PALMER, J., dissenting. Contrary to the determination of the trial court, I believe that the petitioner, Michael C. Skakel, is entitled to a new trial for the 1975 murder of Martha Moxley (victim) in the Belle Haven section of the town of Greenwich due to the discovery of significant new evidence that was not available at the time of his original trial. In particular, I am convinced that the trial court improperly denied the petitioner a new trial on the basis of information brought forward by Gitano "Tony" Bryant[1]—information that directly implicates two other suspects, Adolph Hasbrouck and Burton Tinsley, in the victim's murder—after failing to evaluate the significance of that newly discovered evidence in light of the nature and strength of the original trial evidence. I reach this conclusion because the evidence that Bryant provided during the course of his lengthy and detailed video-recorded interview satisfies all of the requirements necessary for a new trial. First, the Bryant evidence is highly relevant because it identifies Hasbrouck and Tinsley as the persons actually responsible for the victim's murder. Second, as the trial court expressly found, the Bryant evidence, although hearsay, would be admissible at a new trial under the declaration against penal interest exception to the hearsay rule because, inter alia, corroborating circumstances clearly indicate its trustworthiness.[2] I also conclude that the Bryant evidence is admissible under the residual exception to the hearsay rule.[3] Third, because the evidence is marked by substantial indicia of reliability, and because the record reveals nothing about Bryant or his background to suggest either that he is the kind of person who would provide testimony falsely implicating two innocent people in a brutal murder or that he had any reason or motive to do so, the trial court improperly failed to consider that evidence in the overall context of the original trial evidence.[4] Finally, at the very least, it is likely that this new evidence, when considered in light of the state's thin case against the petitioner, would give rise to a reasonable doubt about whether the petitioner was involved in the victim's murder. The likelihood of an acquittal upon retrial is enhanced by other newly discovered evidence, namely, the relationship between the lead investigator in the case, Frank Garr, and Leonard Levitt, the author of a book about the victim's murder on which Garr collaborated, and the views expressed by Garr in that book reflecting, inter alia, his strong and long-standing feelings of antipathy toward the petitioner and the petitioner's family. I therefore dissent.

I

LEGAL STANDARD GOVERNING NEW TRIAL PETITIONS

I begin my review of the petitioner's claim with a brief summary of the legal standard governing the petitioner's contention that he is entitled to a new trial on the basis of newly discovered evidence. As this court stated in *Asherman* v. *State*, 202 Conn. 429, 521 A.2d 578 (1987), to prevail on a petition for a new trial, "[t]he petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial." Id., 434. Because it is undisputed that the Bryant evidence satisfies the first three *Asherman* requirements, the primary issue raised by the petitioner's appeal implicates only the fourth and final requirement.

In *Shabazz* v. *State*, 259 Conn. 811, 792 A.2d 797 (2002), we elaborated on the fourth prong of the *Asherman* test, stating: "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." (Citation omitted.) Id., 827–28; accord *Adams* v. *State*, 259 Conn. 831, 838, 792 A.2d 809 (2002).

Thus, we apply a two part test for the purpose of determining whether the newly discovered evidence warrants a new trial under the final *Asherman* factor. First, the petitioner must demonstrate that the evidence is "not incredible"; *Adams* v. *State*, supra, 259 Conn. 844; because, if the evidence truly is incredible, the second jury would not credit it. See, e.g., *Smith* v. *State*, 141 Conn. 202, 208, 104 A.2d 761 (1954) (no injustice done in denying petition for new trial when newly discovered evidence reasonably is found to be "utterly unworthy of credence . . . since it should be presumed that no jury will believe an incredible story"). Because a new trial is required if the newly discovered evidence, when considered in the context of the original trial evidence, gives rise to a reasonable doubt concerning the petitioner's guilt, that evidence need not be so convincing or persuasive as to be compelling. Rather, the evidence must only meet a "minimum credibility threshold"; *Shabazz* v. *State*, supra, 259 Conn. 827; accord *Adams* v. *State*, supra, 838; a standard that

requires the petitioner merely to establish that the evidence is not so lacking in credibility as to be wholly unworthy of belief.[5] See *Adams* v. *State*, supra, 844. Upon satisfaction of that minimum requirement, the court then must proceed to the second step of the analytical process, which "require[s] [the court] to determine whether the newly discovered evidence is *sufficiently* credible [and of such a nature] that, if admitted in a new trial and reviewed by a second jury together with all of the evidence presented at the original trial, it is likely to produce a different result"; (emphasis added) id.; see also *Shabazz* v. *State*, supra, 827; that is, it is likely to give rise to a reasonable doubt of the petitioner's guilt, "or otherwise [to] avoid an injustice . . . ."[6] (Internal quotation marks omitted.) *Adams* v. *State*, supra, 838; accord *Shabazz* v. *State*, supra, 828.

We review a trial court's decision with respect to a petition for a new trial under an abuse of discretion standard. *Shabazz* v. *State*, supra, 259 Conn. 820. When considering the newly discovered evidence in light of the evidence adduced at the petitioner's original trial, however, this court is no less capable than the trial court of assessing the strength of the original trial evidence if, as in the present case, the trial court did not preside over the petitioner's original trial. See, e.g., *Commonwealth* v. *Lykus*, 451 Mass. 310, 325, 885 N.E.2d 769 (2008) ("We defer to a judge's assessment of the credibility of witnesses at a hearing on the motion for a new trial. However, we regard ourselves in as good a position as a motion judge who was not the trial judge to assess the trial record."); *Commonwealth* v. *Grace*, 397 Mass. 303, 307, 491 N.E.2d 246 (1986) (same).

The petitioner first contends that the trial court improperly concluded that the newly discovered Bryant evidence was sufficiently trustworthy to be admissible as a declaration against penal interest but nevertheless so lacking in credibility as to justify the trial court's failure to consider that evidence in the light of the original trial evidence. Second, the petitioner claims that this court should reverse the trial court's denial of his new trial petition because the trial court improperly failed to consider his separate claim that a new trial is required to "avoid an injustice . . . ." With respect to the petitioner's first contention, the majority concludes that the evidence adduced at the hearing on the petition for a new trial supports the trial court's rejection of the petitioner's claim that he is entitled to a new trial, even though the trial court never considered the Bryant evidence in the context of the original trial evidence.[7] With respect to the petitioner's second claim, the majority concludes that the petitioner is incorrect in asserting that, under *Shabazz*, newly discovered evidence warrants a new trial, irrespective of whether the trial court finds that such evidence *likely* will produce a different result, if a second trial is necessary to avoid an injustice.

In rejecting this contention, the majority interprets *Shabazz* as creating a unitary standard for purposes of the fourth prong of the *Asherman* test despite our express statement in *Shabazz* that a new trial is necessary when the newly discovered evidence "probably would yield a different result *or otherwise avoid an injustice*." (Emphasis added.) *State* v. *Shabazz*, supra, 259 Conn. 828.

With respect to the petitioner's first claim, I conclude that the newly discovered Bryant evidence meets the minimum credibility threshold as a matter of law and, therefore, that the trial court improperly failed to consider that evidence in light of the original trial evidence.[8] I reach that conclusion because, under the particular circumstances of this case, the very same factors that led the trial court properly to conclude that Bryant's statements are admissible as trustworthy declarations against penal interest necessarily sufficed to satisfy the minimum credibility requirement contemplated under the first prong of the *Shabazz* formulation.[9] I further conclude that, on the basis of the undisputed facts, the newly discovered Bryant evidence requires a new trial because that evidence, when viewed in the light of the evidence adduced at the petitioner's original trial, is likely to give rise to a reasonable doubt as to whether the petitioner murdered the victim.

Although my determination in this regard makes it unnecessary for me to address the petitioner's second claim, namely, that a new trial is required to avoid an injustice, I do so because I disagree with the majority that avoiding an injustice constitutes an insufficient ground for granting a petition for a new trial in the present case or in any other case. In particular, I am unwilling to presume that our use of the disjunctive, both in *Shabazz* and *Adams*, when articulating the applicable test, coupled with the use of the word "otherwise" to underscore that the second prong of the test is different from the first prong, constituted merely loose language or surplusage. See *Adams* v. *State*, supra, 259 Conn. 838 (new trial required "[i]f . . . 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*" [emphasis added; internal quotation marks omitted]); *Shabazz* v. *State*, supra, 259 Conn. 827 ("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" [emphasis added]). Indeed, this is precisely the position taken by our Appellate Court, which recently explained that, in *Shabazz*, this court "looked *beyond the traditional four-pronged test* for newly discovered evidence and [was] *guided by the*

general principle of whether an injustice was done." (Emphasis added.) *Joyce* v. *State's Attorney*, 84 Conn. App. 195, 203, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A.2d 578 (2004).[10]

Furthermore, such a test makes eminent good sense. I can think of no legitimate reason why a court should not grant a petitioner a new trial when the discovery of new evidence places the validity of the original conviction in such doubt, or so seriously undermines our confidence in the accuracy of the verdict, that it would be unjust to deny the petitioner a new trial. See, e.g., *Commonwealth* v. *Lykus*, supra, 451 Mass. 326 ("A defendant seeking a new trial on the ground of newly discovered evidence must show that the evidence is newly discovered, that it is material and credible, and that it casts real doubt on the justice of the conviction. Newly discovered evidence that is merely cumulative of evidence admitted at the trial will carry little weight. The task of the [trial court] is to decide whether the new evidence probably would have been a real factor in the jury's deliberations, and in that regard the [court] must consider the strength of the case against the defendant."). The state's interest in the finality of judgments cannot be so great as to deny a petitioner a new trial when the petitioner has satisfied such a standard.[11] See *Gannon* v. *State*, 75 Conn. 576, 577, 54 A. 199 (1903) ("[t]he finality of a judgment does not preclude the court that rendered it from entertaining further proceedings in the same action, *when it is made apparent that injustice has been done*" [emphasis added]). In the present case, because the petitioner satisfies the first *Shabazz* criterion, he necessarily has met this alternative standard.

With these principles in mind, I now briefly summarize the trial court's decision and the majority opinion, both of which reject the petitioner's claims. I then turn to a more lengthy discussion of why I believe that the trial court and the majority are wrong in denying the petitioner a new trial.

II

SUMMARY OF THE TRIAL COURT'S DECISION AND THE MAJORITY OPINION

The petitioner raised several claims in his petition for a new trial, including the claim that he is entitled to a new trial on the basis of the newly discovered Bryant evidence and certain revelations about Garr, including Garr's apparent hostility toward the petitioner and the petitioner's family.[12] I first summarize the trial court's and the majority's treatment of the Bryant evidence.

At the hearing on the petition for a new trial, the trial court was informed that Bryant had invoked his privilege against self-incrimination at a deposition that had been noticed by the petitioner for the purpose of

exploring Bryant's knowledge of certain information that he previously had provided, during a video-recorded interview, directly implicating Hasbrouck and Tinsley in the victim's murder. The petitioner also presented the court with that video-recorded interview, claiming that, because Bryant was unavailable as a witness, the statements contained therein, although hearsay, would be admissible at a new trial because they were against Bryant's penal interest and bore sufficient indicia of reliability.[13] The petitioner also claimed that Bryant's statements were admissible under the residual exception to the hearsay rule. The trial court agreed with the petitioner's first claim that the statements were admissible under the hearsay exception for trustworthy declarations against penal interest, and, therefore, the court did not address the petitioner's alternative ground of admissibility. The trial court also concluded, however, that Bryant's statements were not credible. That conclusion was based primarily on the court's predicate finding that Bryant's statements were supported by no more than minimal corroboration, and on certain evidence adduced at the hearing, including testimony establishing that Bryant did not come forward with the information for more than twenty-five years and that "[n]o one ha[d] any recall of ever seeing Bryant and his companions in Belle Haven on the night of the murder." Having concluded that Bryant's statements were not credible, the trial court did not consider those statements in the context of the evidence adduced at the petitioner's original trial.

In its review of the trial court's decision, the majority declines to decide whether the trial court properly determined that the Bryant evidence would be admissible at a new trial as trustworthy third party statements against penal interest. The majority explains that there is no need to do so because, in its view, the trial court did not abuse its discretion in concluding that Bryant's account of the relevant events, although sufficiently trustworthy to be admissible, is not credible.[14] In light of its determination that the trial court reasonably concluded that the Bryant evidence simply is not sufficiently believable to have a bearing on the jury's assessment of the state's case, the majority also does not engage in an evaluation of the strength of that case.

The petitioner also claimed that Garr's relationship with Levitt, the author of a book about the case that was published after the petitioner's criminal trial, and certain revelations about the publication and content of that book, constitute newly discovered evidence that warrants a new trial. In support of his claim, the petitioner relied in part on the fact that, at the discovery stage of his criminal case, he had sought the disclosure of evidence that any agent of the state had a "pecuniary or other interest in the development and/or outcome of [the] case, including, but not limited to, any contract, agreement, or ongoing negotiations, which relate to the

preparation of any book . . . .” Although it is undisputed that the trial court’s ruling regarding the petitioner’s discovery request in his criminal case applied to Garr, the state never provided the petitioner with any information in response to that request. Despite undisputed evidence of a previously undisclosed private pact between Garr and Levitt that the two would “tell [their] story” when the case was over—a story that, when ultimately told, reveals how passionately they believed that the petitioner, aided in a cover-up by other members of his family, was responsible for the victim’s death, how aggressively they pursued the case against the petitioner, and how intensely Garr disliked him and his family—the trial court in the present case concluded that the agreement was neither newly discovered nor “evidence that would have swayed the jury as to lead it to acquit.” Finally, the trial court also rejected the petitioner’s claim that a new trial was required because of the state’s failure to disclose Garr’s one-half financial interest in the net revenues from Levitt’s book. The majority assumes without deciding that the evidence of Garr and Levitt’s relationship was newly discovered but concludes that the trial court did not abuse its discretion in determining that the petitioner was not entitled to a new trial because the petitioner failed to prove that the evidence probably would result in an acquittal upon retrial.

III

THE NEWLY DISCOVERED BRYANT EVIDENCE

A

The Evidence

The following facts, all of which were adduced at the hearing on the petition for a new trial, are relevant to my conclusion that the newly discovered Bryant evidence[15] was sufficiently credible such that, under *Shabazz*, the trial court was required to consider it in light of the original trial evidence. Shortly after the petitioner was convicted, Robert F. Kennedy, Jr., the petitioner’s first cousin, published an article, entitled “A Miscarriage of Justice,” in the January-February, 2003 edition of The Atlantic magazine, in which he maintained that the petitioner had been wrongly convicted. After the article appeared, Kennedy was contacted by Crawford Mills, a former resident of Greenwich and a classmate of Bryant’s at Brunswick School, a private preparatory school for boys located in the town of Greenwich that Bryant had attended from 1972 until 1975.[16] Mills, a trusted friend of Bryant’s, informed Kennedy that, two years earlier, Bryant, who then was a businessman in Florida, had confided in him that he had been in Belle Haven on the night of the victim’s murder and that two of Bryant’s high school classmates from Manhattan, New York, namely, Hasbrouck and Tinsley, were responsible for the victim’s death.[17] Mills told Kennedy

that, for a number of reasons, Bryant was extremely reluctant to come forward but that, after the petitioner's arrest, he had consented to allow Mills to communicate the information about Hasbrouck and Tinsley to the authorities on the condition that Mills not disclose Bryant's name. Mills did contact the authorities, including the prosecutor in the case, but Mills was told that, unless the person providing the information was willing to come forward, the authorities could not act on the allegations. After the petitioner was convicted and Bryant still refused to come forward, Mills decided that he no longer would protect Bryant's identity and gave Bryant's name to Kennedy.

Shortly after his conversation with Mills, Kennedy contacted Bryant by telephone. Kennedy recorded the telephone call and all subsequent calls that he made to Bryant and to other potential witnesses in the case. The recordings of the telephone calls were entered into evidence at the hearing on the petition for a new trial and played for the court.[18] In his first telephone call to Bryant, which was brief, Bryant told Kennedy only that he had known the petitioner when the two of them were students at Brunswick School but that he and the petitioner never had been friends. Bryant agreed to speak with Kennedy again the next day, when Bryant had more time. In his next conversation with Kennedy, Bryant explained that one of the reasons that he had been so reluctant to come forward was that he was worried about the repercussions for his family. According to Bryant, a few members of his family were quite prominent in the community and would not appreciate any publicity linking Bryant to a murder case. In particular, Bryant's mother, Barbara Bryant, is an Academy Award winning producer of educational films and a cofounder and executive vice president of the Phoenix Learning Group, Inc., and one of his cousins is the professional basketball player Kobe Bryant. Bryant also expressed concern that he could be accused of having been involved in the murder and that his business might be adversely affected if he were to become embroiled in the case.

Bryant then related to Kennedy that, after he left Brunswick School prior to the ninth grade,[19] he briefly attended Charles Evans Hughes High School (Hughes High School),[20] a public high school in Manhattan, before transferring to a private preparatory school in Texas. Bryant met Hasbrouck and Tinsley while attending Hughes High School. According to Bryant, Hasbrouck and Tinsley were "wild" and "[t]hey spurred each other on. They fed off each other big time." Bryant explained that, although he then resided with his mother in Manhattan, all of his friends were still in Greenwich, and he often took a train there to visit them. Bryant also explained that, on several occasions, Hasbrouck and Tinsley went with him. According to Bryant, Greenwich was a different world from New

York City, and, for Hasbrouck and Tinsley, it was "forbidden fruit . . . ." Bryant stated: "[I]magine coming from the inner city into Greenwich in the . . . mid [1970s]; [it was] the difference between Beirut [Lebanon] and Cape Cod [Massachusetts]. . . . It's the difference between [the] have and have-nots . . . ."

On the evening of the murder, Bryant, Tinsley and Hasbrouck went to Belle Haven to participate in "hell night," also known as "mischief night," the night before Halloween when neighborhood children traditionally would engage in pranks and other mischief. According to Bryant, Hasbrouck had met the victim on a previous visit to Greenwich and he "had this thing for her" and "would just say things that were just really, looking back, you would just be, oh my God, why didn't I say something, and it just, it bothers me." Bryant told Kennedy that, after they arrived in Belle Haven from the train station, he, Hasbrouck and Tinsley spent the evening pulling pranks, drinking, and smoking cigarettes and marijuana with another boy from the neighborhood, Geoffrey Byrne.[21] According to Bryant, he left Belle Haven at around 9:15 p.m. to catch a train back to Manhattan, while Hasbrouck and Tinsley decided to stay the night with Byrne. Before Bryant left, Hasbrouck told him that he was going to "[g]et caveman tonight" on a girl.

When Bryant next saw Hasbrouck and Tinsley at school the following Monday, Hasbrouck "said some very . . . damaging" things that left no doubt in Bryant's mind that Hasbrouck and Tinsley had killed the victim. According to Bryant, over the next several months, Hasbrouck and Tinsley showed no remorse for what they had done and, in fact, joked and bragged about it. Bryant also told Kennedy that he immediately told his mother about what had happened, and she told him that he must distance himself from Hasbrouck and Tinsley, explaining that they could be dangerous not only to him but to Bryant's entire family. Bryant further stated that, on the basis of what Byrne had said to him after the murder, he was reasonably certain that Byrne was present when the murder occurred. In a subsequent conversation, Kennedy asked Bryant why, if Hasbrouck was so dangerous, he had associated with him. Bryant responded that, at that point in his life—he was only fourteen—it was precisely that aspect of Hasbrouck's persona that had attracted him.

Bryant subsequently agreed to an interview with Vito Colucci, a private investigator that the petitioner had retained. In that interview, which was video recorded at a hotel near Bryant's home in Miami, Florida, Bryant repeated much of what he had told Kennedy on the telephone but in considerably more detail. A copy of the video recording was admitted into evidence and played at the hearing on the petition for a new trial. In the interview, Bryant stated that, "[a]nything you dared

[Hasbrouck] to do, he would do." Bryant further stated that it was easy to tell that "[t]here was something wrong with him. All you had to do was look at him to know it. . . . [A] lot of kids were afraid of him because he was big and . . . explosive."[22] According to Bryant, Tinsley was the "gasoline" and Hasbrouck was the "engine . . . ." Tinsley would incite Hasbrouck to do things, like throw bricks at passing cars, burglarize, anything Tinsley "put him up to." "It was always the dare between [them]. . . . [T]hey were always trying to outdo each other. And they would just push each other . . . ." According to Bryant, both Hasbrouck and Tinsley were both about six feet, two inches tall and "eas[ily]" weighed 200 pounds.

Bryant told Colucci that Hasbrouck first met the victim at a Greenwich street festival in September, 1975, and became infatuated with her. He also saw her at a couple of dances, one or both of which were hosted by a local church or parochial school. Bryant explained that Hasbrouck was "very immature" and lacked the confidence to approach the victim but that he would talk about her constantly in a very sexually explicit manner. "[F]rom the time he met her . . . until the murder, that's what he would talk about." Bryant claims that he told Hasbrouck, "[y]ou need to think about something else. You need to think about somebody else that is more obtainable, because it is not going to happen [with her]." According to Bryant, Hasbrouck's obsession with the victim "built up with[in] him, [i]t built up tremendous[ly]."

On Thursday, October 30, 1975, the night of the murder, Bryant, Hasbrouck and Tinsley traveled from Manhattan to Greenwich to participate in hell night. As Bryant explained, on hell night, older children in the neighborhood would vandalize property, spray shaving cream and smash pumpkins, among other things. Bryant, Hasbrouck and Tinsley arrived by train at around 5:30 p.m. and went to Neal Walker's house, but Walker, a former schoolmate of Bryant's, could not come out with them. They then went across the street to see Byrne, with whom Hasbrouck and Tinsley previously had become acquainted. According to Bryant, he, Tinsley and Hasbrouck stole beer from a neighbor's refrigerator and walked around the neighborhood with Byrne "playing pranks" with shaving cream and toilet paper. At approximately 8:30 p.m., they met up with a group of kids in the meadow behind the house of the petitioner's family,[23] the Skakels, where the group smoked marijuana and cigarettes and drank some more beer. Bryant recalled that the victim was part of the group for a short period of time. Around this time, Bryant, Hasbrouck and Tinsley picked up golf clubs that were lying around the Skakels' property and started fooling around with them.[24] Hasbrouck and Tinsley stated, "I'm going to get me a girl." Hasbrouck had indicated throughout the night that he wanted to "go caveman" on a girl and

joked, "I've got my caveman club . . . ." According to Bryant, the concept of going caveman derived from a cartoon, and signified grabbing a woman by the hair, dragging her off and presumably sexually assaulting her. Bryant claims that, at approximately 9:15 p.m., he told Hasbrouck and Tinsley that he needed to go home. Bryant stated that he left because he sensed that things were getting out of control but that he also had to go home because of his curfew. Hasbrouck said something to the effect that, "I'm not going out of here unsatisfied." Bryant stated that, by the time he departed, he, Hasbrouck and Tinsley had consumed a significant amount of alcohol and that things were "at a fever pitch. . . . [T]hey were sort of ready to blow up." According to Bryant, the next time that he saw Hasbrouck and Tinsley at school, the following Monday, they told him, "[w]e did it. We achieved the caveman."

Colucci asked Bryant how he knew that Hasbrouck and Tinsley had stayed the night with Byrne. Bryant responded that they had told him that they stayed there and that Byrne had told him the same thing. In his telephone conversation with Kennedy, Bryant had explained that Byrne's house offered "the perfect place" for Hasbrouck and Tinsley to clean up after the murder because "[t]here was hardly anybody home. There [were] a billion rooms in that house and, at most, there were three people there at any given time, [Byrne], his brother and [the] housekeeper. [His] parents were never there." Bryant also told Colucci that he first found out about the murder from his mother, who showed him an article in the New York Times about it one or two days after the murder, and asked him whether he knew the victim. Bryant told Colucci that he did not come forward sooner because he was afraid that he would be "pinned . . . as a suspect" and because he never imagined that the petitioner would be convicted. Bryant observed, "[i]f they [could] convict [the petitioner] on circumstantial evidence, I think I would [have been] an easier conviction . . . ." Bryant explained that, in contrast to the petitioner, he "didn't have the resources to defend [him]self." Bryant also stated that "[o]ne of the parties . . . has passed away. . . . So that made [him] . . . run to the hills even worse, because [he] knew [Byrne] knew as much if not more than [he did]."[25] When asked, Bryant consistently provided the same explanation as to why he did not come forward sooner. For example, Walker, Bryant's childhood friend from Brunswick School, testified at the hearing on the new trial petition that he learned about Bryant's allegations against Hasbrouck and Tinsley from Mills sometime in 2002. Mills had asked Walker to call Bryant to try to convince him to come forward. At that time, Walker did contact Bryant and asked him why he never had said anything about Hasbrouck and Tinsley. According to Walker, Bryant responded that "his mother had told him not to because he would be implicated [by] putting

himself at the scene of the crime." Walker asked him why, if that was a concern, he was bringing it up now. According to Walker, Bryant answered that he had never been friends with the petitioner but that he felt that it "was an injustice seeing [the petitioner] being tried for [a] murder that [Bryant] knew [the petitioner] didn't commit." Walker further testified that Bryant asked him to give the information to investigators but to try "not to reveal his name . . . ." Like Mills, Walker contacted the authorities during the trial but was told that, unless Bryant himself was willing to come forward, the information was useless. Mills similarly testified that, when he asked Bryant why he had not come forward sooner, Bryant replied that he had told his mother at the time what had happened and that she had told him to "keep his mouth shut." Bryant subsequently invoked his privilege against self-incrimination when subpoenaed to testify at a deposition noticed by the petitioner.

Finally, when first contacted and interviewed by Colucci, both Hasbrouck and Tinsley told Colucci and his associate, Kris Steele, that they had been in Belle Haven on the date of the victim's murder. Although both men subsequently retracted that representation in follow-up conversations with Colucci, they each invoked their privilege against self-incrimination and refused to answer any questions posed by the petitioner at depositions conducted in connection with the petitioner's case.

B

Hearsay Exception for Statements

Against Penal Interest

"The hearsay rule . . . is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events [that] he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.

"Nonetheless, the . . . [r]ules of [e]vidence also recognize that some kinds of out-of-court statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible. One such category covers statements that are against the declarant's [penal] interest . . . . *Williamson* v. *United States*, 512 U.S. 594, 598–99, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)." (Internal quotation marks omitted.) *State* v. *Schiappa*, 248 Conn. 132, 146, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152,

145 L. Ed. 2d 129 (1999).

"Our present rule allowing the admission of trustworthy third party statements against penal interest has its genesis in *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)"; (internal quotation marks omitted) *State* v. *Lopez*, 239 Conn. 56, 71, 681 A.2d 950 (1996); which held that an accused's constitutional right to a fair trial prevented the exclusion of such statements. See *Chambers* v. *Mississippi*, supra, 302–303. As the United States Supreme Court stated in *Chambers*, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In the exercise of this right, the accused, as is required of the [s]tate, must comply with established rules of procedure and evidence designed to [en]sure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed." (Citations omitted.) Id., 302. Thus, when a statement against penal interest bears significant assurances of trustworthiness and is crucial to the defendant's theory of defense, the due process clause bars exclusion of the statement. See id., 285, 302–303. In other words, as the court in *Chambers* explained, "[i]n [such] circumstances, [in which] constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id., 302.

Before *Chambers*, however, in this state, "such third party statements were per se inadmissible as hearsay. . . . In *State* v. *DeFreitas*, [179 Conn. 431, 449, 426 A.2d 799 (1980)], we interpreted *Chambers* as forbidding . . . application of the hearsay rule to exclude all third party statements against penal interest exculpatory of an accused. We [nevertheless] concluded . . . that *Chambers* did not mandate the admission of every such statement but required the admission only of those statements that, *after a careful examination*, were determined in the sound discretion of the trial court to be *trustworthy*. *State* v. *DeFreitas*, supra, 451–52." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Lopez*, supra, 239 Conn. 71. As we explained in *DeFreitas*, "courts have recognized that the unrestricted admission of declarations against penal interest would be to invite perjury of a kind that is most difficult to ascertain. To circumscribe fabrication and [to] ensure the reliability of declarations against penal interest, there must exist circumstances . . . [that] clearly tend to support the facts asserted in the declarations." *State* v. *DeFreitas*, supra, 452 n.9. Thus, under our case law and § 8-6 (4) of the Connecticut Code of Evidence,[26] which represents a codification of that case law, a statement against penal interest by an

unavailable declarant is admissible only if the statement is trustworthy and, "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."[27] Conn. Code Evid. § 8-6 (4); see also, e.g., *State* v. *Lopez*, 254 Conn. 309, 315, 757 A.2d 542 (2000). "In allowing this exception to the hearsay rule, *we are primarily concerned that under the particular circumstances*, *the statement is trustworthy*, that is, that safeguards reasonably equivalent to the oath and the test of cross-examination exist." (Emphasis added; internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 316. The court must consider three primary factors in determining whether the statement is sufficiently trustworthy to render it admissible: (1) the time the statement was made and the person or persons to whom the statement was made; (2) the existence of corroborating evidence in the case; and (3) the extent to which the statement was against the penal interest of the declarant. Conn. Code Evid. § 8-6 (4); see also *State* v. *Lopez*, supra, 254 Conn. 316.

"We previously have emphasized, however, that no single factor in the test . . . 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."[28] (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 316.

With respect to the timeliness element of the first prong of the trustworthiness test, "[w]e afford the trial court broad discretion in deciding whether the timeliness of a statement indicates that it is trustworthy. In general, declarations made soon after the crime suggest more reliability than those made after a lapse of time [during which] a declarant has a more ample opportunity for reflection and contrivance. . . . A statement's timeliness, however, is not necessarily dispositive of the trustworthiness determination." (Citation omitted; internal quotation marks omitted.) Id., 317. Thus, this court has upheld the admission of third party statements against penal interest even though the timing of those statements afforded the declarant abundant opportunity for contrivance. See, e.g., *State* v. *Rivera*, 268 Conn. 351, 370–71, 844 A.2d 191 (2004) (statement against penal interest made "within five months" of commission of crime deemed sufficiently trustworthy to be admissible); *State* v. *Gold*, 180 Conn. 619, 634, 431 A.2d 501 (statement made within three months of crime deemed sufficiently trustworthy), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980). We also have upheld the exclusion of a statement against penal

interest as untrustworthy when the statement was made so soon after the crime that the declarant had little or no time for reflection or fabrication. See, e.g., *State* v. *Lopez*, supra, 254 Conn. 317–21 (statement made one and one-half days after crime was nevertheless untrustworthy because it was not sufficiently corroborated); *State* v. *Hernandez*, 204 Conn. 377, 392–93, 528 A.2d 794 (1987) (statement made one day after crime was nevertheless untrustworthy because, inter alia, it was not sufficiently corroborated). Indeed, in certain circumstances, statements against penal interest have been deemed to be particularly reliable because a significant amount of time had elapsed from the date of the crime to the date of the declaration. See, e.g., *Stevens* v. *People*, 29 P.3d 305, 316 (Colo. 2001) (statement against penal interest more reliable when two years had passed since events at issue and investigation of declarant appeared to be inactive), cert. denied, 535 U.S. 975, 122 S. Ct. 1448, 152 L. Ed. 2d 390 (2002). It therefore may be said that "the passage of time makes a statement more reliable in one case and less reliable in another." *State* v. *Mizenko*, 330 Mont. 299, 375, 127 P.3d 458 (Warner, J., concurring), cert. denied, 549 U.S. 810, 127 S. Ct. 43, 166 L. Ed. 2d 19 (2006).

As for the second part of the first prong of the trustworthiness test, "we require that the witness testifying [about] the statement must be one in whom the declarant would naturally confide." (Internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 317–18. Thus, the relationship between the declarant and the person in whom the declarant confided must be close and confidential. *State* v. *Rivera*, 221 Conn. 58, 70, 602 A.2d 571 (1992). "[T]he focus on the party to whom the statement was made is consistent with the requirement that the declarant be aware of the disserving quality of the statement." *Laumer* v. *United States*, 409 A.2d 190, 201 n.15 (D.C. 1979).

With respect to the second trustworthiness factor, namely, the existence of corroborating circumstances, this court repeatedly has emphasized that "[t]he corroboration requirement for the admission of a third party statement against penal interest is significant and *goes beyond minimal corroboration*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Lopez*, supra, 254 Conn. 319; accord *State* v. *Rivera*, supra, 221 Conn. 71. "Therefore, the statement must be accompanied by corroborating circumstances that *clearly indicate* the statement's trustworthiness." (Emphasis in original.) *State* v. *Lopez*, supra, 254 Conn. 319. In determining whether a statement is corroborated, "all evidence bearing on the trustworthiness of the underlying statement may be considered. . . . No one criterion [is] determinative, but the [trial] court [should] consider a wide variety of facts and circumstances in making the ultimate determination of admissibility." (Citations omitted.) *State* v. *Paredes*, 775 N.W.2d 554, 567 (Iowa 2009).

