Docket No. CV 02-0818542			
Richard Lapointe	}	**State of Connecticut**
Inmate #184163	}	**Superior Court**
vs.	}	**Judicial District of Tolland at Somers**
Warden, State Prison	}	**August 2, 2007**

Memorandum of Decision on Respondent's Motion for Judgment

The petitioner, Richard Lapointe, was convicted for the March 8, 1987 rape and murder of his wife's elderly grandmother. He alleges in this, his second petition for a writ of habeas corpus, filed on August 2, 2002, that he was denied his statutory right to the effective assistance of habeas counsel in his first habeas petition. Specifically, the petitioner alleges that his previous habeas counsel failed to address issues concerning: (1) the suppression of exculpatory evidence; (2) the ineffective assistance of his trial defense counsel; and (3) a claim of actual innocence.

Trial of this matter was held on July 16, 17, 18 and 19 of 2007. Testimony was received from: former Manchester Police Detective Michael Ludlow; now retired Connecticut State Police Fire Investigator Stephen Igoe; arson expert Gerard Kelder, Jr.; forensic pathologist Dr. Howard Adelman; trial defense counsel Atty. Patrick Culligan; trial defense counsel Atty. Christopher Cosgrove; prior habeas counsel Atty. Henry Vogt; and the petitioner's former wife Ms. Karen Martin. Transcripts of the petitioner's prior habeas trial and criminal trial, as well as various other documents and items, were received into evidence.

On the fourth day of the habeas trial, the petitioner rested his case. The respondent immediately made an oral motion for judgment. During the respondent's argument, the

petitioner, through counsel, conceded that he had indeed failed to prove some of the claims asserted in the habeas petition. These claims were, therefore, dismissed on the record. The entirety of the petitioner's remaining claims, specifically, those that are the subject of this memorandum of decision, include prior habeas counsel's alleged failure to: (1) raise a claim concerning the prosecution's failure to disclose a note alleged to contain exculpatory material in that it indicated the fire's possible burn time; and (2) address multiple instances of ineffective assistance of trial defense counsel.

Findings of Fact

Based upon a full review of the testimony and evidence, this court makes the following findings of fact:

1. On June 30, 1992, the petitioner was convicted by a jury of capital felony in violation of General Statutes § 53a-54b (7), arson murder in violation of § 53a-54d, felony murder in violation of § 53a-54c, murder in violation of § 53a-54a, arson in the first degree in violation of § 53a-111, assault in the first degree in violation of § 53a-59 (a) (1), sexual assault in the first degree in violation of § 53a-70 (a), sexual assault in the third degree in violation of § 53a-72a (1) (A) and kidnapping in the first degree in violation of § 53a-92 (a) (2) (A).
2. After the completion of the penalty phase, the petitioner was sentenced to life imprisonment, without the possibility of release, pursuant to General Statutes (Rev. to 1991) § 53a-46a (f).[1]

[1] General Statutes (Rev. to 1991) § 53a-46a (f) provides, in relevant part: "If the jury . . . finds that one or more of the [aggravants] set forth in subsection (h) exist and that no mitigating factor exists, the court shall sentence the defendant to death. If the jury . . . finds that none of the [aggravants] set forth in subsection (h) exist or that one or more mitigating factors exist, the court shall impose a sentence of life imprisonment without the possibility of release."

3. Attorneys Patrick Culligan and Christopher Cosgrove represented the petitioner throughout the criminal proceedings. Both of these attorneys are members of the Office of Public Defender.

4. The petitioner's convictions were affirmed on appeal. *State* v. *Lapointe*, 237 Conn. 694, 678 A.2d 942 (*en banc*), cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996). The facts of the underlying criminal case are fully set forth in that decision. Id., 696-702.

5. On May 30, 1997, the petitioner filed his first petition for a writ of habeas corpus.[2]

6. In the final amended petition, filed on July 10, 1999, the petitioner raised the following claims: (1) actual innocence; (2) prosecutorial misconduct; (3) discrimination based on physical and mental disability; (4) ineffective assistance of trial defense counsel; and (5) ineffective assistance of appellate counsel.

