 30, 1997 the petitioner, represented by Attorney Henry Theodore Vogt, filed a Petition for Writ of Habeas Corpus. A trial was held, after a succession of amendments to the original petition, on the Fifth Amended Petition and relief denied on September 6, 2000. LaPointe v Warden, Docket No. CV 97-0571161. [A17to A46] In the petition, the following, pertinent claims, were asserted, but not proven despite the existence of evidence sufficient to establish the claims: (1) in Count Two, the suppression of exculpatory evidence by the

prosecution; and (2) in Count Four, that criminal trial counsel was ineffective based upon his failure to (a) advise the petitioner against testifying; and (b) "adequately employ available information" to establish the petitioner's innocence. [Exhibit 141, A226 to A243]

FACTUAL BACKGROUND

At approximately 5:45 P.M. on March 8, 1987 Natalie Howard was driving past Mayfair Gardens, an apartment complex for senior citizens in Manchester, where her mother, the victim, the 88 year old Bernice Martin, lived and was murdered. As she drove by she observed her mother putting out her trash. In a police interview the next day, and in her testimony at the petitioner's criminal trial, she described the clothing her mother was wearing, as being "a blue sweater" over what she presumed was a blouse, and "black slacks." [Exhibit 88, A130; Exhibit 37, T.T. 5/13/92, 660 (Howard)]

It was Ms. Howard's custom to telephone her mother every night, and the evening of March 8, 1987 was no exception. At approximately 7:55 P.M. she called her mother, received no answer and called again "just a little after 8:00 P.M." and still received no

answer. She estimated her two calls to her mother were 10 to 15 minutes apart. She then "immediately" called the home of Richard and Karen Lapointe and asked the petitioner to check on her mother. Karen Lapointe, the petitioner's wife, was Bernice Martin's granddaughter and Natalie Howard's niece, and the Lapointes lived approximately 3/10ths of a mile from Mayfair Gardens. [Exhibit 32,T.T. 5/6/92,4-5; Exhibit 37,T.T. 5/13/92, 661-663 (Howard)]

The undisputed evidence at the petitioner's criminal trial established the petitioner walked to Mrs. Martin's apartment, received no response and proceeded to the apartment of Jeanette King, a neighbor of Mrs. Martin's, and a friend of the petitioner's. [Exhibit 50, T.T., 6/4/92, 2223 (LaPointe)] At Ms. King's the petitioner called his wife, and Natalie Howard and reported to them that Ms. Martin, who was called "Nana," did not answer the door. [Exhibit 37, T.T. 5/13/92, 664 (Howard); Exhibit 22, T.T. 6/16/92, 148 to 150 (King)] Karen LaPointe suggested to him that maybe Nana was sleeping. [Exhibit 50, T.T, 6/4/92, 2224 (LaPointe)] When the petitioner called Ms. Howard, which she testified was soon after

she spoke to him at his home, he “called right back,” he told her Nana must be in bed, to which she responded, “Oh Richard you know better than that. Nana always stays up late.” According to Ms. Howard, the victim never went to bed before midnight. [id, at 664,707] Ms. Howard instructed the petitioner to return to Ms. Martin's apartment, and when he did he saw smoke coming from the apartment so he ran back to Mrs. King's apartment to call 911. [Exhibit 50, T.T., 6/4/92, 2224 (LaPointe)] The police records established the petitioner called 911 at 8:27 P.M. Almost immediately fire and police personnel arrived on the scene to find the petitioner standing in front of Mrs. Martin's locked front door, calling to them, "This is it. This is the place." [Exhibit 32, T.T. 5/6/92, 6-7, (Tomkunas)]

Michael Tomkunas, the first fire fighter to arrive on the scene, kicked open the decedent’s front door but the "high heat and heavy smoke condition" prevented him from entering. [Exhibit 32,T.T. 5/6/92, 7-8 (Tomkunas)] Firefighter Douglas Boland then vented the apartment by opening the unlocked sliding glass door in the rear of the apartment. [Exhibit 32,T.T. 5/6/92, 4-5 (Boland)] Tomkunas entered the apartment, on his hands and

knees, to minimize the impact of the still present heat and smoke, and observed the body of the 5'2", 160 pound Bernice Martin on the floor in the living room area, 6 to 8 feet from a couch which was burning, with very low flames, and smoking. [Exhibit 32, T.T. 5/6/92, 9-10 (Tomkunas)] Ms. Martin was pulled from the apartment, and Tomkunas thought she possibly had a faint pulse. [id. at pp. 10 to 13; Exhibit 33, T.T. 5/7/92, 63, (Katsnelson)] Ms. Martin was naked, except for a piece of red fabric knotted to a piece of bluish gray fabric tied so tightly around her neck that it was "very hard" to untie. [Exhibit 32, T.T. 5/6/92, 12, (Tomkunas)] Other fabric was wrapped around her wrists and stomach. [Exhibit 32, T.T. 5/6/92, 56 (Cusson)]

Bruce Kramer, a fireman and a certified EMT, arrived on the scene as Ms. Martin was being dragged out of the apartment and placed on the ground. [Exhibit 32, T.T. 5/6/92, 33, 36, (Kramer)] Kramer helped Tomkunas untie the cloth from around her neck and ascertained that she "definitely was not breathing" and had no pulse. [id. at 37, 41-44] According to Kramer, normally when an individual is unconscious they are very limp "because

the muscles tend to be relaxed." He observed that Ms. Martin's hands "were almost in a rested position like so, over the chest area and stomach area," and in his experience with unconscious people "their hands are down at their sides." He testified the position of her hands was especially "peculiar" and "strange" given she was "rather obese or large." [id. at 41-42]

At 8:33 P.M. Kenneth Cusson, a firefighter paramedic, and Donald Turner, a police officer, arrived on the scene, the fire in her apartment was extinguished and CPR was being administered to Ms. Martin. [Exhibit 33,5/7/92, 21, 24, 25, 30 (Turner); Exhibit 32, T.T. 5/6/92, 46, 48 (Cusson)] Cusson, employing a defibrillator monitor, determined there was no electrical activity in Ms. Martin's heart, and she was taken from the scene to the hospital where she was pronounced dead. [id, 48-49; 57-58 (Cusson)]