Finally, the statement also must be against the declarant's penal interest. In determining whether a statement satisfies this requirement, this court has rejected a "narrow and inflexible definition of a statement against penal interest in favor of a definition [that] includes not only confessions . . . but other remarks [that] would tend to incriminate the declarant were he or she the individual charged with the crime." (Internal quotation marks omitted.) *State* v. *Bryant*, 202 Conn. 676, 695, 523 A.2d 451 (1987). Thus, "[t]he against interest exception is not limited to a defendant's direct confession of guilt. . . . It applies as well to statements that tend to subject the speaker to criminal liability. . . . [Consequently, the] rule encompasses disserving statements [made] by a declarant that would have probative value in a trial against the declarant. . . . [Our rule therefore] reaches . . . remarks that strengthen the impression that the declarant had an insider's knowledge of the crimes. . . . As to what is against penal interest, quite obviously the essential characteristic is exposure to risk of punishment for a crime. . . . Moreover, it is not the fact that the declaration is against interest but the awareness of that fact by the declarant [that] gives the statement significance." (Citations omitted; internal quotation marks omitted.) Id., 695–96.

C

Admissibility of the Bryant Evidence as

Statements Against Penal Interest

After carefully reviewing the Bryant evidence, the trial court concluded that the evidence was admissible as trustworthy declarations against penal interest. Although a statement against penal interest may be admissible even when not all of the trustworthiness factors have been satisfied, in the present case, the trial court expressly found that *each and every one* of those considerations had been satisfied. Specifically, the trial court stated: "In the present case, full consideration of the totality of the circumstances supports the admissibility of . . . Bryant's statements. . . . Bryant's statements were made under circumstances [that] support admission, are corroborated by sufficient evidence, and are clearly against his penal interest."[29]

Before reviewing the analytical underpinnings of the trial court's ruling, it first must be noted that the newly discovered Bryant evidence is highly relevant, and, therefore, the evidence would be admissible at a second trial if the petitioner is able to establish that Bryant's statements fall within an exception to the rule against hearsay. The standards governing the admissibility of third party culpability evidence are well established. "[A] defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which [he] has been charged. . . . The defendant must, however, present evidence

that directly connects a third party to the crime. . . . It is not enough to show that another [person] had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated . . . [that] [s]uch evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, *whether a reasonable doubt exists as to whether the defendant committed the offense*. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible . . . necessarily entails a determination that the proffered evidence is relevant to the jury's determination *of whether a reasonable doubt exists as to the defendant's guilt*." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–10, 935 A.2d 975 (2007). Because the Bryant evidence implicates Hasbrouck and Tinsley as the parties responsible for the victim's murder, thereby exonerating the petitioner, it is inarguable that the Bryant evidence would be highly relevant at a second trial. Indeed, the evidence bears directly on the central issue of whether the state has established beyond a reasonable doubt that the petitioner, and not some other person or persons, murdered the victim. Consequently, the admissibility of the evidence depends solely on whether it consists of trustworthy statements against penal interest.

I also note, as a preliminary matter, the standard of review that governs this court's consideration of the trial court's determination that the Bryant evidence does satisfy the requirements of the declaration against penal interest exception to the hearsay rule. "To the extent [that the] trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as

hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). When the trial court's ruling, however, is premised on a correct view of the law, that is, when, as in the present case, the trial court properly has determined "that a particular statement is or is not hearsay, or is subject to a hearsay exception"; id., 219; this court affords "the utmost deference to the trial court's determination [of admissibility]."[30] Id. In the present case, therefore, we must "make every reasonable presumption in favor of upholding the trial court's ruling . . . and . . . upset it [only] for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 496, 964 A.2d 73 (2009). Accordingly, "the question is not whether [the reviewing court], had [it] been sitting as the trial judge, would have exercised [its] discretion differently. Our role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives." (Internal quotation marks omitted.) *State* v. *Day*, 233 Conn. 813, 842, 661 A.2d 539 (1995). Thus, the party seeking to overturn a discretionary evidentiary ruling has the "heavy burden"; *State* v. *Ross*, 230 Conn. 183, 226, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); of establishing that the trial court rationally could not have decided as it did. E.g., *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"); *State* v. *Reynolds*, 264 Conn. 1, 224–25 n.192, 836 A.2d 224 (reviewing court will not find abuse of discretion if trial court "rationally could have decided as it did"), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

I now turn to the trial court's findings with respect to the three part test for evaluating the trustworthiness of a statement against penal interest. As for the timing of Bryant's statements, the court recognized that "there [were] actually two sets of disclosures relevant to this factor; first, the disclosure from Hasbrouck and Tinsley to Bryant and, second, from Bryant to [Mills, Kennedy and Colucci]. . . . [T]he statements by Hasbrouck and Tinsley were made immediately following the commission of the crime, which fits well within the traditional view of a time frame indicative of trustworthiness." The trial court also observed, however, that, "[b]eyond the initial disclosure of Hasbrouck and Tinsley to Bryant . . . the timeline of the present case is far from typical." That is, Bryant's failure to disclose the information known to him about Hasbrouck's and Tinsley's involve-

ment in the victim's murder for more than twenty-five years is unusual and, ordinarily, would render his information highly suspect.[31] The trial court explained, however, why that delay was understandable in the wholly atypical circumstances of the present case. The court stated: "The context of the longer time span in the present case is tied into the twenty-five year delay in reopening the investigation of [the victim's] murder. This unique circumstance, rather then a twenty-five year opportunity for reflection and contrivance, is the central factor that distinguishes it from typical cases [in which] investigation and prosecution of the defendant [do] not even approach the length of time present here. . . .

"Because 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. . . . Bryant indicates that even after the petitioner was arrested and brought to trial, he still refused to come forward because he thought there was no way that [the petitioner] would be convicted. . . . [Moreover] [a]t the time of the murder in 1975, [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 . . . ." The court further observed that Bryant had not come forward immediately after the murder because, as he had told Colucci, he "was afraid of being automatically pinned . . . as a suspect." (Internal quotation marks omitted.) The court also underscored the fact that Bryant had told Colucci that it would have been "easier" for the state to have convicted Bryant than the petitioner and, further, that Bryant's family had far fewer resources than the petitioner's family to provide for Bryant's defense if Bryant had become a suspect. The trial court concluded, on the basis of the foregoing considerations, and in light of the fact that Bryant, who has a law degree, had knowledge that there is no statute of limitations on prosecuting the crime of murder in Connecticut, that "his reluctance to tell his story [was] reasonable."

With respect to the second part of the first prong of the test, that is, the person or persons to whom the declarant made the inculpatory statement and the nature of the declarant's relationship with that person or persons, the trial court concluded that "[c]onsideration of the individuals to whom . . . Bryant made his statements supports their trustworthiness." The court found: "[T]he fact that . . . Bryant's first disclosure regarding the details of his whereabouts on October 30, 1975, was to . . . Mills [a friend whom he trusted] supports the trustworthiness of his statement. Bryant and Mills shared a connection to the facts of this case, dating back to their shared experiences [in] Belle Haven during the time leading up to the murder. Following this disclosure to [Mills], Bryant repeated the events of October 30, 1975, to [Kennedy] and [the petitioner's]

investigator, which further confirm[s] its trustworthiness." With respect to the petitioner's investigator, namely, Colucci, the trial court underscored that Colucci "explicitly informed Bryant that [Bryant] was being sought out in connection with a court proceeding. Bryant was further aware that his statements were being [video recorded] and that the recording was clearly being made in anticipation of being presented in court. Bryant graduated from the University of Tennessee Law School. Bryant's knowledge of [Colucci's] official role provides a greater indication of trustworthiness than the normal individual with whom the declarant does not have a close relationship."

The trial court then considered the second factor, namely, the extent to which Bryant's statements were corroborated, and found that the existence of corroborating circumstances supported the conclusion that those statements were trustworthy. The court identified the following corroborating circumstances in its memorandum of decision: (1) "Bryant went to . . . Brunswick School and was classmates with the children in the Belle Haven neighborhood"; (2) "[s]everal witnesses, including . . . Mills and . . . Walker, confirm[ed] that Bryant socialized [in] Belle Haven"; (3) "witnesses confirm[ed] that Bryant [previously had] indicated that he [had been] present in Belle Haven on the night of the murder";[32] (4) "[o]ne witness recall[ed] seeing . . . Hasbrouck and . . . Tinsley in Belle Haven with Bryant during the fall of 1975"; (5) "[b]oth Hasbrouck and Tinsley admitted to [Kennedy] that they had been in Belle Haven with Bryant on several occasions"; (6) "Bryant also provide[d] detailed descriptions of the layout of Belle Haven, including accurate recitations of where people in the neighborhood lived"; (7) "[a]ccording to Bryant, Hasbrouck was [six feet, two inches tall], at least 200 pounds on the date of the [murder], and 'very strong' "; (8) "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"; (9) "[o]n the night of the murder, Bryant stated that he, Hasbrouck and Tinsley walked around Belle Haven with golf clubs from the [Skakels'] residence, with Hasbrouck stating that he had his 'caveman club' and that he would not leave Belle Haven unsatisfied"; (10) "[t]he 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"; (11) "[p]ieces of the golf club found near the victim's body were the same brand of golf club found at the [Skakels'] residence"; and (12) "[e]vidence presented at the petitioner's criminal trial show[ed] that these clubs were commonly left about the [Skakels'] property."

The trial court further stated: "Corroboration of Bryant's statements [also] 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 [privilege against self-incrimination] after being served with subpoenas to testify at a deposition." In concluding that Bryant's, Hasbrouck's and Tinsley's invocation of their privilege against self-incrimination supports the reliability of Bryant's incriminating statements, the trial court necessarily also concluded that the three men had asserted their privilege because to do otherwise would expose them to possible criminal prosecution on the basis of the truth of Bryant's statements.[33]

With respect to the third and final factor, the trial court found that Bryant's statements were "*clearly* against his penal interest." (Emphasis added.) Although not a confession to the victim's murder, Bryant's statements place him at or near the scene of the murder, with Hasbrouck and Tinsley, immediately before the victim was murdered. Bryant also acknowledged possessing a golf club, the instrumentality used to kill the victim, that he had obtained from the Skakels' property. The information that Bryant provided demonstrates an insider's knowledge of the crime and would constitute highly incriminating evidence of guilt if Bryant were to be the target of a prosecution for an offense or offenses relating to the death of the victim. Indeed, Bryant's mother had urged him not to come forward "because he would be implicated [in the murder by] putting himself at the scene of the crime." Furthermore, when he finally did come forward, Bryant, a law school graduate, was acutely aware of the incriminating nature of his information. The trial court also observed that Bryant's "[e]fforts to explain away possible physical evidence indicate a consciousness of guilt. [Bryant's statements concerning his presence in Belle Haven on the day of the murder and his possession of a golf club at that time represent an attempt] to explain away the possibility that his fingerprints might be found on the murder weapon or another golf club nearby."[34] Finally, although Bryant eventually disclosed the information that he had been so wary of revealing, he subsequently invoked his privilege against self-incrimination, further demonstrating his understanding of the incriminating nature of his statements.

I fully agree with the trial court's conclusion that the Bryant evidence, although hearsay, would be admissible at a second trial under the exception to the hearsay rule for trustworthy declarations against penal interest. Indeed, because, as the trial court found, the Bryant evidence satisfies each of the three factors to be considered in determining the admissibility of such declarations, including the requirement that the reliability of the statements must be clearly demonstrated by corroborating circumstances, a contrary conclusion would deny the petitioner "a trial in accord with traditional and fundamental standards of due process." *Chambers* v. *Mississippi*, supra, 410 U.S. 302. For the reasons set forth in part III G of this opinion, the trial court, having

properly recognized the trustworthiness of Bryant's statements, improperly failed to consider that evidence in the context of the original trial evidence. Before turning to that issue, however, it is necessary, first, to identify certain additional facts in the record that support the trial court's trustworthiness determination; see part III D of this opinion; second, to address the view expressed by the concurrence that the trial court improperly concluded that the Bryant evidence would be admissible at a new trial as trustworthy statements against penal interest; see part III E of this opinion; and, third, to explain why the Bryant evidence would be admissible under the residual exception to the hearsay rule *even if* that evidence did not satisfy the declaration against penal interest exception to the hearsay rule. See part III F of this opinion.

D

Additional Facts and Circumstances That Render the Bryant Evidence Trustworthy

The trial court reasonably could have relied on certain other evidence adduced at the hearing on the petition for a new trial because that evidence supports the court's finding that Bryant's statements are admissible as trustworthy third party declarations against penal interest. This same evidence, moreover, also supports the conclusion that those statements meet the *Shabazz* credibility threshold as a matter of law. In particular, the Bryant evidence is corroborated to varying degrees by the statements and testimony of numerous witnesses, the state has proffered no plausible explanation why Bryant, about whom there is nothing adverse in the record, would falsely implicate two innocent people in a high profile murder and, at the same time, place himself, his reputation and his family's reputation at severe risk, and there is physical evidence that corroborates Bryant's statements.

Perhaps the most significant additional corroboration comes from Hasbrouck and Tinsley themselves, both of whom, before invoking their privilege against self-incrimination, spoke on several occasions to Kennedy and others and acknowledged that they were in Belle Haven on the day of the murder and that they previously had visited Byrne's house on a number of occasions. That corroborative evidence came to light in the following manner. After his initial conversations with Bryant, Kennedy attempted to verify some of the information that Bryant had provided to him. He first located and called Hasbrouck at his residence in Bridgeport. When Hasbrouck answered, Kennedy identified himself and his relationship to the petitioner. Kennedy asked Hasbrouck whether he knew "Tony Bryant." Hasbrouck confirmed that he did and volunteered that he and Bryant used to "run around" with Byrne and Walker in Greenwich. Kennedy then asked Hasbrouck whether

he was in Greenwich on the night of the murder. Hasbrouck responded that, "unfortunately," he was not there. He also claimed that he only recently had learned about the murder. Hasbrouck told Kennedy that Tinsley was living in Oregon and that, although he spoke with Tinsley occasionally, he had not been in touch with Byrne, Walker or Bryant since the 1970s. Before hanging up, Hasbrouck asked Kennedy for Bryant's telephone number.

Kennedy was able to locate Tinsley in Oregon, and, a few days after speaking to Hasbrouck, Kennedy telephoned Tinsley. Tinsley told Kennedy that Hasbrouck had mentioned that Kennedy might call him. In response to the same general questions that Kennedy asked Hasbrouck, Tinsley explained that he had met Bryant at Hughes High School and that he and Hasbrouck had gone with Bryant to Greenwich on several occasions. According to Tinsley, going to Greenwich "was sort of fun . . . new people to meet . . . rich community." Tinsley went to Greenwich about "a half dozen times" and remembered the Walker family "real well." When asked whether he knew Byrne, Tinsley responded that he had gone to his house "probably . . . three times." Kennedy asked him whether he had gone to Greenwich on the night before Halloween. Tinsley responded, "Halloween, it seems to me we were going up there. I have a hard time remembering . . . ." Kennedy then asked him whether he knew that Byrne had committed suicide a few years after the murder. Tinsley responded that he was not aware of that fact and that, "after the murder . . . we never went up there . . . ."

Unlike Hasbrouck, however, who initially claimed not to have learned about the murder until around the time of the petitioner's arrest, Tinsley told Kennedy that he had read about the murder in the New York Times after it happened and that he had discussed it with his brother. Tinsley further stated that he thought that they had gone to a party in Greenwich sometime during the week leading up to Halloween. He then recalled, without prompting, that Byrne's "house was really huge. They had two different kitchens, and it was an old, historical house. There was a servant's kitchen, if I'm not mistaken . . . . It was just huge . . . . [The] refrigerator had no handle . . . . [Y]ou push[ed] the button and electronically the door popped open . . . ." According to Tinsley, Byrne had made fun of him because he did not know how to open it at first. He also recalled that Byrne had lots of "toys and stuff . . . to mess around with" and that they once sprayed so much shaving cream inside the house that it "looked like hell . . . ." Tinsley told Kennedy that he, Hasbrouck and Bryant had attended a dance in Greenwich during that period. As I previously indicated, in his interview with Colucci, Bryant also recalled attending a dance in Greenwich with Hasbrouck and Tinsley, noting that Hasbrouck had been fixated on the victim for the

entire evening. The victim herself wrote about a dance in her diary, stating that two strangers had approached her as soon as she walked in. She also recalled seeing Walker, Bryant's good friend, and many other people from the neighborhood that night.

Finally, Tinsley volunteered to Kennedy that, sometime around the time of the murder, Bryant's girlfriend, who lived in Greenwich, ran away with another friend to Philadelphia, and that he, Hasbrouck and Bryant met up with them while they were in New York and tried to convince them to go home. According to Tinsley, someone had called him on the telephone at his apartment looking for the girls. Tinsley claimed that, after Bryant spoke to the caller on the telephone, the girls went home.

Kennedy asked Tinsley whether he ever had seen the Skakels' house or eaten there. Tinsley responded: "[T]he only time that I ever heard or thought of [the petitioner], and I never met any of them, [was when] [Bryant] pointed these guys out [and] [Byrne] . . . said that . . . one of them was nuts, and I said, what do you mean nuts? He said, you know, it was [the petitioner], and he said [he was in a] pretty serious fight at . . . Brunswick School [and was expelled]."

Kennedy turned over all of the information that he had gathered to Colucci. On September 2, 2003, Colucci and his associate, Steele, made an unannounced visit to Hasbrouck at his home in Bridgeport. Colucci testified that the purpose of the visit was to get a sense of Hasbrouck as a person, to see how he reacted to Bryant's accusations and to inquire whether he would agree to a video-recorded interview as Bryant had. According to Colucci, Hasbrouck started talking immediately and, over the course of approximately seventy minutes, changed his story three times with respect to his whereabouts on the day of the murder. First, he told Colucci and Steele that he was in Belle Haven on the morning of the murder but left around noontime because "nothing much was going on . . . ." Next, he stated that he, Tinsley and Bryant arrived in the morning but went home between 6 and 6:30 p.m., "before it got dark." Finally, at the conclusion of the interview, he stated that the group got there in the morning and left around 9 or 9:30 p.m.

After speaking to Hasbrouck, Colucci contacted Tinsley by telephone in Oregon. During the conversation, Tinsley stated that he was in Belle Haven on the day of the murder but did not remember anything more than that. Not long thereafter, however, both Hasbrouck and Tinsley notified Colucci that, after consulting their calendars, they had realized that they were not in Belle Haven that day. Colucci testified that Hasbrouck admitted that he had spoken to Tinsley and that they had consulted each other for the purpose of reconciling their stories. Both Hasbrouck and Tinsley, like Bryant,

subsequently invoked their privilege against self-incrimination when subpoenaed to testify at a deposition noticed by the petitioner.[35]

Other witnesses also corroborated various aspects of Bryant's statements, including Bryant's close ties to Belle Haven and Hasbrouck's and Tinsley's presence in Belle Haven at or around the time of the murder. For example, Walker, who lived across the street from Byrne and attended Brunswick School with Bryant, testified that Bryant visited his home "on many occasions" and that, after Bryant had moved to Manhattan, he had brought Hasbrouck and Tinsley with him to Greenwich "a few times . . . ." Walker also recalled that, on one occasion, Byrne's mother called his house to complain that either Hasbrouck or Tinsley, he could not remember which one, was sitting on the wall outside her house, "purportedly waiting for [Byrne] to come home . . . . And she was uncomfortable with him being there, and asked [Walker] if [he] could find a way to tell him to stop doing that." Walker stated that, by the time he got outside, whoever it was had left, "so [he] called [Bryant] and asked him if he could tell [Hasbrouck] or [Tinsley] to stop hanging around at [Byrne's] house." He did not recall, however, whether Hasbrouck, Tinsley or Bryant had come by his house on the night of the murder, which was a school night for him, and he did not remember Hasbrouck ever saying anything about the victim in his presence.

Marjorie Walker Hauer, Neal Walker's sister and the victim's best friend, testified, that although she remembered Bryant well, she did not recall whether she ever had met Tinsley or Hasbrouck. She did recall, however, the same incident that Tinsley had related to Kennedy involving the Greenwich girls who ran away and ended up in New York City. Hauer wrote about the incident in her diary on October 26, 1975, four days before the murder, and the diary entry was read into the record at the hearing on the petition for a new trial. Hauer wrote: "I called . . . Bryant, my brother's friend, and [the] boyfriend [of one of the girls] and he said he saw them, and that they were [in New York City]. . . . I told him to try to convince the . . . other three to come home. Two of them are ninth graders, and one [is] in eighth grade . . . ." Although Hauer's diary entry bears no direct relation to Bryant's assertions that Hasbrouck and Tinsley, and not the petitioner, were responsible for the victim's murder, it nevertheless confirms Tinsley's ties to people in Belle Haven just days before the murder.

There also is considerable corroboration of Bryant's statements regarding Byrne's house and how, because of its size, Hasbrouck and Tinsley easily could have been there and not been seen by any adults.[36] Hauer, who grew up across the street, described the house as a "huge Tudor style stone" mansion with "lot[s] of

rooms." Hauer testified that her brother, Walker, spent a lot of time at Byrne's house because it was "a little freer there," "[t]here wasn't as much supervision" and "[Byrne] had a lot of fun toys to play with, like go carts and things like that." She also recalled a secret tunnel that ran beneath the house that was accessible through an outside door. Garr, one of the state's investigators, testified that the house was "enormous" and that if you were in one area of the house, it would be possible to be unaware that another person was in a different area. According to Byrne's older brother, the house had twenty-eight rooms.

Wholly apart from the foregoing corroborating evidence, however, Bryant's testimony is credible because of the complete absence of *any* apparent motive for him to lie. See, e.g., *State* v. *Gold*, supra, 180 Conn. 634–35 (declarant's lack of motive to lie is corroborating circumstance that indicates reliability of third party statement against penal interest). Indeed, the state has adduced no evidence suggesting that Bryant had anything to gain by coming forward with false information exonerating the petitioner and implicating Hasbrouck and Tinsley in the victim's murder. Moreover, every single witness who knew about Bryant's allegations before Bryant agreed to his video-recorded interview with Colucci testified that Bryant was extremely reluctant to come forward and did so only after the petitioner had been convicted—wrongly, on the basis of the evidence known to Bryant—and only after Bryant's identity already had been disclosed publicly. The undisputed evidence clearly demonstrates, therefore, that Bryant never sought any publicity or recognition on account of what he knew about Hasbrouck and Tinsley; rather, he repeatedly failed or refused to return telephone calls or otherwise cooperate with those who, on behalf of the petitioner, sought to interview him about his information.[37]

Furthermore, and significantly, there is nothing in the record concerning Bryant's background or character that would cast genuine doubt on his credibility or trustworthiness as a witness. In particular, the record is devoid of evidence establishing that Bryant has a reputation for untruthfulness[38] or that he otherwise has demonstrated that he has a tendency to be dishonest. It therefore is especially hard to believe that he would concoct a story falsely accusing two former classmates of a murder with which they had nothing to do. In fact, Mills, who has known Bryant since they attended the sixth grade together, testified that Bryant is "a very friendly, easy going, kind person," and that he could not recall a single instance of Bryant "ever saying a mean word about anybody." Moreover, there is no indication that Bryant suffers from any mental illness or instability that might call into question his judgment or ability to appreciate fully the significance of the information that he has provided. Simply put, there is

no reason to think that Bryant is the kind of person who would do what the trial court necessarily believes that he has done—that is, falsely implicate two people in a murder—in rejecting his statements as incredible.

On the contrary, the state has failed to adduce any probative evidence demonstrating that Bryant is any more likely to provide false testimony than any other citizen with knowledge about a crime. Bryant comes from a prominent family, graduated from a private preparatory school in Texas, obtained his college degree from the University of Houston,[39] and attained his law degree from the University of Tennessee. He is married with four children and apparently owned his own business at the time of his video-recorded interview with Colucci. In that interview, Bryant is highly articulate and appears extremely rational, thoughtful and forthcoming. I can think of no plausible explanation—and neither the state nor the majority has proffered one—why someone in Bryant's position would accuse two childhood friends of a heinous crime if he knew that they did not commit it.[40]

Nevertheless, there are several powerful reasons why someone in Bryant's shoes might elect to keep his information to himself. First and foremost is the potential criminal exposure that he might face by coming forward; as the trial court expressly found, "one of the reasons [that] Bryant's testimony is trustworthy is because Bryant places himself in Belle Haven, on the night of the murder, in the company of [the victim], discussing assaulting [her] with Hasbrouck and Tinsley and in possession of golf clubs belonging to the Skakel family."[41] Second, few people would wish to become embroiled in so public a controversy, especially when the alleged perpetrator already has been convicted. Third, because Bryant refused for more than twenty-five years after the murder to come forward with his incriminating information about Hasbrouck and Tinsley, which, if credited, would result in the petitioner's exoneration, he risked both the scorn of his family and friends, and the disapprobation of the investigating and prosecuting authorities as well as the general public. Finally, it is highly doubtful that Bryant would falsely implicate two boyhood friends in a crime that occurred nearly thirty-five years ago by providing information that many, including the state, would seek to discredit.

In my view, only a sociopath, an inveterate liar or a calculating perjurer with something significant to gain would provide information, like the information at issue in the present case, exonerating the guilty and incriminating the innocent.[42] There is absolutely no indication that Bryant is such a person. Although it is true, of course, that the state was unable to cross-examine Bryant because he invoked his privilege against self-incrimination at his deposition, the state was free to provide the trial court with information or evidence demonstra-

ting that Bryant is not a person who can be trusted to tell the truth. Because the state did not do so, one cannot attribute a motive or reason for Bryant to lie without engaging in the rankest kind of speculation and guesswork. Indeed, the majority itself purports to "decline to speculate as to why Bryant invoked his . . . right not to testify," presumably because the evidence provides nary a hint of any such reason other than the self-incriminatory nature of his statements.[43] In the absence of even the slightest suggestion of a motivation for Bryant to lie, the trial court and the majority reject the only plausible reason for Bryant to come forward, a reason that *is* supported by the evidence, namely, a desire to convey the truth, albeit belatedly, to avoid further injustice.

Thus, even though what we know about Bryant and his background indicates that he is *not* a person who would provide knowingly false testimony, and despite the fact that the record is completely devoid of any evidence of a motive to do so, the trial court and the majority have determined that Bryant is so lacking in credibility that there is no reason to consider his video-recorded interview, together with the other corroborative evidence, in relation to the evidence adduced at the petitioner's criminal trial. This determination, which is based almost exclusively on the fact that no witness recalls seeing Bryant, Hasbrouck or Tinsley on the evening of the murder—a fact that, as I explain more fully in part III G of this opinion, may be explained by a variety of considerations—is simply untenable in view of the various factors that militate strongly in favor of a contrary conclusion. Indeed, as this court recently has stated, "in circumstances that largely involve a credibility contest, [as the petitioner's criminal trial did], the testimony of neutral, disinterested witnesses is exceedingly important." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 518, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, U.S. , 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

Furthermore, although there was no physical evidence of any kind connecting the petitioner to the murder, there is physical evidence corroborating Bryant's version of the facts. As I explain in greater detail in part IV B of this opinion, the victim was ambushed on her way home from the Skakels' house, clubbed over the head with at least one golf club and dragged or carried approximately 100 feet, where she was discovered partially naked under a tree. The likely sexual nature of the crime is reflected in the fact that the victim's pants and underwear were pulled down below her knees. Moreover, evidence also led investigators to believe that the perpetrator was disoriented or unfamiliar with the area. The number and direction of the victim's injuries appear to be fully consistent with having been inflicted by more than one golf club, and the

fact that the victim was dragged or carried approximately 100 feet also suggests that the attack may have been carried out by more than one assailant.[44] In addition, because the petitioner's trial strategy was predicated almost exclusively on his alibi, the defense did not challenge any part of the state's theory as to how the crime was committed or whether someone of the petitioner's size would have been capable of committing such a brutal crime without the assistance of an accomplice.[45] In any event, for the reasons set forth more fully in part IV B of this opinion, I believe that the crime scene lends support to the credibility of Bryant's statements about the murder.

Finally, the trial court reasonably could have relied on other important physical evidence that corroborates the information that Bryant had supplied. That evidence consists of two human hairs recovered from the sheets that were used to wrap the victim's body, one of which was identified by the forensic crime laboratory (lab) of the Federal Bureau of Investigation (FBI) as "possessing Negroid characteristics . . . ." Technicians conducting microscopic analysis of certain hair samples concluded that the hair was dissimilar to the only two African-American males known to be in the area at the time, a Greenwich police officer and the son of the Skakel family's cook. Subsequent testing on the second hair revealed that it possessed Asian characteristics. Significantly, Hasbrouck and Bryant are of African-American descent, and Tinsley, according to Bryant, is of mixed race origin, possibly of Asian descent.

E

The Concurrence

The concurrence contends that the trial court abused its discretion in concluding that the Bryant evidence would be admissible at a second trial under the hearsay exception for statements against penal interest because, according to the concurrence, the trial court reasonably could not have concluded that Bryant's statements are, in fact, against his penal interest. For the reasons that follow, I disagree.

The conclusion of the concurrence that Bryant's statements are not against his penal interest is predicated on three separate but related claims. First, the concurrence breaks down the Bryant evidence into discrete statements, analyzes each such statement separately, and then concludes that, when so viewed, none of the various statements is sufficiently disserving so as to expose Bryant to criminal liability. The concurrence next suggests that, in this state, the hearsay exception for statements against penal interest applies only to those statements that directly implicate the declarant in a crime, and, because, in the view of the concurrence, Bryant's statements do not satisfy that requirement, they do not fall within that hearsay exception. Finally,

the concurrence maintains that, even if the trial court reasonably concluded that some of Bryant's statements were sufficiently against his penal interest, those particular statements do not implicate Hasbrouck and Tinsley and, therefore, do not advance the petitioner's third party culpability defense. The concurrence further contends, along these same lines, that, because the statements that Bryant attributes to Hasbrouck and Tinsley are self-serving, that is, they tend to exonerate Bryant, those statements are not admissible at all. Although the concurrence concedes that a declarant's self-serving statements may be admitted when those statements are inextricably linked with the declarant's self-inculpatory statements, it asserts that that is not the case here. None of these arguments is persuasive.

The concurrence's analysis of the trial court's ruling concerning the admissibility of the Bryant evidence begins with an examination of each disserving statement in isolation, divorced from the rest of Bryant's narrative. Upon viewing Bryant's remarks in this manner, the concurrence asserts, first, that "Bryant's statement that he was in Belle Haven on the night of the murder is not against his penal interest . . . because (1) his presence, alone, does not so far tend to subject him to criminal liability for the victim's murder, especially in light of the fact that Bryant states, and the record reflects, that *many* people were in Belle Haven that night, and (2) Bryant specifically states that he took a train back to Manhattan . . . from . . . Greenwich . . . before the victim was murdered." (Emphasis in original.) The concurrence also contends that Bryant's acknowledgment that he possessed one of the Skakels' golf clubs on the night of the murder is not incriminating because Bryant never stated that he held the *specific* club that was used in the murder, and because he later claimed, in the same interview, "not even to know how the victim was murdered." The concurrence reasons, therefore, that, "at the time of his statement [to Colucci], Bryant would not have known that handling one of the Skakels' golf clubs could be against his penal interest." The concurrence further contends that, even if Bryant knew how the victim had been killed, his statements concerning the golf clubs are not against his penal interest because he also stated that "[e]verybody in Belle Haven touched those clubs," thus implicating himself in the murder to no greater degree than anyone else in Belle Haven. Lastly, the concurrence asserts that the record does not support the trial court's determination that Bryant discussed assaulting the victim with Hasbrouck and Tinsley because that determination suggests that Bryant made disserving statements during those discussions when, in fact, only Hasbrouck and Tinsley expressed an intent to abduct and to assault the victim sexually.

