DOCKET NO. CV02-0818542

RICHARD LAPOINTE,	:	**SUPERIOR COURT**
Petitioner	:	
	:	
v.	:	**JUDICIAL DISTRICT OF TOLLAND**
	:	
WARDEN, STATE PRISON,	:	
Respondent	:	**DECEMBER 16, 2010**

RESPONDENT'S POST-TRIAL BRIEF

In his "Second Amended Petition for Second Writ of Habeas Corpus" (hereinafter "Petition"), dated March 4, 2010, the petitioner claims that he was denied his right to the effective assistance of counsel during the proceedings on his first petition for a writ of habeas corpus and that he is actually innocent of the crimes of which he was convicted. The petitioner contends that his prior habeas counsel was ineffective in two ways. First, he claims that his habeas counsel was ineffective in failing to raise a claim that the state failed to disclose exculpatory evidence in violation of the United States Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Petition at 15-19. Second, he claims that his habeas counsel was ineffective in failing to raise certain claims of ineffective assistance against his trial counsel. Petition at 20-23. In addition, the petitioner claims that DNA evidence obtained from a pair of gloves and a pubic hair found at the crime scene establishes his actual innocence. Petition at 24.

The petitioner falls far short of showing that he is entitled to habeas relief on any of these claims. The petitioner failed to establish that his prior habeas counsel was ineffective because he could not show that he would have prevailed on either his *Brady* claim or his claim of ineffective assistance of trial counsel had they been raised in his first habeas

petition. Nor could the petitioner show by "clear and convincing evidence . . . that [he] is actually innocent of the crime of which he stands convicted." *Miller v. Commissioner of Correction*, 242 Conn. 745, 791-92, 700 A.2d 1108 (1997). Accordingly, the relief sought by the petitioner should be denied and his habeas corpus petition should be dismissed.

I. PROCEDURAL BACKGROUND

The petitioner was charged with capital felony, in violation of General Statutes §53a-54b(7); arson murder, in violation of General Statutes §53a-54d; felony murder, in violation of General Statutes §53a-54c; murder, in violation of General Statutes §53a-54a; arson in the first degree, in violation of General Statutes §53a-111(a); assault in the first degree, in violation of General Statutes §53a-59(a)(1); sexual assault in the first degree, in violation of General Statutes §53a-70(a); sexual assault in the third degree, in violation of General Statutes §53a-72a(1)(A); and kidnapping in the first degree, in violation of General Statutes §53a-92(a)(2)(A). Judgment, *State v. Lapointe*, CR89-107933, Judicial District of Hartford; R1. at 89-90.[1] After trial by jury, the petitioner was convicted on all charges. R1. at 90.

After the penalty hearing prescribed by General Statues §53a-46a, the jury found that the state had proven the existence of an aggravating factor, but that the petitioner had also proven the existence of a mitigating factor. R1. at 90. Based on the jury's findings,

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[1] R1. refers to the printed record in *State v. Lapointe*, Supreme Court Case No. 14635. This court may take judicial notice of the contents of the record in *State v. Lapointe*, CR89-107933, Judicial District of Hartford, the prosecution of the petitioner, and *Lapointe v. Warden*, CV97-0571161, Judicial District of Hartford, the case arising from the petitioner's first habeas corpus petition. See *State v. Bunkley*, 202 Conn. 629, 648 (1987); *State v. Lenihan*, 151 Conn. 552, 554 (1964); Connecticut Code of Evidence, §§ 2-1, 2-2; *Tait's Handbook of Connecticut Evidence* § 2.16.5, 3rd ed. 2001.

the trial court, *Barry, J.*, sentenced the petitioner to imprisonment for life without the possibility of release on the capital felony charge. The court merged the other murder charges and the sexual assault charges with capital felony for the purposes of sentencing in accordance with the Supreme Court's ruling in *State v. Chicano*, 216 Conn. 699, 722-23, 584 A.2d 825 (1990), *cert. denied*, 501 U.S. 1254, 111 S.Ct. 2898, 115 L.Ed.2d 1062 (1991). The court imposed consecutive prison terms of twenty-five years for arson in the first degree, twenty years for assault in the first degree and fifteen years for kidnapping in the first degree, for a total effective sentence of imprisonment for life without release plus sixty years. R1. at 91.

The petitioner appealed to the Connecticut Supreme Court which affirmed his convictions. *State v. Lapointe*, 237 Conn. 694, 678 A.2d 942 (1996). The petitioner then filed a petition for a writ of *certiorari* which was denied by the United States Supreme Court. *LaPointe v. Connecticut*, 519 U.S. 994, 117 S.Ct. 484, 136 L.Ed.2d 378 (1996).

On May 30, 1997, the petitioner filed a state petition for a writ of habeas corpus pursuant to General Statutes §52-466 and Practice Book §23-21, *et seq*. Judgment, *Lapointe v. Warden*, CV97-0571161, Judicial District of Hartford; R2. at 118.[2] In his final amended petition, dated July 10, 1999, the petitioner claimed that his imprisonment was unlawful in that: (1) he was actually innocent; (2) his convictions were the result of prosecutorial misconduct; (3) his convictions were the result of discrimination against him because of his disabilities; (4) he received ineffective assistance of trial counsel; and (5)

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[2] R2. refers to the printed record in *Lapointe v. Commissioner of Correction*, Appellate Court Case No. 21249.

he received ineffective assistance of appellate counsel. R2. at 8-24. On September 6, 2000, after an evidentiary hearing, the habeas court, *Freed, J.,* issued a decision rejecting each of the petitioner's claims and dismissing his petition. R2. at 80-109, 118-118a.

The petitioner appealed to the Appellate Court which affirmed the dismissal of his habeas petition on January 22, 2002. *Lapointe v. Commissioner of Correction*, 67 Conn. App. 674, 789 A.2d 491 (2002). The petitioner filed a petition for certification to appeal from the judgment of the Appellate Court which was denied by the Supreme Court on March 6, 2002. *Lapointe v. Commissioner of Correction*, 259 Conn. 932, 793 A.2d 1084 (2002).

On August 1, 2002, the petitioner filed the instant petition for a writ of habeas corpus alleging that he was denied his right to effective assistance of habeas counsel. In July, 2007, a hearing was held on the petition over the course of four days. At the conclusion of the petitioner's case, the respondent moved for judgment. The habeas court, *Fuger, J.*, granted the respondent's motion and dismissed the petition. The petitioner appealed and the Appellate Court affirmed in part and reversed in part and remanded the case for further proceedings. *Lapointe v. Commissioner of Correction*, 113 Conn. App. 378, 404, 966 A.2d 780 (2009).[3]

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[3] The facts pertaining to the crimes of which the petitioner was convicted and the facts relating to his subsequent confession to those crimes are set forth in the Connecticut Supreme Court's decision in the petitioner's direct appeal. *See State v. Lapointe*, 274 Conn. at 696-714. These facts are also set forth in the respondent's pretrial brief. See Respondent's Pretrial Brief at 4-15.

II. ARGUMENT

The writ of habeas corpus is intended to be a "special and extraordinary writ." *McClain v. Robinson*, 189 Conn. 663, 668, 370 A.2d 928 (1983). It is designed to address "fundamental unfairness or miscarriage of justice"; *Bunkley v. Commissioner of Correction*, 222 Conn. 444, 461, 610 A.2d 598 (1992); and "not merely an error which might entitle [the petitioner] to relief on appeal." *Safford v. Warden*, 223 Conn. 180, 190, 612 A.2d 1161 (1992). The Connecticut Supreme Court has declared that "the principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." *James L. v. Commissioner of Correction*, 245 Conn. 132, 137, 712 A.2d 947 (1998); *see Wainwright v. Sykes*, 433 U.S. 72, 97, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (*Stevens, J.*, concurring). In accordance with this principle, the habeas corpus petitioner "does not come before the court as one who is 'innocent,' but on the contrary, as one who has been convicted by due process of law." (Citation and quotation marks omitted.) *Summerville v. Warden*, 229 Conn. 397, 423, 641 A.2d 1356 (1994). The petitioner, therefore, "bears a heavy burden of proof" in mounting an attack upon a presumptively valid conviction. See *Lubesky v. Bronson*, 213 Conn. 97, 110, 566 A.2d 688 (1998).

In this petition for a writ of habeas corpus, the petitioner contends that his prior habeas counsel was ineffective in failing to raise claims that would have resulted in his convictions being overturned and a new trial being ordered. Petition at 15-23. In addition, the petitioner claims that he is actually innocent of the crimes of which he was convicted. Petition at 24-25. When the petitioner's claims are considered in light of the evidence

presented at the hearing in this matter, it is clear that the petitioner is not entitled to habeas corpus relief.

A. The Petitioner Failed to Meet His Burden of Showing That He Received Ineffective Assistance from His Prior Habeas Counsel

The petitioner contends that his prior habeas counsel was ineffective in two ways. First, he claims that his habeas counsel was ineffective in failing to raise a claim that the state's failure to disclose certain notes made by Detective Michael Ludlow during the investigation violated his right to due process under *Brady v. Maryland*, *supra*. Petition at 15-19. Second, the petitioner claims that that his habeas counsel was ineffective in failing to allege that his trial counsel provided him with ineffective assistance in the manner that they challenged the reliability of his confessions. Petition at 20-23. The petitioner failed to meet his burden with respect to either claim.

1. The law governing claims of ineffective assistance of counsel

"In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Citation omitted; internal quotation marks omitted.) *Woods v.*

Commissioner of Correction, 85 Conn. App. 544, 549, 857 A.2d 986, cert. denied, 272 Conn. 903, 863 A.2d 696 (2004).

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness . . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Santiago v. Commissioner of Correction*, 90 Conn. App. 420, 425, 876 A.2d 1277, *cert. denied*, 275 Conn. 930, 883 A.2d 1246 (2005), *cert. denied sub nom. Santiago v. Lantz*, 547 U.S. 1007, 126 S.Ct. 1472, 164 L.Ed.2d 254 (2006). Moreover, the petitioner must show that the "errors [were] so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington, supra*, 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. 695, 701, 652 A.2d 1050, *cert. denied*, 233 Conn. 912, 659 A.2d 183 (1995).

"To satisfy the second prong, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that 'counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.'" *Johnson v. Commissioner of Correction, supra*, 701. Accordingly, "[a]n 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*, *supra*, 691. "The second prong is thus satisfied if the petitioner can demonstrate that there exists a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mozell v. Commissioner of Correction*, 51 Conn. App. 818, 821 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, *supra*, 694.

In this case, the petitioner claims that he was deprived of his right to the effective assistance of habeas counsel. While such a claim is cognizable under Connecticut law, the petitioner must "succeed in ... a herculean task" in order to prevail. *Lozada v. Warden*, 223 Conn. 834, 843, 613 A.2d 818 (1992). "[T]he petitioner will have to show that . . . prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." *Harris v. Commissioner of Correction*, 108 Conn. App. 201, 209-10, 947 A.2d 435, *cert. denied*, 288 Conn. 911, 953 A.2d 652 (2008). To obtain relief on a claim of ineffective assistance of habeas counsel, "the petitioner must prove both (1) that his . . . habeas counsel was ineffective and (2) that [there is a defect in the underlying prosecution that deprived him

of a fair trial]." *Lozada*, 223 Conn. at 842. "Unless [the petitioner] makes both showings, it cannot be said that the conviction . . . resulted in a breakdown in the adversary process that renders the result [of his trial] unreliable." Id., at 842-43, *quoting Williams v. Warden*, 217 Conn. 419, 422, 586 A.2d 582 (1991).

2. The petitioner could not show that his prior habeas counsel was ineffective in failing to claim that the state's failure to disclose certain notes violated *Brady v. Maryland*

The petitioner contends that his prior habeas counsel was ineffective in failing to raise a claim that the state's failure to disclose certain notes taken by Detective Michael Ludlow violated his rights under *Brady v. Maryland*. Petition at 15-19. The petitioner's claim fails because he could not show that Ludlow's notes were suppressed, that they were exculpatory or that they were material. The state's failure to disclose the notes, therefore, did not constitute a *Brady* violation. *See State v. McIntyre*, 242 Conn. 318, 323, 699 A.2d 911 (1997).

a. The law governing claims under *Brady v. Maryland*

"In *Brady v Maryland*, supra, 373 U.S. at 87, the United States Supreme Court 'held that "suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.'" *State v. Esposito*, 235 Conn. 802, 813, 670 A.2d 301 (1996). It is well established that "impeachment evidence as well as exculpatory evidence fall within *Brady*'s definition of evidence favorable to an accused." *State v. Gant*, 231 Conn. 43, 52, 646 A.2d 835 (1994), *cert. denied*, 514 U.S. 1038, 115 S.Ct. 1404, 131 L.Ed.2d 291 (1995); *see Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d

104 (1972). There is, however, "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all . . . investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). Thus, "[t]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence to the accused that, if suppressed, would deprive the defendant of a fair trial." *State v. John*, 210 Conn. 652, 669, 557 A.2d 93 (1989), *quoting United States v. Bagley*, 473 U. S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Accordingly, in order to prevail on a *Brady* claim, "the defendant bears a heavy burden to establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that it was material." (Citations and internal quotation marks omitted.) *State v. McIntyre*, 242 Conn. at 323.

b. The petitioner could not show that the failure to disclose Ludlow's notes violated *Brady v. Maryland*

The petitioner's claim is based on the state's failure to disclose field notes taken by Detective Michael Ludlow during the investigation. The notes in question state as follows:

CSP – Steve Igoe
Joe Roy Fire Marshalls

- Slow Burn Smolder
- no char on wood of couch
30-40 mins - Fabric Burn Test – slow
= Poss.= -soot on window
- High Heat above couch area

Petitioner's Exhibit 87 at 11. The petitioner contends that these notes "represented an undisclosed and suppressed exculpatory expert opinion of Fire Marshals Stephen Igoe and Joe Roy opining that the fire's burn time was [thirty to forty minutes]." Petition at 18. The

petitioner argues that Ludlow's notes were exculpatory because if the fire had burned for only thirty to forty minutes, and was extinguished shortly after 8:27 p.m., it was impossible for the petitioner to have set the fire because he was at home between 7:00 p.m and 8:00 p.m. *Id*. The petitioner argues that the alleged suppression of the "expert opinion regarding the fire's burn time" was material because it "deprived the petitioner and his jury of evidence of his innocence" Id., at 19.

The petitioner's *Brady* claim pertaining to Ludlow's notes fails for three reasons. First, the notes were not suppressed because the state had no duty to disclose them. Second, the notes were not exculpatory. Third, even if the notes were deemed to be exculpatory, they were not material to the outcome of the case.

(1) The state had no duty to disclose the notes

While *Brady* requires the state to disclose exculpatory evidence, it "does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant." *Smith v. Secretary of Department of Corrections*, 50 F.3d 801, 823-24 (10th Cir. 1995). There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all . . . investigatory work on a case." *Moore v. Illinois*, 408 U.S. at 795. Accordingly, "the state need not disclose preliminary or speculative information . . . ." *Tate v. Wood*, 963 F 2.d 20, 25 (2nd Cir. 1992); *see also Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997).

In this case, the notes that the petitioner claims were suppressed were both preliminary and speculative. There is nothing in the notes themselves to suggest that the thirty to forty minute period mentioned is an estimate of the total time that the fire burned.

The meaning that the petitioner attributes to the notes is, therefore, is the result of nothing more than his own speculation. Moreover, because the notes were compiled at an early stage of the investigation, they were also preliminary information. Thus, they could not have constituted an "expert opinion," as the petitioner claims.

