REPLACE PAGES 17-25 FROM STATE SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

		PRISONER
SCOTT T. LEWIS, **Petitioner**	:	**CASE NO. 3:03CV196(RNC)(DFM)**
v.	:	
COMMISSIONER OF CORRECTION, **Respondent**	:	**JULY 31, 2003**

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

This memorandum is submitted in opposition to the application for writ of habeas corpus filed in the above-captioned proceeding. In that application, the petitioner claims that: (1) he was denied due process because exculpatory evidence was suppressed; (2) that his conviction was based on perjured testimony; and (3) that his right to present a defense was violated because a "third-party confession" was not admitted at trial. For the reasons set forth below, the petitioner is not entitled to federal habeas corpus relief and his application for writ of habeas corpus must be dismissed.

I. PROCEDURAL HISTORY[1]

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[1] This procedural history is based the following documents, copies of which are appended to the respondent's Answer dated July 31, 2003.

Appendix A Connecticut Supreme Court's decision on the petitioner's direct appeal; State v. Lewis, 245 Conn. 779, 717 A.2d 1140 (1998)

Appendix B Record on direct appeal to the Connecticut Supreme Court

Appendix C Petitioner's brief on direct appeal

Appendix D State's brief on direct appeal

Appendix E Petitioner's reply brief on direct appeal

MOTION TO CORRECT

On May 10, 1995, the petitioner was convicted after a jury trial, Ripley, J., presiding, of two counts of murder in violation of General Statutes §§ 53a-8 and 53a-54a, and two counts of felony murder in violation of General Statutes § 53a-54c. Appendix B at 25-25a. On July 21, 1995, the petitioner was sentenced to one hundred and twenty years incarceration. Id.

On direct appeal, the petitioner claimed "that: (1) the evidence was insufficient to prove felony murder beyond a reasonable doubt; (2) the court improperly limited cross-examination of the state's key witness; and (3) the court improperly excluded evidence of a third party confession." Appendix A; State v. Lewis, 245 Conn. 779, 781, 717 A.2d 1140

Appendix F	Connecticut Appellate Court's decision on appeal from the decision of the state habeas court; Lewis v. Commissioner of Correction, 73 Conn. App. 597, 808 A.2d 1164 (2002)
Appendix G	Record on appeal from the decision of the state habeas court
Appendix H	Petitioner's brief to the Connecticut Appellate Court on appeal from the decision of the state habeas court
Appendix I	Respondent's brief to the Connecticut Appellate Court on appeal from the decision of the state habeas court
Appendix J	Petitioner's reply brief to the Connecticut Appellate Court on appeal from the decision of the state habeas court
Appendix K	Petitioner's petition for certification to appeal the decision of the Connecticut Appellate Court
Appendix L	Decision of the Connecticut Supreme Court on the petitioner's petition for certification to appeal the decision of the Connecticut Appellate Court; Lewis v. Commissioner of Correction, 262 Conn. 938, 815 A.2d 137 (2003)

building at approximately 4 a.m., and the defendant parked his car a short distance away at the corner. Upon arrival, the defendant turned to Morant and Ruiz and said, "look, whatever happens, we keep it between us." The defendant then told Ruiz to keep the car running while the defendant and Morant went upstairs to get the money and drugs. The defendant was armed with both guns as he and Morant walked toward the victims' apartment building.

The building contained five apartments on three floors: two apartments on each of the first and second floors, and a single apartment on the third floor. The victims' apartment was one of the two on the second floor, located at the rear of the building. The building was secured by a locked front security door and a locked back door. Entry into the building required using an intercom system and being "buzzed in" through the front security door by one of the tenants.

The jury also reasonably could have found that the defendant and Morant entered the building. They then proceeded to the second floor where they entered the victims' apartment and the defendant shot both victims to death with the .357 caliber handgun. They then ran through the hall, down the stairs and out the front door.

Meanwhile, shortly after hearing several gunshots, Ruiz, who had switched to the driver's seat of the defendant's car, saw the defendant and Morant running. He made a U-turn, picked them up in front of Turner's building, and immediately drove away. The defendant was carrying a brown bag labeled "Community Bank," which was "bulging" with cash, and Morant carried a blue gym bag labeled "Puma," which was full of drugs. At that time, the defendant was armed with the .357 caliber handgun, and Morant was armed with the .38 caliber handgun.

As Ruiz drove away, the defendant and Morant insisted that Morant drive because Ruiz was driving erratically. Ruiz switched to the back seat, where he confirmed the contents of the bags. After a short while, the defendant asked Morant whether he thought they were dead, and Morant answered, "don't worry about it, forget about it, they got what they deserved." The three men then returned to Clay Street, and later that morning turned over all of the money to Rochler.

On the same morning of October 11, 1990, Diane Basilicato, who lived in the second floor front apartment of the victims' apartment building on Howard Avenue, returned home and entered her apartment shortly after 4 a.m. She did not hear the buzzer system operate or anyone enter the building after

she had entered. Within a few minutes of entering her apartment, Basilicato heard five or six loud "bangs," and heard two people running down the stairs and out of the building.

Shortly thereafter, the tenant in the first floor rear apartment called the police to report hearing a disturbance and a "loud thump" from the second floor apartment, followed by the appearance of a bullet hole in the ceiling of her apartment. The police were dispatched to the building at 4:34 a.m., and arrived approximately two minutes later. The police found both the front security door and the back door locked.

Basilicato admitted the police into the building through the use of the intercom system. Upon arrival, the police entered the second floor rear apartment and found the bodies of the victims. Turner, clad only in underwear, was lying face down on the bed. He had been shot four times, including one shot to the top of the head that split his brain into three pieces, one to his back, and one to his side. Fields, also clad only in underwear, was lying on the floor next to the bed. He had been shot twice in the back from a distance of no more than eighteen inches and had bled to death from his wounds. The ballistics investigation disclosed that all the bullets had been fired from a .357 caliber handgun. There was no gun found near the bodies of the victims.