In isolating each of Bryant's statements in this manner and considering them out of the context in which

they actually were spoken, the concurrence employs an analytical model that is incompatible with this court's mandate that the determination of whether a statement is sufficiently disserving to be considered against penal interest shall be made by examining the entire statement in context. See *State* v. *Bryant*, supra, 202 Conn. 696–97. In contrast to the trial court's analysis, the approach that the concurrence uses represents precisely the kind of narrow and inflexible approach that this court expressly has rejected for purposes of determining whether a statement is against penal interest. See id., 695. In fact, because all language is contextual, it is impossible to discern the fundamental import of virtually *any* statement by viewing it in a linguistic or factual vacuum. This is what the concurrence has done, however, in parsing Bryant's remarks and reviewing them separately from one another and from the totality of the surrounding circumstances. This approach leads the concurrence to the wrong result, for as the United States Supreme Court has explained in construing rule 804 (b) (3) of the Federal Rules of Evidence,[46] "*whether a statement is self-inculpatory or not can . . . be determined* [*only*] *by viewing it in context.* Even statements that are on their face neutral may actually be against the declarant's interest. 'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. 'Sam and I went to Joe's house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question . . . is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and *this question can . . . be answered* [*only*] *in light of all the surrounding circumstances.*" (Emphasis added.) *Williamson* v. *United States*, supra, 512 U.S. 603–604.

An examination of the entirety of Bryant's statements reveals that Bryant places himself at the scene of the crime, in the company of the victim, shortly before the murder, holding the possible murder weapon,[47] and discussing an attack on the victim with the two persons—both of whom Bryant had introduced and brought to Belle Haven—who, shortly after the victim's murder, boasted about having committed the crime.[48] As this court previously has stated, the exception for declarations against penal interest "encompasses disserving statements [made] by a declarant that would have probative value in a trial against the declarant." (Internal quotation marks omitted.) *State* v. *Bryant*,

supra, 202 Conn. 695. Thus, contrary to the assertion of the concurrence, in this state, the hearsay exception for declarations against penal interest includes "not only confessions" or direct admissions of guilt, "but [also] other remarks [that] would tend to incriminate the declarant [if] he or she [was] the individual charged with the crime."[49] (Internal quotation marks omitted.) Id. Bryant's statements most certainly meet that standard, for if he were being tried for the victim's murder, the statements would be highly relevant and, indeed, highly prejudicial to his case. Far from representing an irrational or arbitrary exercise of discretion, as the concurrence claims, the trial court's determination that the Bryant evidence consisted of trustworthy declarations against penal interest represents a perfectly reasonable application of that hearsay exception to the factual scenario presented by this case.[50]

Certainly, a reasonable person in Bryant's position would not have made the statements that he did without believing them to be true. Indeed, by acknowledging his close involvement with Hasbrouck and Tinsley on the day and evening of the murder and for some time thereafter, Bryant knew that he was likely to become a suspect in that murder, the prosecution of which, as Bryant also knew, was not subject to any limitation period. As this court has observed, a statement has significance as one against penal interest only to the extent that the declarant is aware that the statement is self-inculpatory. Id., 696 ("it is not the fact that the declaration is against penal interest but the awareness of that fact by the declarant which gives the statement significance" [internal quotation marks omitted]). Applying that principle to the present case, I conclude that both Bryant and his mother made it perfectly clear that Bryant's refusal to come forward for more than two decades prior to the petitioner's arrest, and his extreme reluctance to do so even after the petitioner's arrest, stemmed from an overriding concern that to do so would result in Bryant's becoming a suspect in the victim's murder.[51]

Finally, the concurrence contends that, to the extent that any of Bryant's statements may be deemed to be self-inculpatory,[52] only those statements, and not Bryant's entire narrative—including the portion of that narrative that inculpates Hasbrouck and Tinsley—are admissible under the hearsay exception for declarations against penal interest. Although the concurrence concedes that Bryant's statements implicating Hasbrouck and Tinsley would be admissible if they are inextricably linked to Bryant's self-inculpatory statements, the concurrence asserts that those two sets of statements are not so intertwined. The concurrence's contention is belied by this court's well established case law.

In *State* v. *Bryant*, supra, 202 Conn. 676, this court concluded that, when "the disserving parts of a state-

ment 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." Id., 696–97. We also explained, however, that "[t]he problem of statements that are both disserving and self-serving to a declarant has divided commentators and some courts." Id., 696 n.18. After acknowledging that "[o]ne view . . . would admit the entire statement," whereas a second, "somewhat different view suggests admitting only the disserving portion of the declaration and excluding the self serving part [when] the two parts can be severed"; id., 696–97 n.18; we expressed our agreement with the first view, pursuant to which the *entire statement* is admitted. Id. The fact that this has been the law of this state at least since our decision in *Bryant* is reflected in the relevant commentary to the Connecticut Code of Evidence, which provides: "When a narrative contains both disserving statements and collateral, self serving or neutral statements, the Connecticut rule admits the entire narrative, letting the trier of fact assess its evidentiary quality in the complete context."[53] (Internal quotation marks omitted.) Conn. Code Evid. § 8-6 (4), commentary. Other courts have adopted the same approach. See, e.g., *People* v. *Newton*, 966 P.2d 563, 578–79 (Colo. 1998); *State* v. *Sonthikoummane*, 145 N.H. 316, 321–22, 769 A.2d 330 (2000).

Notwithstanding the clarity of our law, the concurrence asserts that only Bryant's self-inculpatory statements, and not his purportedly self-serving statements implicating Hasbrouck and Tinsley in the victim's murder, are admissible. As the foregoing discussion demonstrates, this assertion fails in light of *Bryant* and the commentary to the Code of Evidence.[54] Even if the concurrence were correct, however, that the portions of Bryant's narrative that inculpate Hasbrouck and Tinsley are admissible only to the extent that they cannot be severed from Bryant's disserving statements, Bryant's narrative satisfies that standard. The concurrence contends that, if any of Bryant's statements may be viewed as inculpatory, it is only those statements indicating that, on the night of the murder, (1) Bryant was in Belle Haven, (2) Bryant "picked up one of the Skakels' golf clubs, 'swung it,' and '[slung] it back to where the bag . . . was,' " and (3) that, "at one point, Bryant and the victim were among the ten to fifteen teenagers socializing in the meadow [behind the Skakels' residence]." The concurrence further maintains that only these statements properly could have been deemed to be admissible by the trial court, and not Bryant's self-serving statements implicating Hasbrouck and Tinsley in the victim's murder. Bryant's disserving statements, though severable from a linguistic standpoint, are so intertwined with Bryant's statements about Hasbrouck and Tinsley that the self-inculpatory nature of the former cannot be appreciated unless those statements are con-

sidered in the context of the latter. In other words, severing the two sets of statements would make it impossible for a fact finder to understand why Bryant's self-inculpatory statements are, in fact, self-inculpatory. Thus, as we expressly observed in *Bryant*, "[t]here are cases . . . [in which] allowing such latitude to contextual statements may give real meaning to the declaration that is disserving."[55] *State* v. *Bryant*, supra, 202 Conn. 697. The present case is clearly one of them.

For all the foregoing reasons, neither the state nor the concurrence can demonstrate that the trial court abused its broad discretion in concluding that the Bryant evidence would be admissible at a new trial under the declaration against penal interest exception to the hearsay rule. Indeed, far from representing an abuse of discretion, the trial court's determination was the product of a reasoned analysis predicated on a perfectly proper application of settled principles to the facts presented. Indeed, because the Bryant evidence bears persuasive assurances of trustworthiness and is critical to the petitioner's defense, excluding the evidence would implicate the petitioner's constitutional right to present a defense. See, e.g., *Chambers* v. *Mississippi*, supra, 410 U.S. 302; see also *People* v. *Oxley*, 64 App. Div. 3d 1078, 1084, 883 N.Y.S.2d 385 (2009) ("[S]upported by the relevant [nonhearsay] evidence, the hearsay testimony proffered by [the] defendant bore persuasive assurances of trustworthiness and was critical to his defense . . . . In these circumstances, [in which] constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice . . . . Indeed . . . [when] a statement is exculpatory as to [a] defendant, a less exacting standard [than that applicable to an inculpatory statement proffered by the government] applies in determining whether statements against penal interest are admissible, and [when] the statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission . . . ." [Citations omitted; internal quotation marks omitted.]). As I previously noted, however, even if it could be established that the trial court had abused its discretion in concluding that the Bryant statements would be admissible as trustworthy declarations against penal interest, for the reasons that follow, the court reasonably could have concluded that those statements would be admissible under the residual exception to the hearsay rule. I therefore turn to that hearsay exception.

F

Admissibility of Bryant's Statements Under

the Residual Hearsay Exception

At trial, the petitioner also claimed that the Bryant evidence would be admissible under the residual exception to the hearsay rule. In light of its conclusion that the

evidence would have been admissible as trustworthy declarations against penal interest, however, the trial court not did reach the petitioner's alternative claim of admissibility. The trial court, however, would have been well within its discretion to conclude that the Bryant evidence would be admissible under the residual exception.[56]

The following principles guide my analysis. "A statement that is not admissible under any of the [hearsay] exceptions [enumerated in the Connecticut Code of Evidence] is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 633 n.22, 835 A.2d 895 (2003), quoting Conn. Code Evid. § 8-9. "Reasonable necessity may be established by showing that unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." (Internal quotation marks omitted.) *State* v. *Merriam*, supra, 633 n.21. "[T]he second prong, reliability, is met in a variety of situations . . . . At minimum, the statement must independently bear adequate indicia of reliability to afford the trier of fact a satisfactory basis for evaluating [its] truth . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 810, 709 A.2d 522 (1998). "We previously have identified several factors that bear [on] the trustworthiness and reliability of an out-of-court statement, including: (1) whether the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification [could] be formed . . . (2) the closeness of the relationship between the declarant and recipient . . . (3) whether the statement was made spontaneously and in confidence or obtained in response to government questioning conducted in anticipation of litigation . . . (4) the temporal proximity between the alleged statement and the events to which the statement refers . . . and (5) whether the declarant testifies at trial and is subject to cross-examination." (Citations omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 728–29, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). In addition, a review of cases from this court and the Appellate Court reveals other factors that have been deemed relevant to this analysis. These include whether the declarant had a reason to lie; see id., 729; whether the statement is corroborated or contradicted by other evidence; see *State* v. *McClendon*, 248 Conn. 572, 584, 730 A.2d 1107 (1999); whether the statement was made under oath;

State v. *Faison*, 112 Conn. App. 373, 384, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009); whether the declarant's perception was impaired at the time he made the statement; *State* v. *Rodriguez*, 39 Conn. App. 579, 604–605, 665 A.2d 1357 (1995), rev'd on other grounds, 239 Conn. 235, 684 A.2d 1165 (1996); and whether the declarant has recanted or consistently reaffirmed the statement. See *Morant* v. *State*, 68 Conn. App. 137, 171, 173, 802 A.2d 93, cert. denied, 260 Conn. 914, 796 A.2d 558 (2002). In addition, other courts have concluded that the fact that an unavailable declarant's statement was video recorded militates in favor of admissibility because the jury can assess the declarant's demeanor at the time the declarant made the statement. See, e.g., *United States* v. *Sanchez-Lima*, 161 F.3d 545, 547 (9th Cir. 1998). Finally, the trial court's fact finding and analysis for purposes of determining the trustworthiness of a statement under the hearsay exception for declarations against penal interest is equally applicable to the same determination under the residual hearsay exception. See *Morant* v. *State*, supra, 172–73 (relying on same trustworthiness factors in reviewing trial court's rulings under hearsay exception for declarations against penal interest and residual hearsay exception).

The first prong of the analysis, necessity, is readily satisfied in the present case. Because Bryant has invoked his fifth amendment privilege against self-incrimination, he is not available to testify for the petitioner. Furthermore, the information that Bryant provided is not available from any other source. Finally, Bryant's statements, if believed, exonerate the petitioner. The petitioner, therefore, has demonstrated the necessity of admitting Bryant's hearsay statements.

The Bryant evidence also satisfies the second requirement for admissibility under the residual hearsay exception, namely, that it is supported by indicia of trustworthiness and reliability that are equivalent to those required for admissibility under other hearsay exceptions. Because those circumstantial guarantees of trustworthiness that substantiate the truthfulness of Bryant's statements are set forth in detail in part III C and D of this opinion, I need not repeat them here. It bears emphasis, however, that, in addition to the fact that Bryant's statements are strongly corroborated, no plausible explanation ever has been advanced as to why Bryant would falsely implicate Hasbrouck and Tinsley in the victim's murder.[57] Indeed, the majority correctly observes that Bryant "had nothing personally to gain by coming forward," and the record indicates that, although Bryant was reluctant to come forward, he did so solely because he was convinced, on the basis of what he knew, that the petitioner's conviction constituted a grave injustice. Furthermore, there is nothing in the record that casts doubt on Bryant's credibility. The record does reflect, however, that Bryant is a law school graduate from a prominent family who, at the

time of his interview with Colucci, owned his own business and was married with four children.[58] In addition, because Bryant's lengthy statement to Colucci was video recorded, the fact finder at a new trial will be able to evaluate Bryant's demeanor, temperament and affect as he gave the statement. It also is highly significant that physical evidence found at the scene of the crime, in particular, the two hairs found on the victim's body, support Bryant's version of the events. Finally, Bryant first confided in Mills, an old and trusted friend, and, as the trial court found, Bryant's failure to come forward sooner is readily explainable by his reasonable fear that doing so would have resulted in his being a suspect in the victim's murder. For all the foregoing reasons, the trial court properly could have found that the Bryant evidence would be admissible under the residual exception to the hearsay rule because in no event would such a ruling have constituted an abuse of discretion.[59]

It is apparent, therefore, that the trial court properly concluded that the Bryant evidence would be admissible at a new trial. For the reasons that follow, the trial court was required to consider that evidence in the context of the original trial evidence.

G

The Bryant Evidence and the *Shabazz* Minimum Credibility Threshold

Notwithstanding its finding that the Bryant evidence was sufficiently trustworthy to be admissible at a new trial, the trial court further concluded that the evidence was not sufficiently believable for purposes of the test adopted by this court in *Shabazz* v. *State*, supra, 259 Conn. 811, to warrant a second trial. Although purporting to apply the test mandated under *Shabazz* for analyzing a petition for a new trial, the trial court never considered the newly discovered Bryant evidence in light of the original trial evidence, presumably because, in the court's view, Bryant's statements were not credible enough to require that second level of review.[60] I disagree with the trial court that Bryant's statements were not sufficiently credible to require a review of that evidence in the context of the original trial evidence. In particular, I believe that, because the Bryant evidence was admissible as trustworthy declarations against penal interest, that evidence, under the specific circumstances of this case, necessarily satisfied the minimum credibility threshold that comprises the first prong of the two part *Shabazz* test.[61] Thus, the trial court's failure to view the newly discovered evidence in the context of the evidence adduced at the petitioner's criminal trial was improper. Moreover, as I explain more fully hereinafter, the trial court's findings with respect to the admissibility of the Bryant evidence and its findings with respect to the credibility of that evidence are irrec-

oncilably in conflict, a problem that irretrievably taints both the court's analysis under *Shabazz* and its ultimate determination that a new trial is not warranted.

1

I begin my discussion of these issues by noting, preliminarily, that, in many cases involving new trial petitions based on newly discovered evidence, that evidence will prove to be so inherently incredible or unworthy of belief that it will be unnecessary for the court to consider it in light of the evidence presented at the original trial. In most such cases, the trial judge, who generally will have had the opportunity to observe the in-court testimony of the witness proffering the newly discovered evidence, will be able to assess that witness' veracity on the basis of the witness' conduct, demeanor and attitude on the stand. Indeed, "[t]he trial court . . . is obliged to make such a credibility determination . . . on the basis of [any such] live testimony." *Adams* v. *State*, supra, 259 Conn. 842. If, on the basis of that assessment, the court reasonably concludes that the witness is so lacking in credibility that he or she simply would not be believed by a second jury, there is no reason for the court to consider the witness' testimony in the context of the original trial evidence. In cases involving newly discovered evidence that is *not* proffered through live testimony—in such circumstances, the court is unable to assess the witness' credibility on the basis of his or her demeanor and conduct at the hearing—the court nevertheless reasonably may conclude that the new evidence is unworthy of belief and, consequently, that a second jury would not credit it, either because the evidence bears insufficient indicia of reliability, because it is clearly refuted by other undisputed or highly credible evidence, or because it derives from a source that itself is inherently unreliable or untrustworthy.

The newly discovered evidence at issue in the present case does not fall into any of these general categories. It is true that, although the trial court could not evaluate Bryant's credibility firsthand, the court was able to view his video-recorded interview with Colucci. Thus, unlike documentary or other unrecorded hearsay testimony, the video recording afforded the court the opportunity, albeit somewhat limited by the witness' absence from the courtroom, to assess Bryant's conduct, demeanor and attitude as he responded to Colucci's questions during the interview. There is nothing in the trial court's memorandum of decision or anywhere else in the record, however, to suggest that the court relied on any aspect of Bryant's demeanor in that video recording in concluding that a jury would not credit his version of the facts. In fact, the court expressly states that, because Bryant did not testify at the hearing on the petition for a new trial, the court was *unable* to evaluate his "demeanor and manner . . . ."[62] Instead, the court

relied solely on certain objective, undisputed facts in reaching its conclusion that Bryant was so lacking in credibility that evaluating his testimony in the context of the original trial evidence was unnecessary. In the absence of any indication that the court's credibility determination was predicated on Bryant's conduct in the video recording, as opposed to the substance of his statements, it is apparent that Bryant's demeanor, mannerisms or appearance had no bearing on the court's determination.[63] Thus, to the extent that the trial court's assessment of Bryant's credibility would have been entitled to deference *if* that assessment had been based, in whole or in part, on the court's evaluation of Bryant's conduct during his video-recorded interview with Colucci, there is no occasion for such deference because the record is devoid of any indication that the court's credibility determination was predicated, to any degree, on Bryant's demeanor during that interview.

Furthermore, the court's conclusion that a second jury would discredit Bryant was not founded on any evidence that Bryant, because of his character or background, is a person unworthy of belief. Indeed, there is nothing in the record to suggest that he is the kind of person who would falsely implicate two former classmates in a gruesome and high profile murder. Finally, the court's credibility determination was based entirely on its evaluation of the substance of Bryant's statements viewed in the light of the same objective facts that led the court correctly to conclude that those statements were marked by indicia of reliability sufficient to ensure their trustworthiness for purposes of admissibility. In such circumstances, the trial court was required to consider those statements in the context of the original trial evidence.

This is so because of the requirement in this state that only *trustworthy* declarations against penal interest may be admitted into evidence. See Conn. Code Evid. § 8-6 (4). As this court repeatedly has emphasized, and as I previously explained; see part III B of this opinion; this prerequisite to admissibility is essential and requires the court to engage in a "careful examination" of the statement to ensure its trustworthiness. *State* v. *Rosado*, 218 Conn. 239, 244, 588 A.2d 1066 (1991), citing *State* v. *DeFreitas*, supra, 179 Conn. 451–52. Consequently, a statement against penal interest will be excluded from evidence—notwithstanding that it would fully exonerate a defendant if believed—unless "circumstances [exist that] . . . *clearly tend to support the facts* asserted in the [declaration]." (Emphasis added.) *State* v. *DeFreitas*, supra, 452 n.9. Thus, there must exist facts that strongly corroborate the statement. See, e.g., *State* v. *Lopez*, supra, 254 Conn. 319 (explaining that corroboration requirement for hearsay exception for statements against penal interest is "significant" and "*goes beyond minimal corroboration*" [emphasis in original; internal quotation marks omit-

ted]). In other words, the statement must be supported by corroborating facts that "*clearly indicate* the statement's trustworthiness." (Emphasis in original.) Id.

Only a statement against penal interest that meets these stringent requirements will be deemed sufficiently trustworthy to be admissible under that exception to the hearsay rule. Because a statement cannot be characterized as trustworthy unless it is, in fact, reliable or worthy of confidence,[64] it stands to reason that when, as in the present case, the trial court properly has found that the newly discovered evidence would be admissible at a new trial as trustworthy statements against penal interest, the court must have a sufficiently compelling justification to reject that evidence as so *unreliable* or *unworthy* of confidence that it need not be considered in the context of the original trial evidence. In other words, once the court has determined that a statement against penal interest bears substantial indicia of reliability, such that, at a minimum, a jury reasonably could credit it,[65] the court would need strong reason also to conclude that that *same* evidence is so devoid of credibility that a jury simply would not believe it. Without such a reason, the court is obligated to view the statement in the context of the original trial evidence. To conclude otherwise would unduly diminish the significance of the newly discovered evidence and its potential effect on the jury in light of the relative strength or weakness of the state's original case. Indeed, it would be manifestly unfair for a court to forgo considering a *trustworthy* statement against penal interest in the context of the original trial evidence without a truly sound basis for concluding that the statement, despite its reliability, is entirely lacking in credibility. As I explain hereinafter, the trial court in the present case was not justified in rejecting as wholly incredible Bryant's trustworthy statements against penal interest.

Before providing that explanation, however, it is important to identify a second critical, albeit related, reason why it was improper for the trial court not to consider the Bryant evidence in the context of the original trial evidence. This reason stems from the fact that a new trial is required upon the discovery of evidence following the petitioner's original trial if that evidence is sufficiently credible and of such a nature to raise a *reasonable doubt* at a second trial. In the present case, that newly discovered evidence is third party culpability evidence, which, by its very nature, is always "relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt"; *State* v. *Arroyo*, supra, 284 Conn. 610; as long as that evidence "establishes a direct connection between a third party and the charged offense . . . ." Id., 609–10. It is undisputed, of course, that the Bryant evidence satisfies this relevancy requirement because Bryant's statements directly implicate Hasbrouck and Tinsley in the victim's murder and exonerate the petitioner. Consequently, for a sec-

ond jury to find the petitioner not guilty of the victim's murder, that jury need not be firmly convinced that Bryant is telling the truth about Hasbrouck's and Tinsley's involvement in the murder; indeed, the jury need not even find that it is more likely than not that Bryant's story is truthful. Rather, the jury must find only that the newly discovered evidence, along with the other evidence tending to undermine the state's case,[66] gives rise to a reasonable doubt that the petitioner committed the offense. Because juries are instructed that "[p]roof beyond a reasonable doubt is proof that precludes every reasonable hypothesis except guilt and *is inconsistent with any other rational conclusion*"; (emphasis added; internal quotation marks omitted) *State* v. *Johnson*, 288 Conn. 236, 289 n.49, 951 A.2d 1257 (2008); a second jury would find the petitioner not guilty upon determining that it is reasonably possible that Bryant is telling the truth. Thus, only if the trial court reasonably were to determine that the jury would find the Bryant evidence "utterly unworthy of credence"; *Smith* v. *State*, supra, 141 Conn. 208;[67] that is, so lacking in credibility that a jury rationally would not find it credible enough even to raise a reasonable doubt about the petitioner's guilt, *no matter how weak the state's case against the petitioner*, would it be proper for the court to reject the petitioner's claim without reviewing the newly discovered Bryant evidence in the broader context of the original trial evidence. Indeed, it is in recognition of this relationship between the state's demanding burden of proof in criminal cases and the petitioner's burden of establishing a right to a new trial that this court has explained that, in considering the newly discovered evidence in light of the original trial evidence, the court must determine not whether that new evidence is absolutely credible but, rather, whether it is "*sufficiently*" credible to warrant a new trial. (Emphasis added.) *Adams* v. *State*, supra, 259 Conn. 844; accord *Shabazz* v. *State*, supra, 259 Conn. 827. Because Bryant's statements against penal interest bore significant indicia of trustworthiness, and because, as I explain hereinafter, there is nothing in the record to justify a finding that the Bryant evidence, despite its trustworthiness, is nevertheless wholly lacking in credibility, the trial court's failure to proceed to the next step of the analysis, that is, consideration of that evidence in the context of the original trial evidence, was contrary to the procedure that this court established in *Shabazz* for evaluating new trial petitions.[68]

The trial court based its determination that Bryant's statements were not credible, first, on its finding that the statements were only minimally corroborated and, second, on four undisputed facts. I turn first to the court's first reason for finding Bryant's statements lacking in credibility, namely, that they were only minimally corroborated.

As I explained in part III B of this opinion, a third party statement against penal interest is inadmissible unless supported by significant corroborating evidence that clearly establishes the statement's trustworthiness. E.g., *State* v. *Lopez*, supra, 254 Conn. 319. Consequently, a trial court may not admit such a statement unless it determines, after carefully examining the statement and the surrounding circumstances; *State* v. *DeFreitas*, supra, 179 Conn. 451–52; that the statement is supported by "a significant level of corroboration"; *State* v. *Lopez*, supra, 254 Conn. 321; a threshold that the trial court in the present case necessarily found had been met by the petitioner. Indeed, the court expressly identified various facts and circumstances that it determined were sufficient to satisfy that requirement. Notwithstanding this finding, the trial court thereafter concluded that Bryant's statements were "not credible" and, therefore, would not be believed by a jury, because "[t]he corroboration for Bryant's claim is minimal" and "[t]he testimony of Bryant is absent any genuine corroboration." There simply is no way that the trial court's first finding, that is, that Bryant's statements are trustworthy because they are supported by significant, rather than minimal, corroborating facts, can be reconciled with its second finding, that is, that those same statements are not credible because the facts supporting them are minimal and not genuinely corroborative.

This flaw in the trial court's analysis is critical. Unless the trial court correctly concluded that Bryant's statements were sufficiently trustworthy to be admissible—a determination that the trial court was entitled to make only if its predicate finding of significant corroboration also was correct—Bryant's statements would be inadmissible, and, consequently, there would be no reason for the court even to analyze the petitioner's claim under *Shabazz*. Because, however, the trial court *correctly* concluded that Bryant's statements were sufficiently corroborated to be admissible under the hearsay exception for declarations against penal interest, the court was required to proceed to the *Shabazz* test, the first prong of which mandates that the court decide whether the statements satisfy a minimum credibility threshold. A crucial component of that determination was an evaluation of the extent to which Bryant's statements were corroborated; common sense dictates that a hearsay statement—indeed, any statement—that is supported by significant corroborating evidence necessarily will be far more credible than a statement that lacks any real corroboration. Because the trial court improperly relied on its finding that Bryant's statements were *not* corroborated—a finding that flatly contradicted its earlier determination with respect to the *very same* statements and the *very same* corroborative evidence—its analysis was fundamentally flawed, and, therefore, its conclusion is clearly incorrect.

The trial court's analytical error is compounded by the fact that, as I have explained, a third party statement against penal interest that is found to be admissible—in other words, one that is sufficiently corroborated to be deemed trustworthy—also will be credible enough to surmount the *Shabazz* minimum credibility threshold in the absence of sufficiently strong countervailing evidence to justify a contrary conclusion. This is so because, as I also have explained, under *Shabazz*, the newly discovered evidence need not be fully credible or believable; rather, it need be only *sufficiently* credible to give rise to a reasonable doubt that otherwise did not exist. In rejecting the evidence supporting Bryant's statements—evidence that the trial court already had found, quite properly, to be strongly corroborative of those statements—the trial court improperly failed to give due weight to that evidence for the purpose of determining whether the petitioner had satisfied the minimum credibility threshold under *Shabazz*. Moreover, although the court identified certain other evidence that, in its view, supported the conclusion that Bryant's statements were so lacking in credibility that they failed to meet even that low threshold,[69] the court's express reliance on the purported lack of corroborating evidence[70] skewed the court's analysis, resulting in a credibility determination that is unfaithful to the principles underlying *Shabazz*. Consequently, the trial court's conclusion that Bryant's statements, notwithstanding their trustworthiness, fail under the first prong of *Shabazz*, cannot stand.[71] These flaws in the trial court's analysis are alone sufficient reason to reverse the trial court's judgment.

3

In dismissing the petitioner's claim without considering the nature and strength of the state's case, the trial court also relied on the facts that none of the victim's closest friends had "any recollection of any association between [the victim] and Bryant, Hasbrouck and Tinsley," that Bryant did not come forward with his version of the facts for many years, that none of the witnesses who testified at the new trial hearing had "any recall of ever seeing Bryant and his companions in Belle Haven on the night of the murder," and that "[t]he claim that Hasbrouck and Tinsley went 'caveman style' [was] not supported by the evidence." For the reasons that follow, these facts are insufficient to justify the trial court's failure to consider Bryant's trustworthy statements against penal interest in the context of the original trial evidence as the second prong of *Shabazz* requires.

With respect to the first reason that the trial court advances, it is not at all surprising that none of the victim's closest friends had any recollection of Hasbrouck and Tinsley thirty years after the murder because Bryant never suggested the existence of any

relationship between the victim, on the one hand, and him, Hasbrouck and Tinsley, on the other, such that that association likely would have made much of an impression, if any at all, on the victim. To the contrary, Bryant indicated that Hasbrouck, despite his fixation on the victim, was too insecure even to approach her. Bryant himself knew the victim only through his acquaintance with people who lived in her neighborhood, and he and the victim never attended school together. Moreover, at the time of her death, the victim had resided in Greenwich for only one year. In sum, there is nothing in the record to indicate either that Hasbrouck's interest in the victim was anything but one-sided or, more importantly, that Hasbrouck, Tinsley and Bryant ever spent any significant amount of time with the victim prior to her murder.[72] In fact, it appears quite clear that Hasbrouck and Tinsley were generally unknown in Belle Haven except to those people with whom they actually had spent some time, namely, Byrne and Walker. Notably, Walker remembers both Hasbrouck and Tinsley well and, although Byrne is not alive to testify, Tinsley and Hasbrouck recall Byrne surprisingly well in view of the relatively limited contact that they had had with him more than thirty years ago.

I turn next to the trial court's finding that the Bryant evidence cannot be credited because of the considerable time that had elapsed before he came forward. The trial court stated: "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 [on] anonymity. He did not come forward voluntarily; rather, it only happened when . . . Mills informed [Kennedy] of this information." As I previously explained, Bryant has been very consistent in his reason for not coming forward, namely, that he and his mother feared that he could be subject to criminal liability for his involvement with Hasbrouck and Tinsley on the night of the murder. Indeed, in finding that Bryant's statements are sufficiently trustworthy so as to render them admissible as against his penal interest, the trial court found: "At the time of the murder in 1975 . . . 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 . . . .

"Combined with . . . Bryant's knowledge that there is no statute of limitations on murder, his reluctance to tell his story is reasonable." I can discern no reason why the same rationale should not apply to a determination of Bryant's credibility for purposes of the test that this court adopted in *Shabazz*.

The majority seeks to bolster this particular aspect of the trial court's analysis by hypothesizing a reason why Bryant did not come forward with his version of the facts until years after the victim's murder. Specifi-

cally, the majority speculates that Bryant fabricated Hasbrouck's and Tinsley's involvement in the murder simply in the hopes of being involved in the sale of a screenplay. The majority's theory is purely conjectural—indeed, the trial court itself did not attempt to ascribe this or any other motive to Bryant—and the majority is incorrect in asserting that the theory finds support in the evidence. On the contrary, the majority's postulation rests on a mischaracterization of the facts concerning that screenplay as those facts were related by Mills, the screenplay's author, whose rendition of the facts makes it perfectly clear that Bryant had nothing at all to do with the screenplay, and never sought to have anything to do with it, after he read it and informed Mills of Hasbrouck's and Tinsley's involvement in the murder. See footnote 17 of this opinion. Moreover, the record is perfectly clear that Bryant went to great lengths to *avoid* any publicity or attention with respect to his knowledge about the events on the night of the murder, and he assiduously resisted any and all efforts by Mills and Walker to persuade him to come forward and to speak to the authorities. Finally, as I previously explained, Bryant consistently expressed wholly understandable reasons for not wanting to make his story public, including the fact that, by doing so, he might have placed himself in jeopardy of becoming a subject or even a target of the police investigation into the victim's murder.

It is worth noting, moreover, that, when Colucci asked Bryant whether, by coming forward, he was seeking "the limelight," Bryant reminded Colucci that he had not come forward willingly, stating: "I'm not interested in any publicity. I don't want to be involved in this at all. I'm not interested in fifteen minutes or fifteen years of fame. I'm interested in the preservation of my family . . . ." Bryant continued, however, that he knew that "the wrong person is in jail for this" and that Hasbrouck or Tinsley "should be serving time for this [murder]." When Colucci asked Bryant why he should believe him, Bryant responded: "There is no reason for you to believe me. All I have is a story to tell. I was there. I knew all the parties." Bryant further stated: "And when you have suspects that have been described by other people [as having been] in Belle Haven and police not following up and prosecutors not following up, it sort of makes you kind of [wary].[73] . . . They just beamed in on that one family [the Skakels]. And unfortunately for [the petitioner], [they] had a bull's eye on him. Based on the evidence that they had, they were able to convict [him]. But he's not guilty. He may be guilty of a lot of things, but he's not guilty of this. . . . But, you know, I'm not his judge [or] his jury. So why should you believe me? I was there. I know who was there. I know what the atmosphere was. People still don't understand what was going on in Greenwich at the time. There [were] a lot of drugs, a lot of drinking

by underage[d] minors. And you had outsiders coming in that were volatile. And you mix those things together, and there is no supervision . . . something's going to happen. . . . And do I feel responsible? Yes and no. I feel responsible [such] that I need to come forth and give my statement. I didn't goad anybody into doing anything. My mistake in judgment is not—I mean, I sat on this story the whole time during the [petitioner's criminal] trial, because there was no way, there was no way [I] ever thought that [the petitioner] would get convicted. No way."[74] Thus, the explanation that the majority advances as to why Bryant might have been motivated to come forward with his information about the murder is completely lacking in factual support.

