STATE OF CONNECTICUT

DOCKET NUMBER: CV02-0818542 S	:	SUPERIOR COURT
RICHARD LAPOINTE (INMATE# 184163)	:	JUDICIAL DISTRICT OF TOLLAND AT SOMERS
V.	:	
WARDEN	:	DATE: APRIL 15, 2011

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MEMORANDUM OF DECISION

The petitioner, Richard Lapointe, initiated this habeas corpus matter on August 2, 2002. The history of this case, the underlying criminal case and all post-conviction proceedings, including the instant habeas corpus petition is extensive. The procedural history and factual background were recently summarized by the Appellate Court.

"On June 30, 1992, after a trial to the jury, the petitioner was convicted of capital felony in violation of General Statutes (Rev. to 1987) § 53a-54b (7), arson murder in violation of General Statutes § 53a-54d, felony murder in violation of General Statutes (Rev. to 1987) § 53a-54c, murder in violation of General Statutes § 53a-54a, arson in the first degree in violation of General Statutes § 53a-111, 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 (a) (1) (A) and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). Thereafter, the petitioner was sentenced to life in prison without the possibility of release. The petitioner directly appealed to our Supreme Court; however,

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his conviction was affirmed in *State v. Lapointe*, 237 Conn. 694, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

"The facts underlying the petitioner's conviction were recounted in the decision of our Supreme Court disposing of his direct appeal. As the petitioner makes numerous factual claims, a restatement of these facts, as the Supreme Court determined reasonably could have been found by the jury, are helpful for context. On March 8, 1987, the [petitioner] called the emergency telephone number, 911, to report a fire at the Manchester apartment of the victim, Bernice Martin, his wife's eighty-eight year old grandmother. Manchester firefighters entered the smoke-filled apartment and found the victim lying on the floor approximately six to eight feet from a burning couch. The victim was only partially clad and a piece of fabric was tied tightly around her neck. Other fabric was tied loosely about her wrists. The firefighters noted a bloodstain on the bed in the apartment. Paramedics who arrived at the scene attempted unsuccessfully to resuscitate the victim and subsequently transported her to a hospital where she was pronounced dead shortly after her arrival. Medical personnel did not examine the victim for sexual trauma on the night of her death and did not provide the family with any information pertaining to the cause of death. A priest in attendance, however, did tell family members gathered at the hospital that the victim had been stabbed.

"A knife blade and a melted brown plastic knife handle were found in the victim's apartment. The victim's underwear was found on the floor of the apartment to the right of the bed. No latent fingerprints were discovered at the scene due to fire and water damage. It was determined that the fire in the victim's apartment had three points of origin — the couch, near which the victim had been found, and two towels that were hanging in the kitchen. There was no evidence that an accelerant had

been used to hasten the fire's progress. The couch, which had extensive fire damage, was tested and found to burn at a very slow rate and to emit copious amounts of smoke.

"At approximately midnight on the night that the victim's body was found, Detective Edward Wilson of the Manchester police department interviewed the [petitioner]. The [petitioner] told Wilson that on March 8, from approximately 2 to 4 p.m., he had visited the victim at her apartment with his wife, Karen, and his son, Sean. The [petitioner] also told Wilson that after the family had returned home from their visit he had not left the house until his wife's aunt, Natalie Howard, had telephoned between 7:30 and 7:45 p.m., asking him to check on the victim because she was not answering her telephone. The [petitioner] further told Wilson that, while he was walking to the victim's apartment in order to check on her, he had smelled smoke. He also said that after arriving at the apartment and receiving no answer to his knock, he had attempted to enter both the front and the back doors but that both doors were locked. The [petitioner] stated that the back door felt warm to the touch.

"The [petitioner] said that he then had gone to the apartment of Jeannette King, a neighbor of the victim, to telephone his wife and Howard. Despite having smelled smoke and having felt the heat of the door to the victim's apartment, the [petitioner] made no effort to secure emergency assistance at that time. Rather, he walked to King's apartment and knocked on the door furthest from the victim's apartment. When King opened the door, the [petitioner] greeted her calmly and without any sign of urgency. The [petitioner] asked King for change for a quarter so that he could use a pay telephone down the road. King, who had met the [petitioner] previously, invited him to use her telephone. He did so, telephoning both his wife and Howard and telling them that the victim had not

answered her door and that she must have been sleeping. He never mentioned to either his wife or Howard that he had smelled smoke or that the door to the victim's apartment had been warm to the touch. Howard reminded the [petitioner] that the victim never went to bed as early as 8 p.m. and told him that she was going to the victim's apartment immediately to check on her. The [petitioner] then left King's apartment and returned to the victim's apartment. The [petitioner] claimed that upon returning to the victim's apartment, he saw smoke emanating from under the eaves. He then returned to King's apartment, again knocked on the more distant of the two doors, and, when admitted, called the 911 emergency telephone number.

"On March 9, 1987, an autopsy of the victim's body by the medical examiner revealed that the victim had suffered a three inch deep stab wound to her abdomen and ten less severe stab wounds to her back. The medical examiner also determined that the victim had been strangled and that she had sustained premortem first and second degree burns. The cause of death was determined to be a combination of strangulation and smoke inhalation. The autopsy also revealed, for the first time, that the victim had suffered extensive hemorrhaging as well as lacerations and contusions to her vagina.

"The jury further could have found that a stain on the victim's bedspread was human semen from a person who was a secretor with Type A blood. The [petitioner] has Type A blood and is a secretor. The semen stain also was found to contain no sperm, which is consistent with the semen of a person who has had a vasectomy. The [petitioner] had a vasectomy after the birth of his son in 1979. On March 9, before any information regarding a possible sexual assault became known to the police or the public, the [petitioner] 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*.'

When asked in a June, 1989 interview by Detective Paul Lombardo how he had learned that the victim had been sexually assaulted, the [petitioner] responded that he had been informed by a doctor at the hospital on the night of the murder that the victim had been strangled, stabbed and sexually assaulted. The medical personnel who had attended to the victim unanimously testified, however, that they did not check the victim for sexual assault trauma when she was at the hospital that night and, further, that it would have been highly unusual for them to have done so under the circumstances. Other family members who had been present at the hospital corroborated the testimony of the medical personnel who said that there had been no mention of sexual assault at the hospital.

"On March 9, officer Wayne Rautenberg interviewed the [petitioner] at the Manchester police station. During the interview, the [petitioner] exhibited considerable curiosity concerning the results of the autopsy and asked if there had been causes of death other than smoke inhalation. The [petitioner's] curiosity was further manifested by his persistent questions to Wilson and Captain Joseph Brooks of the Manchester police department concerning the status of the investigation and whether he was a suspect. These inquiries were made during numerous chance encounters that the [petitioner] had with the officers in Manchester between the dates of the victim's death and the [petitioner's] arrest.

"The police investigation of the victim's death remained open and unresolved until March, 1989, when, due to internal changes at the Manchester police department, Lombardo was assigned to the case. Because the investigation had been dormant for some time, Lombardo decided to reinterview all those persons who had been interviewed previously. For that purpose, Lombardo

telephoned the [petitioner] in June, 1989, and asked if he would submit to another interview. The [petitioner] initially responded, 'Why, am I a suspect?' The [petitioner], however, acquiesced to Lombardo's request and, on June 8, walked to the police station where he spoke with Lombardo. At that time, in order to check the [petitioner's] blood type, Lombardo asked the [petitioner] for a saliva sample, which the [petitioner] provided. The [petitioner's] wife, in response to a direct question and in the [petitioner's] presence, had previously told [Detective] Michael Ludlow that the [petitioner's] blood was Type O. An analysis of the saliva sample, however, revealed that the [petitioner's] blood type was in fact Type A and that he was a secretor. These results were consistent with the seminal stain found on the victim's bedspread. During the course of his investigation, Lombardo also belatedly learned from King that she had seen the [petitioner] walking his dog near the victim's apartment shortly after 7 p.m. on the night of the victim's death.

"Inconsistencies in the [petitioner's] version of his activities on the evening of March 8, 1987, and the [petitioner's] prescience that the victim had been sexually assaulted led Lombardo to become increasingly suspicious. Therefore, Lombardo again requested that the [petitioner] come to the police station on July 4, 1989. At that time the [petitioner] was interrogated and gave several incriminating oral and written statements to Lombardo, Detective Michael Morrissey and Brooks, respectively. Morrissey also interviewed the [petitioner's] wife on the same day, at which time she conceded that the [petitioner] had left their house on the night of the victim's death in order to walk their dog. This was contrary to what both she and the [petitioner] had told the police previously, i.e., that the [petitioner] had not left the house after the family returned from their afternoon visit with the victim until the [petitioner] left after talking to Howard. On the basis of, among other evidence, the

[petitioner's] admissions made on July 4, 1989, an arrest warrant was issued, pursuant to which the [petitioner] was taken into custody on July 5, 1989. Id., 696-702. The Supreme Court ultimately affirmed the petitioner's conviction. Id., 739.

