MICHAEL C. SKAKEL *v.* STATE OF CONNECTICUT
(SC 18158)

Katz, Palmer, Vertefeuille, Zarella and McLachlan, Js.*

Argued March 26, 2009—officially released April 20, 2010

Hubert J. Santos, with whom were *Hope C. Seeley* and *Benjamin B. Adams*, for the appellant (petitioner).

Susann E. Gill, senior assistant state's attorney, with whom was *Jonathan C. Benedict*, former state's attorney, for the appellee (respondent).

Opinion

KATZ, J. Following his 2002 conviction, after a jury trial, for the 1975 murder of his fifteen year old neighbor, Martha Moxley (victim), the petitioner, Michael C. Skakel, appealed.[1] In accordance with the three year limitations period under General Statutes § 52-582,[2] in 2005, while a decision on that appeal was pending, the petitioner filed a petition for a new trial, pursuant to General Statutes § 52-270 (a),[3] on the ground of newly discovered evidence. This court thereafter affirmed the judgment of conviction. See *State* v. *Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).[4] The trial court, *Karazin*, *J.*, subsequently denied the petitioner's revised substitute petition for a new trial (petition), and this appeal followed.[5] The petitioner contends that the trial court improperly concluded that his third party culpability, exculpatory and impeachment evidence was either not newly discovered, not credible or not likely to produce a different result in a new trial even if credible. We conclude that the trial court did not abuse its discretion in concluding that the petitioner had not satisfied the prerequisites for a new trial, and, accordingly, we affirm its judgment denying the petition.

The following facts that the jury reasonably could have found on the basis of evidence adduced at the petitioner's criminal trial, as well as the theories the petitioner raised in his defense at trial, were set forth in great detail by this court in our resolution of the petitioner's appeal from the judgment of conviction. The unusual circumstances of this case, its lengthy history, the number of persons involved, the nature of the claims in this appeal and the standard of review applied to claims of newly discovered evidence necessitate their repeating. "Sometime between 6:30 and 7:30 p.m. on the evening of Thursday, October 30, 1975, the victim left her home on Walsh Lane, located in the Belle Haven section of [the town of] Greenwich, with a friend, Helen Ix, to play and socialize in and around the neighborhood. It was the night before Halloween, commonly referred to as 'mischief night,' an evening when the neighborhood children were known to engage in playful mischief. The victim and Ix soon were accompanied by other friends who lived nearby. Several times that night, the group stopped by the Skakel home, which was located on Otter Rock Drive.[6] The first time they did so, the [petitioner] was dining at the Belle Haven Club with his siblings, Rushton Skakel, Jr., Julie Skakel, Thomas Skakel, John Skakel, David Skakel and Stephen Skakel, their cousin James Dowdle,[7] their tutor Kenneth Littleton, and Julie Skakel's friend Andrea Shakespeare. The Skakel group arrived home from dinner before 9 p.m., at which time the victim and her friends again visited the [petitioner's] house.

"Shortly thereafter, the [petitioner], joined by the vic-

tim, Ix and [Geoffrey] Byrne, a friend of the victim, entered one of the Skakel family vehicles, a Lincoln Continental, which was parked on the Skakels' side driveway, to talk and listen to music. Thomas Skakel, the [petitioner's] then seventeen year old brother, soon joined the group. Sometime before 9:30 p.m., the group was interrupted by Rushton Skakel, Jr., and John Skakel, who needed to use the Lincoln Continental to drive Dowdle home, where they planned to watch a television program scheduled to air at 10 p.m. Consequently, Thomas Skakel, Ix, Byrne and the victim exited the car. As Ix began to leave the Skakel property with Byrne, she observed Thomas Skakel and the victim engaging in flirtatious horseplay at the other end of the driveway. Feeling 'a bit embarrassed by the flirting,' Ix left to go home.[8]

"The victim's mother, Dorothy Moxley, expected that the victim would be home that evening by 10:30 or 11 p.m. At about 1:30 or 2 a.m., upon discovering that her daughter had not returned home, she sent the victim's brother, John Moxley, out to look for her. Dorothy Moxley thereafter telephoned anyone who she thought might know the victim's whereabouts, including the [petitioner's] family, whom Dorothy Moxley called several times. Dorothy Moxley's efforts to locate the victim were unsuccessful, and she eventually contacted the Greenwich police department, which dispatched an officer to the Moxley home. The officer made a missing persons report and briefly searched the surrounding area. The next morning, at about 8:30 a.m., Dorothy Moxley, believing that the victim may have fallen asleep in the Skakel family motor home that usually was parked in the Skakels' driveway, went to the [petitioner's] house. The [petitioner] answered the door, appearing 'hungover' and dressed in jeans and a T-shirt. The [petitioner] informed Dorothy Moxley that the victim was not at his home, and an inspection of the motor home by a Skakel employee confirmed that she was not there either.

"Later that day, at about noon, a neighborhood friend discovered the victim's dead body under a large pine tree in a wooded area on the Moxley property. The victim was lying facedown, with her pants and panties pulled down around her ankles. Forensic tests revealed that the victim had died from multiple blunt force traumatic head injuries. A large quantity of blood was discovered in two areas in a grassy region approximately seventy feet from the victim's body, with a distinct drag path leading from the pools of blood to the location where the victim's body was found. The victim likely was assaulted at or near the farther end of her circular driveway and then dragged approximately eighty feet to the pine tree under which her body subsequently was discovered. Remnants of the murder weapon, a Tony Penna six iron golf club, also were found at the crime scene. The head of the golf club and an eight

inch section of its shaft were found on the circular driveway, approximately 116 feet from the area where the large accumulation of the victim's blood was found. Another piece of the shaft was discovered on the grassy area near the two large pools of blood. The remaining part of the shaft attached to the club handle never was found.

"Harold Wayne Carver II, a forensic pathologist and the state's chief medical examiner, testified regarding the findings of the original autopsy performed by then chief medical examiner Elliot M. Gross, also a forensic pathologist. Carver stated that the victim's injuries appeared consistent with having been inflicted by a golf club. In addition to the fatal head injuries, the victim had been stabbed in the neck with a piece of the golf club shaft. According to Carver, Gross had used an ultraviolet light to detect the presence of semen on the victim's pubic region and also had taken vaginal and anal swabs. No semen was found in those areas, however. Nothing in the autopsy report indicated that the ultraviolet light had been applied to the victim's buttocks or to other parts of the victim's body. With respect to the time of death, Carver testified that the victim had been dead for some time before her body was found. He further opined that the time of death more likely was closer to 9:30 p.m. on October 30, 1975, when she was last seen alive, rather than noon the following day, when her body was discovered. Because the autopsy was conducted twenty-four hours after the discovery of the victim's body, a more precise time of death could not be ascertained.

"Henry Lee, a forensic scientist and the former state chief criminalist, reviewed the documents, photographs and physical evidence compiled by the investigators and performed a partial reconstruction of the crime scene. On the basis of his investigation, Lee testified as to the likely nature and sequence of events leading up to the victim's death. In particular, he indicated that the golf club that was used to assault and kill the victim probably had broken into pieces from the force with which the victim had been struck. This force, according to Lee, likely propelled the head of the golf club, and a piece of its shaft, over seventy feet, from the location of the fatal assault to the location inside the circular driveway where those pieces subsequently were discovered. According to Lee, the remaining piece of the golf club shaft then was used as a sharp weapon to stab the victim. Lee further testified that, in light of the amount of blood found on the inside of the victim's jeans and panties, those garments likely were pulled down before the assault occurred. Lee also stated that the absence of vertical blood drippings on the victim's shoes and jeans indicated that the victim was lying on the ground when the perpetrator inflicted the injuries to her head and neck.

"James Lunney, a detective with the Greenwich police department in 1975, testified that, on the day that the victim's body was discovered, he briefly visited the [petitioner's] home and noticed a barrel containing several items, including golf clubs, in a hallway near the rear of the home. Lunney testified that one of the golf clubs, a Tony Penna four iron, later was seized from the property with the written consent of the [petitioner's] father. Thomas G. Keegan, a captain in the detective division of the Greenwich police department in 1975, testified that an examination of the seized golf club and the golf club parts found at the crime scene revealed that the murder weapon came from the [petitioner's] home.

"In the days and months following the victim's murder, the Greenwich police conducted numerous interviews in furtherance of its criminal investigation into the victim's death. The [petitioner] and his siblings were among those interviewed in the early stages of that investigation. On November 15, 1975, the [petitioner], who was accompanied by his father, gave a tape-recorded interview to the Greenwich police at the police station. Responding to inquiries concerning his whereabouts on the night of the murder, the [petitioner] explained that he had accompanied his brothers and Dowdle to Dowdle's home, which was about twenty minutes away, and watched the television show 'Monty Python's Flying Circus.' According to the [petitioner], he returned to his home around 10:30 or 11 p.m.,[9] and went to bed about fifteen minutes later. When asked specifically about whether he left the house after he went to his bedroom that night, the [petitioner] responded, 'no.' The [petitioner] acknowledged, however, that, on other occasions, he had left his home after ostensibly retiring to his room for the night.

"In 1977, two years following the victim's murder, the [petitioner] revealed certain feelings of guilt and remorse to Larry Zicarelli, who then was employed by the [petitioner's] family as a driver and general handyman. While being driven by Zicarelli to an appointment in New York City, the [petitioner], distraught from an earlier altercation with his father, told Zicarelli that he 'had done something very bad' and that he 'either had to kill himself or get out of the country.' On another occasion, Zicarelli and the [petitioner] were stopped in traffic on the Triborough Bridge in New York on their way home when the [petitioner] 'opened the [car] door, started to jump out of the car and ran to the side . . . of the bridge.' Zicarelli ran after the [petitioner] and forced him back into the car. As Zicarelli was proceeding to the driver's side door, the [petitioner] again exited the car and ran toward the other side of the bridge. Zicarelli once again hurried toward the [petitioner] and forced him back into the car. Just before Zicarelli and the [petitioner] arrived at the Skakel home, Zicarelli

asked the [petitioner], '[W]hy would [you] want to do what [you were] trying to do?' The [petitioner] responded that, 'if [you] knew what [I] had done, [you] would never talk to [me] again.'[10] Immediately following this incident, Zicarelli terminated his employment with the Skakels.[11]

"From 1978 to 1980, the [petitioner] was a resident at the Elan School [Elan], a residential facility for troubled adolescents located in Poland Springs, Maine. Several former Elan residents testified about the deplorable conditions at the institution, which employed a behavioral modification approach predicated on controversial techniques of intimidation, confrontation and humiliation of its residents. As a result, Elan residents regularly endured mental and physical abuse at the hands of their peers and Elan staff members. While a resident at Elan, the [petitioner] frequently was confronted and interrogated about his involvement in the victim's murder. For example, Charles Seigen, who was enrolled at Elan with the [petitioner] from 1978 to 1979, testified that he recalled attending two or three group therapy sessions, supervised by a staff member and typically attended by eight residents, during which the [petitioner] was confronted about the victim's murder. According to Seigen, the [petitioner] sometimes responded to such probing with annoyance. On other occasions, however, the [petitioner] became very upset, cried and stated that he did not know if he had done it. The [petitioner] also stated in these group sessions that, on the night of the victim's murder, he was 'blind drunk' and 'stumbling.'[12]

"Dorothy Rogers, another former resident of Elan, testified that, on one occasion, when she and the [petitioner] were talking at an Elan social function, the [petitioner] told her that he had been drinking on the night of the murder and that he could not recall whether he was involved in the victim's death. The [petitioner] further explained to Rogers that his family had enrolled him at Elan because they feared that he may have murdered the victim and wanted him in a location far removed from the investigating officers. Gregory Coleman, a resident at Elan from 1978 to 1980, testified about an exchange that he had had with the [petitioner] while Coleman stood 'guard' over the [petitioner] following the [petitioner's] failed escape attempt from Elan. During this conversation, the [petitioner] confided in Coleman about murdering a girl who had rejected his advances. According to Coleman, the [petitioner] had admitted killing the girl with a golf club in a wooded area, that the force with which he had hit her had caused the golf club to break in half, and that he had returned to the body two days later and masturbated on it. John Higgins, another former resident of Elan, recounted certain emotional admissions that the [petitioner] had made to him while the two were on guard duty one night on the porch of the men's dormitory at Elan. In

particular, Higgins testified that the [petitioner] had told him that, on the night of the murder, there was a 'party of some kind or another' at the [petitioner's] home. The [petitioner] also told Higgins that he remembered rummaging through his garage looking for a golf club, running through the woods with the club and seeing pine trees. Higgins further stated that, as the conversation continued, the [petitioner's] acknowledgment of his culpability in the victim's murder progressed from 'he didn't know whether he did it' to 'he may have done it' to 'he must have done it,' and finally to 'I did it.'

"Elizabeth Arnold and Alice Dunn, both of whom had attended Elan during the [petitioner's] stay at the facility, also testified about certain inculpatory statements that the [petitioner] had made to them. Both testified that the [petitioner] had expressed uncertainty as to whether he or his brother had murdered the victim. Arnold also recalled a group therapy session in which the [petitioner], upon being questioned about the victim's murder, stated that '[h]e was very drunk and had some sort of a blackout' that night, that his brother had 'fool[ed] around' with his 'girlfriend,' and that his brother had stolen her from him. Dunn, who graduated from Elan in 1978 and subsequently became a staff member there, testified that while she was employed at Elan, the [petitioner] stated that he was not in 'his normal state' on the night of the murder.

"Thereafter, in the summer of 1987, the [petitioner] told Michael Meredith, a former Elan resident who was staying temporarily in the [petitioner's] home, that, on the night of the victim's murder, he had climbed a tree on the Moxley property and masturbated in the tree while watching the victim through her window. According to Meredith, he first learned of the victim's murder in this conversation. The [petitioner] also told Meredith that while he was in the tree, he saw his brother Thomas Skakel walk across the Moxley property toward the victim's home but that Thomas Skakel had not seen him in the tree. The [petitioner] related a similar story to Andrew Pugh, a close childhood friend, when the two saw one another in 1991. The [petitioner] had expressed a desire to renew their friendship, which gradually had faded following the victim's murder. In an effort to ease Pugh's concerns about the [petitioner's] involvement in the victim's death, the [petitioner] assured Pugh that he did not kill the victim but mentioned that he had masturbated in a tree on the night that she was murdered. Pugh understood that the tree to which the [petitioner] referred was the tree under which the victim's body was discovered.

"The most descriptive account of the [petitioner's] activities on the night of the murder came in 1997 from [a tape-recorded] conversation between the [petitioner] and Richard Hoffman, a writer who was collaborating with the [petitioner] on a book about the [petitioner's]

life. On that tape [recording], the [petitioner] explained to Hoffman that, earlier in the evening of the victim's murder, he had invited the victim, who was seated with the [petitioner] in his father's car, to accompany him to his cousin's house to watch the Monty Python Flying Circus television show. The victim declined the invitation because of her curfew, and the two instead made plans to go 'trick or treating' the next night. The [petitioner] thereafter left for Dowdle's home with his brothers Rushton Skakel, Jr., and John Skakel, as well as Dowdle.