In sum, I see no reason to disbelieve, or even to doubt, Bryant's explanation for refusing to come forward sooner. Although he certainly deserves no praise for failing to make himself available to the state and to the petitioner in a much more timely manner, the fact that he did not do so is insufficient reason to reject out-of-hand his version of the facts.

With respect to the trial court's next reason for discrediting Bryant, I do agree that the court reasonably concluded that Bryant's credibility is undermined by the fact that no one recalls seeing him, or Hasbrouck or Tinsley, in Belle Haven on the night of the murder, even though Bryant recalls seeing several people there that night. I do not agree, however, that this renders his version of the facts incredible. It may be that Bryant is not telling the whole truth about the murder because of a desire to minimize his own involvement in the events leading up to it. He also may be embellishing, either intentionally or unintentionally, some of his memories regarding whom he saw, or he may be conflating memories of that night with memories of other visits to Belle Haven. As I explain in greater detail in part IV of this opinion, Bryant would not be the first witness in this case to have a mistaken recollection, or no recollection at all, with respect to events that occurred more than three decades ago.[75]

We know, moreover, that many people were outside in Belle Haven on the night of the victim's murder but were never identified by the police. For example, Andrew Pugh, who the state called as a witness at the petitioner's criminal trial, testified that sometime before 8 p.m., he ended up behind the Skakels' house with "ten or twelve of the neighborhood kids . . . causing a ruckus" with "shaving cream and toilet paper . . . ." Pugh was not asked to identify these children, however, and there is no indication that the police ever identified them. Indeed, there is considerable evidence that groups of children congregated at various places in the neighborhood throughout the night. One of the children, Maria Coomaraswamy-Falkenstein, testified at the hearing on the petition for a new trial that she had

observed "a large group" of people near the Skakels' residence and that the group would split up and reassemble within the neighborhood throughout the night. Charles Morganti, a special police officer who was on duty in Belle Haven on the night of the murder, saw a group comprised of at least five or six "young teenagers" in and around the Skakels' property early in the evening and then later on. Because of the darkness, however, he was not able to identify any of them. Evidence adduced at the hearing on the petition for a new trial indicated that there were no street lights in Belle Haven, thereby making it especially difficult to see and identify people at night.

Indeed, the fact that no one remembers seeing Bryant, Hasbrouck and Tinsley in Belle Haven very well could be attributable both to the darkness and to the cold. According to police records, temperatures on the night of the murder were anywhere between thirty-five and forty-five degrees Fahrenheit; anyone who was out, therefore, likely was covered up. Furthermore, according to Morganti, the group of teenagers that he saw near the Skakels' property "scattered" when he approached them. When asked whether he was able to identify any of them, Morganti responded: "There was no light in that area. It was totally pitch black. There is no way I could have recognized anyone over there." Steven Hartig, another Belle Haven resident, saw a group of teenagers near the Skakels' property while he was out walking but claims not to have recognized any of them. Finally, there also was substantial evidence presented at the petitioner's criminal trial that some of the teenagers were consuming drugs and alcohol that night. In short, there is ample reason to believe that people were out in Belle Haven on the night of the murder who never have been identified, either because it was too dark to see them, because they did not want to be seen or for reasons of inattention due to drugs and alcohol. There is no reason necessarily to exclude Bryant, Hasbrouck and Tinsley from that category of persons.[76]

I note, in addition, that Julie Skakel, the petitioner's sister, and Andrea Shakespeare, her close friend, observed the silhouette of a person run past the kitchen window of the Skakels' house at approximately the same time that the victim was sitting in a car in the Skakels' driveway with Byrne, Helen Ix, Thomas Skakel and the petitioner. A short time later, as Julie Skakel was getting into her car to drive Shakespeare home, she observed another figure dart across the driveway in a crouched position and run into the woods. Shakespeare heard the footsteps of the second person but did not see him. Because of the darkness, neither Julie Skakel nor Shakespeare was able to provide a description of the person or to determine whether it was the same person whom they had seen run past the kitchen window. In light of the newly discovered Bryant evi-

dence, it is not implausible that the figures Julie Skakel and Shakespeare had observed prowling about the Skakels' property shortly before the victim was killed were those of Hasbrouck and Tinsley, both of whom could have stalked the victim and waited for Byrne to return. Indeed, according to Ix, Byrne appeared on the street, alone, as she and the victim were walking to the Skakels' residence around 9:10 p.m. Ix told the police that she had left the Skakels' house approximately fifteen minutes later because she had to be home for a 9:30 p.m. curfew, and that Byrne walked with her to her house and then disappeared. Ix assumed that Byrne went home after he left her but did not see which way he actually went.[77]

The majority asserts that, "[i]n his police interviews, Byrne never stated that Bryant, Hasbrouck or Tinsley had been with him" on the night of the murder and that, "[s]everal witnesses . . . placed Byrne with the victim and other friends at various times that night . . . ." I agree with the majority that Byrne's whereabouts on the night of the murder are highly relevant to any assessment of Bryant's credibility because Bryant claims not only that Byrne was with him for much of the evening but also that Byrne was with Hasbrouck and Tinsley after Bryant left. Contrary to the suggestion of the majority, however, to the extent that there is credible evidence documenting Byrne's movements, it tends to support Bryant's claims. In Bryant's videorecorded interview with Colucci, Bryant states that, after going to the Walkers' residence at approximately 6:30 or 6:40 p.m., he, Hasbrouck, and Tinsley went to the home of the Walkers' neighbor and took some beer from that neighbor's refrigerator. They then met up with Byrne, and the four of them proceeded to walk around the neighborhood playing pranks. Bryant places the group in the meadow behind the Skakels' house at between 8:30 and 8:45 p.m. Bryant never indicates that Byrne has left the group, so, presumably, he was with them until Bryant departed for the train station at approximately 9:15 p.m. According to Ix, Byrne met up with the victim and Ix right about this time, at approximately 9:10 p.m., as the victim and Ix were walking to the Skakels' house. At the hearing on the petition for a new trial, the state sought to establish that Byrne had been with Ix all night by introducing part of a statement that Ix had given to the police on the day after the murder. In that statement, Ix indicates that she met up with Byrne "shortly after" meeting up with the victim, sometime around 7 p.m. In the course of further examination of Ix, however, the petitioner's counsel introduced another portion of that 1975 statement indicating that Byrne did not stay with Ix and the victim but, rather, left them to go home to get eggs. Ix told police that, after Byrne left, she and the victim "never really saw [him] again" until he appeared two hours later.[78] Coomaraswamy-Falkenstein testified at the hearing on

the petition for a new trial that, between about 8 and 8:30 p.m. on the night of the murder, she was at the house of the Mouakad family, which lived down the street from the Skakels on Otter Rock Road, with the victim and some other neighborhood children, and that she did not recall Byrne being with the group.

There is, therefore, no firm accounting of Byrne's whereabouts for the two hour period corresponding to the general time frame that Bryant claims Byrne was with him, Hasbrouck and Tinsley. Indeed, Byrne's sudden appearance around the time that Bryant claims to have left for the train station offers a highly plausible explanation as to where he might have been most of the evening. If Byrne had gone to his house to get eggs, as Ix told police that he had done, and bumped into Bryant along the way, as Bryant claims, that would explain why Ix never saw Byrne again until much later in the evening. Indeed, given that Byrne simply showed up alone while the victim and Ix were walking to the Skakels' residence, it is not farfetched to believe that Hasbrouck and Tinsley sent Byrne to try to isolate the victim or to draw her away from Ix. As I explain in part IV of this opinion, much of the evidence that was used to convict the petitioner required the jury to draw precisely this manner of inference. In any event, Byrne's whereabouts are pivotal in terms of assessing Bryant's credibility, and the fact that his whereabouts for most of the evening remain unaccounted for supports Bryant's version of the facts.[79]

Finally, and perhaps most importantly, the trial court expressly found, at the hearing on the petition for a new trial, that "witnesses confirm[ed] that Bryant [previously had] indicated that he [had been] present in Belle Haven on the night of the murder." Because the testimony of those witnesses, namely, Barbara Bryant and Esme Ingledew Dick, strongly corroborates Bryant's claim that he was in Belle Haven with Hasbrouck and Tinsley that night, that testimony necessarily minimizes the import of the fact that no witnesses recall seeing Bryant, Hasbrouck or Tinsley there at that time.

First, with respect to the information provided by Barbara Bryant, the petitioner retained private investigators Michael Udvardy and Catherine Harkness in September, 2006, to locate and interview her. In early November, 2006, Udvardy and Harkness set up a surveillance outside Barbara Bryant's apartment building in New York City. When Barbara Bryant exited the building in the late morning, Udvardy and Harkness introduced themselves and asked her if she would be willing to answer a few questions. She agreed to do so and spoke to the investigators for approximately fifteen minutes. According to Udvardy, Barbara Bryant "expressed frustration with [her son] for coming out with the story" and indicated that "she didn't know why he was discussing it at all." When asked whether her

son was in Belle Haven on the day of the murder, Barbara Bryant responded that he had gone there with Hasbrouck and Tinsley but had returned home "*that night*." (Emphasis added.) She also stated that, at that time, her son had told her that *Hasbrouck and Tinsley had spent the night in Belle Haven*. Barbara Bryant also spoke to Udvardy about the New York Times article of November 1, 1975, that her son had alluded to in his video-recorded interview with Colucci. Barbara Bryant specifically recalled discussing the article with her son at the time of its publication. Udvardy's testimony was confirmed in all respects by Harkness, who also was present for Barbara Bryant's interview with Udvardy.

On February 21, 2007, Barbara Bryant was deposed by the petitioner. Her deposition was video recorded and later admitted into evidence at the hearing on the petition for a new trial. At her deposition, Barbara Bryant changed her story somewhat from what she had told Udvardy and Harkness.[80] Barbara Bryant stated that she then recalled that her son had returned home from Belle Haven while it was still light out, not at night as she had told the investigators. Barbara Bryant also indicated that she no longer was sure if she or someone else in her apartment had brought the New York Times article to her son's attention; she simply remembered that it was discussed in the house shortly after the murder and that a girl who was visiting had said to her son, "aren't you glad you had your black butt home because you certainly would have been accused of this." She also did not recall telling her son that Hasbrouck and Tinsley were dangerous and that he should distance himself from them, although she conceded that it was "possible" that she had had such a conversation with her son. Barbara Bryant stressed that she had no independent knowledge of whether Hasbrouck and Tinsley killed the victim, and that she remembered them as well mannered and attractive young men.[81] Finally, Barbara Bryant noted that the publicity surrounding her son's disclosures had made her "ill" and that she was taking several medications.

Dick, with whom Bryant lived while he was attending Brunswick School, also corroborated Bryant's claim of having been in Belle Haven on the night of the murder. Dick testified at the hearing on the new trial petition that, in the 1970s, her husband was chairman of the languages department at Brunswick School. Through her work as the executive director of the Educational Film Library Association, Dick had met Barbara Bryant, a producer of children's films; see part III A of this opinion; and the two women became good friends. In 1972, Dick and her husband invited Bryant to live with them in Greenwich so that he could attend Brunswick School. Dick testified that Bryant lived with them for three years, until the summer of 1975, at which time he left to reside with his mother in Manhattan. According to Dick, shortly after the murder, Bryant

visited her home and disclosed to her that *he had been in Belle Haven on the night of the murder*. Dick also testified that Bryant was very upset after the petitioner's trial and told her that the petitioner had been "wrongly convicted," although he did not explain why he believed that to be the case. Thus, this testimony, like the evidence that Barbara Bryant provided, seriously undermines any contention that Bryant's story is merely a recent fabrication. It also belies the majority's speculative suggestion that Bryant may have been prompted to tell his story because of a desire to collaborate with Mills on Mills' screenplay. Indeed, the testimony of Barbara Bryant and Dick—testimony that the trial court expressly credited—negates the possibility that Bryant had *any* reason or motive to lie about his whereabouts on the night of the victim's murder because it defies credulity to think that, at age fourteen, Bryant was planting the seeds for a false story not to be revealed until more than one quarter of a century later.

Finally, the trial court also concluded that the evidence did not support Bryant's statements concerning the "caveman style" of attack that Hasbrouck and Tinsley allegedly contemplated because "[t]here was no evidence of the victim being dragged by the hair." The majority posits a second reason why Hasbrouck's and Tinsley's planned "caveman" assault is unsupported by the evidence, namely, the alleged sexual nature of the assault was not corroborated by the existence of semen on the victim's body. Neither of these reasons provides any reasonable basis for rejecting Bryant's statements as lacking in credibility. First, the victim was dragged a considerable distance—at least seventy-eight feet—and it simply is not clear what part of her body her assailant or assailants used to move her that distance. Even if it assumed that she was not dragged by her hair, however, it is clear that Hasbrouck and Tinsley used the term "caveman style" to describe generally what they intended to do, that is, to abduct, to subdue and then presumably to assault their victim sexually. Moreover, because the victim likely struggled when confronted by her assailants, it is reasonable to presume that Hasbrouck and Tinsley sought to accomplish their goal, including avoiding detection, in whatever way they thought was most likely to succeed under the circumstances, irrespective of whether that approach involved dragging the victim by her hair or by some other part of her body.

With respect to the majority's contention that the evidence does not support the conclusion that the victim was the subject of a sexual assault or an attempted sexual assault, the majority is simply mistaken. The victim was found with her pants and underwear pulled down below her knees. Furthermore, the state elicited testimony at the petitioner's criminal trial from Lee, the former chief state criminalist, that semen could have been wiped away from the victim's body, as well as

testimony from Harold Wayne Carver II, the state's chief medical examiner, that certain parts of the victim's body were not tested for the presence of semen. In light of the efforts of the victim's assailant or assailants to remove her pants and underwear, it appears highly likely that the purpose of the assault against the victim was sexual in nature; indeed, it is difficult to discern any other reason or motive for the brutal and shocking attack on the very popular fifteen year old victim.[82]

4

Thus, the record of the proceedings with respect to the petition for a new trial does not support the trial court's failure to consider Bryant's statements—statements that the court properly found were admissible because they were accompanied by corroborating circumstances clearly indicating their trustworthiness—in the context of the evidence adduced and the arguments raised at the petitioner's criminal trial. Indeed, to the extent that the trial court rejected Bryant's statements as lacking in credibility because they were only minimally corroborated, that conclusion directly contradicts the court's threshold finding that the statements were strongly corroborated, a finding that is fully supported by the evidence. Under the circumstances presented, therefore, the significant indicia of reliability that mark Bryant's statements are sufficient, as a matter of law, to surmount the minimum credibility threshold that, under *Shabazz*, triggers consideration of that newly discovered evidence in the context of the original trial evidence.[83] I therefore turn to an examination of the original trial evidence.[84]

IV

STATE'S CASE AGAINST THE PETITIONER

Because the petitioner did not raise a sufficiency of the evidence claim in his direct appeal to this court following his criminal conviction, this is the first time that this court has had occasion to consider the strength of the state's case.[85] See generally *State* v. *Skakel*, supra, 276 Conn. 639–40. On the basis of my review of the state's evidence, I conclude that it was not strong and required the jury to draw every possible inference in favor of the state's theory of the case.[86] Although at least four witnesses placed the petitioner twenty minutes away from the scene of the murder when it occurred, the state argued that each and every one of those witnesses was lying. The evidence to support this argument, however, was weak at best, especially when viewed in light of the testimony that was used to convict the petitioner, which consisted almost entirely of equivocal admissions by the petitioner and one dubious confession that he allegedly had made while he was a student at Elan School, an alcohol and drug rehabilitation facility for troubled adolescents located in Poland, Maine. Moreover, there was no physical evidence con-

necting the petitioner to the crime and no eyewitnesses. In light of the relatively weak evidence adduced by the state and the comparative strength of the newly discovered third party culpability evidence, I am convinced that that new evidence, at an absolute minimum, gives rise to a reasonable doubt about whether the petitioner had murdered the victim. I therefore am persuaded that, if the jury had considered the Bryant evidence together with the original trial evidence that it did consider, it is very likely that the verdict would have been different.

A

Events Leading Up to the Murder

The following facts, many of which are set forth in this court's opinion rejecting the petitioner's direct appeal; see generally id., 639–53; are relevant to the issue of whether the Bryant evidence warrants a new trial. On the evening of October 30, 1975, the victim left her home in the Belle Haven section of Greenwich sometime around 7 p.m. to "hack around" the neighborhood with her friend, Helen Ix. Shortly after 7 p.m., the victim and Ix went by the Skakels' house to see if the petitioner and his brother, Thomas Skakel (Tommy Skakel), were home. All of the Skakel children, however, Rushton Skakel, Jr., age 19, Julie Skakel, age 18, Tommy Skakel, age 17, John Skakel, age 16, the petitioner, age 15, David Skakel, age 12, and Stephen Skakel, age 9, together with their tutor, Kenneth Littleton, age 23, their cousin, James Terrien,[87] age 17, and Julie Skakel's friend, Andrea Shakespeare, age 16, were having dinner at the nearby Belle Haven Club. Rushton Skakel, Sr., the father of the Skakel children, was away on a trip and would not return until the following evening.[88] All of the teenagers were drinking that night, some quite heavily. There also was evidence indicating that some of them had been smoking marijuana. The evidence further established that there was virtually no parental supervision at the Skakel household and that Rushton Skakel, Sr., was an alcoholic. The house was managed by an assortment of personnel, including a cook, a housekeeper, a gardener and their tutor, Littleton.[89]

At approximately 9 p.m., the Skakels and their guests returned home from dinner. Shortly thereafter, at approximately 9:10 p.m., the victim, Ix and Geoffrey Byrne arrived at the residence and were let inside by the petitioner. The four of them immediately went outside to listen to music in a family car that was parked in the driveway. The victim and the petitioner sat in the front seat while Ix and Byrne sat in the backseat. At approximately 9:15 p.m., Tommy Skakel joined them, climbing into the front seat with the victim and the petitioner.[90] After a few minutes, Rushton Skakel, Jr., John Skakel and Terrien came out and told them that they needed to use the car to take Terrien back to his home, which was approximately twenty minutes away

and where they all planned to watch "Monty Python's Flying Circus," a television show, at 10 p.m. The petitioner asked the victim if she wanted to go with them, but she said that she had to go home. According to statements that Ix gave to the police in the immediate aftermath of the murder, she, Tommy Skakel, Byrne and the victim got out of the car and Rushton Skakel, Jr., John Skakel, and Terrien got into the car with the petitioner. Ix told the police that, when she got out of the car, she went home to meet her 9:30 p.m. curfew but also because she felt like a "third wheel" to the victim and Tommy Skakel, who were behaving in a flirtatious manner. When Ix told the victim that she was leaving, the victim responded that she also was going home in a few minutes. Ix, accompanied by Byrne, left Tommy Skakel and the victim at the car and walked toward the rear of the Skakels' house in the direction of Ix' house. Ix' residence abutted the Skakels' property but faced Walsh Lane, directly across the street from the victim's house. The victim was standing in the driveway alone with Tommy Skakel the last time Ix saw her alive. Ix arrived home at approximately 9:30 p.m. in accordance with her curfew.

Two weeks after the murder, the police interviewed Ix and asked her to recall again exactly what she and the victim had done after arriving at the Skakels' residence. Ix responded that, initially, she, the victim, Byrne and the petitioner had gone outside to listen to music in a car. After a short time, they were joined by Tommy Skakel and then by John Skakel, Rushton Skakel, Jr., and Terrien. When the police asked Ix if "everybody . . . got out of the car" when Rushton Skakel, Jr., said he needed it to take Terrien home, she responded, "[n]ot everyone. Just Tom[my] [Skakel], and me, and [the victim]." When asked if anyone else got out, Ix responded, "and [Byrne]." At the petitioner's criminal trial, Ix testified that the car carrying Rushton Skakel, Jr., John Skakel, the petitioner and Terrien was pulling out of the driveway as she and Byrne started to leave.

The victim's body was discovered at approximately 12:30 p.m. on October 31, 1975, under a tree on her family's property. In the hours following the discovery of the body, Greenwich police canvassed the Belle Haven neighborhood looking for anyone who might have been out the night before. At approximately 3 p.m., Detective James Lunney went to the Skakels' home and interviewed all of the Skakel children except for Rushton Skakel, Jr., regarding their activities the night before and was informed at that time that Rushton Skakel, Jr., John Skakel and the petitioner all had gone to Terrien's home and that Tommy Skakel was the last person in the family to see the victim before she left to return home.

Julie Skakel was again interviewed by the police approximately two weeks after the murder. At that time,

she stated that, at approximately 9:30 p.m. on the evening of the murder, after her brothers had left for Terrien's residence, she left to take Shakespeare home. Both Shakespeare and Julie Skakel testified at the petitioner's criminal trial that the car going to Terrien's home already had departed by the time that she and Shakespeare left because Julie Skakel's car was the only car in the driveway.[91] When they got outside, Julie Skakel realized that she had forgotten her car keys and asked Shakespeare to run back inside to get them. The front door was locked, so Shakespeare rang the doorbell. Tommy Skakel, who had just entered the house through the side door where he had been talking to the victim, met Shakespeare at the front door and gave her the keys. Julie Skakel testified that, as she sat in the car waiting for Shakespeare, she saw the victim standing in the driveway and Tommy Skakel at the front door speaking to Shakespeare. Both Julie Skakel and Shakespeare reported to the police that, before leaving the Skakels' house, they had seen an unidentified person run past the kitchen window. Julie Skakel also told the police that, while waiting in the car for Shakespeare to return with the keys, she saw a silhouette of a person running in front of her house. She stated the figure ran in a crouched position across the driveway and disappeared into the woods adjacent to the driveway. Although it was too dark to see who it was, she later told police that she assumed, without any real basis for doing so, that it was one of her brothers, and proceeded to yell, "Michael, come back here . . . ." Although Shakespeare did not see the second person, she told the police that she had heard footsteps on the driveway as she was walking back to the house to get the keys.

Julie Skakel returned home from dropping Shakespeare off at approximately 9:50 p.m. Upon exiting the car, another person ran past Julie Skakel carrying what appeared to be an object in his hands. She could not identify the person, however, because of the darkness.

The evidence established to a high degree of likelihood that the victim was killed between 9:35 and 10 p.m. Dorothy Moxley, the victim's mother, was painting in the master bedroom of her home when, sometime between 9:30 and 10 p.m., she heard a loud "commotion" in the yard, on the side of the house, where the victim's body was later discovered. Dorothy Moxley told police that the commotion consisted of "excited voices," incessant barking and what she thought was her daughter's scream. The commotion was so strange that she stopped what she was doing and went to the window to look outside. Because it was so dark, however, she was unable to see anything and turned on an outside porch light. After a few seconds, however, she turned the light off because she was afraid that whoever was there might see the victim's bike on the porch and steal it. Dorothy Moxley then put away her paint, showered and went downstairs to watch television.

John Moxley, the victim's seventeen year old brother, arrived home at approximately 11 p.m. and was informed by his mother, Dorothy Moxley, that the victim had not come home and that she was "a little worried about her." John Moxley told his mother that it was mischief night, that the victim probably was out having fun and that she would be home soon. After watching the evening news, John Moxley went upstairs to bed, while Dorothy Moxley fell asleep on the sofa in front of the television. At approximately 1:30 a.m., Dorothy Moxley woke up and realized that the victim still was not home. At that point, she woke her son and asked him to go out and look for her. She also began calling the victim's friends to see if someone might know where she was. At approximately 3:45 a.m., she called the Greenwich police to report the victim missing. According to police records, Dorothy Moxley stated that her daughter had been due home "at 9:30 p.m." and "had never been late like this before."

The strongest evidence of the time of death was offered through the victim's friend, Ix. She testified that, after arriving home at 9:30 p.m., she telephoned a couple of friends. During one of the calls, at approximately 9:45 p.m., her Australian Shepherd began to bark incessantly.[92] The barking became so loud and annoying that she put down the telephone receiver and went outside to bring the dog in. When she got there, she could see the dog at the end of her driveway, "frozen" by the edge of the road, barking in the direction of the Moxleys' driveway. Ix testified that she never had seen her dog in such an agitated state and that he was "scared" and barking "violently." Ix further testified that, although the dog always came to her when she called him, on this occasion, he refused. After a while, she gave up and went back inside. According to Ix, the dog barked continuously for about twenty-five minutes, until the family's housekeeper went out and forced the dog to come inside.

Other neighbors, in addition to the victim's mother, reported hearing Ix' dog at around 10 p.m. David Skakel testified that the barking was so "distressed and prolonged" that he got out of bed and opened a window to see what was going on. His bedroom overlooked his family's backyard with views of both Ix' property and the Moxleys' property. Because of the darkness, he could not see the dog, but he could tell from the direction of the barking that the dog was standing near the road at the end of Ix' driveway. At trial, Joseph A. Jachimczyk, the forensic pathologist who assisted the police early on in the investigation, placed the time of death at approximately 10 p.m. on the basis of the contents of the victim's stomach, the fact that rigor mortis had set in by the time her body was discovered and the frantic barking of Ix' dog at the edge of the crime scene.

In the days and weeks following the murder, the police interviewed the Skakel children, as well as their cousins, Terrien and Terrien's sister, Georgeann Terrien, on several occasions. Rushton Skakel, Jr., John Skakel and James Terrien all told police that they and the petitioner had left the Skakels' house at approximately 9:30 p.m. to go to the Terrien residence to watch "Monty Python's Flying Circus." All of them reported that, as they were leaving the house, they saw the victim standing in the driveway with Tommy Skakel. After the show ended at 10:30 p.m., Rushton Skakel, Jr., and John Skakel stayed at the Terrien residence for about twenty minutes and then returned home to Belle Haven, arriving at approximately 11:15 p.m. Georgeann Terrien told the police that she was home when Rushton Skakel, Jr., John Skakel, the petitioner and James Terrien arrived there to watch television. At the petitioner's criminal trial, Rushton Skakel, Jr., John Skakel, James Terrien and Georgeann Terrien gave the same account of their activities on the night of the murder that they had given to police in 1975. Specifically, Rushton Skakel, Jr., John Skakel and James Terrien all testified that they, along with the petitioner, had gone to the Terrien residence at around 9:30 p.m. to watch television and that Rushton Skakel, Jr., John Skakel and the petitioner had returned home at approximately 11:15 p.m.

B

Relationship Between the Crime Scene Evidence and the Bryant Evidence

Photographs of the Skakels' property and the Moxleys' property reveal a densely wooded landscape, with trees, tall hedges and bushes running along the diagonal path that the victim would have taken to walk home after leaving the Skakels' residence. The physical evidence at the crime scene indicated that the victim initially was assaulted near the top of her driveway, just after she crossed Walsh Lane. The Moxleys' driveway was horseshoe shaped, with two entrances, one to the east and one to the west. The west entrance was opposite the southeast corner of the Skakels' property. Inside the horseshoe driveway was a large lawn that extended from the street toward the northwest corner of the Moxleys' house. The house was not centered on the driveway but, rather, was situated to the southeast of it, or to the left of the horseshoe driveway, if one were standing in the street facing the house.[93] According to police reports, at the intersection of the west entrance to the driveway and Walsh Lane, "approximately [four] feet south of the roadway, a compressed grass area existed, indicating the prior presence of a body."[94] On the lawn in the middle of the horseshoe driveway, a bloodstained Toney Penna six iron golf club was found; the club later was determined to have belonged to the petitioner's mother.[95] Three feet west of the golf club

was a patch of blood that measured twelve inches in circumference. Thomas G. Keegan, the Greenwich detective originally in charge of the investigation, believed that the victim either was killed or knocked unconscious at this location. In a letter to Joseph A. Jachimczyk, a forensic pathologist who aided the police in the initial investigation, Keegan wrote: "Approximately eight feet west of the point of attack an eight inch section of stainless steel tubular golf club shaft was found, and this piece of metal, as well as the broken end of the club head, indicated that they were both intentionally broken, apparently by bending back and forth. The victim was then apparently carried or semi-dragged for a distance of fifty-eight feet to the west of the driveway." According to Keegan's crime scene notes, the path through the leaves from the lawn inside of the horseshoe driveway to the west side of the driveway "was obvious . . . ." A small amount of blood was found on the surface of the driveway along the path. "The victim was then apparently carried or dragged for another fifty feet" to a point where "two [more] patches of blood approx[imately] [eighteen] inches in circumference" were found. Keegan concluded that "the victim was repeatedly assaulted at this location" and sustained "at least four stab wounds from the broken end of the [golf] club and multiple blows to the head."

"About eight feet from [the two patches of blood] another seven inch section of tubular stainless steel golf club shaft was found, again apparently intentionally broken. The victim was then dragged for a distance of approximately seventy-eight feet and placed under [a] pine tree . . . [leaving] a clear and visible drag-pattern measuring thirteen and five-[eighths] inches wide. The victim suffered one [nonfatal] blow where there is a clear impression of the golf club head on her left arm and shoulder. All other blows [were] fatal. . . . A black abrasion on the right side of her nose indicates that her nose came into contact with the driveway." Finally, at some point during the attack, the victim's pants and underwear were pulled down below her knees. According to Lee, a forensic scientist who reconstructed the crime for the state sixteen years after the murder,[96] blood splatter inside the victim's underwear and pants indicated that her pants and underwear were down when some or all of the blows were inflicted. In certain respects, however, Lee's reconstruction of the crime differed significantly from that of Keegan's.[97] Lee theorized that the assault had occurred in the area where the two larger patches of blood were found, on the west side of the driveway, and that, during the assault, the golf club broke from the force of one of the blows, sending the head and a piece of the shaft approximately 100 feet through the air to where they were discovered on the lawn in the middle of the horseshoe driveway. According to Lee, the blood that was found on the driveway and the twelve inch patch of

blood on the lawn in the middle of the horseshoe driveway were deposited in those locations from the golf club head and shaft as they flew by.[98] Lee also theorized, and the state maintained during closing argument, that, after the initial assault, the victim ran into the wooded area west of the driveway. Specifically, the state's attorney argued to the jury that "[the victim] was first assaulted somewhere by the driveway . . . . She wasn't knocked unconscious there because we learned that she was somehow able to travel from here to . . . the major blood scene, and there is no drag trail between those two points." As I previously mentioned, however, Keegan had observed an "obvious" path from the lawn inside the horseshoe driveway to the major blood area west of the driveway on the afternoon that the body was discovered. Because defense counsel did not cross-examine Lee about any of his conclusions, he never explained how his reconstruction comported with Keegan's crime scene notes.

In light of Bryant's statements that two teenagers, both of whom were wielding golf clubs, are responsible for the victim's murder, Keegan's description of the crime scene and his theory on the manner in which the victim's murder occurred would merit serious consideration at a new trial.[99] As I discussed previously, Keegan believed that the victim was first assaulted on the lawn in the middle of the horseshoe driveway, where a golf club broke or was intentionally broken. The victim then was carried or partially dragged to the more secluded wooded area west of the driveway, where the attack resumed. If Keegan is correct, and a golf club broke or was intentionally broken on the lawn in the middle of the horseshoe driveway, there would have to have been more than one golf club involved in the attack because, according to Lee's reconstruction and Keegan's crime scene notes, the victim sustained multiple blunt force injuries in the area west of the driveway, where the two large patches of blood were found. Furthermore, on the basis of the nature of the drag marks, John Solomon, the state's chief investigator in the 1980s and early 1990s, concluded that the perpetrator was disoriented, if not unfamiliar, with the location of the neighborhood houses in relation to each another.

