APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 29363

MICHAEL C. SKAKEL,
Appellant

v.

STATE OF CONNECTICUT,
Appellee.

BRIEF OF THE PETITIONER-APPELLANT

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Statement Of The Nature Of The Proceedings

On January 19, 2000 the Petitioner, Michael Skakel, was charged with the 1975 murder of Martha Moxley in Greenwich, Connecticut. Mr. Skakel, who was 39 years old on the date of his arrest, initially was presented in juvenile court because he was 15 years old at the time of the homicide. See In re Michael S., 258 Conn. 621, 622 (2001). The juvenile court (Dennis, J.) granted the State's motion to transfer the matter to the regular criminal docket because of Mr. Skakel's age. Id.

Following a month-long jury trial, Mr. Skakel was convicted of murder on June 7, 2002. He was sentenced to a term of incarceration of 20 years to life in accordance with the 1975 adult sentencing laws. Tr. 8/29/02 at 86. The Petitioner's conviction was affirmed on direct appeal to the Connecticut Supreme Court on January 24, 2006. See State v. Skakel, 276 Conn. 633, cert. denied, 127 S. Ct. 578 (2006). On August 29, 2005, the Petitioner filed a Petition for New Trial, claiming that newly discovered evidence as well as a pattern of nondisclosure by the state warranted a new trial in the interests of justice. Following an evidentiary hearing and extensive briefing by the parties, the trial court (Karazin, J.) issued a memorandum of decision denying the Petition on October 25, 2007. See Appendix A-40 – A-57 (hereinafter "App. ___"). The trial court granted the Petitioner's Motion for Certification to Appeal on January 16, 2008. This appeal followed.

Statement Of Facts Of The Case[1]

The body of Martha Moxley was found under a large pine tree on the Moxley property in the Belle Haven section of Greenwich at about 11:30 a.m. on October 31, 1975. The victim was laying face down, and her pants were around her ankles. Tr. 5/7/02 at 116. She had suffered multiple and severe injuries to her head and stab wounds to her neck that were consistent with being caused by a piece of golf club shaft. Tr. 5/8/02 at 115-116.

[1] The criminal trial transcript was made a full exhibit at the Hearing on the Revised Substitute Petition For New Trial. See Hearing Exhibit 59. The citations in this brief that reference the criminal trial transcript will have a date of 2002 while the transcript citations to the New Trial Hearing will have a date of 2007.

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Three pieces of a golf club were found near the victim's body.[2] Tr. 5/7/02 at 161. The investigation revealed that the victim had been assaulted near her driveway and then dragged to a pine tree on the Moxley property. Id. at 162; Tr. 5/8/02 at 138; 147.

October 30, 1975, the night before the victim's body was discovered, was also the night before Halloween and variously known as "Hell Night," "Doorbell Night," or "Mischief Night," a popular event at Belle Haven.[3] Children played pranks such as ringing doorbells and running away, toilet papering houses, throwing eggs and other minor deviant behavior. Tr. 4/19/07 at 79; Tr. 4/20/07 at 46. Helen Ix Fitzpatrick, a resident of Belle Haven in 1975, testified that it would not have been unusual for teens from other neighborhoods to visit Belle Haven on Mischief Night. Tr. 4/19/07 at 79.

The State charged that the murder occurred between the hours of 9:30 p.m. on October 30, 1975 and 5:30 a.m. on October 31, 1975.[4] At that time, fifteen-year old Michael Skakel was 20 minutes away from Greenwich's Belle Haven community.[5] At the

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[2] It was common for golf clubs to be left about the Skakel property. Tr.5/8/02 at 24; 66. The golf club was a Tony Penna golf club, Tr.5/7/02 at 169-70; the same brand was found at the Skakel residence. Id. at 172; Tr.5/9/02 at 13.

[3] See Hearing Testimony of Helen Ix Fitzpatrick, Tr. 4/19/07 at 81; Hearing Testimony of Maria Coomaraswamy-Falkenstein, Tr. 4/20/07 at 46; Transcript of Videotaped Interview of Tony Bryant, Hearing Ex. 24 at 14, App. A-71.

[4] However, the overwhelming evidence showed that the victim was killed at around 10:00 p.m. on October 30, 1975. In 1975, the police consulted with Dr. Joseph Jachimczyk, a medical examiner from Houston, Texas who concluded that the time of death was about 10:00 p.m. Tr. 5/8/02 at 38; Tr. 5/28/02 at 128-131. His opinion is supported by the observations of several people, including Mrs. Moxley, Helen Ix and David Skakel, who heard dogs barking around this time. See Testimony of Mrs. Moxley, Tr. 5/7/02 at 76 (she heard incessant barking between 9:30 p.m. and 10:00 p.m.); Helen Ix, Tr. 5/9/02 at 74; 84-5; 89 (her dog was really agitated and barking violently between 9:45 p.m. and 10:15 p.m.; it was "scared violent barking"; he was staying in one spot in the middle of the road facing the Moxley property and in the direction of where the victim's body was found); David Skakel, Tr. 5/22/02 at 85 (heard the Ix dog barking between 9:30 p.m. and 10:00 p.m.). Also, between 9:30 p.m. and 10:00 p.m., Mrs. Moxley heard a commotion outside. Tr. 5/7/02 at 42-3; 75. Several years later, she recalled that it was at this point that she heard her daughter screaming and other voices. Id. at 82.

[5] Two of the Petitioner's older brothers (Rushton, Jr. and John), his two cousins (James and Georgeann Dowdle) and a neighbor (Helen Ix) confirmed that he had left Belle Haven around 9:30 p.m. and did not return until after the murder. See Testimony of Helen Ix, Tr.

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Petitioner's criminal trial, held over twenty-five years after the murder, the State offered no physical or forensic evidence, nor any eyewitness testimony connecting the Petitioner to the murder. Its entire case was based on supposed "admissions" made by him that were either highly equivocal in nature, highly questionable in authenticity, or both. See generally Ex. 59, Criminal Trial Transcript.[6]

In addition to his alibi defense, the Petitioner also presented compelling evidence pointing to Kenneth Littleton, the Skakel's newly hired tutor, as another possible suspect for the murder. See generally State v. Skakel, 276 Conn. at 652-53; Tr. 5/9/02 at 155. Littleton was working at the Brunswick School in Greenwich as a teacher and coach when he accepted the part-time tutoring position, and was one of the chief suspects in the murder for many years. Tr. 5/9/02 at 154; Tr. 5/22/02 at 100. While he was interviewed on a number of occasions by the Greenwich police, it was not until the third interview that he admitted going outside near the time of the murder to investigate a disturbance at the rear of the Skakel driveway. Tr. 5/13/02 at 102; Tr. 5/9/02 at 164-167.

5/9/02 at 110-112; J. Dowdle, Tr. 5/22/02 at 10-15; Rushton Skakel, Jr., Tr. 5/22/02 at 63-65; Georgeann Dowdle, Tr. 5/23/02 at 47-48; John Skakel, Tr. 5/28/02 at 33-35; Defendant's taped interview with Hoffman, Trial Ex. 80, at 46-75.

[6] The evidence most relied upon by the State was testimony from several witnesses about statements supposedly made by the Petitioner under conditions of shocking brutality. From 1978 to 1980 Michael Skakel was physically and emotionally brutalized at Elan, a residential "treatment" facility for adolescents and young adults located in Poland Springs, Maine. For two years, Mr. Skakel was held captive in this secluded environment where the residents regularly were beaten unmercifully and emotionally tortured. In its closing argument, even the prosecution conceded that a "concentration camp type atmosphere" existed at Elan, and on direct appeal, the Connecticut Supreme Court summarized the degree to which the Petitioner was "brutalized" during his time at the facility. See Tr. 6/3/02 at 17; State v. Skakel, 276 Conn. at 646-49. Despite the pummeling, the beatings and the threats, witness after witness from Elan testified that Mr. Skakel never confessed to killing Martha Moxley. See Testimony of Sarah Petersen, Tr. 5/23/02 at 158; Donna Kavanah, Tr. 5/23/02 at 209; Dorothy Rogers, Tr. 5/16/02 at 143-4; Alice Dunn, Tr. 5/17/02 at 78; Angela McFillan, Tr. 5/24/02 at 35; Mike Wiggins, Tr. 5/23/02 at 176; Elizabeth Arnold, Tr. 5/17/02 at 16; Charles Seigan, Tr. 5/16/02 at 99. There were only two exceptions, John Higgins and Greg Coleman, two Elan residents who stood out among many others for the brutality of their conduct and the unreliability of their stories.

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Following the Petitioner's conviction, counsel discovered new evidence that would have significantly bolstered the Petitioner's existing third-party culpability defense, cast reasonable doubt on the credibility of the State's chief witness, questioned the integrity of the State's investigation, and added credible allegations of an entirely new suspect supported by significant corroborating evidence.[7] The trial court denied the Petitioner's Revised Petition for New Trial at issue in the present appeal.[8]

Standard of Review

Connecticut General Statutes § 52-270(a) provides that "[t]he superior court may grant a new trial of any action that may come before it, for ... the discovery of new evidence.... or for other reasonable cause....". As recognized by the Connecticut Supreme Court, the standard that governs the granting of a petition for a new trial based on newly discovered evidence is well established:

> The defendant 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.

Asherman v. State, 202 Conn. 429, 434 (1987).

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[7] At the hearing on the Petition For New Trial, the Petitioner pressed the claims alleged in Counts One, Two, Six and Nine of the Petitioner's Revised Petition for New Trial.

Count One alleged that the information obtained from Gitano "Tony" Bryant, namely that he was present near the murder scene with two friends on the night of the murder carrying golf clubs from the Skakel property while discussing how they wanted to "go caveman" on Martha Moxley constituted newly discovered evidence;

Count Two alleged that the three witnesses discovered post-conviction who directly contradicted the testimony of the State's key witness, Gregory Coleman, regarding the Petitioner's alleged confession to murder constituted newly discovered evidence;

Count Six alleged that the State engaged in a pattern of non-disclosure of exculpatory information that supported his third party culpability defense and alibi defenses which warranted a new trial; and,

Count Nine alleged that the discovery of a secret pact and book deal between the state's lead investigator and an author, as well as information that this investigator threatened witnesses, constituted newly discovered evidence.

[8] Additional relevant facts and procedural history will be presented in the Argument Section.

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The Connecticut Supreme Court has also recognized a more general principle that should guide the trial court's assessment of the strength of the evidence presented: "[A] court's decision on the petition should be guided by the more general principle that a new trial will be warranted on the basis of newly discovered evidence only where an injustice was done and whether it is probable that on a new trial a different result would be reached." (Internal quotation marks omitted.) Shabazz v. State, 259 Conn. 811, 823 (2002). In Joyce v. State's Attorney, 84 Conn. App. 195, 203-204, cert. denied, 271 Conn. 923 (2004), the Appellate Court recognized that the more general principle articulated in Shabazz and its progeny was an express "deviation from the traditional four-pronged test," and only warranted in serious criminal cases involving homicides." Id. at 203-204.

A criminal defendant may also separately seek a new trial for "reasonable cause." Conn. Gen. Stat. § 52-270(a). Courts defining the "reasonable cause" portion of the petition for new trial statute have indicated that the basic test is "whether or not the litigant had been deprived of a fair opportunity to be heard and that an injustice will occur if a new trial is not allowed." Jacobs v. Fazzano, 59 Conn. App. 716, 721 (2000). This standard applies "when no other remedy is adequate and when in equity and good conscience relief against a judgment should be granted." Id. (internal quotations omitted).

On appeal from the trial court's denial of a petition for new trial, where the court has granted the petitioner's motion for certification to appeal, this Court will apply an abuse of discretion standard. Shabazz v. State, 259 Conn. 811 (2002).

ARGUMENT

I. The Trial Court Erred in Denying A New Trial Based Upon Newly Discovered Evidence Of Third Party Culpability After Ruling The Evidence Sufficiently Credible To Be Admissible

Following the Petitioner's conviction, new evidence of third party culpability was discovered relating to three men who had never been connected to the murder; Gitano "Tony" Bryant, Adolph Hasbrouck and Burton Tinsley. Prior to invoking his right not to

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incriminate himself, Bryant stated that his two friends made statements and engaged in conduct that led him to conclude that they murdered Martha Moxley on October 30, 1975. Bryant not only inculpated his two friends, but he also placed himself with them near the scene of the crime, on the night of the murder, carrying golf clubs from the Skakel property while discussing with Hasbrouck and Tinsley how they wanted to "go caveman" on Martha Moxley. In Count One of the Petition, the Petitioner claimed that the newly discovered evidence, if presented to a jury, would likely change the outcome of the trial.

In its ruling dated October 25, 2007, the trial court concluded that the statements of Bryant, Hasbrouck and Tinsley were admissible as statements against their penal interest, finding that "Mr. Bryant's statements were made under circumstances which support admission, are corroborated by sufficient evidence, and are clearly against his penal interest." App. A-53. Yet, the court reversed course in determining whether the evidence that it had already deemed trustworthy and admissible would "likely produce a different result at a new trial," finding that it did not pass an unspecified minimum credibility threshold. Id. at A-57. This conclusion stands in contrast to other cases where the court has properly permitted the jury to consider hearsay evidence of third party culpability that bore enough indicia of reliability to qualify as a trustworthy statement against penal interest.[9] Thus, the Petitioner respectfully submits that the trial court abused its discretion when it declined to submit this admissible, newly discovered evidence to a jury at a new trial.

A. Relevant Facts And Procedural History

Background

On October 30, 1975, Gitano "Tony" Bryant was a fourteen year old African American male who had just recently moved to New York City after attending the

[9] See State v. Bryant, 202 Conn. 676, 699 (1987) (where the Supreme Court ordered a new trial after concluding that the declarant's statements met the minimum credibility to be admissible as an exception to hearsay); State v. Gold, 180 Conn. 619, 633-34 (1980) (where the deceased declarant's statements that he "would get" one victim was trustworthy so as to be admissible and warrant a new trial).

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Brunswick School in Greenwich, Connecticut, from 1972 through the school year ending in 1975. Testimony of Esme Dick, Tr. 4/17/07 at 127-29; Testimony of Crawford Mills, Tr. 4/18/07 at 6, 9. During his three years at Brunswick, Mr. Bryant lived in the Greenwich home of a family friend, Esme Dick, who knew him through her work with Bryant's mother in the educational film industry. Tr. 4/17/07 at 126-28; Tr. 4/25/07 at 7. At the hearing, former residents of the Belle Haven section of Greenwich testified that they recalled being classmates with Mr. Bryant, who was a popular student and excelled in sports.[10] See Tr. 4/18/07 at 6-7, 65; Tr. 4/19/07 at 97; Tr. 4/24/07 at 83; Tr. 4/25/07 at 7, 128; 1975 Brunswick Football Team Photograph, Ex. 63.

The Petitioner established that while living in Greenwich, Bryant socialized often with the residents of Belle Haven. Neal Walker, a Brunswick classmate and Belle Haven resident, testified that they were particularly good friends and that Bryant would visit him frequently. Tr. 4/18/07 at 66-68. Walker also testified that they socialized with Crawford Mills, a classmate who lived in Greenwich (but not Belle Haven) as well as Geoffrey Byrne, Walker's neighbor from across the street.[11] Id. at 6; Tr. 4/18/07 at 66. Walker testified that Bryant stayed overnight at both the Walker and Byrne homes on numerous occasions, and Bryant's mother confirmed that when he stayed overnight after he had moved to New York City, he would either take the train home or she would pick him up.[12] See Tr. 4/18/07 at 66-67; Deposition Testimony of Barbara Bryant, Ex. 43 at 14.

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[10] While Martha Moxley did not attend Greenwich Academy, Tony Bryant also knew her as part of the group of friends centered around the Belle Haven neighborhood. Id. at 8; Tr. 4/19/07 at 49. Due to Martha's popularity, it was not unusual for people to know and remember her even if they would not be considered close friends. Tr. 4/18/07 at 11, 60; Tr. 4/25/07 at 9-10.

