NNH CV20-6107902

ADAM CARMON

v.

STATE OF CONNECTICUT

NNH CV19-5052879

ADAM CARMON

v.

COMMISSIONER OF CORRECTION

STATE OF CONNECTICUT

SUPERIOR COURT

JUDICIAL DISTRICT OF NEW HAVEN

NOVEMBER 30, 2022

MEMORANDUM OF DECISION

A seven month old infant, Danielle Taft, was killed and her grandmother, Charlene Troutman, was paralyzed when a gunman fired from the sidewalk into their apartment window on the evening of February 3, 1994. On April 7, 1995, a jury found the petitioner, Adam Carmon, guilty of these horrific crimes, convicting him of the crimes of murder, assault in the first degree and carrying a pistol without a permit. The petitioner has filed a petition for a new trial and petition for writ of habeas corpus related to these convictions. The petitions were consolidated for trial which was held on eight consecutive days beginning April 25, 2022.

The petitioner asserts the following grounds for relief in his petition for a new trial: (1) newly discovered scientific evidence undermines the eyewitness identification presented at trial and (2) newly discovered scientific evidence undermines the firearm identification evidence presented at trial. The petitioner asserts the following grounds for relief in his habeas petition: (1) favorable exculpatory and impeachment evidence was suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), (2) the state violated due process by failing to correct false

testimony at trial and (3) the petitioner is actually innocent.[1] The petitioner asserts that these categories of newly discovered evidence, separately and together, would likely produce a different result at a new trial. The state contends that (1) with respect to the *Brady* claims, none of the suppressed items were material in light of the overwhelming evidence of the petitioner's guilt presented at trial, (2) any failure to correct false testimony was harmless beyond a reasonable doubt, (3) it is not reasonably probable that any newly discovered forensic evidence would change the result at trial, and (4) the petitioner failed to prove by clear and convincing evidence that he is actually innocent. For the reasons that follow, the petitions are granted.

I

EVIDENCE ADMITTED AT TRIAL

The first step in deciding the claims raised by the petitioner in his habeas petition and in his petition for a new trial is to evaluate the evidence submitted at his original trial. See *Asherman v. State*, 202 Conn. 429, 434 (1987) ("In determining the potential impact of new evidence, the trial court must weigh that evidence in conjunction with the evidence presented at the original trial.") The following evidence was admitted at the petitioner's trial.

On February 3, 1994, at approximately 10:00 p.m., a lone male approached the apartment building at 810 Orchard Street in New Haven. The male stopped in front of the first floor apartment and looked in the front window. The male then proceeded past the window, only to return moments later. The male stopped on the sidewalk in front of the first floor window and fired fifteen shots from a handgun into the living room of the first floor apartment. Danielle Taft, a seven-month-old infant, was hit by three bullets, two of them striking her in the head, and she died instantly. Charlene Troutman, Danielle's grandmother, was grievously wounded and

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[1]The petitioner has also raised in his habeas petition various ineffective assistance of counsel claims which by agreement of the parties have been bifurcated from the claims at issue here.

ultimately left permanently paralyzed.

Charlene Troutman testified at trial. She recounted that on the evening of February 3, 1994 she was in the living room of the first floor apartment at 810 Orchard Street with her seven-month-old granddaughter Danielle Taft, who was sitting in a stroller. Troutman was looking out the front window as she was waiting for a taxi to arrive. She observed an individual walk by on the sidewalk. The individual was a black male, wearing a ski mask that covered his eyes and a brown hoodie. The individual walked back to the window and Troutman heard glass break and shots fired. Troutman did not get a clear enough look to be able to identify the individual.

Benny Smith, who at the time of the crime was employed as a New Haven police officer, testified that fifteen shell casings were located on the sidewalk near the front entrance to 810 Orchard Street. In addition, five projectiles were recovered from inside the apartment.

Earlier that day, at approximately 2:00 p.m., a physical altercation occurred at 810 Orchard Street. Arthur Brantley, who was a drug dealer, visited the first floor apartment in an attempt to collect narcotics-related debts from Charlene Troutman and her son Richard Troutman. Brantley spoke with Richard who stated he was not going to pay the debt. While at 810 Orchard Street, Brantley engaged in a fist fight with various friends of Richard.

Due to the events which occurred during the afternoon of February 3, 1994 at 810 Orchard Street, the police viewed Brantley as a suspect in the shooting which occurred that evening. Brantley was interviewed by the police on February 4 and initially denied any involvement in the shooting. That same day, Brantley was given a polygraph examination by the police and he was informed that he failed the examination. Brantley subsequently gave an inculpatory written statement to the police on February 5, 1994. A portion of that written statement was admitted into evidence during Brantley's testimony at trial. In that portion of the February 5 statement, Brantley admitted that he attempted to contact Anthony Little, for whom Brantley sold drugs, to obtain "backup or a gun" because he wanted to seek revenge for what

occurred earlier that day at 810 Orchard Street.[2] Brantley testified that Little was a drug dealer who sometimes carries a firearm.

Brantley subsequently gave a second written statement to the police on February 7, 1994.[3] In this statement, Brantley professed that he wanted to make corrections to his first written statement and admitted that he had information concerning the shooting at 810 Orchard Street. In this statement, Brantley stated that, contrary to his prior written statement, he left his house around 9:50 p.m. on the evening of February 3, 1994. He met an individual named Demetrius Bates. They were subsequently joined by Anthony Little, the individual for whom Brantley sold drugs. Brantley and Bates got into Little's car and proceeded to 810 Orchard Street. In the car, Bates revealed to Brantley that he was carrying a handgun, which Brantley thought might be a nine millimeter handgun. Little told Bates that he was going to drop him off at the church which was in close proximity to 810 Orchard Street and "then when I hear gunshots I'm gonna swing back around and get you." When Brantley suggested that Bates should just rob the place, Bates responded that he was "just gonna shoot it up right quick and jump back in the car." Bates exited the car in front of the church. Brantley subsequently heard nine to eleven gunshots, Bates jumped back in the car, and they left the scene. Based on Brantley's February 7 statement, the police believed that Little had participated in the shooting and obtained a search and seizure warrant regarding Little.

Brantley recanted both his February 5 statement and his February 7 statement at trial. Brantley testified that he never sought backup or revenge for the altercation at 810 Orchard Street. He also testified that his prior statements that he, Little and Bates went to 810 Orchard

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[2]Portions of Brantley's February 5 statement were admitted at trial as a prior inconsistent *Whelan* statement. See *State v. Whelan*, 200 Conn. 743, 753 (1986).

[3]Portions of Brantley's February 7 statement were also admitted at trial as a prior inconsistent *Whelan* statement.

Street on the evening of February 3, 1994 and that Bates fired shots into the building were untrue. Brantley testified that he had no involvement in the crimes that occurred at 810 Orchard Street.

Also admitted into evidence at trial, over the objection of the petitioner, were portions of a written statement given by Brantley to the police on February 18, 1994 in which Brantley disavowed his February 5, 1995 statement and recanted his statements professing his knowledge of or participation in the 810 Orchard Street shooting.[4] Brantley testified that, prior to giving his recantation, the police informed him that they had found the murder weapon and had identified the individual who committed the murder. He testified that the police wanted him to correct his prior statements.

The petitioner first became a suspect on or about February 9 after the police recovered a nine millimeter firearm from a shooting that occurred on February 7, 1994 on Townsend Street in New Haven. The firearm was provided to James Stephenson, a New Haven police detective who was also a firearm expert. Stephenson examined and test fired the firearm and concluded that it was the handgun used in the shooting at 810 Orchard Street.

Stephenson testified at trial that the science of firearms and toolmarks enables him to determine whether a particular bullet was fired from a particular weapon and whether a particular shell casing was ejected from a particular firearm. Stephenson examined the fifteen discharged cartridge cases found at 810 Orchard Street and determined that all fifteen shell casings had been fired from one firearm. On February 9, 1994, Stephenson was given the Browning semiautomatic nine millimeter handgun recovered from the scene of a shooting on Townsend Street. Stephenson test fired the weapon and found it to be operable. He examined the spent cartridge cases ejected from the firearm and noticed "very significant" breech face markings on

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[4]The admission of this written statement was found to be harmless error on appeal. *State v. Carmon*, 47 Conn. App. 813, 822 (1998).

them.[5] Stephenson compared the spent cartridge cases from the Browning nine millimeter pistol with the fifteen spent cartridge cases recovered at the scene of the shooting at 810 Orchard Street and concluded that all fifteen cartridge cases had been fired by the Browning semiautomatic handgun. He testified on direct examination and again on redirect examination that there was no doubt in his mind that the Browning nine millimeter handgun recovered at Townsend Street was the source of the fifteen fired shell casings from 810 Orchard Street. Stephenson also compared the bullets test fired from the Browning handgun with the bullets recovered at 810 Orchard Street. He testified that he could not determine whether the bullets from 810 Orchard Street were fired from the Browning pistol because the front end portion of the barrel of the pistol had been "obliterated." He opined that some foreign object had been placed in the barrel and moved about disrupting the interior surface of the barrel. Stephenson further opined that the disruption of the interior surface of the gun barrel must have occurred after the shooting at 810 Orchard Street on February 3, 1994.

On February 10, 1994, the police interviewed Anthony Stevenson who had been found at the scene of the Townsend Street shooting lying on the ground bleeding from two bullet wounds with the nine millimeter handgun laying next to him. Stevenson was questioned while he was recovering from his injuries in the hospital. The police informed Stevenson that they had linked the handgun found next to him to the murder that occurred at 810 Orchard Street. Stevenson was fearful that he could be charged with murder. Stevenson described the incident on Townsend Street and informed the police that he had received the nine millimeter handgun from the petitioner.

On February 15, 1994, the police returned to the hospital and took a second statement from Stevenson. Stevenson testified that the police wanted to know how the inside of the barrel

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[5]Breech face markings are marks left on the head stamp of a cartridge case when it comes into contact with the beech face of a gun during the firing process.

of the handgun had been marked up. Stevenson told the police that the petitioner had used a screwdriver to damage the gun's barrel.