The autopsy report is in no way inconsistent with a two assailant theory and, in some respects, appears to support it. Harold Wayne Carver II, the state's chief medical examiner who testified at the petitioner's criminal trial regarding the findings of the original autopsy report, stated that the victim had sustained at least eight blunt force injuries to her head. All of those injuries were consistent with having been caused by the head of a golf club. Three such injuries were inflicted to the front of the victim's head, three were inflicted to the back of her head and two were inflicted to the left side of her head. Each of the blows, according to Carver, could have been fatal, and the victim likely would have

lost consciousness relatively quickly. The victim also sustained a broken nose,[100] blunt force trauma to her left shoulder and at least four stab wounds to the neck and head, consistent with having been caused by the broken shaft of a golf club. When the state asked Carver to explain the order in which the injuries were inflicted, he emphasized that his answer was predicated on the "assumption" that only one golf club had been used in the murder. He explained that, "[provided] only one golf club [was] involved," all of the blunt force injuries to the head would have to have been inflicted before the head broke away from the club's shaft. Just as with Lee, however, the defense did not cross-examine Carver, and, consequently, he was not queried as to whether so many potentially fatal blows to the front, side and back of the victim's head were consistent with the state's theory of a lone assailant or whether they were as or more likely to have been inflicted by two assailants, wielding golf clubs from different directions.

Furthermore, despite Keegan's conclusion that the attack was initiated where the club head was found, neither Lee nor Carver was asked whether the petitioner, who, by all indications was no bigger than the victim; see footnote 45 of this opinion; would have been physically capable of carrying or dragging the victim's body from the lawn inside the horseshoe driveway to the second assault area approximately 100 feet away. Hasbrouck and Tinsley, however, each of whom Bryant described as weighing at least 200 pounds and standing approximately six feet, two inches in height, clearly would have been capable of doing so.

Indeed, in my view, the most troubling aspect of the state's theory of the crime stems from the fact that it is predicated on the assumption that the victim fled to the more secluded area west of the driveway, where the major assault occurred. Thus, the state maintained during closing argument that, after the initial assault, the victim "somehow" was able to get away from her killer and run to that location. It is counterintuitive, however, that the victim, seizing on the opportunity to flee, would have opted to run in a direction that would leave her more vulnerable and isolated than she already was. As between the two possible escape routes, one being the wooded area west of the driveway and the other being the safety of her house to the southeast, common sense strongly suggests that she would have tried to run toward her house, which would have taken her across the lawn in between the horseshoe driveway, directly over the area where Keegan theorized that the assault had begun. If that were the case, and the victim had been subdued or knocked unconscious at that location, as Keegan believed that she had been, then someone would have had to have carried or dragged her body more than 100 feet to the other side of the driveway. It is hard to imagine, and the state's experts were not asked to explain, how the petitioner could have man-

aged such a feat in the dark, carrying not only the victim but also a golf club or pieces thereof in his hands.

Finally, as I indicated previously, two hairs that were recovered from the sheet that was used to wrap the victim's body where it was discovered provide additional corroboration of Bryant's statements. One of the hairs was identified by the FBI forensic crime lab as "possessing Negroid characteristics," and subsequent testing on the other hair revealed that it possessed Asian characteristics. Hasbrouck and Bryant are of African-American descent and Tinsley, according to Bryant, is of mixed race origin, possibly of Asian descent.

C

History of the Investigation

At this point, a short history of the investigation is necessary to a fuller understanding of the original trial evidence and to my conclusion that that evidence was neither particularly trustworthy nor particularly strong. The Greenwich police followed numerous leads in the weeks, months and years following the murder. In 1976, the police prepared an arrest warrant charging Tommy Skakel with the murder based, in part, on misleading statements that he had given to the police on the day after the murder, and because he was the last person known to have seen the victim alive. The arrest warrant, however, never was executed. The police then focused their suspicions on Littleton, the tutor whose first night in residence at the Skakels' house was the night of the murder. Littleton's bizarre and erratic behavior in the months and years following the murder, certain allegedly incriminating statements that he had made to his wife and others, and multiple run-ins with the law, convinced Solomon, the state's chief investigator through the early 1990s, that Littleton was the killer. Solomon also believed that Littleton, an alcoholic, was responsible for a series of unsolved murders involving the bludgeoning deaths of young women in and around places Littleton had lived or visited before and after the victim's murder. Like Tommy Skakel, however, Littleton never was charged, and the case went cold for many years.

In the early 1990s, several events caused the revival of the investigation and eventually led to the petitioner's arrest and conviction. In 1991, a rumor circulated that William Kennedy Smith, who then was facing sexual assault charges in Florida, was in Belle Haven on the night of the murder. Like the Skakels, Smith was related to the family of Robert F. Kennedy and Ethel Skakel Kennedy. Although there was no truth to the rumor, it renewed public interest in the case and put pressure on the police to solve it. In 1993, "A Season in Purgatory," which was authored by Dominick Dunne, was published. The book was a best-selling fictionalized account of the victim's murder in which Dunne effec-

tively accused Tommy Skakel of the murder and the entire Skakel family of conspiring to cover it up. Because of the renewed scrutiny on his family, Rushton Skakel, Sr., hired a private investigation firm, Sutton Associates (Sutton), to investigate the murder with the hope of exonerating his family. According to Leonard Levitt, another author who wrote about the victim's murder, before Sutton agreed to take the case, Rushton Skakel, Sr., assured Sutton that they could pursue the investigation wherever it led, and that, if it turned out that a member of his family had committed the crime, the family would publicly acknowledge it.

As part of its investigation, Sutton interviewed Tommy Skakel and the petitioner. Both Tommy Skakel and the petitioner disclosed that they had not been truthful with the police in 1975. Tommy Skakel told Sutton that, after Julie Skakel had left to take Shakespeare home, he went back outside and spent another twenty minutes with the victim in his backyard, where they engaged in heavy petting and mutual masturbation. The petitioner told investigators that, after he returned home from the Terrien residence, he, too, went back out, at around midnight, to peep in the window of a woman who lived on Walsh Lane. On the way home, he stopped at the victim's house, climbed into a tree to look in her window and masturbated. The petitioner later told the same story to Richard Hoffman, a ghost writer with whom the petitioner briefly collaborated in 1997 on a book about the petitioner's life. Hoffman testified at the petitioner's criminal trial regarding his conversations with the petitioner, which he had tape recorded. According to Hoffman, the petitioner told him that, "like . . . all the other boys in the neighborhood, he had [had] a crush on [the victim]." The petitioner also disclosed that, by the age of thirteen, he had developed a serious alcohol problem.

In 1994, an employee of Sutton stole the firm's files on the case, including detailed suspect profiles, and gave them to Levitt and Dunne. On November 26, 1995, Levitt published the first part of a four part series of newspaper articles in which he disclosed that the petitioner and Tommy Skakel had changed their stories with respect to their activities on the night of the murder. Dunne later gave the information that Sutton had obtained to Mark Fuhrman, a detective formerly employed by the Los Angeles police department who testified at the O.J. Simpson murder trial. In 1998, Fuhrman published a book in which he accused the petitioner of the victim's murder. Fuhrman's conclusion was based in part on the petitioner's statements to Sutton that he had gone back out on the night of the murder, peeped in a neighbor's window and masturbated in a tree in the Moxleys' yard.[101]

Following publication of the Levitt article in 1995, the television show "Unsolved Mysteries" dedicated a

segment to the victim's murder. After the program aired, police received numerous tips from around the country. Some of them were from people who were fellow residents of the petitioner at Elan School (Elan), the alcohol and drug rehabilitation facility that the petitioner had attended as a teenager. A number of them recalled that the petitioner, who attended Elan from 1978 to 1980, appeared to have had some involvement in or knowledge of the victim's murder.

D

The Petitioner's Statements at Elan

Most if not all of the evidence that was used to convict the petitioner consisted of statements that he allegedly had made at Elan and to Hoffman. According to the evidence adduced at the petitioner's criminal trial, Elan employed an extremely controversial behavior modification program that was based on confrontation, humiliation and public beatings. Of all the former Elan students who testified against the petitioner, however, only one, Gregory Coleman, claimed to have actually heard the petitioner confess to the victim's murder. Coleman contacted a television station in 1998, after watching a tabloid news show about Fuhrman's book and after a sizeable reward in the case had been advertised in People Magazine. Coleman, a twenty-five bag a day heroin addict, testified before the grand jury that had investigated the victim's murder and at the petitioner's probable cause hearing that he met the petitioner for the first time when he was assigned to "guard" him at Elan, following the petitioner's attempt to escape from the school. According to Coleman, the first thing that the petitioner ever said to him was, "I am going to get away with murder; I am a Kennedy . . . ." Coleman also stated that the petitioner had told him that he had beaten a girl's head in with a golf club and, two days later, had gone back to the body and "masturbated on [it]." Coleman died of a heroin overdose before the petitioner's criminal trial, but his probable cause hearing testimony was admitted into evidence and read to the jury at that trial.[102] Part of the reward money that Coleman had sought ultimately was awarded to Coleman's estate.

Other former Elan students who testified, however, told a very different story about the petitioner, insisting that the petitioner never confessed to the victim's murder. Rather, as they recalled, Joseph Ricci, the executive director of Elan, often taunted the petitioner about the victim's murder, accusing him either of having committed the crime or of knowing who did. At one point, after the petitioner had run away from the school, a general meeting[103] was convened at which the petitioner was brutalized for several hours in a boxing ring in front of the entire school. All of the witnesses gave similar accounts of the incident. Alice Dunn, a former student, testified at the petitioner's criminal trial that,

for three days before the general meeting, the petitioner had been forced to stand in the corner of the school's dining room without any sleep. On the third day, he was placed against the wall, and at least 150 students confronted him by yelling and spitting in his face. After a while, the petitioner was placed in a boxing ring and questioned by Ricci about a variety of matters, including the victim's murder. According to Dunn, this was the first time that anyone at Elan ever had heard about the victim's murder. Ricci, who appeared to be reading from the petitioner's file, tried to get the petitioner to confess, but the petitioner insisted over and over that he "didn't do it." Each time the petitioner denied involvement in the crime, Ricci put him in the boxing ring, and students would "pummel" him until he was "physically . . . wiped out . . . ." The objective of the general meeting was to make the petitioner feel abandoned by his family so that he would think that he had no alternative but to submit to the Elan program.

According to Sarah Petersen, another former Elan student, the petitioner cried "uncontrollably" during the beatings. She said that Ricci often "liked to pull [the petitioner] out [of the crowd at general meetings and] emotionally pound on him," saying things like, "we know you did this . . . ." When Ricci did not get the response that he was seeking, he would put the petitioner in the boxing ring or spank him with a paddle. Petersen testified that the petitioner always denied any involvement in the murder, but, after "long hours of torture," he would say that he did not remember just to "get them to lay off him for a little while."[104] Another former student, Michael Wiggins, remembered the general meetings as pure "mayhem," with students hitting the petitioner as hard as they could while others screamed "hit him, hit him hard, hit him harder . . . ." Wiggins recalled that the petitioner always denied any involvement in the victim's murder until he was beaten down and extremely fatigued, at which point he would say, "I don't remember . . . ." The beatings would stop as soon as the petitioner expressed some doubt. Wiggins himself was beaten so severely at Elan that, twenty-five years later, he still had scars on his body from those beatings. According to Wiggins, the beatings would stop for everyone as soon as they told Ricci what Ricci wanted to hear, even if it was not true. Elizabeth Arnold, another former Elan student, testified that, two days after the petitioner's first boxing ring incident, Ricci tried to reassure the petitioner at a group therapy session that Ricci did not really think that the petitioner had killed the victim, only that the petitioner knew who did and that he probably was covering up for Tommy Skakel. The petitioner responded that "he didn't know" and "didn't remember" anything about the night of the victim's murder.[105]

By all accounts, the petitioner's rumored involvement in the victim's murder became his identity at Elan. For

weeks on end, he was forced to wear a sign around his neck that stated, "I am a spoiled brat, please confront me on the murder of my friend, Martha Moxley . . . ." Dunn testified that she approached the petitioner after the first general meeting and asked him about the victim's murder. She thought that, if she talked to him, it might "jar" his memory, and that she might be the one who would be able to get him to make "some sort of confession . . . ." He responded that "he just didn't know," that he had been "drinking" that night and that he was not in his normal state of mind. Nine months later, after the petitioner had graduated from Elan and both he and Dunn became staff members there, they had dinner at a local restaurant, and she asked him again if he "really ha[d] no memory of what [had] happened . . . ." When the trial court presiding over the petitioner's criminal trial asked Dunn to recall exactly how she had put the question to him, she responded: "To the best of my recollection, I put it to him like, you know, you know, what about that whole thing with your family and, you know, with the murder of that girl in Greenwich and, you know, do you, you know, you know, what do you think, you know, I mean, what do you think happened, really, back there." According to Dunn, the petitioner answered in the same way that he always had answered, that is, "I don't know what happened, you know. I don't know if it was me. I don't know if it was my brother, you know. I don't know because I don't remember anything. I just don't know."

John Higgins testified that, on one occasion, when he and the petitioner were on "night owl" duty at Elan, which consisted of guarding the dormitory door to ensure that none of the students escaped, the petitioner talked with him for hours. According to Higgins, the petitioner told him "about a murder that he was somehow involved in" and that "he remembered that there was a party going on . . . at his house." He also remembered "going through some golf clubs" and "running through some woods." According to Higgins, the petitioner "was sobbing and crying," just "releasing emotions" and "bleeding out." "[T]hrough a progression of statements, he said that he didn't know whether he did it, that he may have done it, [that] he didn't know what happened, [and that] eventually, he came to the point that he [thought he] did do it, [that] he must have done it . . . ."

The import of Higgins' testimony is questionable, however, because, on cross-examination, he acknowledged that he had failed to tell the state's investigator about the petitioner's alleged admissions in the first few conversations that Higgins had had with the investigator. Higgins also claimed that approximately twenty-five to thirty people were with him and the petitioner when the petitioner made his admissions, but none of these alleged witnesses testified at trial. Higgins claimed, moreover, that his conversation with the peti-

tioner was the first and only time that he ever had heard about the victim's murder, and that he later read about it in People Magazine in the 1990s. Every other Elan witness, however, testified that the murder was a regular topic of conversation at general meetings, which were mandatory for all the students to attend. Indeed, one witness, Petersen, testified at the petitioner's criminal trial that Higgins had been the petitioner's "personal overseer" for at least six weeks after the petitioner attempted to run away.[106] Finally, Higgins admitted that he was aware of the reward money when he came forward and that Garr had advised Higgins that the reward had been increased to $100,000.[107]

These statements at Elan constitute the state's strongest evidence of the petitioner's guilt. A careful review of the statements, however, reveals that, although they may have been sufficient to sustain a conviction, they reasonably cannot be characterized as particularly powerful or convincing because the exclusive source of the single, unequivocal admission attributed to the petitioner was the probable cause hearing testimony of Coleman, who, for reasons that I previously have explained, was among the least credible of the witnesses that the state produced. Indeed, it is not unfair to say that it would be difficult to find a witness more lacking in credibility.[108] The other statements that the petitioner made to Elan students—none of whom came forward until many years after the alleged statements were made—all were equivocal and very well could have been the product of an emotionally troubled adolescent who had been hounded about the matter during his entire tenure at Elan.

During closing argument, the state's attorney argued forcefully that the petitioner's statements at Elan constituted powerful evidence of consciousness of guilt. The state's attorney maintained, moreover, that the only way that Ricci would have known about the victim's murder is if the petitioner's family had told him about it when they enrolled him at Elan. The state's attorney also argued that the only explanation for the petitioner's presence at Elan was that his family must have sent him there because they thought that he was guilty of the victim's murder and, further, that sending the petitioner to Elan would assist in the cover-up of the petitioner's guilt. Specifically, the state's attorney asserted: "One thing every client of Elan who was there during that particular era recalls vividly is . . . Ricci referring to a file and telling the [petitioner] that he wasn't getting out of [the boxing] ring until he explained why he killed [the victim], and then being forced to wear a sign [that says]: 'Confront me on the murder of my neighbor.'

"Where did Ricci get that information? Clearly, he didn't get it from the police.[109] Why did Ricci have that information? Why did Ricci confront the [petitioner] with that information? The answer, the only one that

makes sense, lies in why the [petitioner] was there in the first place, lies in why his family felt a need to put him in that awful place. Why? Because that's what they decided that they had to do with the killer living under their roof."[110] The state's attorney also maintained: "One thing that I submit helps tie all this together, particularly on the subject of Elan . . . is the [petitioner's] very presence at that place. The defense scoffs at the idea despite . . . such clear evidence of a cover-up. Why was the [petitioner] at Elan? This is really not a matter of seeing the forest from the trees. It is genuinely transparent.

"Clearly, the [petitioner] had a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort but why exactly so drastic a resort."

Although the state's attorney's argument was sufficiently rooted in the evidence to defeat a claim of prosecutorial impropriety; see *State* v. *Skakel*, supra, 276 Conn. 755–59; the theory—a centerpiece of the state's case against the petitioner—verged on the speculative. Because it called for an inference that was so attenuated from the facts—namely, that the petitioner's father had sent him to Elan because he thought that the petitioner had killed the victim—the theory falls well short of convincing. Indeed, in my view, the relative weakness of the state's case is reflected in this very argument by the state's attorney, which requires the fact finder to reject other equally plausible scenarios without any convincing reason to do so.[111]

The defense, evidently unimpressed with the strength of the state's case, offered no real rebuttal to the state's attorney's argument that only someone who had committed murder would say some of the things that the petitioner had said at Elan, or that the petitioner must have been sent to Elan because his family believed that he was responsible for the victim's murder. The defense also offered no explanation as to how an innocent person, particularly one as emotionally troubled as the petitioner, could convince himself that he may have killed someone in a drunken stupor but had no recollection of doing so. Indeed, during closing argument, defense counsel boasted to the jury that, because of the weakness of the state's case, he had not deemed it necessary to call a single expert witness to provide an alternative explanation for the petitioner's statements. "The nature of our defense—we didn't have the high tech delivery. . . . You don't see the big fancy jury expert sitting at our table. It's somewhat low key. It is me and three kids, as you can see. . . . We didn't bring in one expert. There is no memory expert. There is no this expert, there is no dog expert, nothing. We didn't give you any fancy theories. We didn't give you a twinkie

defense." Defense counsel noted, however, that the petitioner was not the only suspect in the case who had made incriminating statements over the years and that Littleton, like the petitioner, had expressed doubt on several occasions as to whether he, too, could have committed the crime. Indeed, it is remarkable that at least three people have, to varying degrees, made self-incriminatory statements with respect to the victim's murder, namely, Littleton, Bryant and the petitioner. Significantly, of the three, only Bryant has no known history of emotional disturbance, addiction or acting out. In fact, it is precisely because Bryant is so much more credible than practically every other witness in the case that I am persuaded that, if a jury were to consider his statements together with the original evidence, it likely would find the petitioner not guilty of the victim's murder.

E

The State's Theory Concerning the

Petitioner's Masturbation Story

During closing argument, the state's attorney also argued that the reason the petitioner told people that he had gone back outside on the night of the murder and masturbated in a tree next to the victim's house was that he feared that "his semen might one day be identified in a crime lab, or even that, one day, someone might surface who had actually seen him [in the victim's yard]." The state's attorney further asserted that, by the early 1990s, "every criminal investigator on the planet was totally attuned to this miraculous new [DNA] technology, and, of course, that would include the [private investigators] that the Skakel family had hired to assist them in the defense, [namely] Sutton Associates." According to the state's attorney, "the word 'masturbation' . . . [did not] come up until 1992 or thereabouts . . . . You didn't have to be a fly on the wall when [Sutton] came into the picture in 1992 to understand why the defendant soon was serving up his bizarre tale of masturbation in a tree to his friend, [Andrew] Pugh, and later to . . . Hoffman."[112]

As with the arguments of the state's attorney about Elan, the evidence adduced at trial was not all consistent with the arguments of the state's attorney about the masturbation story, and some of the evidence directly contradicted it. For example, Michael Meredith, another former Elan student, testified that, in the summer of 1987, he resided at the Skakels' house while working with the petitioner on a class action lawsuit against Elan. Meredith learned about the victim's murder for the first time that summer in a conversation with the petitioner. According to Meredith, the petitioner "instigated" the conversation, stating that, "I presume you know about [the victim] and her murder. And I want you to know, unequivocally, that I am innocent of that.

If you are curious about the details, I want to tell you what happened so you know from me." In the course of the ensuing conversation, the petitioner told Meredith that, on the night of the murder, he had climbed a tree outside the victim's house and masturbated. Meredith testified that his sense was that this was not the first time that the petitioner had done such a thing.

In light of Meredith's testimony, which the state never discredited, the state's theory with respect to why the petitioner claimed to have masturbated outside the victim's home on the night of the murder lacked persuasive force. Because the petitioner had recounted his story to Meredith several years before the petitioner's family hired Sutton, and many years before the advent of DNA technology in criminal investigations became popularly known, the state's claim that the petitioner had invented the story has little, if any, weight. Thus, this theory, no less than the state's attorney's argument that personnel at Elan had been informed by the Skakel family that the petitioner was involved in the victim's murder, reflects the relative weakness of the state's case against the petitioner.

F

The Petitioner's Alibi Defense

I am persuaded that the Bryant evidence likely would result in an acquittal at a new trial not only because the evidence adduced by the state against the petitioner at his criminal trial was not strong, but also because of the strength of the petitioner's alibi. As I previously indicated, several witnesses, including the victim's close friend, Ix, testified that the petitioner, along with several others, left Belle Haven in a car at around 9:30 p.m. to go to the home of the petitioner's cousin, Terrien, twenty minutes away. Because the time of death was so firmly established, the success of the state's case rested on the state's ability to convince the jury that all of the alibi witnesses were lying. To this end, the state's attorney argued to the jury that the petitioner's alibi was a construct, invented by the petitioner's father, and practiced by its main proponents on a trip that they had taken to the family vacation house in Windham, New York, shortly after the victim's murder. The state's attorney also argued that the family likely used the trip as an opportunity to "dispose of the evidence."

The state's attorney argued to the jury: "Let's stay with the alibi. Why is it so suspect. How was it produced. What did the Skakel family do . . . to put this together. Someone seeing the police all over the place decided, had the sense to get the players out of the area. The oldest brother [Rushton Skakel, Jr.] had already gone off to [Washington] D.C., so the first thing the next morning, Littleton was ordered to take the four players, [the petitioner], John [Skakel], [Tommy Skakel] and

. . . Terrien, out of the way for awhile, for a short trip . . . . The importance of that sudden, brief, one night trip is that the alibi didn't begin to take shape until some time after the return from Windham."

The state's attorney further asserted that the conspiracy was not limited to just the alibi witnesses but also included virtually the entire Skakel family. Thus, he asserted, in closing argument, for example, that "Julie Skakel is the best example of a family support group continuing to this day to do whatever it takes to keep the wraps on [the petitioner]." With respect to David Skakel, the state's attorney stated: "In tune with the alibi witnesses was younger brother David [Skakel]. Not really any useful information came from him, but I guess he felt a need to do his bit for the family. So he testified that, from a distance of 100 to 150 yards away on a cold night . . . over a hill and beyond the trees, [he] could tell which way [Ix' dog's] snout was pointing as he was barking . . . ."

Apart from the trip to Windham itself, however, and the fact that the petitioner's principal alibi witnesses were all related to him, the state presented no credible evidence to support its theory of a cover-up. As I previously indicated, evidence adduced at the petitioner's criminal trial established that all of the Skakel children who went to Windham were interviewed by police *before* they had departed for Windham, and the police were told at that time that the petitioner had gone to the house of his cousin, Terrien, on the night of the murder. Indeed, Tommy Skakel was interrogated for hours at police headquarters immediately following the discovery of the victim's body, the day before he went to Windham. In the petitioner's direct appeal to this court from his criminal conviction, he claimed that the state's attorney improperly had argued that the Skakel family had gone to Windham for the purpose of manufacturing an alibi.[113] *State* v. *Skakel*, supra, 276 Conn. 752. We rejected that claim, stating that "the evidence adduced at trial indicated that, on the day that the victim's body was discovered, several unidentified persons, whom Littleton described as 'suits,' came to the Skakel residence to help take control of the situation. While they were there, it was decided that Littleton would take the [petitioner], his brothers [Tommy] Skakel and John Skakel [and] their cousin . . . Terrien to the family's hunting lodge in Windham. The defendant's father also testified that Littleton would not have had the authority to take his children anywhere without his permission. Accordingly, we conclude[d] that the state's [attorney's] argument that Littleton was directed to take the four boys out to Windham on the basis of '[s]omeone seeing the police all over the place' was not improper because it was founded on reasonable inferences drawn from the testimony of Littleton and the [petitioner's] father. Moreover, because the only family members to go to Windham were the chief proponents of the [peti-

tioner's] alibi—the [petitioner's] other siblings were left behind—it also was proper for the state's attorney to argue that the trip had been arranged for the purpose of placing these crucial witnesses temporarily out of reach of the authorities in order to give them time to prepare a unified account of the events that occurred on the night of the [victim's] murder." Id., 754–55.

Although the state's attorney's argument concerning the allegedly concocted alibi was not so completely lacking in evidentiary support as to be improper, it is abundantly clear that his explanation concerning the manner in which the Skakel family allegedly manufactured the petitioner's alibi was extremely weak. The following evidence adduced at the petitioner's criminal trial demonstrates how factually attenuated the state's attorney's claim actually was. Littleton testified that, on the day the victim's body was discovered, he left the Skakels' house in the morning to go to Brunswick School, where he worked as a teacher and a coach. Upon returning to the house in the late afternoon, he encountered what he described to be a scene of "mayhem." According to Littleton, police cars were all over the street, and several unidentified cars were parked in the Skakels' driveway. Littleton stated that, when he went inside the house, he was confronted by ten to fifteen men in "suits" in the living room, who directed him to take the Skakel children to Windham the next morning. On cross-examination, Littleton further stated that the men in suits, whom he believed to be attorneys from Rushton Skakel, Sr.'s, company, Great Lakes Carbon Corporation, "were in a great hubbub, talking amongst themselves." Littleton acknowledged that, on previous occasions, he had told investigators that, when he arrived at the Skakels' house, he was "swept into a vortex" of twenty attorneys who were there to orchestrate a "cover-up." When defense counsel asked Littleton whose idea it was to take the Skakel children to Windham, Littleton replied: "When I walked into the living room to the . . . twenty suits, we ended up in a discussion. And in that discussion, we discussed the best ways to handle the situation."

The testimony of the other witnesses who were at the Skakels' house on the afternoon in question indicates that Littleton's recollection of being swept into a vortex of attorneys bordered on delusional.[114] Lunney, the officer who interviewed the Skakel children, testified that there were no attorneys at the Skakels' house while he was there that afternoon or the following day. Julie Skakel testified that, after the victim's body was discovered, a woman in her neighborhood, who knew that her father, Rushton Skakel, Sr., was away and observed the police going in and out of the Skakels' house, advised her to call her father's office to inform them of what was going on. James McKenzie, the president of Great Lakes Carbon Corporation, testified at the petitioner's criminal trial that, in 1975, he was an

associate attorney at the company's New York City office. On the afternoon of October 31, 1975, at approximately 3 p.m., he was called into the office of the general counsel and told that "there had been a murder of a neighbor next to . . . the Skakels and that the family was basically unsupervised as the father was out of town." McKenzie was asked if "[he] would go up and stay with the family until the father arrived." McKenzie took a train to Greenwich and arrived at the house at approximately 5 p.m. McKenzie stated that the scene he encountered when he arrived "was chaotic." According to McKenzie, there were a number of reporters, "some neighbors, [children of] neighbors [and] police and kids running in and out of the house . . . ." When asked what he did first, McKenzie responded: "I asked the press to leave, number one, and tried to bring a little order to the family, asked the kids to be respectful of the situation, and I just tried to keep things a little more under control."

In an attempt to bolster Littleton's testimony, the state's attorney asked McKenzie whether there were any "male neighbors or anything of that nature" at the house when he got there. McKenzie responded that there were mostly children and one woman from the neighborhood who "was trying to maintain control of the situation as well." When asked whether any of the people were "wearing suits," McKenzie responded, "I guess a couple members of the press were and certainly the police, but [that was] about it." The state's attorney then asked McKenzie whether he and Littleton had "discuss[ed] anything about [the] safety of the children, where the children should go . . . ." McKenzie responded that he had no such conversation, although he did recall meeting Littleton, who told him that he was the tutor and that it was his first day on the job.

On cross-examination, defense counsel asked McKenzie whether he had been sent to the Skakels' house to give legal advice to the family. McKenzie responded that he was not a criminal attorney and that his only purpose in going to the Skakels' residence was to "try to . . . maintain a little order and wait for the father to return." McKenzie further stated that, by the time he arrived, the police already had interviewed the Skakel children. Defense counsel asked McKenzie, "by the way, you didn't take the train with nineteen other Great Lakes Carbon lawyers, did you?" McKenzie responded that he had not, that he was the only attorney at the house and that he had not given any legal advice to anyone the entire time he was there. According to McKenzie, Rushton Skakel, Sr., returned at approximately 9 p.m. that evening. At that time, McKenzie explained to Rushton Skakel, Sr., what he knew about the situation and then went home.

It is clear that, at some point after Rushton Skakel, Sr., returned home, he decided that the older boys in

the house would go to Windham the next day, a Saturday, and that Littleton would accompany them there. Apart from Littleton's highly dubious testimony, however, there is no evidence as to how or why the decision was made. Julie Skakel testified that, during that period, her brothers went to Windham almost every weekend in the fall and winter to hunt or ski. Indeed, Littleton himself testified that he had observed nothing unusual on the trip and that he never was asked by anyone in the Skakel family to participate in a cover-up. Certain Greenwich police officers testified that they were given unfettered access to the Skakel children, as well as their home and property, in the hours following the murder, and for several months thereafter, and that the family was fully cooperative.

It may be, as the state argued at trial, that Rushton Skakel, Sr., sent his sons to Windham to get them away from police. It may also be that he sent them there simply to get them out of the house, for, as McKenzie stated, the murder had caused quite an uproar in the neighborhood, and some of the children, including the petitioner, were extremely shaken. I am fully persuaded, however, that the evidence of a cover-up was sufficiently weak, and the strength of the petitioner's alibi sufficiently strong, that, if a jury were to reconsider the alibi evidence in the context of credible evidence that one or more other persons had the means, motive and opportunity to commit the murder, that jury likely would find the petitioner not guilty of the victim's murder.

Indeed, it bears emphasis that the state was required, at the petitioner's criminal trial, to disprove his alibi defense beyond a reasonable doubt. See, e.g, *State* v. *Butler*, 207 Conn. 619, 631, 543 A.2d 270 (1988) ("[a] defendant asserting an alibi and relying [on] it as a defense is entitled to have the jury charged that the evidence offered by him on that subject is to be considered by [the jury] in connection with all the rest of the evidence in ascertaining whether [the defendant] was present, and that if a reasonable doubt on that point exists, it is the jury's duty to acquit him"). At the petitioner's criminal trial, the state undertook to prove beyond a reasonable doubt that his alibi was constructed on a trip to Windham and orchestrated by the petitioner's father, that the several young witnesses who gave statements in support of the alibi immediately following the discovery of the victim's body all lied to the police about the petitioner's true whereabouts on the night of the murder, that those witnesses continued to lie about that fact for many years thereafter, and that they then perjured themselves as adults when they testified at the petitioner's criminal trial. Evidence to support this scenario, however, is essentially nonexistent. Indeed, it is striking that, despite the notoriety of the case and the relative youth of the petitioner's alibi witnesses at the time of the murder, all of those wit-

nesses have been unwavering in their testimony, and not a single person ever has come forward with information to suggest that anyone of them ever has been untruthful.