[11] The evidence related to Geoffrey Byrne, his established association with Walker and Bryant, and particularly his parent's largely unsupervised mansion where the children often played was highly relevant to corroborate Bryant's allegation that Hasbrouck and Tinsley hid there after the murder. See Tr. 4/18/07 at 66; Tr. 4/19/07 at 56; Tr. 4/24/07 at 79, 80, 85, 172; Deposition Testimony of Gregory Byrne, Ex. H at 11-13.

[12] Tony Bryant related significant corroborating details regarding the Belle Haven community in his statement to defense investigators. At the hearing, Helen Ix confirmed

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After moving in with his mother and transferring to a public school in New York City, Bryant made fast friends with two of his new classmates, Adolph Hasbrouck and Burton "Burr" Tinsley. See Testimony of Neal Walker, Tr. 4/18/07 at 68; Ex. 24 at 6, App. A-63. In 1975, Hasbrouck and Tinsley were about fifteen years old and very large for their age; Hasbrouck was African American, 6'2" tall and weighed about 200 pounds and Tinsley, who was of Asian/Indian/Caucasian ancestry, was about the same age and height. Ex. 24 at 32, App. A-89; Testimony of Crawford Mills, Tr. 4/18/07 at 19. In addition to the boys' unusually large physical stature, Bryant also described Hasbrouck as explosive, very strong and unpredictable. Ex. 24 at 31, App. A-88. Bryant indicated that Hasbrouck had a reputation as "not to be somebody to mess with," and while Tinsley was not known to have the same temperament, he often served as the "gasoline" that fueled Hasbrouck, daring him to do things such as throwing bricks at moving cars or breaking into buildings. Id. at 30, 33, App. A-89, A-90.

In February of 2003, both Hasbrouck and Tinsley confirmed that they were good friends with Tony Bryant in 1975, and that they had visited Neal Walker's and Geoffrey Byrne's homes on numerous occasions. See Audiotaped Interview of Adolph Hasbrouck by Robert F. Kennedy, Jr., Ex. 12, App. A-119-128; Audiotaped Interview of Burton Tinsley by Robert F. Kennedy, Jr., Ex. 15, App. A-129-139. Neal Walker also confirmed that Tony Bryant had brought Hasbrouck and Tinsley to his house in Belle Haven on a number of occasions. Tr. 4/18/07 at 68. Bryant indicated that on these occasions, Hasbrouck and Tinsley would stay overnight at the large, unsupervised Byrne residence while Bryant stayed at the Walker residence. See Ex. 24 at 11, App. A-68.[13]

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that Bryant accurately described a large, open field behind the Skakel property that served as a neighborhood hangout for the children of Belle Haven. Tr. 4/19/07 at 62-63; Ex. 24 at 17, App. A-74. Ix also confirmed that this area owned by the Skakels was often littered with remnants of the neighborhood activities in the area, including their golf clubs, sporting equipment, toys, and even clothes. Tr. 4/19/07 at 78.

[13] While Hasbrouck's and Tinsley's visits generally went unnoticed by most residents of Belle Haven, Bryant felt that he and his two friends made Neal Walker's mother nervous.

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In his statement to defense investigators, Bryant indicated that Hasbrouck first met Martha Moxley when he attended a Greenwich street fair with Tony Bryant during September of 1975,[14] and again at a Greenwich church mixer that he attended with Bryant that fall. Ex. 24 at 22-23, App. A-79-80.[15] While at the same mixer as Martha Moxley, Hasbrouck became jealous of other boys talking to her, telling Bryant, "I don't understand why she's spending her time with those guys when she could be with me." Id. at 26, App. A-83. Over the month of October, Hasbrouck's obsession with Martha grew to the point that he would make comments about her even when they were not visiting Greenwich. Id. at 24, App. A-81. Hasbrouck made comments to Tony Bryant with regard to her "beautiful blond hair" and indicating that "I really like her," and "she's pretty." Id. at 24-25, App. A-81-82. As time went on, his comments became more forceful, indicating that he wanted to "fuck the shit out of her" and "go caveman on her," meaning that he would take her, grab her and have her the way he wanted.[16] Id.

Bryant's account of October 30, 1975

On October 30, 1975, Bryant, Hasbrouck and Tinsley took the train to Greenwich in order to go to Belle Haven on the night before Halloween. Ex. 24 at 10, App. A-67. On the

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Ex. 24 at 28, App. A-85. Indeed, Neal Walker confirmed that on one occasion, Geoff Byrne's mother called him and expressed her discomfort with one of the teens waiting by their gateway for Geoff to return home. Tr. 4/18/07 at 77.

[14] The Petitioner established that the street fair, a United Way block party held on September 20, 1975, was a huge event in Greenwich and attended by over 12,000 people. See Greenwich Times article, 9/22/75, Ex. 64. Virtually every resident of Belle Haven attended including Martha Moxley, who recalled the event in her diary. See Diary Excerpt, September 21, 1975, Ex. 33; Tr. 4/18/07 at 68-69.

[15] Bryant was familiar with the dances from his days at Brunswick, and attended at least one with Neal Walker at the Convent of the Sacred Heart. See Tr. 4/18/07 at 69. On October 4, 1975, Martha Moxley recalled being at the same dance, writing in her diary: "Tonight was a Sacred Heart dance. I went w/Margie & Jackie. When we walked in some guy asked me to dance. It was Stairway to Heaven. At the fast part he wouldn't even let go!" See Ex. 34.

[16] Bryant would tease Hasbrouck, saying that Moxley was not interested in him, but Hasbrouck would reply that "she likes me" and that it was "going to happen." Ex. 24 at 23, 25-26, App. A-80, A-82-83. In response to Bryant's comments, Tinsley would push Hasbrouck along, saying "no, you can do it, you can get her." Id at 30, App. A-87.

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train ride up to Belle Haven, Hasbrouck and Tinsley immediately began talking about "going caveman" on someone that night.[17] Id. at 34, App. A-91. They arrived in Belle Haven between 6:00 and 6:20 p.m. and first stopped by Neal Walker's house at approximately 6:30 p.m. Id. at 15, App. A-72. However, the Walkers were always expected to be home by 6:00 for dinner, so Neal could not go out with the trio. Id.; Testimony of Marjorie Walker Hauer, Tr. 4/24/07 at 82. After departing the Walker's house, the three teens went to a neighbor's house and stole about three six packs of beer from the refrigerator. Ex. 24 at 15, App. A-72. The boys then went back to Neal Walker's house, but he did not join them.[18] Id.. The three teens drank beer and smoked marijuana while they wandered around Belle Haven, toilet papering trees and using shaving cream on windows. Id. at 16, App. A-73. At some point during the evening, the boys also met up with Geoffrey Byrne, who joined them in various pranks. Id.[19] Throughout the course of the evening, Hasbrouck and Tinsley continued to talk about meeting girls in the neighborhood, making comments such as "where are the bitches?" "we've just got to get into something" and "I'm not going out of here unsatisfied." Id. at 34, App. A-91.

After toilet papering houses, the boys walked to the Belle Haven Club at the far south end of the Belle Haven neighborhood, but did not go inside. Id. at 19-20, App. A-76-77. From there, they went back to the meadow behind the Skakel property, where they

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[17] As Tony Bryant understood them, "going caveman" meant dragging by the hair and pulling the person away, not just picking the person up. Ex. 24 at 27, App. A-84.

[18] The transcript of Tony Bryant's August 24, 2003 interview incorrectly quotes him as saying "And we drank one six-pack with Patrick Neal. He had homework to do." Ex. 24 at 15, App. A-72. The correct quote should actually read, "We drank one six pack, we went back to Neal's, he was doing homework." Ex. 23 at 7:09:33.

[19] Noteworthy corroboration of this statement came from the hearing testimony of Maria Coomaraswamy, a Belle Haven resident who was ten years old in 1975 and tended to follow Geoff Byrne around because she had a crush on him. See Testimony of Maria Coomaraswamy-Falkenstein, Tr. 4/20/07 at 46-47. Coomaraswamy did not remember seeing Byrne with Martha Moxley during the early part of the evening, or when she was walking home with her between 8:00 and 8:15 p.m. Id. at 46-47. Helen Ix, who was also out with Martha Moxley that evening, also did not recall seeing Byrne until around 9:00 p.m., when they went to the Skakel house. Tr. 4/19/07 at 82-83, 113.

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continued to drink and play neighborhood pranks. Id. at 21, 29, App. A-78, A-86. Hasbrouck and Tinsley, who were significantly drunk and high off of marijuana and at least three six packs of beer, continued to talk about "going caveman" and not leaving Belle Haven unsatisfied. Id. at 29, 34, App. A-86, A-91.

As they were wandering around the meadow, everyone in Bryant's group picked up golf clubs strewn about the Skakel property. Id. at 35-36, App. A-92-93. Both Hasbrouck and Tinsley told Bryant that they had their "caveman stick," and that they were going to "grab somebody and pull them by the hair and do what cavemen do." Id. at 38-39, App. A-95-96. While hanging out in the field, the boys also saw Helen Ix, Martha Moxley and a few other girls from the neighborhood on at least one occasion. Id. at 37, App. A-94.[20] Hasbrouck and Tinsley made sexual overtures towards the girls, but none stayed long enough for Bryant to remember the incidents specifically. Id. at 37-38, App. A-94-95. Bryant also reported seeing approximately 10-15 neighborhood kids while they were hanging out in the secluded meadow behind the Skakel property. Id. at 28, App. A-85.[21]

As the night progressed, Hasbrouck and Tinsley continued to talk about "going caveman" and not leaving Belle Haven unsatisfied. See Ex. 24 at 34, App. A-91. After the

[20] Indeed, Helen Ix, Jackie Wetenhall and Martha Moxley spent part of the evening throwing toilet paper in the trees around the same area of the back and side of the Skakel property. See Testimony of Helen Ix Fitzpatrick, Tr. 4/19/07 at 81-82. While Ix recalled seeing Martha Moxley and Geoff Byrne at the Skakel house at around the same time, she could not remember whether she saw Tony Bryant or his friends that evening. Id. at 97.

[21] Indeed, there were at least that many neighborhood teens from Belle Haven wandering the neighborhood that night, including Helen Ix, her sister Alicia, her brother Don, Martha Moxley, Andy Pugh, Kathy Pugh, Geoffrey Byrne, a girl identified as Annemarie or Maria, Chris Gentri, Peter Coomaraswamy, his sister Maria, Jackie Wetenhall, one or more of the Moukads, Michael Skakel, Tommy Skakel and Julie Skakel. See Testimony of Helen Ix Fitzpatrick, Tr. 4/19/07 at 106-107; Interview of Helen Ix dated 11/14/75, State's Ex. L, at 1-9; Testimony of Jackie Wetenhall, Tr. 4/25/07 at 125, 140; 1975 Police Report, Interview of Julie Skakel, 10/31/75, Ex. 29; Criminal Trial Transcript Excerpt, 5/29/02, Cross Examination of Julie Skakel, Ex. 30 at 60-64. Charles Morganti, who was working as a security guard at Belle Haven on October 30, 1975, also saw a large group of youths around the Skakel premise that evening. See Deposition of Charles Morganti, Ex. 46 at 6, 19-20. Because it was "totally pitch black" with no light in that area, Morganti mostly saw shadows and heard noise. Id. at 27.

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two picked up the golf clubs and said that they "had their caveman club and were going to do what cavemen do," Bryant claims that he became increasingly uncomfortable and decided to leave. Id. at 38, App. A-95. Bryant told Hasbrouck and Tinsley that he had to leave due to his mother's curfew, and claimed that he hitchhiked back to the train station. Id. at 39, App. A-96. Bryant then claimed that he took the last train home and returned home that evening. Id. at 24, App. A-81.

Hasbrouck's and Tinsley's Statements to Tony Bryant

Tony Bryant claimed that he first learned of the murder from his mother, Barbara Bryant, who confronted her son after reading an article in the Saturday New York Times reporting on the discovery of Martha Moxley's body the previous afternoon.[22] See Ex. 24 at 41, App. A-98. After reading the article, Tony Bryant claimed that his mother was concerned that he would become implicated in the crime if the authorities discovered that he was in Belle Haven that evening. Id. Bryant claimed that his mother ordered him not to speak with anyone about his presence at Belle Haven on the night of the murder and told him that he was forbidden from returning to the neighborhood ever again. Id.

The next time that Bryant saw Hasbrouck and Tinsley was the following Monday at school. Ex. 24 at 40, App. A-97. Hasbrouck and Tinsley told Tony Bryant that they had spent the night at the Byrne household, and also made the following comments that led him to conclude that one or both of them had murdered Martha Moxley: "Well, I got mine;" "We've achieved one of our fantasies;" "Yeah, we did what we had to do;" "We did it. We achieved the caveman;" "We got her caveman style;" and "we satisfied our caveman urge." Id. at 40, 43, 50, App. A-97, A-100, A-107. While Hasbrouck and Tinsley never mentioned

[22] Martha Moxley's body was discovered at about noon on Friday, October 31, 1975. See State v. Skakel, 276 Conn. at 642. The New York Times published a front-page article reporting the discovery in its Saturday, November 1st edition. See New York Times, 11/1/75, Ex. 62. Three newspapers were delivered to the Bryant apartment in 1975. See Deposition Testimony of Barbara Bryant, Ex. 43 at 46. Tony Bryant's mother corroborated the information that Tony had given to them regarding the confrontation on November 1, 1975. See Testimony of Michael Udvardy and Catherine Harkness, Tr. 4/23/07 at 51-71.

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Martha Moxley by name, Tony Bryant's knowledge of their presence in Belle Haven, combined with the news of Martha Moxley's death, made it obvious to him that they were talking about her.[23] Id. at 43, 46, App. A-100, A-103.

Tony Bryant's statements to Esme Dick

Esme Dick testified at the hearing that after the murder, but before the 1975-76 school year ended, Tony Bryant had dinner with her and her family. Tr. 4/17/07 at 137. There, the conversation turned to possible suspects in the murder, including Michael Skakel. Id. at 137. Bryant told Esme Dick that he knew Skakel did not do it, and that he was in Belle Haven on the night of the murder. Id. at 130. Esme Dick, assuming that the police had interviewed everyone who was in the neighborhood that evening, never informed the police of Bryant's statements. Id. at 139.

The 1975 Investigation

The crime scene in Belle Haven revealed strikingly similar details when compared with the statements of Adolph Hasbrouck and Burton Tinsley to Tony Bryant. The investigation of Martha Moxley's murder showed that she had been clubbed over the head with a golf club that was later linked to the Skakel household. See State v. Skakel, 276 Conn. at 642. Investigation further revealed that she had been dragged for some distance before being hidden under a pine tree on the Moxley property. Id. at 644; Photographs of Crime Scene Showing Drag Marks, Exhibits 39; 40. At a certain point during the dragging, the individual changed directions, leading investigators to conclude that the perpetrator was disoriented, if not unfamiliar with the location of the houses to each other. See Testimony of John Solomon, Tr. 4/23/07 at 25-26. Martha Moxley's pants had also been pulled down to around her ankles before being dragged to another location. See Criminal Trial

[23] Over the course of the school year, Hasbrouck and Tinsley continued to brag to Tony Bryant about murdering Martha Moxley, saying that "we grabbed her" and "we got her." Id. at 46, App. A-100. Laughing, Hasbrouck and Tinsley would also say to Bryant, "Hey, when was the last time you saw your favorite Flintstone character do to Wilma," or simply "Grab Wilma." Id.

