APPELLATE COURT
STATE OF CONNECTICUT

A.C No. 29137

RICHARD LAPOINTE

Petitioner-Appellant

v.

WARDEN, STATE PRISON

Respondent-Appellee

REPLY BRIEF OF PETITIONER-APPELLANT

FOR THE PETITIONER-APPELLANT

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POINT ONE

THE TESTIMONY OF CHRISTOPHER MARVIN ESTABLISHES NOT ONLY THAT THE STATE SUPPRESSED EXCULPATORY EVIDENCE BUT ALSO THAT IT FALSELY REPRESENTED ITS ARSON EXPERT DID NOT RENDER AN OPINION CONCERNING THE FIRE'S BURN TIME

In this court the respondent for the first time maintains, based on the testimony of defense witness Christopher Marvin, that the suppressed opinion of the State's arson expert, Stephen Igoe, regarding the fire's "burn time" was known to the defense therefore the failure to disclose it did not constitute a Brady violation. [Respondent's Brief, pp. 12-14] The record belies the respondent's argument. Indeed, Marvin's testimony supports rather than refutes the petitioner's Brady claim and reveals another devastating consequence suffered by the petitioner as a result of the suppression of Igoe's expert opinion. The prosecution's cross examination of Marvin left the petitioner's jury with the false belief that the "more expertise" Igoe, did not render an opinion regarding the fire's burn time because his assessment "was you couldn't really make an assessment," when in fact the State knew he had given such an opinion to Ludlow days after the fire, as found by the habeas court, and which if accepted by the petitioner's jury would have made it impossible for the petitioner to have committed the rape and murder of Bernice Martin. [Petitioner-A6 (Decision); Respondent–A-43; A-45; A-51 [Marvin]; H.T. 7/16/07, 70,74, 103-104, 114 [Ludlow]; H.T. 7/19/07, 21-23]

In making its argument for the first time in this court, in the absence of any

exploration of Christopher Marvin's testimony prior to or during the habeas trial, the State: (1) equates Marvin's non-expert lay testimony with that of the expert testimony of State Fire Marshall Igoe, [Respondent's Brief, pp. 21-22]; (2) selects a small portion of the Marvin's direct testimony, and omits his qualification that his opinion regarding the burn time was "real hypothetical," [Respondent-A-38 (Marvin)]; (3) ignores the State's cross examination of Marvin, during which he disavowed his "real hypothetical" opinion given on direct examination, admitted he did not discuss any of his "real hypothetical" opinion with Igoe, admitted Igoe possessed "more expertise," answered "Yes" to the prosecutor's leading question "...you are aware, then, that Trooper Igoe made no estimate about what time the fire began?;" and answered "That's correct" to the prosecutor's leading question "...his (Igoe) opinion was you couldn't really make an assessment, wasn't it? [id, A-42; A-43; A-45; A-51(Marvin)]; and (4) ignores the testimony of Patrick Culligan, petitioner's lead criminal trial attorney, in the court below, that "the fact of the fire was not something we ever sought to challenge in any way as to its origin and it was just...not an issue...there was nothing about the fact of the fire that we considered to be in controversy or something that we needed to explore in any detail." [Petitioner-A261, (Culligan)]

In fact, the defense at trial was unaware there was any issue relating to the fire and contrary to what the jury was told, Igoe did estimate the fire's burn time, a few days after the fire, in a conversation he had with Detective Ludlow, as found by the habeas court. [Petitioner-A6 (Decision)] Instead of hearing Igoe's opinion, the

petitioner's jury was told, through the prosecutor's leading questioning of Marvin, that Igoe did not render an opinion regarding the fire's burn time because such a determination could not be made. [Petitioner-A6 (Decision); Respondent-A-15; A-42;A-43 to 45; A-51 (Marvin)]

The respondent's failure to raise the issue of Marvin's testimony prior to or during the habeas trial, with the consequent absence of any questioning of the petitioner's criminal trial attorneys regarding Marvin's testimony, has enabled the respondent to cast Marvin's testimony into something it was not, i.e. expert testimony regarding the burn time of the fire. Marvin, it is submitted, was called as a defense witness, not to give testimony regarding the fire's burn time, but to establish that he, Marvin, was told at the hospital, shortly after the victim was brought there from the scene, that she had been sexually assaulted. This testimony was offered to rebut a major contention of the State, which was that the petitioner in a telephone conversation with a neighbor the day after the incident disclosed information only the perpetrator could have known, in stating "they didn't have to rape her." [Respondent-A-19 to A-22; A-27 to A-30 (Marvin)] According to the State, it was unknown at the time of the petitioner's telephone conversation with the neighbor that the victim had been sexually assaulted.

In sum, Christopher Marvin's testimony at the petitioner's criminal trial in no way establishes the State did not suppress the exculpatory opinion of its arson expert. Instead, it demonstrates that not only did the State suppress the exculpatory opinion

of its expert but also that the State created a false belief in the minds of the jury that an estimate of the fire's burn time could not be made and that the State's expert Stephen Igoe did not render an opinion regarding the fire's burn time.