The medical examiner, Dr. Arkady Katsnelson testified Ms. Martin's ribs were fractured, after she was dead, which is consistent with them being fractured during CPR. She suffered premortem second degree burns on her face, neck and back and premortem first degree burns

in the area of her abdomen and back. All her burns were caused by hot temperature as opposed to contact with an open flame. [Exhibit 33,T.T. 5/7/92, 67 to 68,74,114 (Katsnelson)] She also was stabbed, there was a three inch deep stab wound on her abdomen, and ten less severe stab wounds on her back. She had two superficial scrape type abrasions in the abdominal area, and superficial lacerations and contusions on the front of her vagina, around her urethra and the opening of the vagina, which Dr. Katsnelson opined were evidence of "blunt trauma" to the area. The cause of death was determined to be a combination of asphyxia by strangulation, possibly by means of pressure with a blunt object to the right side of the neck, and smoke inhalation. [id., 85-86, 91] All of Mrs. Martin's wounds were suffered premorten, while she was alive, as established by the extensive hemorrhaging in the areas of the wounds. [id. 68 to 70; 76] She also had cyanide and 43% carbon monoxide in her blood, along with soot in her airways and bronchi, all of which were byproducts of the fire, and established she was alive and breathing when the fire began. [id, 88 to 89]

Stephen Igoe, an arson investigator, assigned to the State Fire Marshal's Office at the time of the incident, investigated the fire and filed a report dated March 31, 1987. Mr. Igoe testified on behalf of the State, as an arson expert, at the petitioner's criminal trial, that he arrived on the scene around 2:20 A.M. on March 9, 1987 and was met by Detective Michael Ludlow of the Manchester Police Department. [id 286] He determined there were three separate fires set in the apartment. [7/16/07, H.T. 103; Exhibit 105; Exhibit 34, T.T. 5/8/92, 283, 285-286 (Igoe)] The major fire was in a couch located in the living room, and the two other fires were on the refrigerator door handle, and around a kitchen drawer handle, both of which caused only very light and minor burning. Igoe found no evidence of the use of an accelerant, and concluded, because there were three separate fires, that the fires were not the result of an accident. [id 286, 194, 298 (Igoe)] At the scene Igoe took a piece of the couch cushion, ignited it with a match in order to see if the material burned rapidly or slowly. He concluded the fire was "slow burning" with very small flames, that created "a lot of smoke." [id. 300; 5/11/92, 318-319 (Igoe)] The smoke from the couch

fire "caused the walls and ceilings ... to be blackened [and] ... the heat ... affected different things by melting them ..." [id. 305] He stated in the living room, where the couch was, the damage to the wall began approximately 4 feet above the floor and went up to the ceiling. [T.T. 5/8/92, 288, 291-292 (Igoe)] He observed that the fire burned the seat cushion material down to its wood frame, lightly blackening it, with no deep charring to the frame. [id. 299]

In March 1989 Detective Ludlow was promoted and transferred, and Detective Paul Lombardo was made the lead investigator on the case. [Exhibit 5, H.T. 2/24/00, 12-24 to 14-23 (Ludlow)] Detective Lombardo zeroed in on the petitioner as his sole suspect, and on July 4, 1989 brought him in for questioning, after it was determined, through the voluntary testing of the petitioner's saliva, that he had Type A blood, and was a secretor. A semen stain found on the decedent's bedspread was determined to have come from a person who was a secretor with Type A blood. [Exhibit 41, T.T. 5/19/92, 1064, 1172-1173, 1215, 1220-1221 (Lombardo)].

The interrogation of the petitioner proved pivitol, as he was convicted of the murder and arson based on the oral and written statements he made during eight hours of interrogation. In his first signed statement, handwritten by Detective Lombardo, he stated: "On March 8, 1987 I was responsible for Bernice Martin's death and it was an accident. My mind went blank." [Exhibit 150, A48]

In the second signed statement, typed by Detective Lombardo, the following, in pertinent parts, was stated:

> "I was at Bernice's apartment with the dog. We were both together and the time was right. I probably made a pass at her and she said no.
>
> So I hit her and I strangled her. If the evidence shows that I was there, and that I killed her, then I killed her, but I don't remember being there."
>
> [Exhibit 151, A50]

In the third signed statement, handwritten by Detective Michael Morrissey, the petitioner stated he went back to Ms. Martin's house, after visiting her earlier in the day with his wife

and son. He had coffee with Ms. Martin then used the bathroom, and as he came out of the bathroom she was in the bedroom, combing her hair. The following is then stated:

> "She was wearing a pink house coat type of outer wear with no bra, (I could see her breasts when she bent over bent over) ... I thru her on the bed and took off her underwear ... I got my penis inside her for a few strokes and then pulled out and masturbated ... after sex she said she was going to tell my wife Karen. I then went to the kitchen and got a steak knife ... and stabbed Bernice in the stomach while she was laying on the couch ... the rest of the incident I do not recall although I admit to having strangled her."
>
> [Exhibit 152, A51 to A52]

1. **State's Suppression of Evidence Relating to Fire's Burn Time**

Karen Martin, the former Karen Lapointe testified, during pretrial hearing to suppress the petitioner's statements that she was physically in the presence of her husband from 7:00 P.M. until the time Natalie Howard and that the petitioner was home at all times, from 4:00 P.M. until a little after 8:00 P.M., except for a 20 minute period of time when he walked the dog prior to the family sitting down to dinner at 5:15 P.M. [Exhibit 73, S.T. 1/30/92, 2090

to 2091 (Karen Lapointe)] During the entire time between 4:00 P.M. and a little after 8:00 P.M., the only time the petitioner was out of Karen Lapointe's sight was when he walked the dog before dinner, and between "maybe, around 6:15, 6:30, whatever" and 7:00 P.M. when "[h]e was downstairs" and she was upstairs bathing the couple's son. At 7:00 P.M. when their son was finished bathing Karen and the boy came downstairs to join the petitioner in watching TV. [id. 2098 to 2099; 2127] Karen Martin testified in the court below, that from upstairs in the apartment she could her someone, e.g. her son, when he was downstairs. [7/18/07, H.T. 41 (K. Martin)]