"The [petitioner] told Hoffman that, after returning to his own home from Dowdle's house, he had walked through the house in search of various people. Upon observing that the door to his sister's room was closed, he had 'remember[ed] that [his sister's friend, Shakespeare] had gone home . . . .' He then indicated that he had gone into 'the master bedroom [but] there was nobody there, the [television] was on but nobody was there.' The [petitioner] went upstairs to bed shortly thereafter, but he became 'horny' and decided to spy on a 'lady' who lived on Walsh Lane. The [petitioner] then 'snuck out' of his house and went to this person's home, hoping to see her through her window. Unsuccessful in that endeavor, he thought, '[f]uck this . . . Martha likes me, I'll go, I'll go get a kiss from Martha.' . . . The [petitioner] then proceeded to the victim's home, climbed a tree near the victim's front door and masturbated in the tree for about thirty seconds. Shortly thereafter, 'a moment of clarity came into [his] head,' and the [petitioner] climbed down from the tree and walked back home. On his way home, he threw rocks into the dark, repeatedly yelling, 'Who's in there?' He and his friends previously had done this while shooting BB guns into the dark. The next morning, the [petitioner] awoke to '[Dorothy] Moxley saying "Michael . . . have you seen Martha?"' The [petitioner] thought to himself, 'Oh my God, did they see me last night?' At that moment, the [petitioner] told Hoffman, he 'remember[ed] just having a feeling of panic.'

"The state also adduced evidence establishing that the [petitioner], who was infatuated with the victim, had grown resentful of her flirtatious friendship with his older brother, Thomas Skakel, whom he considered his nemesis. According to Pugh, who in 1975 was friendly with the victim and the [petitioner], the [petitioner] had 'told [Pugh] that he liked Martha quite a bit and had a crush on her.' Pugh also testified that the [petitioner] had told him that 'he would have liked to have a relationship with her.' Pugh testified that he had observed the [petitioner] and the victim engage in 'horseplay, roughhousing, fooling around . . . [and] kissing one time in the [Skakel family motor home].' With respect to Thomas Skakel's relationship with the victim, Jacqueline Wettenhall O'Hara, a neighborhood friend of the victim, recounted observing flirtatious con-

duct between the victim and Thomas Skakel in the months leading up to the victim's death. Entries recorded in the victim's diary in the two months preceding her murder disclosed the victim's friendship with the [petitioner] and Thomas Skakel, and also revealed the sometimes flirtatious nature of her relationship with Thomas Skakel. In addition, [the victim's friend] Ix testified that she had observed the victim and Thomas Skakel engaging in flirtatious horseplay the last time she saw the victim alive. Moreover, one of the sneakers that the victim was wearing when her body was recovered had the name 'Tom' written on it.

"The [petitioner] raised an alibi defense at trial. In particular, he claimed that the victim had been murdered at approximately 10 p.m. on October 30, 1975,[13] and that he was at Dowdle's home, some twenty minutes away from the murder scene, at that time. The [petitioner] also raised a third party culpability defense, pointing to Littleton as a likely perpetrator of the victim's murder. In fact, Littleton, who had been hired as a part-time tutor by the Skakel family, had taken up residence at the Skakel home on October 30, 1975, the day that the victim was last seen alive, and had slept there with the Skakel children that night. Littleton testified that, after returning home from dinner at 9 p.m., he remained at the house all night, stepping outside briefly at approximately 9:30 p.m. only to investigate a disturbance.[14] In addition, testimony adduced by the [petitioner] revealed that Littleton, who began to manifest serious psychiatric and behavioral problems in the years following the murder, may have made a statement, several years after the killing, in which he implicated himself in the crime. Littleton emphatically denied that he had had anything to do with the victim's death, however." *State* v. *Skakel*, supra, 276 Conn. 640–53. The jury rejected the petitioner's theories, returning a guilty verdict on the charge of murder, and the trial court, *Kavanewsky*, *J.*, rendered judgment in accordance with the verdict.[15] Id., 639.

Following this court's decision affirming the judgment of conviction; id., 770; evidentiary hearings were held on the petitioner's petition for a new trial. Although the petition had set forth nine counts, the petitioner proceeded on only four of those counts. The trial court, *Karazin*, *J.*, construed those counts as follows. Count one alleged newly discovered evidence of third party culpability, specifically, statements from Gitano "Tony" Bryant implicating two of Bryant's former high school classmates, Adolph Hasbrouck and Burton Tinsley, in the victim's murder. Count two alleged newly discovered evidence of witnesses who directly contradicted Coleman's testimony that the petitioner had confessed to killing the victim. Count six alleged newly discovered exculpatory evidence that the state had failed to disclose, specifically, a composite drawing of a person seen in Belle Haven on the night of the murder whom the

petitioner claims resembles Littleton,[16] police suspect profile reports on Thomas Skakel and Littleton, and "time lapse data" chronicling Littleton's actions, including charged and uncharged criminal conduct, before and after the victim's murder. Count nine alleged newly discovered evidence relating to a "secret pact and book deal between the state's lead investigator, Frank Garr, and author Leonard Levitt."[17] The state filed an answer, essentially denying all of the material allegations. After a hearing and review of all of the evidence adduced in relation to the petition, the trial court denied the request for a new trial as to each count.

On appeal, the petitioner challenges the trial court's denial of his petition for a new trial on each of the grounds previously raised. We conclude that the trial court did not abuse its discretion and, therefore, we affirm the judgment. Additional facts will be set forth as necessary.

We begin with the general legal principles that govern our resolution of the petitioner's claims. Pursuant to § 52-270, a convicted criminal defendant may petition the Superior Court for a new trial on the basis of newly discovered evidence. See Practice Book § 42-55. A trial court's decision on that ground is governed by the standard set forth in *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987), and further refined in *Shabazz* v. *State*, 259 Conn. 811, 827–28, 792 A.2d 797 (2002). Under the *Asherman* standard, a court is justified in granting a petition for a new trial when the petitioner demonstrates that the evidence offered in support thereof: (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial. *Asherman* v. *State*, supra, 434. "This strict standard is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason." (Internal quotation marks omitted.) Id.

"The roots of this test can be traced back as far as 1850, when this court first stated that a petition for a new trial will not be granted if the newly discovered evidence could have been known before the trial, by great diligence or if the evidence is merely cumulative . . . . *Waller* v. *Graves*, 20 Conn. 305, 310 (1850). In *Parsons* v. *Platt*, 37 Conn. 563, 564 (1871), we added the requirements that the evidence, in fact, be newly discovered; that it be material; and that, if a new trial were granted a different result would be produced. . . . Id., 565. Finally, in *Hamlin* v. *State*, 48 Conn. 92, 93–94 (1880), we articulated the test in terms virtually identical to that which we later adopted in *Asherman*. See also *Smith* v. *State*, 141 Conn. 202, 208, 104 A.2d 761

(1954); *Taborsky* v. *State*, 142 Conn. 619, 623, 116 A.2d 433 (1955); *Turner* v. *Scanlon*, 146 Conn. 149, 163, 148 A.2d 334 (1959); *Lombardo* v. *State*, 172 Conn. 385, 391, 374 A.2d 1065 (1977); *Burr* v. *Lichtenheim*, 190 Conn. 351, 355, 460 A.2d 1290 (1983)." (Internal quotation marks omitted.) *Shabazz* v. *State*, supra, 259 Conn. 821.

We further explained in *Shabazz* that, in determining whether a different result would be produced in a new trial, a trial court necessarily must engage in some form of credibility analysis. Id., 827. "The trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial. . . . [Thus, if] the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result or otherwise avoid an injustice,[18] the fourth element of the *Asherman* test would be satisfied." (Citation omitted.) Id., 827–28. By a "different result," we mean that the new evidence would be likely to result in acquittal of the petitioner, not merely that it might cause one or more jurors to have a reasonable doubt about the petitioner's guilt. Id., 823 ("it must be evidence which persuades the judge that a jury would find him not guilty" [internal quotation marks omitted]); *Lombardo* v. *State*, supra, 172 Conn. 391 (same); see also *Asherman* v. *State*, supra, 202 Conn. 434, 436 (considering whether admission probably would have led to petitioner's acquittal). Finally and significantly, it is well settled that whether the evidence satisfies the aforementioned standard is within the trial court's sole discretion, and the judgment of the trial court will be set aside on appeal only if it reflects a clear abuse of discretion. *Asherman* v. *State*, supra, 434; *Ridolfi* v. *Ridolfi*, 178 Conn. 377, 379, 423 A.2d 85 (1979).

I

We first turn to the petitioner's claim that the trial court improperly concluded that he is not entitled to a new trial on the basis of Bryant's statements inculpating two other persons in the victim's murder. The petitioner contends that Bryant's account of the events of October 30, 1975, credibly establishes the motive, opportunity and means for two of Bryant's former schoolmates, Hasbrouck and Tinsley, to have committed the murder. We disagree.

A

The record discloses the following additional undisputed facts and procedural history. After the petitioner was convicted, Crawford Mills, Bryant's former Greenwich schoolmate, contacted the petitioner's cousin, Robert F. Kennedy, Jr., with the following information regarding the victim's homicide. According to Mills, Bryant had said that he knew who had killed the victim, and that it was not the petitioner, but, rather, it was

Hasbrouck and Tinsley. Bryant reluctantly had agreed to allow Mills to relay his account to others but told Mills that he did not want his name disclosed and would not come forward with the information himself. Mills initially did not disclose Bryant's identity, but ultimately decided to do so when no one would credit the information without knowing the source. Kennedy then contacted Bryant and, following several telephone conversations, Bryant agreed to submit to a videotaped interview. On August 24, 2003, Vito Colucci, a private investigator the petitioner had hired, conducted the interview. When Bryant was deposed pursuant to a subpoena on August 25, 2006, however, he invoked his fifth amendment right not to incriminate himself in response to every question relating even tangentially to the events of October 30, 1975. Although Hasbrouck and Tinsley initially had spoken willingly with Kennedy and Colucci on several occasions, after they became aware that Bryant had implicated them in the murder, they too invoked their fifth amendment right not to testify at their depositions.[19]

Prior to the hearing on the petition for a new trial, the state filed a motion in limine seeking to preclude admission of Bryant's videotaped statements on the ground that they were hearsay and did not qualify for admission under any exception to the hearsay rule. The parties agreed that the issue of the admissibility of the statements would be reserved until after the court's review of the videotape at the hearing on the petition. Thereafter, the trial court reviewed the August 24, 2003 videotaped interview of Bryant, heard testimony from various witnesses and reviewed documentary evidence relating to Bryant's account before issuing any rulings.

In the videotaped interview, Bryant offered the following account of the events leading up to and following the evening of October 30, 1975. At the time of the murder, Bryant was fourteen years old and living in New York City, where he attended Hughes High School. For the previous three school years, however, he had attended Brunswick School (Brunswick), a private school in Greenwich, and lived with a family friend in Greenwich. The petitioner and Bryant had been classmates at Brunswick, but the two were not friends. After Bryant moved to New York, he continued to socialize with many of the young people around Belle Haven and other Greenwich enclaves, in particular, Neal Walker and Byrne.

Hasbrouck and Tinsley were friends of Bryant's who also attended Hughes High School, although they were about a year older than Bryant. The two accompanied Bryant to Belle Haven four or five times between mid-September and October 30, 1975. Bryant was acquainted with the victim from his time living in Greenwich, but Hasbrouck and Tinsley first met her in mid-September at a street fair in Greenwich. Although Hasbrouck never

made any direct overtures to the victim, he became "obsessed" with her. He would make comments to Bryant and others that "[s]omeday [he was] going to have her," as well as more vulgar variations of that comment, and, on several occasions, stated that he wanted "to go caveman on her," which meant to Bryant that Hasbrouck would drag her away by the hair and sexually assault her.

On October 30, 1975, the night of the victim's murder, Bryant took the train to Greenwich with Hasbrouck and Tinsley, heading into Belle Haven somewhere between 6 and 6:20 p.m. They stopped by Walker's house at approximately 6:30 or 6:40 p.m., but Walker was not able to leave at that time and he told them to come back later. Bryant, Hasbrouck and Tinsley then walked to the house next door, went inside, helped themselves to several six packs of beer in the refrigerator and proceeded to Byrne's house. Byrne then accompanied the three others as they walked about the neighborhood engaging in various acts of mischief, such as smashing pumpkins. As they walked, they saw other teenagers out in the neighborhood, including Ix and Lisa Rader Edwards.

Bryant and the rest of the group walked behind the Skakel residence, where they found some golf clubs strewn about that each of them handled. Thereafter, Hasbrouck and Tinsley walked around Belle Haven carrying the golf clubs as walking sticks. Bryant and the others proceeded to a large meadow, located behind the Skakel property, where young people in the neighborhood commonly congregated to smoke and drink without being seen by the Belle Haven security guard. Bryant and the others drank several six packs of beer and smoked marijuana. At approximately 8:30 to 8:45 p.m., Bryant saw the victim, as well as the petitioner, at the meadow. Thomas Skakel also came and went, and Bryant waved to Julie Skakel, who, per her usual practice, did not stay at the meadow to socialize. By about 9 p.m., a group of ten to fifteen teenagers, including Bryant, Tinsley and Hasbrouck, had congregated together in a circle at the meadow. Tinsley and Hasbrouck made comments and sexual overtures to some of the girls there, which made things uncomfortable. The victim was there around that time, but became "fed up" with what was going on, left the meadow and went over to a group that was standing by the Skakel residence and included at various points the petitioner and Thomas Skakel.

Bryant decided to leave for two reasons. First, he had told his mother that he would catch the last train home, which left at 9:35 or 9:40 p.m. Second, Tinsley and Hasbrouck had gotten "out of control," making comments that made Bryant uncomfortable, such as: "Where are the bitches?"; "We've just got to get into something . . . I'm not going out of here unsatisfied";

"I'm going to get me a girl"; and "I've got my caveman club . . . and I'm going to grab somebody and pull them by the hair and do what cavemen do." While making these comments, Tinsley and Hasbrouck had the golf clubs in hand that they had taken from the Skakel property. Bryant feared that, with the combination of the alcohol, drugs and the personality types of his two friends, anything was possible. Bryant left the group, hitchhiked and caught a ride to the train station from a person whom he knew to be from Belle Haven, but could not identify, and went home. Tinsley and Hasbrouck stayed the night at Byrne's house.

When Bryant saw Hasbrouck and Tinsley the Monday following the murder, they told him, "We did it. We achieved the caveman." Although neither mentioned the victim by name, Bryant knew that they were talking about her, given both Hasbrouck's infatuation with her, as well as the New York Times article Bryant's mother had shown him about the murder. In the days that followed, Hasbrouck and Tinsley continued to brag about having achieved their fantasy of taking a girl "caveman style," meaning with a club, without expressly mentioning the victim's name.

In its memorandum of decision denying the petition for a new trial, the trial court first addressed the issue of whether Bryant's statements were admissible. The trial court determined, in accordance with the factors set forth under the rules of evidence, that "[a] complete analysis of both the time that the statements were made and the people to whom they were made, considered in the context of the unique circumstances of the present case, meets the *minimum* threshold of trustworthiness to warrant the admission of Bryant's statements as a statement against penal interest." (Emphasis added.) See Conn. Code Evid. § 8-6 (4).[20]

With respect to the timing of the statements, the trial court noted that Tinsley and Hasbrouck had made their alleged statements to Bryant immediately after the crime, which supported the trustworthiness of those statements. Although Bryant's recounting of those statements to Mills had been more than twenty-five years later, the court determined that, "[b]ecause of the length of the state's investigation . . . Bryant had an incentive to keep himself out of a case that he reasonably thought would never be solved. . . . [E]ven after the petitioner was arrested and brought to trial, [Bryant] still refused to come forward because he thought there was no way that [the petitioner] would be convicted. . . . Bryant was a fourteen year old black male who was suddenly faced with information that, by his own admission, was clearly against his penal interest . . . ." For all of these reasons, combined with Bryant's knowledge that there is no statute of limitations on murder,[21] the court concluded that his reluctance to tell his story was reasonable.