Anthony Stevenson testified at trial. Stevenson testified that, on February 7, 1994, the petitioner came to the barbershop where Stevenson worked and suggested that Stevenson assist him in robbing some drug dealers. Stevenson accompanied the petitioner in the petitioner's car to Townsend Street to effectuate the robbery. In the car, the petitioner gave Stevenson a nine millimeter semiautomatic handgun. Stevenson identified the nine millimeter handgun admitted into evidence at trial as the handgun given to him by the petitioner. Prior to giving him the weapon, Stevenson testified that he saw the petitioner scrape the inside of the gun barrel with a screwdriver. Stevenson testified that the plan was for the petitioner to enter the drug dealers' motor vehicle to purchase drugs. Stevenson was to run up to the motor vehicle with the weapon and rob the drug dealers. When they arrived at Townsend Street, the petitioner got into the motor vehicle. As Stephenson approached the car with the handgun, he was shot twice by a passenger in the vehicle.

Timothy McDonald testified a trial that he sold the nine millimeter handgun to the petitioner months prior to the shooting at 810 Orchard Street.

Jaime Stanley, who was twenty years old at the time of her testimony, testified that she witnessed the shooting at 810 Orchard Street. Stanley was a front seat passenger in a car stopped at a traffic light at the corner of Orchard and Munson Streets, located just to the right of 810 Orchard Street. She observed a black male walking on Orchard Street. The individual stopped in front of 810 Orchard Street and looked into the window. The individual then started to proceed up the stairs to the building. At that point, the car in which Stanley was seated turned left onto Orchard Street. The black male stopped going up the steps and went back to the front window of the first floor apartment. The individual took a pistol from his coat pocket and started firing toward the window. Stanley's car stopped in front of 810 Orchard Street, four to six feet

away from the shooter, and Stanley had an unobstructed view of the shooter. Stanley testified that she was able to clearly see his face and that she observed his face for three seconds. The black male was wearing a dark brown leather coat, dark black jeans, boots and a hat. Stanley testified that the shooter was not wearing a mask or a hoodie. Stanley stated that she could not believe what she was seeing, she was in shock and she was concerned that the male was going to shoot her. At one point, she ducked down while in the car. After the shooting, the individual ran up Orchard Street and took a left on Munson Street. Stanley testified that the male looked familiar and she might have seen him previously but the shooter was not someone she knew.

Stanley was subsequently shown multiple photo arrays on six separate occasions, totaling approximately three hundred photos, in an effort to identify the assailant. She testified that she did not remember seeing any photo of the petitioner. She testified that she did not make an identification from any of the photos because she did not feel comfortable making an identification from a photograph. The photos were too confusing and it was too important a matter to make a photo identification. She wanted to see the individual in person.

On February 22, 1994, Stanley was transported by the police to the G.A. courthouse in New Haven to see if she could identify the individual who fired the shots on February 3, 1994 into 810 Orchard Street. The prisoners being arraigned were brought into the courtroom in handcuffs and Stanley saw among the arraignees the person whom she had witnessed firing into the window at 810 Orchard Street. She was approximately thirty to forty feet away from the arraignee and had an unobstructed view. There was no doubt in her mind that the individual was the shooter. She testified that the individual looked at her, said, "Oh shit," placed his hands over his head, and put his head on his lap. As she was leaving the courtroom, Stanley heard the individual say, "There she is." Stanley made an in-court identification at trial that the petitioner was the person whom she had identified at the arraignment as the shooter. She testified that there was no doubt in her mind that the petitioner was the shooter she observed on February 3, 1994.

Ralph DiNello, a detective with the New Haven police department, testified that during the police investigation he showed Stanley numerous photos, including a photo of the petitioner. Stanley did not select the petitioner's photo as the shooter during her viewing of the photo arrays though she did say his photo "looks very close, very similar."[6] Stanley also told DiNello that she preferred to see the individual in person rather than make an identification through a photograph.

Anthony DiLullo, a detective with the New Haven police department, testified that he showed mug shot photos to Stanley on two occasions, each session comprising fifty photos. On the second occasion, Stanley selected a mug shot photo of the petitioner as a "look-alike" of the shooter.[7] DiLullo testified that Stanley indicated that she was not comfortable making an identification by photograph, but that she could make an in person identification. DiLullo further testified that he brought Stanley to the G.A. courthouse on February 22. When the arraignees were brought into the courtroom, the petitioner, who was one of the arraignees, said, "Oh shit," placed his hands to his face and put his head down in an apparent effort to conceal his face. Stanley identified the petitioner as the person whom she observed firing into the window at 810 Orchard Street. The petitioner was arrested for the shooting the next day, February 23, 1994.

Raymond Jones was the driver of the car occupied by Jaime Stanley when she witnessed the shooting at 810 Orchard Street. The police had been unable to locate Jones prior to the start of trial. He was arrested on a material witness warrant during the evening of Friday, March 31, 1995 after the defense rested that afternoon upon completion of its evidence. On Monday, April 3, 1995, the court reopened evidence.

Jones testified that he was in a car stopped at a traffic light at Munson and Orchard streets

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[6]DiNello in his testimony did not identify the date that Stanley stated that the petitioner's photo looked similar to the shooter.

[7]DiLullo in his testimony gave no date for Stanley's selection of the petitioner's photo as a "look-alike."

when he saw an individual pacing back and forth in front of the building at 810 Orchard Street looking in the window. The car turned onto Orchard Street. Jones heard shots and stopped the car. The individual fired twelve to thirteen shots into the window. Jones saw the muzzle flash of the gun and, at one point, he and Stanley ducked down in the car when the shots were fired. Jones was twelve feet from the shooter. The shooter was wearing a black hoodie which was over his face. The shooter turned and looked at Jones. Jones had an unobstructed view of his face which Jones observed for approximately three seconds. Jones had seen the individual before on the corner of Henry Street and Orchard Street as he passed through the neighborhood but he did not know him.

On February 16, 1994, Jones was shown a photo array at the police station and selected a photo of the petitioner as the shooter. At the time, Jones testified that there was no doubt in his mind that the individual was the person who fired into the window at 810 Orchard Street. Jones also made an in court identification of the petitioner as the shooter.

After deliberating for two and one-half days, the jury found the petitioner guilty of murder, assault in the first degree and carrying a pistol without a permit. The trial court imposed a total effective sentence of eighty-five years in prison.

II

APPLICABLE LAW

Occasions when a court will grant a request for a new trial in a criminal case are known to be rare. The law, and judges applying the law, are understandably hesitant to grant a new trial. See *Asherman v. State*, 202 Conn. 429, 434 (1987) ("[O]nce a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason.") In a murder case such as this, twelve impartial jurors having heard the evidence and arguments of counsel were firmly convinced of the petitioner's guilt. Retrials are also problematic given the passage of time and its adverse effect on the availability of witnesses and

on memory retention. See *Summerville v. Warden*, 229 Conn. 397, 427 (1994) (the unreliability of fact-finding increases with the passage of time). Nonetheless, a criminal defendant is entitled to a new trial when he can establish that, due to newly discovered forensic scientific evidence and suppressed *Brady* evidence, there is a reasonable likelihood of a different result at a retrial. See Conn. Gen. Statutes §52-582(a) (the court may grant a petition for a new trial if the court finds that had the newly discovered forensic scientific evidence been presented at trial, there is a reasonable likelihood there would have been a different outcome at trial) and *State v. Jordan*, 314 Conn. 354, 370 (2014) (to warrant a new trial for a *Brady* violation, the court must find that there is a reasonable probability of a different result if the evidence had been disclosed).

A

Newly Discovered Evidence

"The standard that governs the granting of a petition for a new trial based on newly discovered evidence is well established. The petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial." *Asherman v. State*, 202 Conn. 429, 434 (1987). "To meet the fourth element of *Asherman*, the petitioner must persuade the court that the new evidence he submits will probably, not merely possibly, result in a different verdict at a new trial. . . . It is not sufficient for him to bring in new evidence from which a jury could find him not guilty—it must be evidence which persuades the judge that a jury would find him not guilty." (Internal quotation marks and citation omitted.) *Jones v. State*, 328 Conn. 84, 93 (2018). "By a 'different result,' we mean that the new evidence would be likely to result in acquittal of the petitioner, not merely that it might cause one or more jurors to have a reasonable doubt about the petitioner's guilt." *Skakel v. State*, 295 Conn. 447, 468 (2020).

The legislature recently established a different standard in petitions for a new trial based on newly discovered DNA evidence or newly discovered forensic scientific evidence. See Conn. Gen. Statutes §52-582. In such cases, "the court may grant the petition if the court finds that had such evidence been presented at trial, there is a reasonable likelihood there would have been a different outcome at the trial." Conn. Gen. Statutes §52-582(a). The difference between this test and the *Asherman* probability test is slight. See *Jones v. State*, supra, 328 Conn. 102-103 (comparing the reasonable likelihood tests of *Strickland v. Washington,* 466 U.S. 668 (1984) and *Brady v. Maryland*, 373 U.S. 83 (1963) with the probability test of *Asherman v. State*, supra.) See also *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (the difference between the reasonable likelihood standard and the probability test "is slight and matters only in the rarest case") and *Skakel v. Commissioner of Correction*, 329 Conn. 1, 40 (2018).

The trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial, *Shabazz v. State*, 259 Conn. 811, 827 (2002), and determine the impact of the new evidence in conjunction with the evidence submitted at trial, *Asherman v. State*, supra, 202 Conn. 434.[8]

B

Suppressed Evidence

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[8]The petitioner argues that this court should consider all the evidence submitted at the hearing on his petition for a new trial and is not limited to a consideration of the newly discovered evidence in conjunction with the evidence submitted at the original trial. The petitioner cites *Miller v. Commissioner of Correction*, 242 Conn. 745 (1997) is support of his contention. *Miller* is inapposite to his claim of newly discovered evidence. The court in *Miller* was addressing the appropriate standard when addressing a claim of actual innocence in a habeas petition, not a claim of newly discovered evidence in a petition for a new trial. When determining a claim of actual innocence, the trial court must take into both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial. Id., at 747.

The prosecution has the constitutional obligation under the due process clause of the Fourteenth Amendment to disclose to the accused favorable evidence where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). To establish a violation of a prosecutor's obligations under *Brady*, a defendant must show that: (1) the government suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material either to guilt or punishment. *State v. Wilcox*, 254 Conn. 441, 452 (2000). See also *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, supra, 473 U.S. 682.