G

Summary

In sum, the state's thin case against the petitioner was predicated primarily on statements that he had made while a resident at Elan. At the time these statements were made, both the petitioner and those to whom he made the statements were young, impressionable and, in most if not all cases, emotionally unstable, which may explain why they were enrolled at Elan. The petitioner presented an alibi defense, the credibility of which was challenged by the state on grounds that find only marginal support in the record. Although each of the persons who testified in connection with that alibi defense is related to the petitioner, no evidence ever has been adduced to demonstrate that any one of them was lying. Indeed, it is difficult to see how those alibi witnesses, who were quite young at the time of the victim's murder, could have concocted a false story immediately after the murder, placing the petitioner twenty minutes away from the crime scene when the victim was murdered, and have stuck to that story, without deviation, for decades. Furthermore, the state acknowledged the existence of at least two other significant potential suspects, including Tommy Skakel, the last person to be seen with the victim and for whom the police had sought an arrest warrant in connection with the victim's murder, and Littleton, a violent and mentally unstable person whose first night as a resident of the Skakels' home was marked by the victim's death. In light of the relatively weak evidence implicating the petitioner in the victim's murder, as well as the long-standing existence of other suspects and the petitioner's alibi defense, it is apparent that the newly discovered Bryant evidence—evidence that the trial court itself concluded was trustworthy because it bore significant indicia of reliability—is more than "sufficiently credible," when viewed in the context of the state's case, to give rise to the likelihood that a second jury would find a reasonable doubt about whether the petitioner murdered the victim.[115] In such circumstances, a new trial is required.[116]

V

THE RELATIONSHIP OF GARR AND LEVITT AND GARR'S ALLEGED BIAS

In support of his petition for a new trial, the petitioner also claims that Frank Garr, the state's lead investigator, and Leonard Levitt, an author, joined in a secret "pact" to write a book about the case, a pact that was motivated by their desire to prove that they were correct in identifying—and, in Garr's case, pursuing—the petitioner as

the person who killed the victim. The petitioner claims that this agreement resulted in the 2004 publication of a book, entitled "Conviction: Solving the Moxley Murder," on which Levitt and Garr had collaborated, that reveals Garr's "particularly unique bias" against the petitioner and his family. The petitioner further claims that this bias so "undermine[d] Garr's credibility in his selection, investigation and use of . . . witnesses and . . . dilute[d] the already tenuous probative value . . . of the circumstantial evidence" on which the petitioner was convicted that a new trial is warranted. The trial court concluded that the evidence relating to the book deal between Levitt and Garr was not newly discovered and that, in any event, it would not have had a bearing on the outcome of the petitioner's criminal trial. I disagree with the trial court that the evidence was not newly discovered. As to whether that evidence would have affected the outcome of the petitioner's criminal trial, I need not resolve that issue in view of my determination that the petitioner is entitled to a new trial on the basis of the newly discovered Bryant evidence. At a minimum, however, the evidence of Garr's bias toward the petitioner and his family bolsters my conclusion that the petitioner is entitled to a new trial.

As the majority has explained, in May, 2001, the petitioner filed a motion for discovery and inspection in his criminal case seeking, inter alia, disclosure of any 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 court, *Kavanewsky, J.*, granted the request limited to witnesses called by the state. During the petitioner's criminal trial, defense counsel asked Garr on cross-examination whether he had a book deal. When the state objected on relevancy grounds, defense counsel did not pursue his inquiry concerning a book deal.

Levitt and Garr both testified at the hearing on the petition for a new trial. Their testimony revealed that they had become friendly in 1995 after Levitt published an article in New York Newsday about the victim's murder. Following the petitioner's trial and conviction, Levitt published his book about the case. According to Garr, his own contribution to the book consisted of proofreading drafts to ensure accuracy. For Garr's assistance with the book, Levitt paid Garr 50 percent of the "net revenues" from the book.

Focusing on the petitioner's claim concerning the existence of a book deal between Levitt and Garr, the trial court rejected the petitioner's claim that any such deal or arrangement was newly discovered. In essence, the trial court found that the petitioner had not pursued the issue with due diligence, and, in any event, the two

men had no book deal prior to the petitioner's criminal trial, and Garr had no expectation of any financial interest in any book that Levitt may have planned to write about the case in the future.

In my view, the trial court viewed the petitioner's claim too narrowly by limiting its consideration to the issue of the existence of a formal business relationship between Levitt and Garr. As the petitioner notes, the book itself refers to a "pact" that the men made to "tell [their] story." L. Levitt, Conviction: Solving the Moxley Murder (ReganBooks 2004), p. x. As Levitt testified, he and Garr had entered into this "pact" shortly after the 1998 publication of a book about the victim's murder by Mark Fuhrman—a point in time that Levitt candidly described as his and Garr's "lowest ebb"—because Fuhrman was highly critical of the investigation of the murder by the Greenwich police department. There is nothing in the record to indicate that the petitioner could have learned of the "pact" between Levitt and Garr anytime prior to the publication of the book, which, so far as we know, contained the first public revelation of that agreement. Furthermore, there was no way for the petitioner to have known about Garr's animosity toward him and his family prior to the publication of the book, which contains comments, directly attributable to Garr, that reflect such feelings. The record clearly establishes, therefore, that the pact between Levitt and Garr to tell their story, and Garr's alleged bias toward the petitioner as reflected in the book that resulted from that agreement, constitutes newly discovered evidence.[117]

The petitioner further contends that this evidence would place the state's case in a new and disturbing light, thereby warranting a new trial. In fact, the book contains potentially troubling revelations about the exceedingly close relationship between Levitt and Garr—a relationship that Levitt himself characterizes as "unnatural"[118]—and about their passionate commitment to establishing that the petitioner was responsible for the victim's murder. For example, in the introduction to the book, Levitt writes: "People say I'm like a dog with my teeth in someone's ankle when I'm on a story. But pursuing the [victim's] murder required more than tenacity or even courage. It required stealth, guile, and, most important[ly], patience.

"I did not solve [the victim's] murder. What I did was prevent the Skakel family from getting away with it. I was that unexpected force that created enough of a stir to keep the case alive until someone smarter than me appeared and put it all together.

"No, that person was not the notorious former Los Angeles detective Mark Fuhrman, whose claim of solving the murder was trumpeted by the national media. Nor was it the celebrity writer Dominick Dunne, whose claims the media also accepted. Rather, the person who

solved the [victim's] murder was an unheralded local detective named Frank Garr, who pursued his investigation for eleven years and whose work and life became intertwined with mine. . . .

"Both of us found ourselves underdogs and outcasts and naturally formed a bond. We were an odd couple, a detective and a newspaper reporter. It was like the lion lying down not with a lamb but with a crocodile. Except that as we grew closer, I wasn't sure which of us was which." Id., p. xiv.

The book also documents in considerable detail Garr's hostility toward the petitioner and his family. Levitt writes: "[Garr] also knows the Skakel family. Despite the image of forthrightness and generosity they present to the world, [Garr] says they have no morals or conscience. He calls them habitual liars and says their loyalty is only to each other.

"[Garr] has no more regard for their friends, neighbors, and attorneys—even their family priest." Id., p. 4.

Levitt later quotes Garr as saying, " 'I never hid the fact that these people were despicable.' . . .

" 'Liars. Liars and drunks. They refuse to take responsibility for anything they do. They actually see themselves as victims.' " Id., p. 163. The factual basis for Garr's belief that the petitioner's family members are all liars, however, is no more apparent in Levitt's book than it was in the evidence adduced by the state at the petitioner's criminal trial, during which the state argued that the Skakel family had engaged in a decades-long cover-up.[119] Furthermore, with respect to the petitioner's appeal from the judgment of conviction, which was pending in this court when Levitt's book was published, Levitt writes: "The Skakels [will] . . . never let it die. They [are] like the forces of evil . . . [who] just kept coming." Id., p. 285. Levitt concludes by quoting Garr as follows: "For the Skakels, it is over. They just don't know it.

"And remember this. If I am wrong and their appeal is somehow granted, and even if [the petitioner] gets a new trial, you and I will still be there. We'll be there to stop them. Sometimes I think that's what we are meant to do in this world." (Internal quotation marks omitted.) Id.

Apparently, Garr's motivation was fueled not only by a deep antipathy toward the petitioner and his family, but also by a desire for recognition that he had been right about the petitioner all along. Thus, Levitt writes that Garr was exceedingly upset by Fuhrman's book not simply because of its criticism of Garr's handling of the investigation, but also because Fuhrman claimed to be the first person to suspect that the petitioner had committed the crime. According to Levitt's book, which Garr proofread for accuracy: "[Garr] was so upset [after reading Fuhrman's book] he called me. I drove over to

his house. While I sat at his kitchen table, [Garr] paced the room. '[Fuhrman] is such a liar.' . . .

"With that he flicked on the television. There on . . . one of the network talk shows was Fuhrman. He was crowing over how he'd solved the [victim's] murder.

"[Garr] and I turned and looked at each other. I didn't know whether to laugh or scream. [Garr] opened his mouth but no words came. If ever I saw a man crushed, this was it.

"[Garr had] fought with his superiors for nearly a decade over [his suspicions about the petitioner]. He'd been ostracized by his colleagues and ridiculed by his bosses yet had virtually singled-handedly gotten a grand jury impaneled. And here was Fuhrman, with barely a connection to the case, taking the credit. . . .

"I wanted to reach over and hug him, or at least touch his arm in commiseration. I didn't, though. Instead, all I could think to say was . . . 'I'm so very sorry.'

"But I made a promise to myself, and to him. When the case was over, I promised that no matter which way it went, no matter how the grand jury ruled, I would tell the story, his and mine.

"[Garr] shook his head. 'I pray that you do,' he said. 'And I'll try to help you. But you're only jerking yourself off. Nobody will listen. Nobody will believe you.' " Id., pp. 213–14.

I agree with the petitioner that evidence contained in the book would be highly relevant to demonstrate Garr's strong feelings of antipathy toward the petitioner and his family. The petitioner maintains, and I agree, that "[t]he state presented and relied heavily on a variety of questionable witnesses who offered circumstantial evidence of the petitioner's guilt," such as Coleman, the convicted felon and heroin addict.[120] At a minimum, the contents of Levitt's book would tend to undermine Garr's credibility and judgment in his selection, investigation and use of such witnesses. This is particularly so in light of Garr's testimony at the hearing on the petition for a new trial that, even though he spoke to Crawford Mills and Neal Walker "several times" about Bryant's allegations, he never once bothered to interview Hasbrouck despite the fact that Garr worked in the same city in which Hasbrouck resided. Finally, if a jury were to be presented with information that an investigator believed that he had been put on earth to thwart any effort on the part of a criminal defendant to demonstrate his innocence, it might well be inclined to view the evidence marshaled by that investigator with a heavy dose of skepticism.

As I have indicated, however, in view of my conclusion that the petitioner is entitled to a new trial on the basis of the Bryant evidence alone, I need not determine the extent to which the revelations about Garr's involve-

ment with Levitt and his intense negative feelings about the petitioner and the petitioner's family would have affected the jury's verdict. It suffices to say that, because that evidence raises questions about the objectivity of the state's investigation of the case, such evidence would make an acquittal at a new trial even more likely.

VI

CONCLUSION

A petition for a new trial is not to be granted lightly, for the state and the public have a strong interest in finality once a criminal defendant has been convicted and that conviction has been affirmed on appeal. There are occasions, however, when the discovery of new evidence following the original trial casts such doubt on the accuracy of a conviction that justice demands a second trial. The present case is such a case. The evidence brought forward by Bryant—a witness at least as credible as the state's key witnesses, without any apparent motive to lie, and whose account of the facts has been corroborated in important respects—is sufficiently compelling to give rise to a reasonable doubt, or even a *serious* doubt, as to whether the petitioner had any involvement in the victim's murder. In such circumstances, the legitimate desire for finality cannot trump the petitioner's right to a new trial. This is especially true in light of the emerging "reality of wrongful convictions"; *McKithen* v. *Brown*, 481 F.3d 89, 92 (2d Cir. 2007), cert. denied, 552 U.S. 1179, 128 S. Ct. 1218, 170 L. Ed. 2d 59 (2008); see also *Kansas* v. *Marsh*, 548 U.S. 163, 210, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (Souter, J., dissenting) ("[m]ost . . . wrongful convictions . . . [result] from eyewitness misidentification, false confession, and (most frequently) perjury . . . and . . . among all prosecutions homicide cases suffer an unusually high incidence of false conviction . . . probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent" [citations omitted]); a reality from which this state's criminal justice system is not immune, as recent events have made all too clear. See, e.g., *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 747–48, 806–807, 700 A.2d 1108 (1997) (habeas court properly granted habeas petition when petitioner, after serving more than ten years of thirty-two year sentence following his conviction on two counts of first degree assault, established by clear and convincing evidence, unavailable at time of trial, that he was innocent of those crimes and that no reasonable fact finder would find him guilty of those offenses); *Taylor* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, geographical area number nineteen at Rockville, Docket No. TSR-CV05-4000409-S (March 17, 2010) (granting habeas petition filed by

Ronald Taylor, who, along with George M. Gould, had been incarcerated for more than sixteen years following their conviction of felony murder, among other crimes, upon finding that both men did not commit crimes of which they had been convicted); *Gould* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, geographical area number nineteen at Rockville, Docket No. TSR-CV03-0004219-S (March 17, 2010) (granting Gould's habeas petition); see also C. Nolan, "Freeing Inmates, Changing Laws," Conn. L. Trib., August 17, 2009, pp. 1, 9 (more than 240 inmates across country have been exonerated due to DNA evidence, including three in this state, namely, James Tillman, released from prison after serving seventeen years for robbery and sexual assault that he did not commit, Miguel Roman, released after serving approximately nineteen years following his wrongful conviction of murder, and Kenneth Ireland, Jr., released after serving twenty-one years following his exoneration for crimes of sexual assault and murder). In the present case, the trial court misapplied the test adopted by this court in *Shabazz* for determining whether a new trial is required due to newly discovered evidence. Proper application of that test and the principles of fundamental fairness that underlie it dictate that the petitioner be awarded a new trial.

Accordingly, I dissent.

[1] All references in this opinion to Bryant are to Gitano "Tony" Bryant.

[2] Bryant asserted his privilege against self-incrimination following his video-recorded interview, and, therefore, he is not available to testify at any subsequent trial. The trial court concluded, however, that his video-recorded statements would be admissible at a new trial as trustworthy declarations against penal interest.

[3] The trial court did not reach the issue of whether the Bryant evidence also would be admissible under the residual exception to the hearsay rule because of its determination that the evidence would be admissible under the hearsay exception for statements against penal interest.

[4] As I discuss more fully hereinafter, the trial court's credibility determination is fundamentally flawed for another, closely related, reason, namely, because it is predicated on a finding by the court that Bryant's statements lack any genuine corroboration. The trial court improperly relied on that finding because it directly contradicts the court's threshold finding that the statements are *significantly* corroborated and, therefore, admissible under the hearsay exception for declarations against penal interest.

[5] As I explain in greater detail in part III G 1 of this opinion, it would be improper to impose a more stringent credibility standard because any such standard would run afoul of the principle that the petitioner must demonstrate only that the newly discovered evidence is credible *enough*—that is, it is *sufficiently* worthy of belief—to give rise to a reasonable doubt concerning the petitioner's guilt. This principle has special relevance when, as in the present case, the newly discovered evidence is completely exonerating in nature because, in such circumstances, a second jury would be required to find the petitioner not guilty on the basis of such evidence unless the state is able to establish beyond a reasonable doubt that the evidence is not credible. Thus, in the present case, if the Bryant evidence is deemed to be sufficiently credible to give rise to a *reasonable possibility* that Hasbrouck and Tinsley, rather than the petitioner, murdered the victim, then the petitioner would be entitled to a new trial on the basis of that evidence. Thus, the minimum credibility threshold that comprises the first step of the two step process mandated by *Shabazz* is satisfied if the newly discovered evidence is not completely lacking in credibility.

[6] As this court made clear in both *Adams* and *Shabazz*, the trial court always must consider the newly discovered evidence in light of the original

trial evidence. *Adams* v. *State*, supra, 259 Conn. 838; *Shabazz* v. *State*, supra, 259 Conn. 827. In other words, the original trial evidence is relevant at both stages of the trial court's analysis. The evidence adduced at the original trial is relevant to the first step of the analytical process, pursuant to which the trial court must decide whether the newly discovered evidence satisfies a minimum credibility threshold, because the court cannot properly make that determination in a factual vacuum; the facts of the case necessarily will inform the court's evaluation of the newly discovered evidence. Put differently, the trial court cannot make an informed view of the credibility of newly discovered evidence without knowing at least *something* about the state's case against the petitioner as developed at the original trial. Of course, the original trial evidence is critical to the second stage of the analysis because, at that point, the issue is whether the newly discovered evidence is sufficiently credible and of such a nature that it is likely to produce a different outcome, a determination that would be impossible for the trial court to make without consideration of the nature and strength of the evidence presented at the original trial. Hereinafter, all references in this opinion to the trial court's responsibility to consider the newly discovered evidence in the context of the original trial evidence pertain to the court's role during the second stage of the analytical process.

[7] Although the majority never expressly says so, its affirmance of the trial court's judgment necessarily reflects its conclusion that the trial court did not abuse its discretion in rejecting the petitioner's claim without reaching the second step of the *Shabazz* analysis, that is, without considering the newly discovered Bryant evidence in light of the original trial evidence.

[8] As I explain more fully hereinafter; see part III G 1 of this opinion; the trial court's impropriety stems either from a misunderstanding of the *Shabazz* minimum credibility threshold or from an abuse of discretion in applying that standard, and from that court's inconsistent factual findings with respect to the degree to which Bryant's statements are corroborated.

[9] Of course, it is possible that, in a given case, 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 even the minimum credibility threshold identified by this court in *Shabazz*, thereby obviating any need for the court to consider the statement in the context of the original trial evidence. For the reasons set forth in part III G 1 of this opinion, however, this is not such a case because there is nothing in the record that so undermines the reliability or trustworthiness of the Bryant evidence as to warrant the trial court's failure to consider that evidence in the context of the evidence adduced at the petitioner's original trial.

[10] In *Joyce*, the Appellate Court also noted that application of this somewhat less stringent standard—both by this court and other courts of this state—has been limited to cases of new trial petitions involving homicides and other similarly serious criminal offenses. *Joyce* v. *State's Attorney*, supra, 84 Conn. App. 203–204; see, e.g., *Adams* v. *State*, supra, 259 Conn. 832 (petition for new trial filed after petitioner's conviction for aiding and abetting first degree manslaughter); *Shabazz* v. *State*, supra, 259 Conn. 812 (petition for new trial filed after petitioner's murder conviction). Although I see no persuasive reason for that limitation, the present case, which involves a murder conviction for which the petitioner received a sentence of twenty years to life imprisonment, meets any such requirement.

[11] I recognize that, in most cases, the result of the trial court's inquiry will be the same under either of the two tests set forth in *Shabazz*. Nevertheless, in the unusual case in which the court, for whatever reason, is unable or unwilling to find that the newly discovered evidence likely would result in an acquittal but does conclude that a new trial is necessary to avoid an injustice, I see no legitimate basis for denying the petitioner a new trial.

The majority, by contrast, rejects this second prong of the *Shabazz* test, characterizing it as "contrary to our case law and common sense" and "amorphous . . . ." Footnote 42 of the majority opinion. None of these grounds for dismissing the alternative *Shabazz* standard is supportable. First, I fully agree with the Appellate Court that, far from rejecting the standard, this court expressly has adopted it. *Joyce* v. *State's Attorney*, supra, 84 Conn. App. 203–204. I also disagree with the majority's second assertion, namely, that common sense is offended by granting a petition for a new trial on the basis of newly discovered evidence when that evidence so seriously undermines the trial court's confidence in the verdict that justice requires a second trial. In fact, I reach precisely the opposite conclusion, that

is, that common sense *compels* the conclusion that it would be fundamentally unfair to deprive the petitioner of a new trial in such circumstances. To conclude otherwise overlooks the grave risk that the first trial has resulted in a manifest injustice, namely, a wrongful conviction. Finally, the standard is not amorphous, as the majority claims. In fact, the very same principles that underlie the test are routinely applied by the trial and appellate courts of this state in a wide variety of contexts. See, e.g., *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 389–90, 973 A.2d 1229 (2009) (applying legislative policy that no writ, pleading or proceeding shall be abated for circumstantial defect when to do so would work injustice); *State* v. *Millan*, 290 Conn. 816, 831, 966 A.2d 699 (2009) (ruling of trial court permitting introduction of uncharged misconduct evidence will not be disturbed on appeal unless court abused its discretion "or an injustice has occurred" [internal quotation marks omitted]); *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 522, 964 A.2d 1186 (to prevail on claim of ineffective assistance of counsel, defendant must establish that counsel's deficient performance undermined confidence in verdict), cert. denied sub nom. *Murphy* v. *Bryant*, U.S. , 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009); *State* v. *Johnson*, 289 Conn. 437, 463, 958 A.2d 713 (2008) (trial court's determination that probative value of evidence is not outweighed by its prejudicial effect will be reversed on appeal "only [when] an abuse of discretion is manifest or [when] injustice appears to have been done" [internal quotation marks omitted]); *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 657, 954 A.2d 816 (2008) (doctrine of law of case does not bar second trial judge from overruling first trial judge's ruling if ruling is clearly erroneous and following ruling would result in manifest injustice); *Monti* v. *Wenkert*, 287 Conn. 101, 118, 947 A.2d 261 (2008) (trial court may order new trial limited to certain issues if issues are separable, unless doing so would result in serious injustice); *State* v. *Davis*, 286 Conn. 17, 26–27 n.6, 942 A.2d 373 (2008) (denial of severance in criminal case will not warrant reversal unless defendant can establish that joinder resulted in substantial injustice); *State* v. *Ortiz*, 280 Conn. 686, 717, 911 A.2d 1055 (2006) (state's failure to disclose evidence favorable to defendant will not result in new trial unless, inter alia, that evidence casts case in such different light as to undermine confidence in verdict); *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 702, 900 A.2d 498 (2006) (trial court must set aside jury verdict when injustice of verdict is manifest); see also Practice Book § 1-8 (rules of practice shall be liberally construed to avoid injustice); Practice Book § 60-1 (rules of appellate procedure shall be liberally construed to avoid injustice). I therefore disagree with the majority's determination that it is appropriate to deny a petitioner a new trial despite the existence of newly discovered evidence when, in the trial court's view, that evidence casts such significant doubt on the legitimacy of a conviction that it would be unjust to deny the petitioner an opportunity to produce that evidence at a second trial. For obvious reasons, the unfairness engendered by the majority's decision is most acute in cases, like the present one, involving convictions for serious crimes, such as murder, that inevitably result in very lengthy prison terms. In sum, the majority's conclusion, which places finality over fairness, represents an unfortunate jurisprudential step backward, especially in light of the growing awareness of the fallibility of our criminal justice system. See part VI of this opinion.

[12] The petitioner also claimed that he is entitled to a new trial on the basis of (1) the statements of several witnesses directly contradicting the testimony of Gregory Coleman, a drug addict and key state witness who died of a drug overdose before the petitioner's trial but who asserted in his testimony at the petitioner's probable cause hearing, which was admitted at the petitioner's trial, that the petitioner had confessed to murdering the victim when he and the petitioner were residents at Elan School, a facility for troubled adolescents located in Poland, Maine, in the late 1970s, (2) a composite drawing of a person observed in Belle Haven on the night the victim was murdered that, the petitioner contends, bears a strong resemblance to Kenneth Littleton, the petitioner's former tutor and long-time suspect in the murder, who testified for the state under a grant of immunity from prosecution, and (3) police suspect profile reports of Littleton and Thomas Skakel, the petitioner's brother, who previously had been the prime suspect in the case, as well as certain information concerning Littleton's actions, including charged and uncharged criminal conduct, before, at the time of, and after the victim's murder. Although at least some of this evidence likely would have been extremely valuable to the petitioner—especially the testimony contradicting Coleman and, at least potentially, the composite drawing purportedly resembling Littleton—I generally agree with the major-

ity that, for the reasons set forth in its opinion, the trial court did not abuse its discretion in concluding, with respect to the foregoing claims, that the petitioner had failed to satisfy one or more of the prongs of the test for determining whether a new trial is warranted due to the discovery of newly discovered evidence.

[13] The Bryant evidence also includes certain statements by Bryant, some of which were tape recorded. See part III A of this opinion.

[14] The concurrence does consider the admissibility of the Bryant evidence, concluding that the trial court abused its discretion in determining that the evidence would be admissible under the declaration against penal interest exception to the hearsay rule. I discuss the concurrence in part III E of this opinion.

[15] References to the Bryant evidence include all of the newly discovered evidence tending to indicate that Hasbrouck and Tinsley may have murdered the victim.

[16] Because Bryant's family did not live in Connecticut, Bryant resided at the Greenwich home of a Brunswick School faculty member and his wife while attending the school. The couple with whom Bryant resided had been friendly with Bryant's mother for some time.

[17] Mills explained that Bryant had called him two weeks after the September 11, 2001 attacks on the World Trade Center to see if Mills, who resided two blocks from that location, was all right. At the time, Mills owned a business that provided simultaneous interpreting services to various corporate clients, but business had dried up completely after September 11. Bryant asked Mills how he intended to make a living going forward and whether he still acted or wrote screenplays. According to Mills, all of his friends, including Bryant, had known "for years" that, in the late 1980s, Mills had written a screenplay about Greenwich and the victim's murder, and that the screenplay was completed in the early 1990s. Bryant told Mills that he might be able to help him with the screenplay because Bryant "had some experience in [the] industry" and had "written a couple of things that had made it to the air on television." Mills stated that he "dusted" the screenplay off and "sent [Bryant] a copy of [his] latest version, which was probably about the [twentieth] . . . version . . . ." According to Mills, he wrote the screenplay "to make a statement about the town in which [he] had grown up and used the [victim's] murder . . . as sort of a vehicle to paint that picture . . . ." Although Mills did not identify any of the characters by their real names, the script "pointed the finger [at] a group of people" through the use of "composite characters" whom everyone knew to be "the Skakel brothers, [Thomas Skakel] and [the petitioner], and [Kenneth] Littleton . . . ." Mills further testified that he "had sent [Bryant] the script with the hopes that he would read it and sort of edit it . . . but that didn't happen." According to Mills, although Bryant apparently read the script, he offered no assistance. When Mills and Bryant finally spoke about the screenplay a few months later, Bryant told him "that none of the Skakels could have been involved in [the victim's] killing" because he had been there and knew that Hasbrouck and Tinsley killed the victim. Mills testified that, at the time of their conversation, the petitioner's arrest and pending trial had received much media attention. Mills stated that Bryant understood that Mills would take the information about Hasbrouck and Tinsley to the authorities, but Bryant implored Mills not to identify him as the source of the information. According to Mills, the first thing he did after learning about Hasbrouck and Tinsley was to call his father for advice. After speaking to his father, Mills then "called the cops . . . the prosecutor, and . . . the defense attorneys." Mills stated that he spoke to Bryant several times to update him on how the various authorities had reacted to the information and told him that it was quite clear that he was going to have to come forward himself. According to Mills, Bryant "refused to come forward [at that time] and tried to make [him] understand how important it was to keep his name out of this story. It seemed to [Mills that Bryant] was endeavoring to do the right thing but only to the point where his name was left out of it." Mills also stated that, once Bryant told him about Hasbrouck and Tinsley, any possibility of working with Bryant on the screenplay "was over . . . ." Mills further noted that he made some "very simple" changes to the script to incorporate the information that Bryant had given him about the murder but that he never showed those changes to Bryant. As it turned out, Mills made no further efforts to sell the screenplay.

[18] Kennedy participated in approximately ten recorded telephone conversations that were introduced into evidence at the hearing on the petition for a new trial. I refer only to those conversations that bear directly on the

petitioner's claims.

[19] Bryant was fourteen years old when the victim was murdered. Hasbrouck and Tinsley were one year older but also in the ninth grade.

[20] Charles Evans Hughes High School was later renamed H.S. 440 Bayard Rustin High School for the Humanities.

[21] Byrne, who was only eleven years old at the time, subsequently died of an apparent suicide involving a drug overdose when he was seventeen. All references in this opinion to Byrne are to Geoffrey Byrne.

[22] When Bryant was asked whether Hasbrouck participated in any sports, Bryant responded that Hasbrouck was involved in wrestling. Bryant further explained that the wrestling coach at Hughes High School had "wanted to develop a wrestling team . . . . And [Hasbrouck] was one of the guys that [the coach] really had pegged as being aggressive enough, having the demeanor, and having the killer instinct to be a good wrestler." Although, at the time, Bryant was big and considered himself to be a very good athlete, he explained that Hasbrouck "could pin [him with] no problem." According to Bryant, Hughes High School was a "tough school . . . . [T]his was a city school in New York. We are not talking about Greenwich . . . . There's no Boy Scouts at this school. And if there were, I didn't know where they met." Nevertheless, according to Bryant, Hasbrouck had "developed . . . a reputation not to be someone to mess with."

[23] Several houses in the Belle Haven section of Greenwich are built around a central, undeveloped space, consisting of trees and grass. It is this area that Bryant refers to as the meadow. At least six houses back up to the meadow, including Byrne's home and the Skakels' home. Bryant explained to Colucci that the meadow was a "collection place [for kids] to sit and smoke cigarettes, smoke some marijuana and drink beer" because "the parents couldn't see" anyone who was back there. According to Bryant, "it was a big enough space so . . . if someone did come a bit close, you could scatter and run, and no one could catch you . . . ." On the night of the murder, there were just a few people there when Bryant arrived, but, after a while, the group grew in size to between ten and fifteen teenagers.

[24] Bryant previously had told Kennedy that he was "surprised [that] they didn't get [his] prints off those [golf] clubs. Everybody touched those clubs." According to Bryant, there were always golf clubs lying around the Skakels' yard or porch. In his interview with Colucci, Bryant elaborated that the clubs generally were found on the Skakels' back porch. Bryant further explained that "[e]verybody in Belle Haven touched those clubs. We used to hit balls behind the house. And we also used to hit balls at cars." On the night of the murder, Bryant claims that he "picked up one. [Tinsley] picked up one. [Hasbrouck] picked up one. . . . Byrne picked up one. And we were . . . goofing around. . . . [Hasbrouck and Tinsley] were using [their clubs] as . . . walking sticks."

[25] In addition to seeking information about Hasbrouck and Tinsley, Kennedy also asked Bryant about Byrne. Bryant responded that, after the murder, Byrne was "freaked out" to the point that he became "a different person . . . ." Byrne sometimes took the train into Manhattan to talk to Bryant and expressed dismay and anger over what had happened. Bryant stated that Byrne blamed him for getting him mixed up with Hasbrouck and Tinsley. According to Bryant, Byrne told him that Hasbrouck and Tinsley once went to his house and let themselves in even though no one was at home. They were sitting in Byrne's bedroom when he walked in, and Byrne thought for a moment that they were going to "jump" him. Bryant said to Kennedy: "I am telling you [that Byrne] is a guy who is a couple years younger than me [and he was] coming to the city just to talk, and his parents had no idea. His parents didn't keep track of him very good, and he had an older brother who . . . pretty much looked . . . after him [because his] mom and dad were always going on some type of trip or something. He lived in a huge house by himself [with just] a maid and his brother, and this is just the way it was. He was always out there looking for affection."

[26] 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. . . ."

Although § 8-6 of the Connecticut Code of Evidence has been amended recently, subdivision (4) has not been amended since the inception of the code in 2000. Hereinafter, all references and citations to Conn. Code Evid. § 8-6 (4) are to the current edition.

[27] Our rule governing the admissibility of declarations against penal interest is modeled generally after rule 804 (b) (3) of the Federal Rules of Evidence. Rule 804 (b) of the Federal Rules of Evidence provides in relevant part: "Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

"(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. . . ."

[28] Of course, "[i]n determining whether the threshold level of trustworthiness [is] satisfied . . . 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Bryant*, 202 Conn. 676, 693, 523 A.2d 451 (1987). Indeed, imposing a stricter standard would be "utterly unrealistic." (Internal quotation marks omitted.) *State* v. *Gold*, 180 Conn. 619, 632, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980). Furthermore, "[w]hen viewing this issue through an evidentiary lens, we examine whether the trial court properly exercised its discretion." (Internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 631, 960 A.2d 993 (2008).

[29] There is no dispute that Bryant's invocation of his privilege against self-incrimination renders him unavailable as a witness for purposes of the statement against penal interest exception to the hearsay rule.

[30] The state nevertheless suggests that the trial court's ruling is not entitled to such deference, asserting that, under *State* v. *Saucier*, supra, 283 Conn. 218, "[w]hether a challenged statement . . . [is] admissible as an exception to the hearsay rule is a legal question demanding plenary review." The state misconstrues this court's holding in *Saucier*. As we explained in *Saucier*, the propriety of the trial court's application of the proper evidentiary rule is subject to an abuse of discretion standard of review. See id., 218–19. In other words, whether a statement constitutes hearsay is a legal question that is subject to plenary appellate review. Id., 218. Whether a statement satisfies the relevant requirements of a hearsay exception, however, is a determination that is reviewed for an abuse of discretion. See id., 218–19. Because the issue raised by the present case falls squarely into the latter category, the trial court's determination must stand unless it is manifestly unreasonable.

[31] As the trial court aptly noted, however, "Bryant's late disclosure, prompted by the petitioner's criminal case, is similar to the delayed disclosure that occurred with many of the witnesses [that] the state relied [on] at the petitioner's criminal trial."