"Following the disposition of the petitioner's direct appeal, he instituted a habeas corpus proceeding. The petitioner, through habeas counsel Henry Theodore Vogt, filed his first petition for a writ of habeas corpus on May 30, 1997, alleging (1) newly discovered evidence regarding Dandy-Walker syndrome, a congenital brain disease afflicting the petitioner, (2) prosecutorial impropriety in the form of suppression of exculpatory evidence, (3) discrimination by the state on the basis of his mental and physical disabilities in violation of his rights to equal protection, (4) ineffective assistance of trial counsel and (5) ineffective assistance of appellate counsel. ... On September 6, 2000, following a full hearing on the merits, the court, *Freed, J.*, dismissed the petition for a writ of habeas corpus. On January 22, 2002, this court affirmed the dismissal, and our Supreme Court subsequently denied the petition for certification to appeal. *See Lapointe v. Commissioner of Correction*, 67 Conn. App. 674, 789 A.2d 491, cert. denied, 259 Conn. 932, 793 A.2d 1084 (2002).

"Thereafter, in August, 2002, after obtaining new counsel, the petitioner filed his second petition for a writ of habeas corpus, alleging that he was denied his right to the effective assistance of habeas counsel. Specifically, he alleged that his previous habeas counsel, Vogt, failed to address issues concerning the suppression of exculpatory evidence, the ineffective assistance of trial counsel and the effect of newly discovered evidence relating to Dandy-Walker syndrome. These allegations comprised counts one through three, respectively, of the petitioner's second petition for a writ of habeas corpus.

"A trial on this petition was conducted over the course of four days. After the close of the petitioner's case, the respondent, the commissioner of correction, made an oral motion for a judgment of dismissal. Pursuant to the agreement of the petitioner, the court, *Fuger, J.*, granted partial judgment of dismissal as to portions of counts one and two, and as to count three in its entirety. Thereafter, Judge Fuger issued a decision in which he granted the respondent's motion for a judgment of dismissal on the remaining counts, concluding that 'no issues [remain] to be litigated in connection with the quality of the representation received by the petitioner that culminated in his 1992 conviction.'" (Footnote omitted.) (Internal quotation marks omitted.) *Lapointe v. Commissioner of Correction*, 113 Conn. App. 378, 380-87, 966 A.2d 780 (2009).

The Appellate Court in part affirmed and in part reversed the judgment of dismissal and remanded the case for further proceedings. Specifically, the Appellate Court "... 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[.]" Id., at 404. The habeas court, *Fuger, Jr., J.*, declared a mistrial as to the issues remanded by the Appellate Court and disqualified itself from any further proceedings in this matter.[1] The matter was then assigned to this court to adjudicate the remanded claims.

On October 2, 2009, the petitioner filed a motion to amend the petition, requesting permission to add a claim of actual innocence based on newly discovered DNA evidence, to which the respondent objected. On December 1, 2009, this court granted the motion to amend and ordered the petitioner to file an amended petition on or before December 18, 2009. On December 16, 2009,

1. The habeas court articulated the bases for declaring a mistrial and disqualification in a memorandum of decision dated August 3, 2009.

the petitioner filed his amended petition but thereafter, on February 5, 2010, sought permission to further amend the petition to incorporate additional evidence in support of his actual innocence claim. This court permitted the petitioner to further amend his petition and ordered the amended petition to be filed on or before February 24, 2010. The second amended petition (hereafter amended petition) was filed on March 5, 2010, and has remained the operative complaint.

The amended petition raises claims in three counts, although counts one and two both allege ineffective assistance by prior habeas counsel, albeit premised on distinct grounds. Because counts one and two both assert the identical legal claim (i.e., ineffective assistance by prior habeas counsel), the court shall discuss these two counts together under the same rubric. Count three embodies the petitioner's actual innocence claim premised upon DNA evidence. As relief the petitioner seeks to have the court vacate his convictions under docket number CR 89-0107933, grant him a new trial, release him from custody, as well as such other relief as may be just and proper. The respondent's return, filed May 3, 2010, denies the petitioner's material allegations and that he is entitled to the habeas corpus relief he seeks.

The matter proceeded to trial over the course of nine days, beginning May 3, 2010, and ending August 3, 2010. The parties filed a stipulation on the first day of trial, agreeing to have virtually all the petitioner's exhibits previously introduced into evidence admitted into evidence under the same markings.[2] The petitioner introduced into evidence a total of 198 full exhibits and

2. The stipulation dated April 29, 2010, and filed in court May 3, 2010, limited the admission of petitioner's exhibit 87 to page 11 only. The parties agreed on the first day of trial to the admission of exhibit 87 in its entirety as a full exhibit.

presented the testimony of 13 witnesses; the respondent introduced 40 full exhibits and presented the testimony of 5 witnesses. The court permitted the parties to file both simultaneous post-trial briefs and simultaneous reply briefs, with all post-trial briefing completed on January 3, 2011. The petitioner also filed, on December 15, 2010, a motion to amend the petition to conform to the proof, which the respondent did not object to and which the court granted on December 20, 2010.[3]

For the reasons stated more fully below, the petitioner's claims are denied. Judgment shall enter denying the petition for a writ of habeas corpus.

INEFFECTIVE ASSISTANCE OF PRIOR HABEAS COUNSEL

LEGAL STANDARD

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a 'habeas on a habeas,' was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a)[4] includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to

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3. The amendment to the petition thereby added claims relating to the "burn time" of the fire and to the petitioner's first habeas counsel's purported failure to retain an arson expert. Specifically, the amendment added the following as paragraph 53a of the first count: "Not only did habeas counsel fail to recognize the exculpatory nature of the 'Ludlow Notes' he also failed: (a) to present an arson expert to testify to the cause origin and burn time of the fire and (b) to raise a claim of criminal trial counsel's ineffective assistance of counsel for their failure to consult and present at trial an arson expert to corroborate petitioner's alibi by establishing it was impossible for him to have set the fire based upon the fire's burn time."

4. "General Statutes § 51-296 (a) provides in relevant part: 'In any criminal action, *in any habeas corpus proceeding arising from a criminal matter*, in any extradition proceeding, or in any delinquency matter, the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant. . . .' (Emphasis added.)"

challenge the effectiveness of habeas counsel is through a habeas petition. Id., 838-41." *Sinchak v. Commissioner of Correction*, 126 Conn. App. 684, 686-87, ___ A.3d ___ (2011).

"'[A] person convicted of a crime is entitled to seek a writ of habeas corpus on the ground that his attorney in his prior habeas corpus proceeding rendered ineffective assistance. *Lozada v. Warden*, [supra, 223 Conn. 845]. . . . To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective and (2) that his trial counsel was ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unworkable. . . . Only if the petitioner succeeds in [this] herculean task will he receive a new trial. This new trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel.' (Citation omitted; internal quotation marks omitted.) *Stevenson v. Commissioner of Correction*, 112 Conn. App. 675, 684, 963 A.2d 1077, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009)." *Harris v. Commissioner of Correction*, 126 Conn. App. 453, 457-58, 11 A.3d 730 (2011).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, 285 Conn. 556, 577, 941 A.2d 248 (2008). "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too

easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . [Moreover], a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (Internal quotation marks omitted.) Id., 577-78.

I

The petitioner's first allegation is that his prior habeas counsel, Attorney Henry Theodore Vogt, "... failed to raise as an issue the State's suppression of its arson expert's opinion that the 'burn time' of the fire set in the decedent's apartment was between '30-40 mins poss.'" Amended Petition, pg. 15. The petitioner further asserts that Stephen Igoe, formerly a fire investigator with the Connecticut State Police (CSP), "... had in fact given an opinion [during the criminal trial], based on his investigation, to the lead investigator on the case, Detective Michael Ludlow, regarding the 'burn time' of the fire in the decedent's apartment." Id., pg. 17. According to the petitioner, "[t]he [Ludlow] note represented an undisclosed and suppressed exculpatory expert opinion of Fire Marshals Stephen Igoe and Joe Roy opining that the fire burn time was '30-40 mins poss.' Attorney Vogt failed to recognize the contents of the note and to raise the constitutional claim that the State suppressed exculpatory evidence as the petitioner's criminal trial." Id., pg. 18. The petitioner has further alleged that Vogt failed to properly consult with and utilize an arson expert.

This first allegation necessitates two determinations: first, whether the note containing the phrase '30-40 mins poss' reasonably can be interpreted to be potentially exculpatory; second, if the note is potentially exculpatory, whether Attorney Vogt rendered ineffective assistance because he failed to raise a claim in the petitioner's first habeas premised on the Ludlow note and failed to use an arson expert.

A

As previously indicated, the Appellate Court in part affirmed and in part reversed the judgment of dismissal and remanded the case to this court for further proceedings according to law. Specifically, the Appellate Court "... 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[.]" *Lapointe v. Commissioner of Correction*, supra, 113 Conn. App. 404. The Appellate Court's decision contains several important discussions and conclusions that are relevant.

"The petitioner claimed that [the Ludlow note containing the possible burn time window] depicts the window of time in which the fire was set, and, as he is able to account for his whereabouts during this specific window, it is his contention that this evidence demonstrated that it was impossible for him to have perpetrated the crimes. On appeal, the petitioner argues that the court failed to draw reasonable inferences from the evidence, viewed in the light most favorable to sustaining his claim, as is required on a motion for a judgment of dismissal.

