PALMER, J., with whom ROGERS, C. J., joins, concurring. I agree with the majority that, contrary to the determination of the Appellate Court, defense counsel rendered ineffective assistance of counsel in connection with his representation of the petitioner, Bernale Bryant, at the petitioner's trial for the murder of the victim, Edward Jones. I disagree with the majority, however, that defense counsel's performance was deficient due to his failure to present a third party culpability defense predicated on the theory that Jones had been shot to death by a small group of unidentified Hispanic males. In my view, the decision whether to raise a defense of third party culpability was a judgment call that counsel was entitled to make. I do believe, however, that defense counsel's performance was constitutionally deficient because of his failure to adduce the exculpatory eyewitness testimony of Thomas Davis, which directly refutes the state's theory that the petitioner beat Jones to death. I therefore concur in the result.

The majority opinion contains a recitation of the evidence presented by the state at the petitioner's murder trial, and that evidence need not be repeated in detail in this opinion. Suffice it to say that the state's evidence consisted primarily of the testimony of two purported eyewitnesses to Jones' murder, Gary Fournier and Ewan Sharp, both of whom claimed to have observed the petitioner kick and beat Jones to death after pulling him through the passenger side window of Fournier's car following an automobile accident involving Fournier's car and another vehicle at the intersection of Irving Street and Albany Avenue in Hartford at approximately 1:30 a.m. on April 14, 1996. The fact that Jones had been beaten to death was confirmed by Arkady Katsnelson, a state associate medical examiner who conducted an autopsy on Jones and testified that Jones had died of multiple blunt trauma wounds to the head, the result of repeated blows to the head and face. Katsnelson further explained that Jones had suffered extensive skull fractures, both to the upper portions and base of the skull, including six separate areas of impact on the right side of the skull.

The state's case against the petitioner was rather weak, primarily because both Fournier and Sharp were readily impeachable. Fournier, who, along with Jones, traveled to the north end of Hartford for the purpose of obtaining some cocaine and then driving away without paying for it, had been drinking heavily and using drugs on the night in question. In fact, Fournier had consumed as many as eighteen beers and an unspecified amount of cocaine that evening. According to a detective who observed Fournier at the time, Fournier was highly

intoxicated and incoherent. In addition, Fournier did not tell the police about the petitioner's alleged involvement in Jones' murder on the night that it occurred, and he did not do so when he was contacted by the police again nearly one year later. At the petitioner's trial, Fournier testified that he had a prior felony conviction as well as other pending charges. He further acknowledged that he repeatedly had lied to the police during the course of their investigation into Jones' death, and that he had given them a false name because of an outstanding arrest warrant against him.

Sharp, who was only fourteen years old at the time of Jones' murder, was equally vulnerable to impeachment. Sharp also made no statement to the police on the night of the murder, and he did not do so until approximately three and one-half years later. When he finally identified the petitioner as Jones' assailant, Sharp was being questioned by the Hartford police following his arrest on felony charges unrelated to Jones' murder. Sharp testified at the petitioner's probable cause hearing that he had four felony convictions and other pending charges, and that he had been using marijuana when he allegedly witnessed the petitioner kill Jones. Finally, Sharp refused to testify at the petitioner's trial, despite having been offered immunity by the prosecution, and the trial court therefore held him in contempt of court.[1]

Furthermore, the testimony of the two men was materially inconsistent. Specifically, Fournier testified that the petitioner had assaulted him before attacking Jones; in marked contrast, Sharp testified that he had witnessed the entire incident and that Fournier never had been assaulted. In fact, according to Sharp, Fournier was at a nearby package store when he claimed to have been beaten by the petitioner. Thus, the testimony presented by the state to establish that the petitioner had killed Jones was, at best, suspect.

The only other evidence directly linking the petitioner to the incident consisted of two statements that the petitioner had given to the police and his trial testimony. According to the petitioner's statements and testimony, he was present, leaning up against Fournier's car, when Fournier was attempting to obtain a quantity of cocaine from a local drug dealer. As Fournier began to drive away, the petitioner, whose arm had been resting inside the car door, instinctively held on to the car and was dragged toward the intersection. The petitioner let go of Fournier's car before it reached the intersection, where it collided with Davis' vehicle. Although the petitioner saw Jones lying on the ground, bleeding, following the accident, the petitioner left the area when he saw other people, including paramedics and security personnel, arrive at the scene.