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Transcript Excerpt, Direct Examination of Dr. Henry Lee, Ex. 41; Criminal Trial Transcript Excerpt, Direct Examination of Dr. Wayne Carver, Ex. 42.[24]

On a sheet used to wrap Moxley's body, two hairs were found. One of the hairs was identified as "possessing Negroid characteristics." See FBI Lab Report, 12/3/75, Ex. 60 App. A-156-158. Hair comparison by the FBI forensic lab concluded that the hair was dissimilar to the only two African American males known to be in the area, a Greenwich police officer and the son of the Skakel's cook, Larry Jones. See Testimony of James Lunney, Tr. 4/25/07 at 105-106, App. A-159-162. Later testing revealed that the second hair on the sheet possessed Asian characteristics. See Criminal Trial Transcript Excerpt, Direct Examination of Dr. Terri Melton, Ex. 87, App. A-163-167; Testimony of John Solomon, Tr. 4/23/07 at 16. Investigators never identified the contributor of either hairs.[25]

The interviews of all the children in the neighborhood were strikingly brief; in the case of the Skakel family, tape recorded interviews with all six children took a total of just one hour and fifteen minutes. Tr. 4/25/07 at 88. While investigators asked a number of the

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[24] At the Petitioner's criminal trial, the State elicited testimony from Dr. Lee explaining that semen could have been wiped away from the victim's body See Ex. 41, Criminal Trial Transcript Excerpt, 5/8/02, at 153, and also testimony by Dr. Carver explaining that certain parts of the victim's body were not tested for the presence of semen. See Ex. 42, Criminal Trial Transcript Excerpt, 5/8/02, at 103; State v. Skakel, 276 Conn. at 643. These points were highlighted during closing argument, where the State concluded that the lack of forensic evidence did not preclude the jury from concluding that the Petitioner had masturbated on the victim's body. See Ex. 59, Criminal Trial Transcript, 6/3/02, at 112.

[25] The discovery of three previously unknown visitors to Belle Haven that evening may also provide a reasonable explanation for investigators' failure to identify strangers wandering the neighborhood. For example, in a 1975 interview with police, Julie Skakel recalled seeing "a shadow of a person, no other description, running in front of her house. She stated the shadow was running in a crouched position, crossed the driveway and disappeared into the wooded area adjacent to the driveway. See 1975 Police Report of Interview of Julie Skakel, Ex. 29. While Julie Skakel was unable to identify the person, she was sure that the figure was too big to be one of her brothers. See Criminal Trial Transcript Excerpt, Ex. 30 at 63. Geoffrey Byrne also reported that as he was walking home at approximately 9:30 p.m., that he heard footsteps behind him and that it frightened him. See Testimony of James Lunney, Tr. 4/24/07 at 108. Investigators never concluded in any report who may have been following Geoffrey Byrne home.

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neighborhood children if they saw any strangers while they were out that evening, at no time did they ask if anyone they knew from outside the neighborhood had visited that day or night. Id. at 93. In some cases, investigators never even interviewed children who were known to have been out that evening, such as Maria Coomaraswamy, who was not only walking around Belle Haven that evening, but even walked with Martha Moxley on her way home. See Testimony of Maria Coomaraswamy-Falkenstein, Tr. 4/20/07 at 47.[26]

Despite the fact that the murder took place on an evening when it would not have been unusual for friends outside the neighborhood to have visited, there was never a comprehensive survey of everyone who was out in Belle Haven that evening, or even an effort to establish a list of people who visited the neighborhood often. Despite the fact that Neal Walker and Geoff Byrne knew that Tony Bryant was a frequent visitor, neither Bryant, Hasbrouck or Tinsley were ever interviewed by the police in connection with this case. As a result, investigators never became aware of Tony Bryant's existence or his highly relevant role as a frequent visitor to the Belle Haven neighborhood. Tr. 4/24/07 at 169-70.

Tony Bryant's Statements to Crawford Mills and Neal Walker

Following high school, Bryant graduated from the University of Houston and the University of Tennessee College of Law, but never formally practiced law. Ex. 43 at 16-17;

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[26] Conversely, investigators also identified a significant number of people who were walking around the neighborhood, but whom the neighborhood children never reported seeing. For example, Patricia McBride reported that she was out in the neighborhood walking her dog at approximately 9:00 p.m., but the children never reported seeing her. See Testimony of James Lunney, Tr. 4/25/07 at 96-97. In another interview, Charles Morganti, a Belle Haven security guard, reported seeing an individual walking around the neighborhood at about 10:00 p.m. See Testimony of John Solomon, Tr.4/23/07 at 11, 54. Mr. Morganti described a white male in his twenties with a stocky build, around six feet tall, blonde, with glasses, wearing a fatigue jacket and tan trousers. See Testimony of Frank Garr, Tr.4/25/07 at 37-38. Similarly, none of the children interviewed by police reported seeing the unidentified man reported by Charles Morganti. In the case of Carl Wold, a neighbor of the Moxleys and the Petitioner, investigators determined that he was out for his evening walk, but was home by 8 p.m. and stayed home for the remainder of the evening. See Testimony of John Solomon, Tr.4/23/07 at 21. None of the children reported seeing Wold while they were out at the same time that evening. Tr. 4/25/07 at 96.

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Ex. 4 at 26. He moved to Los Angeles and worked briefly in the entertainment industry in various capacities and also wrote several screenplays, one of which was aired on television. Tr. 4/18/07 at 17, 44-45, 81. Bryant kept in contact with both Crawford Mills and Neal Walker, speaking with them by telephone on holidays and birthdays, as well as meeting up when he was visiting New York. Tr. 4/18/07 at 15, 70, 90.

In the late 1980's, Crawford Mills began writing a screenplay based on Belle Haven and the murder of Martha Moxley which utilized fictional composite characters and was focused more on making a statement about the town of Greenwich than the murder itself. During a conversation with Tony Bryant in September 2001,[27] Mills mentioned that he had been working on the screenplay, and Bryant offered his assistance and contacts in the entertainment industry. See 4/18/07 at 17. Mills sent the screenplay to Bryant, hopeful that he would be able to assist him in editing and selling his story; however, despite numerous follow up calls from Mills, Bryant was too busy to work on the project. Id. at 17.

During late 2001, Mills called Bryant again to inquire about his work on the screenplay. Id. at 18, 47. During that telephone conversation, Bryant revealed to Mills for the first time that his friends from New York City were the real killers, and related largely the same details that he later disclosed to defense investigators in 2003. Id. at 18. While Bryant asked Mills to keep their conversation between the two of them, Mills contacted Neal Walker and asked him to encourage Bryant to come forward with his information. Id. at 19; Tr. 4/18/07 at 72. Walker agreed, and Bryant similarly indicated to Walker that while he felt it was important for people to know about Hasbrouck and Tinsley, he did not want Walker to reveal his name to anyone.[28] Id. at 73.

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[27] By 2001, Bryant was married with four young children and had moved to Florida, where he was president of a tobacco company. See New Trial Exhibit 24 at 51.

[28] Bryant told Neal Walker that he did not reveal this information for over twenty-five years because he and his mother feared that he would become a suspect. Id. at 74. There were many reasons that Tony Bryant had for not coming forward. As a business man, married with four children, Tony Bryant did not want to publicly expose himself as being involved in a high-profile murder from the 1970's and expressed to many people that his priority was

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Disclosures Following Michael Skakel's Conviction

Following the Petitioner's conviction, Crawford Mills contacted Bryant and implored him to come forward. Id. at 24, 56-57. Convinced that he would not do so, Mills decided that he would not protect Bryant's name any longer and contacted the press, authorities, and lawyers involved in the case. Id. at 24-26. It was not until Mills contacted the Petitioner's cousin, Robert F. Kennedy, Jr., though, that he received any response. After speaking with Mills, Kennedy contacted Tony Bryant by telephone, ultimately engaging him in five separate telephone conversations between the end of February and March 3, 2003. Id. at 46. While Bryant was initially reluctant to talk, he ultimately related to Kennedy an even more detailed account of October 30, 1975 than he had to Mills and Walker. See Audiotaped Interviews of Tony Bryant by Robert F. Kennedy, Jr., Exhibits 2-11.

After speaking with Bryant, Kennedy located Adolph Hasbrouck's telephone number in Bridgeport, Connecticut, and engaged him in a tape-recorded telephone conversation in 2003. See Tr. 4/17/07 at 60-61; Exhibits 12, 13. Hasbrouck admitted that he knew Tony Bryant, Neal Walker and Geoffrey Byrne, and that he had visited Byrne's house many times. Ex. 12 at 22. Hasbrouck further confirmed that he was friends with Burton Tinsley, and that they continued to talk regularly. Id. at 25. However, Hasbrouck denied being in Belle Haven with Bryant and Tinsley on October 30, 1975. Id. at 22-23.

Based on the information received from Adolph Hasbrouck, Kennedy located Burton Tinsley in Portland, Oregon. Tr. 4/17/07 at 63. In a tape recorded telephone call on March

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on protecting his family. See Ex. 4 at 15; Ex. 24 at 56, App. A-113. Bryant also had prominent members of his family whom he did not want to become involved in publicity surrounding the murder, including his Academy Award winning mother and basketball star cousin, Kobe Bryant. Ex. 4 at 15. Further, Bryant was convinced that Michael Skakel would never be convicted when he went to trial, and that his assistance in the defense of a decades-long murder investigation was not necessary for Skakel to be acquitted. Ex. 24 at 43-44, App. A-100-101. Most importantly, though, Tony Bryant feared that by coming forward and admitting that he was in Belle Haven, on the night of the murder, holding golf clubs later linked to the murder weapon, and discussing "going caveman" on Martha Moxley with Adolph Hasbrouck and Burton Tinsley, that he would automatically be pinned as a suspect in the investigation. Id.; Testimony of Neal Walker, Tr. 4/18/07 at 74.

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3, 2003, Tinsley further corroborated Hasbrouck's recollection of their frequent visits to Belle Haven. See Id. at 63; Ex. 15 at 3-4.[29] While Tinsley acknowledged traveling to Greenwich and spending a great deal of time socializing with Neal Walker and Geoff Byrne in Belle Haven, he denied being in the neighborhood on the night of the murder. Id. at 7.

As a result of Kennedy's discussions with Tony Bryant, defense investigator Vito Colucci contacted Tony Bryant in Florida and agreed to submit to a videotaped interview. See Testimony of Vito Colucci, Tr. 4/18/07 at 103. He provided a complete description of his involvement with Hasbrouck and Tinsley on October 30, 1975,[30] as well as their subsequent disclosures to him in school the following week. Id. at 103.

After interviewing Bryant, Vito Colucci met with Adolph Hasbrouck at his home in Bridgeport, Connecticut on September 2, 2003. Tr. 4/18/07 at 134. During that interview, Hasbrouck acknowledged that he was in Belle Haven on the night of the murder, but gave three conflicting accounts of the time he was there. First, Hasbrouck said that they arrived in the morning and then returned by train about noontime, then indicated that they arrived in the morning and went home between 6:00 and 6:40 before it got dark, then finally said that they went in the morning by train and departed at about 9:00 or 9:30 p.m. Id.[31]

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[29] Tinsley recalled Geoffrey Byrne's house in great detail, including the fact that it was extremely large and had a special refrigerator. Id. at 7-8.

[30] Tony Bryant's mother initially verified the fact that Tony had returned home from Belle Haven some time that evening and that Hasbrouck and Tinsley had stayed in Belle Haven. However, Mrs. Bryant dramatically changed both the substance of her recollection and her demeanor after being subpoenaed to a videotaped deposition. See Videotaped Deposition Testimony of Barbara Bryant, Ex. 44, App. A-140-155. The dramatic departure in Mrs. Bryant's willingness to answer questions about Tony Bryant's whereabouts on the evening of October 30, 1975, evidenced a desire to protect her son from becoming involved in the present Petition after he invoked his fifth amendment right not to incriminate himself. Nevertheless, her statement under oath that her son was in Connecticut on the day of the murder, combined with the fact that her son previously confessed to investigators that he was in Belle Haven during the evening hours, creates a reasonable inference that Tony Bryant not only told his mother that he was in Belle Haven that evening, but also told her that he had brought his two friends Adolph Hasbrouck and Burton Tinsley with him.

[31] Hasbrouck also indicated in his interview that he had not spoken to Burton Tinsley since the previous December of 2002. Id. at 138. However, Colucci already had information that Hasbrouck spoke to Tinsley as recently as June of 2003, when Hasbrouck indicated to

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Colucci also spoke with Burton Tinsley twice by phone in September 2003. Tr. 4/18/07 at 138. In their first telephone call, Tinsley indicated that he recalled being in Belle Haven on the night of the murder, but that he couldn't remember any more details. Id. In the second phone call, initiated by Colucci to set up a meeting in Portland, Tinsley recanted, indicating that he had "checked his calendar" from nearly 28 years earlier and determined that he was not in Belle Haven that evening. Id. at 139.[32] Colucci sent his associate to Oregon to meet with Tinsley, but he was not successful. Id. at 139.

Tony Bryant's, Adolph Hasbrouck's and Burton Tinsley's Invocation of the Fifth Amendment Privilege Not to Incriminate Themselves.

At his deposition held on August 25, 2006, Tony Bryant invoked his fifth amendment right not to incriminate himself in response to every question posed, including questions inquiring whether he was in Belle Haven on October 30, 1975, whether he murdered Martha Moxley or was present when she was murdered, and whether he made sexual advances towards Martha Moxley. See Deposition of Tony Bryant, Exhibits 21; 22. Hasbrouck and Tinsley also invoked their fifth amendment right not to incriminate themselves in response to the same questions posed at their depositions. See Deposition of Adolph Hasbrouck, Ex. 25; Deposition of Burton Tinsley, Ex. 28.

B. The Trial Court Abused Its Discretion When It Ruled The Newly Discovered Evidence Of Third Party Culpability Sufficiently Credible To Be Admissible, But Not Sufficiently Credible To Warrant A New Trial

The trial court's ruling on the motion in limine

At the hearing on the Revised Petition, the Petitioner claimed that although the three suspects invoked their fifth amendment rights and were unavailable to testify, their prior

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Robert Kennedy, Jr. that he received authorization to release Tinsley's contact information. See Email from Adolph Hasbrouck to Robert F. Kennedy, Jr., 6/19/03, Ex. 14.

[32] Hasbrouck also indicated during a follow-up telephone call that he too had "checked his calendar" and realized that he was not in Belle Haven on the night of Martha Moxley's murder. Tr. 4/18/07 at 139-40. Hasbrouck also indicated that since their first encounters with defense investigators, both he and Tinsley had talked to be sure that their stories to Colucci would match. Id. at 140-41.

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disclosures were all admissible as an exception to hearsay because the statements were against their penal interest and sufficiently trustworthy to warrant admission. See Conn. R. Evid. § 8-6(4). The state filed a motion in limine objecting to admission of the evidence, arguing that the hearsay did not qualify under the exception because it was not supported by a preliminary showing of trustworthiness. The trial court reserved judgment on the motion until the Petitioner had an opportunity to make such a showing at the hearing.

Following the evidentiary hearing and extensive briefing, the trial court ruled that the Petitioner had made a such a preliminary showing and admitted the evidence. In so doing, the court required the Petitioner to demonstrate the overall trustworthiness under the requirements of § 8-6(4), which provides that "[i]n 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." Conn. Code of Evid. § 8-6(4); State v. Pierre, 277 Conn. 42, 68 (2006).

The court first addressed the unique timeframe of this case, recognizing that "there are actually two sets of disclosures relevant to this factor; first, the disclosure from Hasbrouck and Tinsley to Bryant, and second, from Bryant to Esme Dick, Crawford Mills, Neal Walker, Robert F. Kennedy, Jr., and Vito Colucci." App. A-53. After determining that the initial disclosure, made immediately after the crime, fit "well within the traditional view of a timeframe indicative of trustworthiness," the court found that the delay in his second set of disclosures was reasonably tied to the "twenty-five year delay in reopening the investigation of Martha Moxley's murder. Id. Therefore, court instead focused its analysis on the reasons for the delay, concluding that Bryant's incentive to keep himself out of the investigation, his belief that the Petitioner would never be convicted, and most of all his fear of becoming a suspect were all reasonable reasons justifying the delay.

Next, the court turned to consideration of the persons to whom Bryant made his statements and concluded that they were also indicative of trustworthiness. In particular,

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the court noted that, "the fact that Mr. Bryant's first disclosure regarding the details of his whereabouts on October 30, 1975, was to Crawford Mills supports the trustworthiness of his statement. Bryant and Mills shared a connection to the facts of this case, dating back to their shared experiences at Belle Haven during the time leading up to the murder." App. A-54. The court agreed that Bryant's statements to the Petitioner's investigator were uniquely trustworthy, since Bryant was "aware that his statements were being videotaped, and that the recording was clearly being made in anticipation of being presented in court." Id. at A-55. Under those circumstances, the court concluded that "Bryant's knowledge of the investigator's official role provides a greater indication of trustworthiness than the normal individual with whom the declarant does not have a close relationship." Id.