At trial the defense did not call Karen Martin to testify as an alibi witness because of her suppression hearing testimony that the petitioner was not in her presence from "maybe around 6:15, 6:30" to 7:00 p.m. when she was upstairs and he was downstairs. [id.; A257 to A258 (Culligan)] Instead, at the criminal trial the defense was reduced to putting in the petitioner's alibi through the cross-examination of Detective Joseph Morrissey by eliciting the substance of her July 4, 1989 interview with Morrissey, at her home while the petitioner was

being interrogated at the police station, during which she steadfastly maintained, in the face threats of prosecution and the loss of her son, that the petitioner was home the entire evening of March 8, 1987, except for when he walked the dog prior to dinner at 5:15 P.M. [A55 to A114; Exhibit 25, T.T. 5/22/00; Exhibit 29 T.T. 5/26/92 (Morrissey)] Ms. Martin reaffirmed the truthfulness of her July 4, 1989 statement at the petitioner's habeas trial saying "I told him (Morrissey) what the truth as I knew it, and as I know." [7/18/07, H.T. 37 (K. Martin)]

Unbeknownst to the petitioner at the time of his criminal trial, the State suppressed its expert's opinion, Stephen Igoe, affixing a burn time for the fire in the decedent's apartment. The opinion was contained in a note written by Detective Ludlow, [hereinafter, "Ludlow note"], when he was the lead investigator on the case, and it provided, as follows:

"CSP - Steve Igoe
Joe Roy Fire Marshals

30 - 40 mins poss.
-Slow burn smolder
-No char on wood of couch
-Fabric burn test - slow

-Soot on Window

-High heat above couch area"

[Exhibit 87, p.11, A47]

There was no dispute that the State failed to disclose the "Ludlow note,"until June 21, 1999 when they forwarded it under cover of a letter to Attorney Vogt. [Exhibit 87] Criminal trial counsel testified the note was never disclosed to him and that the defense never received any information from the State concerning the "burn time" of the fire despite filing a motion for disclosure of all exculpatory evidence. [A251 to A254, (Culligan); Exhibit 87, p.11 and Exhibit 140] Attorney Vogt testified "I do not know that I looked at" the Ludlow notes "very carefully," and that he raised no issue as to the notes, which he represented to the first habeas court contained no Brady material. [A314 to A317 (Vogt); Exhibit 5, 1st H.T., 2/24/00, 18]

The court found the "Ludlow note" resulted from a conversation Ludlow had with Stephen Igoe. [A6] Ludlow testified the conversation occurred "within three days" of the fire, but he could not recall whether it was Stephen Igoe or Joseph Roy to whom he spoke. [H.T.

7/16/07, 70,74 (Ludlow)] Igoe, however, conceded he "probably did" speak to Ludlow about the fire and was "positive" he never gave Ludlow an estimate as to the fire's "burn time." [H.T. 7/16/07, 103-104,114 (Igoe)] The State stipulated to Joseph Roy's testimony, which was he didn't "remember talking to anybody" about the case and that he was at the scene only to assist Igoe. [H.T., 7/19/07, 21-23]

The petitioner contended the "Ludlow note" contained the opinion of Igoe, because it matched the substance of Igoe's criminal trial testimony and his report, that the fire burned from 30-40 minutes, therefore it was impossible for him to have committed the crimes. Detective Ludlow testified "30-40 mins. poss" was "the extreme of the earliest" the fire burned, "it could have been an hour fire, something like that,"meaning the fire burned for a minimum of 30 to 40 minutes, and not that the fire burned for a maximum of 30 to 40 minutes. [Exhibit 105; infra, pp. 5-6; 7/16/07, H.T., 70-74 (Ludlow)]

No matter the meaning of the note regarding the opinion expressed by the expert a few days after the fire, the petitioner maintained it was exculpatory because the time the fire was

set fixed the time the perpetrator would have had to vacate the decedent's apartment, and the petitioner, at a minimum, could account for his whereabouts, home in the presence of his wife and son, from 7:00 P.M. until a little after 8:00 P.M., when Ms. Howard called him requesting that he check on her mother. The evidence clearly established that the fire was extinguished by 8:33 P.M. [Exhibit 33,5/7/92, 21, 24, 25, 30 (Turner); Exhibit 32, T.T. 5/6/92, 46, 48 (Cusson)] Under the petitioner's reading of the note, i.e. that the "burn time" of the fire was between 30 and 40 minutes, the fire had to have been set sometime between 7:50 P.M. and 8:00 P.M., a time period when the petitioner was indisputably home, as verified by both his wife and Ms. Howard. [Exhibit 37,T.T. 5/13/92, 661-663 (Howard); Exhibit 147, A55 to A114 (Karen LaPointe interview of 7/04/89; Exhibit 73, S.T. 1/30/92, 2090-2091; 2098-2099; 2117 (Karen Martin, nee Lapointe)] It was submitted a "burn time" of 30-40 minutes made it impossible for the petitioner to have set the fire because there was an insufficient amount of time for the fire to have burned 30 to 40 minutes, it being extinguished no later than 8:33 P.M., considering he received Ms. Howard's call, a little after 8:00 p.m. and he

then had to spend time walking over to the decedent's apartment. It also must be remembered the decedent was alive when the fire was set because her burns were premortem and she had breathed the gases from the fire, as evidenced by the cyanide and 43% carbon monoxide in her blood, but dead when removed from the apartment, as evidenced by the fractured ribs she suffered during the administration of CPR. [Exhibit 33, T.T. 5/9/92, 67-70; 74; 76; 88-89-114 (Katsnelson)] Undoubtably, it had to take the perpetrator some time to tie the victim up and inflict the wounds suffered by her before setting the apartment on fire.

Under the State's interpretation of the note, i.e. that the fire burned for a minimum of 30 to 40 minutes, it did not mean the fire burned for a period of time greater that 30 to 40 minutes and if the fire didn't burn for longer than 30 to 40 minutes, as stated above, it was impossible for him to have set the fire because he was undoubtably home with his wife and son "just a little after 8:00 P.M when Natalie Howard called and spoke to him. If the fire burned longer than 30 to 40 minutes, it was argued, the petitioner could not have set it, unless it was concluded: (1) that he left his home when his wife and son went upstairs at

6:15/6:30 and returned to his home by the time they came downstairs at 7:00 P.M.; (2) that the fire burned a minimum of 93 plus minutes, because it would have had to have been set prior to 7:00 P.M., it was extinguished by 8:33 P.M., when his wife and son came downstairs to watch television with him, after allowing sufficient time for him to travel to and from the decedent's house, assault the decedent and be home at 7:00 P.M.; and (3) that the damage to the apartment was consistent with a fire that was set sometime prior to 7:00 P.M. and was extinguished by 8:33 P.M.