7. Attorney Henry Vogt represented the petitioner in the first habeas matter.

8. The petition was denied by the habeas court after a trial on the merits. *Lapointe* v. *Warden*, Superior Court, judicial district of Hartford, Docket Number CV 97 0571161 (Sep. 6, 2000, *Freed, J.*). The habeas court's decision was subsequently affirmed on appeal. *Lapointe* v. *Commissioner of Correction*, 67 Conn. App. 674, 789 A.2d 491, cert. denied, 259 Conn. 932, 793 A.2d 1084 (2002).

9. Additional facts will be discussed as necessary.

Discussion of Law

At the habeas trial for the instant matter, the respondent made an oral motion for judgment following the close of the petitioner's case. "[A] directed verdict may be rendered only

[2] The case was assigned Docket Number CV 97-571161.

where, on the evidence *viewed in the light most favorable to the non-movant*, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Emphasis in original; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 8thirty A.2d 752 (2003). "A verdict may be directed where the decisive question is one of law or where the claim is that there is insufficient evidence to sustain a favorable verdict." (Internal quotation marks omitted.) *Silano* v. *Cumberland Farms, Inc.*, 85 Conn. App. 450, 453, 857 A.2d 439 (2004).

The petitioner claims that the attorney who represented him in his previous habeas action did not provide constitutionally adequate representation and that, in consequence, the prior habeas petition was improperly denied by the court. "[A]lthough there is no *constitutional* right to counsel in habeas proceedings, General Statutes § 51-296[3]. . . creates a *statutory* right to counsel . . . for an indigent defendant . . . in any habeas corpus proceeding arising from a criminal matter." (Emphasis added) (Internal quotation marks omitted.) *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 132, 866 A.2d 649 (2005). Given this statutory entitlement to the assistance of counsel, it is clear that implicit within CGS § 51-296 is the right to the *effective* assistance of habeas counsel. See, *Lozada* v. *Warden*, 223 Conn. 834, 838-39, 613 A.2d 818 (1992).

In order to succeed on his claim, then, it is incumbent upon the petitioner to first demonstrate that his prior habeas counsel was ineffective. Id., 842. The petitioner must next prove that his trial defense counsel was also ineffective. Id. This is a monumental task on the part of the petitioner; however, the resolution of the issue is relatively simple.

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[3] General Statutes § 51-296 provides, in relevant part: "(a) In any criminal action, in any habeas corpus proceeding arising from a criminal 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 . . . designate a public defender . . . to represent such indigent defendant . . . ."

It is well established that in order to prove ineffective assistance of counsel the petitioner must satisfy both prongs of the test set forth by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Specifically, the petitioner must show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment." Id., 687. If, and only if, the petitioner manages to get over the first hurdle, then the petitioner must clear the second obstacle by proving "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 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 unreliable." Id. In short, the petitioner must show both deficient performance and prejudice. A failure to prove both, even though counsel's performance may have been substandard, will necessarily result in denial of the petition.

"Because both prongs [of the *Strickland* test] must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Pierre* v. *Commissioner of Correction*, 100 Conn. App. 1, 11-12, 916 A.2d 864, cert. denied, 282 Conn. 908, __ A.2d __ (2007).

♦ **Suppression of Exculpatory Evidence**

The petitioner alleges that habeas counsel failed to raise a claim concerning the suppression of a note written by Detective Ludlow indicating the fire's possible burn time. Specifically, the petitioner claims that the note represented an undisclosed exculpatory expert opinion that the fire's burn time was between thirty and forty minutes, thus making it impossible for the petitioner to have committed the crime. The following facts are relevant to the issue.

At the time of the murder of Bernice Martin in 1987, Officer Michael Ludlow was a detective with the Manchester Police Department. He was initially assigned as the evidence officer for the crime but became the lead investigator several days later. At some point into the investigation, Detective Ludlow had a conversation with Connecticut State Police Fire Investigator Stephen Igoe in which he sought to ascertain the *minimum* burn time for the fire. During the conversation, Detective Ludlow noted a *possible* burn time of thirty to forty minutes. Identification of the *minimum* burn time was essential to establish an ending point for the setting of the fire and narrow the timeframe in which the crime could have been committed.