In *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848 (2005) the Pennsylvania Supreme Court considered a claim that was similar to the claim advanced by the petitioner in this case. In *Lambert*, the petitioner claimed that the Commonwealth's failure to disclose certain notes in the case file violated *Brady*. The notes in question appeared on a document next to a photograph of a witness who had testified for the Commonwealth at trial. The petitioner maintained that if the notes memorialized a statement made by the witness, it would have contradicted the witness's testimony. The petitioner argued that disclosure of the notes could have led to an investigation that would have produced exculpatory information. The court rejected the petitioner's claim, stating that *Brady* does not require "disclosure of evidence that is not exculpatory but might merely form the groundwork for possible arguments or defenses." *Lambert*, *supra,* 884 A.2d at 856.

In this case, the petitioner's claim that the Ludlow's notes included an "expert opinion" regarding the time that the fire burned were no less speculative that the claim raised by the petitioner in *Lambert*. Accordingly, the petitioner cannot show that Ludlow's notes were suppressed because the state had no obligation to disclose them. *See Tate v. Wood*, 693 F.2d. at 25; *Flores-Mireles*, 112 F.3d at 340.

(2) The notes were not exculpatory

In order to prove a *Brady* violation, the petitioner must show that the evidence that he claims was suppressed was also favorable to the defense. *State v. Rasmussen*, 225 Conn. 55, 90, 621 A.2d 728 (1993). It is well established that "impeachment evidence as well as exculpatory evidence fall within *Brady*'s definition of evidence favorable to an accused." *State v. Gant*, 231 Conn. at 52. "[E]xculpatory in this context comprehends all evidence which tends to 'negate the guilt of the accused' or support's the accused's innocence." *Commonwealth v. Laguer*, 448 Mass. 585, 863 N.E.2d 46, 56 (2007). The petitioner's claim fails because he could not show that Ludlow's notes were exculpatory.

The petitioner contends that the that the notes in question constitute an "exculpatory expert opinion of Fire Marshals Stephen Igoe and Joe Roy that the fire's burn time" was between thirty and forty minutes. Petition at 18. The petitioner argues that the notes were exculpatory because they established that the fire was set during a time when he was at home with his wife, a few blocks from the victim's apartment. *Id*., at 18-19. Thus, to prevail on his claim, the petitioner had to show that the thirty to forty minute time period mentioned in the notes pertains to the total time that the fire burned and that the notes reflected an expert opinion on the duration of the fire. The evidence presented at the hearing in this matter does not establish either of these facts.

At the hearing, the petitioner presented the testimony of Michael Ludlow in support of his claim. Ludlow testified that in 1987 he was employed as a detective with the Manchester Police Department. He testified that on the evening of March 8, 1987, he was dispatched to 251-A North Main Street, Manchester, to participate in the investigation of

the victim's murder. HT. (5/3/10) at 8-10.[4] Ludlow testified that upon his arrival at the scene, he was directed to serve as the evidence officer for the investigation. Three days later, Ludlow was assigned to serve as the case officer, or the lead investigator, in the case. *Id*. at 10, 22, 65.

Ludlow identified Petitioner's Exhibit 87 as notes that he and other detectives working on the case had taken during the investigation. Ludlow testified that he began compiling the notes after he was assigned to serve as the case officer. HT. (5/3/10) at 64. Ludlow testified that he had written the notes found on page 11 of Petitioner's Exhibit 87. HT. (5/3/10) at 95. He indicated that the names Steve Igoe and Joe Roy, which appeared at the top of the notes in question, referred to the Connecticut State Police fire marshals who worked on the case. *Id*. at 90-91. Ludlow stated that the five items listed in the column on the right (Slow Burn Smolder; no char on wood of couch; Fabric Burn Test - slow; soot on window; and High Heat above couch area) were probably notations pertaining to information that he received from either Igoe or Roy. *Id.* at 92.

Ludlow testified, however, that he could not recall the significance of the phrase "thirty to forty mins poss" that appeared to the left of the five items listed in the column. HT. (5/3/10) at 94. Ludlow stated that he "would have been trying to find out how long the fire was burning." *Id*. at 93. He indicated, therefore, that the notation "could have been a question . . . that [he] was going to ask [the fire marshals]." *Id*. at 94-95. He also stated that the notation "could have been a question by my supervisor because we were looking

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[4] References to the transcript of the hearing in this case will be signified by "HT" followed by the date of the proceedings to which is being made.

at other suspects at the time." *Id*. at 95. Ludlow testified that he could not recall whether the notation was "question to [the fire marshals]" or "a response to question." *Id*.

On cross-examination, Ludlow testified that the thirty-to-forty-minute notation could have been a reference to the minimum time the fire burned. Ludlow stated that he "would have been looking for the minimum [time that] the fire was burning [because] that would have been the closest time the suspect would have been seen leaving the area . . . ." HT. (5/3/10) at 114. Ludlow acknowledged that the notation could have indicated that "the latest time that the fire might have been set [was] thirty to forty minutes before it was extinguished." *Id*. Ludlow testified that he did not recall anyone ever telling him that the maximum time that the fire could have burned was thirty to forty minutes. *Id*. Ludlow stated that he did not have the training to estimate the duration of the fire himself and that he made no attempt to do so. He indicated that as far as he knew, the fire could have been set two hours before it was extinguished. *Id.* at 121-22.

The petitioner also presented the testimony of Steven Igoe in support of his claim. Igoe testified that he was a retired member of the Connecticut State Police. Igoe stated that during his career, he served as an investigator in the Fire Marshals Bureau for fourteen years. HT. (5/4/10) at 107-108. Igoe testified that on March 9, 1987, he was assigned to assist the Manchester Police Department with the investigation of a fire at 251-A North Main Street, Manchester. He arrived at the scene at approximately 2:30 a.m. and stayed until 8:30 a.m. Igoe testified that while he was at the scene, he met Detective Michael Ludlow of the Manchester police. After completing his investigation, Igoe concluded that the fire had been set at three separate points of origin. *Id*. at 109-10. Igoe

testified that he never gave Ludlow an estimate of the "burn time" of the fire. *Id.* at 114, 120-21.

On cross-examination, Igoe testified that he never told Detective Ludlow that the fire burned for thirty to forty minutes. He testified that he never gave Ludlow, or anyone else, an opinion as to how long the fire burned. HT. (5/4/10) at 125. Igoe stated that he never reached a conclusion as to how long the fire burned and that he did not have sufficient information to make such a determination. *Id*. at 124-25. Finally, Igoe testified that he could not exclude the possibility that the fire burned for several hours. *Id*. at 125.

The respondent presented the testimony of Joseph Roy in response to the petitioner's *Brady* claim. Roy testified that he retired from the Connecticut State Police after twenty-one years of service. Roy testified that during his career with the State Police, he was an investigator in the Fire Marshals Bureau for fifteen years. HT. (5/7/10) at 41-42. Roy testified that on March 9, 1987, he was assigned to go to the scene of a fire in Manchester to assist Detective Steven Igoe with his investigation. Upon his arrival at the scene, Roy introduced himself to a Manchester police officer and told him that he was there to assist in the investigation. *Id*. at 43-44. Roy testified that after leaving the scene of the fire that day, he had no further contact with the Manchester police regarding the investigation. *Id*. at 44-45. Roy testified that he did not recall speaking to Detective Ludlow or any other Manchester police officer on the telephone about the case. He stated that he never gave Detective Ludlow, or any one else, an estimate as to the total time that the fire burned. *Id*. at 45. Roy testified that he could not have given such an estimate because he did not have sufficient information to determine how long the fire burned. *Id.*

The record in this case includes no evidence that Ludlow's cryptic notes refer to the duration of the fire or that they are based on the opinion of an expert. Because the petitioner could not show that the notes constituted an expert opinion regarding the total time that the fire burned, they neither "negate the guilt" of the petitioner nor support any theory of his innocence. *See Commonwealth v. Laguer*, 863 N.E.2d at 56. Accordingly, the petitioner failed to show that Ludlow's notes were exculpatory.

(3) The notes were not material

Even if Ludlow's notes are deemed to be exculpatory, the petitioner cannot prevail on his claim because he could not show that the information in the notes was material to the issue of his guilt or innocence. "In *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the United States Supreme Court defined materiality, for *Brady* purposes, as 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *State v. Ross*, 251 Conn. 579, 742 A.2d 312 (1999).

In this case, the petitioner argues that Ludlow's notes are material because information in the notes would have enabled him to establish an alibi for the time that the fire was set in the victim's apartment. Petition at 18-19. The petitioner's argument is unavailing for two reasons. First, the petitioner cannot establish that the fire was started during the time period for which he claims to have an alibi. Second, the petitioner's former wife, Karen Martin, cannot provide him with a credible alibi because she gave numerous

contradictory statements regarding the petitioners whereabouts during the time within which the victim was murdered.

(a) The time of ignition cannot be established

In order to prevail on his claim, the petitioner had to show that the fire in the victim's apartment was set between 7:00 p.m. and 8:00 p.m. – the time during which he claims to have had an alibi. The petitioner attempted to show that the fire was set during this time period through the testimony of two expert witnesses: Gerard Kelder and Dr. John DeHaan. The petitioner's attempt to establish this time frame for ignition of the fire fails for two reasons. First, neither Kelder nor DeHaan could provide credible testimony to establish that the fire was set between 7:00 p.m. and 8:00 p.m. Second, the respondent's expert, Robert Corry, effectively refuted the testimony of the petitioner's experts and credibly testified that the fire could have been set well before the time during which the petitioner claims to have an alibi.

i. Testimony of Gerard Kelder

The petitioner first presented the testimony of Gerard Kelder to establish the "burn time" of the fire in the victim's apartment. HT. (5/4/10) at 136. Kelder testified that, in his opinion, "the fire burned anywhere's [sic] from forty-five minutes to an hour." *Id*. at 145. Kelder's testimony regarding the total time that the fire burned is not credible for three reasons. First, Kelder had little training in fire investigation and virtually no experience testifying as an expert. Second, his investigation of the fire in this case was extremely cursory. Third, Kelder could not provide a scientific basis for his conclusion.

Kelder's testimony reveals that he had very little training as a fire investigator. The highest level of formal education that Kelder completed was high school. HT. (5/4/10) at 165. He testified that he attended the Fire Academy for New York State and went to "various courses pertaining to fire cause and origin. . . ." *Id*. at 140. Kelder testified that he attended an unspecified two-week course "for fire investigations" and that the takes "tests on line through CFI-net.org. . . ." *Id.* Kelder testified that he received a certification from the National Association of Fire Investigators (NAFI). He testified that in order to obtain that certification, he took an open book test that was not proctored. *Id*. at 168. Kelder testified that he had fifty-one years of experience as a fire investigator and that he had investigated "over three thousand fires." *Id*. at 170-71. He initially claimed to have testified "numerous times" as a fire investigator, but when asked to specify the number, he indicated that it was only "about eight to twelve." *Id*. at 141.

Kelder's testimony also reveals that his investigation of the fire in this case was extremely limited. He testified that his "analysis was based on review of various photographs, a blueprint of the property, a videotape and testimony of both firefighters and fire investigators." HT. (5/4/10) at 142-43. In conducting his investigation, however, Kelder made no effort to speak to anyone who had first hand knowledge of the fire. He did not go to the Manchester Police Department to examine the physical evidence from the case. He did not speak to anyone who worked at the apartment complex at the time of the fire and made no made no effort to do so. *Id.* at 175. Although Kelder was initially retained in this case in 2002, issued his report in 2006, and testified for the first time in the case in 2007, he did not go to personally inspect the victim's former apartment until three weeks before

his testimony on May 4, 2010. When he finally went to the scene of the fire, he was unable to gain access to the victim's apartment. *Id*. at 173. When counsel for the respondent asked Kelder why he went to the apartment at that time, he did not claim that he did so for a valid investigative purpose. Rather, Kelder said that he went to the apartment "Just to go there before I came to court." *Id*.

Kelder was also unable to provide a scientific basis for his conclusion that the total time that the fire burned was only forty-five minutes to an hour. During his testimony, Kelder described a number of photographs that depicted the damage to the victim's apartment that was caused by the fire. He made no observations regarding the photographs, however, that could not have been made by any lay person viewing them. HT. (5/4/10) at 146-159. After describing the damage shown in the photographs, Kelder stated the following:

> Most of the damage in the residence is caused by bank down heat and smoke, but not enough heat to distort or to make any variation in the wall texture like burning the paint away, scorching the sheetrock, having the fire go down through the sheetrock and penetrating the sheetrock down to the underlying paper. It's all soot. And soot is based on a fire that burns relatively for a short period of time, not having enough oxygen in the air to support total combustion. This fire, my estimate is forty-five minutes to an hour and looking at the photographs I'm going to have to say that I'd just go toward the lower amount of forty-five minutes because of the lack of fire damage in the structure.

HT. (5/4/10) at 160. Kelder then concluded that:

> Once again, I just – it's my opinion after – you know the number of fires that I've investigated and those – that were in couches and in apartments would say to me that this fire was forty-five minutes long in duration, and it burned itself out, smothered itself out.

HT. (5/4/10) at 160.

On cross-examination, Kelder acknowledged that the ventilation of the apartment would have had had a significant impact on the characteristics of the fire. HT. (5/4/10) at 179. He testified, however, that based on his review of the photographs, the videotapes and the reports, "there was no ventilation" in the apartment. *Id*. Kelder also testified that the maximum temperature reached in the apartment during the fire was "probably about eighteen hundred degrees at ceiling level." HT. (5/5/10) at 21. When counsel for the respondent asked him for the basis of that conclusion, Kelder replied that "It's scientific proof." *Id*.[5]

Finally, Kelder acknowledged that his "estimate of the ignition time of the fire was based largely on the amount of damage that [he] observed . . . ." HT. (5/5/10) at 23. Kelder, however, could identify no scientific principle that would support his assertion that he can determine the duration of the fire simply by viewing photographs of the damage that it caused. Indeed, when Kelder's testimony is considered in its entirety, it becomes clear that it was nothing more than pseudo-scientific babbling. His conclusion, therefore, should not be credited by this court.

ii. Testimony of Dr. John DeHaan

The petitioner also presented the testimony of Dr. John DeHaan to establish that the fire was set during the period of time for which he claims to have an alibi. At first

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[5] In contrast, the petitioner's other expert, Dr. John DeHaan, testified that the maximum temperature reached in the apartment was between four hundred and four hundred fifty degrees Fahrenheit. HT. (5/5/10) at 77. The respondent's expert, Robert Corry, testified that DeHaan had overestimated the temperature reached during the fire. HT. (7/7/10) at 161-65.

glance, DeHaan appears to be a more credible witness than Kelder. He certainly gives a far more polished presentation than Kelder does. DeHaan claims to have impressive academic credentials and extensive experience in fire investigation. Moreover, he appears to have used an appropriate methodology in reaching his conclusion. Upon closer examination, however, it becomes clear that DeHaan is no more credible than Kelder.

DeHaan testified that he received a Ph.D. in forensic science from the University of Strathclyde in Glasgow, Scotland. HT. (5/5/10) at 48. On cross-examination, DeHaan acknowledged that the Ph.D. he received required no course work. *Id*. at 83. DeHaan explained that the Ph.D. that he received was a "research Ph.D." that did not require him to take courses. DeHaan stated that such programs are common in Europe, but he could not name any other universities that offered such a program. *Id*. at 83-84.