Several weeks after the shootings, both Ruiz and Roque saw the defendant discard the .357 caliber handgun into the Mill River under the Chapel Street Bridge in New Haven, when all three were present in the park at Chapel Street. After questioning Ruiz in January, 1991, the police searched the river near the Chapel Street park for the .357 caliber handgun that the defendant had thrown in the river, but were unable to recover it.

At the trial, the defendant raised an alibi defense, claiming that he had worked the entire night at the Minuteman Press on Grand Avenue in New Haven, which was partly owned by Rochler.

(Footnote omitted.) Lewis I, 245 Conn. at 782-85.

III. ARGUMENT

In his petition for writ of habeas corpus, the petitioner claims that: (1) he was denied due process because exculpatory evidence was suppressed; (2) that his conviction was based on perjured testimony; and (3) that his right to present a defense was violated

because a "third-party confession" was not admitted at trial. For the reasons described below, the petitioner is not entitled to habeas corpus relief.

A. The Petitioner Cannot Obtain Habeas Corpus Relief On His Claim That Exculpatory Evidence Was Suppressed

The petitioner first claims that he was denied due process because exculpatory evidence was suppressed. The state habeas court rejected this claim and the petitioner appealed. On appeal, the Connecticut Appellate Court refused to review the petitioner's claim because he failed to: (1) address the issue of the earlier decision to deny him certification to appeal and (2) provide the court with an adequate record to review his claim. Because the Appellate Court declined to review the petitioner's claim on the grounds that he failed to comply with these procedural rules, he cannot obtain review of his claim in this federal habeas corpus proceeding.

1. Facts pertaining to the claim

After a trial on the merits of the petitioner's claims, the state habeas court determined that all exculpatory evidence was turned over to the defense, as follows:

> Count two of this habeas petition alleges the State's Attorney failed to disclose exculpatory evidence that Ovil Ruiz had supplied untrustworthy and false information in prior police reports on December 19, 1990, and December 20, 1990. The report on December 19, 1990, related to the Javier Torres shooting and it was prepared by Detective Raucci. The petitioner claims Ovil Ruiz gave untrustworthy and false information regarding this incident.
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> In this count a similar claim of false or untrustworthy information was given by Ovil Ruiz in the police report of December 20, 1990, which related to the murder of Jacqueline Shaw.
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> The final claim alleged by the petitioner in this count is that the State failed to disclose exculpatory information to the defense relating to the statement

taken from Ovil Ruiz on January 14, 1991. He alleges Detective Raucci gave false information to Ruiz and Detective Sweeney failed to disclose to the defense that Ruiz was untrustworthy. Petitioner also claims Ruiz committed perjury at the probable cause hearing.

The testimony of Detective Michael Sweeney, who was unavailable to testify in this matter, was admitted by filing of a transcript of his testimony on October 25, 1999. That transcript discloses the only information Detective Raucci allegedly disclosed to Ruiz prior to his statement on January 14, 1991, related to an apartment on Howard Avenue; the color of the buildings and the petitioner's car was a BMW. Other insignificant facts were mentioned as part of the questioning technique. The petitioner has failed to prove that any critical information was disclosed by Detective Raucci, or that he provided any false information to Ruiz.

The claim of the petitioner that exculpatory information was not provided to the defense prior to the trial in 1995, has not been proven. This court finds not only was all exculpatory evidence furnished to the defense, but also the alleged evidence was available by due diligence to the defense, and the petitioner was obliged to raise his claims before the trial court or the Appellate Court. The petitioner has failed to sustain the heavy burden to establish "that the prosecution suppressed evidence." State v. McIntyre, 242 Conn. 318, 323 (1997).

Appendix G at 46-47.

The petitioner filed a petition for certification to appeal, which was denied. He then appealed the decision of the state habeas court. The Appellate Court dismissed his appeal for the following reasons:

The record discloses that the petitioner, pursuant to General Statutes § 52-470(b), filed a petition asking Associate Justice Joette Katz of the Supreme Court for certification to appeal from the judgment of the habeas court and that she denied his petition. Accordingly, the petitioner bears the burden of demonstrating that Justice Katz's ruling constituted an abuse of discretion. See Simms v. Warden, 230 Conn. 608, 612, 646 A.2d 126 (1994). "To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) Reddick v. Commissioner of Correction,

51 Conn. App. 474, 477, 722 A.2d 286 (1999). If the petitioner fails to satisfy that burden, then his claim that the judgment of the habeas court should be reversed does not qualify for consideration. See Simms v. Warden, supra, 612.

In the present case, the petitioner, in both his principal brief and in his reply brief, failed to advance any arguments challenging the propriety of Justice Katz's ruling. Moreover, the record before us does not include the transcript of the petitioner's habeas trial. Instead of providing that transcript, the petitioner wrote a letter to this court, stating that "no transcript is deemed necessary to be ordered."

"The duty to provide this court with a record adequate for review rests with the appellant. . . . It is incumbent upon the appellant to take the necessary steps to sustain its burden of providing an adequate record for appellate review." (Citation omitted; internal quotation marks omitted.) Fuller v. Commissioner of Correction, 66 Conn. App. 598, 602, 785 A.2d 1143 (2001); see also Practice Book § 61-10. "Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a [habeas] court." (Internal quotation marks omitted.) State v. Torres, 60 Conn. App. 562, 571, 761 A.2d 766 (2000), cert. denied, 255 Conn. 925, 767 A.2d 100 (2001). Under those circumstances, we only can speculate as to the existence of a factual predicate for the habeas court's rulings. See Chase Manhattan Bank/City Trust v. AECO Elevator Co., 48 Conn. App. 605, 608, 710 A.2d 190 (1998). "Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) State v. Brown, 256 Conn. 291, 303 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S.Ct. 670, 151 L.Ed.2d 584 (2001). On the basis of the foregoing reasons, we decline to review further the petitioner's claims.

The denial of the petitioner's petition for certification to appeal did not result from an abuse of discretion.

The appeal is dismissed.

(Footnotes omitted.) Lewis II, 73 Conn. App. at 597-99.