Perhaps most significantly, the court found that a multitude of the evidence presented by the Petitioner corroborated Tony Bryant's statements to insure their trustworthiness. See App. A-55. This included findings that: (1) Bryant went to the Brunswick School and was classmates with the children in the Belle Haven neighborhood; (2) several witnesses, including Crawford Mills and Neal Walker, confirmed that Bryant socialized at Belle Haven; (3) witnesses, including his mother and Esme Dick, confirmed that Bryant indicated that he was present in Belle Haven on the night of the murder; (4) Neal Walker recalled seeing Hasbrouck and Tinsley in Belle Haven with Bryant during the fall of 1975; (5) both Hasbrouck and Tinsley admitted to Robert F. Kennedy, Jr. that they had been in Belle Haven with Bryant on several occasions; (6) Bryant provided details of the layout of Belle Haven, including accurate recitations of where people in the neighborhood lived; (6) according to Bryant, Hasbrouck was 6'2, at least 200 pounds on the date of the homicide, and "very strong"; (7) Bryant stated that Hasbrouck was obsessed with Martha Moxley, and "wanted to go caveman on her," meaning that he would club her, drag her away by the hair and sexually assault her; (8) on the night of the murder, Bryant stated that he, Hasbrouck and Tinsley walked around Belle Haven with golf clubs from the Skakel residence, with Hasbrouck stating that the had his "caveman club" and that he

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would not leave Belle Haven unsatisfied; and (9) the victim's injuries were consistent with Hasbrouck's description of wanting to "go caveman on her." Id. at A-55. The court also noted that "corroboration of Bryant's statements can be found in the very reason that he is unavailable to testify. In the present case, Bryant, Hasbrouck, and Tinsley have all invoked their fifth amendment right not to incriminate themselves after being served with subpoenas to testify at a deposition." Id. at A-55.

Finally, the court found that Bryant's statements were sufficiently against his penal interest to qualify under the exception, noting that "Bryant places himself in Belle Haven, on the night of the murder, in the company of Martha Moxley, discussing assaulting Moxley with Hasbrouck and Tinsley and in possession of golf clubs belonging to the Skakel family. Efforts to explain away possible physical evidence indicate a consciousness of guilt." Id.

In total, the trial court concluded that "Mr. Bryant's statements were made under circumstances which support admission, are corroborated by sufficient evidence, and are clearly against his penal interest." App. A-53.

The trial court's ruling on Count One

Despite the extensive indications of trustworthiness cited in its memorandum of decision, the court found that the Petitioner had not met its burden of proving that the newly discovered evidence would likely produce a different result on a new trial, stating that "Bryant's statements are admissible, but they are not credible." App. A-56.[33] The trial court correctly noted that inherent in determining whether newly discovered evidence is likely to produce a different result on retrial, is an assessment of whether the evidence passes a minimum credibility threshold. See Shabazz v. State, 259 Conn. at 822. In Shabazz, the Connecticut Supreme Court clarified that the extent to which the trial court assesses the credibility of newly discovered evidence should be guided by balancing the competing

[33] The State did not contest that the evidence was newly discovered, such that it could not have been discovered earlier by the exercise of due diligence, or that the evidence was not cumulative; thus, the court limited its analysis to whether the evidence would likely cause a different result on a new trial.

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interests of (1) preserving final judgments and (2) ensuring that a wrongful conviction does not stand. Id. at 826. The Court stressed, though, that in balancing the second interest, the trial court should be mindful not to completely supercede the role of a future jury:

> [W]ere we to hold that the trial court always acts as the final and sole arbiter of credibility in evaluating the evidence alleged to justify a new trial, we would be impeding the petitioner's legitimate interest in establishing that a wrongful conviction does not stand. For example, 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.

Id. at 826. Indeed, this observation is remarkably similar to the standard articulated in admitting statements against penal interest, where "the trial court does not have to find [a statement against penal interest] 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." App. A-53, citing State v. Hernandez, 204 Conn. 377, 390 (1987).

Research has not revealed a case in which the court has deemed evidence sufficiently "trustworthy" to be admissible, but not sufficiently "credible" to submit to a new jury. To the contrary, in State v. Gold, 180 Conn. 619, 634-35 (1980), the defendant attempted to introduce evidence that a third party committed the murders, and that just prior to committing suicide two months later, admitted to a friend that "he was going to get caught, that he was sorry for what he did, and that he was sorry for killing [the victim]." Id. at 626. On appeal, the Supreme Court ruled the hearsay statements admissible under the exception, citing a number of corroborating circumstances indicative of trustworthiness such as a witness who placed the declarant near the scene of the crime, two more witnesses who testified that the declarant was in the state the day of the murders, and testimony that the declarant fled the state shortly after the murders. Id. at 635-36. In addition, the Court credited a number of circumstantial negatives, such as there being was no motive for the declarant to exculpate the defendant, no real connection between the declarant and the defendant, and no motive for the declarant to gain favor with the

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authorities. Id. at 634-35. The Supreme Court's ruling in Gold was on direct appeal, rather than a petition for new trial; nevertheless, the Court determined that because the statements were already deemed trustworthy, it summarily found without discussion that the defendant had met his burden of showing that the error was harmful.[34] Id. at 640.

Beyond the unprecedented legal contradiction in the trial court's ruling though, its factual contradictions also represent an abuse of discretion. In articulating how Bryant's statements were not credible, the trial court contradicted almost every factor cited to support their trustworthiness:

1. The degree to which the statements were against his penal interest

In rejecting the credibility of Mr. Bryant's statements, the trial court stated that that "on analysis, they are merely claims of information of a crime accompanied by an alibi. The statements appear to be minimally against his interest." App. A-56. In addressing the trustworthiness of the statements for the purposes of admissibility, though, the court came to a completely different conclusion, stating that "one of the reasons Bryant's testimony is trustworthy is because Bryant places himself in Belle Haven, on the night of the murder, in the company of Martha Moxley, discussing assaulting Moxley with Hasbrouck and Tinsley and in possession of golf clubs belonging to the Skakel family. Efforts to explain away possible physical evidence indicate a consciousness of guilt." Id.

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[34] Similarly, in State v. Bryant, 202 Conn. 676, 696 (1987), at issue were four statements by the defendant's brother, excluded by the trial court, that he committed the crime for which the defendant was convicted. On appeal, corroborating evidence convinced the Court of the trustworthiness of those statements included the facts that the declarant knew where the victim lived, his knowledge of certain unique details of the crime, witnesses who provided the defendant with an alibi but could not do so for his brother, and the declarant's statement to his mother during the trial that, if called to testify, he would lie. Id. at 701. After finding that "the excluded evidence was clearly trustworthy under the relevant criteria," the Supreme Court did not even discuss the harm of the nonconstitutional error; it simply ordered a new trial based on the trial court's error.

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2. The persons to whom the statements were made

In rejecting the credibility of his statement, the trial court also found that "[u]nder the Shabazz review the statements were made to two former junior high school classmates with whom Bryant maintained only casual contact over the years." However, in assessing the statement's trustworthiness for the purposes of admissibility, the Court articulated just the opposite conclusion:

> "[T]he fact that Mr. Bryant's first disclosure regarding the details of his whereabouts on October 30, 1975, was to Crawford Mils supports the trustworthiness of his statement. Bryant and Mills shared a connection to the facts of this case, dating back to their shared experiences at Belle Haven during the time leading up to the murder. Following this disclosure to a friend that he trusted, Bryant repeated the events of October 30, 1975, to Robert Kennedy, Jr. and a defense investigator, which further confirm its trustworthiness.

App. A-54. Considered with the fact that the court failed to address Bryant's disclosures to both his mother and Esme Dick, two individuals with whom Bryant was very close, the trial court's inherent contradiction represents an abuse of discretion.

3. The time that the disclosure was made

The court also stated that "[a]lthough 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." App. A-56. In finding the statements were trustworthy, though, the court already articulated why it was reasonable for Bryant to keep the information to himself:

> Because of the length of the State's investigation, Mr. Bryant had an incentive to keep himself out of a case that he reasonably thought would never be solved. ... Combined with Mr. Bryant's knowledge that there is no statute of limitations on murder, his reluctance to tell his story is reasonable.

App. A-54.

4. Corroboration

The trial court's contradictory analysis of the corroboration to Bryant's statements was also an abuse of its discretion. These findings included:

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- *"The claim that Hasbrouck and Tinsley went 'caveman style' is not supported by the evidence. There was no evidence of the victim being dragged by the hair. Missing from Bryant's statement is anything concerning the breaking of the club or the stabbing of the victim."* (App. A-57.)

Martha Moxley was clubbed to death with the same golf clubs that Hasbrouck and Tinsley referred to as their "caveman clubs" that night. She was dragged away for some distance before being hidden under a pine tree on the Moxley property. At a certain point during the dragging, the individual changed directions, leading seasoned investigators such as John Solomon to conclude that the perpetrator was disoriented, if not unfamiliar with the location of the houses in the neighborhood. Her pants were pulled down around her ankles before being dragged to another location. These circumstances reveal an intent to sexually assault Martha Moxley, which strongly corroborates Bryant's recall that, in addition to wanting to "go caveman," Hasbrouck indicated that he intended to sexually assault her. At the Petitioner's criminal trial, the State went to great lengths to elicit testimony from Dr. Henry Lee explaining that semen could have been wiped away from the victim's body, as well as testimony from Dr. Wayne Carver explaining that certain parts of the victim's body were not tested for the presence of semen. Therefore, even the State elicited facts to support the inference of an added sexual nature to this crime.

- *"Importantly, witnesses testify as to Martha Moxley's activities until 9:30 p.m. No one has any recall of ever seeing Bryant and his companions in Belle Haven on the night of the murder."* (App. A-57.)

As discussed supra at 13-15, due to inexperience and an incomplete investigation, the police never learned that Tony Bryant was a regular visitor to Belle Haven prior to the murder. Indeed, there was never any comprehensive list of regular visitors, or even a central accounting of everyone who was out in the neighborhood that night. Interviews with the children who investigators happened to know were out that evening were strikingly short. In the case of the Skakel children, for example, "in-depth" interviews with all six children in November of 1975 took a total of less than 75 minutes. In other cases,

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investigators chose to not even speak with witnesses like Maria Coomaraswamy, who was not only out that evening, but also walked around the neighborhood with Martha Moxley.

Further, the mere fact that residents of Belle Haven cannot recall if they saw Bryant in the neighborhood *over thirty years after the fact* does not discount the significant evidence linking all three boys to the scene of the crime. Even in 1975, residents did not recall seeing a number of people who investigators already knew were out that evening, such as Patricia McBride walking her dog, the unidentified man reported by Charles Morganti, or Carl Wold taking his evening walk. To expect those same people, over thirty years later, to recall whether they saw a regular visitor to the neighborhood on that particular night sets an unreasonably high bar for the Petitioner to reach in this case.

Additionally, Bryant's description of their activities on Mischief Night does not suggest a group looking to interact with all of the people running around Belle Haven that evening. Rather, he describes three teens stealing beer, smoking marijuana, vandalizing property, wandering in secluded areas of the neighborhood, and generally doing everything they could to go unnoticed by the majority of the people in the neighborhood who they did not know. The evidence presented regarding the meadow behind the Skakel's property not only establishes corroboration of Bryant's detailed recollection of the "mead" as it existed in 1975, but also provides a reasonable explanation of where the boys could have been out of view.[35]

- *"Not even Martha Moxley's closest friends have any recollection of any association between Moxley and Bryant, Hasbrouck and Tinsley."* (App. A-56.)

Tony Bryant never suggested in any of his statements that there was ever any association between his two friends and Martha Moxley. Instead, Bryant consistently

[35] Indeed, the Petitioner has presented a number of reasonable hiding spots for the boys both before and after the murder. The Byrne estate, which was so large that people could be at one end of the house and not even know anyone else was there, even included a secret coal shaft where the children were known to play. Also, in the field behind the Skakel house, both a large shed/clubhouse and dugout-style "hut" would have provided easy access to cover that evening

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stated that Hasbrouck unilaterally became infatuated after seeing her at large social functions that Hasbrouck attended with Bryant. Bryant has never indicated that Hasbrouck or Tinsley visited Belle Haven enough to become included in its social network, nor has he described any memorable communications that Martha Moxley would have reasonably related to her friends. Under these circumstances, it is reasonable that neither Hasbrouck nor Tinsley would be memorable to Belle Haven residents over thirty years later.

Far more relevant are those objective facts corroborating Hasbrouck's introduction to Martha Moxley. While the State has conceded that Bryant was familiar with Belle Haven and that he attended the same social functions as Martha Moxley, it is equally indisputable that Hasbrouck and Tinsley also were familiar with Belle Haven and its residents through Tony Bryant. Both recalled in recorded conversations with Robert F. Kennedy, Jr. that they socialized with Bryant in Belle Haven and that they attended several events in Greenwich. The Petitioner has corroborated these statements with the testimony of Neal Walker, Crawford Mills, articles confirming the events described, and even entries in Martha Moxley's diary corroborating her attendance. In sum, there is an abundance of corroborating circumstances confirming Hasbrouck's and Tinsley's familiarity with the Belle Haven, as well as opportunities for Hasbrouck to become infatuated with Martha Moxley.[36]

A striking abuse of the trial court's discretion was its complete failure to address the corroboration from two hairs found at the crime scene, one "possessing Negroid characteristics," and the other bearing Asian characteristics. In both cases, investigators

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[36] In rejecting the credibility of the admissible hearsay evidence, the trial court also attached great significance to the state's inability to cross-examine Mr. Bryant. See App. A-57. Insofar as all admissible hearsay is unable to be cross-examined, this focus represented an abuse of the trial court's discretion in failing to recognize that Bryant's most inculpatory statements are *recorded on videotape*. Indeed, on that videotape he looks calm, collected and both his demeanor and delivery bolster his credibility. (Notably, the jury did not have the same luxury of assessing Gregory Coleman's manifestations of drug withdrawal during his grand jury testimony.) Moreover, as the trial court noted in finding the hearsay statements admissible, the fact that Bryant, Hasbrouck and Tinsley have all invoked their fifth amendment rights not to incriminate themselves when confronted with these allegations provides further credibility to the hearsay evidence.

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never identified the contributors of either hair. Today, two of the three newly discovered suspects, Tony Bryant and Adolph Hasbrouck, are African American. The other suspect, Burton Tinsley, is described by Bryant as part-Asian. In a prosecution utterly devoid of physical evidence linking the Petitioner to the crime, the presentation of newly discovered African-American and part-Asian suspects, when hairs matching those races were found at the crime scene in a predominantly white community, would raise reasonable doubt.

The totality of the circumstances surrounding Tony Bryant's admissible statements against penal interest far exceed any minimum threshold of credibility required for a court to decide whether it should be presented to a jury on a new trial. Quite simply, Tony Bryant is a witness who has no discernable motive to inculpate himself in the murder of Martha Moxley. Bryant's statement would be understandably suspect if he had simply come forward to report that his two friends from New York told him that they murdered Martha Moxley. However, the fact that Bryant has placed himself near the scene of the crime with them, carrying the murder weapon on the night of the murder, exposes himself to enormous risk of criminal charges and adds an entirely different level of credibility to his statements.[37] Accordingly, the trial court's conclusion that the Bryant evidence did not pass the minimum credibility threshold constituted an abuse of discretion.

C. Trial Court Abused Its Discretion When It Failed To Address The Petitioner's Separate Claim That It Would Cause An Injustice Not To Submit The Claim To A Jury

In finding the hearsay admissible as trustworthy statements against penal interest, it would cause an injustice not to admit that evidence to a jury. "The ... admissibility of ..

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[37] Evidence presented to this Court has shown that Tony Bryant grew up in a prominent family, was educated at exclusive prep schools, enjoyed status as a high school and college football standout, and went on to earn a law degree from the University of Tennessee. At the time that he finally disclosed his presence in Belle Haven on the night of Martha Moxley's murder, he was a businessman in Florida, married, and had four young children. In contrast, the State has presented no credible evidence, or even possible motive, for Bryant to come forward and fabricate a role for himself in this case that could very well see him prosecuted.