It is against this evidentiary backdrop that the habeas court, following a trial on the petitioner's sixth amendment claim, concluded that defense counsel had ren-

dered ineffective assistance by failing to present four witnesses, namely, Davis, Melissa Young-Duncan, John Gartley and Rene Fleury, whose testimony, taken together, provided the basis for a viable third party culpability defense. Each of these witnesses testified at the habeas trial, and the habeas court expressly credited their testimony. In the habeas court's view, defense counsel's failure to present the third party culpability defense through the testimony of those witnesses was constitutionally deficient because that defense "may well have led a jury to find reasonable doubt as to the petitioner's guilt."[2] In reaching its conclusion, the habeas court rejected the claim of the respondent, the commissioner of correction, that defense counsel reasonably could have elected not to present a third party culpability defense as a matter of trial strategy.

The habeas court based its determination concerning the significance of that defense on the following testimony of the four witnesses. Davis, a veteran of the United States Marine Corps who had served as a gunnery specialist, was employed as an "armed patrol officer" for Metro Loss Prevention Services on the night of the incident. While operating a company vehicle that night, he approached the intersection of Albany Avenue and Irving Street and heard what he believed were gunshots, probably from a small caliber weapon. As he headed down Albany Avenue, Davis observed a vehicle, later identified as the blue Ford Escort occupied by Fournier and Jones, traveling in the wrong direction on Irving Street, a one way street. Davis expected the Escort to turn right onto Albany Avenue, but it did not do so. Instead, the Escort struck Davis' vehicle, pinning Davis inside. Within seconds after the collision, Davis observed a white Cadillac or Lincoln, occupied by the driver and a back seat passenger, also headed the wrong way down Irving Street, immediately behind the Escort. According to Davis, that vehicle stopped, and the passenger, a light-skinned Hispanic male, got out of the car and walked toward Davis. The man had something in his hand that Davis could not identify. Concerned that the man might be armed, Davis drew a weapon that he had on his person, and the man fled. The white Cadillac or Lincoln headed westbound on Albany Avenue and did not return. Security personnel responded to Davis' radio call for assistance and arrived at the scene within one minute of the collision.

Davis observed one of the occupants of the Escort get out of the vehicle, stumble toward a nearby package store and sit down. Davis did not observe the other occupant leave the Escort. Despite his close proximity to the Escort, Davis did not see anyone drag either occupant of the Escort out of the vehicle, and he did not observe anyone kick or beat either of the two occupants. Prior to trial, defense counsel's investigator located and interviewed Davis, who told the investigator everything that he had witnessed that night.

On April 14, 1996, Young-Duncan and Gartley both were employed by L and M Ambulance Service. At approximately 1:30 a.m. on that date, their ambulance was dispatched to the accident at the intersection of Irving Street and Albany Avenue. Young-Duncan, who, at the time, had been an emergency medical technician for about two and one-half years, observed a man, later identified as Jones, lying in a fetal position near the Escort. When she examined him, she observed a wound on his left temple that was a "perfectly round hole and . . . the same size as a sharp weapon or a bullet." She also observed what appeared to be "black residue around [the] entry." On the basis of these observations, Young-Duncan believed that the wound was a gunshot wound. In testifying about her training as an emergency medical technician prior to the incident in question, Young-Duncan indicated that gunshot wound identification was not among the areas in which she received specialized training.

Gartley, a paramedic with approximately fifteen years of experience at the time of the incident, testified that he also attended to Jones. In doing so, he observed a "small, circular-type hole" on Jones' left temple that appeared to be a gunshot wound. Gartley also noticed "some black residue around the hole, possibly . . . like a powder burn, or something to that effect from a close-range shot." Although he saw "something that seemed to be another wound consistent with what might have been an exit wound" on his scalp, Gartley acknowledged that, "under the circumstances, it was too hard to tell" whether, in fact, it was an exit wound. Gartley also observed that Jones had suffered numerous other serious facial and head injuries, including multiple contusions and swelling, and that he was bleeding from the injuries to his head. In addition, Gartley saw "what appeared to be a boot print" on Jones.