The court then focused on the person to whom Bryant initially had related his story. The court concluded that, because Bryant had made his first disclosure regarding the details of his whereabouts on October 30, 1975, to Mills, with whom he "shared a connection to the facts of this case, dating back to their shared experiences at Belle Haven during the time leading up to the murder," and then to Kennedy and Colucci, the statements were trustworthy. As further support for the minimum threshold of trustworthiness to warrant admission of Bryant's statement, the court also noted that Colucci had informed Bryant that he was being sought in connection with a court proceeding, that Bryant was aware that his statements were being videotaped and that it was clear that the recording was being made in anticipation of having it presented in court.

Next, the court examined the extent to which Bryant's statements were corroborated by other evidence. The court highlighted the following facts: "Bryant went to the Brunswick School, and was classmates with the children in the Belle Haven neighborhood. Several witnesses, including [Mills] and [Walker], confirm[ed] that Bryant socialized at Belle Haven. At the hearing, witnesses confirm[ed] that *Bryant* indicated that he was present in Belle Haven on the night of the murder. One witness recall[ed] seeing [Hasbrouck] and [Tinsley] in Belle Haven with Bryant during the fall of 1975. Both Hasbrouck and Tinsley admitted to [Kennedy] that they had been in Belle Haven with Bryant on several occasions. Bryant also provide[d] detailed descriptions of the layout of Belle Haven, including accurate recitations of where people in the neighborhood lived.

"According to Bryant, Hasbrouck was [six feet, two inches tall], at least 200 pounds on the date of the homicide, and 'very strong.' Bryant stated that [Hasbrouck] was obsessed with [the victim], and 'wanted to go caveman on her,' meaning that he would club her, drag her away by the hair and sexually assault her. On the night of the murder, Bryant stated that he, Hasbrouck and Tinsley walked around Belle Haven with golf clubs from the Skakel residence, with Hasbrouck stating that he had his 'caveman club' and that he would not leave Belle Haven unsatisfied. The victim had suffered multiple and severe injuries to her head and stab wounds to her neck which were consistent with being caused by a piece of golf club shaft. Pieces of the golf club found near the victim's body were the same brand of golf club found at the Skakel residence. Evidence presented at the petitioner's criminal trial shows that these clubs were commonly left about the Skakel property.

"Corroboration of Bryant's statements can be found in the very reason that he is unavailable to testify. In the present case, Bryant, Hasbrouck and Tinsley have all invoked their fifth amendment right not to incrimi-

nate themselves after being served with subpoenas to testify at a deposition." (Emphasis added.)

Finally, the trial court turned to whether Bryant's statements were against his penal interest. Because Bryant had placed himself in Belle Haven on the night of the murder, in the company of the victim, discussed assaulting the victim with Hasbrouck and Tinsley, and had been in possession of golf clubs belonging to the Skakel family, the trial court concluded that Bryant's statements were against his penal interest. In light of these conclusions, the court ruled that the statements "are admitted into evidence, and his self-serving statements go to their weight," not their admissibility.

The trial court then turned to the issue of whether the petitioner was entitled to a new trial on the basis of this evidence. Specifically, the court focused on whether the statements were evidence that, under the fourth prong of *Asherman*, probably would produce a different result upon retrial. The court noted that there was a "substantial difference" between the standard it had applied to the admissibility question, which it viewed as a "close call," and the standard to be applied under *Asherman*. The court further noted that, in accordance with *Shabazz* v. *State*, supra, 259 Conn. 825–28, the latter standard required the court to engage in a threshold credibility determination. Ultimately, the court concluded that Bryant's statements, although admissible, were not credible.

The court explained its conclusion as follows: "On analysis, [Bryant's statements] are merely claims of information of a crime accompanied by [Bryant's] alibi. The statements appear to be minimally against his interest. Under the *Shabazz* review, the statements were made to two former junior high school classmates with whom Bryant maintained only casual contact over the years. Although Bryant acquired his information within days of the offense, he, as a trained lawyer, kept it to himself for over one quarter of a century. On finally disclosing, he insisted upon anonymity. He did not come forward voluntarily, rather, it only happened when [Mills] informed [Kennedy] of this information.

"*The corroboration for Bryant's claim is minimal.* There was some indication of the knowledge of the geography of Belle Haven, but it is clear that he was there before. Of all the persons in Bryant's circle of Greenwich acquaintances at the time, none of them other than Walker and Mills recalled his two companions. Not even [the victim's] closest friends have any recollection of any association between [the victim] and Bryant, Hasbrouck and Tinsley. *No one puts* [*the victim*] *in the company of Bryant and his companions on the night of October 30, 1975*. There is no testimony that the three were in her company on any other occasion. *Importantly, witnesses testify as to* [*the victim's*] *activities until 9:30 p.m. No one has any recall of ever*

seeing Bryant and his companions in Belle Haven on the night of the murder.

"The claim that Hasbrouck and Tinsley went 'caveman style' is not supported by the evidence. There was no evidence of the victim being dragged by the hair. Missing from Bryant's statement is anything concerning the breaking of the [golf] club or the stabbing of the victim. The testimony of Bryant is absent any *genuine* corroboration. *It lacks credibility, and therefore, would not produce a different result in a new trial.*" (Emphasis added.)

B

With these facts in mind, we now turn to the specific contentions made by the petitioner in support of his claim that the trial court improperly denied his petition for a new trial on the basis of Bryant's statements of third party culpability. The petitioner contends that the trial court's conclusion that Bryant's statements were sufficiently trustworthy to be admitted under the hearsay exception for declarations against penal interest is inconsistent with its conclusion that the statements were not credible. Although he acknowledges that the trial court may make a minimum credibility determination under *Shabazz* v. *State*, supra, 259 Conn. 827–28, the petitioner contends that, when the court concluded that Bryant's statements were admissible under this hearsay exception, it necessarily determined that his statements satisfied this credibility threshold. He further contends that the trial court's favorable findings regarding the factors relevant to the question of admissibility—corroboration, and against his penal interest—improperly were contradicted by the court's unfavorable findings on those same factors when deciding whether the *Asherman* test for a new trial had been met. We disagree.

We note that the parties' dispute as to this evidence focuses solely on the fourth prong of the *Asherman* test, as the state does not dispute that this evidence is newly discovered, noncumulative and would be material if credible. The standard under which we review the petitioner's claim is twofold. With respect to his claim that the trial court properly could not engage in a credibility assessment once it determined that the evidence was sufficiently trustworthy to be admissible, his challenge is to the legal standard applied and, therefore, our review is plenary. *Shabazz* v. *State*, supra, 259 Conn. 820; *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 669–70, 461 A.2d 1380 (1983). With respect to his challenge to the trial court's ultimate conclusion that Bryant's statements were not credible, that conclusion is reviewed for an abuse of discretion. *Shabazz* v. *State*, supra, 820.

1

The question of whether, after concluding that Bry-

ant's statements were sufficiently trustworthy to be admitted into evidence, the trial court properly could engage in a credibility analysis is resolved by examining the roles that the trial court played in making each determination. When the trial court determined that Bryant's statements were admissible, it was engaging in a gatekeeping function. See *State* v. *Schiappa*, 248 Conn. 132, 163 n.39, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999); *State* v. *Gordon*, 84 Conn. App. 519, 529–30, 854 A.2d 74, cert. denied, 271 Conn. 941, 861 A.2d 516 (2004). The trial court simply determined that the evidence met the threshold that would allow the jury to *consider* the evidence. It was not acting as the trier of fact to determine whether the jury would find the evidence credible.[22] See *State* v. *Schiappa*, supra, 154 n.26 ("[i]n determining whether the threshold level of trustworthiness [is] satisfied [for the admissibility of a statement against penal interest offered to exculpate a defendant] the trial court does not have to find it to be absolutely trustworthy because if this were so, the province of the jury as the finder of fact and weigher of credibility would be entirely invaded" [internal quotation marks omitted]); *State* v. *Bryant*, 202 Conn. 676, 696–97, 523 A.2d 451 (1987) ("where the disserving parts of a statement [against penal interest] are intertwined with self-serving parts, it is more prudential to admit the entire statement and let the trier of fact assess its evidentiary quality in the complete context").

We previously have explained that, like other hearsay exceptions for unavailable witnesses, a determination that a third party declaration against penal interest is sufficiently trustworthy to be admitted simply means "that safeguards *reasonably equivalent to the oath and the test of cross-examination* exist." (Emphasis added; internal quotation marks omitted.) *State* v. *Lopez*, 254 Conn. 309, 316, 757 A.2d 542 (2000); accord *Ferguson* v. *Smazer*, 151 Conn. 226, 232, 196 A.2d 432 (1963) (third party declaration against pecuniary interest). Neither this court nor any other authority of which we are aware supports the proposition that the mere fact that a witness is under oath and subject to cross-examination would require the jury to find that the witness has even a modicum of credibility. Nor does the fact that a different or more stringent test applies to declarations against penal interest than other hearsay exceptions. The more stringent test simply counterbalances the greater risk of fabrication for such statements to ensure that they have the same equivalent safeguards as other hearsay statements when admitted for the fact finder's consideration. See *State* v. *Lopez*, supra, 319 ("[t]hird party statements that exculpate an accused are suspect because of the danger of fabrication"); *State* v. *Rivera*, 221 Conn. 58, 71, 602 A.2d 571 (1992) (requirement of corroboration is for "purpose of circumventing fabrication"); *State* v. *DeFreitas*, 179 Conn. 431, 452 n.9, 426

A.2d 799 (1980) (admissibility test for third party declarations is designed "[t]o circumscribe fabrication and ensure the [statement's] reliability"); *State* v. *Lynch*, 21 Conn. App. 386, 395, 574 A.2d 230 (admissibility test for third party declarations exculpating accused is based on "concern[s] about the dangers of collusion and fabrication"), cert. denied, 216 Conn. 806, 580 A.2d 63 (1990).

Thus, when determining admissibility, the trial court makes no determination as to what weight, if any, a jury might give this evidence. Indeed, to the extent that the statements most clearly against penal interest are those that Bryant attributes to Tinsley and Hasbrouck before and after the murder, it is well settled that, when a witness testifies as to declarations against interest by a third party, "a trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest." *State* v. *Rivera*, 268 Conn. 351, 372, 844 A.2d 191 (2004); accord *State* v. *Hernandez*, 204 Conn. 377, 391, 528 A.2d 794 (1987).

By contrast, the trial court's role in applying the fourth prong of the *Asherman* test is from a different vantage point. In *Shabazz* v. *State*, supra, 259 Conn. 822–24, this court explained: "Prior case law confirms that a trial court must engage in some form of credibility analysis in order to determine, under *Asherman*, whether the newly discovered evidence offered in support of a petition is likely to produce a different result on retrial. . . .

"[W]hether a new trial should be granted *does not turn on whether the evidence is such that the jury could extend credibility to it*. . . . The [petitioner] must persuade the court that the new evidence he submits will probably, not merely possibly, result in a different verdict at a new trial . . . . It is not sufficient for him to bring in new evidence from which a jury could find him not guilty—it *must be evidence which persuades the judge that a jury* [*probably*] *would find him not guilty*. . . . This articulation of the petitioner's burden of proof assigns to the trial court, in the first instance, the responsibility of evaluating the credibility of the evidence in order to decide properly whether a new trial would produce a different result. In elaborating on this point, we explicitly [have] approved of Judge Cardozo's concurring opinion in *People* v. *Shilitano*, 218 N.Y. 161, 180, 112 N.E. 733 (1916), wherein he stated that a judge, faced with conflicting stories [on a petition for a new trial], should [not] abandon the search for truth and turn it over to a jury. . . . [Rather] it [is] the duty of the trial judge to try the facts, and determine as best he [can] where the likelihood of the truth lay. . . . He [is] not at liberty to shift upon the shoulders of another jury his own responsibility." (Citations omitted; emphasis in original; internal quotation marks omitted.)

The court in *Shabazz* went on to state: "Although

. . . we previously have established that a credibility determination is a necessary part of a trial court's analysis under the fourth prong of *Asherman*, we never have defined the proper parameters of such a determination. In this regard, we note that the extent to which a trial court properly assesses the credibility of the newly discovered evidence is informed, in large part, by two well-defined and, often, competing interests. First, the state has a general interest in preserving final judgments of conviction that have been fairly obtained and in ensuring that appropriate deference is given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility . . . . Second, the petitioner has an interest, shared by the state and the judiciary, in ensuring that a wrongful conviction does not stand. . . .

"Our formulation of the trial judge's role in passing on the credibility of newly discovered evidence must strike the appropriate balance between these two interests. *If, on the one hand, we were to limit the trial court solely to a determination of whether the newly discovered evidence would be admissible in a new trial and whether it might result in a different verdict, the trial court would be stripped of its legitimate fact-finding function on the petition and* [*would*] *be relegated to the role of gatekeeper of the evidence. Such a result would render judgments of conviction unduly susceptible to collateral attacks, thereby giving insufficient weight to the state's legitimate interest in finality.* Alternatively, were we to hold that the trial court always acts as the final and sole arbiter of credibility in evaluating the evidence alleged to justify a new trial, we would be impeding the petitioner's legitimate interest in establishing that a wrongful conviction does not stand. . . .

"We therefore conclude that, in order to give due weight and consideration to these important interests, and in order to provide sufficient flexibility to accommodate the wide variety of types of newly discovered evidence that may be offered in support of a petition for a new trial, trial courts should utilize the following approach when applying the fourth element of the *Asherman* test. The trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial. *In so doing, it must determine, first, that the evidence passes a minimum credibility threshold. That is, if, in the trial court's opinion, the newly discovered evidence simply is not credible, it may legitimately determine that, even if presented to a new jury in a second trial, it probably would not yield a different result and may deny the petition on that basis.* . . . If, however, the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result or otherwise avoid an injustice, the

fourth element of the *Asherman* test would be satisfied." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Shabazz* v. *State*, supra, 259 Conn. 825–28.

Consistent with *Shabazz*, we conclude that the trial court was not divested of its authority, and indeed responsibility, to examine the credibility of Bryant's statements following its conclusion that the statements satisfied the minimum threshold for admission as declarations against penal interest. Indeed, in *Shabazz*, this court stated that, "because the interests implicated in a petition for a new trial remain the same irrespective of the nature of the newly discovered evidence at issue, we can conceive of no principled basis for maintaining two different tests [for different types of evidence]." Id., 829–30. The court underscored that the failure to apply a credibility analysis in certain cases improperly would "relegate the trial court to the role of evidentiary gatekeeper . . . ." Id., 831 n.14.

We also reject the contention advanced by the petitioner that, when doing so, the trial court was precluded from considering any evidence regarding corroboration, or lack thereof, because the court previously had considered whether some aspects of Bryant's statements were corroborated when determining whether the threshold for admissibility had been met.[23] In its admissibility determination, the trial court appears to have relied on corroboration for principally peripheral facts in Bryant's account, such as his visits to Belle Haven with or without Hasbrouck and Tinsley *prior* to the night of the murder, whereas, in its credibility determination, discussed in part I B 2 of this opinion, the court appears to have focused on the lack of corroboration for material facts relating to the night of the murder. Although the trial court *could* have considered all evidence relating to corroboration when addressing the admissibility question, its bifurcation of the corroboration evidence was not improper.[24] Corroboration is only one of several factors that determines the trustworthiness of third party declarations against penal interest, and we have instructed the trial courts to consider the totality of the circumstances rather than to view each factor as necessarily conclusive. See *State* v. *Lopez*, supra, 254 Conn. 316 ("We previously have emphasized . . . that no single factor in the test we adopt for determining the trustworthiness of third party declarations against penal interest is necessarily conclusive . . . . Thus, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." [Citations omitted; internal quotation marks omitted.]).