DeHaan testified that he is a "forensic scientist who currently specializes in the investigation and reconstruction of fires and explosions." HT. (5/5/10) at 48. He stated that he has specialized in fire investigations for twenty years. *Id*. On cross-examination, DeHaan testified that during his career, he has physically visited only about 120 fire scenes. He indicated that he rendered an expert opinion with regard to 100 of those cases. *Id*. at 88. DeHaan testified that since 2005, he has visited a fire scenes and issued an expert opinion only about twenty times. *Id*. at 89. DeHaan testified that he served as the cause and origin expert on a fire only about twenty times. *Id*. at 90.

DeHaan testified that he is the author of *Kirk's Fire Investigation*, which he described as a "major college level textbook." HT. (5/5/10) at 55. DeHaan testified that he has been responsible for the book since 1982 and is the author of the last five editions, beginning

with the second edition. *Id.* On cross-examination, DeHaan testified that he conducted his first fire investigation about one year before he released the second edition of *Kirk's Fire Investigation*. *Id*. at 88. DeHaan testified that he had visited a fire scene and rendered an expert opinion in only a "handful" of cases prior to releasing the second edition of the book. *Id*. at 89.

Like Kelder, DeHaan conducted a very limited investigation of the fire. DeHaan based his conclusions entirely on materials provided to him by petitioner's counsel. These included transcripts of trial testimony, reports by Steven Igoe, Gerard Kelder, Robert Corry and Dr. Arkady Katsnelson, the medical examiner who performed the autopsy on the victim. DeHaan also had thirty-six color photographs, a DVD of the scene and building plans. DeHaan testified that it is "always better to visit a scene firsthand, if it hasn't been changed from the original configuration . . . ." HT. (5/5/10) at 58-59. In this case, however, DeHaan testified that because it was a contents fire, and because he had good graphic documentation of the scene, he felt comfortable "with not visiting" the victim's former apartment. *Id*.

On cross-examination, DeHaan testified that there are things that can be learned by visiting the scene if the building had not been rehabilitated. He admitted that he did not know to what extent the building was different from the time of the fire. He testified that he did not talk to anyone who worked in the apartment complex at the time of the fire and did not attempt to do so. HT. (5/5/10) at 92. DeHaan stated that he did not go to the Manchester Police Department to examine the evidence in the case and did not know if any such evidence existed. *Id.* at 92-93. DeHaan testified that he did not know whether

the first firefighters who entered the apartment were treated for thermal burns and he indicated that he made no effort to find out if they had been. *Id.* at 97.

Finally, unlike Kelder, DeHaan attempted to place a veneer of scientific methodology on his analysis. Nevertheless, DeHaan's analysis is flawed and his conclusions are unreliable because the facts on which he bases his conclusions are unsupported by evidence. DeHaan testified that after the couch was ignited, the fire burned intensely for a period of time and then died down as the oxygen in the room became depleted. HT. (5/5/10) at 68-72. DeHaan testified that the maximum temperature in the apartment during the fire "never got much above four hundred or four hundred and fifty degrees." *Id.* at 77 DeHaan noted that Michael Tomkunas, the first firefighter to enter the apartment, backed out because he had encountered temperatures that were "unpleasantly hot to his skin." *Id.* at 73. Based on this, DeHaan concluded that Tomkunas had encountered "temperatures in the range of . . . three of four hundred degrees Fahrenheit" when he entered the apartment. *Id*. at 73-74.[6] DeHaan concluded, therefore, that "the fire was started [somewhere] between twenty-five and sixty minutes . . . prior to Mr. Tomkunas's entry into the fire." *Id*. at 75.

DeHaan explained that once the significant fire went out, heat would stop being produced and the room would begin to cool down. HT. (5/5/10) at 79. DeHaan testified that if a more than sixty minutes had elapsed, Tomkunas would not have encountered the heat

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[6] Later, on cross-examination, DeHaan would insist that that Tomkunas encountered a temperature of four hundred degrees when he entered the apartment. HT. (5/5/10) at 97.

conditions that he described when entering the apartment. *Id*. DeHaan's conclusion regarding the duration of the fire is, therefore, based on two critical factors: (1) the temperature that Tomkunas encountered when he entered the apartment; and (2) the rapidity with which heat would be lost from the apartment after the significant fire died down. There is nothing in the record to support DeHaan's conclusions with regard to either of these factors.

On cross-examination, DeHaan testified that Tomkunas encountered a temperature of approximately four hundred degrees when he first attempted to enter the victim's apartment. HT. (5/5/10) at 97. DeHaan testified that if the temperatures were much lower than that, Tomkunas would not have been dissuaded from entering the apartment. *Id*. at 98. He acknowledged that "average citizens" would be dissuaded from entering a room by temperatures as low as two hundred and fifty degrees Fahrenheit. *Id*. DeHaan, however, believes that firefighters "are willing to confront higher temperatures for short periods of time . . . ." *Id*. DeHaan testified, therefore, that his estimate of the temperature that Tomkunas encountered when he entered the apartment was "based on his assumption as to the level of temperature that Tomkunas would have tolerated[]." *Id*. Thus, DeHaan's estimate of the temperature in the apartment when Tomkunas first entered was based on pure speculation.

On cross-examination, DeHaan testified that his conclusion regarding the duration of the fire was based on "the amount of heat that was retained in the apartment when the firefighters entered[]." HT. (5/5/10) at 94. In his report, DeHaan himself stated that "[d]ue to the limited data available as to the insulation and ventilation conditions existing in this

structure, *it is not possible to predict the post-fire duration of high temperatures*." (Emphasis added.) Petitioner's Exhibit 191 at 5. Despite the statement in his report, DeHaan maintained that the victim's apartment "would not have retained the heat that Tomkunas described when he entered the building for more than an hour." HT. (5/5/10) at 94. Thus, DeHaan's conclusion with regard to the apartment's ability to retain heat is also based on speculation.

Because DeHaan's conclusion regarding the time that the fire was ignited is not supported by the evidence, it should not be credited by this court.

iii. Testimony of Robert Corry

Finally, the petitioner cannot show that Detective Ludlow's notes were material to his defense because the state's expert, Robert Corry, testified credibly that the ignition of the fire cannot be determined to have occurred during the period of time for which the petitioner claims to have an alibi. Corry's testimony is credible for three reasons. First, Corry is a highly trained fire investigator with almost thirty years of experience. Second, Corry conducted an extremely thorough investigation of the fire in this case. Third, Corry's conclusions are well supported by the evidence and are based on established scientific principles.

Robert Corry testified that he has began his career as a fire investigator while a member of the Massachusetts State Police in 1981. In his capacity as a state police officer, he served as the State Fire Marshal Investigator for the District Attorney in Hampden County. HT. (7/7/10) at 91-93. He was later appointed to serve as the commanding officer of the Statewide Fire and Explosion Investigation Unit for the

Massachusetts State Fire Marshal's Office. *Id*. at 94. After retiring from the state police, he was employed as an fire investigator by the Federal Emergency Managent Agency (FEMA) and American Reinsurance Company. *Id*. at 96. Since 2002, Corry has been self-employed as a private fire investigator. *Id.* at 97. Over the course of his career, Corry has investigated more than 1400 fires. *Id*. at 98.

Corry testified that during his career in law enforcement, he attended over forty training programs for fire investigators. HT. (7/7/10) at 100. He testified that attended the FBI Police Arson School and subsequently became an instructor there. *Id*. at 101-102. He has served as an instructor in fire investigation seminars in thirty-one states as well as in Canada, England, Australia and Panama. *Id.* at 106. He has been qualified as an expert in judicial proceedings approximately one hundred fifty times. *Id*. at 111. When conducting investigations, Corry testified that he always follows the methodology prescribed in Chapter 4 of NFPA 921. HT. (7/7/10) at 112; *see* Respondent's Exhibit A.

Corry conducted a very thorough investigation of the fire in this case. Cory testified that he began his investigation by reviewing materials pertaining to the fire that were provided to him by counsel for the respondent. These materials included transcripts of trial testimony, statements taken from firefighters at the scene, the report of the state fire marshal and photographs of the scene. HT. (7/7/10) at 113.

After reviewing these materials, Corry went to the scene of the fire on two occasions. At the apartment complex, Corry spoke to the Joseph Lange, the director of maintenance, who was employed there at the time of the fire. Lange was able to tell Corry about changes made in the apartment since the fire. *Id*. at 114-116. Corry was able to gain

access to the victim's former apartment and examine its construction to determine "how tight the structure was." *Id*. at 115. Corry explained that this is necessary because "the amount of air infiltration into a . . . compartment, is a critical feature of fire growth." *Id.* Corry was able to determine that the door to the apartment was the same one that was in place at the time of the fire. He learned that the windows were replaced after the fire, but that they were replaced with the same type of windows that were in place before the fire. *Id*. at 116-17.

After examining the fire scene, Corry went to the Manchester Police Department and examined all of the evidence that the police had retained in the case. HT. (7/7/10) at 119. Corry also interviewed Michael Tomkunas, the first firefighter to enter the victim's apartment on the night of the fire and Steven Igoe, the State Fire Marshal who had originally investigated the fire. *Id.* at 119-20. Corry also conducted research regarding a number of issues raised by the case. In the course of his research, he consulted several references, including *The Ignition Handbook*, NFPA 921 and *Kirk's Fire Investigation*. *Id*. at 120. Corry also sought the opinion of two other experts, Dan Madrzykowski and Joel Haynes, regarding issues in the case. *Id*. at 120-21.

After completing his investigation, Corry reached a number of conclusions regarding the fire. Corry testified that the fire had three "distinct and uncommunicated points of origin." HT. (7/7/10) at 122. Corry testified that the first two points of ignition, which were both terry cloth towels hanging in the kitchen, had "zero probability that they would have propagated into a full room involvement." *Id*. at 122, 126. Corry indicated that the third point of origin was the couch in the living room. Corry testified that ignition of the couch

had the potential to create a major fire that would have caused full room involvement, but failed to do so for two reasons. *Id*. at 127-29, 131-37, 161. Corry testified that the biggest factor as to why the fire died was "that it didn't have any air. . . ." *Id.* at 126. Corry stated that "if the perpetrator had simply left the [sliding glass door] ajar . . . it would have been a huge fire . . . ." *Id*. at 126-27. Second, Corry testified that "there was a mass of material that was obviously on top of [the couch] throughout this fire event . . . ." *Id.* at 130. Corry stated that the material acted as a shield that "would essentially take . . . much fuel out of play." *Id.* at 132. He explained that "the fire would not be able to bring the fuel that is potentially ignitable underneath that pile to its ignition." *Id*. Corry stated, therefore, that the material on the couch resulted in a "smaller fire [with] lower energy." *Id*. Corry testified that the manner of ignition of the fire indicated that it was a spontaneous act "by someone who . . . had very limited understanding of . . . how to set a fire, or how a fire behaves. *Id.* at 127.

Corry testified that it was likely that the fire on the couch was set by placing a flame against the back seat cushion. He indicated that a match could have been used to set the fire in this fashion. HT. (7/7/10) at 144-45. Corry testified that the ignition produced a "ventilation controlled fire" because there was "abundant fuel, but a very limited amount of oxygen." *Id.* at 147. Corry testified that because the windows and doors were tightly closed, "there was a very small amount of air . . . for this fire to consume." *Id*. Corry stated that the fire would have produced a great amount of black smoke that would have filled the room. *Id*. at 48. He stated that when "the smoke layer, which is oxygen depleted" reached the level of the fire, it would have caused the fire to slow to "surface only smoldering or

glowing combustion." *Id*. at 149. Corry testified that there were adequate materials in the couch to allow the smoldering combustion to continue for some time. *Id*. at 150, 156. Corry testified that, as a result of the insulation and the ventilation conditions that he observed, the apartment could have maintained for heat for a significant period of time. *Id*. at 158. He testified that the smoldering materials could have reignited when firefighter Tomkunas opened the door to the apartment and provided the fire with a source of oxygen. *Id*. at 159-60.

Corry testified that, based on the evidence that he considered, the fire in the victim's apartment could have been set at any time after 5:45 p.m., the last time that the victim was seen alive outside of her apartment. HT. (7/7/10) at 158-59.

Corry also testified regarding the electric wall clock from the victim's apartment. HT. (7/8/10) at 2-10; *see* Respondent's Exhibit JJ. Corry testified that he was able to examine the clock in the evidence room at the Manchester Police Department. Corry indicated that the face of the clock was discolored by a process called thermal diffusion. He stated that thermal diffusion occurs when particles of soot and aerosols suspended in air are transferred to cooler surfaces with which the air comes in contact. *Id.* at 3. He stated that the discoloration of the clock face was less pronounced on the portions of the face that were covered by the hands of the clock when the thermal diffusion occurred. The lighter markings on the clock face indicated the clock was showing eleven minutes after eight when the thermal diffusion occurred. *Id.* at 3-4.

Corry testified that clocks of this type frequently have a clear plastic cover over the clock face. Corry testified that the plastic body of the clock was melted and he could not

determine whether it originally had a cover. He stated, however, that the flimsiness of the hands of the clock from the victim's apartment suggested that the victim's clock did have a plastic cover. Corry testified that a plastic cover over the face of the clock would have prevented the face from becoming discolored by the thermal diffusion process. He indicated that the discoloration would not have taken place until the cover fell off. HT. (7/8/10) at 4-5. Corry testified that he did not know if the clock were set to the correct time and was working properly at the time of the fire. *Id.* at 6. He testified that the markings on the face of the clock would indicate the position of the hands when the cover on the face of the clock fell off. Corry testified, however, that he did not have sufficient information to determine how long that would have taken in this case. *Id*. at 7-8, 10.

Finally, Corry testified that he had significant disagreements with the testimony of the petitioner's experts in this case. First, Corry testified that he disagreed with the conclusions in Gerard Kelder's report. Corry stated that it was impossible to determine the time that a fire was ignited merely by looking at photographs of the damage, as Kelder claimed to have done. HT. (7/7/10) at 160. Corry also had numerous points of disagreement with Dr. DeHaan's testimony. He testified that, contrary to DeHaan's testimony, the fire in this case was not "high energy" at any point. *Id*. at 161. He testified that DeHaan overestimated the amount of energy produced by the fire because he failed to consider the effect of the materials on the couch that "took large sections of this fuel package out of play." *Id*. at 162. Corry also believed that DeHaan "overstated" the temperatures that Tomkunas encountered when he entered the apartment. *Id.* at 162-63, 152-53. Corry testified that Tomkunas described the heat that he encountered when he

entered the apartment as less "intense [than] a suana." *Id.* at 152. Corry indicated that none of the first firefighters to enter the victim's apartment described high temperatures in their statements. Corry also found it significant that none of the firefighters suffered injuries from the heat that they encountered in the apartment. *Id*. at 152-53. Corry testified that "if the temperatures had been anywhere close [to] for hundred degrees, as Dr. DeHaan said . . . [the firefighters] would have been burned." *Id.* at 153; *see* Chapter 4, *Fire Protection Handbook;* Respondent's Exhibit II. Accordingly, Corry concluded that it was not possible for the temperature in the apartment to be as high as DeHaan's testimony indicated. *Id*. at 156.

Robert Corry's testimony makes clear that the petitioner cannot establish that the fire in the victim's apartment was set during the period of time for which he claims to have an alibi.

Accordingly, the petitioner could not have mounted a successful alibi defense at trial even if he had been aware of Detective Ludlow's notes.