"The United States Supreme Court has held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Walker*, 214 Conn. 122, 126, 571 A.2d 686 (1990). To establish a claim under *Brady*, the petitioner must establish that (1) the evidence allegedly suppressed was favorable to him, either because it was exculpatory or impeaching, (2) the evidence was suppressed by the state, either willfully or inadvertently, and (3) prejudice resulted from its absence. *State v. Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006).

"In its memorandum of decision, the [second habeas] court found that the first prong of the *Brady* analysis was not satisfied because '[e]ven [when] viewed in the light most favorable to the petitioner, the evidence does not support a conclusion that Detective Ludlow's notes are favorable to the defense or exculpatory.' In support of this conclusion, the court cited Ludlow's habeas trial testimony in which he testified that the thirty to forty minute burn time referred to the absolute minimum amount of time that the fire could have been burning. The court then noted that even if the petitioner could account for his whereabouts during this window, he could not account for the complete time frame that the thirty to forty minute minimum burn time created. The court stated: 'A neighbor had seen the victim alive at 5:30 p.m., and the fire was reported at 8:27 p.m. Detective Ludlow was crystal clear in his habeas trial testimony that the thirty to forty minutes in his notes referred to the *absolute minimum* amount of time that the fire had been burning, not the maximum. With thirty to forty minutes as the minimum amount of time that the fire could have been burning, a range of time can be established as the period in which the crime occurred: that is, between 5:30 p.m. [the last time the victim was seen alive] and approximately 7:50 p.m. [the latest possible time the fire could have been set in order for it to burn for the extreme end of the thirty to forty minute minimum

window]. This window has significance only if the petitioner can verify his whereabouts during that time.' Having found that the Ludlow note was not favorable to the petitioner's case, the court ruled that there was no basis to conclude that first habeas counsel's performance fell below an objective standard of reasonableness. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"On appeal, the question for this court is whether the petitioner failed to make out a prima facie claim for a *Brady* violation; specifically, we must determine whether he failed to submit sufficient evidence to establish the exculpatory nature of the Ludlow note. 'Exculpatory has been defined to mean [c]learing or tending to clear from alleged fault or guilt; excusing.' (Internal quotation marks omitted.) *State v. Falcon*, 90 Conn. App. 111, 121, 876 A.2d547, cert. denied, 275 Conn. 926, 883 A.2d 1248 (2005). Therefore, ***for the Ludlow note to be deemed exculpatory, the petitioner must have submitted evidence to demonstrate that the thirty to forty minute minimum burn time tended to clear him from alleged fault or guilt***.[5]

"As the court noted in its memorandum of decision granting the motion for a judgment of dismissal, 7:50 p.m. represents the outer limits of the minimum burn time. The following additional evidence was submitted by the petitioner at the habeas proceeding to demonstrate the exculpatory nature of the Ludlow note and must be credited for the purposes of this court's analysis of whether the habeas court improperly granted the respondent's motion for a judgment of dismissal. A review

5. Phrased in this manner, the focus is only on the *minimum* burn time and does not take into account the maximum burn time. The latter time cannot be determined with precision, but occurred after the victim was last seen and attacked. It is arguable that the Ludlow note only has potential exculpatory value if, and only if, the minimum burn time is the only time used to determine whether or not the petitioner has a valid alibi for the entire burn time window.

of the record reveals evidence that the victim was last seen outside of her apartment by Howard at about 5:45 p.m. The petitioner's former wife, Karen Martin (formerly Karen Lapointe), testified at a suppression hearing that she prepared dinner at the petitioner's home and that they ate dinner at about 5:15 p.m. or 5:30 p.m. Prior to sitting down for dinner, the petitioner had walked the family dog for approximately twenty minutes. Therefore, according to her testimony, the petitioner had returned from his walk before the time that the victim was last seen outside of her apartment. Karen Martin further testified that he did not leave their house again until she received a telephone call from Howard, who requested that the petitioner walk over to the victim's house to check on her. According to Howard, this telephone call was placed a little after 8 p.m. Prior to this telephone call, the petitioner was not always in his wife's sight. In particular, she was upstairs bathing her son from approximately 6:15 to 7 p.m.; however, she testified at the second habeas proceeding that while she was upstairs, it was possible to hear someone downstairs.[6] From 7 p.m. until the time the petitioner

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6. The fact that it is *possible* to hear someone downstairs does not mean, however, that the petitioner has an alibi for this 45-minute window. There is no evidence that Karen Martin in fact heard the petitioner. Quite the contrary, as Judge Fuger's memorandum of decision notes the following: "In the present matter, Attorney Culligan did testify that he did not call Ms. Martin to testify at the criminal trial because she could not account for the petitioner's whereabouts during the forty-five minutes she was upstairs with her son. Indeed, at the suppression hearing held on January 10, 1992, Ms. Martin testified that she did not know for sure whether the petitioner was in the house when she was getting her son ready for bed, at approximately 6:15 p.m. to 7:00 p.m. ... More significantly, Ms. Martin's testimony at this habeas trial was clearly detrimental to the petitioner's defense. Ms. Martin testified that when she was upstairs getting her son ready for bed, not only was she unaware of her husband's whereabouts, she offered that the petitioner *was* out of the house. Because Ms. Martin failed to provide a solid alibi, indeed, undermines it, her testimony is not at all helpful to the petitioner." (Emphasis in original.) *Lapointe v. Warden*, Superior Court, judicial district of Tolland at Somers, docket number CV02-0818542 (Aug. 2, 2007) (CT. Sup. 13685), citing Petitioner's Exhibit 73, Tr. 1/20/92, pp. 2099-2101. Ms. Martin also presented testimony before this court. The 2010 testimony was even more harmful to any alibi defense premised on Ms. Martin, as she testified that when she came downstairs, the petitioner was not there. Ms. Martin also testified that she did not know whether he had been in the house while she was upstairs, if the petitioner had been outside she would not have known, and that she had no way of knowing if he had left the house. It is difficult, if not impossible, to conclude that Ms. Martin's presence on another floor, while giving her son a bath, not seeing or hearing the petitioner downstairs, coupled with not seeing him when she came downstairs at 7:00 p.m., provides the petitioner with anything that remotely amounts to an alibi.

left to check on the victim at the request of Howard, he was watching television with his family.[7] The fire was reported by the petitioner at approximately 8:27 p.m.

"Viewing this evidence in the light most favorable to the petitioner, we conclude that he submitted sufficient evidence to establish the prima facie basis for the exculpatory nature of the Ludlow note. As noted by the court, the thirty to forty minute minimum burn time, if credited as an accurate estimation, establishes that the fire was set at or before 7:50 p.m. The petitioner submitted evidence that, if credited, can account for his whereabouts, albeit tenuously, for the full window of time encompassing the last time the victim was seen alive outside her apartment to the time her body was discovered. Evidence that tends to prove his temporal inability to have committed the crime satisfies the definition of exculpatory and, therefore, is sufficient to establish the first prima facie element of a *Brady* claim. ..." (Emphasis added; footnote renumbered.) *Lapointe v. Commissioner of Correction*, supra, 113 Conn. App. 390-92.The Appellate Court, having reviewed the record and evidence before it as developed to the point of the second habeas corpus proceeding, concluded that the petitioner had established the exculpatory nature of the Ludlow note and satisfied the first prong of the *Brady* analysis. This conclusion by the Appellate Court is binding on this court, in particular given the contours of the remand. This court shall, therefore, treat the Ludlow note as being potentially exculpatory.

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7. "In its brief, the respondent argues that Karen Martin testified at the second habeas petition that '[the petitioner] was not in the house' but nevertheless also testified that she was truthful on previous occasions when she testified as to his whereabouts, a statement that appears to be contradictory. A review of her testimony, however, reveals the proper context in which she made this statement. She testified that the petitioner was not in the house because he had gone to her grandmother's to check on her. She then related what she did during the petitioner's absence. It is undisputed that the petitioner was at the victim's apartment, having been the person who called the police. Therefore, her second habeas trial testimony does not contradict her previous testimony as the respondent seems to argue."

B

The petitioner must show that Attorney Vogt was deficient in not raising in the first habeas petition a *Brady* violation claim premised on the potentially exculpatory Ludlow note. If the petitioner proves deficient performance by Attorney Vogt, the petitioner must then demonstrate that such proven deficient performance resulted in prejudice. In a habeas on a habeas, the petitioner must still affirmatively prove that his defense in the underlying criminal case was prejudiced.

Attorney Vogt testified at the habeas trial that the fifth amended petition he filed in the petitioner's first habeas matter contained a claim in count two that alleged the state suppressed exculpatory evidence. Petitioner's Exhibit 141, pgs. 9-11. In count two of the fifth amended petition, the operative complaint in the first habeas, Attorney Vogt alleged prosecutorial misconduct premised on several bases. More specifically, count two alleged "[u]nlawful and deceptive practices by the prosecuting authority with respect to the disclosure/nondisclosure of evidence. These practices include a) noncompliance with the prosecution's duty of disclosure under the United States and Connecticut Constitutions. ... *Brady v. Maryland*, 373 U.S. 99 (1968) ...; b) noncompliance with discovery obligations under Practice Book § 40-11; c) late disclosure of favorable or otherwise material evidence; and d) misrepresentations about the extent of disclosures made; e) actions inconsistent with the prosecuting authority's duties as a 'minister of justice.' Specific known examples of this prosecutorial misconduct include the following: ...The failure to disclose and/or produce assorted police notes generically referred to as notes of Manchester Police Detective Ludlow (but apparently including notes by other police officers). These notes were made available to Mr. Lapointe's counsel for inspection for the first time on March 22, 1999. Copies of ... some of these

notes were provided to Mr. Lapointe's counsel on June 23, 1999."[8] Petitioner's Exhibit 141, pgs. 9-10. The court's memorandum of decision in the petitioner's first habeas ultimately did not address this claim because it deemed the claim abandoned. Petitioner's Exhibit 142, pg. 16.