Gerald Kelder, an arson expert retained by the petitioner, testified at the habeas trial, that based on his review of the record, the fire burned from 45 to 60 minutes, with 45 minutes being the more likely burn time, and that if it had burned any longer the damage to the apartment would have been greater. He opined because soot lines show a clear line of demarcation at 8:10 on the decedent's kitchen clock, as can be seen on a photograph of the clock, [Exhibit 104, A128], that the heat from the fire, assuming the clock was in working order, attacked the area of the kitchen, which was right off the livingroom, where the couch

was located, at 8:10. [A334 to A338 (Kelder); Exhibit 104, A128] Karen Lapointe testified at the habeas trial the clock was working properly as of 4:00 p.m. on the date of the incident. [H.T. 7/18/07, 42-45 (Karen Martin)]

The petitioner also maintained had the defense known of the expert's opinion regarding the burn time of the fire, they would have (1) investigated the fire and been able to present an expert such as Gerald Kelder to testify; and (2) called Karen Lapointe as a defense witness to verify the impossibility of the petitioner committing the offenses. [A174, ¶29 to A178, ¶39; A191, ¶69 to A199, ¶79 (Petition)] As stated by criminal trial counsel if he had been able to confirm the "burn time" contained in the "Ludlow note" "it would have made a difference in our decision whether or not to call Karen Lapointe ..." [A259 to A260 (Culligan)]

In granting the State's motion for judgment, the court held the note contained an opinion as to the minimum time the fire burned, and that it was not exculpatory because the petitioner needed to be able to verify his whereabouts from 5:30 P.M., when the court said

the decedent was last seen alive by a neighbor, to approximately 7:50 P.M., which the court said he could not do because his wife did not substantiate his alibi defense for the time period of 6:15 P.M. to 7:00 P.M. Alternatively, the court held if the opinion was that the fire burned for a maximum of 30 to 40 minutes it was not exculpatory because "it is indeed possible that the petitioner could have left his home after the victim's daughter called about 7:30 P.M., walked to the victim's apartment, assaulted and mortally wounded the victim, then set the fire and still report the fire at 8:27 P.M." [A7 to A8]

2. Ineffective Assistance of Counsel

a. Failure to Investigate Fire, and Retain an Arson Expert to Testify as the Fire's Burn Time

Patrick Culligan, petitioner's criminal trial counsel testified, he and co-counsel Christopher Cosgrove, never looked into anything having to do with the fire because there was nothing about the fire that they thought controversial or needed exploration. [A260 to A261 (Culligan)] Theodore Vogt, petitioner's attorney for his first habeas trial, testified in addition to not recognizing the exculpatory nature of the "Ludlow note," he never retained an expert in

arson investigation to investigate the fire. [7/18/07, 7-8 (Vogt)] Had either the Culligan/Cosgrove team or Vogt retained an expert, such as Gerald Kelder, who opined that the fire burned for 45 to 60 minutes, with 45 minutes being the more likely burn time and attacked the kitchen area at 8:10 P.M., based on the soot marks on the kitchen clock, the petitioner argued, they would have been able to raise the burn time issue to establish the impossibility of petitioner committing the crimes. [A334 to A338 (Kelder); Exhibit 104, A128]

The judge in the court below held "it was unclear how Mr. Kelder's testimony is helpful ... by Mr. Kelder's estimation the fire could have been set any time before 7:30/7:45 P.M. This does not exclude the petitioner ... because his former wife cannot attest to his whereabouts from 6:15 to 7:00 P.M." Therefore, the court concluded criminal trial counsel and habeas counsel were not ineffective in failing to retain an arson expert. [A11 to A12]

b. Failure to Employ Evidence to Establish the Unreliability of Petitioner's Alleged Confessions and His Innocence

Patrick Culligan, the petitioner's criminal trial counsel, testified that the theory of the

defense, at the petitioner's 1992 capital trial

> "... was to try to persuade the jury that Richard LaPointe was the victim of an intentional police investigation that was designed to take advantage of his mental and emotional limitations and that they should therefore give no credence to his confessions."
>
> [H.T. 7/17/07, 62 (Culligan)]

The petitioner suffers from Dandy-Walker syndrome, which is a congenital brain malformation involving the fourth ventricle and cerebellum. It is defined as an enlargement of the fourth ventricle, an absence, either partial or complete, of the cerebellum vermis, the narrow middle area between the two cerebral hemispheres, and cyst formation in the internal base of the skull, the posterior fossa. In addition, increased intra cranial pressure, hydrocephalus, is often present, as in the petitioner's case. [A25 to A26]

Although the stated defense strategy was to attempt to show the confessions were unreliable based on the petitioner's limitations, criminal trial counsel never thought to or attempted to utilize the information and evidence available to him to show the confessions were contradicted by the physical and forensic evidence recovered from the murder scene.

When asked for the first time, in the court below, why he did not exploit this evidence, criminal trial counsel, stated: "I really don't have an answer to that." [A278 (Culligan)]

It was not until petitioner's second habeas trial that criminal trial counsel was questioned concerning the ineffective assistance of counsel claim because petitioner's counsel at his first habeas trial was of the view that the claim could be proven based solely on the testimony of an expert witness, and any testimony from criminal trial counsel, not of public record, was inadmissable because it constituted attorney work product. As a result, when criminal trial counsel testified at the first habeas trial he was not asked any questions going to the issue of petitioner's ineffective assistance of counsel claim. [A320 to A323 (Vogt); Exhibit 7, 1st H.T., 3/8/00, 87 to 93 (Culligan)] Instead, an expert witness, Ira Grudberg, was asked by Attorney Vogt to opine about the specifics of his claims and as a result no evidence going to the claims was ever presented by Attorney Vogt. [Exhibit 10, 1st H.T., 3/23/00 (Grudberg)]

(i). Clothing at Scene Containing Pubic Hair Belied Confession and

Are Ignored

At the second habeas trial, Michael Ludlow, a former Sergeant in the Manchester Police Department, testified he served as "the evidence officer for the case" logging and tagging the evidence taken from the victim's apartment, then determining which items were to be tested at the State Forensic Laboratory. [H.T. 7/16/07, 28 to 32 (Ludlow)] On the floor of the bedroom was a blue sweater, a multi colored bouse, a white button from the blouse, and a pair of black pants. [id, 39 to 40; 46 to 49] On the floor behind the bathroom door, which opens/closes into the bedroom, was another white button. [Exhibit 85, p.2: Items 26-blue sweater; 27-multicolored blouse; 28-white button and 36-white button] Beryl Novitch, the lead criminalist at the State Police Forensic Laboratory, testified at the criminal trial that the two white buttons were physically similar to the remaining buttons on the multi colored blouse. [Exhibit 36, T.T., 5/12/92, 593-594 (Novitch)] On the blue sweater was a pubic hair, microscopically dissimilar to both the decedent's and the petitioner's pubic hairs. [id. at 593 to 597; Exhibit 37, T.T. 5/13/92, 644 (Novitch)]