(b) The petitioner's alibi is not credible

The petitioner's claim of materiality is also based on his assumption that his former wife, Karen Martin, can provide him with an alibi for the period between 7:00 p.m. and 8:00 p.m. onthe evening of the murder. As the record in this case makes clear, Karen Martin is an unpredictable witness who cannot be relied upon to give credible testimony.

Karen had divorced the petitioner by January 1992. When she appeared pursuant to the petitioner's subpoena to testify at the suppression hearing, she displayed great

hostility to the defense. T. (1/30/92) at 2138-43.[7] While she testified that the petitioner was home watching television between 7:00 p.m. and 8:00 p.m., she explicitly denied knowing where he was between 6:15 p.m. and 7:00 p.m., a period of time during which the murder could have taken place. T. (1/30/92) at 2099-2103. Indeed, at one point during the hearing, Karen testified that the petitioner had confessed the murder to her; T. (1/7/92) at 823-25; although she later recanted that testimony. T. (1/30/92) at 2096-97.

Karen Martin's value as a witness was also diminished by the erroneous information that she had provided to law enforcement during the investigation. She told the police that the petitioner had type O blood when he was in fact a type A. She initially told investigators that the petitioner did not leave the house after they returned from the victim's apartment at 4:00 p.m. until Natalie Howard called them at about 8:00 p.m. She later admitted that the petitioner left the house to walk the dog. Petitioner's Exhibit 71 and 27. Indeed, petitioner's trial counsel deemed Karen to be so unreliable that they chose to impeach her extensively at the suppression hearing. Irma Grimes, an investigator for the public defenders, testified that Karen had given her statements placing the telephone call from Natalie Howard at various times, including 6:00, 6:30 and between 7:30 and 7:45 p.m. T. (1/31/92) at 2168-69, 2171-72, 2174. It is clear, therefore, that Karen Martin could not have provided the petitioner with a credible alibi on the evening of the murder.

At the petitioner's criminal trial, the state presented evidence that the petitioner provided the police with three, separate, written confessions to the crimes with which he

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[7] References to the transcript of the petitioner's criminal trial will be signified by "T" followed by the date of the proceedings to which is being made.

was charged. The state also presented compelling circumstantial evidence to corroborate those confessions. *State v. Lapointe*, 237 Conn. at 696-715. Because Ludlow's notes do nothing to establish an alibi for the petitioner, they could have had no conceivable effect on the outcome of the case if he had obtained them prior to trial. Accordingly, the petitioner cannot show that Ludlow's notes were material for the purposes of *Brady*. *See United States v. Bagley*, 473 U.S. at 682; *State v. Correa*, 241 Conn. 322, 361, 696 A.2d 944 (1997).

c. Because the petitioner failed to establish a *Brady* violation he cannot show that prior habeas counsel was ineffective in failing to raise such a claim

In order to obtain relief on a claim of ineffective assistance of habeas counsel, "the petitioner must prove both (1) that his ... habeas counsel was ineffective and (2) that [there is a defect in the underlying prosecution that deprived him of a fair trial]." *Lozada v. Warden*, 223 Conn. at 842. In this case, the petitioner has failed to meet either prong of the test. The petitioner claimed that his prior habeas counsel was ineffective for failing to raise a claim under *Brady v. Maryland*. As demonstrated above, however, the *Brady* claim that the petitioner contends his prior habeas counsel should have raised is meritless. Consequently, the petitioner failed to prove the existence of a defect in the underlying prosecution that deprived him of a fair trial. Moreover, because the performance of his prior habeas counsel could not have been deficient for failing to raise meritless claims; *see Sekou v. Warden*, 216 Conn. 678, 690, 583 A.2d 1277 (1990); the petitioner has failed to show that his prior habeas counsel was ineffective.

3. The petitioner has not shown that his trial attorneys were ineffective for failing to exploit "available evidence" or that his prior habeas attorney was ineffective for failing to prove such a claim

In the second count of his amended petition, the petitioner claims that *prior habeas counsel* failed to demonstrate that *trial counsel* were ineffective for not employing "available evidence" to "establish the unreliability and falsity of the petitioner's alleged confessions despite the existence of significant evidence establishing they were unreliable and false." Paragraph 57 of Petition. He specifies that the "available evidence" consisted of a blue sweater, multicolored blouse, several buttons, black pants, gloves, and a pubic hair that "was microscopically dissimilar to both the decedent's and the petitioner's pubic hairs." Paragraph 58 of Petition. He further alleges that his third written statement to police was unreliable because it was inconsistent with the physical evidence that the victim's blood was found on the bed and that she was not manually strangled. Because these matters were well-known to the jury, the petitioner cannot demonstrate that his counsel's representation was ineffective.

a. The petitioner is limited to the claim remanded by the Appellate Court

The petitioner pursued this "available evidence" claim at the earlier trial in the instant habeas proceeding. After the prior court granted the respondent's motion for judgment of dismissal, the petitioner appealed. On appeal, he asserted that, taking his evidence as true and in the light most favorable to him, it was sufficient to establish a *prima facie* case and that the court's granting of the motion constituted error. The Appellate Court agreed

and reversed the judgment of the habeas court*, in part*. In its remand, the Court ordered that:

> The judgment is reversed as to count one as it relates to the Ludlow note and as to those portions of count two concerning trial counsel's failure to utilize evidence to prove the factual unreliability of the petitioner's inculpatory statements to the police, and the case is remanded for further proceedings according to law.

Lapointe, 113 Conn. App. 378, 404 (2009).

In other words, the Appellate Court ordered a remand so that the petitioner could relitigate *the same claim* that he litigated at the original trial, supported with a *prima facie* case, and pursued on appeal. It described his "available evidence" claim as follows:

> Failure to Employ Evidence
>
> The petitioner next argues that the court failed to consider his claims arising from habeas counsel's failure to allege deficient trial representation for not utilizing evidence to prove the factual unreliability of the petitioner's inculpatory statements to the police. Specifically, regarding the latter claim, the petitioner argues that trial counsel failed to utilize evidence of (1) the clothes worn by the victim at the time of the attack, (2) the discovery of pubic hair belonging to an unknown individual that was found on the victim's sweater, (3) the existence of gloves at the crime scene that had no connection to the petitioner or the victim, (4) the method of strangulation that did not correlate to the petitioner's confession and (5) the location of the stabbing that did not correlate to the petitioner's confession.
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> * * *
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> It should also be noted from the outset of this analysis that the five issues raised have the potential to act in a cumulative capacity to attack the credibility of the petitioner's confession in a way that carries more weight

than any one issue alone; accordingly, they are best addressed in the aggregate.

The first issue concerns trial counsel's failure to employ available evidence that the clothes worn by the victim at the time of the attack did not match the petitioner's description of what she was wearing when he confessed to attacking her. At the second habeas trial, the petitioner submitted evidence, by way of investigation reports, crime scene photographs and the testimony of Ludlow to establish the articles of clothing found at the crime scene, which included black pants, a blue sweater and a multicolor blouse. The petitioner also submitted the police report detailing Howard's statement that she last saw the victim outside of the victim's apartment wearing a blue sweater and dark slacks. Howard's testimony at various stages of the underlying proceedings reiterated this statement. When this evidence is compared with the petitioner's confession, a clear contradiction arises. In a written statement, the petitioner stated the following: “I went into the bathroom (which is located off the bedroom). When I came out [the victim] was wearing a pink house coat type of outer wear with no bra. (I could see her breasts when she bent over).” The petitioner argues that the evidence of the specific articles of clothing found at the crime scene, in particular the absence of this pink housecoat, is indicative of the unreliability of his confession. Accordingly, he argues that his trial counsel provided ineffective representation by not utilizing this evidence to undermine the credibility of his confession.

The next issue involves the discovery of pubic hair belonging to an unknown individual that was found on the victim's sweater. The plaintiff submitted evidence by way of the evidence report and the complete criminalistics report to demonstrate that his counsel was aware that pubic hair not belonging to the victim or to the petitioner was discovered on the victim's sweater. He argues that this evidence demonstrates, at least circumstantially, that the pubic hair belonged to the perpetrator and that it was transferred to the victim's sweater at the time of the attack. Accordingly, it is his contention that he received inefficient assistance of trial counsel because his counsel failed to employ this evidence to demonstrate that he was not the perpetrator of this crime.

The third issue concerns the existence of gloves at the crime scene that had no connection to the petitioner or the victim. The petitioner submitted evidence that a pair of men's gloves were discovered at the crime scene. One glove was located at the head of the victim's bed while the other was discovered on the floor of the bedroom. The criminalistics report was submitted to establish that the victim's head hair was discovered on both gloves. The crime scene photographs were submitted to substantiate this claim, as well as excerpts from the trial court transcript, the evidence report and the criminalistics report. He maintains that this evidence establishes that the gloves have no evidentiary connection to him, and, therefore, the gloves' appearance at the crime scene should have been employed by his trial counsel to demonstrate, even circumstantially, that the gloves belonged to the actual perpetrator.

The fourth issue concerns trial counsel's failure to employ evidence that the method of strangulation utilized by the perpetrator contradicts the method described by the petitioner in his confession. According to the written confession issued in the presence of Morrissey, the petitioner stated: "I admit to having strangled her." At the criminal trial, Morrissey testified that when the petitioner made this statement, he made a motion with his hands to demonstrate. Morrissey testified that "he brought up his hands and opened palms the way you'd expect somebody to be grabbing somebody's neck." The medical examiner, Arkady Katsnelson, however, testified at trial that "with reasonable degree of medical certainty in this particular case, I believe this asphyxiation was caused by pressure with a blunt object, to the right side of the neck. It is not manual strangulation." The petitioner maintains that this is evidence of inadequate trial representation because his counsel failed to address this contradiction, which would have demonstrated the unreliability of the petitioner's confession to Morrissey.

The last evidentiary issue also involves trial counsel's alleged failure to utilize existing evidence to undermine the reliability of the petitioner's confession due to a factual inconsistency between the evidence adduced at trial and the substance of the confession. According to the petitioner's confession, after the victim was sexually assaulted, "she said she was going to tell my wife Karen. I then went to the kitchen and got a steak knife with a hard plastic

brown handle and stabbed [the victim] in the stomach while she was laying on the couch." Notwithstanding this recounting of the events, the petitioner argues that the forensic evidence adduced at trial demonstrated that the stabbing did not occur on the couch; rather, the victim was stabbed in the bedroom. The petitioner submitted numerous crime scene photographs of both the bedroom and the couch in support of this claim. He argues that his trial counsel failed to address this contradiction even though it demonstrates the unreliability of his statement to Morrissey.

Each of these claims involving trial counsel's failure to employ the available evidence addresses either the credibility of the petitioner's confession or the likelihood of a different perpetrator. Evidence of this nature has a reasonable probability of altering the outcome of the proceedings. Therefore, viewing the evidence in the light most favorable to the petitioner, we conclude that he has submitted sufficient evidence to establish a prima facie showing of prejudice under *Strickland.*

We turn next to the question of whether the petitioner submitted sufficient evidence to demonstrate a prima facie showing that trial counsel's performance was deficient. "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 and the penalty in the event of conviction . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility. . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation, but by demonstrable realities. . . . One cannot successfully attack, with the advantage of hindsight, a trial counsel's trial choices and strategies that otherwise constitutionally comport with the standards of competence." (Internal quotation marks omitted.) *Torres v. Commissioner of Correction,* 84 Conn.App. 561, 566-67, 854 A.2d 97 (2004). Here, the totality of the evidence submitted to demonstrate trial counsel's failure to employ available evidence is sufficient to establish a prima facie showing of prejudice under *Strickland.* This evidence, if credited and viewed in the light most favorable to the petitioner, is substantial enough to take his claim out of the realm of speculation and make the issue of fundamental unfairness a demonstrable reality. Accordingly, the court

> improperly granted the motion for a judgment of dismissal on this portion of count two.

(Footnote omitted.) *Lapointe*, 113 Conn. App. at 397-402.

Thus, the Appellate Court has described in detail the claim that was (1) raised at trial, (2) supported by a *prima facie* case, (3) pursued on appeal, and (4) remanded for a new trial.

It is axiomatic that "'[i]n carrying out a mandate of [an appellate court], the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . .'" (Citation omitted.) *State v. Nicholson*, 83 Conn. App. 439, 441, cert. denied, 271 Conn. 906 (2004) (a trial court is "required to follow the precise directions of the remand order"). "Compliance means that the direction is not deviated from." *Nowell v. Nowell,* 163 Conn. 116, 121 (1972). In other words, "[t]he trial court cannot adjudicate rights and duties not within the scope of the remand." *Nowell,* 163 Conn. at 121. Likewise, "[n]o judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed." *Id.* Rather, on remand, "[t]he trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . These principles apply to criminal as well as to civil proceedings.' . . ." *Nicholson,* 83 Conn. App. at 441. *See also State v. Lafferty*, 191 Conn. 73 (1983).

In the instant case, the petitioner moved to amend his petition. Although that motion was granted, he only added a claim of actual innocence–*i.e.*, Count Three. He cannot

seek to now add new allegations by reinterpreting the "available evidence" that he claims his prior attorneys failed to utilize. Indeed, this Court is without authority to expand the scope of the remand. For these reasons, the petitioner is limited by the remand as to the claims that he may relitigate.

b. Evidence presented at the 1992 criminal trial

At the 1992 criminal trial, Detectives Charles Revoir and David Bates, both of the State Police Major Crimes Squad, testified about each piece of evidence seized from the scene and where those items were found. Transcript (5/8/92) at 151-54, 184-229. Revoir also provided the jury with photographs and a sketch of the scene; State's Exhibits 19A through 19H and State's Exhibit 20; that depicted the location of various pieces of evidence. *Id.* at 138, 151-63. The seized clothing and buttons were admitted as full exhibits and the jury viewed a videotape which showed these items at the crime scene. Transcript (5/7/92) at 211-28. Beryl Novitch, a criminalist from the state's Forensic Science Laboratory, testified that she examined some of the evidence collected at the crime scene. She also advised the jury of her findings as to that evidence.

Additional evidence will be recounted and discussed, below.

c. Evidence presented at the 2010 habeas trial

At the habeas trial, the petitioner offered the testimony of Nicholas Petraco, a certified criminalist, who examined the crime scene video, photographs, a sketch, and three volumes of unspecified materials. Transcript (5/4/10) at 63, 69, 76-77. He described crime scene reconstruction as "during the investigation you're trying to make sense . . . as to what physical evidence you have and how this particular event could have taken

place. . . . [I]t's really in a sense *supposition* because you're looking at the physical evidence and you're trying to piece together what *might* have happened in a given case based on what you find at the crime scene." (Emphasis added.) Transcript (5/4/10) at 66. *See also* Transcript (5/4/10) at 89 ("[Y]ou're just looking at the physical evidence to try and figure what *might* have happened"). Petraco calls crime scene reconstruction "event reconstruction" and indicated that "you're trying to–does the physical evidence match what you *think* happened in this case." (Emphasis added.) *Id.* at 68. He admitted that he knows of "no scientific protocols" as to how a crime scene should be reconstructed. *Id.* at 88. Rather, a criminalist looks at the evidence "collected at the crime scene" and then deduces "what may have happened." *Id.* at 88. He also explained that "[n]o one can ever say exactly what happened in–in any case. . . . [Y]ou're just looking at the physical evidence to try and figure out what might have happened." *Id.* at 89.