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evidence [of third party culpability] is governed by the rules of relevancy." State v. Echols, 203 Conn. 385, 393 (1987). In Echols, the court made clear that this relevancy requirement should be no more difficult to overcome than the hearsay exception:

> We have often stated that "[e]vidence is admissible when it tends to establish a fact in issue or to corroborate other direct evidence in the case. ... 'One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, take alone or in connection with other facts, renders the existence of the other either certain or more probable. ... Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience."

State v. Echols, 203 Conn. at 393. (Citations omitted.)

In the present case, if the statements of Bryant, Hasbrouck and Tinsley are admitted as statements against penal interest, they should certainly be deemed relevant evidence of third party culpability. The trial court provided no independent basis for its conclusion that the admissible statements of Bryant, Hasbrouck and Tinsley would not meet this standard. The Petitioner submits that if he has provided adequate corroboration to warrant admission under an exception to the rule against hearsay, then such evidence directly connects Hasbrouck, Tinsley and Bryant to the crime with which the Petitioner is charged. See e.g., Chambers v. Mississippi, 410 U.S. 284, 302-303 (third party's confession, admissible as a statement against penal interest, was therefore admissible as evidence of third party culpability) (1973) State v. Gold, 180 Conn. 619, 640 (1980) (same).

The same can be said of the court's conclusion that the admissible evidence of third party culpability is unlikely to result in a different verdict on retrial. The Court directly ruled that the statements at issue are supported by adequate corroboration, and further that those statements directly connect Hasbrouck, Tinsley and Bryant to the murder of Martha Moxley. If Tony Bryant's statements against penal interest are admissible as an exception to hearsay, then they are admissible as third party culpability evidence, which would likely

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result in a different verdict on retrial. Accordingly, this Court should reverse the decision of the trial court and order a new trial in the interests of justice.

II. The Trial Court Erred In Rejecting The Claim Of Newly Discovered Evidence And Undisclosed Brady Material Regarding The Secret Pact And Book Deal Between The State's Lead Investigator And An Author

The Petitioner presented compelling newly discovered evidence that Inspector Frank Garr (1) engaged in a secret pact and book deal about the Petitioner's case with author Leonard Levitt; and (2) threatened witnesses in the time leading up to and during the Petitioner's trial. If this secret pact and Garr's threats towards witnesses had been disclosed to the jury, it would have impacted the outcome of the case because of the presence of a particularly unique bias on the part of the State's lead investigator. Thus, the interests of justice demand that the Petitioner receive a new criminal trial based on the newly discovered evidence.

A. Relevant Facts

Frank Garr began working on the Moxley investigation as a police detective when it reopened in 1991, and took the file with him as lead investigator when he joined the state's attorney's office in 1994. See Testimony of Frank Garr, Tr. 4/24/07. at 69, 97.[38] During his investigation of the reopened case, Garr was in charge of virtually all of the witnesses, including investigation of their backgrounds and documenting their interviews, which necessarily included a duty to disclose exculpatory information to the prosecutor. Tr. 4/24/07 at 138-140, 156. He was also the inspector in charge of complying with discovery requests by copying documents and making them available to the defense in connection with the State's "open file" policy. Tr. 4/24/07 at 99, 146.

Leonard Levitt is a freelance writer and newspaper columnist who covered the Moxley investigation and, as early as 1995, believed that someone from the Petitioner's

[38] Garr's involvement actually dates back to 1975, when he was working as a dispatcher for the Greenwich Police Department on the night of the murder. Tr. 4/24/07 at 95.

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family was responsible for the murder. See Conviction, Ex. 56 at 10; Tr. 4/20/07 at 93. Levitt wrote a series of articles during the 1990's that he claims brought the focus of the case away from suspect Kenneth Littleton and toward the Petitioner's family. Id.

Following the Petitioner's conviction, counsel learned for the first time that Levitt and Garr had closely bonded prior to the grand juror's report and the Petitioner's arrest, and as a result worked together on the case for years. Tr. 4/20/07 at 105, 109, 111-113.[39] In 1998, former LAPD detective Mark Fuhrman published Murder in Greenwich, a book in which Fuhrman publicly stated that the local Police Department had "botched" the Moxley case, and in which Fuhrman took significant credit for "solving" the crime. See Ex. 56 at Intro., page xiv and 213-14; Tr. 4/24/07 at 70, 101-102; Tr. 4/20/07 at 100-104. The comments infuriated Garr, and in the course of sharing these feelings with Levitt the two made a secret pact to "tell our story" about the Moxley case. Tr. 4/20/07 at 100-104.[40] Following the Petitioner's conviction, Garr revisited the pact with Levitt and vowed that they would make sure the Petitioner was not successful in any post-conviction proceedings. See Ex. 56 at 285, App. A-169-172; Tr. 4/20/07 at 105, 126; Tr. 4/24/07 at 121. Prior to publication of his book, Levitt did not tell anyone about either of their secret pacts. Tr. 4/20/07 at 138.

At some time prior to 2002, Levitt began proposing a book about the case to his agent and informed Garr that he was circulating it throughout the publishing community. Tr. 4/20/07 at 90-94. Garr's status as a detective for the State is highlighted throughout

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[39] As early as 1995, Levitt and Garr were meeting at a diner discussing details of the case; other meetings took place at area restaurants. See Ex. 56 at 157-161; Tr. 4/20/07 at 109-114. They met for hours at a time and shared their theories of the case and the possible suspects, including the Petitioner. Conviction, Ex. 56 at 159-160; Tr. 4/20/07 at 109, 156-157. Their collaboration even continued during the trial, where they met numerous times at a donut shop near the courthouse, sometimes at 9:00 a.m. on days trial was in session. Ex. 56 at 246, 261. Because of their friendship, Levitt had free reign to wander around the prosecution's basement office during the trial. Ex. 56 at 246; Tr. 4/20/07 at 119-120.

[40] The secret pact between Mr. Garr and Mr. Levitt was made before the grand jury report and the Petitioner's arrest. See Tr. 4/20/07 at 105, 126; Tr. 4/24/07 at 121.

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Levitt's book. See Ex. 56 at 97-129; 154-193; 215;227; 232-234.[41] In February 2003, Garr and Levitt executed a contract in which Levitt agreed to pay Garr one-half the royalties from the sales of the book and any other profits generated. Tr. 4/24/07 at 145; Ex. 57, 85, App. A-175-177. Garr never told his supervisor about receiving compensation for the book; even when his supervisor asked about the book, he did not disclose that he was getting paid. Tr. 4/24/07 at 108-112, 214. The book was eventually published in 2004. Id. at 131.

Although Garr received one-half of the book's profits, he acknowledged that he did not actually write anything and instead was paid to proofread the final draft of the book and for "ensuring accuracy." Tr. 4/24/07 at 105, 201.[42] According to Levitt, this meant that he paid Garr for information. Tr. 4/20/07 at 145-46. In total, Levitt paid Garr a total of $7,406 out of his own checking account between 2003 and 2005, and to this day, Garr continues to have a financial interest in the book. Id. at 131; Ex. 58, App. A-178-180.

Mr. Garr's Conduct Toward Witnesses

Inspector Garr's financial interest in the outcome of the case was not the only newly discovered evidence revealed in the book. On the very first page, Levitt writes: "[T]he case

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[41] The book's subheading reads: "A reporter and a detective's twenty-year search for justice." See Ex. 56. The back cover states: "The case was reopened and investigator Frank Garr began to doggedly pursue unexplored leads. In 2002, more than twenty-five years after Moxley's death, a shocked world watched as Michael Skakel was convicted of the murder, thanks largely to the evidence Mr. Garr alone had marshaled against him. Now, for the first time, Mr. Levitt tells the amazing true story of Mr. Garr's fight to solve the case and of how their friendship with each other, and with Martha Moxley's mother, Dorthy, sustained them over the years. A riveting, suspenseful drama that unfolds like a mystery novel, this incredible memoir also reveals how a police officer and reporter refused to give up, and how they helped justice to prevail, against all odds." See id., back cover.

[42] In this regard, it is significant that Garr did not suggest changes to statements in the book, including: the passage on page 1 of Mr. Levitt's book that states that Mr. Garr "had pursued, cajoled, harassed and threatened" witnesses in the Moxley murder investigation (Tr. 4/24/07 at 114); the passage where Levitt's states that he and Garr, at their "lowest ebb," made a secret pact to tell their story (Id. at 115, 118); the photo caption that identifies the diner where the two met "over the years" as they "worked on the case" (Id. at 120-121); Levitt's description that Garr was "crushed" by Mark Fuhrman's criticism of the Greenwich Police Department's handling of the Moxley case (Id. at 129); or Levitt's observation that Garr "had virtually single-handedly gotten a grand jury impaneled" (Id. at 131).

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was all Frank's. He had found all the witnesses. Many hadn't wanted to testify. *Frank Garr, they related, had pursued, cajoled, harassed, or threatened them.*" Ex. 56 at 1, App. A-171 (emphasis added). The book also provides remarkable insight into Garr's conduct with regard to the State's key witness, Gregory Coleman. Coleman first spoke to Garr on June 7th, 1998, after a reward for the case had been advertised in People magazine.[43] See Tr. 4/24/07 at 139; Ex. 59, 5/16/02 at 214; 222. While aware that Coleman was a serious drug user and also that there were numerous individuals who considered him a liar, Garr indicated that he "really liked" Coleman and was of the opinion that he "was one of the most believable guys" he had ever talked to. Tr. 4/24/07 at 158; Ex. 56 at 238-39. Indeed, Garr eventually concluded that Coleman was "mentally sick," but never disclosed that opinion in writing or to the defense.[44] Tr. 4/24/07 at 172-73; Ex. 56 at 238.

Garr was aware that Coleman had a trust fund that was overseen by an executor and that the executor insisted that Coleman appear before him prior to releasing any funds since the executor was aware of Coleman's drug habit. Tr. 4/24/07 at 155; Ex. 56 at 238. Beyond that information, though, he failed to conduct any further investigation regarding the background of the State's most critical witness.

B. The Trial Court Abused Its Discretion In Finding That The Newly Discovered Evidence Could Have Been Discovered Through The Exercise Of Due Diligence Prior To Trial

In its ruling on Count Nine, the trial court concluded that "Petitioner has not established that any evidence regarding Garr and Levitt was unknown or undiscoverable

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[43] The reward started at $20,000 and went as high as $100,000. Tr. 4/24/07 at 137. At some point, Coleman asked Garr if he could get money from the State. Tr. 4/24/07 at 157. In fact, prior to testifying in the juvenile court proceedings, Coleman wrote to Garr while he was incarcerated and demanded $1,200.00. Coleman reminded Garr that he did what he had to do to help Garr when he testified before the grand jury. See Criminal Trial Transcript, Ex. 59, 5/20/02 at 23-4.

[44] In fact, after the first day of testifying at the probable cause hearing, Mr. Coleman was suffering from heroin withdrawal. Garr went to great lengths to get Coleman treatment so that he would be able to testify the next day. Tr. 4/24/07 at 181; Ex. 56 at 238-39.

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through the exercise of due diligence at or prior to trial." App. A-48. In so doing, the Court relied on its finding that defense counsel had heard "rumors of a book deal involving Garr," and that counsel's failure to inquire further into those rumors constituted "either a lack of due diligence or a strategic decision." The evidence presented at the hearing on the present Petition does not support either of these conclusions, and therefore represents an abuse of discretion on the part of the trial court.

Petitioner's trial counsel, following up on unsubstantiated rumors, attempted numerous times to gather evidence that Garr was involved in a book deal, the most direct of which was his motions for discovery which requested all evidence that any agent of the state had "a pecuniary *or other interest* in the case." Tr. 4/19/07 at 173; Tr. 4/24/07 at 30; Ex. 78 at, App. A-288-289.[45] As a result of the State's failure to respond to the discovery request, the Petitioner's trial counsel had no evidentiary foundation upon which to pose questions to Garr about a book deal, which he attempted to do but was dissuaded from pursuing. Tr. 4/19/07 at 188. Thus, the trial court's ruling that due diligence was not exercised in this case represents a patent abuse of discretion, as it implies that the failure of the State to respond to the discovery requests could be imputed to the Petitioner or his counsel. In short, there was simply no other due diligence that counsel could have exercised to elicit this evidence.[46]

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[45] The discovery motion that counsel drafted specifically requested any evidence that any agent of the state has "a pecuniary *or other* interest" in the outcome of the case, including "any contract, *agreement* or on-going negotiations which relate to the *preparation of any book...or which relate to contracts or agreements pertaining to future employment* . . ." See Motion for Discovery, Question 13, Ex. 78, App. A-288-289; Tr. 4/25/07 at 30 (emphasis added). The State did not respond to this particular request. Tr. 4/24/07 at 30. Garr and Levitt waited until *after* the trial and sentencing to formally document their agreement.

[46] Furthermore, the great lengths that Garr and his collaborator went to in order to conceal their secret pact made it impossible for *anyone* to discover evidence of the book deal. Levitt did not tell anyone about the secret pact, and Garr similarly never told his supervisor that he would be or was receiving compensation for the book – even when his supervisor directly asked him about it. Tr. 4/20/07 at 138; Tr. 4/24/07 at 108-110; 112; 214. Given the secrecy that the pact and the book deal were shrouded in, it is no wonder that the evidence was not uncovered, despite vigorous efforts on the part of Petitioner's trial counsel.

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C. The Trial Court Abused Its Discretion In Finding That The Newly Discovered Evidence Would Not Have Likely Caused A Different Result On A New Trial

The trial court additionally found that "[i]f petitioner had presented this evidence at trial, Garr's acknowledgement that he told his friend if he wrote a book he would try to help him, but he could not do anything until the case was over, is not evidence that would have swayed the jury as to lead it to acquit." App. A-49. The trial court's decision represents an abuse of discretion for a number of reasons.

"Misconduct that implicates the credibility of the witnesses is central to the critical issues of a case where the case is a 'credibility contest' between the state's witnesses and the defendant's witnesses because the state's evidence is otherwise weak." State v. Spencer, 275 Conn. 171, 186 (2005); see also State v. Ceballos, 266 Conn. 364, 415-17 (2003) (misconduct related to witness credibility was central to critical issues in child sexual abuse case because state's physical evidence was not conclusive). The evidence that Garr and Levitt made a secret pact to tell their story is of vital significance and would be material at a new trial. Their close relationship and pact is unequivocally material to the case, as it involves collaboration between the lead investigator in the case and a reporter admittedly biased against the Petitioner and his family. It would be admissible as highly relevant evidence of the investigator's credibility and potential bias against the Petitioner.

The State presented and relied heavily on a variety of questionable witnesses who offered circumstantial evidence of the Petitioner's guilt, the most relevant of whom was the State's key witness and specially protected by Garr. The new evidence undermines Garr's credibility in his selection, investigation and use of these witnesses, and therefore substantially dilutes the already tenuous probative value and effect of the circumstantial evidence presented through them at the original trial.[47]

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[47] Additionally, Garr's collaboration with Levitt was a violation of his statute-based ethical duties as a public official. He used his position in the state's attorney's office for financial gain, he used state time to further his private work and he took steps to conceal his improper conduct from his supervisor. This misconduct provides ample grounds for

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It is not reasonable to infer that Garr was paid solely for his "proof reading" and "accuracy-checking" services.[48] Thus, Garr was being paid for the information he gave Levitt before and during the trial. Tr. 4/24/07 at 101-02; Tr. 4/20/07 at 98, 105; Ex. 56 at 157-61. A jury presented with the suppressed evidence of the book deal would probably conclude that Garr was paid for the information he provided to Levitt during the course of their collaboration. The fact that the two men were savvy enough to avoid drafting a contract that documented their arrangement until after sentencing does not absolve him of responsibility for violating the Code of Ethics that apply to him. Garr and Levitt should not be rewarded for crafting a paper trail that does not begin until after Petitioner's sentencing.