The petitioner here asserts that Attorney Vogt failed to recognize the contents of the Ludlow note. Attorney Vogt testified that he reviewed the notes disclosed by the counsel for the respondent and felt that some of the notes were exculpatory and some were not exculpatory. The Ludlow notation regarding the estimated burn time of "30-40 mins poss" was not, in Vogt's view, exculpatory or material that had not been disclosed in violation of *Brady*. Attorney Vogt testified that he retained Dr. Peter DeForest, an arson expert, to help him evaluate the crime scene because the fire, its cause, origin, etc., were of considerable interest. Although Attorney Vogt had Dr. DeForest evaluate the crime scene and consulted with him regarding the fire's cause and origin, Dr. DeForest neither produced a report nor testified at the first habeas trial before Judge Freed. Much is implicitly suggested by the consulting expert not producing a report. As this court remarked at length in a bench ruling in the matter of *Linarte v. Warden*, Superior Court for judicial district of Tolland at Somers, docket number CV04-4000127 (July 1, 2010), there is no deficiency in not asking an expert to produce a report. Although convenient and desirable for many reasons, an expert report, much the same as a police officer's report, is a paper "trail" which raises the issue of probable criticism and fertile cross examination for what may not be referenced in the report as opposed to its substance.

8. The counsel referenced here is Attorney Vogt himself, as counsel for the petitioner in his first habeas. The notes turned over to Attorney Vogt, accompanied by a letter from respondent's counsel, are contained in Petitioner's Exhibit 87.

Hence, this court makes no inference, let alone a negative one, as a result of Vogt not requesting Deforest to produce a report.

At the habeas trial before this court, former Detective Ludlow testified that his investigation sought to determine how long the fire burned. The critical aspect of such a determination was to establish a minimum burn time and an approximate time when the fire was ignited. The approximation of when the fire began would help focus the investigation and permit the police to more accurately canvass individuals living in the victim's neighborhood about what they observed and, more importantly, when. Detective Ludlow emphasized that it was difficult to determine with precision how long the fire burned, that the time could have ranged anywhere from fifteen minutes to two hours.

Detective Ludlow testified that he is not sure where he got the time from. Presently, Ludlow could not recall who gave him the estimate, though he made the notations during his conversation with Igoe and Roy. In 2007, before Judge Fuger, he testified that got the "30-40 mins poss" burn time estimation from one of the fire marshals on the scene, either Igoe or Roy, and that the burn time estimation would not have been a number that he came up with in his own mind. Detective Ludlow indicated it was even possible that he came up with the number after talking with Igoe and Roy. Whether or not the number derived from either one of the fire marshals or was his own estimate, Ludlow notated "30-40 mins poss" as part of his investigation.

As addressed above, the Appellate Court concluded that the petitioner submitted sufficient evidence to establish the prima facie basis for the exculpatory nature of the Ludlow note. This

conclusion stands, of course, in direct contrast to the testimony presented by Attorney Vogt that he did not think the "30-40 mins poss" notation was exculpatory. Whether or not Attorney Vogt's conclusion regarding the exculpatory nature of the Ludlow note is correct, this court shall, for purposes of the discussion that follows below, assume that Attorney Vogt was deficient for failing to perceive the potential exculpatory nature of the Ludlow note. The question then becomes whether such deficient performance prejudiced the petitioner. Here, given the remaining parts of the *Brady* test, the petitioner must additionally show, however, that the evidence was suppressed by the state, either willfully or inadvertently, and that prejudice resulted from its absence. *State v. Ortiz*, supra, 280 Conn. 717.

There is no indication or evidence that the Ludlow note was willfully suppressed, so this court will assume, without deciding, solely for purposes of further addressing the petitioner's claim, that the Ludlow note was inadvertently "suppressed." Consequently, the court must assess whether the petitioner's alibi defense during the criminal trial was prejudiced by the absence of the Ludlow note.

C

"The test for materiality is well established. 'The United States Supreme Court . . . in *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), [held] that undisclosed exculpatory evidence is material, and that constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different.[9] A reasonable probability is a probability sufficient to undermine confidence in the outcome. The United States Supreme Court recently discussed several aspects of materiality under *Bagley* that bear emphasis. See *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The court explained that a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. Id. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Id. The United States Supreme Court also emphasized that the *Bagley* test is not a sufficiency of evidence test. Id. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Id. [434-35].' (Internal quotation marks omitted.) *State v. Esposito*, [235 Conn. 802, 814-15, 670 A.2d 301 (1996)]; see *State v. Ross*, 251 Conn. 579, 595, 742 A.2d 312 (1999). Accordingly, the focus is not whether, based upon a threshold standard, the result of the trial would have been different if the evidence had been admitted. We instead concentrate on the overall fairness of the trial and whether nondisclosure of the evidence was so unfair as to undermine our confidence in the jury's verdict. *United States v. Bagley*, supra, 682." *State v. Wilcox*, 254 Conn. 441, 453-54, 758 A.2d 824 (2000).

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9. Thus, the extent to which the third *Brady* prong is demonstrated, the petitioner thereby also demonstrates the second *Strickland* prong.

"'Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' ... *State v. Skakel*, 276 Conn. 633, 699-700, 888 A.2d 985, [cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428] (2006), discussing *Kyles v. Whitley*, [supra, 514 U. S. 534-35]." *State v. Ortiz*, supra, 280 Conn. 717.

"In *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the court further elaborated on the materiality prong, stating that the prosecutor does not violate his constitutional duty of disclosure 'unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.' In illuminating the proper standard of materiality that must be shown, the *Agurs* court said that 'if the omitted evidence creates a reasonable doubt [of guilt] that did not otherwise exist, constitutional error had been committed.' *United States v. Agurs*, supra, 112. Pointing out that this meant that 'the omission must be evaluated in the context of the entire record,' it went on to note that '[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial, [but] on the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.' *United States v. Agurs*, supra, 112-13. That court, however, also said that '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' *United States v. Agurs*, supra, 109-10; see *State v. Doolittle*, [189 Conn. 183, 197, 455 A.2d 843 (1983)].

"... Under the *Brady* line of decisions, the evidence suppressed must not only be favorable to the defendant, but also material to either his guilt or punishment. ... Evidence is material if it could . . . in any reasonable likelihood have affected the judgment of the jury. ... The defendant must show that the evidence was material and of some substantial use to him. ... Favorable evidence is that evidence which . . . might have led the jury to entertain a reasonable doubt about . . . guilt [,] and this doubt must be one that did not otherwise exist. ...

"The level of materiality that need be proven here to establish a *Brady* violation is such that the omitted evidence creates a reasonable doubt [as to guilt] that did not otherwise exist . . . [and] the omission must be evaluated in the context of the entire record. ..." (Citations and quotation marks omitted.) *State v. Green*, 194 Conn. 258, 263-65, 480 A.2d 526 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 964, 83 L. Ed. 2d 969 (1985).

D

Considerable and extensive testimony by arson experts/investigators was presented by both the petitioner and the respondent in their efforts to determine the burn time. The court heard testimony from Stephen Igoe, Gerard Kelder Jr., John D. DeHaan, Joseph Roy, and Robert Corry. The court will summarize their testimonies below.[10]

10. Igoe and Roy have testified on numerous occasions in these matters spanning nearly a quarter of a century. Kelder testified previously before Judge Fuger. The summaries will focus on the testimony presented to *this* court.

Stephen Igoe

Stephen Igoe testified that he met Detective Ludlow at the victim's apartment. Igoe arrived at the scene several hours after the fire and conducted his investigation while on the scene for several hours. Igoe concluded that the fire was slow burning because although there was significant damage to the couch, the fire had not completely burned the wood on the back of the couch. Additionally, Igoe conducted a burn test on one of the couch cushions. The fabric ignited and burned slowly, emitting heavy black smoke. Notably, the burn test was conducted outside, where oxygen is freely available compared to the nearly hermetically sealed apartment.

When questioned about the Ludlow note, which reference his conclusions (slow burning; smolder; no char on wood of couch; fabric burn test – slow; soot on window; high heat above couch area), Igoe testified that the "30-40 mins poss" was not an estimate that he provided to Ludlow. While Igoe indicated that he would like to give exact times like that, such exact times are normally given by witnesses to an event.

Igoe testified that he believed the couch burned slowly, giving off heavy black smoke. Depending on the specific conditions in the apartment, the oxygen supply, etc., the couch could have burned slowly and/or smoldered between several minutes or several hours, according to Igoe. The estimation that Igoe provided was that the fire burned slowly/smoldered for between fifteen minutes and three hours.

Igoe's testimony and burn time estimation encompasses the entire forty-five minute period from 6:15 p.m. until 7:00 p.m., when Ms. Martin cannot account for the petitioner's presence. See, infra, pg. 16 n.6.