The U.S. Supreme Court in *Kyles v. Whitley*, 514 U.S. 419 (1995) elaborated further on the standard of materiality established in *U.S. v Bagley*. First, the defendant is not required to establish that it is more likely than not that disclosure of the suppressed evidence would have resulted in his acquittal. Id., 434. "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." Id. Second, the *Bagley* test is not a sufficiency of evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Third, materiality is to be determined by the cumulative effect of the suppression. Id, 436 -38. In sum, a *Brady* violation is established "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id, 435. See also *State v. Wilcox*, supra, 254 Conn. 454 ("The focus is not whether, based upon a threshold standard, the result of

the trial would have been different if the evidence had been admitted. We instead concentrate on the overall fairness of the trial and whether nondisclosure of the evidence was so unfair as to undermine our confidence in the jury's verdict.")

The suppressed evidence must be evaluated in the context of the entire trial. *U.S. v. Augurs*, 427 U.S. 97, 112 (1976). See also *State v. Pollitt*, 205 Conn. 132, 143 (1987) (the materiality determination is not to be made in a vacuum; rather, it must be made in the context of all the evidence introduced at trial.)[9]

The same analysis is done regarding newly discovered forensic science evidence and suppressed evidence. *Jones v. State*, supra, 328 Conn. 102. "Both require the court to assess the impact that changed circumstances -, e.g., the introduction of either newly discovered or withheld evidence – might have on the result of the original trial." Id.

III

ITEMS OF SUPPRESSED EVIDENCE

The petitioner contends that fifty items of evidence were suppressed by the state and not disclosed to the petitioner prior to trial. The state has stipulated that twenty-four items of evidence were not properly disclosed. The parties disagree as to whether the items were material.

A

February 6, 1994 Police Report by Detective DiNello

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[9]The state contends that this court must consider the impact of inculpatory evidence that could have been presented at the original trial and that would be admissible at any new trial in assessing the materiality of any exculpatory evidence suppressed under *Brady*. In support of this claim, the state cites *Wong v. Belmontes*, 558 U.S. 15, 20 (2009). *Wong* is inapplicable. The issue in *Wong* was whether there was a reasonable probability that a jury presented with additional mitigation evidence during a sentencing hearing in a capital case would have returned a different verdict. In such a situation, the court held that, to establish prejudice, the petitioner must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence against the entire body of aggravating evidence. Id.

Detective DiNello authored a police report dated February 6, 1994 which was not disclosed to the petitioner. Arthur Brantley was the initial suspect in the shooting and had undertaken a polygraph examination at the request of the police. The polygraph examiner concluded that Brantley had been untruthful in his answers when he denied involvement in the shooting. Brantley was informed of the results. The February 6 police report reveals that, on February 5, 1994, DiNello together with other members of the police department visited Daisy Brantley, the mother of Arthur Brantley, at her home. Daisy Brantley told the police that her son had said that he had essentially passed the polygraph examination. DiNello informed Daisy Brantley that Arthur had not passed the examination. Upon hearing this news, Daisy Brantley told the detectives that she would encourage Arthur to provide the police with any information he possessed regarding the investigation.

The report further discloses that later that afternoon Arthur Brantley contacted DiNello and requested a meeting so he could provide information regarding the shooting at 810 Orchard Street. Brantley did meet with DiNello at the police station on February 5, 1994 and provided his first recorded statement which implicated Little in the shooting. In that statement, portions of which were admitted into evidence at trial, Brantley stated that after the fight at 810 Orchard Street on February 4 he attempted to contact Little, for whom Brantley sold narcotics, to inform him that he "got jumped" and to obtain "back up" and a gun. Brantley stated that he wanted revenge. According to Brantley's statement, Little called him at approximately 8:00 p.m. that night. Little told Brantley that he knew what had occurred at 810 Orchard Street and that he was going to go over there and handle it. The next day, Little told Brantley that "He went there, he took care of it, he went there, ruffled some feathers and fucked shit up." Brantley took these words to mean that Little had "shot the place up."

The information contained in the February 6, 1994 police report contradicts Brantley's trial testimony that he never contacted the police to tell them that he had additional information

to provide and that he never voluntarily went to the police station. It also supports a claim that Brantley's statement inculpating Little in the shooting was true as it was motivated by a desire to tell the truth at the urging of his mother. The report also provides information which could potentially support a third party culpability claim that Little was responsible for the shooting.

B

Documents Concerning Anthony Little

Three additional documents related to the possible involvement of Anthony Little in the shootings at 810 Orchard Street were suppressed by the state. On February 9, 1994, Detective Gil Burton interviewed and took recorded statements from Anthony Little and Alfred Kitchens. Kitchens was a friend of Little and served as his alibi witness, telling the police that Little was with him at his house on the evening of February 3, 1994 during time of the shooting at 810 Orchard Street. In his statement, Little told the police that Arthur Brantley had previously sold drugs for him and that Brantley had told him that he was having a problem collecting drug money from individuals at 810 Orchard Street. Little stated, that on February 1, 1994, Brantley asked Little if Little could get him a gun. Little stated that he did not speak with Brantley at any time on the day of the shooting. Little further stated that he was not involved in the 810 Orchard Street shooting and that he did not provide Brantley with a gun.

In his statement to police, Kitchens contradicted Little's statement that Little did not speak with Brantley on the evening of February 3, 1994 about a gun. Kitchens stated that, while Little was at Kitchens' apartment that evening, Little spoke with Brantley on the phone. Brantley was hysterical. He told Little that he had been "jumped" at an apartment building by guys who owed him money and that he needed a gun.

In addition to the two witnesses' statements which were not provided to defense counsel, the state failed to provide a copy of a police report dated February 10, 1994 authored by Detective Gil Burton. The report noted that Little and Kitchens had given statements at the

police station on February 9. The report also noted that there existed an outstanding warrant for Little's arrest on unrelated charges.

The suppressed documents bear significance for two reasons. First, the statements of Little and Kitchens corroborate the February 5, 1994 statement of Brantley that he engaged in an altercation on February 3, 1994 with individuals who owed him money for drugs at 810 Orchard Street, that he was seeking revenge and that he was looking for a gun; a statement which Brantley subsequently recanted at trial.

Second, the documents call into question the integrity of the police investigation. On February 9, 1994, Little was allowed to walk out of the police station after giving his statement without being served with an outstanding warrant notwithstanding that the detective conducting the interview knew that a warrant existed for his arrest. In fact, Little was wanted on two active arrest warrants, one of which was for escape from parole for a drug conviction. Sergeant Michael Sweeney, who was in charge of the 810 Orchard Street investigation, testified at the hearing on the petitions that he would have never allowed a person with outstanding arrest warrants to simply leave the police station and that it was illegal to do so. On February 9, the investigating detectives had learned of Detective Stephenson's conclusion that the Browning nine millimeter firearm connected to the petitioner was the murder weapon. The fact that Little was not arrested on outstanding warrants could have been used to show that the police were now focused on the petitioner as the shooter to the exclusion of all others.

C

18 Black Male Photographs

During the trial, on March 31, 1994, the state disclosed for the first time to defense counsel that it had in its possession 18 photos of Black males that had been shown to witnesses,

including Jaime Stanley, by the police.[10] Included in the array were two photos of the petitioner at different ages. One of the photos was of David Myles with a notation on the back of the photo that read, "Pick as a look a like to the shooter at 810 Orchard." The late disclosure contradicted the state's express statement one week earlier during the trial that the photo arrays had not been preserved.

Detectives DiLullo and DiNello each testified at trial that Stanley was shown a photo of the petitioner which she selected as "very similar" and a "look-alike" to the shooter. Their testimony was significant in that it served to support Stanley's subsequent identification of the petitioner as the shooter during the petitioner's arraignment on February 22, 1994. The 18 Black male photos would have been valuable to the defense as they impeach the testimony of Detective DiLullo and DiNello that Stanley chose the petitioner as the "look-alike."

The photos also undermine Stanley's testimony. Her selection of the photo of David Myles as a look-alike to the shooter undercuts her testimony that she was unwilling to make any identification using a photograph. The discovery of the 18 photos also resulted in a consequential shift in the evidence. Stanley was shown at least one and probably two distinct photos of the petitoner, failed to select him as a "look-alike," and selected a photo of a different individual instead.[11] Rather than Stanley being shown a photo of the petitioner and selecting his photo as very similar to the shooter, which was the testimony of two detectives at trial, the suppressed evidence established that Stanley was shown one or more photos of the petitioner and

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[10]It is evident that the 18 male photos included photos shown to Stanley as the investigating detectives testified at trial that Stanley was shown a photo of the petitioner and had selected a photo as a "look-alike." Among the 18 photos were two photos of the petitioner and a photo of another individual with the notation that the individual was a "look-a-like" to the shooter.

[11]The state conceded at the consolidated hearing that it was reasonable to infer that Stanley selected Miles' photo as a look-alike.

failed to identify his photo at all.

The state concedes that the disclosure was late. It argues that the disclosure did not violate the mandate of *Brady* as it was made in time for its effective use at trial. I do not agree.

When exculpatory evidence is disclosed by the state during the trial, the issue is not one of suppression but of the timing of the disclosure. Evidence must be disclosed at a time in which it can be effectively used at trial. *State v. White*, 229 Conn. 125, 138 (1994). See also *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). The petitioner bears the burden of proving that he was prejudiced by the state's failure to make the information available to him at an earlier time. *State v. Reddick*, 197 Conn. 115, 122 (1985). The appropriate standard is whether the disclosure came so late as to prevent the petitioner from receiving a fair trial. Id. See also *State v. Guilbert*, 306 Conn. 218, 272 (2012).

The disclosure of the photos was made on the fourth day of evidence after the state had rested. It was made after defense counsel and the court had been told by the state that the photo arrays had not been preserved. Defense counsel was understandably surprised by the disclosure. He was unable to make effective use of the photos, particularly the notation on the back of the photo of David Myles that Myles' photo had been selected as a look-a-like to the shooter, because he inadvertently failed to notice it. See *Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (the defense may be unable to assimilate the information into its case when disclosure is first made on the eve of trial or when the trial is under way). His failure was understandable. Detectives DiLullo and DiNello had testified that Stanley had chosen the petitioner's photo, not a different photo, as a look-alike. More important, the state upon disclosing the 18 male photos during the trial expressly stated, when asked by the court, that the photos had nothing to do with Stanley selecting a photo as a look-alike. The state's misrepresentation together with the extreme lateness of the disclosure resulted in the defense's failure to discover the notation and make effective use of it at trial. See *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (defense counsel is

entitled to treat a prosecutor's representations as truthful).