Such an inference would serve to undermine the credibility of the case's lead investigator, and of the prosecution as a whole. The jury would be entitled to find that the lead investigator in the case was "either less than wholly candid or less than fully informed." Kyles v. Whitley, 514 U.S. 419, 453 (1995). The prosecution's failure to disclose that Garr was involved in a collaborative effort with an author predisposed against the Petitioner's family – an effort that was launched before Petitioner's arrest and continued through this trial all the way to conviction – was a clear violation of § 54-86c, and therefore, would have likely caused a different result at a new trial.

III. The Trial Court Abused Its Discretion When It Rejecting The Claim Of Newly Discovered Evidence Directly Contradicting The Testimony Of The State's Key Witness Regarding His Testimony That The Petitioner Confessed To Him

At the Petitioner's criminal trial, Gregory Coleman was the State's only witness who testified unequivocally that the Petitioner confessed to him that he killed Martha Moxley.

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impeaching Garr's credibility in the course of his investigation of the murder. See Code of Ethics for Public Officials, General Statutes § 1-84; Advisory Opinion 89-19 (a state employee may not improperly use public office for financial gain, including fees and honorariums offered by virtue of their public position).

[48] Garr's own testimony at the hearing establishes that it is doubtful that he did any proof reading or accuracy checking at all. Passages that he claims are not accurate were published in the book, and he acknowledged that he had read a final copy of the book before it was published. See Tr. 4/24/07 at 106; 114-118; 120-121; 129; 131-133.

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During his probable cause testimony, he said that a fellow Elan classmate was present when the Petitioner allegedly confessed – either "Everette" James, John Simpson or Cliff "Reubin." Neither the State nor the Petitioner's trial counsel was able to contact any of these three witnesses prior to trial, despite reasonable efforts to do so. After the Petitioner was convicted, his present counsel located all three individuals with extraordinary efforts. These witnesses, *Alton* Everette James, John Simpson and Cliff *Grubin*, exposed the lie told by Coleman: the Petitioner ***never*** confessed to murder. This material, newly discovered evidence, if presented to a jury, would likely change the outcome of the trial; as such, the Court abused its discretion in failing to allow a jury to evaluate it on a new trial.

A. Relevant Facts and Procedural History

Gregory Coleman was a key witness for the State at the Petitioner's criminal trial in 2002, and undoubtedly central to its case because he was the only witness to say without equivocation that the Petitioner admitted to killing Martha Moxley. See generally Testimony of Frank Garr, Tr. 4/24/07 at 149; Transcript of Petitioner's Criminal Trial, Ex. 59, Testimony of Gregory Coleman, Tr. 5/17/02. In fact, two alternate jurors told reporters that it was Coleman who provided the most believable testimony against the Petitioner. See Conviction, Ex. 56 at 269.

Mr. Coleman attended Elan with the Petitioner.[49] While at Elan, Coleman – armed with a baseball bat – stood guard over the Petitioner with another person in the dining room

[49] Coleman came forward at least 20 years post-Elan after watching a television news magazine story. Tr. 4/24/07 at 139. Mr. Coleman, a 20-25 bag a day heroin addict and convicted felon, testified before the grand jury one hour after shooting up. Id. at 155; 168-9. He was unable to focus at the probable cause hearing because he was under severe heroin withdrawal that required him to go to the hospital after testifying. Id. at 173-76. He admitted that his recall was questionable because of his ingestion of drugs and alcohol over a long period, because of the passage of time, and because he had been exposed to television tabloid shows and read about the case. Id. at 59, 5/17/02 at 150; 5/20/02 at 41; 53-54. Coleman died of a drug overdose in 2001 about four months after he testified at the probable cause hearing. Id. at 147. The jury was permitted to hear Coleman's transcribed – and hence sanitized -- testimony without ever having the opportunity to observe those matters that are critical in assessing credibility: the give and take of cross-examination; the

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after the Petitioner attempted to escape the facility but prior to his first general meeting. Mr. Coleman was singled out for guard duty because of his intimidating size. Id. at 134-35. The rules mandated absolutely no talking. Id., 5/24/02 at 8. Nonetheless, Mr. Coleman testified at the probable cause hearing that the Petitioner told him, "I am going to get away with murder because I am a Kennedy," and then said he had made advances to this girl, she spurned his advances, and he drove her head in with a golf club. According to Mr. Coleman, the Petitioner said that he hit her so hard that the golf club broke in half and that two days later he returned to the body and masturbated on it. Ex. 59, 5/17/02 at 137.

Coleman indicated that another Elan student was present when the Petitioner allegedly confessed that he murdered Martha Moxley, and he named that person as being either "Cliff Reubin, Everett James or John Simpson". Ex. 59, 5/17/02 at 156; 191. State's Inspector Frank Garr testified that he may have tried to locate these witnesses, but he was unsuccessful. Tr. 4/24/07 at 160-61. Thus, the State did not call any of these individuals to corroborate their star witness during the criminal trial in 2002.

After the Petitioner's conviction and present counsel were hired, Mr. Vito Colucci, a private investigator who also worked on this matter for Petitioner's trial counsel, was given the task of locating Mr. James, Mr. Simpson and Mr. "Reubin." See Testimony of Vito Colucci, Tr. 4/18/07 at 102; 145-47. Colucci was unable to locate either Simpson or "Reubin", but he was able to locate and contact Mr. James in the Spring of 2004.[50] Id. at 146-48; see also Deposition Testimony of Alton Everette James, Ex. 49 at 18.

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hesitancy in a witness's response; the witness' reaction when impeached by a prior inconsistent statement or testimony; a witnesses' body movements while testifying. See Ex. 59, Testimony of Gregory Coleman, Tr. 5/17/02.

[50] **Mr. James** provided a deposition in 2007. See Exhibit 49. At that time, he resided in West Chester, Pennsylvania with his wife and two children. Id. at 11. Prior to living in Pennsylvania in March 2006, he had lived in Virginia and Washington, D.C. for eight years. Id. at 6-7. Mr. James grew up in Baltimore and Boston and his father was chairman of radiology and an academic radiologist. Id. at 7. He graduated from the University of North Carolina with a B.A. in art history with honors in 1985; he received an MBA from the Illinois Institute of Technology, Stuart School of Business in 1990; and he graduated from Chicago-Kent College of Law, Illinois Institute of Technology in 1990. Id. at 9; 11.

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In 2005, the other two individuals[51] were located and interviewed due to the extraordinary efforts of Keith Weeks, an investigator hired by Petitioner's present counsel who specializes in locating people. See Testimony of Keith Weeks, Tr.4/19/07 at 119-120; 126-31. *All three witnesses directly contradict Coleman's allegations that the Petitioner confessed to killing Martha Moxley in their presence.*[52]

After graduating law school, Mr. James worked in a health care product development company called United Medical International which was started by him and his father. Id. at 9-10. In 1996, Mr. James was appointed by President Clinton to serve as the Deputy Assistant Secretary for the Service Industry And Finance in the Department of Commerce for four years. Id. at 10. Mr. James worked as a lawyer for LeBoeuf, Lamb in Washington, D.C. from 2000 to 2006, and then became a solo practitioner in West Chester, Pennsylvania and is an active horse breeder. Id. at 10-11, 20.

[51] **Mr. Grubin** lived in Spain on the island of Ibiza since 2003 with his 13-year-old daughter. Tr. 4/24/07 at 5-6. He currently operates a juice bar at one of the beaches on Ibiza; previously, he was involved in making jewelry and trading in stones and beads. Id. at 5-6. Mr. Grubin has lived abroad on and off for the past 20 years, however, he was living in Santa Cruz, California from January 2000 to June 2002. Id. at 5-6.

Mr. Simpson also provided a deposition. See Videotaped Deposition Testimony of John Simpson, Ex. 48; Transcript, Ex. 47 at 5-6. He resided in Riverview, Florida with his wife and two children. See Ex. 47 at 5-6. Mr. Simpson has been employed as a credit manager for Pathfinder Credit Services for the past five years, although he has been in the collections field for almost 20 years. Id. at 6-7. Mr. Simpson graduated from Penn State University in 1984 with a B.S. in quantitative business analysis. Id. at 7.

[52] **Simpson** recalled that he did guard the Petitioner with Gregory Coleman on the stage at Elan 3. Id. at 21, 23. While guarding the Petitioner with Coleman, Simpson recalled that "all of a sudden Greg just went, 'I can't believe it', to which Simpson said 'What?'" Id. at 23. According to Simpson, Coleman then said that the Petitioner "just admitted that he killed this girl." Id. at 23. Simpson looked at the Petitioner and asked him if he just told Coleman that he killed this girl, and the Petitioner responded, "No." Id. at 24. Simpson then said to Coleman, "Greg, what are you talking about. He just said that he didn't say that he killed this girl." Id. at 24. Coleman responded that the Petitioner "didn't answer yes or no" but that he had "this shit-eating grin on his face." Id. at 24. Simpson replied, "How could you say, yes, he just admitted it?", to which Coleman said "Well, it was his reaction, the fact he didn't say no." Id. at 24. While guarding the Petitioner on the stage with Coleman, Simpson testified that he never heard the Petitioner make any of the specific statements claimed by Coleman. Id. at 24-25.

James testified that he recalled guarding the Petitioner on more than one occasion, but the Petitioner never confessed to murdering Martha Moxley, nor did he ever hear the Petitioner confess to murdering Martha Moxley at any point. Id. at 11-16.

Grubin testified that he knew both the Petitioner and Gregory Coleman at Elan, and did not recall ever guarding the Petitioner with Coleman after a general meeting. Id. at 9. When Grubin lived with Coleman towards the end of his time at Elan, Coleman told him that

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B. The Trial Court Abused Its Discretion When It Concluded That The Newly Discovered Evidence Could Have Been Discovered Prior To Trial Through The Exercise Of Due Diligence

In its memorandum of decision, the trial court concluded that "[a]ll three of these witnesses could have been found prior to trial by the same methods employed to find them after trial." App. A-43. However, even if the witnesses could have been discovered by the same methods employed after trial, those efforts were so extraordinary so as to go far beyond the "due diligence" required by trial counsel. The Petitioner is not required to take extraordinary steps to investigate his case at the time of trial. He should not be punished for taking those extraordinary steps today.

According to Mr. Colucci, trial counsel did not ask him to locate John Simpson or Cliff Grubin. Nevertheless, when he was asked to do so by the present counsel in 2004, he was unable to locate either witness. He performed computer searches using a search engine that yielded hundreds of results for both "John Simpson" and "Cliff Reuben". See Ex. 51 and 52. Thus, even if trial counsel had requested him to locate these two witnesses prior to the Petitioner's criminal trial, the computer searches would have yielded the same unwieldy results as it did in 2004. These two witnesses were only located by the extraordinary efforts of Keith Weeks, an investigator who specializes in locating hard-to-find people. See Tr. 4/19/07 at 119-20.

As to John Simpson, Weeks testified that locating him "was the most difficult person I have ever had to locate. I have never had another locate that took me more or less a solid month to find someone." Id. at 126. Weeks indicated that it took him 5-6 hours a day, five-six days a week for a month before he was eventually successful in locating the witness. Id. After on-line search databases yielded negative results, he spoke to

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he (Coleman) was a very good liar. Id. at 12-12. Grubin testified that he never heard the Petitioner confess to committing murder while at Elan; however, he did recall that the Petitioner expressed concern that one of his brothers may have been involved. Id. at 15-18.

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numerous former Elan students, and while many remembered Simpson, they could not provide any identifying information about him such as where he was from. Id. at 122. As a result of speaking with the Elan students, he "took bits and pieces of information ... to make a puzzle and make something appear." Id. at 123. He eventually learned that Simpson had graduated from Penn State, so he found an alumni who was able to access the school's alumni website which eventually led him to the John Simpson in this case.

As to Cliff Grubin, Weeks testified that he began his search for "Cliff Reuben" by accessing an internet message board where former Elan students posted messages. Id. at 127. He indicated that the message board "was quite long, it was screens and screens long" and he just happened upon a posting by a "Cliff Grubin." Id. Since the message board identified "Cliff Grubin" as having attended Elan from 1978-1980, Mr. Weeks deduced that the "Cliff Reuben" identified by Gregory Coleman in his prior testimony was actually "Cliff Grubin." Id. It was posted in February of 2005 and identified his location as Teaneck, New Jersey.[53] Id. at 128. Weeks was unable to locate him in New Jersey, so he expanded to a national search and eventually located a Cliff Grubin in California, who was the father of the Cliff Grubin who attended Elan in 1978-1980. Id. After speaking with his father, Weeks learned that Grubin was living in Spain. He asked the father to let his son know that Weeks was trying to contact him. After not receiving any contact, Weeks reached out to Grubin's father a second time, and was informed that his son was a grown man and it was up to him to contact Weeks. Id. at 129. Weeks testified that "I literally gave up because I didn't have any other options," but then he wrote an email to the address on the Elan message board and Grubin responded seven days later. Id. at 129-30.

Thus, Keith Weeks' approach of "leaving no stone unturned" far exceeds the due diligence standard of "reasonable efforts." See Willliams v. Commissioner, 41 Conn. App.

[53] The only evidence presented in this case is that Cliff Grubin posted to a message board in February 2005, almost 2 years after the Petitioner's criminal trial. Thus, the court's conclusion that "[a]ll three of these witnesses could have been found prior to trial by the same methods employed to find them after trial" " is not supported by the evidence.

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515, 528 (1996), cert. denied, 240 Conn. 547 (1997) ("Due diligence does not require omniscience ... [I]t means doing everything reasonable, not everything possible.") The fact that Weeks was able to locate Simpson and Grubin by performing extraordinary investigative work after the Petitioner's conviction does not translate into a finding of a lack of diligence by Petitioner's trial counsel.

In contrast to this established standard of due diligence, the trial court instead relied upon the factual application of this test in State v. Roberson, 62 Conn. App. 422 (2001) to the significantly distinguishable circumstances of the present case. In Roberson, the state provided defense counsel with the name of an eyewitness to the crime one month before jury selection; however, counsel only checked the telephone book and the city assessor's office and was unsuccessful in locating him prior to trial. After the defendant's conviction, the state did locate this witness while preparing for the codefendant's trial; during that trial the witness provided testimony exculpatory to the defendant. Under those circumstances, the Appellate Court ruled that the defendant had not met his burden of demonstrating that the witness could not have been discovered by the exercise of due diligence.

In the present case, the trial court erroneously determined that the Roberson decision should instead be viewed as "the Roberson standard," understanding the case to mean that if defense counsel engaged in a "scant search" for the witness, then the petitioner could not prevail on a petition for new trial. App. A-42. In contrast to the circumstances of Roberson, though, the evidence presented in the present case clearly demonstrated that extraordinary efforts were required to locate Simpson, Grubin and James. Furthermore, neither party in the present case was able to find any of the three witnesses, despite engaging in reasonable efforts to do so. See Testimony of Frank Garr, Tr. 4/24/07 at 160-61. (attempts were made to locate these individuals, but they were unable to do so). Thus, the Roberson decision is not instructive since in that case, it was clear that the witness could have been located because the state did find him very shortly after the defendant's conviction. See State v. Roberson, 62 Conn. App. at 428 n. 5. Here,

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where the State was unable to locate these witnesses before trial, it is not unreasonable that the Petitioner also was unsuccessful.[54]

Thus, based upon the circumstances of this case, including the fact that the State also was unable to locate two of the witnesses and unable to interview the third witness, Petitioner's trial counsel conducted a reasonable investigation prior to trial such that their discovery in 2004 and 2005 constitutes newly discovered evidence.

C. The Testimony Of The Three Witnesses Who Directly Contradict Gregory Coleman -- The State's Key Witness – Is Noncumulative, Material, And Likely To Result In A Different Verdict On Retrial

The trial court also concluded that the fact that both "James and Grubin testified they had never heard the petitioner confess to the murder" is cumulative because other trial witnesses such as Sarah Peterson, Michael Wiggins, Donna Kavanaugh, and Angela McFillan, also testified that they never heard Michael Skakel confess to murder. App. A-43. However, Gregory Coleman never identified those witnesses as having been present when Michael Skakel confessed to him. Therefore, the fact that those five witnesses testified that the Petitioner did not confess to murder while he was at Elan is irrelevant to this issue. Since Coleman specifically identified either James, Grubin or Simpson as being present during the alleged confession, and none of them testified at the criminal trial, their testimony would not be merely cumulative.