Despite the fact that no "pink house coat type of outwear" was found at the scene, and the clothing Ms. Howard observed her mother wearing at 5:45 P.M. the evening of her death, matched perfectly the clothing found strewn about her mother's bedroom at 8:30 P.M., on which was a pubic hair that was neither the victim's nor the petitioner's, criminal trial counsel failed to utilize the evidence in anyway to establish the unreliability of the petitioner's statements to the police. [Exhibits 85 and 86] Minimally, the evidence established circumstantially that the clothing was torn from the victim by the perpetrator, whose pubic hair was on her blue sweater, and that someone other than the petitioner committed the crime, while also establishing the unreliability of the petitioner's confession that when he committed the offense Ms. Martin "was wearing a pink house coat type of outwear with no bra (I could see her breasts when she bent over)." Not only could criminal trial counsel not "recollect that we did anything specific about the particular clothes that Mrs. Howard remembered that her mother was wearing," he conceded that the defense never used or uttered the words "pubic hair" or asked any specific questions about the pubic hair during the course of the entire trial.

[2nd H.T. 7/17/07, 53-55 (Culligan); Exhibit 152]

The court below did not address this issue in granting the State's motion for judgment. [A1 to A16]

(ii). Manner of Strangulation Contradicts Confession and is Ignored

In petitioner's third statement, he stated "I admit to having strangled her." [Exhibit 152] Detective Morrissey testified petitioner demonstrated how he strangled her by bringing his hands together to indicate a manual strangulation. In fact, the medical examiner, on direct examination at the criminal trial, specifically ruled out manual strangulation, finding instead a possibility, based on contusions only on the right side of the neck, that the decedent was asphyxiated by pressure with a blunt object to the right side of her neck. [Exhibit 33,T.T., 5/7/92, 82-86 (Katsnelson)] Despite the significant inconsistency between the confession and the medical science, criminal trial counsel did not ask the medical examiner one question on the subject or ever raise the issue to the jury. [id., at 105-118; 2nd H.T., 7/17/07, 57-58

(Culligan)]

The court below did not address itself to this issue in granting the State's motion for judgment. [A1 to A16]

(iii). Bloody Bedding Contradicts Stabbing Location in Confession and is Ignored

In petitioner's third statement, he stated he stabbed the decedent "while she was laying on the couch." [Exhibit 152] All the forensic evidence, which included the decedent's blood stained bedspread, sheets and pillow case, all containing the decedent's blood type, indicated the stabbing occurred in the bedroom. Nonetheless, criminal trial counsel failed to utilize the forensic evidence establishing the stabbing occurred in the bedroom to show the unreliability of the petitioner's confession that he stabbed her "while she was laying on the couch." [2nd H.T., 7/17/07, 58-59 (Culligan); Exhibits 78, 79, 82, 86]

The court below did not address this issue in granting the State's motion for judgment. [A1 to A16]

(iv). Gloves in Bedroom Circumstantially Belonging to the Perpetrator are Ignored[1]

Left at the scene were a pair of men's gloves, having no evidentiary connection or link to the petitioner, State's Trial Exhibits 24 to 25. One glove was found at the head of the decedent's bed, the other on the bedroom floor. [Exhibit 34, T.T. 5/8/92, 200 to 201, 224; Exhibit 35,T.T. 5/11/92, 415 to 419 (Bates); Exhibits 78, 82] Head hairs on the gloves were determined to be similar to the decedent's head hairs. [T.T. 5/12/92, 592 to 593, (Novitch)] That the gloves belonged to the perpetrator was certainly a reasonable and logical inference, nevertheless, as stated by criminal trial counsel, "I don't think we mentioned

---

[1]On the third day of the habeas trial the petitioner filed a motion to amend the petition to allege actual innocence, based on the July 16, 2007 DNA report of Orchid-Cellmark Laboratories, Dallas, Texas concerning testing it did on scrapings taken from the gloves found in the decedent's bedroom, State's Exhibits 24 and 25, and determined they contained mixed male profiles excluding the petitioner as a contributor. [A244 to A247] The petitioner argued there existed good cause to permit the amendment and the State objected, arguing the amendment would require discovery and investigation. [7/18/07, H.T. 47-49] The court denied the motion, saying "it was too late to amend the petition to include a new claim. [id. at 50] It is submitted the habeas court abused its discretion in denying the petitioner's motion to amend the petition. [7/18/07, H.T., 50]

anything about the gloves" throughout the entire trial. [2nd H.T., 7/17/07, 58 (Culligan)]

The court below did not address this issue in granting the State's motion for judgment. [A1 to A16]

c. Counsel Has Petitioner Testify in Guilt Phase Knowing He Is An Unreliable Witness and Will Be Impeached

Criminal trial counsel testified the petitioner "didn't have the ability to recall facts well," "had a very difficult time focusing on what we considered to be...important key aspects of the case," and "a difficult time understanding that because of what he said at the police station that the State ... wanted to convict him ... [and] have him executed." In addition, counsel had observed the petitioner testify as a witness during the hearing to suppress petitioner's statements to the police and was well aware that he was a witness who could be impeached and confused on cross examination. [id, at 59-63] As stated by trial counsel in summation, "we knew that Richard Lapointe was going to say some things differently than he had said them before ... But that's who Richard LaPointe is." [Exhibit 28, T.T., 6/25/92, 514

(Defense summation)] Nevertheless, criminal trial counsel had petitioner testify during the guilt phase of his capital murder trial, without having him review his suppression hearing testimony, "because he just wouldn't, even reading it, have remembered the specifics of what he testified to several months before." [H.T., 7/18/07, 64-65 (Culligan)] Predictably, petitioner was a bad witness, whose testimony was seized upon by the prosecutor in summation. [Exhibit 28, T.T., 6/25/92, 484-489 (State's summation)] By way of example, the prosecutor argued, the following:

> "If you compare what the defendant has said in the past with his testimony here there are variations. He told Wilson [a detective who interviewed him on March 9, 1987, Exhibit 149] He went to both doors and called [Ms. Howard], as he called her. He says here he didn't call her; he didn't know her number; and he only went to one door ... It's apparent that he testified on an earlier occasion that he was asked about the source of each part of the various statements. He admitted that in January when asked about whole one sentence statement, the first one, he said:'I might have said that, yes.' He says here, 'well, it's Lombardo's; but I might have said my mind went blank.' As to the second statement: 'if the evidence shows I killed her.' He said previously; 'I might have said this.' He says now: 'Oh, Lombardo said that.' As to the last paragraph:'I made a pass at Bernice

> because she was a nice person and I thought that I could get somewhere with her. She was like a grandmother to me that I never had.' He testified before, 'that might have come from me.' Now he says Lombardo wrote that."
>
> [id. at pp. 488-489]

According to criminal trial counsel, having the petitioner testify in the guilt phase

> "would give the jury an opportunity to view him as a human being and as we hoped, a person with limited intellectual cognitive abilities and if in fact they had to make a decision about whether he should be sentenced to death or life imprisonment, that the experience of having him testify would tend to encourage them and make it easier for them to vote for a life sentence."
>
> [H.T., 7/18/07, 64 (Culligan)]

Criminal trial counsel, who conceded the goals of humanizing the petitioner and showing that he had limited cognitive abilities could have been achieved by having him testify in the penalty phase, if he were convicted, was asked why then didn't he wait until the jury returned a verdict before having the petitioner testify, and he stated: "That's a difficult question to answer. It was a decision that we made. Today can I explain it? I don't think I

can." [id., at 65-66]

The court below did not address this issue in granting the State's motion for judgment. [A1 to A16]

3. The Parties Are Not Permitted to File Post Trial Briefs and Petitioner's Assistance of Counsel Claims Are Termed Frivolous

At the end of the petitioner's case his counsel requested the opportunity to submit post trial briefs arguing the case was complex, and the trial judge denied the application based on a "Standing Order" under which he said post trial briefs are not "normally" accepted, and when asked to exercise his discretion to permit briefing he said, "I don't need it." [7/19/07, H.T., 17-18] Oral argument on the State's oral motion for judgment continued at the end of which the habeas court adjourned the trial pending his written decision on the motion without the parties being afforded an opportunity to sum up the case. [id., at 31]

In granting the State's motion as to the petitioner's claim that trial counsel was ineffective the trial judge termed the claim frivolous, but failed to address the claim relative to

trial counsel's decision to have the petitioner testify in the guilt phase of the trial to curry the jury's sympathy relative to the death penalty, knowing he was an unreliable witness and could testify for the same purpose in the penalty phase if convicted. Furthermore, the habeas court did not address criminal trial counsel's failures to utilize evidence of (1) the clothes worn by the victim at the time of the attack belying the petitioner's confession that she was wearing a pink house coat; (2) the pubic hair belonging to an unknown individual on the victim's blue sweater; (3) the gloves having no connection to the petitioner or victim; (4) the incorrect manner of strangulation, manual, asserted by the petitioner in his statements; and (5) the petitioner's incorrect location of the stabbing of the victim, on the couch as opposed to the bed, which the petitioner asserted would have proven, either alone or in combination with the medical evidence concerning the petitioner's vulnerability to the police interrogation tactics, the unreliability of his inculpatory statements to the police.

POINT ONE

THE COURT BELOW ERRED IN CONCLUDING THE SUPPRESSED LUDLOW NOTE WAS NOT EXCULPATORY

The trial court's findings of fact and analysis were erroneous, in granting judgment at the end of the petitioner's case, on the petitioner's due process claim that the State suppressed exculpatory evidence in the form of the expert opinion of its arson investigator/expert. In addition, the habeas court refused to either view the petitioner's evidence as true or to interpret it in the light most favorable to petitioner. Grondin v Curi, 262 Conn. 637, 647, Fn. 2 (2003).

To establish a Brady v Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed2d 215 (1963), violation the petitioner must show: (1) the government suppressed evidence, (2) the suppressed evidence was favorable to him; and (3) the evidence was material to either his guilt or punishment. Floyd v Commissioner of Correction, 99 Conn. App. 526, 534 (2007). Evidence is material if there existed a reasonable probability that the result would have been different had there been disclosure. United States v Bagley, 473 U.S. 667, 105 S.Ct. 3375,

87 L.Ed. 2d 481 (1985). In Kyles v Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), the court in discussing the Bagley, supra materiality standard, stated, in pertinent parts, the following:

> "Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. ... Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its

absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial. Bagley, 473 U.S., at 678, 105 S.Ct., at 3381."

The standard of review is that directed verdicts are disfavored and a trial court should not grant judgment unless it can say it could not reasonably and legally reach any other conclusion than that the respondent is entitled to prevail, after considering the petitioner's evidence as true and according him all favorable inferences. Grondin v Curi, supra. Whether a habeas petitioner's right to due process of law was violated by the suppression of exculpatory evidence is a mixed question of law and fact and review is plenary. Miller v Commissioner of Correction, 63 Conn. App. 726, 735-736 (2001).

At the habeas trial it was undisputed that the State did not disclose the "Ludlow note" at the time of the criminal trial and that it first disclosed the note, to Attorney Vogt, in

connection with the petitioner's first habeas trial. In granting the State's motion for judgment, the court concluded: (1) the "Ludlow note" meant the fire burned a minimum of 30 to 40 minutes; (2) that the range of time the crimes could have occurred was between 5:30 P.M., when "a neighbor had seen the victim alive" and approximately 7:50 P.M.; and (3) that the note was not exculpatory because the petitioner cannot verify his alibi from 6:15 P.M. to 7:00 P.M. [A7] Alternatively, the court held the "Ludlow note" was not exculpatory, assuming the 30-40 minute time period was the maximum time of the fire, because "it is indeed possible that the petitioner could have left his home after the victim's daughter called about 7:30 P.M., walked to the victim's apartment, assaulted and mortally wounded the victim, then set the fire and still report the fire at 8:27 P.M." [A7 to A8]