D

February 17, 1994 Report by Detective DiLullo

The petitioner contends that a police report authored by Detective DiLullo on February 17, 1994 was not disclosed to the petitioner. While the state has not agreed that the report was suppressed, it has not seriously contested it. Based on the testimony at the consolidated hearing of Attorney Glen Conway, who at the time of trial was an intern in the office of defense counsel and responsible for cataloguing the discovery material provided by the state, I find that the report was not disclosed to the petitioner at the time of trial.

The petitioner asserts that the report is material because it conflicts with Stanley's insistent during her trial testimony that she was able but unwilling to make a photo identification of the shooter.[12] According to the report, Detective DiLullo and Sergeant Michael Sweeney reinterviewed Stanley regarding her observations of the shooting at 810 Orchard Street. In the

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[12]The petitioner also contends that the February 17, 1994 Report of Detective DiLullo is material because (1) it contradicts Stanley's trial testimony that she went straight to work after seeing the shooting, and (2) it can be used to impeach Stanley's testimony as the report states that Stanley remarked that the lighting conditions in the area were poor and she admitted that she was extremely surprised by the shooting. I find none of this information to be material.

According to the police report, Stanley told the police officers that, after observing the shooting, she and Jones drove to Howard Avenue and then returned to the area of 810 Orchard Street on the way to taking Stanley to her job at Stop and Shop in Hamden. While on Dixwell Avenue, Stanley observed numerous police cars at 810 Orchard Street. The petitioner contends that the undisclosed information that Stanley went to Howard Avenue prior to returning to work constitutes important impeachment evidence as Stanley testified at trial that, after observing the shooting, she immediately went to work. I do not agree that this portion of the police report is material. Stanley admitted on cross-examination at trial that, while traveling down Dixwell Avenue after the shooting, she observed police cars in the vicinity of 810 Orchard Street. The fact that she may have gone to Howard Avenue prior to going to work is simply not important.

The police report also states that Stanley indicated that the intersection at Orchard Street and Munson Street was "not very well lit" and were in fact "poor." She also stated that "she was extremely surprised at to what was occurring." This information is inconsequential as Stanley provided similar testimony at trial. She admitted on cross-examination that "the lighting wasn't that good." She also testified that she couldn't believe what she saw and that she was in shock.

February 17 report, DiLullo states that "Ms. Stanley informed both Detective Sergeant Sweeney and I that, of all the photographs she looked at, she *could* not positively state that anyone in these photographs is in fact the person she observed doing the shooting on the evening of February 3, 1994 . . . . Again, Ms. Stanley stated that she *could* not make any positive identification from the photographs that she has looked at." (Emphasis supplied). These statements attributed to Stanley are significant. Stanley was adamant during her trial testimony that she was not willing, rather than unable, to make a photo identification. On cross-examination, she testified that "I didn't feel comfortable identifying somebody who is going to be tried for murder from a photograph. It's too serious a matter. I couldn't live with myself doing that. I wanted to see the person in person." Nowhere in the police report does it state that Stanley expressed a preference for an in person identification. Rather, it states that she could not make a positive identification. It is undisputed that Stanley was shown a photo of the petitioner during the investigation. The fact that she could not make a positive identification of the petitioner after being shown his photo is undoubtedly important.

E

Prosecutor's Notes

The parties agree that the notes of the prosecutor, Michael Dearington, dated April 4, 1994 were not disclosed to the petitioner. The parties disagree as to the materiality of those notes. The notes appear to summarize Dearington's interview with Stanley. The notes reveal that Stanley reported that she possessed "poor close vision." This information would unquestionably be useful in impeaching the reliability of Stanley's identification of the petitioner as she testified that she was only four to six feet away from the shooter.[13]

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[13]The petitioner also claims that the notes contradict Stanley's trial testimony regarding the precise courtroom in which her identification of the petitioner occurred. I find this contradiction to be insignificant.

F

Arraignment Mug Shots

The parties agree that the state did not disclose ten photos of the individuals who were arraigned with the petitioner on February 22, 1994. Included in the undisclosed packet was a printout with information regarding a twelfth arraignee with no accompanying photo.[14] The petitioner asserts that the information regarding the arraignees establishes that the identification procedure used to identify the petitioner was unduly suggestive. The petitioner further contends that the suppressed information could have been used at trial to show the unreliability of Stanley's in court identification of the petitioner, support an argument at trial that the police investigation was biased toward implicating the petitioner, and form the basis of a successful motion to suppress the identification.

The arraignment array involving the petitioner was exceedingly suggestive. It comprised twelve individuals. All twelve individuals were brought into the courtroom as accused criminals, restrained by handcuffs and possibly by leg irons. See *State v. Ledbetter*, 185 Conn. 607, 613 (1981) ("[t]he mischief involved in the arraignment observation is the real possibility that the victim of one crime, armed with the knowledge that the suspect is being charged with another crime, possibly of the same character, is more likely to leap to the conclusion that the person being arraigned in front of him committed both crimes"). According to the information provided with each photo, the petitioner was 5 feet 6 inches tall and weighed 150 pounds. He is Black and was 21years old. Eight of the other arraignees were Black and three were white.[15] Four of the individuals were age 30 or over, two being more than 40 years old. Four of the arraignees were

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[14]It is unclear from the trial record the exact number of arraignees who appeared in court with the petitioner on February 22, 1994. Stanley testified at trial that there were approximately ten to fifteen arraignees.

[15]The information accompanying the photo of one arraignee states race unknown and of Hispanic origin. He appears to be white in the photo.

six feet tall or taller. Three arraignees weighed 200 pounds or more. Seven arraignees appear to have facial hair. The petitioner did not. Only one arraignee was similar to the petitioner in race, age, height and weight and lacking facial hair. Stanley made her identification of the petitioner when he was seated among this group of dissimilar individuals.[16]

Nancy Franklin, an Emeritus Associate Professor in the department of psychology at Stony Brook University with a PhD in psychology, testified at the consolidated hearing on the petitions. Her specialty is cognitive science, particularly memory and memory retention. She testified that poor fillers in an identification array result in increased rates of false identifications, that is, that an innocent suspect is more likely to be selected. She also testified that "duds" are fillers that mismatch the suspect in multiple ways. The presence of duds leads to a further increase in the rates of false identifications. This is so because duds are dismissed by the observer out of hand and their presence makes the suspect stand out. The fillers in the arraignment array shown to Stanley were greatly mismatched. They differed in race, age, height, weight and facial hair. Upon conducting a statistical study of the array, Franklin concluded that it was highly biased.

G

Jones' Pending Charges

The petitioner asserts that the state failed to correct false testimony provided by Raymond Jones at trial. Specifically, the petitioner claims that Jones falsely testified at trial that he did not have any pending criminal charges when he identified the petitioner as the shooter on February 16, 1994.[17] The state in its brief to this court assumes arguendo that the state failed to correct

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[16]Though Stanley testified at trial that she observed the approximately 100 spectators in the courtroom at the time, she stated that she was not really looking at them.

[17]The petitioner also claims that Jones testified falsely when he testified that (1) he never discussed his pending charges with the state prior to his testimony, (2) he cooperated with Detective Green in a investigation of a homicide, and (3) he was not a drug dealer, he never dealt

false testimony by Jones and asserts that any failure to correct that testimony was harmless beyond a reasonable doubt.

Jones was interviewed by the police and gave a statement on February 16, 1994 in connection with the 810 Orchard Street shooting. Jones was shown a photo array and identified a photo of the petitioner as the person he saw shooting into the front window. At that time, Jones had pending against him charges of operating a motor vehicle under suspension and two counts of failure to appear in the second degree. A review of the trial transcript reveals that Jones did not testify at trial concerning any pending cases. The only testimony by Jones about charges pending at the time of his photo identification of the petitioner occurred outside the presence of the jury during the hearing on the petitioner's motion to suppress Jones' identification which immediately preceded his trial testimony. When asked by defense counsel whether he had any pending cases at the time he provided his statement to the police, Jones responded that he did not remember. The state possessed that information and should have disclosed it as impeachment evidence pursuant to *Brady*.

More problematic is the false representation by the state to the court and defense counsel that no charges were pending against Jones at the time he gave his statement to police and made his identification of the petitioner. Immediately after Jones' testimony during the hearing on the motion to suppress that he did not remember whether he had pending charges, defense counsel complained to the court that he did not have a printout of Jones' criminal history. Defense counsel had been given a hand written note by the prosecutor listing Jones's criminal history. The list did not provide a complete criminal history. It was unusual for a hand written note rather

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drugs and the drugs found on his person on March 31, 1995 were not his drugs. I do not address these claims as the petitioner has not established the falsity of this testimony at the time it was given.

than a computer printout to be used to identify a person's criminal history.[18] In response to a question by defense counsel, the prosecutor expressly stated to the court and defense counsel that there were no criminal charges pending against Jones when he gave his statement to the police. The prosecutor's representation was false. The prosecutor should have known of the falsity of his representation as Jones was arraigned on the three charges the same day that he testified.[19]

In *Napue v. People of State of Illinois*, 360 U.S. 264 (1959), the court held that it is a violation of due process for the state to knowingly use false testimony to obtain a conviction. The duty to correct false testimony includes false testimony that goes only to the credibility of a witness. Id., 269. A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Because the state's use of false testimony corrupts the truth seeking process and is fundamentally unfair, reversal is virtually automatic unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury. *Adams v. Commissioner of Correction*, 309 Conn. 359, 373 (2013).

The misrepresentation by the prosecutor does not fall squarely within the parameters of *Napue* as it was not made before the jury. Nonetheless, it was a corruption of the truth seeking process and potentially an ethical violation.[20] The false representation also appears to be part of an effort to conceal information from defense counsel. While the existence of pending misdemeanor charges is not explosive impeachment evidence, it adds to the previously discussed

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[18]The trial court, Hadden, J., indicated its surprise that a hand written note was used since a criminal history is ordinarily disclosed through a computer printout.

[19]The criminal charges were subsequently nolled on May 12, 1995.