The respondent also incorrectly maintains, contrary to the petitioner's arguments in this court and in the court below, that the petitioner "attempts to make the 'Ludlow notes' exculpatory by mischaracterizing their meaning." [Respondent's Brief, p.14; Petitioner's Brief, pp. 25 to 29; H.T. 7/19/07, p.14] The petitioner did not have the opportunity until the habeas trial to ferret out the facts contained in the note, 19 years after the fact, and as a result the author's interpretation of the meaning of his notes was unknown to the petitioner. In the petition it was contended the "Ludlow note," because it matched the substance of Igoe's testimony at petitioner's criminal trial, and his report, in stating "30-40 mins. poss" meant the fire burned from 30-40 minutes, and therefore that it was impossible for the petitioner to have committed the crimes. [Record at 23-24, Paragraphs 25 to 27] According to Detective Ludlow, at the habeas trial, "30-40 mins. poss" was "the extreme of the earliest" the fire burned, "it could have been an hour fire, something like that," meaning the fire burned for a minimum of 30 to 40 minutes, and not that the fire burned for a maximum of 30 to 40 minutes. [Exhibit 105; <u>infra</u>, pp. 5-6; 7/16/07, H.T., 70-74 (Ludlow)]

Whatever the meaning of the "Ludlow note" it contained exculpatory evidence that the defense was entitled to know and present to the petitioner's jury. The time the fire was set fixed the time the perpetrator would have had to vacate the

decedent's apartment, and the petitioner, at a minimum, could account for his whereabouts, home in the presence of his wife and son, from 7:00 P.M. until a little after 8:00 P.M., when Ms. Howard called him requesting that he check on her mother. The evidence clearly established that the fire was extinguished by 8:33 P.M. [Exhibit 33,5/7/92, 21, 24, 25, 30 (Turner); Exhibit 32, T.T. 5/6/92, 46, 48 (Cusson)] Under the petitioner's reading of the note in his petition, i.e. that the "burn time" of the fire was between 30 and 40 minutes, the fire had to have been set sometime between 7:50 P.M. and 8:00 P.M., a time period when the petitioner was indisputably home, as verified by both his wife and Ms. Howard. [Exhibit 37,T.T. 5/13/92, 661-663 (Howard); Exhibit 147, A55 to A114 (Karen LaPointe interview of 7/04/89; Exhibit 73, S.T. 1/30/92, 2090-2091; 2098-2099; 2117 (Karen Martin, nee Lapointe)]

Under the respondent's interpretation of the note, i.e. that the fire burned for a minimum of 30 to 40 minutes, it did not necessarily mean the fire burned for a period of time greater that 30 to 40 minutes and if the fire didn't burn for longer than 30 to 40 minutes, as stated above, it was still impossible for the petitioner to have set the fire because he was undoubtedly home with his wife and son "just a little after 8:00 P.M when Natalie Howard called and spoke to him. If the fire burned longer than 30 to 40 minutes, the petitioner could not have set it, unless it was concluded: (1) that he left his home when his wife and son went upstairs at 6:15/6:30 and returned to his home by the time they came downstairs at 7:00 P.M.; (2) that the fire burned a minimum of 93 plus minutes, because it would have had to have been set prior to

7:00 P.M., it was extinguished by 8:33 P.M., when his wife and son came downstairs to watch television with him, after allowing sufficient time for him to travel to and from the decedent's house, assault the decedent and be home at 7:00 P.M.; and (3) that the damage to the apartment was consistent with a fire that was set sometime prior to 7:00 P.M. and was extinguished by 8:33 P.M.

Contrary to the assertion of the respondent the petitioner does not mischaracterize the "Ludlow note" but instead maintains it is exculpatory no matter the meaning of "30-40 mins-poss." Moreover, it establishes that the State falsely represented to the petitioner's jury, during Christopher Marvin's testimony, that its arson expert's assessment was that an assessment could not be made and that he therefore did not issuer an opinion concerning the fire's burn time.

The respondent also contends the "Ludlow note"is not material because Igoe testified at the habeas trial he never rendered an opinion concerning the fire's burn time. Therefore, according to the respondent, the petitioner has failed to establish that the notes represent "an opinion regarding the length of time that the fire burned." [Respondent's Brief, p. 17] The respondent's argument is contrary to the habeas court's finding that Igoe, in fact, did render an opinion to Ludlow that the fire burned a minimum of 30-40 minutes. [Petitioner-A6 (Decision)]

POINT TWO

ARTICULATION HAS NO APPLICATION TO THE PETITIONER'S CASE. ALTERNATIVELY, THERE WAS NO AMBIGUITY IN THE HABEAS COURT'S DECISION DISMISSING THE PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS SO AS TO REQUIRE A REQUEST FOR ARTICULATION