[32] According to these witnesses, namely, Barbara Bryant (Bryant's mother) and Esme Ingledew Dick (a friend of Bryant's mother), Bryant told them shortly after the victim had been murdered that he was in Belle Haven on the night of the murder. In fact, Barbara Bryant recalled that, according to her son, both Hasbrouck and Tinsley also were in Belle Haven that night and, in addition, that Hasbrouck and Tinsley had spent the entire night there. The testimony of Barbara Bryant and Dick is particularly significant because it contained Bryant's contemporaneous account of his whereabouts that night, an account that, because it was given shortly after the murder when Bryant was only fourteen years old, strongly corroborates his statements, made many years later, that he, along with Hasbrouck and Tinsley, had been in Belle Haven on the night of the murder. See part III G 3 of this opinion.

[33] I note that the trial court found that Bryant's, Hasbrouck's and Tinsley's invocation of their privilege against self-incrimination corroborated Bryant's

statements even though the court was not required to draw such an inference. Cf. *Rhode* v. *Milla*, 287 Conn. 731, 738, 949 A.2d 1227 (2008) (whether nonparty witness' invocation of privilege against self-incrimination may be considered by fact finder is determination to be made by trial court, on case-by-case basis, in exercise of court's sound discretion). Furthermore, as the majority has noted, the state explained in oral argument before this court that it did not seek to grant Bryant immunity from prosecution for the purpose of compelling his testimony because it is not the state's practice to grant immunity to persons who, in the state's view, are not telling the truth. Although Hasbrouck and Tinsley also invoked their privilege against self-incrimination, the state elected not to grant them immunity even though it credited the statements that they had made denying any involvement in the victim's murder.

[34] In fact, Bryant had told Kennedy that he was "surprised [that the authorities] didn't get [his] prints off those clubs."

[35] The state suggests that, because Colucci's interviews with Hasbrouck and Tinsley were not recorded, and because one of the written interview reports mistakenly failed to reflect certain of Tinsley's statements, Colucci's testimony concerning Hasbrouck's and Tinsley's acknowledgment that they were in Belle Haven on October 30, 1975, is not necessarily reliable. There does not appear to be any dispute, however, that, as Colucci testified, both men changed their story about being in Belle Haven on the day of the victim's murder after checking their calendars. Because the state does not challenge Colucci's testimony that the two men subsequently changed their stories, there also can be no dispute that they previously had indicated that they were in Belle Haven on that date.

[36] Byrne's brother testified at his deposition that, although he did not live in Belle Haven at the time of the murder, he did not recall seeing Hasbrouck and Tinsley at his parents' house on the morning after the murder, when he arrived to work in a basement office that he used there.

[37] The state suggests that Bryant might have made up his story merely "to get into the act," perhaps to gain the attention of his former classmates. This theory, like the similar theory hypothesized by the majority; see part III G of this opinion; is highly implausible because it is absolutely clear from the record that Bryant did everything possible to *avoid* any publicity or attention on account of what he purported to know about the victim's murder. Indeed, he did not confide in Mills until more than twenty-five years after the murder, following the arrest of a person who, on the basis of Bryant's knowledge of the facts, is innocent.

[38] See Conn. Code Evid. § 6-6 (a) ("The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached.").

[39] The evidence also indicates that Bryant was a standout athlete in both high school and college.

[40] Of course, I do not vouch for Bryant's credibility. The state, however, has presented no evidence to establish that Bryant is not an honest or credible person. In the absence of such evidence, and in light of what we do know about him and his background, it would be improper, and entirely unfair to the petitioner, to surmise that Bryant is not a trustworthy person. Undoubtedly for those reasons, neither the state nor the trial court has sought to discredit Bryant on the basis of any aspect of his personal, academic or professional background.

The majority, by contrast, suggests that Bryant may have "lied to or misled" his friends, a possibility that the majority also suggests might reflect adversely on the credibility of Bryant's statements to Mills and Walker. In support of this assertion, the majority relies on the fact that Mills and Walker understood that Bryant was a sports or entertainment lawyer even though Bryant, a law school graduate, was not licensed to practice law. In fact, the evidence indicates that Bryant, who, as I previously noted, comes from a family that truly has distinguished itself in the sports and entertainment world, has written several screenplays and otherwise been involved in the law and entertainment business. Furthermore, there is nothing in Mills' or Walker's testimony to suggest that either of them believed that Bryant had misled them in any way. Indeed, the record reflects that, when asked, Bryant did not hesitate to reveal that he was not a member of the bar. In the absence of any evidence to suggest that Bryant intentionally had misled his friends—or anyone else—with respect to his professional endeavors, it is improper for the majority to speculate otherwise. This is particularly true

in light of the fact that the state has failed to adduce any evidence casting doubt on the veracity of Bryant's own statements concerning the nature of his professional activities.

[41] Indeed, Bryant stated to Kennedy in their first conversation that anyone who had come forward with information in the case "has either become a whacko or a suspect," and that "[he did not] want to go through that." Bryant presumably was referring to Gregory Coleman and Kenneth Littleton, two of the state's key witnesses at the petitioner's criminal trial. As I previously noted, Coleman died of a drug overdose before the petitioner's criminal trial, and his probable cause hearing testimony was read to the jury. Littleton, who, for years, was himself a suspect in the victim's murder, suffered from serious mental problems, including bizarre delusions about himself and the petitioner's extended family.

[42] The state has not asserted, and I do not believe, that there is any reasonable possibility that Bryant simply is mistaken in his assertions with respect to the incriminatory conduct and statements of Hasbrouck and Tinsley. Although it certainly is possible that Bryant may be confused or that his recollection is faulty with respect to some of the details he recounted, the information that he has provided is not such that he could be confused or mistaken about its essential nature. It would appear, therefore, that, if Bryant is not lying, he is telling the truth.

[43] This is equally true for Hasbrouck and Tinsley. If they were *not even in Belle Haven* on the night of the murder, it is difficult to understand why they would have invoked their privilege against self-incrimination, especially in view of the fact that someone else already has been convicted of the victim's murder—the legitimacy of which remains unquestioned by the prosecuting authorities—and because of the adverse effect on one's reputation that such an invocation inevitably has, particularly in a high profile murder case such as this one.

[44] Thomas G. Keegan, the Greenwich detective originally assigned to perform the investigation of the victim's murder, conducted a review of the crime scene that gives rise to inferences about how the murder was committed that differ in some respects from the conclusions drawn by Henry Lee, formerly the state's chief criminalist. Only Lee testified at trial as to how the crime likely unfolded. Keegan, however, took meticulous notes, documenting the location and condition of the physical evidence at the crime scene, including obvious paths through the leaves connecting blood and other physical evidence, and reached somewhat different conclusions regarding, among other things, where the assault began and the manner in which some of the evidence came to be located in certain areas of the crime scene. As I explain more fully in part IV of this opinion, Keegan's theory of how the murder occurred is more consistent with an assault carried out by two assailants rather than one, particularly if the lone assailant was someone the size of the petitioner; see footnote 45 of this opinion; because, in Keegan's view, the killer or killers moved the victim's body over a considerable distance.

[45] Although one childhood friend described the petitioner as strong and athletic, photographs of the victim and the petitioner taken around the time of the murder reveal that the petitioner, who had just turned fifteen, was no taller than the victim and appeared to have been even smaller. In one such photograph, for example, the petitioner is standing with his freshmen soccer team and, in relation to the other boys on the team, is only of average size. Most of the boys in the photograph, including the petitioner, appear not to have experienced any significant growth spurt. For the reasons set forth in part IV of this opinion, the petitioner's size at the time of the murder is relevant to my conclusion that the newly discovered evidence warrants a new trial. Because the defense relied so heavily on the petitioner's alibi, and because the issue of whether the crime had been committed by one assailant or two was relatively unimportant to the defense as long as the state could point to another member of the Skakel household, such as Thomas Skakel, as the possible second perpetrator, the defense apparently saw no need to challenge any aspect of the state's reconstruction of the crime. Indeed, the central thesis of the state's case was that the petitioner's family had conspired to cover up the crime. Consequently, the defense did not question, among other things, whether someone of the petitioner's size would have been physically capable of committing the crime alone. Significantly, the Greenwich police department's original crime scene investigation, the results of which were not introduced into evidence, appears to support the conclusion that the murder was committed by two assailants or, possibly, by a single assailant who was much bigger and stronger than the petitioner.

[46] See footnote 27 of this opinion.

[47] The concurrence contends that Bryant's statement to Colucci that he "picked up one of the Skakels' golf clubs, 'swung it,' and '[slung] it back to where the bag . . . was' . . . does not constitute a statement against his penal interest" because "Bryant does not state that he touched *the* golf club used in the murder." (Emphasis in original.) The mere fact that Bryant did not know whether the golf club that he handled was, in fact, the club that was used to kill the victim does not mean that his statement was not against his penal interest. First, Bryant's acknowledgment that he was in possession of what may have been the murder weapon certainly constitutes evidence that "would tend to incriminate [him] were he . . . the individual charged with the crime." (Internal quotation marks omitted.) *State* v. *Bryant*, supra, 202 Conn. 695. Second, Bryant understood that his statement was disserving, and it is that fact that gives the statement significance as a declaration against penal interest. Finally, as the trial court expressly found, Bryant's statements concerning his possession of a golf club on the day of the murder, including his statement to Kennedy that he was "surprised" that the authorities "didn't get [his] prints off those [golf] clubs," demonstrate that he knew that the golf clubs would be dusted for fingerprints and reflect his attempt "to explain away possible physical evidence," thereby "indicat[ing] a consciousness of guilt." For all of these reasons, it is incorrect to assert that Bryant's remarks about the golf clubs were not disserving.

The concurrence further contends that Bryant's statements about handling the golf clubs on the night of the murder cannot reasonably be construed as statements against penal interest because, later in the interview, Bryant "claimed not even to know how the victim was murdered." The concurrence takes this statement out of context. Although Bryant apparently never sought to ascertain a detailed account of exactly how the murder was committed, it is perfectly clear that he, like virtually everyone else with any connection to this high profile case, generally was aware that the victim had been beaten to death. In fact, as he explained, he had understood that Hasbrouck and Tinsley intended to abduct and then to "club" the victim, "caveman style . . . ."

The concurrence also states that, "even if Bryant knew how the victim was murdered, his statements regarding the Skakels' golf clubs, when viewed in context, demonstrate that they are insufficiently against his penal interest to be admitted pursuant to Conn. Code Evid. § 8-6 (4). Specifically, Bryant stated that '[*e*]*verybody* in Belle Haven touched those clubs,' and that 'those clubs went through *tons of people's hands*.' Accordingly, Bryant's statements no more implicate Bryant in the victim's murder than 'everybody in Belle Haven . . . .' This is insufficient to qualify as a statement against penal interest, especially in light of the fact that Bryant states that he was not in Belle Haven at the time of the murder." (Emphasis in original.) Once again, this assertion misses the point because the concurrence views Bryant's statements about the golf clubs in isolation from his other self-inculpatory remarks. Of course, not everyone in Belle Haven handled the golf clubs on the night of the murder, in the vicinity of the victim, accompanied by the two men who, according to Bryant, discussed "going caveman" and, shortly thereafter, acknowledged doing so on the victim. When these facts are considered in this context, it is clear that the trial court properly found that Bryant's comments about the golf clubs were self-inculpatory.

[48] The concurrence contends that the trial court's characterization of Bryant's statements as "discuss[ing] assaulting [the victim] with Hasbrouck and Tinsley . . . inaccurately and unfairly implies that Bryant made *self*-inculpatory statements during those discussions, when, in fact, he did not." (Emphasis in original.) As a result, according to the concurrence, "the trial court apparently leaped to the conclusion that Bryant's statements regarding the discussions were against *his* penal interest simply because he was present while Hasbrouck and Tinsley were making statements against *their* penal interests." (Emphasis in original.) In contrast to the trial court, the concurrence views Bryant's statements in isolation from what transpired both before and after the conversations in which Hasbrouck and Tinsley expressed their intention to "go caveman . . . ." Considering Bryant's presence at those discussions in that broader context, it is evident that the trial court reasonably found that Bryant's statements concerning those conversations revealed a close and confidential association with Hasbrouck and Tinsley, and that that involvement, when viewed in light of Bryant's other statements placing him at or near the scene of the crime, in possession of a golf club and in the company of Hasbrouck and Tinsley on the evening of the murder, supported the conclusion that Bryant's narrative was sufficiently

disserving to warrant its admissibility as a statement against penal interest.

[49] Indeed, in *State* v. *Bryant*, supra, 202 Conn. 691–92, 694–95, this court concluded that the trial court in that case had abused its discretion in *prohibiting* the defendant from introducing into evidence, under the declaration against penal interest exception to the hearsay rule, statements by the declarant in which the declarant did not acknowledge committing the most serious of the crimes with which the defendant had been charged (sexual assault) but in which the declarant nevertheless acknowledged committing one of the lesser crimes (burglary). In rejecting the state's contention that that omission rendered the statement insufficiently reliable for admissibility purposes, we explained that, when viewed in the broader context of the facts of the case and the entirety of the declarant's statements, those statements were sufficiently disserving such that the defendant was *entitled* to introduce them into evidence. Id., 696–702.

[50] The concurrence asserts that my agreement with the trial court that Bryant's statements are against his penal interest is founded "on an inaccurate and hyperbolic summary of the 'context' of Bryant's statements." Footnote 8 of the concurring opinion. On the contrary, my analysis, in contrast to that of the concurrence, is predicated on the facts that the trial court reasonably had found. For example, the trial court expressly found that "one of the reasons [that] Bryant's testimony is trustworthy is because Bryant places himself in Belle Haven, on the night of the murder, in the company of [the victim], discussing assaulting [the victim] with Hasbrouck and Tinsley and in possession of golf clubs belonging to the Skakel family."

[51] The concurrence claims that my analysis and the trial court's analysis are unfaithful to our case law concerning the hearsay exception for statements against penal interest because other cases of this court, including *State* v. *Bryant*, supra, 202 Conn. 676, involve statements against penal interest that are more inculpatory than Bryant's statements. The concurrence misconstrues *Bryant* and our other precedent interpreting that hearsay exception. It is axiomatic, of course, that each case must be decided on its particular facts, and, for the reasons that I have set forth in this opinion, the trial court in the present case properly concluded that the statements at issue meet *all* of the requirements for admissibility under the hearsay exception for statements against penal interest. Indeed, as this court made crystal clear in *Bryant*, a statement need not constitute a confession or other direct acknowledgment of guilt to be admissible; id., 695; rather, the declarant must be aware that the statement exposes him to a risk of prosecution, such that the statement would have probative value at a trial against him. Id. In light of this standard, the fact that the declarant denies responsibility for the crime is not a bar to admissibility of a statement that otherwise is incriminating for purposes of our test. Thus, for example, in *State* v. *Paredes*, supra, 775 N.W.2d 554, the Iowa Supreme Court recently undertook a thorough analysis of its state's hearsay exception for statements against penal interest. Under the Iowa exception, the test for admissibility is identical to our exception in all material respects. Compare Iowa R. Evid. 5.804 (b) (3) with Conn. Code Evid. § 8-6 (4). The court concluded that, although the declarant in that case expressly had denied involvement in the offense; *State* v. *Paredes*, supra, 569; the trial court nevertheless had abused its discretion in barring the defendant from introducing the statement under that hearsay exception. See id. In particular, the court determined that other statements made by the declarant were sufficiently incriminating to satisfy the "threshold adversity requirement . . . ." Id., 565. Explaining that this requirement "poses a question of degree"; id.; the court concluded that the statement at issue was both sufficiently incriminating and sufficiently corroborated that the trial court was required to admit it as a matter of law. See id., 570. The analysis and conclusion of the Iowa Supreme Court in *Paredes* is no less applicable to the present case. Moreover, even if it is assumed, arguendo, that the trial court in the present case was not required to reach the conclusion that it did concerning the incriminating nature of Bryant's statements, it certainly cannot be said that the court's decision constituted a manifest abuse of discretion. See, e.g., *State* v. *Ritrovato*, 280 Conn. 36, 50, 905 A.2d 1079 (2006) ("[w]e will make every reasonable presumption in favor of upholding the trial court's [evidentiary] ruling, and only upset it for a manifest abuse of discretion" [internal quotation marks omitted]).

Finally, the incriminatory nature of Bryant's statements is further evidenced by the fact that Bryant has asserted his privilege against self-incrimination, thereby opting not to repeat those statements under oath at a deposition or at a trial. Of course, if his sworn testimony regarding those statements was not likely to incriminate him, he would have had no reason

for refusing to testify because his sworn testimony denying the truthfulness of his prior statements also would not expose him to any criminal liability.

[52] The concurrence also maintains that, even if Bryant's statements are against his penal interest, they nevertheless fail to satisfy the three trustworthiness factors enumerated in Conn. Code Evid. § 8-6 (4). I disagree with this contention for all of the reasons previously set forth in parts III C and D of this opinion. I note, moreover, that, in reaching its conclusion, the concurrence rejects the reasonable inferences and findings of the trial court and improperly substitutes its different view of the facts. For example, the concurrence asserts that the record does not support the conclusion that Hasbrouck and Tinsley boasted about having committed the victim's murder. The concurrence argues, rather, that, "Bryant explicitly stated that Hasbrouck and Tinsley *never* confessed to murdering the victim and *never* disclosed any details about their alleged involvement in her murder. Indeed, Hasbrouck's and Tinsley's alleged comments *never* contained any mention of the victim by name and were always couched in vague terms, such as, 'I got mine,' '[w]e did it,' and '[w]e achieved our fantasy.' " (Emphasis in original.) Footnote 8 of the concurring opinion. As the record reveals, however, although Bryant stated that Hasbrouck and Tinsley never identified the victim by name, Bryant expressly stated that, "I knew who they were implying. It was so obvious because, I mean, [one or two days after the murder, the news of the victim's murder] was all over. I mean, it was everywhere." Bryant further stated, "I knew exactly who they were talking about. . . . They were talking about [the victim]." In view of the facts that (1) Hasbrouck and Tinsley had discussed going "caveman" on a girl on the evening of the victim's murder, (2) they told Bryant shortly after the victim's murder that they had "achieved the caveman," and (3) the victim was the only person who was assaulted and killed in Greenwich around the time that Hasbrouck and Tinsley had told Bryant that they intended to go "caveman," it would have been manifestly *unreasonable* for the trial court to conclude that Bryant had not identified the victim as the person about whom Hasbrouck and Tinsley had been speaking.

The concurrence also improperly second-guesses the trial court's finding that Bryant's reluctance to tell his story, and thus his twenty-six year delay in coming forward with it, was reasonable and, under the unique circumstances presented, did not detract from the trustworthiness of Bryant's statements. In particular, the concurrence attacks the trial court's finding that Bryant had knowledge that there was no statute of limitations for murder in Connecticut in 1975, asserting that this finding was not supported by the record, and, further, that, even if this finding was supported by the record, it would not make Bryant's statements any more timely or trustworthy. Bryant explicitly stated, however, that one of the reasons why he did not come forward sooner was because he was afraid that he would be identified immediately as a suspect. Indeed, the fact that the petitioner was tried more than twenty-five years after the victim's murder, suggests, at the very least, that the *state* believed that there was no applicable statute of limitations for murder. Consequently, the trial court's finding that Bryant believed that he, too, could be prosecuted for the murder is hardly unreasonable.

Similarly, the concurrence rejects the trial court's conclusion that Bryant's statements to Mills and Colucci are trustworthy because, among other reasons, Mills, whom Bryant has known since childhood, was someone Bryant trusted and with whom he shared a close connection to the case, and because Bryant was aware that his statements to Colucci were being recorded for later use in a court of law. Even though these findings are firmly rooted in the evidence, the concurrence simply refuses to credit them. As the foregoing examples demonstrate, the concurrence refuses to accept the inferences fairly and reasonably drawn by the trial court, relying, instead, on its own contrary conception of the facts. In doing so, the concurrence violates the bedrock principle of appellate jurisprudence that the trial court, not this court, is the finder of fact, and, consequently, we are bound by those findings unless they are clearly erroneous. See, e.g., *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 231, 983 A.2d 1 (2009) ("[t]o the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous" [internal quotation marks omitted]).

Finally, the concurrence mistakenly asserts that I have "ignore[d]" certain facts that the trial court highlighted when it concluded, for purposes of its credibility determination rather than for its determination of admissibility, that Bryant's statements are "absent any genuine corroboration." (Internal quotation marks omitted.) Footnote 10 of the concurring opinion. I address

these facts and the issues relevant thereto in part III G of this opinion.

[53] Notably, this court recently has underscored the importance of the commentary to the Code of Evidence, explaining that the code "cannot be properly understood without reference to the accompanying [c]ommentary. The [c]ommentary provides the necessary context for the text of the [c]ode, and the text of the [c]ode expresses in general terms the rules of evidence that the cases cited in the [c]ommentary have established. . . . Additionally, the [j]udges took an unusual step when they formally adopted the [c]ode. Unlike other situations, in which the [j]udges, when voting on rules, are guided by but do not formally adopt the commentary submitted by the [r]ules [c]ommittee that normally accompanies proposed rule changes, in adopting the [c]ode the [j]udges formally adopted the [c]ommentary as well. This is the first time that the [j]udges have done so. Thus, the [c]ode must be read together with its [c]ommentary in order for it to be fully and properly understood." (Internal quotation marks omitted.) *State* v. *DeJesus*, 288 Conn. 418, 442 n.16, 953 A.2d 45 (2008).

[54] The concurrence relies on *Williamson* v. *United States*, supra, 512 U.S. 600–601, which was decided approximately seven years after our decision in *Bryant*, to support its contention that this court should adopt the approach—expressly considered and rejected in *Bryant*—under which the declarant's self-serving statements are not admissible as part of the declarant's broader narrative even when they are intertwined with the declarant's disserving statements. In *Williamson*, the court adopted that approach for purposes of rule 804 (b) (3) of the Federal Rules of Evidence; id.; which is similar but not identical to this state's hearsay exception for declarations against penal interest. See Conn. Code Evid. § 8-6 (4). As I have explained, in *Bryant*, this court carefully considered the two competing modes of analysis and, in contrast to *Williamson*, elected to follow the less restrictive approach pursuant to which the fact finder is permitted to consider both the declarant's disserving *and* self-serving statements. See *State* v. *Bryant*, supra, 202 Conn. 696–97 and n.18. In accordance with *Bryant*, the trial court properly proceeded in that manner, and neither the state nor the petitioner has suggested that this court should overrule *Bryant* and adopt the *Williamson* methodology. Significantly, although an apparent majority of sister state courts that have considered the issue after *Williamson* have followed the rule of that case for purposes of their states' hearsay exceptions for declarations against penal interest—perhaps, because those states' exceptions contain language that is identical to the language of their federal counterpart—other states have declined to do so. See *People* v. *Newton*, supra, 966 P.2d 578–79 (declining to follow *Williamson*); *State* v. *Sonthikoummane*, supra, 145 N.H. 320–21 (same); see also *State* v. *Hills*, 264 Kan. 437, 447, 957 P.2d 496 (1998) (noting that *Williamson* is not binding on state court's interpretation of its own evidentiary rules); *Chandler* v. *Commonwealth*, 249 Va. 270, 279, 455 S.E.2d 219 (same), cert. denied, 516 U.S. 889, 116 S. Ct. 233, 133 L. Ed. 2d 162 (1995). In any event, the fundamental point is that, in the absence of a request from the parties that we revisit our decision in *Bryant*, the present case does not present an appropriate opportunity to decide whether the reasoning of *Williamson* is sufficiently persuasive to warrant overruling the portion of *Bryant* that is inconsistent with *Williamson*. Indeed, to do so would violate the well established rule that an appellate court "may not reach out and decide a case before it on a basis that the parties never have raised or briefed. . . . To do otherwise would deprive the parties of an opportunity to present arguments regarding those issues." (Citations omitted.) *Sabroski* v. *Sabrowski*, 282 Conn. 556, 560, 923 A.2d 686 (2007).

[55] Despite our long-standing precedent supporting the trial court's conclusion that the Bryant evidence would be admissible as trustworthy declarations against penal interest, the concurrence, in defending its contrary view, asserts that "cases in this jurisdiction and various federal jurisdictions have held that statements that were far more inculpatory than Bryant's statements were not sufficiently against the declarant's penal interest to be admissible." The concurrence neglects to note, however, that, in each and every one of those cases, the reviewing court concluded that the trial court *had not abused its discretion* in determining that the statement at issue was not against the declarant's penal interest. See, e.g., *State* v. *Snelgrove*, 288 Conn. 742, 769–70, 954 A.2d 165 (2008) (reviewing for abuse of discretion); *State* v. *Bryant*, 61 Conn. App. 565, 573–76, 767 A.2d 166 (2001) (same); *State* v. *Jones*, 46 Conn. App. 640, 649, 700 A.2d 710 (same), cert. denied, 243 Conn. 941, 704 A.2d 797 (1997); see also *United States* v. *Bonty*, 383 F.3d 575, 579–80 (7th Cir. 2004) (reviewing District Court's ruling for abuse of discretion); *United States* v. *Butler*, 71 F.3d 243, 250–52 (7th Cir. 1995) (same).

In light of the extremely wide latitude accorded trial courts with respect to the admission of evidence generally and the admission of evidence under hearsay exceptions specifically, it is hardly surprising that the concurrence has found cases in which the trial court's ruling on the admissibility or inadmissibility of a statement against penal interest has been sustained on appeal.

[56] In applying an abuse of discretion standard to determine whether the trial court properly could have determined that Bryant's statements would be admissible under the residual hearsay exception, I am mindful of this court's statement in *State* v. *Saucier*, supra, 283 Conn. 207, that "the question of whether the trial court properly could have admitted [a hearsay] statement under the residual exception if the admission of that type of statement *expressly was barred* under another hearsay exception would present a question of law over which the appellate courts exercise plenary review." (Emphasis in original.) Id., 219. This admonition in *Saucier* bears no relevance to the issue in the present case, however, because, even if Bryant's statements were not admissible under the declaration against penal interest exception to the hearsay rule, that exception does not expressly bar the admission of those statements; if that hearsay exception bars the admission of Bryant's statements at all, it is because the statements do not meet the requirements of that exception, not because of any express or categorical prohibition against the admissibility of such statements. Accordingly, the issue is whether the trial court reasonably could have concluded that Bryant's statements would be admissible under the residual hearsay exception.

[57] The majority suggests that Bryant might have fabricated a story about Hasbrouck and Tinsley as an outgrowth of his offer to assist Mills in the development of a screenplay regarding the victim's murder. In essence, the majority raises the specter that Bryant's desire to become involved in that undertaking was so strong that he lied to Mills about Hasbrouck and Tinsley, and then repeated his imaginary and detailed story, with considerable embellishment, to several others, including the petitioner's investigator, Colucci. As I discuss in part III G 3 of this opinion, there is nothing in the record to support an inference that Bryant had any particular interest in participating in the screenplay aside from assisting his good friend, Mills. Because the majority's purely speculative hypothesis has no foundation in the facts, it hardly can be deemed a plausible explanation for why Bryant would falsely and repeatedly report that his two former classmates were responsible for the victim's brutal and tragic death.

[58] See part III D of this opinion.

[59] I note that the commentary to § 8-9 of the Connecticut Code of Evidence provides that "[§] 8-9 takes no position on whether a statement that comes close but fails to satisfy a hearsay exception enumerated in the Code nevertheless can be admitted under the residual exception. Connecticut courts have not addressed definitively the 'near miss' problem, although some cases would seem to sanction the practice of applying the residual exception to near misses." Conn. Code Evid. § 8-9, commentary. As I have explained, the Bryant evidence falls within the purview of the residual exception to the hearsay rule because it "is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." (Internal quotation marks omitted.) *State* v. *Merriam*, supra, 264 Conn. 633. I see no principled reason why a statement that satisfies that requirement should be excluded from admission under the residual exception solely because it comes close to being admissible under another hearsay exception. Indeed, a contrary conclusion, that is, one that bars admission of a statement that is equivalent in trustworthiness to that of a statement that falls within another exception, might well run afoul of a defendant's constitutional right to present a defense. See, e.g., *State* v. *Cerreta*, 260 Conn. 251, 260–61, 796 A.2d 1176 (2002) ("The federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment right to compulsory process includes the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." [Citations omitted; internal quotation marks omitted.]); see also *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (right to present defense in criminal case is "a fundamental element of due process of law").

[60] The trial court did comment on the strength of the state's evidence, however, in connection with its analysis of the petitioner's claim concerning

the witnesses whose testimony contradicted Gregory Coleman's testimony that the petitioner had confessed to him. Although acknowledging the limited impeachment value of one such witness, the trial court nevertheless concluded that that testimony "would not lead to an acquittal on retrial" when "considered in view of the *strong evidence of guilt presented at trial* . . . ." (Emphasis added.) For the reasons set forth in part IV of this opinion, I disagree with the trial court's characterization of the strength of the state's case. To the extent that the trial court may have relied on its view that the state's case was "strong" in concluding that the Bryant evidence does not warrant a new trial, albeit without expressly stating that it was doing so, any such reliance was, in my view, seriously misplaced and would provide an independent basis for reversing the trial court's ruling.

[61] Because the trial court concluded that the Bryant evidence was admissible under the declaration against penal interest exception to the hearsay rule, I refer to that exception in the following analysis. Because the trial court properly could have found that that evidence was admissible under the residual hearsay exception, however, and because the admissibility of the evidence under that exception requires that evidence to be no less trustworthy and reliable than it would be to be admissible under the exception for declarations against penal interest, the analysis that follows applies to the former as well as to the latter.

[62] The trial court stated in its memorandum of decision: "The trier of fact may consider whether a witness is worthy of belief by considering the [witness'] intelligence, motive, state of mind, demeanor and manner while on the stand. These items were missing from this hearing since the court was . . . given [only] a transcript and a video presentation. There was no in-person testimony."

[63] I note that, to the extremely limited extent that the facts on which the trial court relied in reaching its credibility finding were adduced through in-person testimony at the hearing on the new trial petition, none of that testimony is disputed. Because the truth of that testimony is unchallenged, the court's reliance on it also is not subject to challenge. As I discuss more fully in the text of this opinion, for present purposes, the only issue is whether those undisputed facts are legally sufficient to justify the trial court's failure to consider Bryant's statements in the context of the original trial evidence.

[64] "Trustworthy" is defined as "worthy of confidence: dependable . . . ." Webster's Third New International Dictionary. Its designated synonym is "reliable." Id.

[65] Of course, if the jury reasonably could *not* credit the statement, then it would be *inadmissible* as *lacking* sufficient indicia of reliability.

[66] See part IV of this opinion.

[67] In *Smith*, this court concluded that the trial court in that case reasonably had denied a petition for a new trial upon finding that the version of the facts offered by a third party, who claimed that he, rather than the petitioner, had participated in the murder of the victim, was wholly unworthy of belief. *Smith* v. *State*, supra, 141 Conn. 208, 214.

[68] The majority attempts to avoid this conclusion, contending that, because a trial court reasonably may find that a witness who is "under oath and subject to cross-examination" lacks "even a modicum of credibility," there was no reason why the trial court in the present case could not have made such a finding with respect to the Bryant evidence. As I have explained, however, in the present case, Bryant did *not* testify in court, the trial court made no finding that Bryant's performance during the video recording rendered him incredible, and the court expressly found that Bryant's statements bore significant indicia of trustworthiness and reliability. In such circumstances, the court reasonably could not have concluded that the newly discovered evidence was wholly incredible. Consequently, the trial court was required to consider that evidence in light of the original trial evidence.

[69] For the reasons set forth hereinafter, even if the trial court properly had considered the corroborating facts and circumstances in connection with its analysis under *Shabazz*, the other evidence on which the trial court relied or reasonably could have relied in finding that Bryant's statements did not meet the minimum credibility threshold under *Shabazz* is inadequate to support that finding.

[70] The importance of that reliance to the court's decision is reflected in the court's repeated reference to the absence of corroboration.