In April, 1996, Fleury was engaged to Fournier and shared an apartment with him. When she awoke at approximately 5:30 a.m. on April 14, 1996, Fournier was not there. She did not see him until he visited her place of employment, Denny's Restaurant in East Hartford, sometime after she began work at 7 or 8 a.m. that day. Fournier told her that he had been in an automobile accident earlier that morning. Because Fournier was bruised and cut, Fleury left work and took Fournier home. When they arrived there, Fleury asked Fournier what had happened, and Fournier said something about "three Spanish guys with a gun . . . ." Fournier also explained that he and the other person in the car, Jones, "got beat up . . . ." According to Fleury, "that was pretty much all [she] ever got out of him."

Finding the testimony of these four witnesses to be "considerable and compelling," and that "a jury likewise would have found their testimony to be credible and highly persuasive," the habeas court concluded that it

was "clear that the missing testimony could easily have led a jury to harbor a *reasonable doubt* as to the guilt of the petitioner. Consequently, it was deficient performance on the part of . . . defense counsel not to present this testimony at the petitioner's original trial." (Emphasis in original.) The habeas court rendered judgment granting the habeas petition, setting aside the petitioner's conviction and ordering a new trial.

On appeal, the Appellate Court reversed the judgment of the habeas court; *Bryant* v. *Commissioner of Correction*, 99 Conn. App. 434, 444, 914 A.2d 585 (2007); concluding that defense counsel reasonably had rejected a third party culpability defense. See id., 440–44. The Appellate Court set forth a number of reasons in support of its conclusion: (1) defense counsel reasonably had decided not to "introduce evidence of a gun for fear of introducing a firearm at the scene, lest it be attributed to the petitioner, thereby increasing the sentence he might receive"; id., 443; (2) "the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself" because the petitioner never mentioned a gunman or gunshots in either of the two statements that he had given to the police or in his trial testimony; id.; and (3) the testimony of Young-Duncan and Gartley was unsupported because "[n]o other witness indicated the presence of a gun at the scene, including the petitioner," and any suggestion that Jones had died of a gunshot wound was directly contradicted by Katsnelson's testimony and report, both of which established definitively that Jones had died of blunt trauma to the head. Id.

The majority disagrees with the Appellate Court, however, concluding that the habeas court correctly determined that defense counsel's performance was prejudicially deficient in that he had failed to present the testimony of Davis, Young-Duncan, Gartley and Fleury, which, according to the majority, "would have worked in concert to create a credible scenario in which the cause of Jones' death was [not the petitioner but, rather] a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln . . . ." I believe that the majority, in reaching this conclusion, (1) places too little weight on the overwhelming forensic proof that Jones was killed by repeated and severe blows to the head, and not by a gunshot, (2) improperly relies on the hearsay testimony of Fleury without explaining why it would be admissible, (3) ignores the two voluntary statements that the petitioner had provided to the police, neither of which contains any mention of gunshots or a shooting, even though the petitioner claimed that he was clinging to Fournier's car at or about the time that Jones, who was seated in that same car, purportedly was shot at close range by a small group of Hispanic males, and (4) affords defense counsel too little leeway with respect to the decision of whether it would be

beneficial for the petitioner to testify in his own behalf.[3]

Before elaborating on why I disagree with the majority's conclusion that defense counsel rendered ineffective assistance of counsel in failing to present the third party culpability defense, I turn first to the reason why I believe, nevertheless, that defense counsel's performance was constitutionally deficient.[4] I reach this conclusion because Davis would have testified, credibly, that he was at the scene when Fournier and Sharp purportedly witnessed the petitioner beat Jones to death, and that Davis himself never saw anyone attack or assault Jones, then or at any other time. This testimony corroborates the petitioner's own statements and testimony that he did not assault Jones, and directly contradicts the testimony of Fournier and Sharp, who, as I previously explained, were highly impeachable. Because Davis' testimony is unassailable and casts grave doubt on the only evidence that the state adduced implicating the petitioner in Jones' murder, Davis' testimony would have undermined the state's already tenuous case against the petitioner. Finally, defense counsel had no countervailing reason not to call Davis as a witness.[5] Under the circumstances, his failure to do so cannot be justified and clearly prejudiced the petitioner by depriving him of evidence that was severely damaging to the state's case.[6]