2. The petitioner is not entitled to federal habeas corpus review of his claim

The petitioner is not entitled to review of his claim because he defaulted it in state court. Such defaults occurred when he: (1) failed to argue that it was an abuse of discretion for Associate Justice Joette Katz of the Connecticut Supreme Court to deny his petition for certification to appeal and (2) failed to present the Appellate Court with an adequate record for review.

It is well-established that a state prisoner who defaults his federal claim in state court pursuant to an independent and adequate state procedural rule will be denied federal habeas review absent a showing of cause for the default and actual prejudice arising therefrom or that failure to consider the federal claim will result in a fundamental miscarriage of justice.[3] Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.Ct. 1587, 1592, 146 L.Ed.2d 518 (2000); Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed. 308 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (where state court refused to review the merits of petitioner's claim because he failed to raise the claim at trial as required under state procedure, federal habeas relief was unavailable absent a showing of "cause" and "prejudice"). A procedural default bars federal habeas review when "the last state court rendering a judgment in the case clearly

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[3] The "fundamental miscarriage of justice" exception applies to those cases where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 499 U.S. 467, 494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986); Murray v. Carrier, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986).

and expressly states that its judgment rests on a state procedural bar. . . ." (Citations omitted.) Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996).

a. The petitioner procedurally defaulted his claims by failing to address the denial of certification to appeal the habeas court's decision and argue that such denial was an abuse of discretion

The state habeas court denied the petitioner's claims for relief and then dismissed his petition. Thereafter, in accordance with General Statutes § 52-470(b), the petitioner forwarded a petition for certification to appeal the state habeas court's decision to Associate Justice Joette Katz of the Connecticut Supreme Court. Justice Katz denied the petition. The petitioner appealed but, in his briefs to the Appellate Court, did not address Justice Katz's denial of certification to appeal. (UNTRUE)

General Statutes § 52-470(b) provides that:

> *No appeal* from the judgment rendered in a habeas corpus proceeding brought in order to obtain his release by or in behalf of one who has been convicted of crime may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or a judge of the supreme court or appellate court to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

(Emphasis added.)

Nevertheless, if an individual demonstrates that the denial of certification constitutes an abuse of discretion, an appellate court will entertain his appeal. A "petitioner will establish a clear abuse of discretion in the denial of a timely request for certification to appeal if he can demonstrate the existence of one" of the criteria described in Lozada v. Deeds, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). Simms v. Warden,

230 Conn. 608, 616, 646 A.2d 126 (1994). "A petitioner satisfies that burden by demonstrating: that the issues are debatable among jurists of reason; that a court *could* resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. . . ."[4] (Citations omitted; emphasis in original; internal quotation marks omitted; brackets omitted.) Id. Thus, if a petitioner has been denied certification to appeal *and* he cannot establish that such denial was an abuse of discretion, he is not entitled to appellate review and his appeal will be dismissed.

The petitioner failed to address the denial of certification in either his opening brief *or* in his reply brief to the Appellate Court.[5] Appendices H and J. When a petitioner does not brief this threshold issue, he "fails to establish that the habeas court abused its discretion and cannot, therefore, properly obtain appellate review of the habeas court's decision." Reddick v. Commissioner of Correction, 51 Conn. App. 474, 477, 722 A.2d 286 (1999). In the instant case, as in Reddick, the Appellate Court dismissed the appeal because the petitioner failed to demonstrate that the denial of certification constituted an abuse of discretion. This default in state court pursuant to an independent and adequate state procedural rule must result in the denial federal habeas review unless the petitioner can show good cause for the default and actual prejudice arising therefrom or that failure to consider the federal claim will result in a fundamental miscarriage of justice.

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[4] The term "issues" refers to the underlying claims decided by the habeas court. Mitchell v. Commissioner of Correction, 68 Conn. App. 1, 4, 790 A.2d 463 (2002).

[5] The respondent raised the petitioner's failure to brief the denial of certification in its appellate brief. Appendix I at 3. The petitioner did not respond to that argument in his reply brief. Appendix J.

b. The petitioner procedurally defaulted his claims by deliberately failing to file the transcripts of his state habeas trial with the Connecticut Appellate Court

The second default occurred when the petitioner deliberately failed to file the transcripts of his state habeas proceeding with the Connecticut Appellate Court.[6] Under Connecticut law, the appellant is responsible for providing the court with an adequate record for review.[7] The failure to provide an adequate record will result in the reviewing court's refusal to reach the merits of the claim. See State v. Duteau, 68 Conn. App. 248, 251-54, 791 A.2d 591 (2002) (refusal to review claim because no motion for articulation, no motion to compel, and no transcript was filed by the appellant); Gipson v. Commissioner of Correction, 67 Conn. App. 428, 434-35, 787 A.2d 560 (2001) (refusal to review claim because no motion for articulation was filed by appellant); State v. Talton, 63 Conn. App. 851, 861, 779 A.2d 166 (2001) (refusal to review claim because record was inadequate); Strobel v. Strobel, 64 Conn. App. 614, 620-22, 781 A.2d 356 (2001) (same); State v. Bronson, 55 Conn. App. 717, 746-47, 740 A.2d 458 (1999) (same).

APPELLATE COURT DECISIONS ARE PRESUMED SUBJECT TO REVIEW BY HIGHER COURTS - AND THEIR FINDINGS OF FACT ARE NOT BINDING FOR PROCEDURAL PURPOSES

THE QUESTION OF ADEQUACY IS A QUESTION OF FACT TO BE DETERMINED NOT A QUESTION OF PROCEDURE THAT IF FOUND INSUFFICIENT WOULD BAR FURTHER REVIEW.

[6] In his appeal from the decision of the state habeas court, the petitioner repeatedly referred to the transcripts of the 1999 testimony Detective Michael Sweeney's testimony. Detective Sweeney did not testify at the petitioner's habeas trial which commenced and concluded in 2001. Rather, a transcript of Sweeney's testimony at a hearing held in a state court proceeding brought by the petitioner's co-defendant, Stefon Morant, was entered as an exhibit at the petitioner's state habeas trial. See Appendix I at 3-4 n.3; Appendix K at 7.