[20]See Rules of Professional Conduct 3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact to a tribunal) and 3.4 (a lawyer shall not conceal a document or other material having potential evidentiary value).

mountain of suppressed evidence weakening the state's case. See *Napue v. People of State of Illinois*, supra, 360 U.S. 269 (the jury's estimate of the truthfulness and reliability of a witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a petitioner's life or liberty may depend).

H

Stephenson's Bench Notes

The parties concur that the bench notes of the firearm expert, James Stephenson, were not disclosed to the petitioner at his trial. The petitioner contends that the notes contain significant impeachment evidence. I agree.

The bench notes comprise notations regarding Stephenson's examination of the projectiles and shell casings from the 810 Orchard Street shooting and his examination of the test fired projectiles and shell casings from the Browning nine millimeter handgun recovered from the subsequent shooting at Townsend Street. The suppressed bench notes from the 810 Orchard Street shooting contain no drawings or illustrations of the primer breech face marks on the cartridge casings on which Stephenson based his identification of the nine millimeter handgun as the source of the fired casings. The bench notes also fail to contain any meaningful description of the breech face marks. Stephenson admitted at the consolidated hearing that he did not describe in writing what it was about the breech face marks that supported his conclusion.

The same bench notes do reflect that Stephenson observed that all fifteen fired casings from the 810 Orchard Street shooting had "heavy chamber marks." His bench notes regarding the test fired cartridge casings from the Browning handgun make no mention of any chamber marks on those casings.

The bench notes could have been used by defense counsel at trial to attack Stephenson's conclusion that the Browning nine millimeter handgun recovered on Townsend Street was the murder weapon. Stephenson testified at trial that he identified individual marks on the primer

breech face of the recovered casings which he compared with the marks on the primer breech face of the test fired casings and found sufficient agreement to make an identification. Yet, he never described those distinctive marks in his bench notes or the ways in which the marks were similar. Counsel would have been able to contrast the detailed illustrations in Stephenson's bench notes of the five bullets recovered from 810 Orchard Street with the complete lack of any detail regarding the conclusive breech face marks on the cartridge casings. In addition, counsel could have sought to discredit Stephenson's conclusion by the absence of any observed chamber marks on the cartridges test fired from the handgun.[21]

I

GRC Database Queries

Stephenson testified at the consolidated hearing on the petitions that during his investigation he queried the General Rifling Characteristics database (GRC) compiled by the FBI to determine the type of handgun which could have fired the projectiles found at 810 Orchard Street.[22] The GRC database is a non exhaustive database of firearms containing the class characteristics, the rifling pattern and the diameters of the individual lands and grooves of the barrels of numerous firearms. Using these parameters, a firearm examiner can search through the database of known rifling data and narrow the search for the unknown firearm. The lands and grooves of the barrel leave impressions on the projectile as it is fired from the gun. An examiner measures the lands and grooves of projectiles recovered at the scene of a shooting, inputs this information into the GRC database and receives a listing of the firearms contained in the

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[21]Stephenson acknowledged at the consolidated hearing that he had not observed any damage to the chamber of the nine millimeter handgun and that any subsequent damage to its barrel would not have affected any chamber marks produced by the firearm. Stephenson did testify at the hearing that the absence of chamber marks could possibly be explained by a cleaning of the gun's chamber in the four days between shootings.

[22]The state does not dispute that it failed to disclose the GRC database queries at trial.

database which matches the inputted information.

Stephenson testified at the consolidated hearing that he queried the GRC database three times prior to the recovery of the Browning handgun on Townsend Street. He took measurements of the land and groove markings of the projectiles fired at 810 Orchard Street. In accordance with the practice at the time, he used a range for the land and groove measurements in his queries. None of his queries yielded a single Browning firearm in response. After the Browning Hi-Power nine millimeter firearm was found on Townsend Street, Stephenson queried the GRC database again. This time he asked the database to provide the land and groove measurements for all Browning firearms in the database. The results of that query listed the measurements for sixty-six firearms manufactured by Browning. No Browning firearm matched the measurements documented by Stephenson in connection with the projectiles located at 810 Orchard Street. One Browning firearm came close to those measurements. The failure of the first three queries by Stephenson to yield a Browning firearm and the inexact result of the fourth query of all Browning manufactured firearms contained in the database would be useful during cross examination in challenging Stephenson's conclusion that the Browning firearm connected to the petitioner was the murder weapon.

J

February 17, 1994 Report by Detective Ponteau

The state did not disclose to the petitioner prior to his trial a police report prepared by Detective James Ponteau summarizing an apparently unrecorded interview with Anthony Stevenson that occurred on February 16, 1994. The statements attributed to Stevenson in the police report contradict testimony provided by Stevenson at the petitioner's murder trial.

During the trial, Stevenson testified that the petitioner handed him the nine millimeter firearm while they were seated in petitioner's motor vehicle on Townsend Street. Stevenson told the police on February 16 that the petitioner gave him the handgun at 143 Henry Street prior to

traveling to Townsend Street.

Stevenson testified at trial that the petitioner scraped the inside of the barrel of the firearm with a screwdriver when they were together on Townsend Street. According to the police report, Stevenson told the police that the scraping occurred in a parking lot at 660 Winchester Avenue.

K

Remaining Items of Suppressed Evidence

The petitioner contends that additional items of evidence were suppressed and are material. I have reviewed each of those items and I do not find any to be material. A few warrant further discussion.

The petitioner emphasizes in his brief the importance of a February 11, 1994 police report of Detective Robert Benson in which he notes that the police matched Brantley's fingerprint to a latent print located on the side of an ammunition box found on the curb in front of a church near 810 Orchard Street. The petitioner argues that this evidence provides a direct physical link between Brantley and the crime scene. The fingerprint evidence is insignificant because defense counsel knew prior to trial that the ammunition box belonged to Brantley. Prior to trial, defense counsel received a copy of the transcribed statement that Brantley gave to the police on February 5, 1994. In that statement, Brantley admitted that he had gone to 810 Orchard Street on February 2, 1994 to retrieve ammunition which he had left there. Brantley disclosed that he picked up an ammunition box containing 40 caliber bullets at 810 Orchard Street and when he got outside of 810 Orchard Street he took the bullets out of the box and threw the ammunition box on the ground by the church. Defense counsel possessed information that tied Brantley to the ammunition box but chose not to use it at trial. See also *Carmon v. Commissioner of Correction*, 178 Conn. App. 356, 365 (2017) in which the court rejected the petitioner's claim in a prior habeas petition that the state's failure to disclose the subject fingerprint report was material pursuant to *Brady*.

The petitioner contends that certain information regarding Raymond Jones' prior involvement in crimes and his past cooperation with the police was suppressed and is material. Specifically, the petitioner points to information that Jones participated in the homicide of Frank Martin and cooperated in the police investigation of the homicide in 1991 and to information that Jones was not arrested for his criminal conduct in having sexual intercourse with a minor in 1992. I do not find this undisclosed information to be material as defense counsel had ample opportunity at trial to establish Jones' self interest in cooperating with the state as well as the police and counsel took advantage of that opportunity.[23] During the trial, Jones was arrested on a material witness warrant. At his arrest, Jones was found in possession of narcotics and a handgun. He was charged with multiple crimes as a result and those charges were pending during his testimony at trial. At the very outset of the cross examination of Jones by defense counsel, Jones admitted that he was arrested the previous Friday and that he had in his possession narcotics and a loaded 40 caliber semiautomatic handgun. Defense counsel brought out before the jury that Jones was charged with six separate criminal offenses ranging from possession of narcotics with intent to sell, interfering with a police officer and criminal possession of a firearm and that he faced more than forty years in prison. The jury also heard that Jones was a convicted felon. Any additional information regarding Jones' prior criminal acts or cooperation with the police would add little.

The state failed to disclose at trial that Timothy McDonald had misdemeanor assault and failure to appear charges pending at the time that he testified. The state did disclose and the jury heard that the state gave McDonald immunity from prosecution for his possession and transfer of the Browning firearm to the petitioner. The jury knew that McDonald possessed a potent reason

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[23]Defense counsel was also aware that Jones had previously cooperated with a police investigation of a homicide as Jones disclosed that fact during cross examination at the hearing to suppress Jones' identification of the petitioner. Furthermore, Jones admitted to his cooperation with the police in that case during cross-examination by defense counsel at trial.

to curry favor with the state during his testimony, more so than the presence of pending misdemeanor charges.

The petitioner contends that information regarding police officer Peter Carusone's involvement in this case was suppressed and was sufficiently important to be material. I am not persuaded.

Carusone, who was a New Haven police officer at the time of the shooting, was a neighbor of Stanley. On the night of February 3, 1994, he drove Stanley to the police station so that she could be interviewed by the investigating detectives. He also accompanied Stanley and Detective DiLullo to the courthouse on February 22, 1994 when Stanley identified the petitioner. The petitioner asserts that Stanley was a confidential informant employed by Carusone which information was not disclosed to the petitioner prior to trial. Carusone testified at the consolidated hearing regarding these petitions and stated that Stanley was not his confidential informant. I credit his testimony.

The petitioner also asserts that Carusone testified at the consolidated hearing that Stanley identified the petitioner by looking through a window of the courtroom.[24] I do not agree. Carusone did not testify that Stanley's identification of the petitioner was performed while she was looking through a window into the courtroom. He merely stated that when he saw her she was looking through a door window into the courtroom.[25]

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[24]The petitioner further asserts that Causone's testimony that Stanley's identification occurred in courtroom A, rather than in courtroom B as she testified at trial, is significant. I do not agree.

[25]Carusone's testimony was as follows:
Question: So you went to the G.A. with her, right?
Answer: Yes.
Question: And Ms. Stanley looked through a window into Courtroom A; correct?
Answer: I believe so.
Question: All right. And that is the-- through the door on the side of Courtroom A leading to the Prosecutor's Office, right?

IV

NEWLY DISCOVERED FORENSIC EVIDENCE

A

Firearm and Toolmark Evidence

The petitioner asserts that newly discovered forensic evidence regarding firearm and toolmark analysis vitiates the expert testimony presented by the state at his trial as to the source of the shell casings found at the scene of the crime. The petitioner asserts that the science has changed in at least two respects: first, that the effect of subclass characteristics on firearm and toolmark analysis was not known at the time of trial, and, second, that a consensus has since emerged that the methods underpinning firearm and toolmark identification lack foundational validity. The state contends that the petitioner has not established that any changes in the science of firearm and toolmark analysis would probably result in a different verdict at a new trial.