Gerard Kelder Jr.

Mr. Kelder, a highly experienced fire investigator, conducted an investigation that included reviewing all relevant materials, reports, pictures, blueprints, testimonies, etc., and visited an apartment with the same layout in the same complex approximately three weeks prior to testifying before this court. Kelder's experience, it is clear to this court, stems from on the job training. Other than a high school Diploma, Kelder holds no advanced degrees from any University or College. Kelder in vastly extensive detail testified about the observable damage to the victim's apartment and its contents. In Kelder's opinion, the fire burned from forty-five minutes up to an hour. Kelder thought the forty-minute estimate was more likely and that there would have been more damage to the apartment if the fire had burned for an hour. The basis for Kelder's opinions was his review of the materials, with particular emphasis placed on the photographs showing the detailed damage to the victim's apartment and its contents. Kelder testified in his estimation the maximum the temperature could have reached as high as 1,800° at the ceiling level.

The petitioner called 911 at 8:27 p.m. and firefighter Tomkunas was on the scene within a couple of minutes. Thus, Kelder's estimated maximum burn time would result in the fire being set sometime around 7:30 p.m. A fire start time of 7:30 p.m. is not inconsistent with the estimate provided by Igoe, as this falls somewhere near the middle of Igoe's estimated burn time range. Given

Ms. Martin's testimony that she, her son and the petitioner were watching television at 7:30 p.m., Kelder's burn time estimation could support the petitioner's alibi defense.

Dr. John D. DeHaan

Dr. DeHaan, a criminalist and forensic scientist specializing in fire and explosion reconstruction, also presented extremely thorough testimony about the numerous variables that impact a fire, even in an apartment as small and contained as the victim's. Dr. DeHaan did not visit the scene, but did review the photographs, a DVD of the scene, the relevant trial testimony, reports from investigators at the scene as well as the reports from Kelder and Corry, and the building plans of the victim's apartment. Dr. DeHaan produced a report and testified at length about the types of material used in the couch, in particular the fabric and the cushions contained therein.[11]

In Dr. DeHaan's opinion, the maximum temperature in the smoke layer never got above 400-450 degrees Fahrenheit, a conclusion supported by the fact that items such as a newspaper on or near the floor did not ignite and burn. While Dr. DeHaan acknowledged that the temperature could have been slightly lower than 400 degrees Fahrenheit, he did not think that the temperature was as low as 200 degrees Fahrenheit. Dr. DeHaan estimated that approximately twenty-five minutes to one hour elapsed from the time of ignition and when the fire was discovered/extinguished. According to Dr. DeHaan, if the fire had burned significantly longer than one hour, then it would have gone out and the room would have cooled down. Dr. DeHaan's opinion as to the approximate burn time is

11. Dr. DeHaan's report was entered into evidence as Petitioner's Exhibit 191. Interestingly, Petitioner's expert DeHaan contradicted another petitioner's expert, Kelder, regarding his opinion on the type of foam used and burned in the couch, one of the fire's three points of origin.

consistent with Kelder's opinion and not inconsistent with Igoe's opinion and would support the petitioner's alibi defense.

Joseph Roy

Former fire marshal Joseph Roy briefly testified about his participation in the investigation. According to Roy, he arrived at the scene the morning after the fire and assisted Igoe to help determine the cause and origin of the fire. Roy testified that he believes he talked with Ludlow at the scene but denied giving him an estimate of the total burn time. No definite time could have been provided, per Roy's testimony, especially in the absence of a proper analysis of the combustible items in the victim's apartment. Roy's involvement was limited to assisting Igoe, who was focused on the cause and origin of the fire.

Robert Corry

Mr. Corry, a highly experienced fire and explosion investigator, also presented extremely detailed testimony about the fire and its dynamics. Corry holds a Bachelor's and Master's degree in criminal justice. He rose from the infantry to the position of Caption in the United States Army. He was an active member of the Massachusetts State police for twenty three years. Corry testified credibly that he has investigated approximately fourteen hundred fires over a professional career spanning nearly three decades. Corry boasts an extensive resume with experience in law enforcement with particular emphasis in investigating arson and structure fires. He has worked for the Federal Emergency Management Agency (FEMA), arson tasks forces, Massachusetts State Police, Massachusetts State Fire Marshal's office, and has attended and taught numerous hours of arson

investigation courses. He has been qualified as an arson expert in courts of law approximately one hundred fifty occasions. For the most part, Mr. Corry has testified for the prosecution and defendant insurance companies. Here, he testified on aspects including the fire's cause and origin, burn time, probable temperature range, and other aspects involving analysis of the historical, forensic and physical evidence he either reviewed or observed firsthand. Corry reviewed the photographs, reports, relevant trial testimonies, etc., as part of his review process. Corry also spoke twice with fire responder Tomkunas and was able to visit the victim's apartment in 2007 and assess the crime scene, albeit decades after the fire occurred. Corry noted that there remained a strong odor of smoke in the victim's apartment twenty years after the fire.

Corry presented detailed testimony about the apartment's physical structure, insulating capabilities, ventilation, etc. Given the physical properties of the apartment, combined with no or almost no ventilation, Corry determined that the fire was a ventilation control fire. The oxygen in the apartment was consumed by the fire and self-extinguished due to oxygen deprivation. The fire was, according to Corry, a smoldering-type fire that was low energy and emitted a significant amount of smoke due to the cushion material. The materials themselves, although they burned and smoldered, also helped to reduce the energy of the fire, thereby keeping down the amount of heat created by the fire.

As to his estimation of the total burn time, Corry testified that the apartment could hold heat and smoke for a significant period of time. Corry thought the fire could have been set any time within the two hours plus preceding Tomkunas's entry into the apartment. In contrast to Dr. DeHaan and Kelder, Corry opined credibly that "this was not a high energy fire." He disputed DeHaan's and

Kelder's estimate of peak temperature. Corry noted that Tomkunas first responded to the call and found the door to the apartment was "hot", but he did not burn himself. He sustained no injury to his hands, his exposed ears or any other body part. These facts, Corry pointed out, contradict Dr. DeHaan's estimate that the temperature upon entry was four hundred degrees. Corry testified credibly that Dr. DeHaan overstated the amount of heat generated by this fire. Corry noted that Tomkunas had dropped to his knees upon entering the apartment. Corry opined the temperature at that time was more likely one hundred fifty to one hundred ninety degrees. The fact that Tomkunas was not burned contradicts any opinion that the temperature was four hundred degrees. At four hundred degrees, Corry cogently explained, one would expect Tomkunas to suffer injury to the back of his neck and his hands at a minimum. In addition, the photographs of the fire damage, or lack thereof, of materials in the apartment in evidence do not support Dr. DeHaan's testimony that temperatures reached four hundred degrees. Corry also criticized the validity of Dr. DeHaan's opinion's regarding temperatures as not taking into account the material in the room which helped to slow the fire's burning such as a blanket and poly foam cushions on the couch, thought to be one of three of the fire's points of origin.

When compared with Corry's reasonable and measured analysis, Kelder's estimate of temperature at eighteen hundred degrees appears wildly exaggerated. In addition, Kelder's and Dr. DeHaan's opinions regarding a forty to forty-five minute window of burn time appear totally contradicted by the historical and physical evidence marshaled by Corry. Corry's estimation of the much lengthier total burn time encompasses the entire time the petitioner's whereabouts are not

verifiable through his then wife and, therefore, does not support the petitioner's potential alibi defense.

E

The testimonies presented by the foregoing fire experts, in particular Kelder, DeHaan and Corry, were extensive and detailed. The court intentionally has succinctly summarized these testimonies because they demonstrate how each expert can, by focusing more on some factors versus others, render an opinion that varies from another expert's opinion. The differences between the varying estimations of the burn time stem from each expert's particular focus (e.g., DeHaan on the materials in the couch; Corry on the insulative and thermal properties of the apartment; Kelder on the damage as depicted in the photographs). The evidence presented to this court in the form of expert testimony amounts to a contest among experts conducted many years after fact witnesses testified, and were subject to rigorous cross-examination, before the jury. The court as the finder of fact in this proceeding assigns far more credit or weight to the testimony of Robert Corry rather than Gerard Kelder or Dr. DeHaan regarding estimation of the burn time. The petitioner, thusly, has failed to establish prejudice with respect to any claim vis-à-vis *Brady*.

The court further notes that it finds less credible the attempts to provide more precise burn time estimations. Given the complexity of fires and the many factors or dynamics that impact a fire, a complexity which is patently evident from the testimony of Kelder, DeHaan and Corry, it is impossible to establish with precision when the fire was set. Thus, the more precise the estimate, the less credible the court finds the opinion. What is clear from all the evidence in the record, the original trial testimony, crime scene photographs, reports, and the expert testimony presented to this

court on the fire, is that the precise time the fire was set cannot be determined. At best, a range is established that includes that time period of 6:15 p.m. to 7:00 p.m., (fire could have been burning between 5:45 p.m. and 7:55 p.m.) when Ms. Martin cannot account for the petitioner's whereabouts and does not provide an alibi for him.