[7] Practice Book § 61-10 provides: "It is the responsibility of the appellant to provide an adequate record for review. That appellant shall determine whether the entire trial court record is complete, correct and otherwise perfected for presentation on appeal. For purposes of this second, the term 'record' . . . includes all trial court decisions, documents and exhibits necessary and appropriate for appellate review of any claimed impropriety."

IF THE COURT WOULD READ FOR AN APPELLATE COURT TO BAR REVIEW SIMPLY BY FINDING A RECORD INADEQUATE FOR

HOLDING COURTS

This default in state court pursuant to an independent and adequate state procedural rule must result in the denial federal habeas review unless the petitioner can show good cause for the default and actual prejudice arising therefrom or that a failure to consider the claim will result in a fundamental miscarriage of justice. For this reason, the petitioner's first claim must be denied without a review of its merits.

B. The Petitioner Cannot Obtain Habeas Corpus Relief On His Claim That His Conviction Was Based On Perjured Testimony

The petitioner next claims that his conviction was based on perjured testimony. This claim also is not reviewable. At the same time that the Appellate Court refused to review the petitioner's claim described in Section III.A., above, it declined to review this claim on the grounds that the petitioner failed to comply with the court's procedural rules. Therefore, he cannot obtain review of this claim in this federal habeas corpus proceeding.

1. Facts pertaining to the claim

After a trial on the merits of the petitioner's claims, the state habeas court determined that the petitioner had failed to demonstrate that one of the state's witnesses, Ovil Ruiz, testified falsely at the petitioner's 1995 trial, as follows:

> The first count alleges that Ovil Ruiz committed perjury at the criminal trial when the petitioner was convicted of two counts of murder and felony murder on May 10, 1995. Ovil Ruiz testified under oath at that trial. On February 22, 1996, the petitioner alleges Ovil Ruiz stated to the F.B.I. that he had lied at the trial and the petitioner had nothing to do with the crimes for which the petitioner was convicted.
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> The evidence in this case has established that October 11, 1990, in the early hours of the morning, Ricardo Turner and Edward Lamont Fields were shot dead. The killings occurred at 634 Howard Avenue, New Haven, Connecticut. The petitioner and Stefon Morant were arrested and charged with two counts of murder and two counts of felony murder. On January 13,

CREDIBILITY OF RECANTATION IS NOT THE SAME INQUIRY AS TO WHETHER TESTIMONY AT TRIAL WAS PERJURED.

1991, Ovil Ruiz was arrested and brought to the Detective Division for questioning. The statement from Ruiz was tape recorded on January 14, 1991. In that statement Ruiz states he had sold drugs for the petitioner and Morant for two years. Ruiz said he over heard a discussion between Morant and the petitioner that the petitioner shot two guys who tried to run away with my money and my drugs. Ruiz later saw the petitioner throw the murder weapon into the water near the Chapel Street bridge.

Ruiz then remained in custody until March 19, 1991, when he was released. On April 11, 1991, he was rearrested and convicted thereafter on larceny and narcotics charges. On May 28, 1991, Ruiz tape recorded and signed a statement in the office of the State's Attorney in the presence of his attorney, David Gold and Detective Raucci. In that statement he stated he obtained guns for the petitioner and Morant and drove them to the scene of the crime where the petitioner and Morant went into the house. He then heard shots and saw the petitioner come out with a bag of money, and Morant with a Puma bag containing drugs.

At the trial of the petitioner, Ruiz was presented as a state's witness. He was extensively questioned by the attorney for the petitioner while he was under oath. He testified he was in danger in the general prison population because of his cooperation with the police and the state's attorney in the prosecution of the petitioner. Ruiz was a key witness for the state, and the petitioner raised questions as to his mental health both at the trial and in the appeal to the Supreme Court.

On February 22, 1996, Ruiz while in prison gave a statement to the F.B.I. He then stated that Detective ~~Raucci~~, who had recently been suspended and arrested by the New Haven Police Department, was involved with drug dealers named Armando and Raul Luciano, Frank Parese and a Colombian named "Loco." He stated they killed the victims not the petitioner and Morant. Ruiz said he was used to "set up" the petitioner by Detective Raucci and Parese's drug distribution operation.

On October 24, 1996, Ruiz gave a different statement to the F.B.I. that he had killed Edward Lamont Fields when he fired shots into his chest with a .357 caliber revolver, and Raul shot Turner with a .38 caliber revolver. At the petitioner's trial the physical evidence established both victims were murdered by a .347 caliber weapon, and they both were shot in the back.

On February 16, 1997, Ruiz gave a final statement to the F.B.I. that he was pressured to lie to the F.B.I. and the statement he gave regarding Detective

Raucci and State's Attorney Gold was false. Ruiz then stated the testimony he had given at the trial of the petitioner in 1995, was the truth.

At the hearing on this habeas petition the petitioner presented Ovil Ruiz as a witness. Ruiz then invoked his constitutional privilege against self-incrimination and he refused to testify based upon his exposure to murder and perhaps perjury charges for his involvement in the murders.

The claim of the petitioner that Ovil Ruiz had testified falsely at the criminal trial of the petitioner has not been proven. False testimony may only be the basis of a new trial when: "(a) the court is reasonable well satisfied that the testimony given by a material witness is false; (b) that without it the jury might have reached a different conclusion; (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it. . . ." Prudlik v. State, 131 Conn. 682, 687 (1945); Talton v. Warden, 33 Conn. App. 171, 177 (1993).