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[54] Mr. Colucci testified that he did not contact Alton Everette James before the Petitioner's criminal trial. See Tr. 4/24/07 at 160. However, Inspector Frank Garr indicated that prior to the criminal trial he recalled speaking with an attorney from the Washington, D.C. area who he believed was Mr. James, but he was hesitant and uncomfortable about talking and further indicated that "[h]e had no information." Tr. 4/24/07 at 160. This would be consistent with Mr. James' decision not to contact anyone associated with the Petitioner's case. See Ex. 49 at 20. James testified that in the time period of 2000-2002, he was "in the early stages of being a brand-new partner in one of America's largest law firms," and thus, it is reasonable to infer that he did not want to become associated with a murder case or have it revealed that he had attended Elan, an institution for troubled youth. Id. at 25. Therefore, even if Petitioner's investigator had contacted James in 2002, it is reasonable to conclude that he would have provided the same response that he had provided to Garr, namely, that he did not have any information.

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The trial court's conclusion that the evidence presented by James, Simpson and Grubin – in which they directly contradict Gregory Coleman's testimony -- provides only minimal impeachment value ignores the central role that Coleman had as a State's witness in the Petitioner's criminal trial. Coleman was the *only* witness who testified unequivocally that the Petitioner confessed to him that he killed Martha Moxley.[55] As such, the Petitioner's alleged confession to Coleman was the linchpin of the State's case.

Coleman's credibility was a central issue in the case. Coleman himself identified these three witnesses and therefore, testimony from them directly contradicting his claim would be extremely powerful evidence casting doubt on his credibility. If a jury were to disbelieve Coleman, then it is likely that the jury's verdict would be an acquittal or a mistrial.

IV. The Trial Court Abused Its Discretion When It Rejected The Petitioner's Claim That Newly Discovered Evidence Relating To The Pattern Of Non-Disclosure Of Exculpatory Evidence

Prior to the Petitioner's criminal trial, four extremely important, relevant, and exculpatory documents were denied to the defense: a composite sketch of a person seen near the crime scene on the night of the murder that resembled a long-time police suspect, Kenneth Littleton; suspect profile reports prepared by the lead investigators in the case detailing powerful evidence against two other suspects, Kenneth Littleton and Thomas Skakel; and, a time lapse data that documented *inter alia* numerous other murders that could be traced to Kenneth Littleton's travels. These documents provided the tools by which the Petitioner could have supported his third party culpability and alibi defenses. As a result of the State's withholding of evidence, the Petitioner was deprived of a fair

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[55] The trial court further noted that "Coleman's testimony was only one of the direct confessions admitted below, citing to the testimony of John Higgins. App. A-44. However, the testimony of John Higgins regarding the Petitioner's "confession" to him is equivocal. For example, Higgins testified that he was present when the Petitioner had a conversation with himself in which he first said he did not know whether he did it; then, that he may have done it; then, that he did not know what happened; then, that he must have done it; then, that he did it. Ex. 59, Criminal Trial Transcript, 5/16/02 at 179-182; 227.

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opportunity to defend himself, which resulted in the injustice of his conviction. The State's failure to produce exculpatory evidence regarding the composite sketch, profile reports, and time lapse data, as well as its egregious pattern of nondisclosure of exculpatory evidence, warrants a new trial.

A. Relevant Facts

Background

John Solomon was the Supervisory Police Inspector for the State's Attorney's Office for the Judicial District of Fairfield from 1973 to 1995. He was involved in the investigation of the Moxley murder from the very date of the homicide in 1975, and participated in the investigation when it was reopened in 1991. See Testimony of John Solomon, Tr. 4/23/07 at 3-5. In 1991, Frank Garr was a detective with the Greenwich Police Department and assigned to work with Solomon on the renewed investigation. Id. at 5; Tr. 4/24/07 at 96-97. When Garr retired from the police department in 1994, he began as an inspector for the State's Attorney's Office and continued to work with Solomon on the case. Id. at 96-97, 99.

Prior to the Petitioner's criminal trial, trial counsel requested exculpatory information by way of several discovery motions. See Tr. 4/19/07 at 144-45; Motion For Discovery and Inspection dated 5/21/01, Ex. 78, App. A-285-292; Motion For Discovery and Inspection dated 6/12/00, Ex. 79. These motions supplemented the State's established "open file policy" in connection with the Petitioner's criminal trial; Mr. Garr was in charge of complying with the policy by copying documents and making them available to the defense. Tr. 4/24/07 at 99, 146. Tr. 4/19/07 at 146; Tr.4/20/07 at 21. Garr's understanding of the open file policy was that "everything is available to the defense." Tr. 4/24/07 at 99-100.

The Thomas Skakel And Kenneth Littleton Profile Reports

Trial counsel's discovery motions specifically included requests for any documents showing that anyone other than the Petitioner was the focus of the State's investigation, in particular Kenneth Littleton and Thomas Skakel. Tr. 4/19/07 at 144-45; Exhibits 78; 79, App. A-285-292. Solomon and Garr had authored profile reports of suspects in the Martha

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Moxley murder, including separate reports regarding Thomas Skakel and Kenneth Littleton around 1991 or 1992. See Thomas Skakel Profile Report, Ex. 55; Tr. 4/23/07 at 8; Kenneth Littleton Profile Report, Ex. 53, App. A-185-225; Tr. 4/23/07 at 8. However, these profile reports were never provided to trial counsel during discovery in the Petitioner's criminal case, and only provided to defense shortly before the hearing on the new trial petition in 2007. Tr. 4/19/07 at 146-47.

The Thomas Skakel profile states that around 9:30 p.m. on the night of the murder, the Petitioner left the Skakel home with his brothers Rushton, Jr. and John, and his cousin James Terrien and that Martha Moxley remained at the Skakel residence. See Ex. 55, Thomas Skakel Profile Report, at 3, 4, App. A-274-275. The Thomas Skakel profile also states that Dr. Jachimczyk concurred that the time of death was approximately 10 p.m. on the night of the murder. Id. at 6-7, App. A-277-278.

The Littleton profile states conclusively that on the night of the murder, the Petitioner left his home around 9:30 p.m. with his two brothers to drive his cousin home in the north section of the town of Greenwich. See Ex. 53 at 2, 7, App A-184, A-189. The Littleton profile indicates that several facts were "established," according to the authors, such as the fact that the Petitioner left the Skakel residence around 9:30 p.m., prior to the time of the murder. Tr. 4/19/07 at 208-09. If trial counsel had the Littleton profile prior to the Petitioner's criminal trial, he would have questioned Garr or Solomon as to these "established," and clearly exculpatory points. Id. at 152.

The Time Lapse Data

Solomon also prepared a document entitled "Kenneth Littleton – Time Lapse Data" in the course of considering Littleton as a suspect in the Moxley case and as a possible serial killer. Tr. 4/23/07 at 9. The Time Lapse Data was prepared concurrently with the profile reports, and much of its data is incorporated by reference into the Littleton profile report. Compare Ex. 53, App. A-183-225 (Kenneth Littleton Profile Report) and Ex. 54 (Time Lapse Data) at 33, 43, App. A-258, A-268. The Time Lapse Data contains

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information about many other homicides and crimes against women that occurred in areas where Kenneth Littleton was known to frequent, as well as biographical information about Littleton, including psychiatric information, arrests, addresses and work information.[56] Tr. 4/23/07 at 10; Ex. 54.

Once again, the Time Lapse Data was not included as part of the State's open file policy and defense counsel only received a copy during discovery on the Peittion For New Trial. Tr. 4/19/07 at 149, 159. If trial counsel had the Littleton Time Lapse Data during the Petitioner's criminal trial, he would have investigated the unsolved murders listed in the report in order to find out if Littleton was involved or otherwise followed upon the information contained in the report. See Tr. 4/19/07 at 160; Tr.4/20/07 at 29-30. Additionally, he would have put its authors on the stand to testify that they felt this information about Littleton was significant and that they believed that Littleton may have committed the crime. Id. at 161.

The Sketch

Police determined that Kenneth Littleton's activities on the night of the murder were "questionable," particularly during the time period when Martha Moxley left the Skakel property. See Ex. 53, Kenneth Littleton Profile Report, at 3, App. A-185. Littleton initially informed investigators on October 31, 1975, that upon returning to the Skakel home after dinner at the Belle Haven Club, he went up to the second floor master bedroom to watch television and he told investigators that he neither heard nor observed anything suspicious

[56] Specifically, the Time Lapse Data documents a number of criminal and/or sexual incidents committed by Littleton within a year of the Moxley murder. See Tr. 4/23/07 at 31-35. Captain George Risendez of the Nantucket Police Department described Littleton as being weird, sadistic and self-centered. Id. at 35. The episodes set forth in the Time Lapse Data that occurred within a year of the Moxley murder in part led Solomon to believe that Littleton was the possible killer. Id. at 37. Moreover, Littleton failed two polygraph examinations about the killing of Martha Moxley. Id. at 35-36.

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during the evening hours. Id. at 3-4, App. A-185-186. He repeated this same story again on November 5, 1975, and November 14, 1975. Id. at 4, App. A-186.

During an interview on December 10, 1975 Littleton for the first time told investigators that he recalled exiting the Skakel home via the front door at around 9:15 p.m. or 9:30 p.m., walking to the north side of the house adjacent to the driveway, and reentering the house via the side door. Id. at 4, App. A-186. Littleton claimed he went outside to check on the activities of the Skakel boys. Id. On April 22, 1976, Littleton was interviewed again. This time, he stated that he came downstairs and the nanny requested that he check out the driveway area because she had overheard a "fracas" there. Id. at 6, App. A-188. Littleton claimed that he went out the front door of the residence, where he encountered Julie Skakel and her friend Andrea Shakespeare, and walked across the front lawn to the area of the driveway where Mrs. Sweeney had reported overhearing the "fracas." Id. at 7, App. A-189. Littleton stated to investigators that after checking the area, he did not observe anyone, but that he heard rustling noises in the bushes that he could not identify, then re-entered the house through the front door. Id. Investigators noted that this April 22, 1976 interview was significant because it placed Littleton, by his own admission, outside of the Skakel residence at the same time that it was believed that Martha Moxley was en route from the Skakel property to her home.[57] Id.

Charles Morganti, a private Belle Haven security guard, saw a person walking near the victim's home around 10 p.m. on the night of the murder. See Tr. 4/23/07 at 11; Tr. 4/25/07 at 54; Ex. 46, Deposition of Charles Morganti, at 4, 15, 33, 39. Morganti described a white male in his twenties with a stocky build, around six feet tall, blonde, with glasses,

[57] In her October 31, 1975 interview, Julie Skakel told investigators that on the night of the murder, she had seen the shadow of a person running in a crouched position along the front lawn of the Skakel property, headed in a northerly direction toward the Skakel driveway. See Ex. 53 at 7-8, App. A-189-190. In spite of all of this, the State claimed at the Petitioner's criminal trial that there was "no evidence" against Kenneth Littleton. See Ex. 59, Criminal Trial Transcript, 6/3/02 at 115.

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wearing a fatigue jacket and tan trousers. Tr. 4/25/07 at 37-38; Ex. 46 at 34-35, 39. Within a day or two of the murder, Morganti assisted police in creating a composite sketch the man he described.[58] See Tr. 4/25/07 at 36-37. With the exception of the hair color, Morganti's description of the person that he saw was similar to the appearance of Kenneth Littleton. See Testimony of Frank Garr, Tr. 4/25/07 at 55-56. In fact, the sketch resembles Kenneth Littleton. See Testimony of Michael Sherman, Tr. 4/19/07 at 168; compare Ex. 80, App. A-181 (Sketch) and Ex. 81, App. A-182 (Photo of Kenneth Littleton). ***Most importantly, the sketch does not look like the Petitioner.*** Id.

Prior to the Petitioner's criminal trial, defense counsel made a formal, written discovery request for all photographs, composite sketches or other media replications that depicted the likeness or physical attributes of the alleged perpetrator of the crime. See Tr. 4/19/07 at 167; Ex. 78, App. A-285-292, Motion For Discovery and Inspection dated 5/21/01. Counsel did not receive any sketches of anybody in connection with the murder prior to the Petitioner's criminal trial. Tr. 4/19/07 at 167-68, 216; Tr. 4/25/07 at 52; see also Ex. 59, Criminal Trial Sentencing Hearing Transcript, 8/29/02 at 6. In response to counsel's request between early June and late August of 2002, the sketch was finally produced after Petitioner's criminal trial and before his sentencing. See 4/19/07 at 168.

The Thomas Skakel Arrest Warrant Application

During the course of the investigation, Greenwich Police prepared an arrest warrant application for Thomas Skakel, and it was brought to the State's Attorney's Office between

[58] Carl Wold, a Belle Haven resident, told police that on the night of the murder, he was out for his walk, but was home by 8 p.m. for the rest of the evening. See Ex. 45, Deposition of Carl J. Wold, at 8, 15, 18. Mr. Wold passed a polygraph as to both the fact that he was home by 8 p.m. and that he remained home for the rest of the evening. Tr. 4/23/07 at 21; Deposition of Carl J. Wold, Ex. 45 at 18-19. Garr re-interviewed Charles Morganti in 1994; Morganti restated that he had seen someone around 8 p.m. and again around 10 p.m., and that he believed it was the same person. Tr. 4/25/07 at 42; Tr. 4/23/07at 21. The person who Mr. Morganti saw at 10 p.m. could not have been Mr. Wold if Mr. Wold was truthful in his statement. Tr. 4/23/07 at 21. Nevertheless, investigators concluded that the sketch of the person whom Morganti saw on the night of the murder depicted Carl Wold. See Ex. 46, Deposition of Charles Morganti, Deposition Ex. F (Report of Frank Garr, 10/8/94).

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1975 and 1976. Tr. 4/23/07 at 6. A copy of the application was kept at the State's Attorney's Office since that time.[59] Id. at 6. Both Garr and Solomon testified at the Petitioner's criminal trial that the Thomas Skakel arrest warrant application had been in the state's file. Tr. 4/20/07 at 21-22; Ex. 59, Criminal Trial Transcript, 5/10/02 at 88; 155. Nevertheless, counsel did not receive the application before the criminal trial. He finally received it when the criminal trial was in its fifth day of evidence, well after a number of police officers had already testified.[60] Tr. 4/19/07 at 166; Tr. 4/20/07 at 1, 22-23.

B. The Trial Court Erred In Failing To Grant A New Trial For "Reasonable Cause" Due To The State's Pattern of Nondisclosure

Pursuant to Connecticut General Statutes Section 52-270, a criminal defendant may seek a new trial for a number of reasons, including the discovery of new evidence, as well as any other "reasonable cause." Conn. Gen. Stat. § 52-270(a). Courts defining the "reasonable cause" portion of the petition for new trial statute have indicated that the basic test of "reasonable cause" is "whether or not the litigant had been deprived of a fair opportunity to be heard and that an injustice will occur if a new trial is not allowed." Jacobs v. Fazzano, 59 Conn. App. 716, 721 (2000). The statute applies "when no other remedy is

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[59] During discovery in the Petitioner's criminal case, trial counsel requested the names, addresses and criminal records of all persons other than the Petitioner who at any time were considered suspects in the Moxley murder, along with any materials and information which caused them to be suspected, including information and/or evidence that someone other than the Petitioner was the focus or target of the state's investigation, including Littleton and Thomas Skakel. See Motion For Discovery and Inspection dated 5/21/01, Ex. 78, A-289-290, ¶ 20; Tr. 4/19/07 at 164-65. Trial counsel's written request also sought any applications for the arrest of Thomas Skakel, as well as any signed or unsigned arrest warrants during the course of the Petitioner's criminal case. Tr. 4/19/07 at 165; Tr. 4/20/07 at 17; Ex. 78.