For several reasons, however, I disagree that defense counsel's failure to present a third party culpability defense constituted ineffective assistance in violation of the sixth amendment. First, that defense is predicated on the assumption that Jones had been shot to death, and that he had not been killed by blunt force trauma to the head. The evidence to the contrary, however, is absolutely overwhelming. Katsnelson, an associate medical examiner, performed an autopsy on Jones, and his detailed and thorough report of that two and one-half hour postmortem examination was provided to both parties.[7] In the section of the report entitled "Evidence of Injury," Katsnelson identifies numerous contusions, lacerations and abrasions on Jones' head and neck, including a laceration of his "right eyeball," multiple contusions and abrasions on Jones' left hand and fingers, contusions on Jones' right knee and right wrist, and abrasions and contusions on Jones' pelvis and chest.[8] That section of the report also notes at least six areas of impact on the right side of the head and neck. The section of the report entitled "Head and Brain," which is similarly detailed, reveals that Jones suffered multiple and extensive skull fractures and lacerations, as well as considerable hemorrhaging. In addition, the section of the report entitled "Internal Examination" indicates that Jones had suffered three fractured ribs, with hemorrhaging in the surrounding soft tissue. Finally, the report sets forth Katsnelson's "[a]natomic [d]iagnoses," namely, "multiple extensive skull fractures," "subdural and subarachnoidal hemorrhage,"

"contusions and lacerations of the brain," "fracture of the fifth and sixth ribs on the left side," "contusion of the left lung," and "fracture of the first right rib." On the basis of Katsnelson's postmortem examination, he concluded that the cause of death was blunt force trauma to the head, and that the manner of death was homicide. In view of the painstakingly thorough internal and external examination that Katsnelson conducted on Jones' body, it is well-nigh inconceivable that he could have missed evidence establishing that Jones had been killed by a gunshot. Moreover, there is absolutely no doubt about the severity of Jones' head injuries, which included multiple and extensive skull fractures, and that he could not have possibly survived them.[9]

Furthermore, at the probable cause hearing, Katsnelson testified with respect to the autopsy that he had performed on Jones. According to Katsnelson, an examination of "every part of the body is important for [a] medical examiner, if there is any positive findings or negative findings. . . . [D]uring my examination of [Jones'] body, I found multiple areas of contusions on the face, in different parts of the face. Also there [were] contusions in the area of the head, [a] contusion on the neck, contusions on the back of the body, and there [were] also some superficial abrasions on the body. *I did not find any evidence of gunshot wounds*, *for example*. There was no evidence of stab wounds on the body. . . . All these injuries which I found [were] consistent with blunt force injury." (Emphasis added.) Defense counsel was present during Katsnelson's testimony at the probable cause hearing.

Despite the clarity and conclusions of Katsnelson's report and his probable cause hearing testimony, defense counsel testified at the habeas trial that he interviewed Katsnelson in advance of trial, and that he also had reviewed the hospital records relating to Jones' treatment immediately following the incident. On the basis of Katsnelson's statements and testimony, and defense counsel's review of the autopsy report and Jones' hospital records, defense counsel testified that it was apparent that "there was no [gunpowder] stippling . . . or gunshot residue on [Jones'] head . . . . There was no indication of an entrance wound or an exit wound, and there was no ricocheting or chipping of the bones indicating a bullet had ever been in the brain, and, finally, there was no lead or fragmentation found inside [Jones' head]." Because it was very evident that Jones' cause of death was blunt force trauma, defense counsel elected not to present a defense predicated on the theory—categorically refuted by the uncontradicted forensic evidence—that Jones had died of a gunshot wound.

Finally, at the petitioner's trial, Katsnelson testified that he graduated from medical school in 1957, that he has served as a medical examiner with the office of the

chief medical examiner since 1983, and that he performs approximately 250 to 270 autopsies each year. Katsnelson further testified that an autopsy is the examination of a deceased person for the purpose of determining the cause and manner of death. Thus, in conducting the autopsy, which consists of a thorough external and internal examination of the body and all of its organs, the examining physician must determine why the decedent died, that is, whether death was caused by a gunshot wound, a stab wound, blunt force trauma or something else. Katsnelson thereafter provided a detailed explanation of the findings of his postmortem examination of Jones. Consistent with the autopsy report, Katsnelson explained that the examination revealed that Jones had suffered multiple and extensive blunt force trauma wounds to the head, and that those wounds had caused Jones' death. Katsnelson further explained that the lethal wounds that Jones had sustained were not caused by a car accident because they were not consistent with the kind of wounds that a person would sustain in such an accident.