The respondent contends the record is inadequate on several of the petitioner's claims of ineffective assistance of counsel because the petitioner failed to request an articulation on these claims when the habeas court made no specific factual findings on the claims and therefore this court cannot review those claims. [Respondent's Brief, pp. 24; 33] In making this argument the respondent ignores the fact that the habeas court's decision emanates from a motion for judgment of dismissal at the end of the petitioner's case where the petitioner was entitled to have his evidence accepted as true and to receive all favorable inferences in the habeas court's consideration of the motion for judgment of dismissal.[1] The presumption of the truth of the testimony and the benefit of all favorable inferences remains with the petitioner on appeal for this Court to consider in determining the appropriateness of the ruling

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[1]As stated in Grondin v Curi, 262 Conn 637, 647, fn. 2 (2003)

"A motion for judgment of dismissal has replaced the former motion for nonsuit [pursuant to §52-210] for failure to make out a prima facie case. When such a motion has been granted, the question is whether sufficient facts were proved to make out a prima facia case....A prima facie case, in the sense in which that term is relevant to this case, is one sufficient to raise an issue to go to the trier of fact...In order to establish a prima facie case, the proponent must submit evidence which if credited, is sufficient to establish the fact or facts which it is adduced to prove...In evaluating a motion to dismiss [t]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff]; and every reasonable inference is to be drawn in [the plaintiff's] favor..."

dismissing the petition. The failure of the habeas court to address some of the petitioner's claims is evidence that it failed to accept the testimony as true and accord the petitioner all favorable inferences. The respondent in arguing the petitioner's failure to request articulation deprives this court of the ability to review the claims is in effect arguing that the petitioner was obligated as a condition of appeal to ask the habeas court to correct its errors, which is not the law. See § 52-211.[2]

The habeas court failed to accept the petitioner's evidence as true or to accord him all favorable inferences, as clearly demonstrated by its failure to even address several of the petitioner's ineffective assistance of counsel claims, while terming the petitioner's evidence "exceeding in extraneous detail yet lacking in key substance" "largely non-material" "unnecessary for a resolution of petitioner's claims," and "inadequate," in concluding "[t]here are no issues remaining to be litigated in connection with the quality of the representation received by the petitioner that culminated in his 1996 (sic) conviction. Any further petitions...along those lines shall be considered successive and abusing the privilege of the writ and will, therefore, be summarily dismissed." [Petitioner-A14 to A16, (Decision)] In arguing that the

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[2] § 52-211 provides, as follows:

"If a nonsuit has been so granted in the superior court, the plaintiff may either (a) during the same term or session of the court and before its next return day, file a written motion to set aside such judgment; and, if such motion is denied, may appeal from such denial; and to enable him to do so the court shall state the whole evidence so produced as aforesaid that it may become a part of the record or (b) appeal pursuant to section 51-197a directly from the judgment of nonsuit..."

petitioner, in the face of the habeas court's decision excoriating his evidence and case, after refusing to permit the parties to submit written briefs, is required to ask the habeas court to expand on its excoriation by requesting an articulation on certain aspects of his claims in order for this court to be able to review the correctness of the habeas court's decision granting dismissing the petition, the respondent misperceives the articulation procedure. This Court in In re Coby, 107 Conn.App 395, 408, fn. 9 (2008), in quoting approvingly from Fantasia v Milford Fastening Systems, 86 Conn. App. 270, 283 (2004), stated the purpose of the articulation procedure to be, as follows:

> [A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification...An articulation may be necessary where the trial court fails completely to state any basis for its decision...or where the basis although stated, is unclear...The purpose of articulation is to dispel any... ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal."

There was no ambiguity in the habeas court's opinion dismissing the petitioner's ineffective assistance of counsel claims and therefore no need sharpen the issues, through a request for articulation, in order for this Court to able to determine whether the habeas court was correct in dismissing the petition.

CONCLUSION

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

Respectfully submitted,

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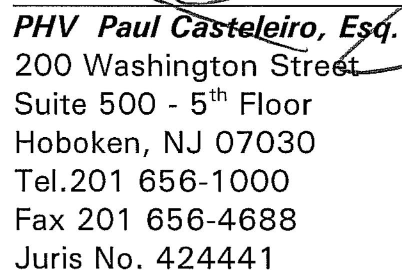

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CERTIFICATION PURSUANT TO RULE 67

Pursuant to Conn. Prac. Bk. § 67-2, the undersigned hereby certifies that the petitioner's Brief and Appendix complies with all the provisions of Rule 67-2.

W. James Cousins

CERTIFICATE OF SERVICE

Pursuant to Conn. Prac. Bk. § 67-2, the undersigned hereby certifies that a copy of the foregoing Reply Brief of Petitioner-Appellant has been served on the trial judge and counsel of record for the respondent-appellee, whose name, address, telephone and facsimile numbers appear below, by first class mail on 5/31/08:

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