The notation concerning the fire's possible burn time was made as part of Detective Ludlow's collection of investigative notes. Although the state had an open file policy and a request for the disclosure of all exculpatory material was made, Attorney Culligan was not aware of Detective Ludlow's notes at the time of the petitioner's criminal trial. Prior to the first habeas trial, the respondent disclosed Detective Ludlow's handwritten notes, along with other documents, to Attorney Vogt. Attorney Vogt testified that he reviewed the notes very carefully. He stated that he did not find anything of an exculpatory nature in the notes.

"In [*Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . 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. To establish a *Brady* violation, the [petitioner] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [petitioner], and (3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *Floyd* v. *Commissioner of Correction*, 99 Conn. App. 526, 533-34, 914 A.2d 1049, cert. denied, 282 Conn. 905, 920 A.2d 308 (2007).

Even 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. "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." (Internal quotation marks omitted.) *State* v. *Tomasko*, 242 Conn. 505, 518, 700 A.2d 28 (1997). "Exculpatory has been defined to mean [c]learing or tending to clear from alleged fault or guilt; excusing." (Internal quotation marks omitted.) *State* v. *Kelley*, 93 Conn. App. 408, 419, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006).

A neighbor had seen the victim alive at about 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 note 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. and approximately 7:50 p.m. This window has significance only if the petitioner can verify his whereabouts during that time. In other words, without a solid alibi the petitioner cannot be excluded as the perpetrator of the crime. Although the petitioner claims that his former wife can substantiate an alibi defense, the evidence submitted at the habeas trial does not support that assertion. It is not likely, therefore, that the brief time noted by Detective Ludlow would have caused the jury to entertain a reasonable doubt as to the petitioner's guilt.

Moreover, there is an argument that the note, rather than being exculpatory is inculpatory. Even taking all of the evidence produced at the habeas trial in the light most favorable to the petitioner, if it is found that the fire burned for a maximum of 30-40 minutes[4]

[4] As testified by Mr. Kelder

and accepting the forensic pathologist's opinion[5] that the victim expired about thirty minutes before being pulled from the apartment, it is indeed possible that the petitioner could have left his home after the victim's daughter called about 7:30 pm, walked to the victim's apartment, assaulted and mortally wounded the victim, then set the fire and still report the fire at 8:27 pm. Thus, even with the evidence presented by the petitioner, the alibi is destroyed and Detective Ludlow's note cannot be considered exculpatory.

Without evidence that Detective Ludlow's note is favorable to the petitioner, it would have been pointless for Attorney Vogt to raise a *Brady* claim in the petitioner's first habeas action. There is, therefore, no basis upon which this court can find that Attorney Vogt's performance fell below an objective standard of reasonableness. Consequently, the petitioner has failed to satisfy the first part of the *Strickland* test.

◆ **Ineffective Assistance of Trial Defense Counsel**

In count two of the petition, the petitioner makes multiple allegations concerning habeas counsel's failure to attack the effectiveness of trial defense counsel. Specifically, the petitioner alleges that habeas counsel neglected to address trial counsel's failure to: (1) call Karen Martin as a witness; (2) adequately investigate the possible burn time of the fire and secure an arson expert; (3) consult a forensic pathologist concerning the victim's time of death; and (3) impeach the testimony of Detective Morrissey.[6]

The matter of proof for these allegations is significant. It is therefore incumbent on this court to restate the standard under which they will be analyzed. The deprivation claimed in the instant petition is *the effective assistance of habeas counsel*. To prove this claim, the petitioner must *first* demonstrate that his habeas counsel was ineffective. *Lozada* v. *Warden*, supra, 223 Conn. 842. *If*

[5] Dr. Adelman

and only if, he is successful in that endeavor, the court will then determine whether his trial defense counsel was also ineffective. Id.

♦ **Karen Martin as a Witness for the Defense**

The petitioner claims that competent habeas counsel would have addressed trial counsel's failure to call the petitioner's former wife, Karen Martin, as a witness. He asserts that Ms. Martin can substantiate his alibi defense, proving that he was at home during the time the crime was committed.