In the present case, the trial court considered some

of the corroboration evidence and determined that this evidence, considered as part of the totality of circumstances, was sufficient to admit Bryant's statements as declarations against penal interest. The petitioner's approach would not only be contrary to *Shabazz*, but also would force trial courts to apply a higher threshold for admissibility so as not to abdicate their right to review all pertinent evidence when making their determination as to whether the proffered evidence probably would yield a different result on retrial. We cannot sanction such an approach.

2

In light of our conclusion that the trial court properly considered the credibility of Bryant's statements, we turn to the question of whether its conclusion that this evidence "is absent any genuine corroboration . . . lacks credibility, and therefore, would not produce a different result in a new trial" constituted an abuse of discretion. In so doing, we are mindful that evidence of third party culpability, if credible, undoubtedly would be of great significance in a retrial. We also are mindful, however, that, "when reviewing the action of a trial court under an abuse of discretion standard, we should read the record to support, rather than contradict, [the trial court's ruling]." (Internal quotation marks omitted.) *State* v. *Lugo*, 266 Conn. 674, 692 n.16, 835 A.2d 451 (2003); accord *State* v. *Orr*, 291 Conn. 642, 667, 969 A.2d 750 (2009) ("[i]n determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did" [internal quotation marks omitted]); *State* v. *Skakel*, supra, 276 Conn. 724 ("[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion" [internal quotation marks omitted]). We, therefore, have scrutinized carefully all of the evidence presented at the hearing on the petition that bears on this issue, and we conclude that the lack of corroboration, as well as the circumstances under which Bryant's allegations emerged, fully support the trial court's conclusion.[25]

The documentary and testimonial evidence presented to the trial court on the petition for a new trial reveals the following evidence relating to whether Bryant's account was credible. As the trial court noted, not a *single* witness who Bryant claimed to have seen or with whom he claimed to have spoken, including his close friend Walker, or anyone who was out in the neighborhood that night recalled Bryant's presence or that of Hasbrouck and Tinsley. Perhaps most significantly, none of the girls who Bryant claims were in the meadow when Tinsley and Hasbrouck supposedly made comments and sexual overtures that created an "uncomfortable" situation reported their presence or this

incident—an incident that would seem highly relevant following the discovery the next day of the half naked, brutalized teenage female victim who allegedly was in the meadow when these comments were made. Bryant's description of his companions also suggests that they would have been noticed had they been there. Although Tinsley and Hasbrouck had been to Belle Haven on a few occasions, Bryant described them as "outsiders." He also described them both as approximately six feet, two inches tall and 200 pounds, Hasbrouck as African-American and Tinsley as mixed race. Bryant also is African-American and was six feet tall, and 160 to 170 pounds at the time of the murder. These three young men did not look like the average fourteen or fifteen year olds who would have blended into the crowd,[26] particularly not in an area that was described by one witness as "a fairly lily-white community."[27] We also note that one person who Bryant claimed to have seen walking about the neighborhood that night, Edwards, unequivocally stated that she was not even out in the neighborhood that night.

The evidence also contradicts Bryant's account of the location of the principal parties to the events of that evening. Bryant claimed that the victim had been with his group in the meadow in the latter part of the evening, yet other people who undeniably had been with the victim accounted for her whereabouts throughout the entire evening at other locations. Bryant also claimed that Byrne, who had died in 1980 and was only eleven or twelve years old at the time of the homicide, had been with Bryant and his two friends that evening, had been a witness to the murder and had allowed Hasbrouck and Tinsley to spend the night at Byrne's house. Several witnesses, however, placed Byrne with the victim and other friends at various times that night, and all of this testimony placed him with the victim and her friends by no later than approximately 9 p.m. In his police interviews, Byrne never stated that Bryant, Hasbrouck or Tinsley had been with him that night, but instead told the police that he had been at the Skakel house with the victim and others and had gone home after dropping Ix off at her house around 9:30 p.m.[28] Significantly, Byrne's sister stated in a tape-recorded interview that their father had been on the porch when Byrne came home at 9:30 p.m., and that their mother had told her that she had seen Byrne *in his bed at 10 p.m. that night*.[29] Thus, at the very point in time when the petitioner claims the victim was murdered, a murder to which Bryant claims Byrne bore witness, Bryne's mother saw him in his bed. Bryne's sister further indicated that their mother was certain that Tinsley and Hasbrouck were not at the Byrnes' house that night, and Byrne's brother stated that he had arrived at the Byrne house at 8 a.m. on the morning of October 31, had seen Byrne several times around the house that morning, and did not see Tinsley or Hasbrouck.

The record also reflects no corroboration for the alleged motive for the murder, namely, Hasbrouck's supposed obsession with the victim. Bryant claimed with certainty that, prior to October 30, 1975, Walker and Mills both had heard Hasbrouck make comments about wanting to go "caveman" on the victim. Neither Walker nor Mills, however, had any recollection of such comments or even that Hasbrouck had an "obsession" with the victim. Significantly, Walker testified that, if he ever had heard either Tinsley or Hasbrouck make the "caveman" or other graphic comments about the victim that Bryant attributed to them, he would have informed the police. As there is no record of any such report, presumably no such comments were made in Walker's presence.

Similarly, Bryant's account of when Hasbrouck and Tinsley obtained the murder weapon is not corroborated by the record. Bryant stated in his interview with Colucci: "Everybody in Belle Haven touched those clubs. We used to hit balls behind the house." Bryant indicated that they would find the golf clubs on the "back porch," which Bryant described as an "extension of [the Skakels'] yard," "just laying around." Bryant then recounted that, on the night of the murder, "I picked up one. [Tinsley] picked up one. [Hasbrouck] picked up one. [Byrne] picked up one. And we were, like, goofing around. . . . I had swung it and put mine down. I didn't even put it down, I swung it back to where the bag—there was like a bag that was sort of laying there and so I swung it back toward the bag. . . . [Tinsley and Hasbrouck] were using them as sort of like walking sticks." Although, as the trial court noted, there was testimony at the criminal trial that golf clubs commonly were left around the Skakel yard and thus Bryant's account of handling the clubs *prior to* the night of the murder was corroborated to some extent by that evidence, the evidence adduced at that trial did not corroborate his account with respect to the night of the murder. As we noted in *State* v. *Skakel*, supra, 276 Conn. 644, on the day that the victim's body was discovered, Detective James Lunney of the Greenwich police department found golf clubs *inside* the Skakel house, in a barrel in the mudroom.[30] Lunney made that discovery in the course of a neighborhood canvass for golf clubs that might be mates to the murder weapon, after he and another police officer walked from the crime scene *through the Skakel backyard* and into the back door of the Skakel house. The evidence at trial also indicated that, although numerous people had spent time in or walked through the Skakel backyard on the night of the murder, no one reported observing any golf clubs or a golf bag laying about the yard, despite the fact that it was well known in Belle Haven and the surrounding neighborhoods that the police were looking for golf clubs and the missing section to the murder weapon.[31] Indeed, the petitioner's family had

every incentive to bring a witness forward who could place the golf clubs outside the house that night, but could not produce any such witness. Police records indicate that Franz Wittine, the Skakels' chauffeur and handyman, gave a statement reporting that, on the day of the murder, "I was working about the Skakel property for most of the day and during this time didn't observe any golf clubs lying about the property, nor adjacent to the house, nor did I find any golf clubs lying about the property for the past couple of weeks." Thus, all of the evidence points to the conclusion that there were no golf clubs in the Skakel yard before, during, or after the time period when Bryant claims that he and his friends allegedly were there handling the clubs.

In sum, there is no evidence, *independent of Bryant*, to corroborate any significant aspect of his account of the events of the night of October 30, 1975, whereas there is a plethora of evidence to contradict his account.[32] Contrary to the approach advocated by the petitioner, the mere fact that one could hypothesize explanations for the lack of corroboration as to particular facts does not render improper the trial court's conclusion that Bryant's statements lack "any genuine corroboration."

The petitioner contends, however, that the trial court improperly failed to credit certain statements that he claims corroborate the fact that Bryant, Tinsley and Hasbrouck were in Belle Haven on the night of the murder. We note that the trial court's memorandum of decision does not address these statements, and, therefore, we do not know whether the trial court found the testimony not to be credible, noncorroborative or irrelevant. Even if we were to assume that the trial court found the statements credible, our review of these statements, read in the full context of the witnesses' testimony and the record, indicate that these statements were explained in a manner fully consistent with a conclusion that they were not materially corroborative of Bryant's rendition of the facts. Under the abuse of discretion standard, we do not selectively isolate those parts of a witness' testimony that undermine the trial court's conclusion to the exclusion of other evidence that supports its conclusion. Rather, "every reasonable presumption should be made in favor of the correctness of the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Skakel*, supra, 276 Conn. 724.

Specifically, the petitioner points to Colucci's testimony stating that Hasbrouck and Tinsley had admitted to him that they were in Belle Haven on October 30, 1975. Even if we were to assume, arguendo, that the trial court credited Colucci's testimony, despite the questionable circumstances under which these alleged admissions were made, the complete record indicates that Hasbrouck and Tinsley initially recalled not being in Belle Haven that night, indicated in later conversa-

tions that they had been there, but, upon checking their calendars, subsequently confirmed that they had not been there that night.[33] The trial court reasonably could have concluded that Tinsley and Hasbrouck simply were unclear in their recollection of whether they had been in Belle Haven on that date thirty years ago, having been there on previous occasions near that time, until they checked the day of the week on which October 30, 1975, fell and realized that they would not have been there that night because it was a Thursday and, hence, a school night. Indeed, the trial court reasonably could have taken into account the unlikelihood that Tinsley and Hasbrouck would have willingly and repeatedly discussed past visits to Belle Haven and their whereabouts on the night of the murder if indeed they had committed the murder.[34]

The petitioner also relies on a statement made by Bryant's mother, Barbara Bryant, to two private investigators hired by the petitioner, that her son, Tinsley and Hasbrouck had been in Belle Haven that night, as well as her deposition testimony that he had been in Connecticut earlier that day. Barbara Bryant's full testimony reveals, however, that she repeatedly stated that her son had arrived home well before dark on October 30, 1975, that she offered evidence in support of that fact and that her statement to the contrary to the investigators was simply a repetition of what her son had told her *after* his account had become public knowledge.[35] Thus, accepting as true the part of Barbara Bryant's testimony based on personal knowledge, the best that can be said is that it gives rise to the possibility of a grain of truth in her son's elaborate story, namely, that he may have been in Greenwich on the afternoon of October 30, 1975. Therefore, we cannot conclude that it was an abuse of discretion for the trial court not to credit the statements of Barbara Bryant upon which the petitioner relies.

The petitioner also points to certain physical evidence from the crime scene that he claims corroborates the involvement of Hasbrouck and Tinsley. Specifically, two human hairs were found on a sheet used to cover the victim's body, one with "[n]egroid" characteristics and the other "possibly" having an Asian DNA profile.[36] Close examination of that evidence, however, reveals the de minimis nature of that supposed corroboration. Although it was undisputed that Hasbrouck is African-American,[37] there is no clear evidence as to Tinsley's race. Bryant's mother recalled him as white, Mills recalled him as African-American, and only Bryant described Tinsley as being of "mixed race" and possibly part Asian. It is clear that the sheet was placed over the victim after the discovery of her body, but there was no evidence presented to the trial court to establish where it had come from or who had placed it there. At the criminal trial, Henry Lee, one of the state's forensic experts, had testified about the limited value of hair as

an identifier. Lee also had described the concept of secondary hair transfer, explaining that the hair could have fallen on the sheet at any time. Given these factors, the trial court did not abuse its discretion in rejecting this evidence. Indeed, with respect to other physical evidence, contrary to Bryant's understanding of what the alleged "achieved the caveman" comments meant, there was no evidence that the victim had been pulled by her hair. Nor was there any evidence of semen to corroborate the allegedly completed sexual assault.[38]

In addition to the lack of corroboration, the trial court found reason to question the credibility of Bryant's account in light of the particular circumstances under which he had disclosed this account so many years after the events in question. We agree. Specifically, Mills testified that he and Bryant had had infrequent contact with each other after Bryant left Brunswick. During a telephone conversation in late 2001, well after the petitioner's January, 2000 arrest warrant had been issued and while his criminal trial was pending, Bryant asked Mills about "Little Martha," a screenplay that Mills had been working on for many years that included a fictionalized account of the victim's murder.[39] Bryant suggested that he and Mills collaborate on the screenplay. It was only after Bryant reviewed the screenplay, in which Mills had used composite characters to represent the petitioner, Thomas Skakel and Littleton as suspects, that Bryant named Hasbrouck and Tinsley as the "real" perpetrators of the crime.

The fact that Bryant relayed this account directly in connection with his offer to assist in the development of a screenplay provided an additional reasonable basis for the trial court to question the veracity of the account. Indeed, at the time he relayed this account, Bryant never asked Mills to provide this information to others who could aid the petitioner or who could bring charges against the two men who Bryant claimed had committed the murder and who he claimed should be punished. Logic would dictate that, if Bryant's motivation actually had been to make this information known both to aid the petitioner but to do so *without disclosing his identity*, he would not have told a friend with whom he had had only limited contact since high school, but, rather, would have made an anonymous telephone call or sent an anonymous letter to the petitioner's attorney or to the state's attorney. Mills had no knowledge to substantiate Bryant's account. Furthermore, we note that the record indicates that Bryant's account to Mills, and later to Walker, may not have been the only time that Bryant lied to or misled these friends.[40]

Finally, like the trial court, we decline to speculate as to why Bryant invoked his fifth amendment right not to testify. It is not surprising that counsel advised Bryant, Tinsley and Hasbrouck to remain silent when they had nothing personally to gain by coming forward

and the state already had convicted someone else of the crime. The sole question we must answer is whether the trial court abused its discretion in concluding that Bryant's account, while sufficiently trustworthy to be admissible, "is absent any genuine corroboration . . . lacks credibility, and therefore, would not produce a different result in a new trial." Given the weight of evidence in the record to amply support this conclusion, we conclude that the trial court did not abuse its discretion in denying the petition for a new trial on the basis of Bryant's statements.[41]

II

The petitioner also claims that he is entitled to a new trial on the basis of evidence that, prior to his criminal trial, Garr, who had worked first as a police detective on the victim's murder case when the investigation was reopened in 1991 and later as lead investigator in the state's attorney's office in 1994, had engaged in a "secret pact" and book deal with Levitt about the petitioner's criminal case.[42] In the foreword to a book Levitt wrote that was published in 2004, he referred to his relationship with Garr and noted: "At our lowest ebb, we made a pact to tell our story. Here it is." L. Levitt, Conviction: Solving the Moxley Murder: A Reporter and a Detective's Twenty Year Search for Justice (Regan Books 2004), forward, p. x. According to the petitioner, Levitt and Garr had a secret arrangement to write a book about the case that caused Garr to have a "particularly unique bias" against the petitioner that "undermin[ed] Garr's credibility in his selection, investigation and use of . . . witnesses, and . . . dilutes the already tenuous probative value and effect of the circumstantial evidence" on which the petitioner had been convicted. As evidence of the effect of this bias, the petitioner points to statements in Levitt's book indicating that Garr had "threatened witnesses leading up to and during the petitioner's trial." The petitioner contends that the trial court improperly concluded that this evidence was not newly discovered and that, had this evidence been disclosed to the jury at his criminal trial, it would not have impacted the outcome of the case.