Based upon the materials he reviewed, Petraco observed that the firemen arrived, found the victim, cut bindings from the victim, rendered medical aid to her, and transport her to the hospital. *Id.* at 78-79. He next recounted that an autopsy of the victim's body was performed and went through the medical examiner's findings. *Id.* at 79-80. Although he is not a "psychologist or psychiatrist," Petraco observed that the multiple stab wounds to the victim's back looked like certain cases that he had seen involving torture. *Id.* at 80. He had admitted, however, that such wounds could have been inflicted by "a weak individual who did not know what he was doing." *Id.* at 94. After noting the position of the victim's clothing, the loose buttons, the blood on the bed, and the knife, he stated that "there's [a] good indication" that a struggle had taken place and "something violent

happened in the bedroom." *Id.* at 80-81. He did not know, however, whether the victim was stabbed on the bed or stabbed and then moved onto the bed. *Id.* at 92. Petraco also noted that it "looks like she was somewhat tortured and you know by the knife. . . ." *Id.* at 81-82. He observed that "there's no record of any pink gown ever being found" and that "there's no indication of blood on the couch. Yes, the couch is burned and it's severely burned and stuff, but no one even examined it for blood. . . ." *Id.* at 82. He opined that the victim's position in the living room indicted that she was trying to escape and that the perpetrator set the fire and then left "as soon as possible." *Id.* at 82-83. He later admitted that he did not know whether the victim moved herself into the living room or was dragged there. *Id.* at 91. Petraco concluded that the victim "was assaulted primarily in the bedroom." *Id.* at 83. He was unable to render any opinions as to black gloves found in the victim's bedroom and a pubic hair found on the victim's sweater. *Id.* at 83-87.

Additional evidence will be recounted and discussed, below.

d. Counsel's representation was effective

Here, the petitioner does *not* allege that counsel was ineffective for failing to present certain evidence to the jury. Rather, he asserts that counsel should have done more to emphasize or highlight that evidence. In so doing, he over-emphasizes the importance of this evidence. Likewise, he ignores the fact that the jury was presented with this evidence, often on several occasions. As a result, counsel's alleged failure to highlight or emphasize evidence of which the jury was well-aware was *not* "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

Strickland, 466 U.S. at 687. For these reasons, and those discussed below, the petitioner's allegations fail.

(1) Any inconsistencies between the petitioner's third written statement and the victim's clothing was known to the jury

The petitioner asserts that both prior habeas counsel and trial counsel should have used evidence of the victim's clothing to demonstrate that the petitioner's confessions were false and unreliable. He attacks that portion of his third written statement which contains the following passage: "After my coffee, I went into the bathroom (which is located off the bedroom). When I came out, Bernice was in the bedroom combing her hair. She was wearing a pink housecoat type of outerwear with no bra. (I could see her breasts when she bent over). I grabbed her with my hand around her waist area. When I did that she pushed me. I threw her on the bed and took off her underwear because I wanted to have intercourse with her." No pink housecoat was seized.[8] Rather, police seized a blue sweater, multicolored blouse, and black pants. The victim was seen wearing similar clothing shortly before her death. Police also found and seized several loose buttons from the floor of the bedroom. Because counsel appropriately highlighted this evidence and the jury was cognizant of the inconsistency, the petitioner cannot demonstrate either deficient performance or prejudice as to this issue.

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[8] Detective Morrissey testified that the petitioner actually said that the victim was wearing a pink "mau-mau." Morrissey had no idea what he was talking about. As they continued talking, Morrissey came to understand that it was similar to a housecoat or nightgown. Transcript (5/22/92) at 1510-11.

The petitioner asserts that prior habeas counsel and trial counsel should have used this evidence to demonstrate the falsity of the petitioner's third written statement. Of course, the jury was well-aware of such discrepancies. Through the testimony of Detectives Revoir and Bates, the jury was presented with the evidence collected at the crime scene, photographs of the crime scene, and the crime scene video tape. Transcript (5/8/92) at 131-282. The victim's clothing and the loose buttons were admitted as exhibits. Beryl Novitch testified about her examination of these items and her findings. The prosecutor mentioned the clothing during her closing argument, drawing the jury's attention to Novitch's finding that the blouse was missing three buttons, that buttons matching the blouse were found on the floor and arguing that the jury could infer "that the clothing was forcibly removed." Transcript (6/25/92) at 468. She further noted that Nathalie Howard testified about the type of clothing worn by the victim and that such items were found on the bedroom floor. *Id.* at 471. Finally, during his closing argument, the petitioner's counsel, Attorney Cosgrove, highlighted portions of the petitioner's statement and compared it to the evidence. As to this subject, he referred to the "pink housecoat" and argued, "God knows where they got him to say that. . . . It's not in evidence here. It wasn't picked up by the State Police or the Manchester Police. We didn't hear anything about it." Transcript (6/25/92) at 523.

Given the above, the petitioner's allegation that his *prior habeas counsel* was ineffective for failing to demonstrate that *trial counsel* was ineffective for failing to use the victim's clothing to demonstrate the falsity of his confession must fail. Trial counsel faced the daunting task of attempting to convince the jury that they should reject *all* of the

petitioner's written and oral statements to police as false or unreliable. Although he now contests his third written statement by comparing it to the physical evidence, trial counsel did not face such simple circumstances. Rather, they had to convince the jurors to *also* ignore or reject Detective Paul Lombardo's testimony concerning the petitioner's oral statements and two written statements. Lombardo was the first detective to interview the petitioner on July 4, 1989. The petitioner told Lombardo that he killed Martin, that "[s]he wouldn't cooperate with me, so I killed her," and that he made a pass at Martin and that she probably said "No" so he killed her and punched and strangled her. Transcript (5/15/92) at 927-28, 937-38, 942. Lapointe did not speak with Detective Morrissey or provide the third written statement until after he made these statements to Lombardo and dictated and signed two written statements. Lombardo was not in the room during Morrissey's interview with the petitioner. Although the petitioner now focuses on this third written statement, trial counsel did not have that luxury. They chose to use the petitioner's mental and physical impairments to provide the jury with reasons why he would confess. In so doing, however, they did not ignore the physical evidence and the apparent inconsistencies between such evidence and the third statement. For example, Attorney Cosgrove discussed some of these during his closing argument. In part, he argued that "*Now if Richard Lapointe is going to admit the killing and raping of his wife's grandmother why doesn't he tell the way it actually happened if he knew it? He didn't know it,* ladies and gentlemen." (Emphasis added.) *Id.* He continued, "Richard Lapointe knew a lot of things that everybody in town knew and *said a lot of things in his statement that simply aren't borne out by the facts; that aren't true; and that don't corroborate anything*. Keep that in

mind. Keep that in mind with the common sense theme that I've asked you to keep in mind." (Emphasis added.) *Id.* at 558. The mere fact that, decades after his conviction, counsel's performance can be dissected and second-guessed as to minutiae does not render such performance deficient. 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. 695, 701 (1995).

Additionally, the petitioner cannot establish prejudice. Nicholas Petraco's testimony was cumulative to that presented at the 1992 criminal trial. Indeed, the jury was presented with *superior* evidence in that they actually viewed the videotape, photographs, and physical evidence, rather then merely hearing someone who was not at the crime scene describe it to them. Likewise, they heard from the actual police officers who entered the scene and the medical examiner who performed the autopsy. The jury was shown the victim's clothing and had it with them during deliberations. Attorney Cosgrove encouraged them to examine exhibits. Transcript (6/25/92) at 557 ("You have a whole cart full of evidence to go through if you choose to do so. . . . There are a couple of things you should look at though"). They were informed that the petitioner is not a reliable historian.[9] Transcript (6/9/92) at 2561; Transcript (6/11/92) at 2847-48. Indeed, trial counsel conceded that the petitioner had a poor memory and that he "doesn't always say the same

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[9] Nevertheless, the petitioner's memory tested in the average range. Transcript (6/8/92) at 2521. In some areas, his memory is intact but in others it is less reliable. *Id.* The petitioner, however, is not "even close" to suffering from mental retardation. Transcript (6/9/92) at 2598. Likewise, he shows no signs of thought disorder. *Id.* at 2548. Rather, he is capable of rationale and realistic thought. *Id.* at 2534.

things the same way on different occasions." Transcript (6/25/92) at 548-49. Alternatively, they could have concluded that the petitioner was seeking to minimize his conduct by intimating that the victim was behaving seductively in brushing her hair and exposing her breasts. He told Detective Lombardo, "If I tell you everything, then the whole town's going to find out and know that I'm a sex fiend." Transcript (5/15/92) at 948; Transcript (5/19/92) at 1332.

Finally, a review of the petitioner's third statement reveals that every inconsistency can be countered by a consistency. In that statement, the petitioner reported that "I wanted to have intercourse with her. I got my penis inside her for a few strokes and then pulled out and masturbated." He explained that he ejaculated on the bedspread. The victim suffered contusions and superficial lacerations within the vagina and in the vaginal area. Transcript (5/7/92) at 69-70. Seminal fluid was found on the victim's bedspread but not on the vaginal swabs taken by the medical examiner.[10] Transcript (5/7/92) at 90, 114; Transcript (5/12/92) at 594-96. The petitioner's third written statement also indicates that he "got a steak knife with a hard plastic brown handle and stabbed Bernice in the stomach." The autopsy revealed that the victim suffered a stab wound to her abdomen that penetrated her stomach. Transcript (5/7/92) at 68-69, 72-73. A knife blade was found in the victim's bedroom.[11] Transcript (5/8/92) at 143-44, 148-49, 202-03. A melted knife

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[10] Although the swabs showed low levels of acid phosphatase, these levels were consistent with the "normal levels, which are present in every human being." Transcript (5/7/92) at 114.

[11] The medical examiner testified that the knife blade, State's Exhibit 38, was consistent with the wounds inflicted on the victim. Transcript (5/7/92) at 98.

handle was found in the living room by the sliding door. Transcript (5/8/92) at 203-04. Similarly, he told Detective Lombardo–and indicated in his second written statement--that he hit or punched the victim.[12] Transcript (5/15/92) at 942. The medical examiner found light blue hemorrhages–*i.e.*, bruises--in the area of the victim's lower lip. Transcript (5/7/92) at 66. Finally, although the autopsy was not completed until 2:40 p.m., on March 9, 1987; Transcript (5/7/92) at 97, 117; around 3:30 p.m., that same day, before information about the sexual assault was released, the petitioner told his neighbor, Eileen Giacalone, that "it was a shame they killed an old lady, but they didn't have to rape her, too."[13] Transcript (5/14/92) at 780, 802-03. Lapointe also told Giacalone that he had visited the victim twice and had gone over a third time, which was when he discovered the fire. *Id.* at 779-80. Moreover, the petitioner, like the perpetrator, has blood type "A"[14] and is a secretor.[15] Transcript (5/12/92) at 580. Although seminal fluid was found on the

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[12] In speaking with Lombardo, the petitioner did not specify the manner of strangulation. Transcript (5/19/92) at 1314-15.

[13] The Supreme Court found that "[o]n March 9, before any information regarding a possible sexual assault became known to the police or the public, the defendant stated in a conversation with Eileen Giacalone, a friend of the Lapointe family, that "it was a shame they killed an old lady, but they didn't have to rape her too." *Lapointe*, 237 Conn. at 699.

[14] Approximately 41% of the population has type-A blood. Transcript (5/13/92) at 640.

[15] A "secretor" is a person who secrets their blood group substances into their bodily fluids such as saliva, perspiration, urine, and seminal fluid. Transcript (5/12/92) at 577. Eighty percent (80%) of the population are secretors. *Id.*

bedspread, Novitch found no sperm and further testing revealed no sperm or DNA.[16] Transcript (5/12/93) at 595; Transcript (5/28/92) at 1880, 1883; Transcript (5/6/10) at 32-33 (Jody Hynds). The petitioner underwent a vasectomy; Transcript (6/5/92) at 2240-41; which can account for the lack of sperm. Transcript (5/13/92) at 618-20.

For these reasons, counsel's failure to repeatedly dwell on an issue so apparent to the jury cannot support a finding of ineffectiveness. As a result, his claim must fail.

(2) Because the pubic hair cannot be linked to the perpetrator, counsel cannot be deemed ineffective for failing to emphasize this evidence

The petitioner also complains that his prior habeas counsel and trial counsel were ineffective for failing to utilize evidence of a pubic hair from an unknown source was discovered on the victim's clothing. In so doing, however, he over-emphasizes the importance of this evidence. The pubic hair simply cannot be tied to the perpetrator. Indeed, despite the results of DNA tests; *see* Section II.B.3, below, the hair *still* does not exonerate or exculpate the petitioner. As a result, counsel cannot be deemed ineffective for failing to place more emphasis on this neutral piece of evidence. Thus, this claim must fail.

Criminalist Beryl Novitch discovered a pubic hair on a blue sweater, State's Exhibit 26, recovered from the victim's bedroom floor. Petitioner's Exhibit 36; Transcript (5/12/92)

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[16] Semen consists of seminal fluid and sperm. Transcript (5/28/92) at 1866. Only sperm, however, contains DNA. *Id.* at 1882. Seminal fluid does not. *Id.* at 1866, 1882. No DNA was found in the two samples from the bedspread that were subjected to DNA testing. *Id.* at 1866, 1883, 1897, 1903.

at 593. Her examination revealed a small amount of human blood on the sweater's cuff, a head hair, and a pubic hair. *Id.* The head hair was microscopically similar to the victim's but the pubic hair was not. *Id.* at 593; Transcript (5/13/92) at 641-44, 647-48, 652. Indeed, she found hairs that were dissimilar to the victim's on two shoes, a blanket, and the blue sweater. *Id.* at 647. Subsequently, she compared the pubic hair to the petitioner's pubic hair and found that they also were dissimilar. Transcript (5/13/92) at 643-44. She could not determine whether any of these unexplained hairs–including the pubic hair–belonged to the person responsible for the victim's death. *Id.* at 648. Novitch explained that people lose head hairs and pubic hairs everyday. *Id.* at 649. She also discussed principles of secondary transfer. Transcript (5/13/92) at 649–51. A hair can fall on the floor and someone may step on it. The hair may attach to that person, who then walks around, and the hair is moved someplace else. There need not be a direct transfer of the hair from the donor to the person upon whom the hair ultimately rests. *Id.* at 649. On re-cross examination, petitioner's counsel again elicited that the "unexplained" hairs were dissimilar to the petitioner's hair and that DNA tests might be able to provide further information. *Id.* at 652-53.

At the first habeas trial in 2000, the petitioner raised an ineffectiveness claim based upon "trial counsel's failure to argue to the jury that *hairs of unknown origin* and a knife known not to be the murder weapon were found at the scene." (Emphasis added.) *Lapointe v. Warden, State Prison,* Superior Court, judicial district of Hartford, Docket No. CV97-0571161; 2000 WL 1409721 (September 6, 2000). The court resolved this claim, as follows:

> [T]hese items were in evidence and available to the jury. Culligan was never asked at the habeas trial about these items so, again, the court was left to speculate about petitioner's claim. The court is unable to find that petitioner has sustained his burden to show that counsel's actions were not strategic in nature and further that the result in this case would probably have been different if he had argued to the jury concerning them.

Lapointe, 2000 WL 1409721 at *14.