In light of the autopsy results, Katsnelson's testimony and defense counsel's interviews with Katsnelson, defense counsel reasonably concluded that he could not make a credible showing that Jones had died of a gunshot wound despite the testimony of Young-Duncan and Gartley. This conclusion was appropriate for two primary reasons. First, the defense that Jones was shot to death by a small group of Hispanic males does not account for the blunt force trauma injuries that Jones had suffered as a result of multiple blows to the body and, in particular, the head. Indeed, the majority does not even attempt to explain how those injuries are consistent with the theory that Jones was killed by a bullet rather than by repeated blows to the head. The majority also does not dispute the lethal nature of the blows that Jones had suffered. In asserting nevertheless that defense counsel was required to present a third party culpability defense, the majority simply ignores the fact that Jones was severely and brutally beaten, and that the beating he suffered caused his death.

Defense counsel's decision to reject the third party culpability defense also was reasonable because Katsnelson, a trained and experienced medical examiner whose sole task was to determine how and why Jones had died, conducted a thorough internal and external examination of Jones' entire body, including his head, skull and brains, and found clear and incontrovertible evidence that Jones had died of blunt force trauma to the head. Katsnelson found no evidence of a gunshot wound.[10] Indeed, as defense counsel learned, Katsnelson's forensic examination of Jones' body, which was witnessed by an inspector from the office of the state's attorney and a Hartford detective, had revealed no gunpowder residue on Jones' head, no evidence of an entrance or exit wound, no damage to Jones' brain that

might have been caused by a bullet and no trace of any substance within Jones' skull suggesting the presence of a bullet. Katsnelson, a physician trained and experienced in conducting postmortem examinations, had thoroughly examined Jones under optimal conditions and found no evidence of a gunshot wound, whereas Young-Duncan and Gartley made their observations hurriedly, in the dark of night, while trying to save Jones' life. Thus, it was perfectly logical for defense counsel to reject the third party culpability defense that the majority concludes he was required to present.[11] The fact that the third party culpability defense reasonably might be deemed both unwise and unnecessary is buttressed by the availability of Davis' compelling testimony demonstrating that Jones was not murdered in the manner posited by the state's key witnesses, Fournier and Sharp.

This conclusion is not undermined by Fleury's testimony about Fournier's statement to her concerning "three Spanish guys with a gun . . . ." Although I do not believe that this rather vague statement is particularly significant, even if it were, it is classic hearsay and, therefore, inadmissible unless it falls within a recognized hearsay exception. The majority has not identified any such exception, and I am aware of none.

In addition, the petitioner voluntarily provided two statements to the police, both of which were admissible against him. In neither statement, however, did the petitioner make any reference to a shooting or to gunshots. Because the petitioner, by his own admission, was present at the scene when, in accordance with the third party culpability defense, Jones purportedly was shot in an altercation with "three Spanish guys," the petitioner's failure to mention gunshots to the police obviously is damaging to that defense. Naturally, the jury would wonder why the petitioner had failed to report hearing such gunshots, fired so close to the petitioner, if, in fact, those shots had been fired. Of course, defense counsel was entitled to consider that fact in deciding whether to raise a third party culpability defense.

Finally, I do not believe that the majority's conclusion gives sufficient weight to the strategic decision of having the petitioner testify at trial. The petitioner's trial testimony was consistent with the two statements that he previously had provided to the police, and, therefore, the decision was made that the petitioner would testify. Defense counsel reasonably may have concluded that the jury would like to hear from the petitioner—and view him favorably for taking the stand—despite his constitutional right to refrain from doing so. Raising a third party culpability defense, however, would make it less likely that the petitioner would elect to testify because that trial testimony, which presumably would not include any reference to a third party shooting even though the petitioner was at the scene when that shoot-

ing purportedly took place, would undermine the defense. Thus, to the extent that it may have been beneficial for the petitioner to testify at trial, raising a third party culpability defense would have made that testimony far more problematic. Defense counsel also was entitled to weigh that consideration in deciding not to raise a third party culpability claim.