The petitioner has filed a post trial brief which discussed the statement taken from Ovil Ruiz on January 14, 1991. He argues that Detective Sergeant Sweeney was critical of Detective Raucci. He contends Detective Raucci therefore, conveyed false or misleading information to Ruiz. Detective Sweeney's testimony at the trial of Morant disclosed that the information provided by Detective Raucci was insignificant and did not disclose the names of the petitioner or Morant. It also did not reveal numerous other significant facts which were disclosed by Ovil Ruiz in his statements as well as his testimony at the trial of the petitioner. The statements obtained from Ruiz on January 14, 1991, and May 28, 1991, were available to the petitioner at the time of his trial. The evidence relating to those statements was known or available at the time of trial and it is not now newly discovered evidence. "Newly discovered evidence must consist of facts which were unknown at the time of trial, and it must appear [that] the defendant or defense counsel could not have known those facts by the use of [due] diligence." Coleman v. State, 718 So.2d 827, 829 (Fla.App.1998). "Due diligence means doing everything reasonable. . . ." Williams v. Commission, 41 Conn. App. 515, 528 (1996).

The argument of the petitioner in his brief that Detective Sweeney had evidence of Ruiz's untruthfulness in his statements in 1991, has not been proven by the petitioner. This court is not persuaded that Detective Sweeney's knowledge constituted new evidence that would probably result in a different verdict at a new trial, or that an injustice has been done. Lombardo v. State, 172 Conn. at 391 citing Prodlik v. State, 131 Conn. 686.

> The petitioner has failed to sustain the burden of proving the claims made in the first count. Lubesky v. Bronson, 213 Conn. 97, 110 (1989). Ruiz has not testified in this habeas proceeding. His testimony in the trial of the petitioner was credible because it was under oath and subject to cross examination by the attorney for the petitioner. The testimony was also consistent with other credible evidence including Morant's confession to his involvement with the petitioner. The statements given to the F.B.I. in 1996, by Ruiz while he was incarcerated, were given under circumstances that are unlikely to be reliable. Smith v. State, 139 Conn. 249, 252-53 (1952). The 1996 recantations were not credible, and therefore, the petitioner has failed to prove Ruiz testified falsely in 1995.

Appendix G at 41-45.

2. The petitioner is not entitled to federal habeas corpus review of his claim

For the same reasons that he cannot obtain review of his claim that exculpatory evidence was suppressed, the petitioner is not entitled to review of this claim because he defaulted it in the state courts pursuant to two independent and adequate state procedural rules as discussed in Section III.A.2., above. The petitioner cannot demonstrate both cause for the default and actual prejudice arising therefrom or that a failure to consider the claim will result in a fundamental miscarriage of justice. For this reason, the petitioner's second claim must be denied without a review of its merits.

C. The Petitioner's Claim That His Right To Present A Defense Was Violated When The Court Refused To Admit A "Third-Party" Confession Is Without Merit

Finally, the petitioner claims that his right to present a defense was violated because a "third-party confession" was not admitted at trial. The refusal to admit this evidence is not contrary to, or an unreasonable application of, clearly established federal law. The evidence sought to be admitted was a police report. Given the "multiple levels of hearsay"

represented by the report and "the lack of independent bases for the admissibility of hearsay statements within hearsay statements, and the lack of any other sufficient indicia of trustworthiness," the report was determined to be "insufficient to serve as an adequate surrogate for cross-examination so as to permit the report to be part of the determination the guilt or innocence of the defendant." Lewis I, 245 Conn. at 809.

1. The Connecticut Supreme Court's decision on the petitioner's claim

On direct appeal, the petitioner claimed that two hearsay statements by a third party, Michael Cardwell, should have been admitted into evidence. The Connecticut Supreme Court rejected that claim, as follows:

> The defendant had sought to introduce the statements under the hearsay exception for declarations against penal interest. The trial court ruled, however, that he had not established that Cardwell was unavailable. On appeal, the defendant mounts a two part challenge to the trial court's ruling claiming that: (1) as a constitutional matter, the statements were admissible as part of his right to present evidence of third party guilt, which, he maintains, did not require him to establish Cardwell's unavailability; and (2) as an evidentiary matter, the trial court abused its discretion in ruling that Cardwell was not unavailable, and the statements were admissible as a trustworthy declaration against penal interest.
>
> We reject the defendant's constitutional claim that he was entitled to admit the statements irrespective of Cardwell's unavailability. We conclude, moreover, that, even if we were to assume without deciding that the trial court abused its discretion in its ruling on Cardwell's unavailability, the trial court's ruling excluding the statements was proper because, as a matter of law, the defendant failed to establish that the statements overcame the hurdle of three levels of hearsay.
>
> The defendant sought to introduce the report of Detective Vaughn Maher of the New Haven police department. The report, dated November 24, 1990, stated that during the week of November 11, 1990, Maher had met with an informant who, Maher had been advised by Lieutenant Francisco Ortiz of the New Haven police department, had worked with Ortiz for several years and

had given reliable and accurate information relative to homicides, robberies, burglaries and narcotics offenses that had resulted in arrests and convictions. According to the report, the informant stated that during the week of October 21, or October 28, 1990, he had had a discussion with a "male well known to him as Michael Caldwell," whose street name was "Bullet." The informant stated that "he has been an associate of Cardwell for several years," and identified a police photograph of Cardwell.

According to the informant, Cardwell had told the informant that Cardwell had killed Turner and Fields. Specifically, the informant related that Cardwell claimed to have gone to the apartment on Howard Avenue along with his brother, Vincent Cardwell, whom the informant also identified from a police photograph. Further, the informant stated, Cardwell claimed that: when he and his brother arrived at the apartment, Vincent stayed outside to signal with a whistle when there was no activity on the street; Cardwell was then let into the apartment by ringing the doorbell and being buzzed in; the second floor apartment door was open; Cardwell walked into the apartment, where he found Turner awake in the bedroom and Fields asleep in the bed; he then fired five shots, killing Turner first and then Fields; and he then fled with Vincent.

Maher's report also recounted a second statement purportedly made by Cardwell to the informant during the week of November 18, 1990. According to the informant, Cardwell told the informant that Cardwell had killed Turner "because [Turner] did him wrong."

The trial court held a hearing in the absence of the jury on the defendant's claim for the admission of Maher's report into evidence. In support of that claim, the defendant took the following steps.