In the instant habeas proceeding, the petitioner's expert, Nicholas Petraco, could add nothing to Beryl Novitch's 1992 testimony. He had no opinion as to the presence of the pubic hair on the sweater.[17] Like her, he discussed principles of direct and secondary transfer–*i.e.*, Locard's principle–"which states that whenever two things or a person [and a] place or two people come into contact there's a neutral transfer of trace evidence. . . ." Transcript (5/4/10) at 85-86. He even noted that he had "seen pubic hairs in all kinds of places where you wouldn't expect to see them, so it's always possible that there's one that was shed innocently dropped by someone . . . going to the bathroom and then coming out of the bathroom and dropping one." *Id.* at 86.

The petitioner also presented the testimony of his trial counsel, Attorneys Culligan and Cosgrove. Attorney Culligan testified that a pubic hair was recovered from a sweater found in the victim's bedroom. Transcript (5/4/10) at 16-17. He did not recall asking any questions about that hair. *Id.* at 17. Culligan reviewed Petitioner's Exhibit 90, a report from the State Forensic Laboratory, and acknowledged that the pubic hair was dissimilar to the

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[17] The petitioner may point to Petraco's written report, admitted as Petitioner's Exhibit 190. Transcript (5/4/10) at 77. The respondent notes this report was not written under oath whereas Petraco's testimony at the habeas trial was under oath.

petitioner's and the victim's. *Id.* at 17-18. When asked why he did not exploit this evidence, Culligan stated, "I don't have a good explanation for that. I don't really have an explanation." *Id.* at 18. Attorney Christopher Cosgrove testified that a pubic hair was found that was dissimilar to those of the petitioner and the victim. Transcript (7/7/10) at 20. He did recall an extensive discussion about hair during Beryl Novitch's testimony but could not "recall how extensive it got about the pubic hair." *Id.*

Here, the jury was aware that Beryl Novitch discovered a pubic hair on the victim's blue sweater and that the donor of that hair was not the victim or the petitioner. Thus, the petitioner does *not* allege that counsel was ineffective for failing to present evidence that an unknown pubic hair was found at the crime scene. Rather, he asserts that counsel should have done more to emphasize or highlight that hair. Obviously, counsel could not have done that through a witness such as Nicholas Petraco. Petraco was unable to render any opinion regarding the pubic hair and his testimony actually corroborated that of Beryl Novitch. Other means of emphasizing the existence of the unknown pubic hair might include cross-examination or closing argument. Further cross-examination, however, would be merely cumulative and counsel structured the closing argument to focus on the unreliability of the petitioner's oral and written statements to police. Such a strategy certainly cannot be deemed unreasonable. Indeed, any assertion that counsel should have abandoned parts of that argument in favor of a discussion of the pubic hair is nothing more than Monday-morning quarter-backing. Moreover, an attack based on such minutiae cannot support a finding of deficient performance. Rather, deficient performance can only shown if "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The instant petitioner has not made such a showing. Indeed, the evidence as to this issue is exactly the same as that reviewed in the first habeas proceeding by Judge Freed. Testifying eighteen years after their representation terminated, neither Attorney Culligan nor Attorney Cosgrove could explain why they did not emphasize the pubic hair.

Moreover, the petitioner cannot demonstrate prejudice. The prior habeas court found that no prejudice resulted from trial counsel's failure to address the hairs during closing argument. Given Petraco's testimony, no evidence was presented in the instant proceeding that would alter that finding. The mitochondrial DNA evidence was not available at the time of the 1992 trial. The pubic hair evidence was neutral because nothing showed that the hair belonged to a male. Likewise, principles of "secondary transfer" indicate that trace evidence, such as hairs, can be dropped by an individual and then moved around by others or even by the wind. Here, the victim's daughter, Nathalie Howard, would pick-up the victim's laundry, bring it to Howard's home where she would wash it, and then return it to Martin. Transcript (5/13/92) at 512. Thus, the victim's clothing traveled without her and trace evidence could have attached itself to her clothing at that time. Similarly, the victim received several visitors and numerous individuals such as firefighters, fire investigators, and police entered the victim's apartment before the evidence was collected. Indeed, a firefighter left footprints in the victim's bathroom. Transcript (5/8/92) at 241. That bathroom was located off the victim's bedroom and one would have to walk through the small area in which the blue sweater discovered to reach the bathroom. Transcript (5/4/10) at 89-90; Transcript (5/8/92) at 241; Petitioner's Exhibit 159 (sketch).

For these reasons, the petitioner has not established that his attorneys were ineffective for failing to emphasize the discovery of the pubic hair. Likewise, he cannot show that his prior habeas attorney was ineffective in presenting this meritless claim to the prior habeas court. As a result, the petitioner's claim must fail.

(3) Because the gloves have never been linked to the commission of the offenses, counsel cannot be ineffective for failing to emphasize their existence

The petitioner also asserts that both prior habeas counsel and trial counsel should have used evidence that a pair of fairly-generic-looking black gloves was found in the victim's bedroom. They were not mentioned in the petitioner's statements to police. Nevertheless, he asserts that counsel should have highlighted their existence because it certainly was a "reasonable and logical inference" that they "belonged to the perpetrator." At the habeas trial, the petitioner failed to elicit any evidence that would support such an inference. Prior habeas counsel, Attorney Henry T. Vogt, raised this claim in the first habeas action. It was rejected by that court, and, in the instant case, the petitioner has not presented any evidence that was not before that earlier court. For these reasons, and those discussed below, the petitioner's claim must fail.

A pair of black gloves were found in the victim's bedroom. They were admitted as State's Exhibits 24 and 25. Petitioner's Exhibit 34; Transcript (5/8/92) at 200-201. On each glove, Beryl Novitch discovered head hairs that were "microscopically similar" to the victim's hair. Transcript (5/12/92) at 592-93. At the petitioner's first habeas proceeding, he alleged that his trial attorneys were ineffective for failing to argue that these

gloves–together with other evidence--established reasonable doubt. The habeas court, *Freed*, judge trial referee, determined that:

> Two men's gloves found at the scene and admitted into evidence contained hairs similar to the victim's. The petitioner was not asked about the ownership of the gloves. Attorney Culligan was not asked about the gloves at the habeas trial. The court, therefore, is left to speculate why Attorney Culligan did not argue about the ownership of the gloves. It can only conclude, indulging in the strong presumption that his conduct was within the range of acceptable professional assistance, that this act was not proven to be ineffective conduct.

Lapointe v. Warden, State Prison, Superior Court, judicial district of Hartford, Docket No. CV97-0571161; 2000 WL 1409721 at *14 (September 6, 2000).

In the instant habeas proceeding, the petitioner's expert, Nicholas Petraco, added nothing to Beryl Novitch's 1992 testimony. Transcript (5/4/10) at 83-84. He simply mentioned that the gloves were found and that their ownership was undetermined. *Id.* Attorney Patrick J. Culligan testified that two gloves were found in the victim's bedroom but could not recall why he did not ask any questions about those gloves. Transcript (5/4/10) at 15-16, 21-22. Attorney Cosgrove was called and testified that gloves were found. Transcript (7/7/10) at 20. He did not recall whether he questioned any witness about the gloves. *Id.* Finally, the petitioner's prior habeas counsel, Attorney Henry T. Vogt, testified that he raised a claim that trial counsel was ineffective for failing to use available evidence. Transcript (7/7/10) at 62; Petitioner's Exhibit 141. He called Attorneys Culligan and Cosgrove to testify at that first habeas proceeding. *Id.* at 62. Vogt could not remember, however, what questions he asked these attorneys or whether he questioned them about

the gloves. *Id.* at 63, 68, 81-82. Vogt recalled that he wanted to use Attorney Culligan's testimony primarily to support a *Brady* claim. *Id.* at 66.

Given these circumstances, counsel cannot be deemed ineffective. Because Nicholas Petraco's testimony was not helpful, the petitioner cannot demonstrate that counsel should have called such a witness at the criminal trial or at the first habeas proceeding. Thus, as in the first habeas action, he is left to argue that trial counsel should have included a discussion of the gloves in his summation. Neither Attorney Cosgrove nor Attorney Culligan testified about why they did not "highlight" the gloves. Instead, after eighteen years, their memories failed. Thus, this Court has no more evidence on this issue than did the first habeas court. As a result, this claim attacking prior habeas counsel's representation must fail.

(4) The jury was aware of the manner of strangulation

The petitioner also alleges that his *prior habeas counsel* was ineffective for failing to demonstrate that his *trial counsel* were ineffective for failing to emphasize evidence that the petitioner's third statement differed from the physical evidence. For the reasons set forth, below, the petitioner cannot demonstrate that his counsel were ineffective.

At the criminal trial, Detective Michael Morrissey testified about events surrounding the petitioner's third written statement. Morrissey explained that the petitioner said that he strangled the victim. The petitioner "brought up his hands, and opened palms the way you'd expect somebody to be grabbing somebody's neck." Transcript (5/22/92) at 1516. Dr. Arkady Katsnelson of the Chief Medical Examiner's Office performed an autopsy of the

victim on March 9, 1987. Transcript (5/7/92) at 59-60. During that autopsy, he found indications that the victim had been strangled, including petechial hemmorhages in the eyes and a blueish hemorrhage on the right side of the neck. *Id.* at 63-65, 82-83. Katsnelson fully discussed strangulation: manual strangulation, strangulation by compression, and ligature strangulation. *Id.* at 83-84, 105-06. He opined that the victim suffered "strangulation by compression" which is caused when pressure from a blunt object–which could be anything from a piece of wood to a person's arm–is applied to one area of the neck. *Id.* at 83-86. In this case, pressure was applied against the right side of the victim's neck resulting in contusions to that area and asphyxiation. *Id.* at 84-85. Katsnelson found soot in the victim's nostrils, trachea, and bronchi. *Id.* at 65, 79. Carbon monoxide and cyanide were detected in her blood. *Id.* at 87-88. Because strangulation does not necessarily result in immediate death, Katsnelson opined that Martin survived for some period of time after the strangulation and that she was alive and breathing during the fire. *Id.* at 89, 91. Thus, he concluded that her death resulted from a combination of asphyxia by strangulation and smoke inhalation.[18] *Id.* at 91.

In the instant proceeding, Attorney Culligan recalled evidence that the victim was discovered with "a ligature around her neck that was very tightly tied." Transcript (5/4/10) at 22. He testified that the medical examiner determined that the victim had been

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[18] Katsnelson also found that the victim suffered first and second degree burns. Transcript (5/7/92) at 67a-68. He found lacerations and contusions to her vaginal area. *Id.* at 69-70, 95-96, 118.

strangled "by ligature."[19] *Id.* at 23. When discussing the events with Detective Morrissey, the petitioner made "a hand motion of strangulation." *Id.* at 23-24. When asked whether the defense did anything "to exploit this inconsistency," Culligan referred to the cross-examination of the medical examiner. *Id.* at 24.

Here, the jury was presented with the evidence of victim's cause of death and with Morrissey's testimony about the petitioner's hand gestures. Counsel highlighted that evidence during his closing argument, mentioning the items tied around the victim's neck and the petitioner's gesture. Transcript (6/25/92) at 557. He noted that a shirt and apron were tied tightly around the victim's neck and that the police "knew they had to get something about strangling in [the petitioner's statement]. So he adds as an afterthought, oh, I strangled her too. And he motions like this. *Now if Richard Lapointe is going to admit the killing and raping of his wife's grandmother why doesn't he tell the way it actually happened if he knew it? He didn't know it,* ladies and gentlemen." (Emphasis added.) *Id.* He continued, "Richard Lapointe knew a lot of things that everybody in town knew and *said a lot of things in his statement that simply aren't borne out by the facts; that aren't true; and that don't corroborate anything*. Keep that in mind. Keep that in mind with the common sense theme that I've asked you to keep in mind." (Emphasis added.) *Id.* at 558. Moreover, the prosecutor also mentioned the petitioner's gesture when she argued that the petitioner "demonstrated that strangulation holding his hands out. Now, we have no way

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[19] Actually, Dr. Katsnelson testified that the strangulation was not manual but was caused by pressure with a blunt object to the right side of the victim's neck. Transcript (5/7/92) at 85, 105.

of knowing if the defendant did attempt a manual strangulation at some point in time. *Id.* at 480.

Given the above, the petitioner's attorneys appropriately highlighted the apparent inconsistency between the petitioner's gestures during his conversation with Detective Morrissey and the medical examiner's testimony. Indeed, counsel clearly argued that the inconsistencies between his statements to police and the evidence demonstrated that the petitioner did not commit the crime. Thus, the instant allegations amount to nothing more than an attempt at an "end run" around the jury's determination that such inconsistencies did not establish a reasonable doubt. Instead, despite their knowledge of all of the inconsistencies, they found him guilty. Such finding, however, was not the result of the petitioner's counsel committing "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. As a result, this claim must fail.

(5) The jury was aware of the evidence regarding the location of victim's blood

Finally, the petitioner asserts that prior habeas counsel was ineffective for failing to show that trial counsel was ineffective for failing to highlight the inconsistency between the presence of the victim's blood in the bedroom and the petitioner's statement that she was on the couch when he stabbed her. Because such evidence was appropriately highlighted, the petitioner's ineffectiveness claim must fail.

A large amount of the victim's blood was found on the bed and bedding material. The petitioner indicated in his third written ssstatement that he stabbed the victim while she

was on the couch. The petitioner's expert, Nicholas Petraco, noted that "there's blood on the bed" and that "something violent happened in the bedroom. . . ." Transcript (5/4/10) at 81, 90. Nevertheless, Petraco could not determine where the victim was stabbed. *Id.* at 92-93. Rather, he stated that "it looks like there was bleeding on the bed. How it got there, I couldn't tell you." *Id.* Attorney Culligan was asked whether the defense did anything "to exploit the fact that there was no evidence of blood on the couch and the only evidence was that there was blood on the bed and [the petitioner] said he stabbed the victim on the couch." Transcript (5/4/10) at 26. He responded that Attorney Cosgrove brought this out in summation. Id. at 27. Indeed, during his closing argument, Cosgrove quoted the petitioner's statement that "I stabbed Bernice in the stomach while she was lying on the couch." Transcript (6/25/92) at 525. He then argued that "the blood is all on the bed. We don't know about any blood on the couch." *Id.* at 525.

Here, the jury viewed the crime scene video, photographs taken at the scene, heard the witnesses testify, were shown the physical evidence, and had that evidence with them in the jury room during deliberations. Thus, they were overwhelmed with evidence that the victim's blood was found on the bed. Counsel highlighted this in his closing argument. The petitioner has not demonstrated that his attorneys failure to do more renders their representation constitutionally deficient. As a result, his claim must fail.

B. The Petitioner Has Not Demonstrated That He Is Actually Innocent

As his final claim for relief, the petitioner asserts that he is actually innocent. In support of this claim, he alleges that a pair of gloves were found in the victim's bedroom and that DNA testing reveals that they "belonged to and were worn by someone other than

the petitioner or the decedent, i.e., the perpetrator." Paragraphs 66 and 70 of Petition [Doc. # 152.00]. Likewise, he maintains that DNA testing of a pubic hair discovered on a blue sweater found in the victim's bedroom "conclusively" establishes that it belonged "to someone foreign to the scene, i.e., the perpetrator." Paragraphs 69-72 of Petition. Because the petitioner cannot establish that (1) the gloves and pubic hair were involved in the commission of the offenses or were in an way associated with the "real" perpetrator, (2) the pubic hair belonged to a man, (3) the testing of the gloves comported with appropriate scientific standards, and (4) the gloves were not subject to contamination, he utterly fails to establish his innocence by clear and convincing evidence. As a result, his claim for relief must be denied.