The state requests that we affirm the trial court's decision on the alternate ground that, because the petitioner had failed to plead this claim properly and it was time barred, the trial court should not have considered it. See footnote 16 of this opinion. Should this court reach the merits, the state claims that: (1) the petitioner failed to establish that this evidence was unknown or undiscoverable through the exercise of due diligence at or prior to trial because the petitioner's trial counsel had heard rumors about the book deal, could have called as witnesses the sources of these rumors and chose not to question Garr himself about the book; and (2) even had the rumors been explored or Garr been questioned in the criminal trial, such testimony would

not have produced a different result. We conclude that, even if we were to assume without deciding that the petitioner properly had pleaded this claim and that this evidence was newly discovered, the trial court did not abuse its discretion in determining that the petitioner was not entitled to a new trial because of the petitioner's failure to prove that this evidence probably would result in an acquittal on retrial.

The record discloses the following additional undisputed facts. On or about May 21, 2001, the petitioner's criminal trial attorney, Michael Sherman, filed a motion for discovery and inspection, requesting, inter alia, disclosure of evidence that any agent of the state had a "pecuniary or other interest in the development and/or outcome of this case, including, but not limited to, any contract, agreement, or on-going negotiations, which relate to the preparation of any book . . . ." The trial court, *Kavanewsky, J.*, denied the request as written, but granted it limited to the state's witnesses. The petitioner received no evidence from the state in response to this request prior to trial. During the course of the criminal trial, Garr testified outside the presence of the jury. When Garr was asked by Sherman whether he had a book deal, the state objected on relevancy grounds. Sherman did not challenge that objection.

At the hearing on the petition for a new trial, the petitioner presented three witnesses, Levitt, Garr and Sherman, to testify in connection with this claim. In its decision rejecting the claim, the trial court, *Karazin, J.*, recited the following testimony. Levitt testified that he began covering the victim's murder case as a reporter in 1982. In 1995, he published an article in Newsday recounting the findings of Sutton Associates, a private investigation firm hired by the petitioner's father, Rushton Skakel, Sr., that disclosed that Thomas Skakel and the petitioner had given the firm different accounts of their activities on the night of the murder than they had given to the police in 1975. Shortly after the article was published, Garr contacted Levitt, expressed interest in the information that Levitt had obtained, which had not been available to Garr, and the two men became friends. Levitt had been thinking of writing a book about the homicide and had made inquiries prior to the grand jury convening in 1998. Levitt expressed his interest to Garr and even sought his help in this endeavor, but, according to Levitt, Garr consistently had refused, stating that he would not help Levitt until the case concluded. Although Levitt stated in the book that he and Garr had made a "pact" to tell their story, Levitt testified that there had been no conversations regarding compensation at that time. It was only after the petitioner's conviction that Levitt concluded that it seemed only fair to split the book profits with Garr, and, in February, 2003, he entered into an agreement to do so. The lowest ebb to which Levitt also had referred in the book's foreword was the period after the publication of Mark

Fuhrman's book about the victim's murder case, in which Fuhrman, and later others, had made disparaging remarks about the Greenwich police department's investigation into the victim's homicide.[43] Levitt further testified that it was only after the case had concluded and he knew the "end" of the story that he began working on the book. Additionally, Levitt explained that, although he had stated in the book that reluctant witnesses had related that Garr "cajoled, harassed, or threatened them," he simply meant that Garr had told witnesses that, if they did not come forward voluntarily, he would subpoena them. Garr testified that, although he had met with Levitt and reviewed drafts of the book, his role was limited to pointing out inaccuracies; he had no role in drafting and provided no access to evidence.

Sherman testified that, prior to trial, he had received " 'pretty good information' " that Garr had a book deal. Although Levitt never had made such an assertion, Sherman identified three persons as his sources regarding the alleged deal—Fuhrman, Tim Dumas and Dominick Dunne—all of whom had written about the victim's murder case. Sherman testified that it was because of these rumors about Garr having a "book deal" that he had filed the aforementioned motion for discovery. Sherman claimed that, if he had known about the alleged pact Levitt mentioned in *his* book, he would have made Garr's financial motive a central theme of the petitioner's defense. Finally, Sherman testified that he had spoken to the state's witnesses prior to trial and concluded that Garr had been "heavy-handed" in his treatment of them.

On the basis of this testimony, the trial court then essentially made two determinations before denying the petitioner's claim in connection with this evidence. First, the trial court turned to the issue of whether the evidence offered in support of the petitioner's claim for a new trial was newly discovered, meaning that it could not have been discovered previously despite the exercise of due diligence. The court determined that the petitioner had not established that "any evidence regarding Garr and Levitt was unknown or undiscoverable through the exercise of due diligence at or prior to trial." It reasoned that Sherman had heard rumors of a book deal involving Garr and should have pursued them. Specifically, all three of the sources of these rumors—Fuhrman, Dumas and Dunne—had attended the petitioner's criminal trial in 2002, and "[n]othing prevented Sherman from inquiring further to see if any of those persons had information regarding an alleged book deal." Additionally, in light of Judge Kavanewsky's ruling granting the petitioner's discovery request for information of potential pecuniary gain by the state's witnesses, the trial court concluded that it was apparent that, had Sherman "requested a ruling from the court when he asked Garr about a book deal, the court would have overruled the state's objection."

Next, the trial court examined whether the evidence, even if newly discovered, was likely to produce a different result in the event of a new trial. Second, the court concluded that, even "[i]f [the] petitioner had presented this evidence . . . that [Garr] told his friend [that] if he wrote a book he would try to help him, but he could not do anything until the case was over, [it] is not evidence that would have swayed the jury as to lead it to acquit."

Whether trial counsel has fulfilled his or her duty to conduct a reasonable investigation forms the linchpin issue in a petition for a new trial made on the basis of newly discovered evidence. "[T]o entitle a party to a new trial for newly-discovered evidence, it is indispensable that he should have been diligent in his efforts fully to prepare his cause for trial; and if the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted." (Internal quotation marks omitted.) *Terracino* v. *Fairway Asset Management, Inc.*, 75 Conn. App. 63, 77, 815 A.2d 157, cert. denied, 263 Conn. 920, 822 A.2d 245 (2003). Therefore, "[t]he [petitioner] has the burden of proving that the evidence . . . could not have been discovered and produced [in] the former trial by the exercise of due diligence . . . ." *Kubeck* v. *Foremost Foods Co.*, supra, 190 Conn. 670; accord *Asherman* v. *State*, supra, 202 Conn. 434. "Due diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible. . . . The question which must be answered is not what evidence might have been discovered, but rather what evidence would have been discovered by a reasonable plaintiff by persevering application, [and] untiring efforts in good earnest." (Citation omitted; internal quotation marks omitted.) *Kubeck* v. *Foremost Foods Co.*, supra, 672.

We recognize that, with due diligence and reasonable effort at or prior to the criminal trial, the petitioner *might* have been able to pursue further the "rumors" of a book deal because Dumas, Dunne and Fuhrman had attended the criminal trial in 2002 and clearly were available to be called as witnesses at that time. Additionally, in light of Judge Kavanewsky's ruling on the petitioner's discovery request, the petitioner *might* have been given permission to question Garr about the book, any expectation of financial gain or his meetings or sharing of information with Levitt, despite the "look" the trial court gave to Sherman after he had asked a question about the book deal. Therefore, we are hesitant to conclude that the trial court improperly determined that the evidence was not newly discovered. On the other hand, we are hesitant to suggest that the state can avoid the deleterious impact of any failure to comply fully with its obligations under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), simply because one of its investigators has not been forthcoming about information relevant to a discovery

request filed with the specific purpose of obtaining that particular information. See *State* v. *White*, 229 Conn. 125, 135, 640 A.2d 572 (1994) ("nondisclosure of the reports and statements constitutes suppression by the prosecution even if, at the time of the hearing on probable cause, the reports and statements were in the police files rather than the prosecutor's files"); but see *State* v. *Rasmussen*, 225 Conn. 55, 91, 621 A.2d 728 (1993) ("[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*" [internal quotation marks omitted]).

Accordingly, we conclude that, even if we were to determine that the evidence was newly discovered, the petitioner has failed to demonstrate that the trial court abused its discretion in concluding that this evidence likely would not result in an acquittal upon retrial. The petitioner has made vague claims of witness intimidation, but has pointed to no witness whose testimony was affected by Garr's conduct, and the petitioner has pointed to no evidence that was suppressed by Garr such that the petitioner was prevented from preparing his defense. Although the petitioner argues in his brief that Garr failed to investigate Coleman's testimony, as we explain in greater detail in part III of this opinion, the petitioner had equal access to evidence that could corroborate or discredit Coleman's testimony. Thus, we are unable to conclude that the trial court abused its discretion in concluding that the petitioner was not entitled to a new trial on the basis of the evidence regarding Garr's agreement to assist Levitt with the writing of Levitt's book.[44]

III

We next turn to the petitioner's claim that the trial court improperly denied his petition for a new trial on the basis of testimony from former Elan residents that would contradict the testimony of Coleman, the state's only witness to attest unequivocally that the petitioner had confessed to killing the victim. The petitioner contends that, despite reasonable efforts, these witnesses whom Coleman had named as possibly having overheard the confession could not be located prior to trial. He further contends that, only after trial and exerting *extraordinary* efforts was he able locate these witnesses, who would testify that they never had heard the petitioner make such a confession and would cast doubt on Coleman's credibility generally. The petitioner, therefore, claims that the trial court improperly concluded that: (1) these witnesses could have been discovered prior to trial with due diligence; and (2) their testimony was largely cumulative of other former Elan residents who never had heard the petitioner confess, was not material and was unlikely to result in an acquittal upon retrial. We conclude that the trial court did not abuse its discretion in concluding that the peti-

tioner had failed to meet his burden of proving that this evidence was newly discovered.

The record reveals the following additional undisputed facts and procedural history. Coleman testified before the grand jury in 1999, and at the petitioner's probable cause hearing, but, because he died in 2001, his probable cause testimony was read into the record at trial. As we previously have noted in our discussion of the evidence at the petitioner's criminal trial, Coleman testified that, one night, while he was guarding the petitioner in the Elan dining hall after the petitioner's unsuccessful escape from the facility, the petitioner had said "I am going to get away with murder because I am a Kennedy." According to Coleman, the petitioner then stated "how he had made advances to this girl where he lives and that she spurned his advances and that he drove her skull in with a golf club." The petitioner told Coleman that this had happened in "a wooded area" and that "he had hit her so hard that the golf club had broken in half." Coleman acknowledged that, in his grand jury testimony, he had testified that another Elan resident—either John Simpson, Cliff "Reubin" or Everette James—was working with him in the dining hall that night and could have overheard the petitioner make this confession. None of these witnesses testified at trial.

At the hearing on the petition for a new trial, the petitioner offered testimony from Cliff *Grubin*—not Reubin, as misstated by Coleman, James, whose full name is Alton Everette James III, and Simpson. Grubin, whom the petitioner had located in Ibiza, Spain, testified that he never had guarded the petitioner at Elan and never had heard him confess to killing the victim. Grubin further testified that Coleman once had stated that he "was a very good liar." James, whom the petitioner had located in Virginia, recalled guarding the petitioner on more than one occasion, but stated that he never had heard the petitioner confess to killing the victim on those or any other occasions. Simpson, whom the petitioner located in Florida, recalled guarding the petitioner on one occasion in which Coleman suddenly had stated that the petitioner "just admitted that he killed this girl," but Simpson explained that it had become evident upon his questioning of the petitioner that he had made no such admission, and Simpson never heard such an admission at any other time.[45]

The petitioner also presented testimony from Sherman, Colucci and Keith Weeks, a private investigator, regarding the steps they had taken to procure the testimony of these three witnesses. Sherman testified that, prior to trial, he had told Colucci to do what he could to locate these witnesses and "see if we can get them on the phone." Colucci testified, however, that the young attorney at Sherman's office to whom Colucci actually reported only had directed him to look for James and

that no one in Sherman's office ever had told him to look for Simpson or Grubin. Although testimony and documentary evidence established that Colucci had found an address for James in April, 2002, and subsequently a telephone number, Sherman stated, "we just . . . couldn't connect on the phone with him." Sherman acknowledged that he never directed Colucci to see whether any of the Elan residents whose contact information they did have knew the whereabouts of any of the three witnesses. Colucci eventually spoke to James in 2004, after he had been hired by the petitioner's appellate counsel.

Weeks testified that he had been hired by the petitioner's appellate counsel in May, 2005, to locate Simpson and Cliff "Reubin." Weeks only knew their names and the time frame during which they had resided at Elan. Weeks ran several unsuccessful computer searches, but then found a posting on an Internet message board set up by former Elan students from a Cliff "Grubin," who listed his attendance at Elan from 1978 to 1980. The posting listed a city and state of residence and an e-mail address. Weeks unsuccessfully attempted to track Grubin down through his place of residence, but eventually sent Grubin an e-mail at the address provided on the message board. Grubin responded seven days later, and Weeks interviewed him shortly thereafter. Weeks found Simpson through information that Weeks had acquired from various former Elan residents and eventually pieced together to obtain contact information. Weeks stated that it took him approximately one month to locate Simpson, whom Weeks referred to as "the most difficult person I have ever had to locate."[46]

The trial court concluded that efforts to locate the three witnesses prior to and during trial did not satisfy due diligence. The court further concluded that these witnesses could have been located using the same methods that ultimately were used after trial to locate them. Therefore, the court concluded that the evidence was not newly discovered within the meaning of § 52-270. We agree.

It is highly significant that this evidence is not newly discovered in the sense that the petitioner did not know of the existence of these witnesses prior to trial. Coleman had identified these witnesses *years* before trial. Moreover, the petitioner should have known that Coleman's testimony, if credited, could be a key piece of evidence in the state's case. Sherman apparently concluded, however, that cross-examination of Coleman at trial would be sufficient to discredit him, as he justified his lack of direction to Colucci about locating these witnesses by the fact that he "didn't anticipate that . . . Coleman would be dead at the [time of] trial . . . [and] believed that the jury would see [him]." Sherman had James' contact information in the spring of 2002, but could not "connect" with him. *No* effort was made to

locate Simpson or Grubin prior to or during the trial. Therefore, we fully agree with the trial court's conclusion that Sherman had failed to exercise due diligence to locate the three witnesses.

The petitioner contends that these witnesses could not have been located prior to trial because the state was unable to locate them, despite reasonable efforts to do so. Although that fact *might* demonstrate that these witnesses similarly could not have been discovered by the petitioner before trial with the exercise of due diligence, the testimony to which the petitioner draws our attention does not establish such efforts by the state. Garr indicated that he had a vague recollection of "possibly" attempting to contact Simpson and thought that the state had made "some attempts" to find another witness who possibly lived abroad, to no avail. He never stated what efforts had been made to locate these witnesses, and, therefore, the state's efforts in this regard cannot demonstrate that the witnesses could not have been discovered with the exercise of due diligence. Garr also testified that he believed that he had spoken with James, but that James was uncomfortable talking about his experiences at Elan and had no information. We disagree with the petitioner that this testimony establishes that the petitioner's efforts would have been thwarted had he approached James during the same time period. James willingly submitted to a deposition when he ultimately was approached on behalf of the petitioner, and there is no indication in the record that James would not have cooperated had he been approached by the petitioner prior to or during the trial.