First, he produced Lieutenant Ortiz, who testified to the standard procedures of the police department for the registry and use of known and reliable informants. Ortiz testified that once an informant was determined to be reliable, he would be registered with an informant number that would identify him and that would be used in lieu of his name. Ortiz also testified that if a registered informant produced "bad information," his file would be "flagged" to indicate that he was not reliable. Ortiz also testified that during the week of November 11, 1990, he was contacted by a registered informant who claimed to have information regarding the murders of Turner and Fields. Ortiz arranged for the informant to be interviewed by Maher, who was the primary investigator on the case. Ortiz also testified that the department's last contact with the informant was during the investigation of these murders. Ortiz testified further that he knew the name of the informant, that during the

trial of Morant for the same murders approximately one year previously, Ortiz had confirmed the name and last known address of the informant, that he would be willing to do the same in this case if ordered by the court, and that the informant had not been located or presented during Morant's trial but that he "might . . . still live in New Haven." Finally, Ortiz established that Maher had retired from the department and lived out of state.

The defendant also presented a subpoena that he had attempted to serve on Cardwell at his last known address bearing a return notice that Cardwell could not be located. Moreover, the defendant's counsel made the following offer of proof regarding the defendant's further efforts to locate Cardwell. The counsel offered to prove, through his own testimony, the testimony of Emma Jones, who had been assisting him as a volunteer on the case, and the testimony of a former New Haven police matron who had attempted to serve the subpoena, that: the defendant had been diligently searching for Cardwell since the case had been called for trial; the defendant had investigated "all of the last known haunts of [Cardwell]"; from "word on the street and talking to people," the defendant had been "trying to find [Cardwell] without success"; the defendant had "done everything that anybody could think of doing to try and locate [Cardwell]"; and that "nobody has heard from [Cardwell], not just in the last few days, not just in the last couple of weeks, but that in fact he has been an unknown quantity in [New Haven]" for approximately four years. Further, defense counsel represented that he had discovered the address listed on the subpoena "as a result of an investigation at Yale-New Haven Hospital that . . . showed [an address] for [Cardwell] in some of their records." In addition, the defendant had subpoenaed the New Haven police department's entire file on Cardwell. The trial court unsealed the file, which disclosed the addresses of Cardwell that the defendant had unsuccessfully investigated, but no others.

On the basis of these facts, the defendant, claimed that Cardwell's statements, as recounted in Maher's report, should be admitted into evidence as a declaration against penal interest. The defendant argued that: (1) Cardwell was unavailable, and that the defendant had exercised due diligence to locate Cardwell; and (2) the statements were trustworthy. The state contended that the defendant had not sufficiently established: (1) Cardwell's unavailability; and (2) the trustworthiness of his statements.

The trial court assumed, for purposes of its ruling, that the defendant could establish the truth of his counsel's offer of proof. Nonetheless, the court sustained the state's objection on the sole ground that the defendant had not sufficiently established that Cardwell was unavailable.

We first address the defendant's claim that the trial court's ruling excluding Cardwell's statements, irrespective of Cardwell's availability, violated his federal constitutional right to present a defense because the excluded evidence constituted evidence of the guilt of a third party. The defendant contends that his "constitutional right to present evidence of third party guilt (as opposed to an evidentiary basis for admissibility) did not require him to establish Cardwell's unavailability. This is because evidence which tends to show that a third party is actually guilty of the crimes charged is evidence exculpatory of the defendant." (Emphasis in original.) The defendant asserts further that the only limitation on this rule is that the evidence must directly connect the third party with the crime, and "[o]nce such a direct connection has been shown, it is reversible error for the court to refuse the evidence." We disagree.

We first note that the defendant did not make this broad claim in the trial court. He may only prevail on this claim, therefore, under the rubric of State v. Golding, 213 Conn. 233, 567 A.2d 823 (1989). His claim founders, however, on the third prong of Golding requiring him to establish that a constitutional violation exists. Id., at 240, 567 A.2d 823.

In essence, the defendant argues that any hearsay evidence that, if believed, would be exculpatory of the defendant is constitutionally required to be admitted irrespective of whether it is admissible under the rules of evidence regarding hearsay, and irrespective of any considerations of necessity or trustworthiness that those rules embody. We know of no reason, policy or authority, and the defendant offers none, for such a broad proposition. The constitutional right to present a defense, which includes, under appropriate limitations, the right to present evidence of third party culpability; Chambers v. Mississippi, 410 U.S. 284, 298-303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); does not require that any evidentiary limitation on the admissibility of evidence, no matter how sound as a matter of policy, must yield. Id., at 302, 93 S.Ct. 1038. "[I]n the exercise of his sixth amendment right [to defend himself] the accused, as required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (Internal quotation marks omitted.) State v. Stange, 212 Conn. 612, 625, 563 A.2d 681 (1989). One of the factors determining the fairness of permitting a defendant to introduce exculpatory evidence is whether the declarant is unavailable. See State v. Lopez, 239 Conn. 56, 74, 681 A.2d 950 (1996) ("[r]equiring that the unavailability of the declarant be established in order to admit a hearsay statement fulfills the necessity factor that is part of any exception to the hearsay rule"); State v. DeFreitas, 179 Conn. 431, 449, 426 A.2d 799 (1980) ("Chambers holds that trustworthy third party declarations against penal

interest which exculpate the accused and are critical to his defense cannot be excluded as hearsay in mechanical fashion when the declarant is unavailable for cross-examination" [emphasis added]). We, therefore, reject the defendant's argument that any exculpatory evidence should be admitted regardless of the declarant's availability.

The defendant next claims that as an evidentiary matter, the trial court abused its discretion in ruling that he had failed to establish Cardwell's unavailability for purposes of the hearsay exception for declarations against penal interest. The defendant also claims that "the record . . . supports the [statements'] trustworthiness." We need not decide in this case whether the trial court abused its discretion in its ruling on Cardwell's unavailability, or whether, after assuming the offer of proof by defendant's counsel to be true, the trial court should have required an evidentiary hearing based on that offer of proof. Even if we were to assume without deciding that Cardwell's statements were admissible as declarations against penal interest and that the police report was admissible under the business record exception to the hearsay rule, we conclude that the defendant has failed to establish the unavailability of the informant and the trustworthiness of the informant's statements to Detective Maher under the residual hearsay exception, which is the only hearsay exception arguably applicable to the informant's statements. Thus, we affirm the trial court's ruling on grounds different from those relied on by the trial court. See State v. DeFreitas, supra, 179 Conn. at 449-55, 426 A.2d 799.