F

"Expert testimony generally is admissible if '(1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues.' (Internal quotation marks omitted.) *State v. Borrelli*, 227 Conn. 153, 165, 629 A.2d 1105 (1993). Although expert testimony may be admissible in many instances, it is required only when 'the question involved goes beyond the field of the ordinary knowledge and experience' of the trier of fact. *Franchey v. Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967); see also C. Tait, Connecticut Evidence (3d Ed. 2001) § 7.5.4, pp. 517-20. 'The trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters.' *Way v. Pavent*, 179 Conn. 377, 380, 426 A.2d 780 (1979)." *State v. Padua*, 273 Conn. 138, 149, 869 A.2d 192 (2005).

The expert testimony on the fire and its estimated total burn time would not be in the ordinary knowledge and experience of the typical juror. While it may be relatively easy to conclude that expert testimony such as what was presented to this court could have been presented to the jury, the use of such experts would not have assisted the jury in knowing precisely when the fire was set. Given all of the foregoing, the court simply cannot conclude that the non-disclosure of the Ludlow

note, assuming it is potentially exculpatory and was inadvertently not disclosed by the state, supported the petitioner's "alibi" defense. The inability to precisely determine the start time of the fire, coupled with Karen Martin's testimony that she cannot account for the petitioner's whereabouts from 6:15 p.m. to 7:00 p.m., leads this court to conclude that the petitioner has failed to show both the third prong of *Brady* and the second *Strickland* prong. That is, the petitioner has failed to show how the Ludlow note and the "30-40 min poss" reference if disclosed to defense counsel, reasonably would have led the jury to conclude there was reasonable doubt in light of all the evidence presented to the jury.

Accordingly, and based upon the foregoing, the court concludes that the petitioner has failed to show that Attorney Vogt rendered ineffective assistance of counsel for failing to raise as an issue the State's suppression of its arson expert's opinion that the 'burn time' of the fire set in the decedent's apartment was between '30-40 mins poss.' The court is unable to conclude that Vogt's failure to have an arson/fire expert testify in the first habeas matter would have resulted in anything different than the instant habeas: a prototypical battle of the experts resulting in diverging opinions. Here, the court finds more persuasive the testimony presented by the respondent, to wit, Robert Corry, rather than either of the petitioner's two experts, Mr. Kelder and Dr. DeHaan.

II

The petitioner's second allegation is that Attorney Vogt also rendered ineffective assistance of counsel as follows: "In the Fourth Count of the Fifth Amended Petition [in the first habeas] it was alleged petitioner's criminal trial counsel provided constitutionally infirm representation in failing to

employ the information, i.e., evidence available to the defense.[12] During the petitioner's [first] habeas trial Attorney Vogt failed to 'reconstruct the circumstances of counsel's challenged conduct' through Attorneys Patrick Culligan and Christopher Cosgrove who represented the petitioner during his criminal trial, despite calling them as witnesses. Attorney Vogt asked the attorneys no questions regarding their competence as the petitioner's trial counsel, and blocked the State from cross-examining Attorney Culligan on the subject of the petitioner's ineffective assistance of counsel claim, arguing questioning of trial counsel on the subject would cause the witness to disclose 'work product with respect to his representation of Mr. Lapointe.' ... As a result no questions were asked of the trial lawyers about their failure to employ available evidence resulting in the failure to establish the unreliability and falsity of the petitioner's alleged confessions despite the existence of significant evidence establishing they were unreliable and false." Amended Petition, pg. 20.

The amended petition goes on to identify various items of physical evidence, as well as the criminal trial testimony from criminalist Beryl Novitch, in support of the allegation that inconsistencies between these items and such testimony and the petitioner's statements to the Manchester police were not properly utilized by defense counsel. Thus, "[d]espite alleging in the Fifth Amended Petition [in the first habeas] that criminal trial counsel provided ineffective assistance of counsel in failing to make use of available evidence to prove the petitioner's innocence, first habeas counsel failed to utilize any of the evidence to prove the falsity of the petitioner's confessions

12. This claim encapsulates the Appellate Court remand 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 to establish the petitioner's innocence." Amended Petition, pg. 23. Although this claim arises in the context of an ineffective assistance for failure to properly use evidence, it is readily apparent that at the heart of this allegation are the extensively litigated statements made by the petitioner to Detectives Lombardo and Michael Morrissey.

The petitioner attempts to equate discrepancies between the statements made to police and the evidence obtained from the victim's apartment with proof, albeit circumstantial, that the confessions were false. To wit: "At the habeas trial the petitioner proved circumstantially that the decedent was dressed precisely the same way when attacked as when last seen alive, and in doing so proved the falsity of the confession. This is so because if the decedent was not wearing a pink housecoat but a blue sweater over a blouse and camisole, the alleged precipitating event, i.e., the petitioner seeing 'her breasts when she bent over' could not have occurred, just as the petitioner could not have taken off her underwear to have intercourse with her if she was wearing her black slacks." Petitioner's Post-Trial Brief, pg. 15.

"The clothing the decedent was wearing was the precipitating event to the assault described in the confession, nonetheless trial counsel, whose stated purpose was to demonstrate the falsity of the confession, ... completely ignored the evidence at their disposal by failing to make any attempt to prove what they could have proven beyond a reasonable doubt, i.e., that the decedent was not wearing the non-existent 'pink house coat type of outer wear' but a blue sweater over a blouse with black slacks and the white panties. Therefore, the petitioner could not have been able to see the decedent's breasts under her blue sweater, blouse and camisole, nor could he have thrown her underwear on the right side of the bed without first having removed her black slacks. ..." Id., pg. 23.

The respondent counters that "[h]ere, 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." (Emphasis in original.) Respondent's Post-Trial Brief, pgs. 43-44.

The court finds the respondent's arguments to be more persuasive.

Nicholas Petraco, a crime scene reconstruction expert, testified that in his opinion, it took the individual who attacked the victim at least an hour, perhaps even two hours, to inflict both the injuries to the victim and the damage to the apartment. The court finds such an estimate to be not credible. The victim was almost ninety years old, in poor health, suffered superficial stab wounds to the back, and had a single ligature tied around her neck. The sexual assault does not appear to have been extensive or of long duration. The three separate fires appear to be hastily set, a factor contributing to the apartment not being completely destroyed by fire. In sum, while it is unknown precisely how long it took for the events to transpire in the victim's apartment, an estimate of one-to-two hours simply is not credible. Petraco's testimony in general was very vague and unhelpful, as is evident even from the petitioner's extensive post-trial briefs, which only in the most cursory way mention Petraco. See Petitioner's Post-Trial Brief, pg. 36; Petitioner's Reply Brief, pg. 4.

As previously indicated, Attorney Vogt retained Dr. DeForest and consulted with him for the purpose of crime scene evaluation and reconstruction. The operative complaint in the first habeas contained an allegation that trial defense counsel did not make proper use of available evidence. Vogt testified that he was aware that Mrs. Howard described the victim as wearing a blouse underneath a blue sweater and dark slacks, which are consistent with the items of clothing found in victim's bedroom, were inconsistent with the petitioner's statement to the police that the victim was wearing some type of pink housecoat. Vogt acknowledged that although he called Attorneys Culligan and Cosgrove as witnesses, he did not ask them questions about such evidence as the blue sweater described by Mrs. Howard, the victim's daughter, or other clothing such as the blouse and black pants.

According to Vogt's testimony, he concluded that Detective Lombardo's notebook, which had not been disclosed to trial counsel at the time of the suppression hearing, was the single most important item to focus on in the first habeas. Vogt employed the deliberate tactic of not asking Lombardo specific questions on what the words he used in his notes meant. Vogt utilized Culligan's testimony to attempt to affirmatively show that a *Brady* violation had occurred when the state failed to disclose Lombardo's notebook before the suppression hearing.

Both Attorneys Culligan and Cosgrove testified about the defense efforts. The petitioner's defense theory was that he was innocent of the charges and had no viable motive to commit any of the crimes. Furthermore, the defense team strove to show that the confessions were false confessions,

coerced out of the petitioner through the police officers' manipulations and/or deceptions.[13] The defense team attempted to persuade the jury that it made no sense for the petitioner to have perpetrated these crimes.

The evidence *itself*, as presented to the criminal jury, made the various discrepancies such as the absence of the pink housecoat/nightgown, the victim's stabbing on the couch but the blood being found on the bed, etc., readily discernable. The respondent quite aptly emphasizes this point. "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 (5/8/91) 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

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13. The petitioner's post-trial brief at some length addresses Detective Michael Morrissey's interview of Karen Martin. See Petitioner's Post-Trial Brief, pgs. 27-30. A fair reading of the allegations in count two shows that they focus on counsels' purported failure to utilize the *physical* items of forensic evidence recovered from the victim's apartment to show that the petitioner's statements were false. See Amended Petition, pgs. 20-22, paragraphs 58-60; 62-63. Detective Morrissey's taped interview of Karen Martin is not a physical item of forensic evidence recovered from the apartment. The petitioner here clearly is attempting to weave into the allegations in count two an additional way to underscore that the petitioner's statements were coerced and their contents false or unreliable. The voluntariness of the petitioner's statements to police was extensively litigated in hearings on the petitioner's motion to suppress. The evidence before this court shows that petitioner's criminal defense counsel were aware of the recorded interview with Karen Martin as early as the motion to suppress hearing. Former Detective Michael Morrissey testified over the course of two days before this court. Even though this court finds Morrissey's interview with Karen Martin was indeed laden with implicit threats, the court finds Morrissey's testimony before this court regarding the nonthreatening nature of the circumstances of the defendant's/petitioner's inculpatory statement(s) to be highly credible. Attorney Culligan testified that defense counsel had the transcript of the Morrissey/Martin interview and also received a copy of the tape. The scope of Attorney Culligan's cross-examination of Detective Michael Morrissey during the criminal trial was a tactical decision by counsel that this court does not find evidences deficient performance. Defense counsel used cross-examination to show to the jury the interviewing techniques employed by the individuals who interviewed the petitioner. This court will neither revisit nor relitigate the voluntariness of the petitioner's statements to the Manchester police. The Morrissey/Martin interview *itself* does not, in any way, prove why there are discrepancies between the petitioner's statements and the forensic evidence. Thus, even viewing count two of the amended petition broadly enough to encompass the failure by trial defense counsel to use the transcript and tape of the Karen Martin interview, the court does not find that this amounts to deficient performance.