The court's ruling was factually incorrect, and contrary to the record in the case. First, the fact that the fire may have burned a minimum of 30 to 40 minutes does not mean it didn't burn for just 30 to 40 minutes. Second, there is no evidence in the case that a "neighbor had seen the victim alive at about 5:30 P.M."as stated by the court. [A7] The last

report of anyone seeing the victim alive was by her daughter, Natalie Howard, who testified it was 5:45 P.M. when she drove past her building and saw her "coming down off her doorstep toward the garbage can." [Exhibit 37, T.T. 5/13/92, 660-661 (Howard)] Therefore, the court's range of time, 5:30 to 7:50 P.M., the crimes could have been committed is incorrect. Third, the court was incorrect in holding the petitioner had no alibi for the 6:15 to 7:00 P.M. time period. His ex-wife, Karen Martin, nee LaPointe, testified at his suppression hearing she was physically in his presence from 7:00 P.M. until the time Natalie Howard and that he was home at all times, from 4:00 P.M. until a little after 8:00 P.M., except for a 20 minute period of time when he walked the dog prior to the family sitting down to dinner at 5:15 P.M. [Exhibit 73, S.T. 1/30/92, 2090 to 2091 (K. Martin)] From 5:15 P.M. to a little after 8:00 P.M., the only time the petitioner was out of her sight was "from around 6:15, 6:30 whatever" to 7:00 P.M. when he was downstairs and she was upstairs bathing the couple's son. [id, 2098 to 2099] She testified at the habeas trial that when she was upstairs she could hear someone who was downstairs. [7/18/07, H.T. 41 (K.Martin)] At 7:00 P.M. when their son

was finished bathing Ms. Lapointe and the boy came downstairs to join the petitioner in watching TV. [Exhibit 73, S.T. 1/30/92, 2098 to 2099 (K.Martin)] Fourth, even assuming the petitioner did not have an air tight alibi for the 6:15 to 7:00 P.M. time period, the only way for the "30-40 mins. poss" to not be exculpatory would be if the jury concluded the fire burned more than 90 plus minutes, so as to enable the petitioner to have left his apartment at 6:15 / 6:30 when his wife went upstairs, set the fire after assaulting the victim, and return home in time to be downstairs in his apartment when his wife and son joined him in watching television at 7:00 P.M. Fifth, the victim's daughter called the LaPointe house "just a little after 8:00 P.M." and not "about 7:30 P.M.," as stated by the court below, [A8], therefore, contrary to the court's findings, it was impossible for the petitioner, assuming the fire had a "burn time" of 30-40 minutes, to have committed the offenses after receiving Ms. Howard's telephone call.

In Benn v Lambert, 283 F3d 1040, 1060 (9th Cir. 2002), the court held the prosecution's suppression of a fire marshal's opinion that a fire was accidental, constituted a

Brady violation because it undercut the prosecution's theory that the defendant killed the man out of fear of police exposure. Benn, supra involved a capital murder prosecution in which the State maintained the defendant killed the two victims to cover up his participation with the victims in an arson insurance fraud scheme and the defendant contended he shot the victims in self defense. Similarly, in Paradis v Arave, 130 F3d 385 (9th Cir. 1997), the prosecution suppressed an initial opinion by its medical expert, on the day of the autopsy, that the victim did not die in the creek, and testified at trial that the victim was killed in the creek where his body was found. The defendant contended others killed the victim, and that he merely helped carry the body, from the murder site to the creek, where it was dumped. The court held the defendant established the prosecution's suppression of the opinion violated his due process rights "by showing that the suppressed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. Paradis, supra, at 398 - 399.

In the petitioner's case the suppressed opinion of the expert clearly "undermines

confidence in the verdict“ because, if the fire burned a minimum of 30 - 40 minutes, as the court below concluded was the meaning of the “Ludlow note,” the fire could have been 30 - 40 minutes in duration, making it indisputably impossible for the petitioner to have set it because he was home with his wife and son when Natalie Howard called “just a little after 8:00 P.M.” [Exhibit 33, T.T. 5/13/92, 661-663 (Howard)] The jury did not know this, and had it known it, there is a reasonable probability that the result would have been different. Bagley, supra. at 678. Furthermore, if the fire burned longer than 30 - 40 minutes the petitioner had a solid alibi from 7:00 P.M. to the time the fire was extinguished, meaning the fire had to have burned for a period greater than 90 minutes for him to have had any possibility of having committed the crimes. [Exhibit 73, S.T. 1/30/92, 2090-2091; 2098-2039; 2127; A35 to A120; Exhibits 144, A53 and145, A54 (Karen Martin nee Lapointe)] Under this scenario that the fire burned for a period of time greater than 90 minutes, the petitioner would have had to have left his home when his wife went upstairs, at 6:15 / 6:30, traveled to the victim's house, sexually assaulted her, stabbed her, tied ligatures around her

neck, set the three fires and returned home in time to be downstairs when his son and wife came down at 7:00 P.M. to watch television with him. Had the jury known the fire had to burn a minimum of 90 plus minutes in order for the petitioner to have had any possibility of being able to set it, there exists a reasonable probability that the result would have been different. Bagley, supra. at 678. What's more, because the "Ludlow note" was suppressed criminal trial counsel did not know the fire was an issue and did not investigate it. [A260 to A261(Culligan)] Had disclosure been made the petitioner would have been in a position to call an expert, e.g. Gerald Kelder, to prove the damage to the apartment was not consistent with a fire that burned longer than one hour making it impossible for him to have committed the crime. [A334 to A338 (Kelder); Exhibit 104, A128] Furthermore, had disclosure been made, criminal trial counsel would have called the petitioner's ex-wife to testify to his presence in their home during the critical time period. [A55 to A114 (Karen LaPointe statement);A174, ¶29 to A178, ¶39; A191, ¶69 to A199, ¶79 (Petition); A259 to A260 (Culligan)].

POINT TWO

THE PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CRIMINAL TRIAL AND FIRST HABEAS TRIAL AND THE HABEAS COURT IN GRANTING JUDGMENT TO THE STATE FAILED TO ACCORD ALL FAVORABLE INFERENCES TO HIS PROOFS, MADE ERRONEOUS FINDINGS OF FACT, FAILED TO ADDRESS CLAIMS AND IN THE PROCESS DEPRIVED PETITIONER OF A FAIR TRIAL

The standard of review is that directed verdicts are disfavored and a trial court should not grant judgment unless it can say it cannot reasonably and legally reach any other conclusion than that the respondent is entitled to prevail, after viewing the petitioner's evidence as true and according him all favorable inferences. Grondin v Curi, supra. The standard of review of a habeas court's judgment of an ineffective assistance of counsel claim as to findings of fact is clearly erroneous, and the Court's review of whether the facts constitute a violation of the petitioner's right to counsel is plenary. Beverly v Commissioner of Correction, 101 Conn. App. 248, 250 (2007).