In sum, I believe that defense counsel's failure to call Davis as a witness violated the petitioner's constitutional right to the effective assistance of counsel. As I have explained, there was no reason, strategic or otherwise, not to call Davis as a witness as Davis' credible testimony directly contradicted the testimony of the state's two key witnesses. I do not believe, however, that defense counsel also was required to present a third party culpability defense. A competent defense attorney reasonably could have concluded that Davis' testimony, coupled with Fournier's and Sharp's lack of credibility, was likely to give rise to a reasonable doubt as to the petitioner's guilt. It also would have been reasonable for defense counsel to conclude that raising a third party culpability defense would have reduced the possibility of an acquittal by causing the jury to focus unduly on that defense—which, as I have explained, was extremely weak—instead of the state's marginal case against the petitioner.[12] I therefore concur in the result.

[1] In view of Sharp's refusal to testify, and because he was subject to cross-examination at the probable cause hearing, the trial court permitted the state to introduce Sharp's probable cause testimony at the petitioner's trial.

[2] The habeas court also observed that, in light of the credible evidence of the third party culpability defense, "there is clearly sufficient reason to doubt the reliability of [the jury's] actual verdict, based as it is [on] incomplete evidence."

[3] Of course, ultimately, the decision whether to testify rested with the petitioner, not defense counsel. See, e.g., *State* v. *Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008) ("[t]he fundamental rights that a defendant personally must waive typically are identified as the rights to plead guilty, waive a jury, testify in his or her own behalf, and take an appeal"). As a general matter, however, most such decisions are made jointly, with a defendant relying heavily on counsel's informed advice. In the absence of any indication to the contrary, I presume that that is what happened in the present case.

[4] It is well established that, under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a claim of ineffective assistance of counsel "must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. [Id.], 688, 694. The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. . . .

"[Furthermore] [i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Additionally, [j]udicial 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." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 63, 951 A.2d 520 (2008).

[5] At the habeas trial, Davis testified that he had been interviewed by defense counsel's investigator. Davis further testified that he told the investigator that he had not seen an altercation of any kind following the accident on April 14, 1996. Moreover, although defense counsel testified at the habeas trial that he had been unable to contact Davis prior to the petitioner's criminal trial because Davis did not respond to repeated telephone calls and notes, the habeas court expressly found that "Davis was available to be subpoenaed by either of the parties to the original trial had they done so." Thus, Davis' testimony was exculpatory, and he was available.

I note that defense counsel also testified that Davis' "existence or nonexistence, either way, did not . . . hurt [the petitioner] because [Davis] didn't say he saw someone else do something. He didn't say he saw [the petitioner] do anything." It appears that this testimony represents defense counsel's explanation as to why, in defense counsel's view, the failure to call Davis as a witness was not harmful to the petitioner. That failure was, in fact, very prejudicial to the petitioner because Davis' testimony that he had observed no altercation at the scene of the accident contradicted the highly incriminating testimony of Fournier and Sharp.

[6] Of course, Davis' testimony would not have provided an alternative theory or explanation as to who had beaten Jones to death, or precisely when. Davis' testimony, however, was extremely important, first, because it demonstrated that Jones' murder did not occur as Fournier and Sharp had described it and, second, because it corroborated the petitioner's contention that he did not kill Jones.

[7] The report indicates that John Mazzamurro, an inspector with the office of the state's attorney in the judicial district of Hartford, and Detective Edwin Soto of the Hartford police department were present when the autopsy was performed.

[8] The care with which Katsnelson examined Jones' body is reflected in the following verbatim recitation of that portion of the autopsy report entitled "Evidence of Injury": "A dark blue contusion is located in the frontal area of the head on the right side measuring up to 7 x 2 cm. with superficial abrasions, the largest of which measures up to 2 cm. An extensive abrasion is located in the right parietotemporal region of the head in an area which measures up to 12 cm. in greatest dimension. A laceration is noted on the upper aspect in the area of the connection of the right ear. This laceration measures up to 2.2 cm. A contusion and superficial abrasion is also present on the upper aspect of the right ear measuring up to 1.2 cm. A dark blue contusion is noted on the right side of the face involving the right upper and lower eyelids measuring 11 x 5.3 cm. On the surface of this contusion, there is also a superficial abrasion which is 3 x 0.2 cm. The right eyeball is lacerated. Dark blue hemorrhage is noted in the lower left eyelid measuring 2.5 x 0.5 cm. Palpation of the facial bones reveal[s] fractures of the maxilla. A dark red abrasion is noted on the upper aspect of the neck on the left side measuring up to 5 cm. in greatest dimension, and it is mostly horizontally oriented. There is an extensive abrasion with downward directions noted on the left lateral aspect of the chest. This abrasion measures 26 cm. vertically by 10 cm. horizontally. A superficial dark red abrasion is also noted on the left lateral aspect of the pelvis measuring up to 2.5 cm. in greatest dimension. There is [a] dark red abrasion located on . . . the posterior aspect of the chest in the upper part measuring 9 cm. in greatest dimension. This abrasion is surrounded by a contusion which measures up to 12 x 6 cm. A dark blue contusion is located in the posterior aspect of the right knee measuring up to 9 cm. in greatest dimension. There is a blue contusion located on the base of the second right finger measuring up to 2 cm. Below this contusion is a superficial abrasion measuring 1.5 cm. in greatest dimension. In the area of the right wrist on the dorsum there is a blue contusion noted measuring up to 2 cm. On the dorsum of the left hand and fingers multiple bluish contusions and abrasions are noted, the largest of which measures up to 4 cm. in greatest dimension. The contusion on the posterior aspect of the right knee reveals a grayish-green discoloration. Examination of the injuries of the head reveals at least six separate areas of impact located on the right side of the head, the right side of the neck, in the temporoparietal regions of the head and in the area of the right eye.