Firearm and toolmark analysis involves the study of marks made by tools, such as the marks a gun imprints on projectiles or shell casings when the firearm is discharged. "Firearm and toolmark analysis rests on the twin assumptions that the surface contours of every gun are unique and that, every time that gun is fired, some of those unique markings, along with markings caused by the act of firing itself, are transferred to the shell casing and bullet, leaving distinctive patterns on each of them." *United States v. Glynn*, 578 F. Supp. 2d 567, 572 (S.D.N.Y. 2008). A firearm examiner presented with a handgun and fired projectile or cartridge case will test fire the weapon using the same type of ammunition. The examiner will look at the test-fired sample and the recovered item simultaneously using a comparison microscope. The comparison microscope allows the examiner to compare the markings left on the two items. In theory, if the test projectile or cartridge casing and recovered projectile or cartridge casing were

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Answer: Yes.

fired from the same gun, the examiner would see sufficient patterns of matching marks.

James Stephenson, the state's firearm and toolmark expert at trial, testified at the hearing on the subject petitions. At the original trial, Stephenson based his opinion that the petitioner's Browning 9 millimeter firearm was the source of the fired cartridge casings found at 810 Orchard Street on a comparison of the class characteristics[26] and individual characteristics[27] of the found casings with the test fired casings from the firearm. He admitted at the consolidated hearing that there have been changes in the science of firearm and toolmark identification since his trial testimony in 1995. Specifically, new information has been developed concerning the subclass characteristics of firearms. Subclass characteristics are markings on the firearm resulting from the manufacturing process of the same production lot. National Research Council of the National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" (National Academies Press 2009) at 152. Stephenson testified that it is now understood that subclass characteristics are a potential source of false identifications. See *United States v. Monteiro*, 407 F. Supp. 2d 351, 371 (D. Mass. 2006) (one critical problem with firearm and toolmark analysis is the lack of objective standards for deciding whether a particular mark is a subclass or individual characteristic). An examiner could erroneously attribute a microscopic marking on a bullet or casing to be individual to a specific firearm when in fact it is attributable to a manufactured lot of firearms. As a result, a firearm examiner needs to be careful to distinguish between individual and subclass characteristics. The examiner would need to be familiar with the manufacturing process of the weapon in order to perform the analysis, a

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[26]Class characteristics are general characteristics that separate a group of objects from a universe of diverse objects and are determined prior to manufacture.

[27]Individual characteristics refer to those "fine microscopic markings and textures that are said to be unique to an individual tool or firearm." National Research Council of the National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" (National Academies Press 2009) (NRC Forensic Science Report) at 152.

familiarity that Stephenson acknowledged that he lacked. Stephenson did not make a differentiation between individual and subclass characteristics in his examination of the fired casings. Stephenson admitted that, based on the new understanding of subclass characteristics, his opinion that petitioner's Browning firearm was the source of the 810 Orchard Street shell casings would no longer be valid today.

William Tobin, a research metallurgist and a former member of the forensic metallurgy operations at the FBI Laboratory, also testified at the consolidated hearing on the petitions. Tobin testified that, since the petitioner's trial, a consensus has emerged within the relevant scientific community that the practice of opining that a particular projectile or casing was fired by a particular firearm lacks foundational validity, both scientifically and experientially.[28] Tobin testified that the science of firearm and toolmark analysis rests on four assumptions: (1) uniqueness, that is, that each firearm contains unique marks because the tool or machine that manufactures the component is slightly altered each time a new component is manufactured, resulting in unique toolmarks on each component, (2) discernable uniqueness, that is, the ability to identify the uniqueness of each component, (3) repeatability, that is, that individual characteristics repeat over time and (4) probative value, that is, that the ultimate findings of the examiner have probative value.

Tobin opined that it has not been scientifically established that firearm and toolmark examiners are able to identify the uniqueness, if it exists, of projectiles and cartridge casings. He testified that there is a lack of adequate validation studies verifying firearm and toolmark identification because the validation studies which have been done are flawed for a variety of reasons. A primary reason is that the studies do not mirror case work. They use a closed set of

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[28] "'Foundational validity' means the scientific standard corresponding to the legal standard of evidence being based on 'reliable principles and methods.'" President's Council of Advisors on Science and Technology, "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods" (2016) ("PCAST Report") at 43.

samples which allows the examiner to increase the probability of a correct match by using differences amongst the samples to eliminate samples that do not match the known sample.[29] The validation tests are also not test blind. The examiner knows he is being tested and is able to use nonconclusive answers to inappropriately raise his test score.[30]

Tobin also testified that the twin assumptions of uniqueness and repeatedly are contradictory. Uniqueness assumes that the individual characteristics of a component formed during the manufacturing process are volatile, that is, that the characteristics transferred during the forming process are changing so rapidly that each component coming off the production line is unique, while repeatability assumes non-volatility, that is, that bullets or cartridges fired from a specific firearm in the past can be associated with that firearm today because there is no change in the component.

Tobin cited three studies that support his conclusion: (1) National Research Council of the National Academy of Sciences, "Ballistic Imaging" (National Academies Press 2008) (NRC Ballistic Imaging Report), (2) National Research Council of the National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" (National Academies Press 2009) (NRC Forensic Science Report) and (3) President's Council of Advisors on Science and Technology, "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods" (2016) (PCAST Report).

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[29]The PCAST Report similarly found fault with closed set studies. "This 'closed-set' design is simpler than the problem encountered in casework, because the correct answer is always present in the collection. In such studies, examiners can perform perfectly if they simply match each bullet to the standard that is closest. By contrast, in an open-set study (as in casework), there is no guarantee that the correct source is present—and thus no guarantee that the closest match is correct. Closed-set comparisons would thus be expected to underestimate the false positive rate." PCAST Report at 108.

[30]See PCAST Report, at 58 (proficiency testing should ideally be conducted in a "test-blind" manner - that is, with samples inserted into the flow of casework such that examiners do not know that they are being tested).

While the authors of the NRC Ballistic Imaging Report stressed that their study was not "an assessment of the validity of firearms identification as a discipline," id., 18, the committee found that "[t]he validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated," id., 3. "A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness." Id.

According to the NRC Forensic Science Report, other than nuclear DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. " Id., 8. The NRC Forensic Science Report noted that "the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Id., 153-154.

The PCAST Report stated that "Although firearms analysis has been used for many decades, only relatively recently has its validity been subjected to meaningful empirical testing. Over the past 15 years, the field has undertaken a number of studies that have sought to estimate the accuracy of examiners' conclusions. While the results demonstrate that examiners can under some circumstances identify the source of fired ammunition, many of the studies were not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework." Id., 106. The PCAST Report concluded that, with respect to firearms analysis, "firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility." Id., 112.

Tobin opined that there is only one scientifically and forensically defensible opinion that can be rendered by an examiner and that is that a specific firearm could not be eliminated as the

firing platform. According to Tobin, a firearm examiner cannot appropriately opine with certainty, as Stephenson did, that a particular cartridge casing was fired from a specific firearm. See PCAST Report, at 54 ("From the standpoint of scientific validity, experts should never be permitted to state or imply in court that they can draw conclusions with certainty or near-certainty (such as 'zero,' 'vanishingly small,' 'essentially zero,' 'negligible,' 'minimal,' or 'microscopic' error rates; '100 percent certainty'; or 'to a reasonable degree of scientific certainty;' or identification 'to the exclusion of all other sources.'")

A jury could reasonably credit the expert testimony of Tobin that the practice of firearm experts of opining that particular casings were fired by a particular firearm lacks foundational validity and, by extension, reasonably discredit Stephenson's opinion that the recovered Browning firearm was the source of the 810 Orchard Street fired shell casings. See *Lapointe v. Commissioner of Correction*, 316 Conn. 225, 293-294 (2013) (the issue for the court is whether a jury reasonably could have credited the testimony of the petitioner's expert witness).[31]

B

Eyewitness Identification

The petitioner asserts that advances in the science of eyewitness identification undermine the identifications of the petitioner made by Jaime Stanley and Raymond Jones at his trial. In its brief, the state does not contest that the petitioner has presented forensic evidence regarding eyewitness identifications that is newly discovered.[32] The state contends that the petitioner has

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[31]Though the court in *Lapointe* was addressing a claim of suppressed evidence in violation of *Brady*, its method of addressing the credibility of expert witnesses is applicable here as the standard for deciding *Brady* claims is the same as the standard for determining claims of newly discovered forensic evidence under Conn. Gen. Statutes §52-582(a), that is, whether there is a reasonable likelihood of a different outcome at trial.

[32]The state did claim in its motion to dismiss the petition for a new trial that eyewitness identification evidence does not qualify as forensic scientific evidence. In denying the state's motion to dismiss, I concluded that eyewitness identification met the statutory definition of

failed to establish that the newly discovered eyewitness identification evidence would probably result in a different verdict at trial.

As noted previously, Nancy Franklin testified as an expert witness on eyewitness identifications at the consolidated hearing on the petitions. She testified that the science of eyewitness identifications, like any science, progresses incrementally; ultimately reaching consensus on various issues. See *State v. Guilbert*, 306 Conn. 218, 258 (2012) "Scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was three decades ago, and it will likely be quite different thirty years from now. (quotation marks and citations omitted).

Franklin testified that event stress is essentially a negative arousal, typically fear or a sense of stress, that a witness experiences at the time of observing a crime. Research has shown that when an individual is stressed their cognitive resources tend to be redirected toward survival processing, such as searching for escape routes and ways to defend one's self, not toward processing details such as another's face. Consequently, a person's face seen under stressful circumstances is less likely to be correctly identified and more likely to lead to misidentification. Franklin further testified that prior to 1995 there was not a consensus among experts in the field that very high levels of stress impair the accuracy of eyewitness testimony. See S. Kassin et al., "The 'General Acceptance' of Psychological Research on Eyewitness Testimony; A Survey of the Experts," 44 American Psychologist No. 8, 1089-1098 (1989) (A Survey of Experts). In addition, a subsequent study showed that a significant segment of the lay population erroneously believed that they will never forget a face they saw in a high stress situation. Prior to 1995, it was also not generally understood by experts that event stress results in higher rates of false identifications.