In order to conclude that the trial court improperly failed to admit Maher's report into evidence, the defendant must overcome three levels of hearsay. When a statement is offered that contains hearsay within hearsay, each level of hearsay must itself be supported by an exception to the hearsay rule in order for that level of hearsay to be admissible. See State v. Williams, 231 Conn. 235, 249, 645 A.2d 999 (1994); State v. Milner, 206 Conn. 512, 521, 539 A.2d 80 (1988); C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.1988 & Sup.1998) § 11.14.5, pp. 389, 229-30; 2 C. McCormick, Evidence (4th Ed.1992) § 324.1, pp. 368-70. Cardwell's statements to the informant, the informant's statements relating this information to Detective Maher, and Maher's report each constitute hearsay because neither Cardwell, the informant, nor Maher was present in court to testify and the report, along with all statements contained therein, was offered to prove the truth of the matters asserted. See State v. Sharpe, 195 Conn. 651, 661, 491 A.2d 345 (1985). In resolving this issue, we will assume without deciding that Cardwell's statements to the informant were admissible as declarations against penal interest.[6] We will also assume without deciding that the police report was admissible under the business record exception to the hearsay rule.

Because the defendant has not proven and the trial record does not support the admissibility of the informant's relation of Cardwell's statements to Detective Maher, however, the trial court properly ruled that the police report was inadmissible.

If, therefore, the trial court had ruled incorrectly on the issue of Cardwell's unavailability, and if the trial record was sufficient for the trial court to have exercised its discretion and found the statements offered to have been sufficiently trustworthy to be presented to the jury, we would remand the case to the trial court for it to consider the matter and to exercise its discretion. In this case, however, the trial record makes clear that the statements could not be found to be sufficiently trustworthy for admission because the record could not support a proper determination for admission of such statements. Thus, hearsay evidence excluded upon an improper ground may nonetheless be "properly excluded if no ground existed for its admission for the truth of the matter asserted therein." State v. DeFreitas, supra, 179 Conn. at 450, 426 A.2d 799.

It is well established that all hearsay exceptions are rooted in the notion that they contain a sufficient guarantee of trustworthiness to serve as a sufficient surrogate for cross-examination of testimony in court. Chambers v. Mississippi, supra, 410 U.S. at 298-99, 93 S.Ct. 1038; State v. Stange, supra, 212 Conn. at 625, 563 A.2d 681. "The 'residual,' or 'catch-all,' exception to the hearsay rule allows a trial court to admit hearsay evidence not admissible under any of the established exceptions if: (1) there is 'a reasonable necessity for the admission of the statement,' and (2) the statement is 'supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions.' . . . We have stated that 'the necessity requirement is met when, unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources.' " (Citations omitted; emphasis in original.) State v. Oquendo, 223 Conn. 635, 664-65, 613 A.2d 1300 (1992). Application of these propositions to the facts of the present case compels the conclusion that Maher's report could not, in the proper exercise of the trial court's discretion, have been admitted.

The informant's statements do not satisfy the requirements of admission under the residual exception to the hearsay rule. Contrary to the defendant's assertion in the trial court; see footnote 16; he did not show that the informant was unavailable. The defendant could have obtained the informant's name and last known address from Ortiz, and the sole fact that

the informant had not been produced by the defense in Morant's trial one year previously, after having learned the informant's name and address, falls far short of establishing that reasonable efforts to locate him for this trial; see State v. Lopez, supra, 239 Conn. at 75, 681 A.2d 950; would have been unsuccessful. The record is bereft of any evidence regarding what efforts, if any, Morant made at that time, and regarding any efforts by this defendant to locate the informant for this trial.

In addition, the evidence before the trial court could not support a finding of the trustworthiness of the statements. Contrary to the defendant's assertion, there was insufficient evidence of any close relationship between the informant and Cardwell so as to suggest that Cardwell would have confided in the informant that Cardwell had killed the victims. The only evidence of their relationship was that the person known as "Bullet" was "well known to [the informant] as Michael Caldwell," and that "[the informant] has been an associate of Cardwell for several years." Moreover, whatever trustworthiness value there might have been in Ortiz' description of the informant as "reliable" was minimal at best, and in Ortiz' testimony permitting the inference that his name had not been flagged as unreliable; see footnote 13; was undermined by Maher's subsequent report indicating that at least insofar as this case was concerned, the informant was unreliable. See footnote 17.

Furthermore, although there is some corroboration of some of the information conveyed by the informant's statements, the elements of corroboration–whether viewed individually or collectively–fall short of clearly indicating the trustworthiness of the statements. The fact that the informant accurately conveyed where Cardwell was living at the time of the killings, that the informant knew of Cardwell's and his father's drug activity, and that, according to Detective John Bashta's informant, the "word on the street" was that Cardwell was the killer, add very little to the trustworthiness of the statements. The most telling corroboration is that the informant's statements of how Cardwell purportedly described the criminal episode corresponded generally to the facts of the episode. That corroborating effect is undermined, however, by the absence of any evidence that this information had been undisclosed by the police and could not or would not have been generally known in the area.

Finally, the defendant's reliance on Ortiz' characterization of the informant as a "reliable informant" is wholly misplaced because of the difference between, on the one hand, the concept of trustworthiness in relation to the residual hearsay exception, which operates in the trial setting, and, on the other hand, the concept of a reliable informant, which operates in the investigation

and probable cause settings. If a statement is determined to be trustworthy under the residual hearsay exception, that means that the trial court is satisfied that it should be heard by the jury, despite the lack of opportunity by the opponent of the statement to cross-examine the declarant. That determination reflects a judgment by the court that its trustworthiness is sufficiently established so as to serve as an adequate surrogate for that right of cross-examination, and that, therefore, the question of guilt or innocence ought not to be adjudicated without the statement as evidence. Such a determination, therefore, is part of the evidentiary gatekeeping function of the trial court and bears directly on the fact-finding function of the jury.