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 Natalie 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." Respondent's Post-Trial Brief, pg. 45.

Even the floor plan of the victim's apartment, as sketched by Detective Revoir on March 9, 1987, and introduced as a state's exhibit during the criminal trial, clearly shows the location of items such as the sweater, the two buttons found on the floor, the blouse and the panties. See Petitioner's Exhibit 159. The petitioner's claim here belies the jury's common sense and ability to discern readily apparent facts.[14] The discrepancies between the petitioner's statements and evidence in the victim's apartment necessitated little additional emphasis from trial counsel and the court is very hard pressed

14. The court notes that much has made of the petitioner's purported mental deficiencies. The petitioner's own mental health experts concluded his level of intelligence was in the normal range. The petitioner's arguments, quite understandably, do not consider the possibility that the petitioner intentionally gave the police a mixture of both truthful and misleading information. The petitioner's behavior may be nothing more than manipulation and duplicity. The petitioner did not testify in the instant habeas corpus proceeding, but he did testify during the criminal proceedings, both during the motion to suppress hearing and the criminal trial itself. Thus, the jury had an opportunity to assess the petitioner's credibility. This court's thorough review of the transcripts of the petitioner's testimony, both during the trial and the extensive motion to suppress hearing, reflect an individual who answered questions quite well but nevertheless was often evasive, selective in his recall and bordering on so incredible as to be not believable (e.g., signing a statement that he had committed a brutal sexual assault and murder, but did not expect the police to arrest him; the police believed he did not commit the crimes because he signed the statements; Petitioner's Exhibit 51, Transcript 6/5/92, pgs. 2262 & 2269-70).

to somehow fault Attorney Vogt's decision not to dwell on such a claim. Furthermore, the petitioner's present attempts to show that these discrepancies are indicative of the falsity of the statements also belie the jury's factual determinations.

The court concludes, based upon the foregoing, that the petitioner has not proven that Attorney Vogt rendered deficient performance for failing to employ evidence available to the defense. The evidence was before the jury and was considered by the jury prior to reaching its verdicts. The adversary process did not suffer a breakdown. The petitioner has neither shown that trial defense counsel rendered deficient performance nor that his defense was prejudiced thereby. This court's confidence in the outcome of the criminal trial has not been undermined. The claim in count two, therefore, is denied.

III

The petitioner's third and final allegation is one of actual innocence. "In *Miller v. Commissioner of Correction*, 242 Conn. 745, 747, 700 A.2d 1108 (1997), our Supreme Court 'held that the proper standard for evaluating a freestanding claim of actual innocence . . . is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence — both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial — he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty of the crime.' (Internal quotation marks omitted.) *Mozell v. Commissioner of Correction*, 291 Conn. 62, 80-81, 967 A.2d 41 (2009).

"'[O]ur Supreme Court has deemed the issue of whether a habeas petitioner must support his claim of actual innocence with newly discovered evidence an open question in our habeas jurisprudence. . . . [The Appellate Court], nevertheless, has held that a claim of actual innocence must be based on newly discovered evidence. In *Weinberg v. Commissioner of Correction*, 112 Conn. App. 100, 119, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009), [that court] stated: [A] writ of habeas corpus cannot issue unless the petitioner first demonstrates that the evidence put forth in support of his claim of actual innocence is newly discovered. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence.' (Citation omitted; internal quotation marks omitted.) *Sargent v. Commissioner of Correction*, 121 Conn. App. 725, 734-35, 997 A.2d 609, cert. denied, 298 Conn. 903, 3 A.3d 71 (2010)." *Gaston v. Commissioner of Correction*, 125 Conn. App. 553, 558-59, 9 A.3d 397, (2010), cert. denied, 300 Conn. 908, ___ A.3d ___ (2011).

A

The petitioner's claim of actual innocence centers on three items of physical evidence found in the victim's apartment: a pair of gloves found in the bedroom and a pubic hair recovered from a blue sweater also found in the bedroom. The right glove was found on the floor near the foot of the victim's bed; the left glove was found on the bed next to the headboard. The blue sweater, from which the pubic hair was recovered, was also found on the floor near the right glove. See Petitioner's Exhibit 159. The petitioner asserts that "[t]he gloves have never been connected to the victim or the petitioner and all evidence leads to but one conclusion: the gloves were worn by the assailant during

the commission of the offenses. In 2007 the gloves were subjected to DNA analysis by Orchid Cellmark Laboratories, Dallas, Texas and in a report dated July 16, 2007 it was established that the gloves contained mixed male DNA profiles which excluded the petitioner as being a contributor." Amended Petition, pg. 24. Additionally, "[i]n November 2003 the pubic hair along with sample pubic hairs from the victim and the petitioner were sent, with the consent and cooperation of the State, to Mitotyping Technologies, LLC in State College, Pennsylvania for mitochondrial DNA testing to determine if a mitochondrial DNA profile could be developed and compared to the mitochondrial DNA profiles of the victim and the petitioner." Id. Pg. 25.

DNA analyses performed on the gloves and the pubic hair establishes, according to the petitioner, that the "gloves contained mixed male DNA profiles which excluded the petitioner as being a contributor," and that "a mitochondrial DNA profile of the pubic hair ... was different from the mitochondrial DNA profiles of both the victim and the petitioner." Id., pgs. 24-25. Based upon these analyses and results, the petitioner claims that "[t]he DNA evidence obtained from the gloves left at the murder scene establishes that the gloves belonged to and were worn by someone other than the petitioner or the decedent, i.e., the perpetrator, and the DNA evidence developed from the pubic hair conclusively establish[es] it belonged to someone foreign to the scene, i.e., the perpetrator, overwhelmingly establish the petitioner's innocence." Id., pg. 24.

B

At the habeas corpus trial, the court heard testimony pertaining to the claim centered on the gloves and the pubic hair from: Dr. Terry Melton, Mitotyping Technologies, LLC; Jody Hynds, a forensic DNA consultant and formerly employed as forensic analyst and supervisor by Orchid

Cellmark; Elaine Pagliaro, formerly with the State of Connecticut Forensic Laboratory; Cheryl Lewis, Court Officer, judicial district of Hartford; Alex Wood, reporter for the Journal Inquirer; and Dr. Carll Ladd, State of Connecticut Forensic Laboratory.

Dr. Terry Melton

Melton testified about recovering DNA from samples and DNA testing procedures such as mitotyping. According to Melton, approximately 95% of hairs no longer attached to a person's scalp do not have the root or were naturally shed. The absence of the hair's root means that nuclear DNA testing cannot be performed on the hair. Mitochondrial DNA is a naturally abundant molecule, of which there are thousands of copies in every cell. Although nuclear DNA testing is not possible on a hair sample lacking the root, mitotyping of such a sample can be performed. Mitochondrial DNA differs from nuclear DNA, however, in that mitochondrial DNA is inherited only from a person's mother and nuclear DNA is inherited from both parents. Thus, contrary to nuclear DNA, mitochondrial DNA is not a unique marker, but it can nevertheless be used to include or exclude an individual and his or her maternal relatives.

Melton further testified that two separate samples were tested: the sample contained in slide #26, the pubic hair retrieved from the blue sweater, and assigned #23-68-Q1 (Q1) by Mitotyping Technologies; the sample contained in slide #31, the head hair retrieved from the yellow blanket, which was assigned #23-68-Q2 (Q2). The pubic hair retrieved from the blue sweater was subjected to mitochondrial DNA testing and analyzed. The profile developed from the pubic hair was compared to that of two individuals' known profiles, namely the victim's, Bernice Martin, and the petitioner's. The profile developed from Q1 excluded the victim and the petitioner and their maternal

relatives. The profile developed from Q2 gave a mixed report excluding the victim but not excluding the petitioner. According to Melton, the petitioner's DNA is in Q2, but Q2 is a mixture of DNA. Melton indicated that although the precise DNA of the petitioner is in Q2, it was possible that two other individuals' DNA could make up the Q2 mixture. Given the procedures a sample is subjected to prior to testing (e.g., washing, DNA extraction and purification, etc.), Melton noted that the testing should not result in a mixture of DNA, but that the hair sample was old and dirty when received by Mitotyping Technologies from the State of Connecticut Forensic Laboratory.