Attorney Vogt was not asked why he did not pursue this claim in the first habeas action. Without that information, this court cannot determine whether his performance was deficient. For instance, it is possible that Mr. Vogt failed to recognize the claim or conduct an adequate investigation into Ms. Martin's value as a witness. This would lend support to the petitioner's claim of ineffective assistance. However, it is also possible that Attorney Vogt considered the claim but made a *strategic decision* not to pursue it. Such decisions are presumed to be made with reasonable competence and professional judgment. *Iovieno* v. *Commissioner of Correction*, 67 Conn. App. 126, 128, 786 A.2d 1113 (2001), cert. denied, 259 Conn. 916, 792 A.2d 851 (2002). In sum, the petitioner has given the court nothing but mere speculation as to why the claim was not raised in the first habeas action, and this is not enough to prove his case. See *Lozada* v. *Commissioner of Correction*, 89 Conn. App. 850, 860, cert. denied, 275 Conn. 905, 882 A.2d 672 (2005). The petitioner has therefore failed to satisfy the first part of the *Strickland* test.

Even if the petitioner had proven deficient performance, he cannot prevail on this claim because there is no proof to support a finding of prejudice. In the present matter, Attorney Culligan did testify that he did not call Ms. Martin to testify at the criminal trial because she could

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♦ Additional claims were raised in count two, including habeas counsel's failure to address trial counsel's improper cross examination of Detective Lombardo and reckless questioning of witnesses. Absolutely no evidence was presented in support of these claims; thus, the court deems them to be abandoned.

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 30, 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.[7] 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. To prove ineffective assistance for the failure to call a witness to testify, the petitioner must show that the testimony would have been helpful to his case. See *Hopkins v. Commissioner of Correction*, 95 Conn. App. 670, 676, 899 A.2d 632, cert. denied, 279 Conn. 911, 902 A.2d 1071 (2006). The petitioner failed to demonstrate prejudice; therefore, his claim fails on both prongs of the *Strickland* test.

Moreover, Attorney Culligan was clear in his testimony to this Court that he elected not to call Karen Martin because at the time of the trial she and the petitioner had become estranged, she was backing off her support for him and her testimony would have undermined the alibi. All of these are sound strategic reasons to avoid putting her on the stand.

The next two issues raised by the petitioner rely on the success of the alibi claim for support. The court will address the following issues to the extent possible notwithstanding the petitioner's failure to prove the alibi claim.

- **Burn Time and Arson Expert**

The petitioner alleges that Attorney Vogt should have raised a claim concerning

[7] Ex. 73, Tr. 1/20/92, pp. 2099-2101.

trial counsel's failure to adequately investigate the possible burn time of the fire and secure an arson expert. Attorney Vogt admitted that he did not hire an arson expert for the petitioner's first habeas matter; however, he was not asked to explain why he did not do so. Despite the problem with demonstrating deficient performance without such testimony, as articulated above, the court will review the testimony presented in support of the petitioner's claim.

Connecticut State Police Fire Investigator Stephen Igoe, now retired, was assigned as the lead investigator in the petitioner's case. Trooper Igoe testified for the state at the petitioner's criminal trial. He was present at the fire scene and observed first hand what the results of the fire had been. Based on his investigation, Trooper Igoe was confident that there were three separate points of ignition and that the fire was deliberately set. He also believed that the fire was a slow burning fire, as opposed to a rapidly burning one. Trooper Igoe did not offer an opinion as to a possible burn time for the fire because he believed that too many variables were involved to establish such a timetable.

The petitioner then called Mr. Gerard Kelder, Jr. to testify as an arson expert. Mr. Kelder is a private investigator who makes his living doing fire investigations for signs of arson. For this case, Mr. Kelder reviewed a video tape of the fire fighting efforts, observed photographs and read Trooper Igoe's report as well as the testimony of the firefighters. Based upon this review, Mr. Kelder opined that the fire was a smoldering fire. This opinion, as recognized by Mr. Kelder, is consistent with the opinion given by Trooper Igoe. Mr. Kelder concluded that the fire actively burned for forty-five to sixty minutes; however, he thought that the forty-five minute estimate was more accurate. He further stated that the fire burned until the oxygen in the apartment was used up, approximately sixty minutes, and then smoldered.