The use of informants, however, serves very different functions. In the first instance, it is part of the investigatory function of the police. A determination that an informant is "reliable" is made by the police, not by any court, as part of that function. Its use as part of the judicial process is principally to serve as one of the bases on which a court may rely in determining whether there is probable cause for the issuance of a warrant. See State v. Barton, 219 Conn. 529, 544-45, 594 A.2d 917 (1991) (court may rely on knowledge obtained by informant in probable cause ruling). Evidence is not required to rise to a significant level of trustworthiness in order to meet the probable cause standard. See State v. Marra, 222 Conn. 506, 513, 610 A.2d 1113 (1992) ("[t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction" [internal quotation marks omitted]). Ordinarily, it plays no role as a surrogate for the right of cross-examination or in the ultimate fact-finding process by the jury.

Therefore, because the record does not support the admissibility of each of three levels of hearsay necessary to admit Maher's report into evidence, the trial court did not abuse its discretion in excluding Maher's report. The multiple levels of hearsay, the lack of independent bases for the admissibility of hearsay statements within hearsay statements, and the lack of any other sufficient indicia of trustworthiness, rendered the report insufficient to serve as an adequate surrogate for cross-examination so as to permit the report to be part of the determination the guilt or innocence of the defendant.

(Footnotes omitted.) Lewis I, 245 Conn. at 793-809.

1. Standard Of Review

Pursuant to 28 U.S.C. § 2254(d)(1), a writ of habeas corpus "may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a

[SEE 2nd STATE ANSWER FOR MISSING PAGES MOTION FOR SUMMARY JUDGMENT]

decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000).[8] The phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta," of the High Court's "decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412, 120 S.Ct. at 1523.

A state court decision is "contrary to" clearly established Federal law if it falls within one of two scenarios. Under the first scenario, a state-court decision will be contrary to "clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." Williams, 529 U.S. at 405, 120 S.Ct. at 1519. As for the second scenario, the Court explained that a "state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Id. at 406, 1519-20.

If a state-court decision is not "contrary to" U.S. Supreme Court precedent, the federal habeas court must determine whether the state court's decision involved an

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[8] Justice O'Connor delivered the opinion of the Court with respect to Part II in which it determined that the Antiterrorism and Effective Death Penalty Act (AEDPA) modified the role played by federal habeas courts in reviewing petitions filed by state prisoners and interpreted § 2254(d)(1). Justice Stevens delivered the opinion of the Court with respect to Parts I, III, and IV.

"unreasonable application" of clearly established Federal law. In so doing, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409, 120 S.Ct. at 1521. Thus, courts must apply an objective standard. An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. at 410, 1522. See also Lockyer v. Andrade, __ U.S. __, 123 S.Ct. 1166, 1174-75, 155 L.Ed.2d 144 (2003) (A state court's application must be "objectively unreasonable," and "objectively unreasonable" requires something more than "clear error.") "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411, 120 S.Ct. at 1522.

Once this standard is applied to the claim raised by the instant petitioner, it becomes clear that federal habeas corpus relief is unwarranted and the petition must be dismissed.

2. The state court's denial of the petitioner's claim was not contrary to, or an unreasonable application of, clearly established federal law

At his 1995 criminal trial, the petitioner sought to introduce a report authored by Detective Vaughn Maher of the New Haven police department. In that document, Maher related that an informant reported that an individual named Michael Cardwell confessed to the murders. None of these individuals--Detective Maher, Cardwell, or the informant--"was present in court to testify and the report, along with all statements contained therein, was offered to prove the truth of the matters asserted." Lewis I, 245 Conn. at 802.

In Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), the Court explained that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[9] In the very next sentence, however, the Court cautioned that "[i]n the exercise of this right," a defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. See also Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646 653, 98 L.Ed.2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.") In Chambers, the Court noted that:

> The hearsay rule, which has long been recognized and respected by virtually every State is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Chambers, 410 U.S. at 298, 93 S.Ct. at 1047.

Nevertheless, such rules "may not be applied mechanistically to defeat the ends of justice." Id. at 302, 1049. Rather, a key factor in determining the admissibility of evidence

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[9] "Chambers was an exercise in highly case-specific error correction." Montana v. Egelhoff, 518 U.S. 37, 52, 116 S.Ct. 2013, 2022, 135 L.Ed.2d 361 (1996). "[T]he holding in Chambers--if one can be discerned from such a fact-intensive case--is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." Id. at 53, 2022.

that does not fall squarely within a recognized exception to the rule against hearsay will be the trustworthiness of that evidence. Id.

In the instant case, the Connecticut Supreme Court determined that "trial court did not abuse its discretion in excluding Maher's report. The multiple levels of hearsay, the lack of independent bases for the admissibility of hearsay statements within hearsay statements, and the lack of any other sufficient indicia of trustworthiness, rendered the report insufficient to serve as an adequate surrogate for cross-examination so as to permit the report to be part of the determination the guilt or innocence of the defendant." Lewis I, 245 Conn. at 809. Thus, it was the unreliability of the evidence, not simply the fact that the evidence did not fall within well-established exceptions to the hearsay rule, that supported the state court's determination that the evidence was inadmissable. As a result, the decision excluding the report was neither contrary to, nor an unreasonable application of, clearly established federal law.

IV. CONCLUSION

For the reasons discussed above, the petitioner is not entitled to habeas corpus relief on the claims raised in his petition and the petition should be dismissed.

Respectfully submitted,

RESPONDENT–COMMISSIONER OF CORRECTION

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CERTIFICATION

I hereby certify that a copy of this memorandum was mailed to Scott T. Lewis, # 13768, Cheshire Correctional Institution, 900 Highland Avenue, Cheshire, Connecticut, 06410, on July 31, 2003.

_____

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