Dr. Jody Hynds

Hynds testified in detail about the DNA profiling process. First, the DNA must be extracted; second, the extracted sample is quantified to determine how much DNA is available; third, the sample is subject to polymerase chain reaction (PCR) copying and amplification; and fourth, the sample is put in a genetic analyzer which reads the DNA. If an obtained sample remains too small for testing, also referred to as a low copy number (LCN), an additional process known as montage may be applied to further amplify the DNA for analysis.

Hynds also described the process employed to obtain material from the gloves found in the victim's apartment. The gloves, which are polyester with either leather or faux leather palms, potentially absorbed sweat. Hynds testified that sweat and oils, deposited in 1987, could contain DNA that could be analyzed in 2000, when the extraction and testing was performed on the gloves. Here, a scalpel was used to scrape the inside layers of the fingers and palm, which was made into a lint ball of fibers. The lint ball was placed in a coin envelope, sealed and returned to the Orchid Cellmark Laboratories for analysis.

The testing of the sample obtained from each of the gloves indicated that the DNA profile was a partial mixed DNA profile. Thus, more than one person donated the DNA sample. Both the left and right gloves contained such mixed DNA profiles. These profiles, which contained the DNA of at least three separate individuals, were compared to the petitioner's DNA and he was excluded as the contributor to the samples that were extracted from the glove scrapings. It is unknown when any of the DNA extracted from the gloves was deposited by any of the donors. The glove samples tested by Orchid Cellmark were subjected to montage because the DNA material initially extracted was too small for further analysis and needed to be amplified.

Hynds testified that additional materials were also tested to obtain the victim's DNA profile: right and left hand fingernail scrapings obtained from the victim; a cutting from the comforter; and swabbings from the sleeves of both the red and blue and the black and white shirts. The right fingernail scrapings resulted in a partial profile consistent with an unknown female; the left fingernail scrapings also resulted in a partial profile consistent with an unknown female, consistent with the right fingernail scraping. The red and blue shirt resulted in a partial DNA profile of an unknown female, consistent with the fingernail scrapings. The DNA from the female donor of these profiles was not found in the mixed profiles obtained from the gloves; thus, that female donor could be excluded as contributor to the glove samples.

Avoiding contamination of samples subjected to such sensitive testing is a critical issue. Breathing and, more importantly, speaking over or near a sample can lead to contamination. Hynds acknowledged on cross-examination that she cut herself with the scalpel and bled when scraping the fibers from the insides of the gloves. Although this was not notated in her notes or report, Hynds'

DNA profile was compared to the extracted DNA and she was excluded as a donor. Additionally, all employees' profiles are compared to every tested profile and compared to other cases to rule out contamination and cross-contamination.

According to Hynds, post-amplification clean up procedures such as montage are appropriate in post-conviction matters such as habeas corpus proceedings.

Elaine Pagliaro

Pagliaro testified that she was involved in examining evidence in this case such as the gloves as far back as 1987. Pagliaro testified that anti-contamination procedures such as wearing gloves when handling evidence were used back then, but face masks were not routinely worn during handling of the evidence, including evidence such as the gloves recovered from the victim's bedroom. The anti-contamination procedures have evolved over time and now face masks are worn when such evidence is handled.

Cheryl Lewis

Lewis testified that the evidence in criminal cases is made available to the public. Thus, any person can access and examine evidence. The Clerk's Office in judicial district of Hartford, where the petitioner was prosecuted and the evidence stored subsequent to the petitioner's criminal trial, maintained a log of individuals who accessed the evidence room, but there was no log of who accessed individual items of evidence. Individuals examining items in evidence were not, in the past, required to wear latex gloves. Such glove use in the past was mostly when requested by an individual looking at evidence, but now is more common and is required for any evidence that is a biohazard.

Alex Wood

Wood testified that he went to the Hartford Clerk's Office in 1994 to examine the gloves and photographs of the gloves. Wood examined the photographs and the gloves themselves. According to Wood, he took measurements of the gloves and, after donning latex gloves, tried on the black gloves. Wood testified that he then took off the latex gloves and tried on the black gloves directly on his hands to get a feel for the size of the gloves.

Dr. Carll Ladd

Ladd, the supervisor of the DNA section, State of Connecticut Forensic Laboratory, testified in detail about DNA sampling and testing procedures. Most importantly, Ladd testified that LCN analysis is not widely accepted in the forensic community, although there are efforts to build a consensus in the community. The problem is that post-amplification clean up procedures make the method more sensitive, thereby increasing the risk of errant or unreliable results due to contamination, also referred to as drop in; result in the inability to consistently reproduce results, also referred to as stochastic effect; as well as increase drop out, which is when amplification of a sample essentially results in a loss of the sample itself.

According to Ladd, Connecticut's law does not incorporate LCN analysis and the State of Connecticut Forensic Laboratory does not find LCN analysis suitable for forensic applications, in particular post-conviction proceedings such as the instant case. Ladd was not aware of any other state or government laboratories, aside from one in New York City, that do LCN analysis. LCN is not

generally and widely accepted in the United States for criminal cases, regular forensic cases or post-conviction matter.

Ladd testified that there are concerns about the results in the instant case because evidence was directly handled without precautions such as latex gloves and particle masks. The state of the evidence when tested is not the same as when collected. Contamination of the evidence and tested samples cannot be ruled out, rendering genetic profiles obtained therefrom invalid. Ladd had no confidence that the results obtained from Orchid Cellmark Laboratories are accurate DNA profiles of the evidence in its 1987 status.

On cross-examination, Ladd acknowledged that all DNA profiling uses amplification procedures. The problem of reliability arises when a sample is subjected to increased amplification. In Ladd's opinion, post-amplification procedures are too sensitive to produce confidence in the testing results. Orchid Cellmark's procedures as employed in this case, according to Ladd, were thirty (30) times more sensitive that the procedures widely accepted in the forensic community. Ladd also noted that there is no consensus on how LCN is defined; thus, Orchid Cellmark itself does not consider its procedure to be a LCN procedure, while others view Orchid Cellmark's procedures as being a LCN procedure.

C

From the foregoing testimony and evidence presented in support of the claim in count three, it is readily apparent that the petitioner has presented newly discovered evidence. The most problematic aspect of the evidence presented to this court is the unreliability of the results, in particular regarding the gloves. The gloves were donned by at least one person who was not wearing

latex gloves and subjected to testing procedures that are not widely accepted in the forensic community. The fact that these testing procedures are not accepted in criminal matters, in particular in post-conviction cases such as this habeas corpus proceeding, is highly pertinent, for it is the petitioner who must present clear and convincing evidence so as to prevail on a claim of actual innocence.

The DNA evidence presented to this court is anything but clear and convincing. Potentially or actually contaminated samples, subjected to testing procedures not widely accepted in the forensic community because of their increased potential to produce unreliable results, by definition are not clear and convincing evidence of the petitioner's innocence. While the DNA analysis of the pubic hair excludes the petitioner as a donor, it cannot be determined with any degree of certainty how the pubic hair ended up on the blue sweater. It is possible that the pubic hair came from the perpetrator; it also is possible that the transfer occurred in some manner unassociated with the attack on the victim. Neither scenario can be confirmed and, therefore, eviscerates any assertion that DNA evidence obtained from the pubic hair is clear and convincing evidence of the petitioner's innocence. Similarly, the DNA evidence obtained from the head hair could be viewed as inculpatory and not exculpatory, since the petitioner's DNA is contained in the mixed profile. But the petitioner's frequent presence in the victim's apartment is one explanation for the presence of such a head hair. What cannot be determined with any certainty is precisely how the head hair was deposited on the yellow blanket.

The petitioner asserts that the gloves have never been connected to the victim or the petitioner. The DNA testing on the gloves may permit such an assertion, but that nevertheless does not mean that the DNA testing in any way exonerates the petitioner or proves his innocence. Stated

somewhat differently, the fact that no direct link via DNA can be established between the petitioner and the gloves does not prove that the petitioner did not commit the assault and murder.

Based upon the foregoing, the court concludes that the petitioner has failed to meet his burden of proof to show his actual innocence as asserted in count three. None of the DNA evidence rises to the level of being clear and convincing. Taking into account all of the evidence from both the criminal trial and the instant habeas corpus trial, the petitioner has not shown that he is actually innocent. The claim in count three is denied.

Lastly, the court notes that the respondent exhorts this court to "articulate in [the instant] 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." Respondent's Post-Trial Brief, pg. 72 n.27. Legislative action is not the only manner in which such valid concerns can be addressed and result in the implementation of better evidence handling procedures. The court inescapably agrees that evidence should remain preserved to the best extent possible to permit future testing utilizing newer and more precise technologies and techniques. The court, by the same token, declines to wade into the murky waters of recommending legislative action on specific laws, means or measures on how best to preserve evidence for future testing.

CONCLUSION

The petition for a writ of habeas corpus is denied. Judgment shall enter in favor of the respondent. The petitioner shall file a judgment file with the clerk no later than thirty days from the date of judgment.

It is so ordered.

NAZZARO, J.

Copies mailed/given to:

✓ Richard Lapointe (Cul/pet. cert. + fee waiver)
Hby. Cousins (Cul/pet. cert. + fee waiver)
Hby. Castelieiro (Cul/pet. cert. + fee waiver)
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4/15/11 T. Shuntz
Court officer