PALMER, J., concurring. I fully agree with and join the majority's well reasoned opinion in which it concludes that the habeas court failed to apply the proper standard for assessing a claim of actual innocence under *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108 (1997). I further agree that this deficiency arises from the habeas court's exclusive reliance on recantations of testimony from the criminal trials of the petitioners, George M. Gould and Ronald Taylor. For the reasons that the majority persuasively advances, in order to establish their actual innocence, the petitioners were required to produce affirmative evidence that they did not commit the crimes of which they were convicted. I write separately simply to express my view regarding one avenue by which I believe the petitioners potentially could meet this burden upon retrial.

Inasmuch as habeas relief on the basis of actual innocence is reserved for a truly extraordinary case in which a clear miscarriage of justice is demonstrated; see *Summerville* v. *Warden*, 229 Conn. 397, 421–22, 641 A.2d 1356 (1994); the present cases reflect an unusual, indeed almost unprecedented, situation that raises the possibility that such a miscarriage may have occurred. We have before us two cases in which the habeas court found credible the recantations of the only state witnesses to link the petitioners to the crimes of which they were convicted, thus effectively negating the only evidence that supported their convictions. This evidentiary lacunae, in my view, raises the exceptional situation in which the petitioners should be permitted to provide affirmative proof of their innocence through their own testimony. If the petitioners can offer testimony that, in the view of a habeas court, constitutes clear and convincing proof of their innocence, I see no reason why, given the absence of any remaining credible evidence of their guilt,[1] the petitioners should not be deemed to have met their burden under *Miller*.[2]

As the majority properly observes, clear and convincing proof of actual innocence does not require a petitioner to establish that his or her guilt is a factual impossibility. See *Turner* v. *Commonwealth*, 56 Va. App. 391, 410 n.7, 694 S.E.2d 251 (2010) (rejecting proposition that only irrefutable scientific evidence such as DNA can be used to prove actual innocence), appeal granted, Docket No. 101457, 2011 Va. LEXIS 9 (Va. January 7, 2011). In *Miller*, this court was careful not "to cabin the particular type of evidence that must underlie the finding of innocence." *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 801. Indeed, consistent with the rejection of such categorical rules, this court previously held that the state properly established guilt

beyond a reasonable doubt solely on the basis of an *uncorroborated* statement given to the police by a witness who subsequently retracted the statement.[3] See *State* v. *Newsome*, 238 Conn. 588, 601, 611–12, 682 A.2d 972 (1996). If such uncorroborated hearsay evidence can suffice to meet the highest possible evidentiary standard, I see no reason why a habeas petitioner's highly credible denial of his or her participation in the crime, together with the highly credible recantation testimony of the critical state witness, could not satisfy the lesser, although undoubtedly stringent, standard of clear and convincing evidence.

I am mindful that, when a petitioner seeks to advance a claim of actual innocence, affirmative proof usually comes in the form of newly discovered eyewitnesses, third party alibis or exculpatory physical evidence, such as DNA. See, e.g., *Schlup* v. *Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (citing as reliable evidence in support of actual innocence "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence . . . that was not presented at trial"). Nonetheless, it seems clear that this court's application of the *Miller* test must not operate in such a way as to categorically bar relief for petitioners who have been able to negate all evidence of their guilt but, through sheer happenstance, have no ability to produce this particular kind of affirmative evidence of their innocence. Fundamental fairness dictates that a petitioner who is simply unlucky enough to have been alone or with his codefendant when the crime was committed and to have been implicated in a crime for which the perpetrator left no physical evidence should have some means available to demonstrate affirmatively his or her innocence short of proving the identity of the actual perpetrator. In such circumstances, to disallow a petitioner's testimony as self-serving would be to deprive the petitioner of an opportunity to prevail no matter how credible that testimony and the testimony of the recanting witness might be.

I also underscore, however, that the availability of such means would not in any way relieve the petitioner of meeting the high standard of proof set forth in *Miller*. As this court emphasized in that case, the clear and convincing standard is satisfied only "if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 794. To prove actual innocence by this standard in a factual scenario like the present one, a petitioner must be able to provide, in addition to evidence that effectively negates the state's case, highly persuasive testimony denying his or her involvement in the commission of the crime, testimony that withstands the rigors of cross-

examination. Cf. *People* v. *Wheeler-Whichard*, 25 Misc. 3d 690, 696, 884 N.Y.S.2d 304 (2009). The habeas court would be entitled to view such testimony with the same skepticism that it views recantations. See *Carpitcher* v. *Commonwealth*, 273 Va. 335, 346, 641 S.E.2d 486 (2007) ("recantation evidence . . . is widely viewed by courts with suspicion because of the obvious opportunities and temptations for fraud"); see also *Miller* v. *Commissioner of Correction*, supra, 795 ("the clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory" [internal quotation marks omitted]). For the very reasons why this court does not categorically bar recantation evidence, however, I would not foreclose the possibility of a petitioner proving actual innocence through his or her own testimony when the petitioner effectively has discredited the state's evidence of guilt.

[1] My analysis is predicated on the presumption that, for purposes of retrial, the recantation testimony proffered by the petitioners is deemed to be highly credible.

[2] Like the majority, I also would leave open the possibility that the petitioners could amend their habeas petitions to advance a claim that their convictions were predicated on perjured testimony in violation of their right to due process.

[3] In *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), this court adopted a rule permitting "the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." Id., 753.