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forensic scientific evidence set forth in C.G.S §52-582(d). See *Carmon v. State*, Superior Court, judicial district of New Haven, Docket No. CV206107902 (Aug. 22, 2022) 2022 WL 3593977.

Similarly, Franklin testified that, prior to the petitioner's trial, there was not general acceptance among experts that a witness' focus on a weapon can impair the reliability of an identification. See A Survey of Experts (1989) at 1095-1096. She testified that if a witness's attention is drawn even somewhat to the weapon the witness is not able to form an adequate memory of the perpetrator's face. See *State v. Henderson*, 208 N.J. 208, 262-263 (2011) (when a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit) and *State v. Guilbert*, 306 Conn. 218, 237–38 (2012) ("Courts across the country now accept that . . . the reliability of an identification can be diminished by a witness' focus on a weapon [and] . . . high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events . . . .") Franklin further testified that the presence of a weapon leads to an increased rate of a false identification.

The state argues that neither event stress nor weapon focus is a factor in the identifications made by Stanley or Jones as there is no evidence that the gun was pointed in their direction and Stanley testified at trial that she was looking at the shooter's face, not at his weapon. I do not agree. It cannot be persuasively argued that witnessing, from a short distance of four to six feet, a gunman fire multiple shots into an apartment window is not a highly stressful event. In fact, Stanley testified at trial that she could not believe what she was seeing and she was in shock. She further testified that she was concerned that the gunman was going to shoot her. Jones testified that both he and Stanley ducked down in the car when the shots were fired and that he believed that the shooter was firing at him. Regarding the issue of weapon focus, both Stanley and Jones testified that they saw the firearm in the gunman's hands and they witnessed flashes from the muzzle. Although Stanley testified that she was looking at the shooter's face, not the gun, expert testimony that the presence of a weapon impairs the accuracy of an identification remains relevant and material.

V

CUMULATIVE IMPACT OF NEW AND SUPPRESSED EVIDENCE

Individually, none of the new items of evidence is a game changer. Collectively, they combine to likely alter the outcome.[33] See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the materiality of suppressed evidence is to be considered collectively, not item by item). Had the suppressed evidence and the new forensic evidence been available to the defense, it is reasonably probable, and likely, that the result of the trial would have been different. That evidence puts the entire case against the petitioner in such a different light as to undermine confidence in the verdict.

The state's case against Adam Carmon in 1995 fundamentally rested on three pillars, which were the only direct evidence supporting the conclusion that the petitioner was the shooter on February 3, 1994: (1) ballistic evidence that a firearm connected to him was the murder weapon, (2) the identification of the petitioner as the shooter by Jaime Stanley and (3) the identification of the petitioner as the shooter by Raymond Jones. Each of these pillars has been splintered by the persuasive force of the new evidence.

The jury heard evidence that the petitioner possessed the murder weapon prior to and shortly after the shooting at 810 Orchard Street. It is impossible to overstate the importance of such evidence. The firearm was the only physical evidence tying the petitioner to the homicide. See *State v. Raynor*, 337 Conn. 527, 544-545 (2020) (the testimony of the firearm expert was important because it was the only objective evidence connecting casings found at the murder scene with the recovered firearm). It was unquestionably powerful evidence of guilt. It was admittedly fallacious. Stephenson, the state's firearm expert, conceded that, since he failed to

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[33]Although the petitioner was not required to prove that the newly discovered forensic evidence is likely to produce a different result in a new trial, see Conn. Gen. Statutes §52-582(a), he has met that standard as well.

differentiate between individual and subclass characteristics in his examination of the fired cartridges, his opinion that petitioner's Browning firearm was the source of the 810 Orchard Street shell casings is no longer valid. A jury could also reasonably credit the expert testimony of Tobin that an opinion that particular casings were fired by a particular firearm currently lacks foundational validity.

As to the eyewitness identification evidence, there exists a very substantial likelihood that both Stanley and Jones misidentified the petitioner as the individual who shot into the window at 810 Orchard Street.[34] While both Stanley and Jones testified at trial that they were able to clearly see the assailant's face, they also admitted that they only observed his face for a mere three seconds. Stanley also testified that the lighting in the area was poor and the suppressed prosecutor's notes disclosed that she had "poor close vision."

Franklin testified that the presence of a weapon and high stress at the time of the observation of a person's face diminishes the reliability of a subsequent identification and are more likely to result in a false identification. Our Supreme Court has likewise recognized that weapon focus and high stress situations can impair the reliability of an identification.[35] *State v. Guilbert*, supra, 306 Conn. 253-254. As noted previously, Stanley and Jones gave testimony

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[34]The likelihood of a misidentification is buttressed by the our courts' increased understanding of the phenomenon of false identifications. See *State v. Guilbert*, supra, 306 Conn. 249–50 (mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions). Cf. *Lapointe v. Commissioner of Correction*, 316 Conn. 225, 293-294 (2015) ("One cannot evaluate the strength of the state's evidence against the petitioner in the present case incognizant of the fact that our awareness of the phenomenon of false confessions has increased vastly in the nearly twenty-five years since the petitioner's conviction.")

[35]The court in *Guilbert* recognized that the findings of social science research concerning eyewitness identifications are largely unfamiliar to the average person, and many of the findings are counterintuitive. *State v. Guilbert*, supra, 306 Conn. 239. The jury was unaware of these findings as the existing case law prohibited the petitioner from presenting expert testimony on eyewitness identification at his trial. See *State v. Kemp*, 199 Conn. 473, 477 (1986) overruled by *State v. Guilbert*, supra, 306 Conn. 220–21.

indicating that the shooting was a stressful event, e.g., Stanley stated she was in shock, she feared that she might be shot and they both ducked down in the motor vehicle. They both also testified that they observed the firearm in the gunman's hands and saw flashes from the muzzle.

Both Stanley and Jones testified at trial that they were certain that the petitioner was the shooter. We know from recent social science research that there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy. *State v. Guilbert*, supra, 306 Conn. 237. See also *State v. Harris*, 330 Conn. 91, 115 (2018) (as a matter of state constitutional law, courts should use the factors identified in *State v. Guilbert* in determining the reliability of an identification).

We also know that (1) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (2) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure and (3) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. *State v. Guilbert*, supra, 306 Conn. 238-239. Stanley and Jones did not identify the petitioner until weeks after the shooting. Stanley made her identification at the petitioner's arraignment on February 22, almost three weeks after the incident, and Jones made his identification at a photo array on February 16, almost two weeks later. The identification procedure used during both identifications was not double-blind. The detective who administered the photo array to Jones and the detective who took Stanley to the arraignment knew that the petitioner was the prime suspect in the shooting.[36] Both Stanley and

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[36]Franklin testified that it is clear from the social science research that administrators of an identification who know who the suspect is can impact the response given by a witness, such as by inadvertently providing clues or unintentionally affecting the selection. See *State v. Henderson*, 208 N.J. 208, 248 (2011) (research has shown that lineup administrators familiar with the suspect may leak that information by consciously or unconsciously communicating to witnesses which lineup member is the suspect).

Jones testified at trial that they may have seen the person around the neighborhood but did not know him. Defense counsel could reasonably argue that the witnesses were confusing their previous sightings of the petitioner with their identification of him as the gunman. Finally, courts have recognized that the fact that a person is wearing a hat or a hood may diminish a witness' ability to identify that person.[37] Id., n. 20 at 239. Stanley testified that the gunman was wearing a hat and Jones testified that he was wearing a hood.

The reliability of Stanley's identification of the petitioner is further compromised by the excessively suggestive nature of the procedure. The petitioner was being arraigned in handcuffs on criminal charges. He was surrounded by "duds" at the arraignment. While the state is not required to ensure that the individuals in the array look exactly like the petitioner, the array must not single out the petitioner from the others. *State v. Harris*, 330 Conn. 91, 103 (2018). A review of the mugshots of the arraignees and the analysis performed by Franklin establish that the state failed to meet its obligation. The petitioner stood out amongst the other arraignees and, according to Franklin, that fact increased the likelihood of a false identification. See *State v. Harris*, supra, 330 Conn. 129-130 (because none of the custodial arraignees was sufficiently similar to the petitioner in height, weight and age, the identification procedure was impermissibly suggestive).

Stanley's testimony regarding her identification of the petitioner could also be significantly impeached by evidence that was suppressed at trial. She testified that she was unwilling to make an identification from a photograph because it was too important a matter. She wanted to see the individual in person. That testimony is contradicted by the notations in the suppressed February 17, 1994 police report authored by Detective DiLullo that Stanley could not

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[37]Franklin testified at the consolidated hearing that a head covering, such as a hat, obscures the hair and hairline which is very important information that people tend to rely on when trying to identify strangers and results in increased rates of false identifications.

positively state that anyone in the photographs was the person she observed firing into the window of 810 Orchard Street on the evening of February 3, 1994. It is also contradicted by the disclosure of the 18 Black male photos as she was willing and able to choose the photo of David Myles as a look-alike to the shooter. Those photos further tarnish her identification of the petitioner as she was shown the petitioner's photo on one and probably two occasions,[38] failed to select him as a "look-alike," and selected a photo of a different individual instead. In fact, she failed to identify the petitioner's photo at all.[39]

It is highly unlikely that the jury would have convicted the petitioner based solely on the testimony of Jones, who was facing serious felony charges having been found in possession of a firearm and narcotics on the day he testified at trial. Evidence was also presented at trial that Jones was a drug dealer.

The jury could reasonably conclude that the police investigation of the shooting at 810 Orchard Street was fundamentally flawed. See *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (materiality can be found in an attack on the thoroughness and even the good faith of the police investigation). The invalid ballistics report was the keystone of the investigation. Once Stephenson concluded that the handgun previously possessed by the petitioner was used in the shooting, the police unquestionably abandoned the leads implicating Brantley and Little and focused on the petitioner.

A jury could also reasonably find that the police actively took steps to conform the

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[38]Franklin testified about the detrimental impact of "exposure effects" which refer to instances by police of exposing a suspect to a witness. Such exposures substantially increases the risk of misidentification.