The petitioner also contends that it was improper for the trial court to presume that the methods that ultimately were successful in locating Simpson and Grubin in 2005 similarly would have been successful had they been applied in 2002 or earlier. He further contends that, even if we were to assume that the methods used to find Grubin and Simpson *after* trial would have enabled the petitioner to contact them *prior* to or *during* the trial, his posttrial efforts were so extraordinary that they exceeded what is required to meet the due diligence standard. In essence, the petitioner's claim is that due diligence prior to or during the trial would not have yielded the location of these witnesses so he should not be penalized for failing to exercise such diligence. We are not persuaded.

It is the *petitioner's* burden to prove that the efforts used to find these witnesses would not have yielded the same result had they been applied earlier. *Asherman* v. *State*, supra, 202 Conn. 434 ("[t]he petitioner must demonstrate, by a preponderance of the evidence, that . . . the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence"); *Terracino* v. *Fairway Asset*

Management, Inc., supra, 75 Conn. App. 75 ("[t]he burden of showing due diligence [rests] solely and throughout on the [petitioner]" [internal quotation marks omitted]); see also *Seebeck* v. *State*, 246 Conn. 514, 545, 717 A.2d 1161 (1998) ("[A] petition for a new trial is a civil action . . . . In this civil action, the petitioner is just that, a petitioner, and, therefore, in the trial court he bore the burden of proving, by a preponderance of the evidence, that newly discovered evidence warranted the granting of a new trial." [Internal quotation marks omitted.]). The trial court was not required to infer that the petitioner had met his burden of proof from the evidence demonstrating no actual effort to locate these witnesses prior to trial and from the *absence* of evidence as to whether pretrial efforts would have been successful. The petitioner has not drawn our attention to any testimony adduced from these witnesses as to their accessibility during the pretrial period in relation to the methods used to locate them after the trial. For example, Grubin was not asked whether his 2005 posting to the Elan message board was his first to that site or any other comparable site. We note, however, that the record does reflect that Grubin was living in the United States prior to and during the trial, from 2000 to 2003, a fact that may have made him easier to locate at that time.

We also are not persuaded that the trial court abused its discretion by failing to find that the petitioner's posttrial efforts were so extraordinary so as to exceed the bounds of due diligence. Although we are mindful that Coleman misstated Grubin's last name, Weeks adduced without undue difficulty based on the years of attendance listed on the posting on the Elan message board from Cliff Grubin that he was the person Weeks had been seeking. Moreover, Weeks readily could have pursued Grubin via the e-mail address provided on the Elan message board while simultaneously pursuing his location by way of the place of residence listed. With respect to Simpson, although it did take Weeks almost one month to piece together all of the information from Elan alumni that led to Simpson's contact information, the alumni, and in turn the information they provided, were accessible without undue effort. In sum, in light of the fact that several years had lapsed between Coleman's identification of these witnesses and the time of the trial and the potential significance of Coleman's testimony, the petitioner's efforts to locate these witnesses does not go beyond the bounds of "persevering application, [and] untiring efforts in good earnest." (Internal quotation marks omitted.) *Kubeck* v. *Foremost Foods Co.*, supra, 190 Conn. 672; cf. *State* v. *Wright*, 107 Conn. App. 85, 90–91, 943 A.2d 1159 (rejecting claim that due diligence standard was not met to establish unavailability of witness to testify *at trial* when state spent nine days trying to locate witness, searched numerous databases, made numerous calls, visited vari-

ous locations and attempted to locate witness' family members), cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008). Therefore, we conclude that the trial court did not abuse its discretion in denying the petition for a new trial on the ground that the petitioner had failed to meet his burden of proving that the evidence provided by these witnesses was newly discovered.

IV

Finally, we turn to the petitioner's claim that he should have been granted a new trial because of the state's pattern of failing to disclose exculpatory evidence. The petitioner points to the following pieces of evidence: a composite drawing of a person seen by Charles Morganti, a Belle Haven security guard on October 30, 1975, at approximately 10 p.m., whom the petitioner claims resembles Littleton but clearly does not resemble the petitioner; reports prepared by a state investigator that profile Littleton and Thomas Skakel as potential suspects and that state as an established fact that the petitioner had left his home at around 9:30 p.m. to go to his cousin's house (profile reports); and "time lapse data" that sets forth a chronological account of Littleton's actions prior to, during and after the murder that included charged and uncharged misconduct, as well as listings of crimes against female victims in areas Littleton had frequented. The petitioner claims that the trial court improperly failed to grant the petition for a new trial on the ground of reasonable cause due to the state's pattern of suppression and nondisclosure of this evidence in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. He also claims that the trial court abused its discretion in denying the petition on the ground of newly discovered evidence.

The state contends that we should not consider the petitioner's reasonable cause argument because he declined to pursue it as an independent basis for a new trial, asserting only the ground of newly discovered evidence. The state also contends that the trial court properly relied on this court's decision in the petitioner's direct appeal from his judgment of conviction to conclude that this evidence was not newly discovered. It further contends there was no *Brady* violation with regard to the profile reports and time lapse data because the state had given the petitioner the raw data. The state simply did not produce the *conclusion* of the investigator who had prepared the profile reports, which it claims would have been inadmissible and of little value, or the state's *compilation* of the raw data. We agree with the state.

We note that, although, at the outset of its decision, the trial court referenced the time lapse data as part of the petitioner's claim of a pattern of nondisclosure of exculpatory evidence, the court did not specifically address that evidence in its analysis or make any findings in relation thereto. In his brief to this court, the

petitioner asserts that Solomon prepared the time lapse data concurrently with the profile reports and that "much of its data is incorporated by reference into the Littleton profile report" or that the profile reports "include" the time lapse data. Therefore, for purposes of our analysis, we consider the time lapse data as part of the Littleton profile report and do not address it separately.

The petitioner's claims are to a large degree resolved by our decision in his prior appeal from the judgment of conviction. In *State* v. *Skakel*, supra, 276 Conn. 693–94, the petitioner claimed that he was entitled to a new trial because the state improperly had withheld certain exculpatory evidence, specifically, the composite drawing and the two suspect profile reports. The petitioner further claimed that the state's failure to disclose that evidence had deprived him of his right to a fair trial in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. *State* v. *Skakel*, supra, 694. We rejected his claims as to both the drawing and the profile reports. Id.

With respect to the composite drawing, we concluded that, although the state improperly had failed to produce the drawing in response to the petitioner's pretrial general discovery request,[47] there was no *Brady* violation because the petitioner had had actual notice of the existence of the drawing. Id., 703. Specifically, the state had mentioned the preparation of this drawing in its investigative reports, those reports were turned over to the petitioner, and the petitioner's trial counsel had acknowledged that he was aware of these reports. Id. We further noted that the petitioner had known of Morganti's potential significance as a witness and had the ability to explore this issue directly with him. Id. Finally, we rejected the petitioner's argument that he had not had actual notice because he did not know the exculpatory nature of the drawing until he actually had seen it. Id., 704–705. We concluded that it was sufficient for the petitioner to have known that the drawing potentially could be exculpatory. Id., 705. Because the petitioner had actual notice of this evidence, we concluded that, in the absence of a specific request for the drawing to supplement the general discovery request, there was no *Brady* violation. Id., 707.

With respect to the suspect profile reports, we noted the following facts. "John F. Solomon, a former supervisory inspector with the office of the state's attorney in the judicial district of Fairfield, testified outside the presence of the jury concerning issues that were raised in a motion then pending before the court. During his testimony, Solomon referred to a copy of a report that he had prepared in connection with the investigation of the victim's murder. Solomon characterized that report, which he wrote in 1992, as a profile of Littleton summarizing why, at the time the report was written, Littleton was considered a suspect. Immediately after Solomon

referred to the report, the [petitioner's] trial counsel requested a copy, to which the court responded: 'Not right now. You are talking about examining the witness.' At that same proceeding, the state elicited testimony from Solomon indicating that he had prepared a similar profile of Thomas Skakel, who, at one time, also was a suspect in the victim's murder. The [petitioner] failed to renew his request for those reports before the conclusion of the trial, and his original motion for a new trial, which was timely filed on June 12, 2002, did not refer to the two reports." Id., 707–708.

We concluded that "the trial court acted within its discretion in rejecting the [petitioner's] claim on the ground that the [petitioner] had failed to raise it in a timely manner under Practice Book § 42-54. *Even though the* [*petitioner*] *became aware of the two reports during trial*, he did not raise a *Brady* challenge to the state's failure to provide him with the reports until two and one-half months after the five day limitation period [for filing a motion for a new trial under] . . . § 42-54 had expired." (Emphasis added.) Id., 710.

In addition to the aforementioned facts and conclusions set forth in *Skakel*, the trial court in the present case pointed to the following testimony. Garr had offered testimony to establish that the composite drawing had been in the state's files, which always were accessible to the petitioner. Sherman admitted that, shortly before trial, Solomon had told him about the profile reports.[48] Although Sherman had filed a discovery request almost one year before trial, he acknowledged that he had not renewed this discovery request specifically to request the profile reports.

In light of this testimony and this court's conclusions in the petitioner's previous appeal, we conclude that the trial court did not abuse its discretion in concluding that this evidence was not newly discovered. Although the petitioner contends that this court's statement in *State* v. *Skakel*, supra, 276 Conn. 710, that "the [petitioner] became aware of the two reports during trial" was dicta because the court's holding was directed at the timeliness of the *Brady* challenge, it is clear that this statement was predicated on facts established by the evidence. The petitioner also contends that his May, 2001 discovery motion sought documents that would have included these reports, which were prepared in 1991 or 1992. Although we would agree that the reports would have fallen within the scope of this request,[49] this fact would not negate the knowledge that the petitioner subsequently obtained prior to and during trial that the profile reports existed. The petitioner did not exercise due diligence to obtain these reports once he knew of their specific existence. Indeed, neither the *Brady* doctrine nor our rules of discovery are intended either to relieve the defense of its obligation diligently to seek evidence favorable to it or to permit the defense to close

its eyes to information likely to lead to the discovery of such evidence. In light of these facts, the trial court did not abuse its discretion in concluding that the evidence was not newly discovered.

With respect to the petitioner's reasonable cause and *Brady* claims, we decline to address them for several reasons. First, the trial court did not address these arguments. The petitioner does not claim that he sought an articulation to obtain a ruling on these claims; see *State* v. *Smith*, 289 Conn. 598, 613, 960 A.2d 993 (2008); nor has he sought *Golding* review. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Moreover, the petitioner extends the bounds of reasonable cause beyond its limits. "Although [§] 52-270 permits the court to grant a new trial upon proof of reasonable cause, the circumstances in which reasonable cause may be found are limited." (Internal quotation marks omitted.) *Bleidner* v. *Searles*, 19 Conn. App. 76, 78, 561 A.2d 954 (1989). "[T]he basic test of 'reasonable cause' is whether a litigant, *despite the exercise of due diligence*, has been deprived of a fair opportunity to have a case heard on appeal. *Black* v. *Universal C. I. T. Credit Corporation*, 150 Conn. 188, 194, 187 A.2d 243 (1962); *Wojculewicz* v. *State*, 142 Conn. 676, 678, 117 A.2d 439 (1955); *Dudley* v. *Hull*, 105 Conn. 710, 719, 136 A. 575 (1927)." (Emphasis added.) *Wetzel* v. *Thorne*, 202 Conn. 561, 565, 522 A.2d 288 (1987). Accordingly, the trial court did not abuse its discretion in denying the petition for a new trial on the basis of this evidence.

We are mindful that we have disposed of two of the petitioner's claims solely on the ground that the trial court did not abuse its discretion in concluding that the evidence was not newly discovered because the petitioner did not meet his burden of proving that this evidence would not have been available for use at trial if due diligence had been exercised. Because this conclusion is dispositive of those claims; *Costello* v. *Costello*, 139 Conn. 690, 695, 96 A.2d 755 (1953); *Terracino* v. *Fairway Asset Management, Inc.*, supra, 75 Conn. App. 80; we express no opinion on the possible effect that this evidence could have in a new trial. Undoubtedly, the prerequisites for obtaining a new trial at this stage are stringent. "This strict standard is meant to effectuate the underlying 'equitable principle that once a judgment is rendered it is to be considered final,' and should not be disturbed by posttrial motions except for a compelling reason." *Asherman* v. *State*, supra, 202 Conn. 434. To the extent, however, that the petitioner believes that this evidence would have changed the outcome of his trial, habeas relief is the appropriate avenue to pursue such a claim.

The judgment is affirmed.

In this opinion VERTEFEUILLE, J., concurred, and ZARELLA and McLACHLAN, Js., concurred in parts II, III and IV and in the result.

* This case was argued prior to the implementation of the policy of this court to hear all cases en banc.

[1] The petitioner appealed to the Appellate Court, rather than directly to this court as directed by General Statutes § 51-199 (b) (3). Therefore, the appeal was transferred to this court pursuant to Practice Book § 65-4.

[2] General Statutes § 52-582 provides: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence."

[3] General Statutes § 52-270 (a) provides: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the action to any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or the want of actual notice to any plaintiff of the entry of a nonsuit for failure to appear at trial or dismissal for failure to prosecute with reasonable diligence, or for other reasonable cause, according to the usual rules in such cases. The judges of the Superior Court may in addition provide by rule for the granting of new trials upon prompt request in cases where the parties or their counsel have not adequately protected their rights during the original trial of an action." Under Practice Book § 42-55, "[t]he judicial authority may grant the petition even though an appeal is pending."

[4] The petitioner, who was fifteen years old at the time of the murder but thirty-nine years old at the time of his arrest, raised the following claims in his appeal from the judgment of conviction, each of which we rejected: "(1) his case improperly was transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court; (2) his prosecution was time barred by the five year statute of limitations for felonies that was in effect when the victim was murdered in 1975; (3) the state failed to disclose certain exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), thereby depriving [the petitioner] of his right to a fair trial; (4) the state's attorney engaged in pervasive misconduct during closing argument in violation of the [the petitioner's] right to a fair trial; (5) the trial court improperly permitted the state to introduce into evidence the prior sworn testimony of a certain witness in violation of the [petitioner's] constitutionally protected right of confrontation; and (6) the trial court improperly permitted the state to present evidence of several incriminating statements that the [petitioner] made while a resident at a school for troubled adolescents in Maine." *State* v. *Skakel*, supra, 276 Conn. 639–40. We also rejected the petitioner's challenges to the propriety of several other evidentiary rulings of the trial court. Id., 640.

[5] After the trial court denied the petition, the petitioner filed a motion for certification to appeal, pursuant to General Statutes § 54-95 (a), which the trial court granted. The petitioner then appealed from the judgment to the Appellate Court, and we subsequently transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[6] "The victim's home was located on Walsh Lane, diagonally across the street from the [petitioner's] home, which faced Otter Rock Drive." *State* v. *Skakel*, supra, 276 Conn. 640 n.4.

[7] "Dowdle also was known as James Terrien." *State* v. *Skakel*, supra, 276 Conn. 640 n.5. References to him in this opinion are to Dowdle.

[8] "The trial testimony was less than definitive as to whether the [petitioner] had accompanied his brothers when they drove Dowdle home or whether he had stayed behind with the victim and the others. For example, Shakespeare testified that the [petitioner] had stayed behind and did not accompany his brothers to Dowdle's home that night. Shakespeare, however, was unable to articulate the basis of her recollection and conceded that she had no specific memory either of the Lincoln Continental leaving without the [petitioner] or seeing the [petitioner] in the house after the car had departed for Dowdle's home. Rushton Skakel, Jr., John Skakel and Dowdle all testified that the [petitioner] had accompanied them to Dowdle's home that evening." *State* v. *Skakel*, supra, 276 Conn. 641 n.6.