[71] Although the majority acknowledges that the finding of the trial court that Bryant's statements lack any genuine corroboration "appears to fall short of the standard for admission of a statement against penal interest";

footnote 23 of the majority opinion; the majority states that it "need not examine . . . the court's admissibility determination" because of the majority's conclusion that the trial court properly determined "that the petitioner had failed to persuade it that Bryant's statement[s] probably would result in a different verdict at a new trial . . . ." Id. The majority's attempt to avoid the problem created by the trial court's inconsistent findings is unavailing. To the extent that the trial court's finding that Bryant's statements are *uncorroborated* is a proper one, as the majority has determined, it *necessarily* follows that the trial court abused its discretion in concluding that those statements are trustworthy and, therefore, that they would be admissible, because, as I have explained, under settled law, only trustworthy third party statements against penal interest are admissible, and only those statements that are significantly corroborated may be deemed trustworthy. E.g., *State* v. *Lopez*, supra, 254 Conn. 319; *State* v. *Bryant*, supra, 202 Conn. 700. Thus, the majority's endorsement of the trial court's finding that the statements lack corroboration leads inexorably to the conclusion that the trial court abused its discretion in concluding that Bryant's statements were sufficiently trustworthy to be admissible. For whatever reason, the majority elects not to acknowledge that unavoidable fact.

[72] As I previously indicated, Bryant stated in his video-recorded interview with Colucci that Hasbrouck first may have seen the victim at an annual street festival in Greenwich. According to Neal Walker, the festival was attended by the whole town. An article in a Greenwich newspaper that was published in September, 1975, stated that "more than 12,000 residents took part in the fourth annual Block Party." B. Young, "Block Party Proves Massive Success," Greenwich Time, September 22, 1975, p. 1. The other two events that Bryant claims Hasbrouck and Tinsley attended and that the victim also attended were two local dances.

[73] Bryant is referring to the fact that, after the petitioner's arrest, he had authorized Mills and Crawford to convey to the police the information about Hasbrouck and Tinsley that Bryant himself already had provided to Mills and Crawford. Garr, the state's lead investigator, testified that, although he had, in fact, been given that information in advance of the petitioner's criminal trial, he never followed up on it. Indeed, although Mills honored Bryant's request not to reveal his name to the prosecuting authorities and to the defense, Mills did tell the prosecuting authorities, but apparently not the defense, that Bryant was African-American. Because only one other African-American attended Brunswick School with Bryant and because there were no more than fifty students in Bryant's class, it would have been extremely easy for the state to have ascertained Bryant's identity and then to have interviewed him prior to the petitioner's criminal trial. For whatever reason, however, the state elected not to do so.

[74] It is also noteworthy that, in his video-recorded interview with Colucci, Bryant candidly acknowledged that he "[does not] like" the petitioner. Bryant explained, however, that, "just because I don't like him doesn't mean he should be incarcerated" for a crime he did not commit. In a tape-recorded telephone conversation with Kennedy, Bryant alluded to one of the possible reasons why he and the petitioner did not get along, suggesting that it may have been an issue of race. Bryant states: "[The petitioner] is innocent. . . . I am not a very loving or caring person, but I feel very bad for [the petitioner's] situation because I wouldn't wish that on anybody. . . . And he is not my enemy. I don't dislike [the petitioner], you have to understand that. It was kind of a difficult situation, being the only black kid living in Greenwich for a couple years. So I, you can imagine, it wasn't easy. It wasn't the worst thing in the world, but it wasn't easy."

[75] Although there are many examples of witnesses with similar memory problems, one such witness is Jacqueline Wetenhall, who was one of the victim's closest friends and was with the victim for much of the evening on the night of the murder. At the hearing on the petition for a new trial, Wetenhall testified for the state that she had no recollection of seeing Bryant that night or of ever having met Hasbrouck or Tinsley. When asked whether she recalled being at the Greenwich street festival where Bryant claims Hasbrouck saw the victim for the first time, Wetenhall responded that she had no memory of having attended the event. A copy of the victim's diary, however, reveals that the victim wrote about attending the event with Wetenhall, recounting that she and Wetenhall walked home after the festival and that she then slept at Wetenhall's house. Of course, if Wetenhall cannot remember attending the event herself, she hardly can be expected to remember others who attended. Another person who suffered a lapse of memory is Dorothy Moxley, the victim's mother, who testified at the petitioner's

criminal trial that she could not recall whether she had heard dogs barking on the night of the victim's murder even though she told police on the day following the murder that she had heard such barking, and notwithstanding that the time of the barking had played a very significant part in determining the time of the victim's death. Dorothy Moxley also could not remember what time she expected her daughter home on the night of the murder.

I note that the state, in closing argument during the petitioner's criminal trial, focused on the inability of some members of the petitioner's family to remember similar details about the night of the murder as evidence of their deceit. Specifically, the state argued that it simply was unbelievable that they would not remember such details about the night in light of the shocking and painful nature of the crime that occurred at that time.

[76] The majority states that Bryant, Hasbrouck and Tinsley "did not look like the average fourteen or fifteen year olds who would have blended into the crowd, particularly not in an area that was described by one witness as 'a fairly lily-white community.' " The witness to whom the majority refers, however, namely, Morganti, was working in Belle Haven for the first time on the night of the murder, and, therefore, it cannot be presumed that he had sufficient familiarity with that community or its residents to be able to assess reliably the extent to which a person's race or nationality would make him or her more recognizable, particularly on mischief night, when those outside were dressed for the cold weather and seeking to ensure that they would not be apprehended for their pranks. More importantly, as Morganti himself repeatedly acknowledged in his testimony, *it simply was too dark to see anyone that night*, irrespective of skin color. We know, moreover, that at least one African-American family lived in Belle Haven with their teenaged child next door to the Skakels at the time of the murder and that Bryant, who also is African-American, regularly visited the neighborhood during the three years preceding the murder.

[77] In an interview with Ix conducted shortly after the murder, the police asked her whether she had seen which way Byrne went after he left her. Ix responded that she had not observed which way Byrne went.

[78] Several hours after the victim's body was discovered, Detective Theodore J. Brosko of the Greenwich police department interviewed Ix, who related that she and the victim "left the Mouakad residence and while in [the] process of walking on Otter Rock Drive to the [Skakels'] [r]esidence, they met [Byrne] . . . .

"[T]he three of them then walked to the [Skakels'] residence arriving at about 9:10 p.m."

When Byrne was interviewed the next day by a different detective, however, he indicated that he, too, had been at the Mouakad residence with Ix and the victim until about 9:10 p.m. In another interview one day later, however, Byrne told a different story to yet a different detective, namely, that he was the person that Willie Jones, the husband of the Skakels' cook, saw "dart" in front of Jones' car at approximately 9:05 p.m. as Jones was pulling out of his driveway on Walsh Lane. Byrne's statements, at least as memorialized by the police, conflict insofar as he places himself at two different locations at or around the same time. Unlike Byrne, however, Ix was very clear and consistent in her statements to the police that Byrne had left her early in the evening and met up with her and the victim again in the street about two hours later as the victim and Ix were walking to the Skakels' residence.

[79] I note that, in 2003, Kennedy telephoned Byrne's sister, Daryl Fleuren, in an attempt to verify the information that Bryant had given Kennedy concerning Byrne. Fleuren told Kennedy that she did not know much about the murder "because [she] was married and out of the house by then and [she and her family] weren't allowed to talk about it." She remembered being told by her parents that her father was on the front porch when Byrne returned home at 9:30 p.m. on the night of the murder, and that her mother had seen Byrne in bed at around 10 p.m. This information, however, based as it is on Fleuren's recollection of what she had been told by others about events that had occurred nearly thirty years earlier, is suspect because there is nothing else in the record even to indicate that Byrne's parents were home that night. Indeed, Byrne's parents were never interviewed by the police, and Byrne's older brother, rather than Byrne's parents, accompanied Byrne when he was interviewed by the police immediately after the murder. Fleuren also checked with her mother to see if she had any recollection of Bryant, Hasbrouck or Tinsley, and Fleuren reported back to Kennedy that her mother never had met or seen the three boys and, further, that "[Byrne] never had any black friends." This latter observation, however, is belied by

the fact that both Hasbrouck and Tinsley acknowledged that they and Bryant had socialized with Byrne when they went to Greenwich, and both Tinsley and Bryant recalled that they had been to Byrne's home on several occasions. See part III D of this opinion. Indeed, one of Bryant's best friends, namely, Walker, lived directly across the street from Byrne, and both Bryant and Walker explained that they and Byrne socialized together often.

Although there is no indication that the trial court relied on or even credited Fleuren's second-hand account of her deceased brother's activities, and notwithstanding that Fleuren's statements to Kennedy regarding her parents' alleged memories likely would be inadmissible at a new trial, the majority places great weight on those statements, asserting that they support the trial court's credibility determination because they contradict "Bryant's account of the location of the principal parties to the events of that evening." Specifically, the majority states: "Significantly, Byrne's sister [Fleuren] stated in a tape-recorded interview that [her] father had been on the porch when Byrne came home at 9:30 p.m., and that [her] mother had told her that she had seen Byrne *in his bed at 10 p.m. that night*. Thus, at the very point in time when the petitioner claims the victim was murdered, a murder to which Bryant claims Byrne bore witness, Byrne's mother saw him in his bed." (Emphasis in original.) As I previously indicated, however, in the thousands of pages of police notes and interview transcripts entered into evidence at the hearing on the petition for a new trial, there is no indication that Byrne's parents were home on the night of the murder, and there also is no indication that they were interviewed by the police regarding Byrne's whereabouts that night. In contrast, police records indicate that virtually all of the other parents living in the vicinity of the murder were interviewed by the police, along with their children.

[80] At her deposition, Barbara Bryant stated that Udvardy and Harkness initially had "accosted" her, "[s]cared the hell out of [her]" and that she was "full of [prescription] drugs" when they conducted their unannounced interview. Udvardy and Harkness testified, however, that they introduced themselves to Barbara Bryant before proceeding and informed her that it was a voluntary interview and that she could walk away at any time. One of the investigators, Udvardy, testified that, in his opinion, Barbara Bryant appeared "more vague" and "out of it" during the video-recorded deposition than when he encountered her on the street. Moreover, Barbara Bryant conceded at her deposition that, when she met with Udvardy and Harkness, she voluntarily had given them her telephone number in the event that they had any additional questions to ask her.

[81] The majority attempts to minimize the significance of Barbara Bryant's statements to Udvardy and Harkness, emphasizing that, in her deposition, she gave an account of her son's whereabouts on the night of the murder and of other surrounding events that was different from the one that she had given to Udvardy and Harkness. See footnote 35 of the majority opinion. The majority also underscores that Barbara Bryant claimed in her deposition to have been heavily medicated when Udvardy and Harkness approached her. Id. The fact remains, however, that Barbara Bryant consistently has acknowledged, first to Udvardy and Harkness, and subsequently in her deposition testimony, that Bryant was in Belle Haven on the day of the murder; she simply changed the time that she claims that he returned home. It is noteworthy that she changed her story in this regard only after Bryant had asserted his privilege against self-incrimination at his own deposition. In light of all the relevant facts and circumstances, including Barbara Bryant's own statements and deposition testimony, it is clear both that she disapproved of her son's willingness to come forward with information about the victim's murder and that she wished to downplay any possible involvement that he may have had with respect to it.

[82] As further reason for discrediting Bryant, the trial court also notes that "[m]issing from Bryant's statement is anything concerning the breaking of the [golf] club or the stabbing of the victim." On the contrary, it is clear from Bryant's statements that he knew that the victim had been beaten and stabbed to death by one or more golf clubs; in fact, the trial court observed that Bryant's explanation that he had been in possession of golf clubs belonging to the Skakel family on the night of the murder "indicate[s] a consciousness of guilt" that reflects Bryant's "[e]fforts to explain away the possibility that his fingerprints might be found on the murder weapon or another golf club nearby."

[83] Although the trial court expressly identified the evidence that it had relied on in rejecting the petitioner's claim without considering Bryant's statements in the context of the original trial evidence, the majority identifies

certain other evidence on which, the majority asserts, the trial court reasonably could have relied to support that conclusion. None of that additional evidence, however, renders Bryant's statements materially less reliable or trustworthy than the evidence on which the trial court did rely, and, moreover, some of the evidence to which the majority refers simply has no bearing on Bryant's credibility. For example, the majority makes much of Bryant's statement that, on the day of the victim's murder, he, Hasbrouck and Tinsley had "picked up" golf clubs at the Skakels' residence. (Internal quotation marks omitted.) The majority then asserts that, according to Bryant, he had obtained those golf clubs from the Skakels' yard, even though other testimony indicates that no golf clubs were seen lying around the yard that day. Although it is undisputed that golf clubs frequently were left outside the Skakels' home, a careful review of Bryant's statement indicates that he obtained the golf clubs from somewhere on the Skakels' property, perhaps from inside the back porch, where they generally were located. In any event, contrary to the majority's assertion, there is nothing in that portion of Bryant's statement in which he speaks about the golf clubs—a portion of Bryant's statement that the trial court expressly concluded was *supported* by corroborative evidence—that in any way contradicts the statements of others that no golf clubs were known to be lying around the Skakels' property on the day of the murder. In fact, Bryant's testimony is consistent with the findings of police investigators that the Skakel family owned numerous sets of golf clubs that were stored in different locations in their house.

[84] As I previously noted, a trial court's evaluation of the strength of the evidence adduced at the petitioner's original trial is not entitled to deference when, as in the present case, the trial court did not preside over that original trial, because, in such circumstances, this court is no less able to perform that function, which entails a review of the record of the original trial. Because our review of the strength of the state's case is de novo, we are not hampered in our resolution of the petitioner's claim by the fact that the trial court failed to undertake that review. Indeed, to the extent that the trial court did engage in such a review, I believe that its conclusory characterization of the state's case as "strong" is not supported by the original trial record. See footnote 60 of this opinion. Furthermore, although the parties adduced certain testimony relating to the petitioner's claim concerning the newly discovered Bryant evidence, that testimony is unchallenged and, therefore, did not give rise to any credibility findings by the trial court. See footnote 63 of this opinion. Consequently, there is no impediment to resolving this second and final prong of the *Shabazz* test at this stage of the proceedings.

[85] In addition, in that original appeal, this court rejected all of the petitioner's claims of impropriety which, if meritorious, would have required us to engage in harmless error analysis. Of course, that analysis, if necessary, would have required us to consider the strength of the state's evidence against the petitioner.

[86] The evidence also was tainted by more than twenty years of sensationalistic media coverage, which included two true crime books, a novel and a television mini-series in which the petitioner's family was vilified as utterly lacking in moral conscience. The theme of a family cover-up was pounded by the prosecution at trial but supported only by the very questionable testimony of Kenneth Littleton, whose long-standing mental illness and delusional thought patterns caused him to believe that the Skakel family had tried to kill him and that he himself was a member of the Kennedy family.

[87] James Terrien now uses the name James Dowdle. At the time of the victim's murder, he used the last name Terrien. I refer to him as Terrien throughout this opinion.

[88] Anne Reynolds Skakel, the wife of Rushton Skakel, Sr., and mother of the Skakel children, had passed away in 1973.

[89] This was the first evening that Littleton would be spending the night at the Skakel residence, as he only recently had accepted the position of tutor.

[90] The victim's diary entries revealed that she, the petitioner, Tommy Skakel and several other teenagers from the Belle Haven neighborhood enjoyed a close friendship, often socializing together at each other's homes and in a motor home that usually was parked in the Skakels' driveway. There also was evidence that the victim and Tommy Skakel had developed a crush on each other. When the victim's body was discovered, the shoe that she was wearing had the name "Tom" written on it.

[91] Shakespeare, a crucial witness for the state with respect to the petitioner's alibi defense, was the only person to testify that the petitioner did not

go with his brothers to Terrien's house. When pressed to explain the basis for her testimony, however, Shakespeare stated that it simply was her "impression."

[92] Three days after the murder, Ix told police that the dog began to bark between approximately 10 and 10:15 p.m.

[93] Given the layout of the driveway in relation to the house, if the victim had been walking in a straight line from the Skakels' backyard to her front door, it would have been more convenient and direct to walk across the lawn rather than to walk down the western leg of the driveway. Blood and bloodstained pieces of a broken golf club were found on the lawn within the horseshoe driveway. The state maintained at trial that no aspect of the assault against the victim had occurred in this area. Thomas G. Keegan, the detective in charge of the original investigation, concluded, however, that the assault *began* in this area, and that the victim was then dragged or carried approximately 100 feet to a more secluded area west of the driveway, in the opposite direction from the house, where she was beaten to death. The victim apparently then was dragged another seventy-eight feet to a large pine tree, under which her body ultimately was found. Keegan's reconstruction of the crime is significant insofar as it posits that the victim was dragged or carried over a much larger area and, as I explain hereinafter, raises the question, which neither party posed or addressed at the petitioner's criminal trial, as to whether someone of the petitioner's slight stature would have been capable of dragging or carrying the victim the distance that Keegan believed that she had been moved. There can be no doubt, however, that two teenagers the size of Hasbrouck and Tinsley easily could have done so.

[94] A photograph of the rather large compression just off the road along the Moxleys' driveway was admitted into evidence at the petitioner's criminal trial and at the hearing on the petition for a new trial. The grass appears to have been flattened either by a body or perhaps by two persons kneeling or standing side by side. On the basis of its appearance, it is perfectly plausible that the compression was made by a person or persons lying in wait for the victim as she made her way across the street from the Skakels' yard, or even by the victim herself if she had been forced to the ground in that location by her assailant or assailants.

[95] The police determined that golf clubs routinely were left scattered about the Skakels' property.

[96] Lee testified that his reconstruction was based on photographs of the crime scene, police reports, the autopsy report and any evidence that was collected at the crime scene.

[97] Keegan was called by the state to lay a foundation for the various crime scene photographs that were admitted into evidence, but he was not questioned by either party about the conclusions that he had drawn regarding the manner in which the murder had been committed, which had been based on his own observations and collection of evidence from the crime scene itself.

[98] Lee also posited, however, in the alternative, that the blood on the driveway could have been deposited there by the victim if the assault had been initiated at that location.

[99] The petitioner presumably did not challenge the state's reconstruction or otherwise suggest the possibility that the murder had been committed by two people rather than by a lone assailant because his alibi defense was not dependent on either theory. Indeed, even if the petitioner had asserted that the evidence indicated that two people were involved in the murder, the state likely would have maintained that, notwithstanding any such claim, the evidence still pointed to the petitioner as one of those people. The Bryant evidence, however, places Keegan's testimony in an important new light because it supports the third party culpability defense, predicated on the newly discovered Bryant evidence, that the victim was murdered by Hasbrouck and Tinsley.

[100] Gravel embedded in the victim's face led both Carver and Lee to conclude that, at some point, the victim's nose had come into contact with the surface of a driveway or roadway.

[101] Several of the state's key witnesses, including Gregory Coleman, Elizabeth Arnold and Shakespeare, testified that they had read Fuhrman's book or seen television shows about the book prior to testifying.

[102] According to Coleman, three former Elan residents likely were present when the petitioner allegedly made his incriminating statements to Coleman. Each of those former residents testified at the hearing on the petition for a new trial, however, that they never had heard the petitioner confess to the murder. In fact, one such witness, Clifford Grubin, recalled that Coleman

once had bragged about being "a very good liar." Another witness, John Simpson, remembered the incident in question and recalled that Coleman had turned to him while he and Coleman were guarding the petitioner and said that the petitioner "just admitted that he killed this girl." Simpson testified that he had not heard the petitioner make any such confession, and, therefore, he immediately asked the petitioner whether he had confessed to Coleman. The petitioner, according to Simpson, denied having done so. Simpson then turned to Coleman and said, "[the petitioner] just said that he didn't say that he killed [the] girl," to which Coleman replied, "[w]ell, he didn't answer yes or no, but he gave one of those . . . shit-eating grin[s]." According to Simpson, Coleman also stated, "[w]ell, it was his reaction, the fact that he didn't say no." The trial court in the present case concluded that the testimony of the three former Elan residents was not newly discovered because, in the exercise of due diligence, the defense could have located the witnesses prior to the petitioner's criminal trial. I agree with the conclusion of the trial court in this regard, but I underscore that the testimony of those witnesses would be extremely important if the petitioner were to receive a new trial.

[103] One witness described the nature of a general meeting at Elan as follows: " '[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. . . . [T]he [petitioner] was the subject of a general meeting as a result of his failed attempt to run away from the facility." *State* v. *Skakel*, supra, 276 Conn. 647 n.12.

[104] Petersen stated that she was enrolled at Elan by order of the Maryland Juvenile Court because she had run away from home several times. Even though she was fifteen years old and a virgin, Ricci repeatedly accused her, at general meetings and in front of the entire school, of being a "slut," and would not relent until she confessed that she was "a whore." According to Petersen, even though it was not true, she would tell Ricci that she was a "slut" just so that he would stop.

[105] "Charles Seigen, who was enrolled at Elan with the [petitioner] from 1978 to 1979, testified [at the petitioner's criminal trial] 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.' " *State* v. *Skakel*, supra, 276 Conn. 647.

[106] Petersen testified that, in Higgins' capacity as the petitioner's "overseer," Higgins regularly tormented the petitioner and, in Petersen's opinion, would have been the last person in the world in whom the petitioner would have confided. Petersen also explained that Elan's "protocol" was predicated on a system of rewards and privileges such that students were rewarded for turning one another in for the smallest of offenses, such as not making a bed properly, as well as for more serious infractions, such as having sexual relations. According to Petersen, if Higgins actually had heard the petitioner make any sort of admission, he would have told Ricci about it because it would have improved his status tremendously and yielded significant rewards for him, as it would have for any Elan resident.

[107] I note that another former Elan student, Dorothy Rogers, testified that the petitioner had told her that his family had sent him to Elan because they were afraid that he might have killed the victim.

[108] As I have noted, Coleman's credibility would be further undermined at a new trial because of the three witnesses identified by the petitioner following his conviction whose testimony directly contradicts Coleman's assertion that the petitioner had confessed to him. See footnote 102 of this opinion.

[109] Police records indicate that Ricci did, indeed, get the information from the Greenwich police. See footnote 111 of this opinion.

[110] In fact, this was not true. The petitioner had been sent to Elan as part of a plea agreement in New York arising out of a serious drunken driving incident there. See footnote 111 of this opinion.

[111] Although it does not factor into my conclusion that a new trial is required, I note that evidence presented at the hearing on the petition for a new trial reveals that, contrary to the state's attorney's argument at the petitioner's criminal trial that the Greenwich police did not tell Ricci about

the murder, the Greenwich police were, in fact, in contact with Elan during the petitioner's stay there. Moreover, the police were aware that the petitioner had been sent to Elan as part of a plea agreement arising out of an incident in Windham, New York, in which the petitioner had been arrested for operating his vehicle while under the influence. A suspect profile of the petitioner that Garr, the state's lead investigator, prepared in the 1990s, indicates that James Scarey, the chief of police in Windham, contacted the Greenwich police in April, 1978, and informed them that the petitioner had pleaded guilty to a number of charges stemming from his arrest in March, 1978. According to the suspect profile, the petitioner had driven at high speeds, attempted to evade police and crashed his vehicle into a telephone pole. Scarey told the Greenwich police that the petitioner had pleaded guilty to all of the charges except the charge of driving while under the influence and that, after the plea hearing, "an airplane arrived at the local airport, occupied by two . . . attendants . . . and a doctor, at which time [the petitioner] was handcuffed and taken to a hospital in . . . Maine. . . . Scarey reported that he was very familiar with the Skakel family and that recently [the petitioner] had been causing numerous problems for his family." In May, 1978, the Greenwich police learned that the petitioner was residing at Elan. According to the suspect profile, "[d]uring this phase of the investigation [the petitioner's attorney] Thomas Sheridan became aware of inquiries [that the Greenwich police had] made at Elan, and . . . subsequently . . . contact[ed] . . . the . . . department." Sheridan informed the police at that time that the petitioner was making some progress at Elan, that he was going to be there for ten months, and that Sheridan feared that the petitioner would suffer a relapse if he was interviewed at that time. Police records further indicate that, "[o]n November 15, 1978, information was received that [the petitioner] had escaped from Elan. He had left by himself, and had not been adjusting to the facility." On November 16, 1978, the petitioner's father informed the police that the petitioner had been located and returned to Elan by his older brother, Rushton Skakel, Jr. In short, notwithstanding the state's argument to the contrary, it appears that the Greenwich police were given regular updates about the petitioner's placement and progress at Elan, that they were fully informed of the reason why he had been sent there and that they had attempted to arrange an interview with him while he was a resident at Elan. Thus, there was very little or no factual basis for the argument of the state's attorney that Ricci could not have learned about the murder from the Greenwich police, or that there was no other explanation for the petitioner's presence at Elan except that his family must have believed that he had killed the victim.

[112] The state's attorney further articulated the state's theory to the jury as follows: "Looking at the evidence, the beating started again in the driveway. [The victim's] pants certainly weren't below her knees at that point because she couldn't have gotten five feet, let alone a near fifty feet, to get over toward that bloody major assault scene. And, of course, it only took one good swing over at the bloody major assault scene to render her permanently beyond help.

"This, as you review the evidence, is where the absolutely weird masturbation story acquires significance. It's incorrect to say this is not a forensic case. It is a forensic case, not for the forensic evidence that was produced but, rather, for the forensic evidence that wasn't produced . . . ." The state's attorney also suggested that the petitioner must have pulled the victim's pants down after he killed her and masturbated and ejaculated on her.

[113] Specifically, the petitioner maintained on direct appeal from his criminal conviction that, "without a shred of evidence to support it, the state fabricated an elaborate story about a Skakel family 'conspiracy' to falsify evidence that would supply an alibi for [the petitioner]. This devastating 'cover-up' theme not only conveyed a familial verdict of guilt, it also gutted the credibility of all alibi witnesses in one argumentative thrust, and appealed to the jury's sense of outrage that a wealthy family thought it was able to trick the police by concocting a false alibi. The state's conduct was grossly egregious because it was deliberate and false." The petitioner further contended that "[t]his story of a family 'alibi' conspiracy has no evidentiary support; in fact, the evidence was all to the contrary." In support of this contention, the petitioner referred to Julie Skakel's testimony that her brothers were interviewed by police before the trip to Windham, and to the testimony of the Greenwich police officers that the Skakel family was fully cooperative with the investigation from the moment the police arrived at the scene on October 31, 1975.

[114] As I noted previously, Littleton was known to have suffered from such delusional thinking. Indeed, on cross-examination, Littleton acknowledged that he once told the police, after an arrest in Florida, that he was "Kenny Kennedy, a black sheep of the Kennedy family," and that he previously had told a friend that the Skakel and Kennedy families were trying to "blow [his] heart out with an intravenous dosage of cocaine."

[115] The majority asserts that my analysis is "unprecedented," that I advocate what the majority characterizes as essentially de novo review of the trial court's findings, and that I view the evidence "in the light least favorable" to sustaining the trial court's decision. Footnote 25 of the majority opinion. These contentions are without merit.

My analysis is not predicated on a de novo review of the trial court's factual findings. With respect to the threshold issue of the admissibility of Bryant's statements, I conclude that the trial court properly exercised its discretion in concluding that those statements are admissible as trustworthy statements against penal interest. With respect to the trial court's failure to consider those statements in the context of the original trial evidence, the court did not elaborate on its rationale for not doing so, stating only that the statements, while admissible, are not credible. For the reasons that I previously have set forth in this opinion, I believe that the trial court was required to conduct such a review because, under the particular circumstances of the present case, *Shabazz*, if properly applied, requires that review. I cannot discern from the trial court's memorandum of decision, however, whether the court failed to consider Bryant's statements in light of the original trial evidence because the court did not give due consideration to the fact that the first prong of the *Shabazz* test erects a truly *minimal* credibility hurdle or, instead, because the court's fact-based finding that the petitioner had not met that low credibility threshold was unreasonable. If the court's decision to reject the petitioner's claim without proceeding to the second prong of the *Shabazz* test was predicated on a misunderstanding of the petitioner's minimal burden under the first prong of *Shabazz*, then the court's decision is the product of an error of law. Indeed, that may well be the case in view of the fact that the majority itself does not agree with my conclusion that the first prong of *Shabazz* is satisfied unless the court reasonably finds that the newly discovered evidence lacks all credibility. If, however, the court's decision not to consider Bryant's statements in the context of the original trial evidence was based on the conclusion that, as a factual matter, those statements were so utterly lacking in credibility that it was unnecessary to engage in such a review, then, in my view, the court's finding constituted an abuse of discretion. Thus, contrary to the majority's assertion, I do not engage in a de novo review of the trial court's factual findings.

Furthermore, contrary to the majority's contention, there is nothing in this opinion to support the conclusion that I view the evidence in the light least favorable to sustaining the trial court's decision. To the extent that the impropriety of the trial court's decision, in particular, its decision to reject the petitioner's claim under the first prong of *Shabazz*, is the product of unreasonable fact finding, rather than a misunderstanding of the minimum credibility threshold, I have explained why I reach that conclusion, that is, because the court's finding in that regard is unsupported by the facts and the inferences reasonably drawn therefrom. Moreover, as I also have explained, that determination cannot stand because of the court's inconsistent findings with respect to the extent to which Bryant's statements are corroborated.

[116] In light of the trial court's factual findings and the undisputed nature of the evidence underlying this case, the inherent reliability of the newly discovered evidence and the state's failure to rebut it, and the weakness of the state's original trial evidence, I see no reason to remand the case to the trial court for another hearing. In other words, under the particular facts and circumstances presented, in my view, the only proper resolution of the petitioner's claim is to direct a new trial. I therefore disagree with the majority that the appropriate remedy for the trial court's failure to weigh the newly discovered evidence against the original trial evidence is another hearing on the petitioner's claim for a new trial. See footnote 25 of the majority opinion. Although that would be the proper remedy in some cases, for the foregoing reasons, it is not the proper remedy in the present case.

[117] As an alternative ground for affirming the trial court's judgment, the state contends that the court should have barred the petitioner from proceeding on its claim concerning Levitt and Garr. In light of the following procedural history, I disagree with the state's contention. In October, 2005, the

state filed a request to revise in the present case, claiming, among other things, that the petitioner should be required to delete count nine of its complaint, which alleged, inter alia, that he was "entitled to a new trial based [on] newly discovered evidence, including but not limited to the information previously alleged in" the first eight counts of the complaint. The trial court denied the state's motion, and the state sought no further relief at that time. In particular, the state did not file a motion to strike that portion of count nine containing the broadly worded allegation that the petitioner was entitled to a new trial on the basis of newly discovered evidence "including *but not limited to*" the allegations contained in the other counts of the complaint. (Emphasis added.) During the hearing on the petition for a new trial, the state moved to bar the petitioner from proceeding on his claim concerning Levitt and Garr. In support of its motion, the state maintained that count nine did not afford it adequate notice of the claim and that it was too late for the petitioner to amend that count due to the three year limitation period applicable to petitions for a new trial under General Statutes § 52-582. The trial court rejected the state's contention that it had not been afforded adequate notice of the claim because the state was well aware of the claim on the basis of certain submissions by the petitioner during the pretrial discovery phase of the case. The trial court also explained that the state's request to revise had sought only to delete count nine, not to "flush it out." Because the state never sought a more specific statement or articulation of the petitioner's claim, and because the state had actual notice of that claim, the trial court denied the state's motion to preclude the petitioner from proceeding on the claim. Although the state undoubtedly would have been entitled to more specificity from the petitioner with respect to the broad allegation contained in count nine, the state did not seek it, and, as the court found, the state had ample notice of the claim. I therefore see no reason to disturb the trial court's decision to deny the state's motion to preclude the petitioner from proceeding on his claim involving Levitt and Garr.

[118] Levitt writes: "Here we were, two grown men with wives and children, now spending an increasing amount of time together. At each meeting, we'd talk for hours.

"Our coming together—a reporter and a detective—seemed so unnatural I said to [Garr], 'Jesus, if anyone noticed what was going on between us, they might think we're gay.' " L. Levitt, supra, p. 164.

[119] According to Levitt, friends and colleagues of Rushton Skakel, Sr., the alleged mastermind of the Skakel family cover-up, praised him as an extremely generous person whose "unspoken directive" in life was "[m]y house is your house . . . ." (Internal quotation marks omitted.) L. Levitt, supra, p. 24. According to Levitt, Rushton Skakel, Sr., volunteered at a local nursing home, opened his family's swimming pool in the summertime to a camp for mentally disadvantaged children and, according to one person who worked closely with him for thirty years, he was "the most loyal person in the world . . . [t]he person I'd most want to be stranded with on a desert island" because "[h]e'd never take advantage of you . . . ." (Internal quotation marks omitted.) Id.

[120] The petitioner contends that "[Levitt's] book also provides remarkable insight into Garr's conduct with regard to . . . Coleman. Coleman first spoke to Garr on June 7, 1998, after a reward for the case had been advertised in People Magazine. . . . While aware that Coleman was a serious drug user and also that . . . numerous individuals . . . considered him a liar, Garr [told Levitt] that he 'really liked' Coleman and [thought] that he was 'one of the most believable guys' he had ever talked to."