[39]Franklin testified that instances when an eyewitness, having been shown a photgraph of the suspect, fails to select him as the perpetrator and further selects a photograph of a different individual as a look-alike to the perpetrator are diagnostic of innocence; in other words, that the suspect is not the perpetrator.

evidence to their new found conclusion. Michael Sweeney, the sergeant supervising the investigation, testified at the hearing on the petitions that there was significant external pressure on the police to solve the case due to its horrid nature. The day after Stephenson issued his ballistic report on February 14, Detectives DiNello and Burton reinterviewed Stevenson. They were addressing a problem with their recent determination that the petitioner was the shooter. Although Stephenson concluded that the petitioner's Browning 9 millimeter firearm was the source of the fired cartridge casings from 810 Orchard Street, Stephenson was unable to make a conclusive comparison of the fired bullets recovered from 810 Orchard Street to the test-fired bullets from the petitioner's firearm because the interior barrel of the firearm had been altered by some type of implement having been used to gouge and mark the barrel interior. During the February 15 interview, Detective Dease asked Stevenson if he had "told me everything" in his first statement on February 10. Stevenson responded that he had not. Dease specifically asked Stevenson what the petitioner was doing with the pistol while they were in the car together. Stevenson responded that the petitioner was scraping the inside of the barrel with a screwdriver. At trial, Stevenson gave conflicting testimony. At one point, he denied that he was fed the answer regarding the screwdriver. At another point, he agreed that he was fed the answer.[40] The jury could reasonably infer that Stevenson's statement regarding the screwdriver was solicited by the detective. Stevenson possessed a strong motive to tell the detectives what they wanted to hear as he was facing serious felony charges for his involvement in the botched robbery on Townsend Street and he was the individual found in possession of the "murder weapon."[41]

On February 18, the police interviewed Brantley for a fourth time. The clear purpose of

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[40]Sweeney testified at the consolidated hearing that, typically, the recorded statements of witnesses were preceded by unrecorded interviews with the detectives. Consequently, we do not know what was said by the detectives to Stevenson prior to the recording of his statement.

[41]Stevenson testified at trial that at one point the detectives told him that he was "going down" for the murder.

the reinterview was to explain the contradiction between Stephenson's conclusion that the petitioner's firearm was the murder weapon and Brantley's statement that he, Little and Bates were involved and that Bates was the shooter. Brantley testified at trial that the detectives came to his house and told him that they had found the murderer. He further testified that the detectives told him that they had made a mistake when they previously thought that he was involved in the shooting and they wanted him "to correct the statements I gave before." The transcript of Brantley's statement is replete with leading questions by the detective with Brantley repeatedly answering simply "yes" or "no" to the questions. In his statement, Brantley disavows his previous inculpatory statements. The jury could reasonably find that the police solicited Brantley to recant his previous confession.

Detectives DiLullo and DiNello testified erroneously at trial that Stanley selected the petitioner's photo as a "look-alike" to the shooter. No police report documented that Stanley selected the petitioner's photo as being similar to the shooter.[42] The suppressed 18 Black male photos reveal that a photo of David Myles, not the petitioner, was selected as a photo of a person who looked similar to the shooter.

The state at trial provided no evidence of the petitioner's motive. "Evidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant." *State v. Harris*, 182 Conn. 220, 224 (1980). The jury was given no reason as to why the petitioner would be motivated to fire fifteen shots from a handgun into the front window of the first floor apartment at 810 Orchard Street. Conversely, the jury heard that Arthur Brantley, by his own admission, did have a motive. He was angry about the events that occurred earlier that day at 810 Orchard Street and was seeking revenge.

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[42]Sweeney testified at the hearing on the petitions that it would have been important to document in a police report any selection of the petitioner's photograph as a look-alike by Stanley.

Although motive is not an element of an offense, the absence of evidence of motive may tend to raise a reasonable doubt. *State v. Pinnock*, 220 Conn. 765, 792 (1992).

Suppressed exculpatory evidence supports a third-party culpability claim that Brantley and Little were responsible for the crimes for which the petitioner stands convicted. The state failed to disclose information to defense counsel that Brantley voluntarily went to the police station, motivated by a desire to tell the truth, when he implicated himself and Little. It also suppressed a statement by Little's alibi witness which contradicts Little's claim that Brantley did not call him on the night of the shooting seeking a firearm. Counsel's task, of course, would not have been to convince the jury that a third party committed the murder. He needed only to argue that Brantley's statements regarding the culpability of himself, Little and Bates create a reasonable doubt in the minds of the jury as to the petitioner's guilt. See *State v. Arroyo*, 284 Conn. 597, 609–10 (2007) (evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense).

The new evidence together with the evidence admitted at trial establish the following. The shooter's head was covered by a hat or a hoodie. Jaime Stanley and Raymond Jones saw the shooter's face for three seconds at night in a poorly lit area. Stanley admittedly had poor close vision. Stanley stated she was in shock and she feared that she might be shot. Jones stated that he believed that the shooter was firing at him. They did not identify the petitioner as the shooter until weeks later, through non-blind procedures, after the police had concluded that he was the shooter. Neither Stanley nor Jones personally knew the petitioner. Stanley failed to identify the petitioner after viewing one and probably two separate photos of him. The jury was erroneously told that Stanley selected the petitioner's photo as a "look-alike" to the shooter. The jury was not told that she selected a photo of a different individual as a look-alike. Stanley ultimately identified the petitioner at a patently suggestive and highly biased court arraignment. The

prosecutor falsely represented to the trial court and counsel that Jones had no criminal charges pending at the time that he made his initial identification of the petitioner. At trial, Jones possessed a strong interest in conforming his identification to the police theory of the case because he was facing serious felony charges. The jury was told that the petitioner was in possession of the murder weapon based on ballistics evidence, a scientific conclusion that would not be valid today. There is now no physical evidence tying the petitioner to the crime. There is no evidence that the petitioner had a motive to fire into the window at 810 Orchard Street. There is no evidence that he even knew the victims. Another individual, Arthur Brantley, did have a motive. Brantley admittedly sought revenge for a fight at the residence the afternoon of the shooting and was seeking a firearm to exact that revenge. He confessed to his involvement in the shooting and named another individual as the shooter. The police abandoned their investigation of Brantley and his compatriot Anthony Little when their firearm expert, James Stephenson, invalidly concluded that the petitioner's firearm was the murder weapon. Brantley later retracted his confession after the police encouraged the retraction because it did not fit their new found conclusion that the petitioner was the shooter.

How could anyone have confidence in a verdict of guilty in a case such as this?

VI

CLAIM OF ACTUAL INNOCENCE

The petitioner claims that he is actually innocent of the crimes for which he has been convicted. He contends that his claim is supported by (1) the confession by Brantley about his involvement in the shooting, (2) Little's refusal to answer questions concerning this matter based on his invocation of his fifth amendment privilege, and (3) newly discovered forensic science evidence regarding firearm and toolmark science and eyewitness identifications. I am not persuaded.

Our Supreme Court in *Miller v. Commissioner of Correction*, 242 Conn. 745 (1997)

established a two-part test for obtaining relief based on a free standing claim of actual innocence. "First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty." Id., 791-792. The court further emphasized that the clear and convincing standard is "a very demanding standard" and "should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." Id., 795. The court underscored that "truly persuasive demonstrations of actual innocence after conviction in a fair trial have been, and are likely to remain, extremely rare." (Internal quotation marks omitted.) Id., 805–806. "[A]ctual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime." *Gould v. Commissioner of Correction*, 301 Conn. 544, 561 (2011).

The petitioner has not met that exceedingly high standard here. Brantley did not confess that he fired into the window at 810 Orchard Street on February 3, 1994. He claimed that an individual named Demetrius Bates did so. Brantley later recanted his statement and asserted that Bates was a fictitious person. Petitioner presented no other evidence, direct or circumstantial, that Bates committed the shooting.

Little asserted, at the hearing on the petitions, his fifth amendment right not to incriminate himself and declined to answer questions concerning his involvement in the events surrounding the shooting at 810 Orchard Street on February 3, 1994. The petitioner asks this court to draw an adverse inference from Little's invocation of this fifth amendment right against self-incrimination. Even if I were to draw such an inference it is not evidence of the petitioner's actual innocence. "To sustain the privilege, it need only be evident from the implications of the

question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Martin v. Flanagan*, 259 Conn. 487, 495 (2002). Little need only have had some tangential, but injurious, connection to the crimes to validly assert the privilege. One cannot infer from his assertion of the privilege that Little was the shooter.

The newly discovered forensic science evidence does not prove the petitioner's actual innocence. It substantially undermines the ballistic and eyewitness evidence presented at the petitioner's trial. It does not affirmatively prove his innocence.

As this court has determined, the petitioner has established, based on a consideration of the suppressed and new forensic evidence, that it is reasonably probable that the verdict would be different. He has not shown by clear and convincing evidence that he is actually innocent of the crimes of which he has been convicted. "Although the postconviction evidence the petitioner presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove his innocence. The petitioner has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of his guilt." (Internal quotation marks and citations omitted.) *Gould v. Commissioner of Correction*, supra, 301 Conn. 561.

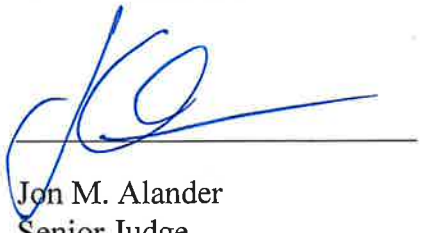
VII

CONCLUSION

It is axiomatic that the state must prove beyond a reasonable doubt that a defendant is guilty of the crimes with which he has been charged. Phrased simply, a jury must be firmly convinced of a defendant's guilt. *State v. Jackson*, 283 Conn. 111 (2007). It is unlikely that a jury of twelve would be firmly convinced, after hearing the new evidence in conjunction with the prior evidence, that the petitioner was responsible for the tragic shooting that killed Danielle Taft

and permanently paralyzed Charlene Troutman on the evening of February 3, 1994 at 810 Orchard Street. Put differently, the suppressed evidence and the new forensic evidence places the entire case against the petitioner in such a different light as to undermine confidence in the verdict that the jury reached on April 7, 1995. Accordingly, the petition for a new trial and petition for a writ of habeas corpus filed by the petitioner are hereby granted.

BY THE COURT



Jon M. Alander
Senior Judge