[9] "Dowdle and Rushton Skakel, Jr., corroborated the [petitioner's] statement that he had spent part of that evening at Dowdle's home watching television. Shakespeare, however, recalled seeing the [petitioner] at his home after Dowdle and Rushton Skakel, Jr., departed for Dowdle's home in the Lincoln Continental." *State* v. *Skakel*, supra, 276 Conn. 645 n.9.

[10] "On cross-examination, defense counsel asked Zicarelli whether he was aware that, on the night before this incident, the [petitioner] 'had slept in his dead mother's dress and felt bad about it . . . .' Zicarelli responded that he had been unaware of any such incident. Julie Skakel testified that the [petitioner] had contemplated jumping off the Triborough Bridge because he felt guilty about having slept in his deceased mother's dress." *State* v. *Skakel*, supra, 276 Conn. 646 n.10.

[11] "The state also introduced the testimony of Matthew Tucharoni, who stated that, in the spring of 1976, the [petitioner], accompanied by Rushton Skakel, Jr., and Julie Skakel, came to the barbershop in Greenwich where Tucharoni then was employed and inquired about a haircut. Tucharoni testified that while he was preparing to cut the [petitioner's] hair, he overheard the [petitioner] say, 'I am going to kill him.' According to Tucharoni, Julie Skakel responded, 'you can't do that,' and the [petitioner] replied, 'Why not? I did it before . . . .' " *State* v. *Skakel*, supra, 276 Conn. 646 n.11.

[12] "Seigen also described the nature of the 'general meetings' at Elan, which were convened to confront residents about specific issues. According to Seigen, '[a] general meeting was probably the scariest word that you would hear when you were at Elan.' A typical general meeting, which was attended by 100 or more Elan residents and staff, focused on one or two residents who were singled out for violating Elan rules. Seigen recalled that the [petitioner] was the subject of a general meeting as a result of his failed attempt to run away from the facility. Seigen stated that he first learned of the [petitioner's] possible involvement in the victim's murder when it was announced at a general meeting by Joseph Ricci, Elan's executive director. Elizabeth Arnold, another former Elan resident, testified that, at that particular general meeting, which lasted approximately three hours, Ricci continuously had confronted the [petitioner] about various issues and that four or five Elan residents 'brutalized' the [petitioner] in a boxing ring. Other former residents of Elan also testified about the details of the torment that the [petitioner] had endured at this meeting, including accusations leveled against the [petitioner] that he had killed the victim. The [petitioner's] initial response to this interrogation was to deny his involvement in the murder. After several rounds in the boxing ring, however, the [petitioner] stated, 'I don't know' or 'I don't remember' in response to questioning regarding his involvement in the murder. During the course of his enrollment at Elan, the [petitioner] also was forced to wear a large cardboard sign around his neck, another form of punishment at Elan. The sign read, 'Confront me on why I murdered Martha Moxley,' or words to that effect." *State* v. *Skakel*, supra, 276 Conn. 647 n.12.

[13] "[The petitioner's] counsel adduced testimony from Joseph Alexander Jachimczyk, a forensic pathologist from Houston, Texas, who concluded that the time of the victim's death most likely was around 10 p.m. on October 30, 1975. Jachimczyk's testimony was bolstered by the testimony of several people, including Dorothy Moxley, Ix and David Skakel, that they had heard dogs barking in the vicinity of the crime scene at approximately that time." *State* v. *Skakel*, supra, 276 Conn. 652 n.14.

[14] "According to Littleton, he was unable to discern the cause of the disturbance." *State* v. *Skakel*, supra, 276 Conn. 653 n.15.

[15] The trial court sentenced the petitioner to a period of incarceration of twenty years to life.

[16] Count five of the petition set forth allegations regarding the composite drawing. The petitioner subsequently withdrew that count, but, because he had offered evidence regarding the drawing in connection with his claim of a pattern of nondisclosure by the state under count six of the petition, the court addressed this evidence as part of that count.

[17] Count nine of the petition did not set forth any specific allegations relating to Garr, Levitt or the book deal, but instead realleged all of the allegations in the preceding eight counts. Limited aspects of Garr's involvement in the investigation were referenced in counts three and five of the petition; there were no references in any counts to either Levitt or the book deal. Nonetheless, because the trial court concluded that "[i]t became clear as the petition for a new trial evolved, that [count nine] was primarily focused on . . . Garr, the book and Garr's conduct," over the state's objection, the court construed that count to be sufficiently broadly drafted to allow it to consider evidence adduced as to the book deal. The state has raised as an alternate ground for affirming the trial court's denial of the petition with respect to this evidence that the petitioner's allegations relating to the book deal should not have been considered because they were not pleaded in the revised petition and did not relate back to allegations actually pleaded

to satisfy the statute of limitations. We decline to address this alternate ground, however, in light of our conclusion in part II of this opinion that the trial court properly concluded that the book deal was not newly discovered evidence.

[18] To the extent that the petitioner relies on the phrase "otherwise avoid an injustice" from *Shabazz* v. *State*, supra, 259 Conn. 828, as an independent ground for a new trial, see footnote 41 of this opinion in which we address that contention.

[19] Accordingly, neither Bryant, Tinsley nor Hasbrouck were subject to cross-examination, nor were they available to testify at the hearing on the petition for a new trial. In response to a question at oral argument before this court as to why the state had not offered Bryant immunity in order to compel him to testify, the state's attorney explained that it is not the state's practice to provide such immunity when it deems a witness' account to be wholly incredible.

[20] Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . .

"(4) Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . ."

[21] Bryant told Kennedy that he had graduated from law school, but never had taken the bar examination or practiced law. Bryant's mother confirmed that he had graduated from law school.

[22] This conclusion is not contrary to the proposition that "[c]ourts have generally subscribed to the view that admissions against penal interest by an informant carry their own indicia of credibility—sufficient at least to support a finding of probable cause. *United States* v. *Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); 1 [W.] LaFave, Search and Seizure [1978] § 3.3, p. 523. This principle has been applied by this court to find adequate verification of the reliability of an informant's naming of other participants in a *crime where at least some significant details of his account of the crime itself have been corroborated independently* . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Velez*, 215 Conn. 667, 674, 577 A.2d 1043 (1990). "The existence of probable cause does not . . . turn on whether the defendant could have been convicted on the same available evidence. . . . [P]roof of probable cause requires less than proof by a preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *James*, 261 Conn. 395, 415, 802 A.2d 820 (2002); accord *State* v. *Marra*, 222 Conn. 506, 513, 610 A.2d 1113 (1992) ("[t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction" [internal quotation marks omitted]).

[23] We note that the state disagreed with the trial court's determination that Bryant's statements qualified as statements against penal interest, renewed its objection to that evidence in its posttrial briefs, and asserts in this appeal, essentially as an alternate ground for affirmance, that, because this evidence would be inadmissible in a retrial, it cannot provide the impetus for affording a new trial. We acknowledge that the trial court's statement when considering whether the evidence probably would result in a different verdict in a new trial, namely, that Bryant's statements are "absent any genuine corroboration," appears to fall short of the standard for admission of a statement against penal interest. See *State* v. *Lopez*, supra, 254 Conn. 319 ("We previously have emphasized that [t]he corroboration requirement for the admission of a third party statement against penal interest is significant and *goes beyond minimal corroboration*. . . . Third party statements that exculpate an accused are suspect because of the danger of fabrication. . . . Therefore, the statement must be accompanied by corroborating circumstances that *clearly indicate* the statement's trustworthiness." [Citations omitted; emphasis in original; internal quotation marks omitted.]). Because we reject the petitioner's claim, however, that the trial court improperly determined that the petitioner had failed to persuade it that Bryant's statement probably would result in a different verdict at a new trial, we need not examine the state's alternative ground for affirmance regarding the court's admissibility determination.

[24] We note, moreover, that a contrary conclusion, namely, that the trial court was required to consider all evidence relating to corroboration when making its admissibility determination, would not advance the petitioner's cause. We then would have to look to the only express statements wherein the trial court quantified the extent to which Bryant's account was corroborated, in which the court found the corroboration "minimal" and "absent any genuine corroboration." That assessment would compel the result that the petitioner did not meet the corroboration factor for declarations against penal interest.

[25] The dissent acknowledges in footnote 9 of its opinion that, as a general matter, "a trial court reasonably could find that, although a newly discovered third party statement against penal interest is sufficiently trustworthy to be admissible at a second trial, the statement nevertheless is otherwise so unworthy of belief that it fails to meet the minimum credibility threshold [under] . . . *Shabazz*, thereby obviating any need for the court to consider the statement in the context of the original trial evidence." The dissent further acknowledges that the abuse of discretion standard applies to our review of a trial court's decision whether to grant a petition for a new trial. As to those statements, we are in agreement. The dissent, however, fails to apply this standard of review. Specifically, the dissent reads the evidence in the light least favorable to supporting the trial court's conclusion, ignores evidence that supports the trial court's conclusion, and hypothesizes theories never advanced and founded on the slimmest of evidentiary reeds.

The dissent's approach is unprecedented in our case law. For more than one century, it has been settled law that an abuse of discretion standard applies not only to the trial court's ultimate decision whether to grant the petition for a new trial, but also to its subsidiary determinations in support of that decision. See, e.g., *Adams* v. *State*, 259 Conn. 831, 837, 792 A.2d 809 (2002); *Shabazz* v. *State*, supra, 259 Conn. 820; *Seebeck* v. *State*, 246 Conn. 514, 536, 717 A.2d 1161 (1998); *State* v. *Raguseo*, 225 Conn. 114, 139, 622 A.2d 519 (1993); *Asherman* v. *State*, supra, 202 Conn. 434; *Lombardo* v. *State*, 172 Conn. 385, 389–93, 374 A.2d 1065 (1977); *Smith* v. *State*, 141 Conn. 202, 207, 104 A.2d 761 (1954); *Gannon* v. *State*, 75 Conn. 576, 578, 54 A. 199 (1903). As we previously have noted, under the abuse of discretion standard, "every reasonable presumption should be made *in favor of the correctness* of the trial court's ruling . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Skakel*, supra, 276 Conn. 724. This court also squarely has rejected the proposition that a less deferential standard than abuse of discretion should apply to review of decisions pertaining to evidence that is not predicated on an assessment of the witness' demeanor. See *State* v. *Lawrence*, 282 Conn. 141, 156–57, 920 A.2d 236 (2007) ("[T]he defendant misapprehends the fundamental distinction between the function of the fact finder, which is to make credibility determinations and to find facts, and the function of the appellate tribunal, which is to review, and not to retry, the proceedings of the trial court. . . . In light of our limited function, it would be improper for this court to supplant its credibility determinations for those of the fact finder, regardless of whether the fact finder relied on the cold printed record to make those determinations." [Citation omitted; internal quotation marks omitted.]); *Besade* v. *Interstate Security Services*, 212 Conn. 441, 448–49, 562 A.2d 1086 (1989) ("To the extent that the [workers' compensation] commissioner's assessment of the evidence before him did not rest on a personal appraisal of the demeanor and credibility of the witnesses before him, [the defendants] urge us to hold that such deference is inappropriate and to engage in a broader appellate scrutiny. . . . We have not heretofore distinguished between documentary and testimonial evidence in defining the role of appellate tribunals in reviewing findings of fact . . . and we are not prepared to introduce such a distinction into administrative proceedings." [Citations omitted.]). Moreover, if the trial court improperly had failed to weigh Bryant's statement against the evidence at the criminal trial, the proper remedy would be to remand the case to the trial court, not for this court to engage in that weighing process, as the dissent does.

[26] The petitioner attempts to explain the fact that no one mentioned seeing Bryant or his friends following the murder by positing that the police investigation was limited to an inquiry as to whether anyone had seen any "strangers" in Belle Haven, which, in the petitioner's view, would not have yielded an identification of Bryant, who was known to people there, or his friends, who had been there previously. Testimony and police records, as well as common sense, however, indicate otherwise. Ix, Edwards and O'Hara all testified that they did not know Tinsley or Hasbrouck. Thus, these young

men would have been strangers to them. Indeed, Bryant himself characterized Tinsley and Hasbrouck as "outsiders." The evidence also indicates that the police questioning was not limited simply to the question of whether people had seen strangers.

The dissent's rationalization that no one saw Bryant and his two friends because of the darkness and the cold also reasonably would have been rejected by the trial court. Bryant did not claim that his group was lurking in the bushes throughout the evening. Rather, he claimed to have spoken with friends like Walker face-to-face and to have congregated with a group of neighborhood teenagers for some period of time. Unless Bryant and his friends wore face masks to ward off the cold, the teenagers would have been able to identify features of persons they encountered face-to-face.

The petitioner also attempts to explain the current inability of witnesses to recall Bryant's presence that night partly by the fact that this incident occurred approximately thirty years ago. For the reasons stated in this opinion, however, the facts suggest that someone would have recalled Bryant's presence. To the petitioner's point, however, it is striking that, while other witnesses had difficulty piecing together a comprehensive and coherent account of the events of October 30, 1975, Bryant was able to provide an incredibly detailed timeline of the events of that evening, recalling times, places, people seen and exact comments made, not to mention such innocuous details as having waved to Julie Skakel. His ability to recount with such clarity the events of almost thirty years past is all the more remarkable given that, by his own admission, he had smoked marijuana and drank a sufficient amount of beer that he described his condition as "a good buzz. Not slightly buzzed, I would say lightly drunk." Indeed, unlike other witnesses who had memorialized accounts of their actions in numerous police interviews, grand jury testimony and trial testimony that would have aided their recall, Bryant had no such occasion to commit these events to memory.

[27] It appears that there was only one African-American family living in Belle Haven, the Jones family. Ethel Jones worked as a cook for the Skakels and resided with her husband and son in a house at the foot of the Skakel property. Bryant told Kennedy that he was "the only black kid living in Greenwich for a couple of years." Mills testified that there were only two African-American students at Brunswick in 1975. At his deposition, Charles Morganti, the Belle Haven security guard who was on duty the night of the murder and stated that he had observed a group of five to six youngsters around the Skakel yard, provided the following testimony in response to questions posed by the state's attorney:

"Q. At any occasion while working that night did you notice any tall, young, black teenage males?

"A. No.

"Q. Did you observe any black males in Belle Haven that night?

"A. A black male in Belle Haven would have been very, very obvious. There was none there."

[28] The police interview report dated November 1, 1975, contained the following account of Byrne's initial statement to police: "[Byrne] stated that he was with [Ix, the victim and O'Hara] and stated the same as [Ix], that they went to the [neighboring] Mouakad residence and stayed until about 9:10 p.m. . . . They then left the Mouakad house and were enroute to the Skakel home. After remaining at the [Skakels'] until about 9:20 p.m., he and [Ix] left to go home.

"After he left [Ix], and was walking home by himself, he heard footsteps following him. When he stopped to listen the footsteps kept coming. He then started to run and ran all the way to his house. [Byrne] further stated that the footsteps ran after him all the way home and that he did not look back to see who was following him."

The dissent offers the novel proposition that "the fact that [Byrne's] whereabouts for most of the evening remain unaccounted for *supports* Bryant's version of the facts [placing Byrne with Bryant's group]." (Emphasis added.) Although the inability to account for Byrne's whereabouts may not be *inconsistent* with Bryant's account, that is hardly the same as *corroborating* that account.