Under Strickland v Washington, 466 U.S. 668, 687, 80 L.Ed. 674, 104 S.Ct. 2052

(1984), in order for a convicted petitioner to prevail on a claim that his trial and/or his habeas attorney failed to provide him with effective assistance of counsel he must show that the attorney's performance was deficient and that as a result of the deficient performance that he was prejudiced. In order to show prejudice a petitioner must prove that counsel's errors were so serious as to deprive him of "a fair trial, a trial whose result is reliable."

The habeas court's finding that Gerald Kelder's testimony concerning the damage to the victim's apartment and the fire's burn time was not helpful to petitioner, because in "Mr. Kelder's estimation the fire could have been set anytime before 7:30 / 7:45 P.M.," was clearly erroneous. Mr. Kelder testified the fire burned anywhere from 45 minutes to an hour, with the former being the more likely burn time. [A334 to A342 (Kelder); Exhibit 104, A128] Based on the court's erroneous finding of fact, it held the testimony was not helpful because the petitioner's former wife could not attest to his whereabouts from 6:15 to 7:00 P.M., therefore there was no proof that hiring an arson expert to investigate the fire's burn time

would in anyway have rendered the result of the first habeas trial unreliable, and the claim fails on both parts of the Strickland, supra test. [A11 to A12] The petitioner's arguments, made above in Point One, concerning the implications of a "burn time" of a maximum of 30 to 40 minutes or a minimum of 30 to 40 minutes and the alleged 6:15 to 7:00 P.M. time period, when the petitioner was downstairs and his wife and son were upstairs, apply equally to the testimony of Gerald Kelder and are incorporated herein as if fully set-forth at length. Clearly, had criminal and prior habeas counsel investigated the fire they would each have been in position to establish precisely what has been proven with the disclosure of the "Ludlow note," i.e. the impossibility of the petitioner committing the crimes if the fire had a burn time of less than 90 plus minutes and that if the fire's burn time was 90 plus minutes that the jury, in order to convict the petitioner had to believe, beyond a reasonable doubt, that the petitioner left his home when his wife went upstairs, at 6:15 / 6:30, traveled to the victim's house, sexually assaulted her, stabbed her, tied ligatures around her neck, set the three fires and returned home in time to be downstairs when his son and wife came down at 7:00 P.M. to

watch television with him. The petitioner was prejudiced by the failures of his criminal trial attorney and first habeas counsel to retain and present an arson expert on the issue of the damage caused by the fire and the fire's burn time, because their failure resulted in a trial whose result was unreliable. id.; [A334 to A342 (Kelder)]

Compounding the error of the habeas court in ruling the failure of criminal trial counsel and prior habeas counsel to retain and present an arson expert did not constitute ineffective assistance of counsel, was the failure of the court to address the claim relative to habeas counsel's decision to rely entirely on an expert to prove criminal trial counsel's ineffectiveness; and the failure of the habeas court to address the claim relative to trial counsel's decision to (1) have the petitioner testify in the guilt phase of the trial to curry the jury's sympathy relative to the death penalty, knowing he was an unreliable witness and could testify for the same purpose in the penalty phase, if convicted; and (2) trial counsel's failures to utilize evidence of (a) the clothes worn by the victim at the time of the attack belying the petitioner's confession that she was wearing a pink house coat; (b) the pubic hair belonging to an unknown individual

on the victim's blue sweater; (c) the gloves having no connection to the petitioner or victim; (d) the incorrect manner of strangulation, manual, asserted by the petitioner in his statements; and (e) the petitioner's incorrect location of the stabbing of the victim, on the couch as opposed to the bed, to prove the factual unreliability of the petitioner's inculpatory statements to the police.

Clearly, habeas counsel's decision to rely solely on an expert's opinion to support the claim that criminal trial counsel was ineffective, and to not "reconstruct the circumstances of counsel's challenged conduct," Strickland, supra, at p.689, through examination of criminal trial counsel, left the first habeas court with only speculation, as opposed to demonstrable realties, and constituted ineffective assistance of counsel. Lewis v Commissioner of Correction, 89 Conn. App. 850, 860, cert. denied, 275 Conn. 905 (2005). As stated in Martin v Rose, 744 F.2d 1245, 1249 (6th Cir. 1984), "Under the analysis set forth in Strickland, even deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance."

Similarly, criminal trial's conduct in having the petitioner testify in the guilt phase of the trial knowing he was an unreliable witness who would be easily impeached in case in which he was contending his confessions were not true was suicidal to the petitioner's innocence claim as demonstrated by the trial prosecutor, in her summation, in discussing the petitioner's trial testimony. [A115 to A120] There in fact was no upside to the petitioner testifying in the guilt/innocence phase knowing he could testify and be humanized in the penalty phase, if convicted, when it is considered his credibility would be pitted against the police and the defense had put in issue, through medical testimony detailing the petitioner's condition, that his condition made him unusually susceptible to the police interrogation. See State v LaPointe, 237 Conn. 694 (1996), in which the Court discusses in detail the medical testimony elicited at the criminal trial. See, Cave v Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992), ("an attorney's choice of tactic must be reasonable under the circumstances.") See also, Martin v Rose, 744 F.2d 1245, 1249-1250 (6th Cir. 1984). Clearly, the decision to have the petitioner testify constituted ineffective assistance of counsel because it inevitably led the jury to

conclude he was not believable and therefore guilty.

Lastly, there simply was no justification for criminal trial counsel's failure to place in issue, the abundant available and objective evidence concerning the clothes, gloves, pubic hair, manner of strangulation and the location of the stabbing which belied the petitioner's confessions. Williams v Washington, 59 F.3d 673, 683 (7th Cir. 1995); Harris v Reed, 894 F.2d 871, 878 (7th Cir. 1990) As stated by trial counsel, when asked why he did not exploit this evidence, "I really don't have an answer to that." [A278 (Culligan)] Criminal trial counsel's failure to utilize the available evidence prejudiced the petitioner resulting in a verdict which is unreliable.

The habeas court did not address the bulk of the petitioner's ineffective assistance of counsel claim. Had the habeas court permitted the parties to submit post trial briefs the court may not have failed to consider the totality of the petitioner's claims. Why the habeas court did what it did, is unknown but what is known is that the effect was to deny the petitioner a fair trial mandating a retrial.

CONCLUSION AND REQUESTED RELIEF

For the reasons stated above an Order should issue granting the petitioner's writ of habeas corpus and ordering a new trial. Alternatively, an Order should issue granting the petitioner a new trial on his habeas petition.