It is unclear how Mr. Kelder's testimony is helpful to the petitioner's defense. Mr. Kelder himself acknowledged that his opinion was consistent with Trooper Igoe's. Moreover, by Mr.

Snider's estimation the fire could have been set any time before 7:30/7:45 p.m. This does not exclude the petitioner as a perpetrator of the crime, particularly because his former wife cannot attest to his whereabouts from 6:15 p.m. to 7:00 p.m. There is simply no proof that hiring an arson expert to investigate the fire's burn time would, in any way, have rendered the result of the first habeas trial unreliable. The petitioner's claim, therefore, fails on both parts of the *Strickland* test.

♦ **Forensic Pathologist and Victim's Time of Death**

The petitioner next claims that a competent habeas attorney would have raised a claim regarding trial counsel's failure to consult with a forensic pathologist. Specifically, the petitioner alleges that a forensic pathologist would have provided an approximation of the victim's time of death, thus corroborating his alibi and establishing that it was impossible for him to have committed the crime.

Attorney Vogt testified that he looked into issues surrounding the victim's autopsy but decided not to pursue them. To rebut the presumption that this decision was not the result of reasonable professional judgment, the petitioner presented the testimony of Dr. Howard Adelman, MD. Dr. Adelman is a forensic pathologist. He examined the autopsy results of the medical examiner and other evidence in the petitioner's case. Dr. Adelman testified that the victim died about thirty minutes before she was extracted from the fire scene. He opined that she was alive during a portion of the fire because there was soot and cyanide in her lungs. Dr. Adelman believed that the victim was already in rigor mortis when her body was carried out of the apartment by the firefighters. He bases this opinion on the fact that, at that time, the victim's arms were at her chest and not at her side. He testified that while rigor mortis usually sets in approximately two to four hours after death (taking even longer in the elderly), because the victim was exposed to the heat of a fire the onset of rigor mortis occurred significantly sooner.

On cross examination, Dr. Adelman acknowledged that the victim's hands were bound together as she was being carried out of the apartment and that this could have accounted for the fact that her hands were not at her side. Additionally, Dr. Adelman conceded that at the autopsy the victim's arms were at her side and in full rigor mortis. He further conceded that once rigor mortis is broken with a manual movement of the extremity by another person it does not reestablish. If Dr. Adelman were correct that the victim was in rigor mortis when removed from the apartment, the only way her hands could have gotten to her sides at the autopsy would have been had it been manually broken at the scene. Had that happened, there is no way she could have been in rigor mortis at the autopsy. The only logical conclusion then is that Dr. Adelman was mistaken when he testified she was in rigor mortis when removed from the apartment.

Based on the foregoing, the court rejects the testimony of Dr. Adelman as evidence of ineffective assistance. His estimation of the victim's time of death is completely unreliable. The petitioner's claim therefore fails on both parts of the *Strickland* test.

♦ **Testimony of Detective Morrissey**

The petitioner's final claim involves various allegations surrounding the criminal trial testimony of Detective Michael Morrissey. Essentially, the petitioner claims that Attorney Vogt should have addressed trial defense counsel's failure to impeach the testimony of Detective Morrissey.

Attorney Vogt was not questioned as to why he did not raise claims concerning Detective Morrissey in the first habeas petition. As discussed above, this court cannot properly resolve the issue of deficient performance without this testimony. Even if the petitioner had managed to prove deficient performance, there is not even one scintilla of evidence to support a finding of prejudice. Most of the petitioner's claims concerning Detective Morrissey involve his interview with Karen Martin. Any damage to the validity of Ms. Martin as an alibi witness caused by

Detective Morrissey's testimony matters not; as discussed above her testimony would have been of no help to the petitioner. Detective Morrissey's impeachment might have affected his credibility in general; however, the petitioner failed to demonstrate a reasonable probability that this would have made a difference in the outcome of the habeas trial.