[29] Bryant claimed to know "for a fact" that Tinsley and Hasbrouck had spent the night at Byrne's house. He immediately followed that assertion, however, with statements that, "You could stay at their house and they would never know, though. . . . The Byrnes would never know. It was a huge house." Bryant stated that both Tinsley and Hasbrouck, as well as Byrne, had told Bryant that they spent the night at Byrne's house. In conversations with Kennedy, both Tinsley and Hasbrouck acknowledged that they

had been to Byrne's house on several occasions, but denied ever having spent the night in Belle Haven.

[30] In *State* v. *Skakel*, supra, 276 Conn. 644, we described the room as a back "hallway" because police described it as such based on its long narrow shape, but the Skakel family and others familiar with the house referred to it, in accordance with its use, as a mudroom.

[31] Andrew Pugh, the petitioner's close childhood friend, testified at the criminal trial that he was with a group of ten to twelve neighborhood teenagers playing in the Skakel backyard from approximately 6 to 7:30 p.m., which is at or near the time that Bryant claims to have been in the yard. Ix gave a statement to the police indicating that she and Byrne had left the Skakel residence through the backyard around 9:30 p.m. Keegan, a captain in the detective division of the Greenwich police department in 1975, testified that the police had considered and pursued, to no avail, the possibility that someone had picked up a golf club on the Skakel property. The search for other golf clubs included a November 2, 1975 check of many of the neighborhood properties, including the Skakels', with a metal detector. Residents of Belle Haven and nearby areas assisted the police in this search, and the police received numerous telephone calls in the days after the murder about missing or found golf clubs.

[32] The petitioner points to testimony by Esme Dick, with whose family Bryant had lived while attending Brunswick, as corroborative. Dick testified that, during a dinner conversation in 1976 at which Bryant had joined her family, the group was speculating as to who could have committed the victim's murder. According to Dick, Bryant stated that "he did not think [the petitioner] could have done it." This statement reflects an opinion, not a fact based on personal knowledge, and indeed was an opinion likely shared by other people who lived in Greenwich in 1976. Dick also testified that Bryant had stated that he was in Belle Haven on the night of the murder, but she could not recall whether Bryant had made that statement during the same dinner conversation or in the course of another conversation near that time period. Notably, Bryant did not indicate in his statement that Hasbrouck or Tinsley were with him, nor did he provide any information to Dick to indicate that he had any personal knowledge about the crime. Therefore, in light of these significant omissions and the fact that Bryant was the source of this information, the trial court was well within its discretion to discount his statement to Dick. Cf. *Shabazz* v. *State*, supra, 259 Conn. 818–20 (concluding that trial court did not abuse its discretion in finding statement of newly discovered eyewitness lacking in credibility despite fact that witness' substance abuse counselor testified at hearing on petition for new trial that, after petitioner's criminal trial, witness had confided in counselor that he had witnessed encounter between petitioner and victim).

[33] In their initial discussions with Kennedy, which were tape-recorded without their knowledge, Hasbrouck and Tinsley had indicated that they were not in Belle Haven on the night the victim was killed, although Tinsley's recollection was somewhat more equivocal because the question related to events that occurred thirty years previous. Colucci testified, however, that, in subsequent conversations with him, which were not recorded, both men had admitted to being in Belle Haven on October 30, 1975. According to Colucci, Hasbrouck admitted to being in Belle Haven that day and had given three different times for his departure (noon, 6 to 6:30 p.m., and 9 to 9:30 p.m.), none of which, coincidentally, match Bryant's account. Colucci testified that Tinsley had told him that he had been in Belle Haven that day, but was shaky on the details and could provide no time for his departure. On cross-examination, Colucci acknowledged that these admissions were not reflected in notes taken of those conversations by the investigator who had accompanied Colucci and only later were added, upon Colucci's instruction, to a second set of notes, a curious omission given the significance of the alleged admissions. Colucci further admitted on cross-examination that, in a follow-up call that the investigators made, the two men had confirmed that, after checking their calendars, they were certain that they had not been in Belle Haven on the night of October 30, 1975. In fact, Colucci acknowledged that the investigators' notes reflect that Hasbrouck said he never had spent the night in Belle Haven, that his mother would have "tanned his hide" if he had done so and that she never would have let him stay out on a school night.

[34] Until they were made aware that Bryant had implicated them in the crime, Tinsley and Hasbrouck voluntarily engaged in numerous and lengthy conversations with Kennedy initially, and Colucci later, recounting details of several visits to Belle Haven prior to the murder. In fact, it was Hasbrouck

who provided Kennedy with a telephone number for Tinsley, whom Hasbrouck described as having "a far better memory of events around that time period."

[35] In her deposition, taken pursuant to a subpoena, Barbara Bryant recalled her son being in Connecticut during the *day* of October 30, 1975, but repeatedly stated that he had returned home by "early in the afternoon," or at least while it was still light out. She further recalled that, because he was under a curfew at the time, he would not have been allowed to go to Connecticut on a school night without her permission. Barbara Bryant recounted an incident in which a group of women were gathered at her home shortly after the murder and, upon seeing the newspaper account of the victim's murder, made a statement to her son to the effect that "aren't you glad you had your black butt home because you certainly would have been accused of this." Barbara Bryant did not have a conversation with her son at that time regarding his whereabouts on the night of the murder, because she knew where he was, namely, at home. She had no personal knowledge of her son going to Greenwich accompanied by Hasbrouck, whom she described as shy, friendly and respectful, and Tinsley, whom she described as attractive and friendly. Notably, Barbara Bryant admitted the possibility that she had discussed the victim's murder with her son *after* she saw an article reporting that he had implicated other persons in the murder. She recalled being approached on the street by two private investigators whom the petitioner had hired and acknowledged the possibility that she may have told them that *her son had told her* that Tinsley and Hasbrouck had spent the night in Belle Haven on the night of the murder.

Thus, the trial court reasonably could have concluded that Barbara Bryant's statements that were consistent with her son's account were noncorroborative because he was the source of that information and he had given her that information many years after the murder, only after his account became public knowledge. The trial court also may have taken into account the fact that medications appeared to impair Barbara Bryant's memory. Barbara Bryant testified while on several medications that she described as making her "foggy" and "not always clear," and expressed confusion about the time frame of events. She also stated that, at the time the petitioner's investigators approached her on the street, she had been on another medication that made her feel "sick and confused."

[36] The dissent also has hypothesized a two perpetrator, two golf club theory as corroboration for Bryant's account. In support of this theory, the dissent points to statements in a letter by Keegan, then a Greenwich police captain, to a forensic expert in which Keegan discussed the conclusions that the police investigators had drawn as to the likely sequence of events in the attack of the victim. In our view, the dissent's theory is too speculative to corroborate Bryant's account in light of the facts that the expert forensic testimony on which both parties relied at the criminal trial to establish the likely sequence of events reached a different conclusion, neither party offered Keegan or any other Greenwich police officer as an expert on this matter, there is nothing to indicate that Keegan was qualified as an expert in such matters, and the letter does not state who made the determinations referred to and on what basis. Therefore, in the absence of any indication that a competent expert would offer an opinion that the evidence indicated that there were two perpetrators, such speculation cannot corroborate Bryant's account. We further note that, even if such evidence did exist, the other evidence overwhelmingly contradicting Bryant's account would inexorably lead to the conclusion that Hasbrouck and Tinsley were not the perpetrators.

[37] The hair with negroid characteristics was tested against, but found dissimilar to, samples taken from Thomas Skakel, Larry Jones, the teenage son of the Skakels' cook, Ethel Jones; see footnote 27 of this opinion; and Daniel Hickman, a police officer who was at the crime scene. Larry Jones and Hickman are both African-American. There is no indication that hair samples from Ethel Jones or her husband were tested to rule them out as possible sources of the hair found on the sheet.

[38] Although nothing in the victim's autopsy report indicated whether any attempt had been made to determine whether semen was present on external areas of the victim's body other than her pubic region, the tests performed on that region, as well as vaginal and anal swabs, revealed no traces of semen. *State* v. *Skakel*, supra, 276 Conn. 643.

[39] We note that the testimony from Bryant and Mills indicates that Bryant initiated the conversation to check on Mills' well-being after the September 11, 2001 attacks in New York City, where Mills lived. The trial court neither credited nor discredited this reason as the actual or exclusive motive for

Bryant having initiated the conversation.

[40] According to Mills, when Bryant offered his help on the screenplay, he had stated that "he either was an entertainment lawyer or had experience as an entertainment lawyer, and had worked in Hollywood, and also had done some writing for television." Bryant had given Walker a similar impression, namely, that he was either an entertainment attorney or a sports and entertainment attorney. Bryant admitted to Kennedy, however, that, although he had graduated from law school, he never has been licensed to practice law, let alone taken the bar examination. See footnote 21 of this opinion.

[41] We note that the petitioner also has claimed that the trial court abused its discretion by failing to consider his separate claim that it would cause an injustice not to submit this evidence to a jury. To the extent that the petitioner believes that this court's isolated references to "avoid an injustice" means that injustice is an independent basis on which to grant a new trial, he is mistaken. To order a new trial on the basis of newly discovered evidence that *fails* to meet the *Asherman* factors but meets an amorphous and less stringent injustice standard is contrary to our case law and common sense. Review of the cases from which this injustice language originates indicates that the factors that ultimately became the *Asherman* test were the means by which the court determined whether an injustice has occurred. See *Gannon* v. *State*, 75 Conn. 576, 578, 54 A. 199 (1903); *Salinardi* v. *State*, 124 Conn. 670, 672, 2 A.2d 212 (1938); *Smith* v. *State*, 139 Conn. 249, 253, 93 A.2d 296 (1952). There is not a single instance in the case law dating back more than one century in which this court has granted a new trial on the ground that such a result is necessary "to avoid an injustice," without application of the *Asherman* factors. Indeed, to read our isolated use of the phrase "avoid an injustice" as an independent ground for granting a new trial would allow a petitioner to avoid satisfying factors other than the credibility element of the *Asherman* test. Thus, a petitioner could circumvent the habeas process for claims of ineffective assistance of counsel despite the fact that the evidence is not newly discovered by asserting that the evidence is so material that a new trial must be ordered to avoid an injustice. For all of the foregoing reasons, therefore, we decline to adopt the approach suggested by the petitioner to his claim under a broad injustice standard untethered to the *Asherman* factors. We are mindful, however, that we left open the possibility in *Shabazz* v. *State*, supra, 259 Conn. 827, that "there may be cases in which the trial court is justified in determining that the newly discovered evidence is sufficiently credible and of such a nature that, in order to avoid an injustice, a second jury, rather than the trial court itself, should make the ultimate assessment of its credibility." For the reasons we previously have set forth, we conclude that the trial court did not abuse its discretion in concluding that this is not such a case.

[42] Although the petitioner also contends in his brief to this court that Garr "threatened witnesses in the time leading up to and during the petitioner's trial," his brief focuses on Garr's secret pact and book deal with Levitt. The only further discussion of these alleged threats is the following quote from Levitt's book, as emphasized by the petitioner in his brief: "[T]he case was all [Garr's]. He had found all the witnesses. Many hadn't wanted to testify. [*Garr*], *they related*, *had pursued*, *cajoled*, *harassed*, *or threatened them*." (Emphasis added.) We, therefore, construe the petitioner's claim to be that these alleged threats were evidence of Garr's bias because of his pact to write a book and his book deal and do not address these alleged threats independently from our discussion of that deal.

[43] Fuhrman's book, entitled "Murder in Greenwich: Who Killed Martha Moxley?," was published in 1998. Sherman testified that, in his book, Fuhrman had indicated that he sought Garr's help when writing his book, but that Garr refused because he said that he was writing his own book. Sherman conceded that the publication of Fuhrman's book preceded or coincided with the grand jury proceedings in the petitioner's case.

[44] We note, however, that, although we see no direct evidence in the record that Garr engaged in improper conduct during the course of the investigation to advance his interest in the publication of Levitt's book and indeed Garr's singular focus on the petitioner may well have been predicated on the fact that the evidence kept pointing in that direction, Garr's acceptance of a share in the book's profits creates, at the very least, an appearance of a conflict of interest. We further note that the evidence in the record indicates that the state's attorney had no knowledge of Garr's agreement to assist Levitt prior to receiving a letter from the petitioner's appellate counsel raising that issue, and in fact that Garr never informed the state's attorney that he was receiving a share of the profits from the book even after the

state's attorney inquired about the book deal upon receiving that letter. Nonetheless, Garr's conduct undermines the public's confidence in the office of the state's attorney and we, therefore, express our strong disapproval.

Despite our criticism, we decline the petitioner's invitation, raised for the first time at oral argument, to order a new trial under our supervisory authority over the administration of justice because of what he characterizes as Garr's unprecedented breach of the code of ethics. Specifically, the petitioner contends that Garr violated General Statutes § 1-84 by disclosing to Levitt confidential information that Garr had obtained through his employment with the state. In addition to the fact that the testimony credited by the trial court does not support the factual predicate for the petitioner's claim, there is no persuasive justification for using the court's inherent authority to order a new trial. The code of ethics sets forth its own remedial measures, which are directed at the violator personally. See General Statutes § 1-88 (a). The alleged situation in the present case is not akin to circumstances in which the courts have deemed it necessary to craft their own remedial measure to act as a prophylactic measure against future abuses, such as the exclusionary rule to address fourth amendment violations.

[45] The following exchange took place between Simpson and the petitioner's counsel after Simpson was asked whether he recalled a particular incident at Elan:

"A. [Coleman] and I were watching [the petitioner]. . . . And [Coleman] and [the petitioner] were to my left, and all of the sudden [Coleman] just went, 'I can't believe it.' And I said, 'What?' [Coleman] goes, 'He just admitted that he killed this girl.'

"Q. And what did you say?

"A. Well, I just—I looked at [the petitioner], and I said, 'Did you just tell him that you killed this girl?' And [the petitioner] said, 'No.' And so I looked back at [Coleman], and I said, 'Greg, what are you talking about? He just said he didn't say that he killed this girl?' [Coleman] goes, 'Well, he didn't answer yes or no, but he gave one of those'—and, for lack of a better term, [the petitioner] used to have this shit-eating grin on his face sometimes, and [Coleman] said that's what he had. . . . And [Coleman] said, 'Well it was his reaction, the fact that he didn't say no.' "

[46] In what we assume is an attempt to bolster the extraordinary nature of Weeks' efforts, the petitioner characterizes Weeks as "an investigator who specializes in locating hard-to-find people." Weeks' testimony indicated merely that he had worked on locating missing persons and witnesses and also had lectured on those topics. We do not equate "missing" with "hard to locate" and we therefore do not assume a specialized expertise on Weeks' part.

[47] The petitioner had filed a pretrial motion for disclosure and production, "requesting, inter alia, that the state disclose any '[i]nformation and/or material which is exculpatory in nature,' including '[p]hotographs, composite sketches or other media replications that depict the likeness or physical attributes of [any] alleged perpetrator of this crime.' " *State* v. *Skakel*, supra, 276 Conn. 694.

[48] Sherman also acknowledged that he had seen both profile reports in the possession of a state's witness during the criminal trial.

[49] The discovery motion, filed May 21, 2001, requested, inter alia: "The names, addresses and criminal records of all persons, other than the [petitioner], who were at any time considered suspects, or who were detained, questioned, and/or arrested in relation to this case, together with any materials and information which caused them to be suspected, including, but not limited to, any oral and/or written statement, report, narrative, affidavit in support of a warrant, or any other document. This request would include information and/or evidence that someone other than the [petitioner] was the focus and/or target of the state's investigation, in particular, Ken Littleton, Frank Wittine, Thomas Skakel, and/or Edward Hammond."