1. To prevail, the petitioner must establish his innocence by clear and convincing evidence

In deciding a claim of "actual innocence," a habeas court must consider both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing. To prevail, a petitioner must persuade the court by clear and convincing evidence that he is actually innocent of the crime of which he stands convicted. In using the clear and convincing standard, the habeas court "must be convinced of the petitioner's actual innocence to a high degree of probability, a probability substantially greater than a preponderance of the evidence, and that it must find the petitioner's claim to be highly and truly persuasive." *Miller v. Commissioner of Correction*, 242 Conn. 745, 798 (1997). Indeed, this standard "forbids relief whenever the evidence is loose, equivocal, or contradictory. . . ." (Citation omitted.) *Miller*, 242 Conn. at 795. For example, "a fourth

expert opinion derived" from the same data about which three prior experts testified is not the type of evidence which demonstrates actual innocence. *Summerville v. Warden,* 229 Conn. 397, 437-40 (1994). As a result, a petitioner must establish that, after considering all of the evidence and the inferences drawn therefrom, *no* reasonable fact finder would find him guilty. *Id.* at 791-92.

Additionally, a claim of actual innocence must be supported by "newly discovered evidence." *Weinberg v. Commissioner of Correction,* 112 Conn. App. 100, 119 (2009); *Batts v. Commissioner of Correction,* 85 Conn. App. 723, 726-27 (2004). *See also Williams v. Commissioner of Correction*, 41 Conn. App. 515, 526-29, *cert. improvidently granted*, 240 Conn. 547 (1997) (per curiam). To be considered "newly discovered," the evidence must be such that it could not have been discovered prior to the criminal trial through the exercise of due diligence. *Williams*, 41 Conn. App. at 528-29.

Finally, in attempting to prove his innocence, a petitioner cannot rely on the presumption of innocence. *Summerville*, 229 Conn. at 422. Such "presumption does not survive a judgment of conviction." *Id.* In the eyes of the law, the petitioner "does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law. . . ." (Citation omitted; quotation marks omitted.) *Summerville*, 229 Conn. at 423.

2. The DNA results as to the gloves are not reliable

The petitioner presented evidence of the results of DNA testing performed on samples taken from two gloves found in the victim's bedroom. Such results cannot be relied upon be relief upon because (1) the gloves were subject to contamination and

(2) unreliable methods were used in obtaining the results. Moreover, neither these results nor any other evidence establish the ownership of the gloves or whether they were worn by the perpetrator. In other words, these results do not represent "clear and convincing evidence" of the petitioner's actual innocence. Therefore, the petitioner's claim must fail.

a. Evidence relevant to the gloves at the 1992 trial

At the 1992 criminal trial, Detective David Bates identified a pair of black gloves that he seized from the victim's apartment. Transcript (5/8/92) at 200-01. The right glove was found on the victim's bedroom floor and was admitted as State's Exhibit 24. *Id.* at 200; Transcript (5/11/92) at 415-19. The left glove was found on the victim's bed and was admitted as State's Exhibit 25. *Id.* at 200-01; *Id.* at 415-19. A criminalist from the state's Forensic Science Laboratory, Beryl Novitch, testified that she removed head hairs from both gloves and that those hairs were "microscopically similar" to those of the victim. Transcript (5/12/92) at 592-93.

b. Evidence presented at the 2010 habeas trial

Elaine Pagliaro, former assistant director of the Connecticut Forensic Science Laboratory, testified that the gloves were submitted to laboratory for examination in 1987. Transcript (5/6/10) at 77-78. The laboratory's report was finalized in 1988 and the gloves were returned to the Manchester Police Department. *Id.* at 78-79. The gloves again were submitted to the laboratory in 1997, at which time they were examined by Dr. Robert Schaler of the Office of the Chief Medical Examiner of New York City, who was working on the petitioner's behalf. *Id.* at 79. Although protective gloves were worn during the examination of the evidence, the examiners did not wear protective masks. *Id.* at 79-80.

Ten years later, the gloves again were removed from storage. *Id.* at 81. This time, they were examined by Jody Hynds of Orchid Cellmark Laboratory. *Id.* Hynds cut herself while scrapping a sample from the left glove. *Id.*

Cheryl Lewis, a court officer for criminal matters at the Hartford Superior Court's Clerk's Office, testified that members of the general public are permitted to examine evidence that has been admitted in a criminal case. Transcript (7/7/10) at 2-3. Unless the evidence is in a sealed bag, the examiner may handle the item. *Id.* at 3. The evidence entered in the petitioner's criminal case was stored at the Hartford Clerk's Office during the 1990's and could have been viewed by the public on request. *Id.* at 4-5. Records were not maintained, however, as to who viewed the evidence or whether particular items were stored in a sealed bag. *Id.* New procedures were implemented around 2002 and then updated a few years ago. *Id.* at 6.

In 1994, Alex Wood, a reporter for the Journal Inquirer, visited the Clerk's Office of the Hartford Superior Court where he examined the evidence in the petitioner's criminal case, including the black gloves. Transcript (7/8/10) at 111-13. At first, he wore latex gloves while inspecting the evidence. He removed the latex gloves, however, in order to put the black gloves "directly onto [his] hands." *Id.* at 112.

In 2007, Jody Hynds, at that time an employee of Orchid-Cellmark Laboratories, examined certain items of physical evidence seized from the crime scene and took samples from such items for DNA testing. Transcript (5/5/10) at 129-32. After returning to Orchid-Cellmark Laboratories in Dallas, Texas, these samples were subjected to traditional DNA testing. *Id.* at 127-28, 132. Hynds described the four-step method of DNA

testing as (1) extraction, (2) quantitation, (3) PCR amplification,[20] and (4) detection. *Id.* at 127-28. In the instant case, very little DNA was discovered on the samples taken from the right and left gloves. Quantitation revealed only 133 picograms[21] of DNA on the sample taken from the left glove and 152 picograms were recovered from the right glove.[22] Transcript (5/6/10) at 64. Such quantitation, however, is a "ballpark estimate" and is subject to stochastic fluctuations. Transcript (8/3/10) at 24. In other words, there could be "quite a bit of variability between the true amount of DNA in that sample and what we might actually detect by the quantitation method." *Id.* at 25. After standard procedures were completed, no DNA profile was generated because all of the peaks[23] were below Orchid-Cellmark's threshold. Transcript (5/5/10) at 141-43; Respondent's Exhibits H. When peaks are below threshold, "that means [the] genetic data is . . . [too] low to be able to analyze." *Id.* at 142-43. Therefore, Hynds undertook an additional step by subjecting the samples to a "montage" procedure–also called post-amplification clean-up or purification.

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[20] "PCR" stands for polymerase chain reaction and is the method by which DNA is copied or "amplified" to produce an amount sufficient for testing. Transcript (5/5/10) at 128; Transcript (7/8/10) at 121-22

[21] A picogram is one trillionth of a gram. Transcript (7/8/10) at 144, 152. A single human cell contains approximately seven picograms of DNA. *Id.* at 153.

[22] Hynds indicated that one definition of Low Copy Number (LCN) typing included any sample containing less than 200 picograms of template DNA. Transcript (5/6/10) at 63-64.

[23] A "peak" is how the data is viewed on the electropherogram generated at the conclusion of the four-step process. Transcript (5/5/10) at 142; Transcript (7/8/10) at 125-26. They represent the alleles, *i.e*, the particular DNA molecule, found at a particular location. *Id.*

Id.; Transcript (5/6/10) at 8. Essentially, this procedure is designed to filter out "salts and unincorporated reagents, so that you're taking out all these extra unused product in your amplified product." Transcript (5/5/10) at 141. After performing the "montage" procedure, DNA "mixed" profiles were revealed. Regarding the left glove, Hynds obtained "a partial mixed DNA profile consisting of at least one unknown male." *Id.* at 134; Respondent's Exhibit I. Likewise, the sample taken from the right glove produced "a partial mixed DNA profile consisting of at least one unknown male." *Id.* at 134. The profiles developed from the left and right gloves contained DNA from at least three people. Transcript (5/6/10) at 14-15; Respondent's Exhibits H and I. Hynds could not ascertain whether the same three people donated DNA to the right and left gloves. Transcript (5/6/10) at 17. Hynds also could not determine *when* any of the DNA was deposited on the gloves. *Id.* at 16-17. Finally, Hynds admitted that the reagent blank used when testing these samples revealed a peak above threshold–*i.e*., contamination--at one locus named "TPOX." *Id.* at 18-19. Hynds compared the partial mixed profiles developed from the gloves to a profile generated from a buccle swab obtained from the petitioner. Transcript (5/5/10) at 134-35. She determined that the petitioner was excluded as a source of the partial mixed DNA profiles developed from the gloves. *Id.* at 135-36. In an attempt to create a DNA profile for the victim, Hynds tested fingernail scrapping taken from the victim at the time of the autopsy, a red and blue shirt, and a black and white shirt. *Id.* at 136-38. Partial DNA profiles were generated from these items and revealed a female DNA donor. *Id.* 138. These profiles were consistent with one another. *Id.* at 138. That female donor was excluded as a contributor to the mixed profiles obtained from the gloves. *Id.*

Carll Ladd, Ph.D., supervisor of the DNA unit at the Connecticut State Forensic Laboratory in Meridan, examined the results generated by Orchid-Cellmark and testified that they could not be relied upon because (1) the samples could have been contaminated and (2) LCN testing procedures–*i.e*, the post-amplification clean-up–were used. Generally, the optimal amount of DNA for a single-source sample of good quality is one nonogram–*i.e*., one billionth of a gram of DNA. Transcript (7/8/10) at 123. Given a nanogram of such DNA, the results of the testing procedures will be reliable. *Id.* at 123-24. Here, however, testing involved only 133 picograms of DNA on the sample taken from the left glove and 152 picograms from the right glove. Transcript (5/6/10) at 64; Transcript (7/8/10) at 153.

Dr. Ladd testified that the term "low copy number" DNA typing (LCN) refers to the use of "enhanced interrogation procedures. That is, extra sensitive DNA typing procedures that are employed in instances where there is a particularly small quantity of DNA, so small that you can't get DNA typing results with the standard DNA typing approach." Transcript (7/8/10) at 129. The original definition of low copy number DNA typing was developed by Peter Gill of the United Kingdom and meant the "adding extra PCR cycles. That is, extra rounds of amplification." *Id.* at 130. Traditional testing amplifies the DNA identified at the quantitation stage twenty-eight times–*i.e.*, during twenty-eight "cycles." *Id.* Theoretically, the amount of DNA doubles with each cycle. *Id.* at 130. Gill advocated increasing the number of cycles to thirty-one or even thirty-four. *Id.* Although no standard definition of

LCN typing exists,[24] Dr. Ladd explained that there is a growing consensus within the forensic community around the term "low template amplification"–which would be defined more broadly than Peter Gill's original definition--as "any enhanced interrogation procedure; that is, any procedure which is markedly more sensitive than your standard procedure. . . ." *Id.* at 131, 132. Increased cycles would be one such technique; another one is "post-amplification clean-up." *Id.* at 131-32, 170; Transcript (8/3/10) at 6. Like Hynds, Dr. Ladd described post-amplification clean-up as a method by which the amplified product is subject to "desalting and removing other things." Transcript (7/8/10).at 131. He explained that "you get higher [peak] heights and it makes your method infinitely more sensitive than the original PCR, around twenty to thirty times more sensitive that the twenty-eight cycle PCR [method]. . . ." *Id.* at 131. In 2009, the administrators of the Combined DNA Index System (CODIS), the national DNA database, issued a bulletin and changed their manual to prohibit the uploading of any profile created using enhanced interrogation methods such as extra cycles and post-amplification clean-up. *Id.* at 132. Thus, DNA profiles generated through the use of LCN techniques would not be permitted in CODIS. *Id.* at 155.

LCN techniques are particularly ill-suited for use in post-trial proceedings. *See, e.g.,* Respondent's Exhibit J. The degree of contamination associated with LCN procedures is

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[24] On cross-examination, Dr. Ladd agreed that opinions differed as to the definition of LCN. Transcript (7/8/10) at 160, 169. Indeed, he noted that Orchid-Cellmark "does not consider their methodology to be a low copy number procedure." *Id.* at 169. Their worksheets in this case, however, bear the term "LCN sample." Transcript (8/3/10) at 27; Respondent's Exhibits OO and PP.

"elevated and enhanced markedly" beyond that associated with standard PCR procedures. *Id.* at 137. Contamination is the "introduction of a foreign source of DNA into the evidence at some point and contamination can be at any stage up until contamination in the laboratory, but as far as ow copy number is concerned, there are issues with contaminations at stages before the sample gets to the laboratory." Transcript (7/8/10) at 136. Contamination can occur during the collection and transportation of evidence. *Id.* at 140. Ladd has observed evidence handled and passed around in courtrooms without any anti-contamination measures–such as gloves–in place. *Id.* "[T]he biggest thing is that the [LCN] method is so sensitive that contamination often referred to as drop-in, is simply . . . too prevalent to utilize [LCN] methodology in this type of case." *Id.* Indeed, a "false exclusion" can occur when results are marginal or contamination occurs. In other words, "a person is excluded when they're actually in there." Transcript (8/3/10) at 25. To avoid contamination at the state's Forensic Science Laboratory, everyone who comes near evidence must wear gloves and particle masks. *Id.* at 138. Airborne DNA particles can result in contamination even when standard PCR procedures are used. *Id.* at 139. "When people cough, talk, sneeze, a lot of cells [go] into the air and it floats around . . . for a considerable period of time." *Id.* at 141. LCN procedures also are more susceptible to stocastic effects–or the visualization of such effects–than testing using the optimal amount of DNA. *Id.* at 142-43. One such stocastic effect is called "drop-out" and occurs when a "sub-optimum amount of DNA" is amplified. *Id.* at 144. Drop-out occurs when an allele, although present, cannot be detected. *Id.* Although these stocastic effects may occur during standard STR-PCR testing, when smaller quantities of DNA are subjected to these

more sensitive LCN procedures, the ability to visualize such stocastic effects is enhanced. *Id.* at 144-45. These stocastic effects complicate the interpretation of results.[25] *Id.* at 145.

Regarding the instant case, Dr. Ladd explained that "you cannot be confident in who you're sampling: Are you sampling the glove as it was at the time of collection? That's an issue. That's what you can't be sure of since somebody has put their hands in a glove,[26] they have possibly *removed* some material that was in the glove, and, in addition, put some of their own cells in the glove area, so you can't – the issue there is what does the result mean, and that's the problematic area. That is not how you preserve evidence that you want to test, if your question you want to anser is, who could be on that glove at the time of the incident, or at least at the time of collection." (Emphasis added.) Transcript (8/3/10) at 20. He emphatically testified, "You cannot be confident that you're not looking at a contaminant [rather] than the original condition of the evidence, that's as a general rule; specifically *in this case* we have very *suboptimal* procedures that the samples were subjected to and that would–I would have an objection with regard to those types of mishandling of the samples, whether you were doing twenty-eight cycles or any kind or

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[25] Dr. Ladd explained that in standard PCR testing, once an electropherogram is generated, the analyst must determine which peaks represent true alleles and which represent "some artifact." Transcript (7/8/10) at 128. These artifacts have various names such as "Pull-up and Stutter and Minus A, Florescent Spikes." *Id.* There are many reasons why such artifacts may be generated. *Id.* After verifying that the peaks represent true alleles, a comparison is made between the DNA profile from the unknown sample and the profile from the known sample. *Id.* at 128-29.