♦ Abuse of the Writ

The writ of habeas corpus serves as "a bulwark against convictions that violate fundamental fairness." (Internal quotation marks omitted.) *Bunkley* v. *Commissioner of Correction*, 232 Conn. 444, 460-61, 610 A.2d 598 (1992). "[H]abeas corpus has traditionally been regarded as governed by equitable principles. . . . Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. *Fay* v. *Noia*, 372 U.S. 391, 438, 83 S. Ct. 822, 9 L. Ed. 2d 837. . . . Nothing in the traditions of habeas corpus requires . . . courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay." (Citation omitted; internal quotation marks omitted.) *Negron* v. *Warden*, 180 Conn. 153, 166 n.6, 429 A.2d 841 (1980).

After reviewing the petitioner's voluminous 83 page habeas petition, this court expected a thorough presentation of cogent and detailed evidence and testimony in support of the petitioner's claims. The evidence submitted at the habeas trial, however, was much like the contents of the petition, exceeding in extraneous detail, yet lacking in key substance. Instead of being exhaustive, the evidence submitted at the habeas trial was largely non-material[1] the petitioner's exhibits alone totaled 177. Over one-third of those exhibits were completely irrelevant. The examination of teeth, blood and underpants from the petitioner's criminal trial, as well as gruesome autopsy photographs, were completely unnecessary for a resolution of the

[1] Indeed, if one were looking to write a book about this case, the evidentiary package for this most recent habeas trial would provide a comprehensive single location source. Nevertheless, this overwhelming amount of information does not adequately address the salient issues before this court.

petitioner's claims in the habeas trial. In addition, the testimonial evidence elicited from the witnesses was inadequate. A complete review of the petitioner's claims required further testimony from Attorney Vogt, whose performance in the first habeas matter was the primary subject of the present petition.

The petitioner's case has been on the docket for exactly five years. At the time of trial, the petitioner should have been prepared to *prove* the allegations set forth in his complaint. There is no excuse for the paucity of substantive evidence presented in this case. It is an abuse of the writ to waste the court's time and resources with a habeas petition such as the petitioner's, that is, one that alleges serious constitutional violations yet lacks even rudimentary evidentiary support.

It is settled law that "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *McCleskey vs. Zant*, 499 US 467 at 489 (1991). Clearly, "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one, or for some other reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. ..." *Sanders vs. United States*, 373 U.S. 1 at 18 (1963). Indeed, even something less than a "deliberate choice" not to raise an issue in the first petition could constitute an abuse of the writ. See, for example, *Woodard vs. Hutchins*, 464 U. S. 377 (1984) (no explanation as to why an issue was not raised in the first petition constituted an abuse of the writ), *Antone vs. Dugger*, 465 U. S. 200 (1984) (hasty preparation of the initial petition that overlooked a ground did not warrant raising that ground in a subsequent petition), and *Kuhlmann vs. Wilson*, 477 U. S. 436 (1986) (raising grounds in a subsequent petition that were available at the first filing is an abuse of the writ).

A constant re-litigation of issues, in addition to squandering precious judicial resources, undermines the entire criminal justice system. "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. ... There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern, but merely anxiety and a desire for immobility." Bator, 76 Harv. L. Rev., at 452-453. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague vs. Lane*, 489 U. S. 288 at 309 (1989).

There are no issues remaining to be litigated in connection with the quality of the representation received by the petitioner that culminated in his 1996 conviction.[9] Any further petitions for a writ of habeas corpus along those lines shall be considered successive and abusing the privilege of the writ and will, therefore, be summarily dismissed.

Accordingly, the respondent's motion for judgment is granted and the petition for a writ of habeas corpus is denied.

The petitioner shall submit a judgment file to the Clerk's Office within thirty days of the date of this decision.

S.T. Fuger, Jr., Judge

[9] The Court does note that on the third day of trial of the instant petition, counsel for the petitioner attempted to amend the petition to include a claim of actual innocence. While the results of DNA testing had been received the evening before, July 16, 2007, the Court notes that this material was not sent out for testing until June 22, 2007. Consequently, the request to amend the petition was denied. While further attacks upon the petitioner's representation is an abuse of the writ, the petitioner is not barred from asserting a claim of actual innocence provided that there is newly discovered evidence of such.