"An incision is made on the posterior aspect of the chest in the area of the abrasion/contusion, and a dark red hemorrhage is present in the soft tissue measuring 10 cm. in vertical dimension and 4 cm. deep."

[9] The magnitude of Jones' head injuries, which are depicted in the exhibits introduced by the state at the petitioner's criminal trial, is obvious even to the lay observer.

[10] The majority, quoting approvingly from the decision of the habeas court, proffers the following explanation as to why the jury might have been persuaded, despite the autopsy report and Katsnelson's testimony, that Jones could have been killed by a gunshot: "[I]t is not impossible that with the force of the impact of the collision, coupled with a gunshot wound to the head, and emergency treatment at the trauma center . . . a severe fracturing of the skull might have masked the existence of the gunshot wound by the time of the postmortem examination." (Internal quotation marks omitted.) Footnote 21 of the majority opinion. I respectfully submit that this assertion is based on nothing more than conjecture and speculation; it certainly is not supported by any testimony or other evidence. Indeed, photographs of Jones taken prior to the autopsy belie the contention that Jones' physical condition was so bad that Katsnelson reasonably could have failed to notice (1) gunpowder residue on Jones' head, (2) wounds on Jones' head where a bullet entered and then exited his head, (3) signs of the path made by the bullet as it traveled into and through Jones' head, and (4) bullet traces inside Jones' skull. In fact, if the petitioner had sought to establish that Jones' condition "might have masked the existence of the gunshot wound by the time of the postmortem examination"; (internal quotation marks omitted) id.; then he could have elicited testimony to that effect from a physician or other expert with experience and expertise in such matters. The majority's attempt to fill that evidentiary gap for the petitioner is unavailing, first, because there is nothing in the record to suggest that Jones' body was in unusually bad condition when it was delivered to the office of the chief medical examiner and, second, because there is nothing in the record to support the conclusion that Katsnelson, a trained and experienced medical examiner, somehow was unable to determine Jones' cause of death.

[11] I therefore disagree with the majority's unsupported assertion that Young-Duncan's and Gartley's testimony "would have given the jury a strong basis to question Katsnelson's conclusion." Footnote 22 of the majority opinion. Contrary to the assertion of the majority, Katsnelson's testimony, coupled with the multiple blunt force head injuries that Jones had suffered, compels the opposite conclusion: Young-Duncan and Gartley's good faith belief, based on their observation of Jones under emergency conditions in the middle of the night, that Jones may have been shot is wholly untenable in light of the undisputed forensic and medical evidence establishing that Jones had died of repeated blows to the head, and that he had not been shot.

[12] Unfortunately, unless there is a material change of circumstances at the time of the petitioner's retrial, counsel for the petitioner at that retrial will be obligated to present a third party culpability defense—the majority opinion would require counsel to do so—despite the fact that Davis' testimony, standing alone, would undermine the state's case, and notwithstanding the fact that the third party claim ultimately is unconvincing. Moreover, the likelihood of a material change of circumstances is not great because the offense took place more than twelve years ago, and all of the witnesses already have testified under oath. If, in fact, there is no such change in circumstances, for the reasons that I have set forth in this opinion, I disagree with the majority that defense counsel should be required to present a third party culpability defense.