[60] Trial counsel would have used the arrest warrant application during his examinations of these police officers. Tr. 4/20/07 at 22-23. The application included the oath of two Greenwich police officers swearing that they believed Thomas Skakel committed the murder. Id. at 2. If trial counsel had had this application prior to the criminal trial, he would have attempted to introduce evidence of the officers' opinion that Thomas Skakel had committed the crime, and he would have spent more time looking into the background of the investigation. Id. at 2-3.

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adequate and when in equity and good conscience relief against a judgment should be granted." Id. (internal quotations omitted).

In the present case, the trial court merely concluded that the Petitioner did not meet his burden of proving that the profile reports and composite sketch were newly discovered evidence warranting a new trial. App. A-51. However, the Petitioner also argued and fully briefed the issue of whether the State's pattern of nondisclosure constituted "reasonable cause" to grant the Petitioner a new trial. Indeed, as a result of the State's withholding of evidence, the Petitioner was deprived of a fair opportunity to defend himself, which resulted in the injustice of his conviction. The unconscionability of the State's conduct and the necessity of granting a new trial is mandated by the fact that not merely one exculpatory document was withheld. Rather, in this case, four extremely relevant and exculpatory documents were denied to the defense. All of the documents provided the tools by which the Petitioner could have supported his third party culpability and alibi defenses.

The Sketch

First, the sketch was a highly probative piece of evidence that would likely have changed the outcome of the trial. One of the cornerstones of the Petitioner's defense at trial was a claim of the third party culpability of Kenneth Littleton. The sketch uncannily resembled Kenneth Littleton. Had the Petitioner had the sketch prior to trial, Attorney Sherman would have introduced it at trial through the appropriate witness and would have argued that it was in fact Kenneth Littleton that Mr. Morganti had seen wandering around the neighborhood at the time of the crime, around 10 p.m. At the very least, Attorney Sherman would have highlighted for the jury that the sketch in no way resembled the Petitioner, which in and of itself would have been very probative evidence.

In addition to using the sketch to prove that Kenneth Littleton committed the crime and that the sketch did not resemble the Petitioner at all, trial counsel also could have used the sketch to cross examine and impeach Littleton as to his claim that he did not leave the Skakel property when he went outside at 9:30 p.m. on the night of the murder. Littleton

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gave conflicting statements on the issue of leaving the Skakel house on the night of the murder, and Julie Skakel testified that she saw a shadowy figure walking on the Skakel lawn on the night of the murder around the time period that Littleton is believed to have been outside. Therefore, the sketch was crucial evidence to support the fact that Littleton lied to police about being outside around the time that Mr. Morganti saw the person whom he described for the sketch, and it could have been used to significantly question Littleton's credibility on the stand.

Finally, the Petitioner could have used the sketch to discredit the State's claim that there was no evidence tying Littleton during the murder. The State argued during its summation that "[t]he only evidence that remains against Ken Littleton ... is that 11 years after the crime he was diagnosed as being manic depressive." Tr. 6/3/02 at 115. If the defense had the sketch prior to the criminal trial, it could have diffused this argument advanced by the State and could have highlighted that, in fact, there was evidence tying Littleton to the area of the murder at the time the murder was believed to have been committed, as well as the fact that Littleton had lied to police about his whereabouts. Therefore, the sketch could reasonably have changed the outcome of the Petitioner's criminal trial. This withholding of evidence deprived the Petitioner of a fair opportunity to be heard and an injustice will occur if a new trial is not allowed. See Jacobs v. Fazzano, 59 Conn. App. at 721.

The Profile Reports

These profile reports amassed data as well as the conclusions of the authors supporting the fact that persons other than the Petitioner committed the murder of Martha Moxley. These profile reports also set forth determinations of the investigators that were highly relevant and probative as to the Petitioner's alibi defense. For example, the Thomas Skakel profile indicates in several instances that around 9:30 p.m. on the night of the murder, the Petitioner left the Skakel residence with his brothers Rushton, Jr. and John, and his cousin James Terrien, and that Martha Moxley remained at the Skakel property

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when they left. Additionally, the Kenneth Littleton profile report states that Littleton's statement that he went to the driveway area at around 9:30 p.m. at the request of the nanny and was unable to locate anyone in the area "clearly establishes" that the Skakel vehicle had already left the driveway, "occupied by the SKAKEL boys (Rushton, Michael and John) along with their cousin JAMES TERRIEN ...." Ex. 53, at 7, App. A-189; see also Exhibit 53, at 2, App. A-184.

These statements regarding the Petitioner's whereabouts on the night of and at the time of the murder bear the imprimatur of Mr. Garr and Mr. Solomon as the authors of the reports. Thus, the defense could have used these statements in the profile reports to substantially bolster the Petitioner's alibi defense. If trial counsel had the profile reports prior to the criminal trial, he would have examined Mr. Garr and Mr. Solomon about their conclusions in the report as to the fact that the Petitioner's whereabouts had been "clearly established." Attorney Sherman would have also argued to the jury that Mr. Garr and Mr. Solomon had apparently put enough credence into the reports about the Petitioner's whereabouts that they were included as clearly established facts in the reports that attempted to prove that someone else committed the murder.

Therefore, these two profile reports contained information that had not been available to the defense through other sources. The Thomas Skakel and Kenneth Littleton profile reports, if they had been available to the defense prior to trial, reasonably would have changed the outcome of the Petitioner's criminal trial. Withholding this evidence deprived the Petitioner of a fair opportunity to be heard and an injustice will occur if a new trial is not allowed. See Jacobs v. Fazzano, 59 Conn. App. at 721.

The Time Lapse Data

Finally, the document entitled "Kenneth Littleton – Time Lapse Data" is another vital piece of evidence that was withheld by the State that would likely have affected the outcome of the Petitioner's criminal trial. The Time Lapse Data contains information about criminal and sexual misconduct by Kenneth Littleton that occurred within a year of the

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Moxley murder. The Time Lapse data also contains information about fifteen murders, one attempted murder, and three disappearances, all involving young women, that took place between 1976 and 1991 in areas where Kenneth Littleton was known to frequent.

One of the Petitioner's defenses at trial was the third party culpability of Kenneth Littleton. Mr. Solomon testified in the instant trial that the criminal and sexual episodes set forth in the Time Lapse Data that took place within a year of Martha Moxley's death led Mr. Solomon to conclude that Kenneth Littleton had committed the crime. Attorney Sherman would have used the Time Lapse Data during the Petitioner's criminal trial to question its authors as to the fact that they found this information about Littleton significant and that it led them to believe that Littleton had committed the crime.

Further, if Attorney Sherman had had the information about the fifteen murders, the attempted murder, and the three disappearances of other young women prior to the Petitioner's trial, he would have investigated these matters in an attempt to link them to Kenneth Littleton. Upon further investigation of these other crimes, Attorney Sherman could have argued to the jury that Littleton was involved in these crimes, evidencing a pattern that tended to show that he committed the Moxley murder.[61]

A Pattern Of Nondisclosure

The State's conduct throughout the Petitioner's criminal trial evidences a clear pattern of nondisclosure of exculpatory and relevant information. In addition to the documents discussed supra, the State also withheld from the defense an arrest warrant application that was prepared regarding Thomas Skakel. This document was not disclosed until the fifth day of the Petitioner's criminal trial and is further evidence of the State's pattern of egregious conduct throughout the criminal case.

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[61] The Connecticut Supreme Court did not consider the issue of the Time Lapse Data in its opinion regarding the Petitioner's direct appeal. See generally State v. Skakel, 276 Conn. 633. Therefore, there are no prior findings as to this issue to affect this court's decision.

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While each of the acts of withholding of evidence in itself requires a new trial in the interests of justice, the sum of the State's five egregious acts adds up to a pattern of nondisclosure that clearly warrants a new trial. Because of the State's improper withholding of this evidence, the Petitioner was "deprived of a fair opportunity to be heard and ... an injustice will occur if a new trial is not allowed." Jacobs v. Fazzano, 59 Conn. App. at 721. "[N]o other remedy is adequate and ... in equity and good conscience relief against a judgment should be granted." Id. (internal quotations omitted). For these reasons, reasonable cause exists for the granting of a new trial.

C. Reasonable Cause Exists To Grant A New Trial Because The Profile Reports And Time Lapse Data Were Suppressed By The State In Violation Of Brady v. Maryland

The disclosure of exculpatory evidence is a right that the both our state and federal constitutions provide as part of their basic "fair trial" guarantee. See U.S. Const., amends. 5, 6; Conn. Const., Art. I, § 8. In its landmark decision in Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that the suppression of evidence that would tend to exculpate a defendant results in a proceeding "that does not comport with standards of justice – even when suppression 'is not the result of guile.'" Id. at 87. In Strickler v. Greene, 527 U.S. 263 (1999), the Supreme Court articulated three components to a "true Brady violation": (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and, (3) prejudice must have ensued. Strickler, at 281-2.

The profile reports and Time Lapse Data are favorable to the Petitioner because they would have assisted him with his third party culpability and alibi defenses and with the impeachment of key witnesses. See Boyette v. Lefevre, 246 F.3d 76, 91 (2d Cir. 2001)[62]

[62] See also Bowen v. Maynard, 799 F.2d 593, 610 (10th Cir. 1986) (finding Brady violation and stating, "Impeachment evidence merits the same constitutional treatment as exculpatory evidence. Suppression of material which could be used to impeach witnesses

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(finding that evidence that could have helped the defense suggest an alternative perpetrator is favorable to the accused under Brady). Additionally, there is no doubt that the profile reports and Time Lapse Data were suppressed because they were not produced to the defense despite a specific request for the type of information contained in the profile; see Criminal Trial Tr. 5/13/02 at 77, 81; and despite a discovery order from the trial court.

Finally, the profile reports and Time Lapse Data were material. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickler v. Greene, 527 U.S. at 289-90. The defendant need not show that the evidence, if disclosed, would have resulted in his acquittal. United States v. Schwarz, 259 F.3d 59, 64 (2d Cir. 2001). The documents were material because they provided critical information and conclusions regarding the Petitioner's alibi defense, as well as conclusions of the authors supporting the fact that others committed the crime and important impeachment evidence.[63]

Because the State violated Brady v. Maryland by failing to turn over the profile reports and the Time Lapse Data, reasonable cause existed for the granting of a new trial, and the trial court's failure to grant a new trial on that basis represented an abuse of discretion.

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violates the Constitution if it deprives the defendant of a fair trial."); Lindsey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (Brady violation occurred when state withheld evidence that could have been used to impeach state's witness).

[63] In Bowen v. Maynard, supra, the Tenth Circuit found a Brady violation when information regarding a different suspect in a triple murder was withheld from the defense. The court noted that the withheld evidence, "in the hands of the defense, ... could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders." Bowen v. Maynard, 799 F.2d at 612. The withheld information in the present case would have presented the exact same opportunity to the Petitioner, and its suppression prevented the Petitioner from pursuing these avenues, in derogation of his right to a fair trial.

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D. A New Trial Is Warranted Because The Profile Reports, Which Include The Time Lapse Data, Constitute Newly Discovered Evidence

Analysis of the four Asherman prongs demonstrates that the discovery of the profile reports and Time Lapse Data, requires the granting of a new trial in this case and that the trial court's failure to grant a new trial on this ground represented an abuse of discretion.

1. The proffered evidence could not have been discovered earlier through the exercise of due diligence

In the present case, the profile reports, which include the Time Lapse Data, could not reasonably have been discovered prior to trial with the exercise of due diligence. Nevertheless, the trial court ruled that:

> The Supreme Court held that petitioner was aware of the profile reports during trial, yet failed to make a timely request for them. ... In light of the criminal trial record regarding when petitioner became aware of the reports, and his untimely request for them, this evidence cannot be considered "newly discovered."

App. A-45. However, the Connecticut Supreme Court's holding regarding the profile reports was only that the trial court correctly rejected the Petitioner's claim relating to the reports on the ground that it was not raised in a timely manner under Practice Book Section 42-54. State v. Skakel, 276 Conn. 633, 710 (2006). The Court's statement regarding the fact that the Petitioner was aware of the profile reports during the trial is merely dicta.

Therefore, there has been no "holding" by the Supreme Court regarding whether or not the profile reports are newly discovered evidence. Thus, the trial court's reliance on the Supreme Court's discussion should not have prevented the trial court from finding that the profile reports, which included the Time Lapse Data, constitutes newly discovered evidence. Indeed, there is no evidence that trial counsel had any reason to believe that the profile reports, including the Time Lapse Data, even existed prior to the Petitioner's criminal trial. During pre-trial discovery, counsel had requested any documents showing that anyone other than the Petitioner was the focus of the State's investigation, specifically Kenneth Littleton or Thomas Skakel. Because the profile reports, including the Time Lapse Data, were not produced either in response to the Petitioner's specific discovery request or

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as part of the State's open file policy, it was reasonable for trial counsel to conclude that no such documents existed.

2. The newly discovered evidence would be material at a new trial

In this case, the profile reports, which included the Time Lapse Data, are clearly material because they go to the heart of the Petitioner's main defenses at trial: third party culpability and alibi. The materiality of the profile reports, including the Time Lapse Data, is discussed at length, supra, at pages 53-55, which is incorporated herein by reference. As argued supra, the profile reports, including the Time Lapse Data, contain critical information supporting the fact that someone other than the Petitioner committed the crime. Further, the documents include important conclusions of Mr. Garr and Mr. Solomon establishing conclusively facts relative to the Petitioner's alibi. Moreover, the documents contain invaluable information that would have been used to cross-examine and/or impeach several witnesses, namely Kenneth Littleton, Mr. Garr and Mr. Solomon.

3. The newly discovered evidence is not merely cumulative

In the instant case, the profile reports, including the Time Lapse Data, contain crucial information that is not merely cumulative of other evidence at the Petitioner's criminal trial. Although the Petitioner had some of the information contained in the reports and Time Lapse Data prior to the trial from other sources or documents, there was considerable information in these documents which the Petitioner did not have from any source. For example, the two profile reports set forth the conclusions of Mr. Garr and Mr. Solomon that certain facts supporting the Petitioner's alibi defense had been "clearly established."

Further, much of the information contained in the Time Lapse Data was unknown to the Petitioner prior to his criminal trial. Although trial counsel may have been aware from other sources of certain misconduct of Kenneth Littleton, the defense was by no means aware of the fact that fifteen murders, an attempted murder, and three disappearances, all of young women, had occurred in the years following the Moxley murder in places where Littleton was known to frequent. Further, the Petitioner could not have been aware that all

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of this information was put together by investigators in a timeline, and that investigators were thus led to believe that Littleton may have been involved in these other crimes.

No evidence was introduced during the Petitioner's criminal trial regarding the fact that Mr. Garr and Mr. Solomon believed certain facts relating to the Petitioner's alibi defense were conclusively established. No evidence was offered at the criminal trial regarding Mr. Garr's and Mr. Solomon's belief that Littleton had committed the murder based upon his other misconduct and potential involvement in numerous other crimes. Therefore, this newly discovered evidence cannot be viewed as cumulative.

4. The newly discovered evidence is likely to produce a different result at a new trial

In this case, the newly discovered evidence would probably have changed the outcome of the trial. The profile reports, including the Time Lapse Data, go to the very heart of the Petitioner's two defenses at trial, third party culpability and alibi. The two lead investigators in this case amassed data in these reports clearly supporting the fact that someone other than the Petitioner committed this crime. The information set forth in the Time Lapse Data led Mr. Solomon to believe that Kenneth Littleton committed the murder. The two lead investigators also believed that the facts underlying the Petitioner's alibi defense had been clearly established. The credibility and importance of this evidence is undeniable. Had the jury heard these conclusions Mr. Garr and Mr. Solomon, the result of the trial most likely would have been different. Therefore, the trial court abused its discretion in denying the Petition For New Trial.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For these reasons stated herein, this matter should be reversed and remanded for a new criminal trial.

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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing Appendix has been mailed postage prepaid this 11th day of April, 2008 to the following counsel of record and interested persons:

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HOPE C. SEELEY

CERTIFICATION PURSUANT TO P.B. § 67-2

THIS IS TO CERTIFY that this Brief complies with all of the provisions of Practice Book § 67-2.

HOPE C. SEELEY