[26] Dr. Ladd was present in court when Alex Wood, a reporter, testified that he inserted his bare hands into the gloves. Transcript (8/3/10) at 21.

post-[amplification] procedure or extra cycles. *That's treatment of the evidence that is simply, completely inappropriate always and that has absolutely nothing to do with the low copy number issue. You have simply destroyed the evidentiary value of the item, if you allow other individuals to handle it or to be in proximity to the evidence without particle masks.'*[27] (Emphasis added.) Transcript (7/8/10) at 167-68.

LCN typing is rarely performed in the United States and Dr. Ladd testified that he knew of only one government laboratory[28] that uses such procedures–the New York City Medical Examiner's Office. Transcript (7/8/10) at 131, 133. *See People v. Megnath*, 27 Misc.3d 405, 898 N.Y.S.2d 408 (2010) (approving the use of LCN technique of adding extra cycles to the amplification process under the standard set forth in *Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923]). That Office built a separate facility for LCN testing with stringent anti-contamination preventative measures.[29] *Id.* at 134, 173. The Connecticut Forensic Science Laboratory does not perform LCN techniques and has no

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[27] The respondent notes, *and hopes the court will articulate in its decision,* that legislative action is necessary and desirable to establish procedures for the correct handling of trial court exhibits. Although the legislature has provided incarcerated individuals with the right to seek post-conviction DNA testing; *see* General Statutes § 54-102kk; such testing is meaningless unless these exhibits are properly handled and stored.

[28] Dr. Ladd testified that approximately ninety-five percent (95%) of the "laboratories in the U.S. doing forensic DNA testing are governmentally owned." Transcript (7/8/10) at 166.

[29] Dr. Ladd noted that he had read the protocols for both Orchid-Cellmark and the New York City Medical Examiner's Office and that the later "are much stricter." Transcript (7/8/10) at 174.

plans to do so. *Id.* at 132. The use of LCN techniques makes DNA testing "that much more sensitive, it causes interpretational problems which go to the relevance and reliability of the method, and so we[30] feel that in general any of these low copy number procedures are not suitable for forensic applications. . . ." *Id.* at 133. As for the post-amplification clean-up procedure used in this case, he explained that "it's an extremely uncommon procedure." *Id.* at 166. Dr. Ladd opined that LCN techniques are "not widely or generally accepted in the United States for" use in post-conviction or criminal cases. *Id.* at 136. He explained that "[i]n any of these post-conviction cases, especially where the evidence was treated in a less than optimal fashion, contamination is a substantial threat in general when you're doing twenty-eight cycle PCR but if you're doing any of these enhanced interrogation methods, the prospect for contamination leading to a false exclusion is so great that there is fairly widespread agreement that the method should not be used in that type of setting and it's because of the contamination issue." *Id.* at 151. Prominent members of the forensic DNA community–such as Dr. Bruce Budowle, Dr. Arthur J. Eisenberg,[31] and Dr. John Butler–likewise oppose the use of LCN techniques in post-conviction matters. *Id.* at 150-51. *See* Respondent's Exhibit J. Other members of the community advocate for the use of such procedures only in missing persons cases, mass

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[30] In using the term "we," Dr. Ladd referred to the DNA unit at the state's Forensic Science Laboratory. This unit is composed of twenty-one scientists. In addition to Dr. Ladd, six or seven of these scientists hold Ph.D.'s. Transcript (7/8/10) at 133.

[31] Dr. Eisenberg was Jody Hynds advisor on her master's thesis. Transcript (5/6/10) at 9. She testified that he is "[v]ery well respected," has an international reputation, and is a "good guy." *Id.* at 25.

disasters, and developing investigative leads. *Id.* at 136. Others argue that LCN techniques are appropriate if replicate testing is performed. *Id.* at 146. Under such procedure, multiple samples from the same piece of evidence would be tested using LCN techniques and a "consensus" profile would be generated. *Id.* Finally, Dr. Ladd explained that results generated through the use of LCN techniques are less reproducable than results obtained through standard DNA testing. *Id.* at 147.

In summary, given the danger of contamination, Dr. Ladd reported that he had "serious questions about the reliability and relevance of [Cellmark's] results." Transcript (7/8/10) at 155. He explained that the LCN procedures were simply "too sensitive" and that "the primary Achilles' heel for the samples in this case is before the evidence got to any crime lab . . . it was not handled under the conditions that every laboratory today would insist upon." *Id.* at 175. He concluded that "if on any case a reporter puts their hands in gloves and then you do an extra sensitive procedure, absolutely" the findings are invalid and "[i]f that doesn't make it invalid, I cannot conceive of a situation where the results would be invalid." *Id.* at 176. Not only can the placing of hands in the gloves add to the DNA profile, it can also "mask or hide something that was there." *Id.*

c. The DNA testing of the gloves does not establish the petitioner' s innocence

Given the obvious contamination and potential for contamination to which the gloves have been subjected since they were collected in 1987, any DNA results are utterly compromised. Thus, the results obtained by Orchid-Cellmark in 2007 cannot establish by "clear and convincing evidence" that the petitioner is actually innocent of the murder of

Bernice Martin. Even without the contamination problem, however, these results would not support his claim of innocence because unreliable methods were used in the testing process. Finally, neither these results–nor any other evidence--establish the ownership of the gloves or their use in the commission of the offenses. For all of these reasons, the petitioner's claim of innocence must fail.

3. The DNA results of the pubic hair do not establish the petitioner's innocence

Police recovered a blue sweater from the floor of the victim's bedroom. Upon examination, a pubic hair was discovered on the sweater. Traditional hair analysis was performed and the examiner, Beryl Novitch, testified before the jury that the "unexplained" hairs–*i.e.*, those that were dissimilar to hairs taken from the victim's body–were also dissimilar to the hairs seized from the petitioner. Now, DNA testing again has confirmed that the "unexplained" pubic hair was not the petitioner's. Such results, however, do not establish the petitioner's innocence.

a. Evidence relevant to the hair

At the criminal trial, the state presented evidence that police found a blue sweater, State's Exhibit 26, on the floor of the victim's bedroom. Transcript (5/8/92) at 199. Criminalist Beryl Novitch testified that when she examined the blue sweater she discovered head hairs that were similar to Bernice Martin's. She also found a pubic hair on the sweater. Transcript (5/12/92) at 593. Novitch compared the public hair against known hairs taken from the victim and the petitioner. Transcript (5/12/92) at 593; Transcript (5/13/92) at 644. Novitch concluded that the pubic hair was dissimilar to those of both

Martin and the petitioner. *Id.* at 593; *Id.* at 644, 648. She further explained that principles of secondary transfer rendered her unable to determine whether the individual "who donated the pubic hair found on the blue sweater was the person or persons responsible for the death of Bernice Martin." Transcript (5/13/92) at 648-50. "Secondary transfer" results when a hair falls out and then is moved around. *Id.* Because of this, it is not necessary that the donor of the hair have any contact with the person or place where the hair eventually settles. *Id.*

Nathalie Howard, the victim's daughter testified that members of the victim's family "would drop in quite often" to see the victim. Transcript (5/13/92) at 715. The victim visited a restaurant the day before her murder. *Id.* at 657-58. She was last seen taking out the trash shortly before her death. *Id.* at 660, 712-13. Numerous individuals including firefighters, fire marshals, members of the State Police Major Crimes Squad, and members of the Manchester Police Department entered the victim's apartment after the discovery of the fire.

At the habeas trial, the petitioner presented the testimony of Nicholas Petraco, as follows:

> [Attorney Casteleiro]: Did–based on your review and experience, education and training did your form an opinion as to the presence of a pubic hair on this sweater?
>
> [Nicholas Petraco]: ***No.*** According to reports written the Laboratory of Connecticut State Police, who I have nothing but high regard for and great respect for, there's a pubic hair on the sweater and it's not the suspect's and it's not the victim's, so it certainly would look–it certainly would be something to look further into as far as you know who's

is this hair? Could it be a hair that was randomly laying there? That's a possibility. But you know you're talking about an eighty-eight year old woman who was in a pretty small apartment and to find a pubic hair right on top of the clothing that's involved–that might have been involved in an event that seems to be involved in this event, you know you would think that would be something that you really want to concentrate on. It seems to me, in my eye, an important thing to look at closely and, again, today you can do DNA on the root tissue, you can–if it still exists, you can do DNA mitochondrial DNA on the shaft, at least try to make an association as to who it might have come from. Now, to this point there has been microscopic examinations eliminating them as that hair as coming from the suspect [or] the victim. Okay.

Q. Well, could that hair have been a transparent from–

A. Well, typically, I mean in this field one of the guiding principles is something known as the (indiscernible) principle was where–which states that whenever two things or a person [and a] place or two people come into contact these's a neutral transfer of trace evidence and some of those things are typically fibers and hairs from bodies. People tend to shed hair a great deal so that–good avenue for trace evidence plus the–plus fibers that happen or soil or different types of trace materials, and when I say trace materials, typically small fibers or particularly type size pieces that you really don't notice, they just happen to be there and they're transferred during events. Okay.

Q. Well, is it–is there a–are there some transplants of a pubic hair versus the innocent of a head hear; is there? Is there a difference or–

A. Well, you know head hairs are usually exposed. The pubic region really is not usually exposed, *but in fairness I've seen pubic hairs in all kinds of places where you wouldn't expect to see them so it's always possible that there's one that was shed innocently dropped by someone walking down–you know going to the bathroom and then coming out of the bathroom and dropping one.*

(Emphasis added.) Transcript (5/4/10) at 84-86.

Although he initially indicated that the pubic hair was found "right on top of the thing," Petraco later admitted that he did not know where on the sweater the pubic hair was found. Transcript (5/4/10) at 89-90. He did not know whether the hair was found on top of the sweater or underneath it. *Id.* at 90. Likewise, Petraco did not know the victim's housekeeping habits or the number of visitors that she received. *Id.* The sweater was found on the floor of the victim's bedroom in an area that one would travel through when going to and from the only bathroom in the apartment. *Id.* at 90; Petitioner's Exhibit 159 (sketch).

The petitioner also presented the testimony of Terry Melton, Ph.D., the laboratory director and Chief Executive Officer of Mitotyping Technologies of College Park, Pennsylvania. Transcript (5/5/10) at 106-107. Melton testified that a form of DNA is contained in the mitochondria which are located in the cytoplasm that surrounds the nucleus of a cell. Mitochondrial DNA is found in abundance in every cell. It differs from nuclear DNA in that a person inherits mitochondrial DNA only from his or her mother. *Id.* at 110. In contrast, nuclear DNA is inherited from both parents. *Id.* Because mitochondrial DNA is inherited directly from one's mother, it lacks the uniqueness of nuclear DNA. A mitochondrial DNA profile can be used to include or exclude an individual and "his or her maternal relatives" as the donor of a particular sample. *Id.* at 110-11.

Analysts at Mitotyping tested a sample from the pubic hair (# 26). They designated that sample "23-68-Q1" and were able to generate a profile of the hair donor's mitochondrial DNA. *Id.* at 112. They also tested a sample from a hair found on the victim's

yellow blanket (# 31). *Id.* at 112-114. They designated that sample "23-68-Q2" and were able to generate a profile of the hair donor's mitochondrial DNA. *Id.* at 112. Finally, the laboratory "developed profiles from two known individuals; one was B. Martin and the other one was Richard Lapointe." *Id.* at 112. After developing these four profiles, the analysts were able to determine that the victim, the petitioner, and their maternal relatives were excluded as the contributor of 23-68-Q-1--*i.e.*, the pubic hair. Transcript (5/5/10) at 112. They could not exclude the petitioner as the source of the hair found on the yellow blanket. *Id.* at 114-15.

b. The DNA results do not establish the petitioner's actual innocence

The petitioner asserts that "DNA evidence developed" from the pubic hair found on the blue sweater discovered on the floor of the victim's apartment "conclusively" establishes that "it belonged to someone foreign to the scene, i.e., the perpetrator" and "overwhelmingly" establishes "the petitioner's innocence." Paragraph 70 of Count Three of the Petition [Doc. 152.00]. In other words, he claims that the mitochondrial DNA evidence conclusively establishes that the pubic hair belongs to the *perpetrator* of the sexual assault and murder of Bernice Martin. Contrary to such assertion, the petitioner has not linked the pubic hair to the perpetrator. Indeed, he has not shown that the hair came from a man or that it was deposited at the time of the crimes. Rather, his evidence merely reveals that a stray pubic hair was found on a sweater on the floor of the victim's bedroom. The jury, however, was presented with equivalent evidence that the pubic hair was "dissimilar" to the petitioner's hair as well as the victim's. Thus, this newly discovered DNA

evidence is merely cumulative to evidence that the jury heard. As a result, the petitioner cannot prevail on his claim of innocence.

Here, Bernice Martin could have picked-up the unknown hair anytime she left her home–including shortly before the crime. Likewise, because her daughter laundered Martin's clothing, the hair could have come in contact with the sweater when it was in the daughter's possession.[32] Indeed, anyone who entered the victim's apartment could be the source of the pubic hair–including friends, family, and the firefighters and police officers who entered after she was murdered. Finally, any of these persons could have picked-up a pubic hair originating from an unknown source on their shoes or trousers and then brought it into the apartment. Indeed, every time a person enters a bathroom that is used by others–*i.e*., a public restroom, a restroom at their place of employment, even a bathroom shared with family members–he or she is at risk of picking-up the hairs of others. Given the plethora of avenues by which this hair, not marked male or female, could have come in contact with the victim's sweater–and the lack of any evidence as to how it actually came to land there–the petitioner's evidence simply does not support a finding of innocence.

For all of the reasons set forth above, the petitioner can only demonstrate that a pubic hair of unknown origin was found at the crime scene. Of this, however, the jury was aware. He cannot show when that hair was deposited or by whom. Moreover, this

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[32] Bernice Martin's granddaughter, Donna Brodin, testified that Nathalie Howard would pick-up the Martin's laundry, bring it to Howard's home where she would wash it, and then return it to Martin. Transcript (5/13/92) at 512.

evidence is merely cumulative to the testimony of Beryl Novitch at the 1992 criminal trial. Despite her testimony about the hair, however, the jury reasonably convicted the petitioner. That conviction has survived both a direct appeal to the state Supreme Court and a prior habeas proceeding. Thus, not only is the petitioner unable to meet the clear and convincing standard, he utterly fails to show that after considering both the old and new evidence "and the inferences drawn therefrom, *no* reasonable fact finder would find him guilty." *Miller*, 242 Conn. at 791-92. As a result, his claim of actual innocence must fail.

III. CONCLUSION

For the reasons set forth above, the respondent requests that this Court deny the petitioner's claims and prayer for relief and dismiss the petition.

Respectfully submitted,

RESPONDENT--WARDEN, STATE PRISON

By: /s/

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CERTIFICATION

I hereby certify that copies of this document were mailed and delivered electronically to Attorney Paul Casteleiro, 200 Washington Street, 5th Floor, Hoboken, New Jersey 07030, (201) 656-1696, (201) 656-4688 (facsimile) and Attorney W. James Cousins, 3 Strawberry Ridge Road, Ridgefield, Connecticut 06877, (203) 438-9136, (203) 454-1284, and that copies were hand-delivered to Supervisory Assistant State's Attorney Michael E. O'Hare, Senior Assistant State's Attorney Angela R. Macchiarulo, and Assistant State's Attorney Michel Proto, at the Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, Connecticut 06067, (860) 258-5887, (860) 258-5968 (facsimile), on December 16, 2010.

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