UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SCOTT T. LEWIS	:	**CASE NO. 3:03cv196 (CSH)**
Petitioner	:	
	:	
V.	:	
	:	
COMMISSIONER OF CORRECTION	:	
Respondent	:	**DECEMBER 31, 2013**

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR STAY PENDING APPEAL

This memorandum of law is submitted in support of the respondent's motion for stay. That motion to stay the Court's order that "the State of Connecticut is directed to release the Petitioner from the custody of the State of Connecticut within sixty (60) days of the date of this Ruling and Order, unless the State of Connecticut within those 60 days declares its written intention, addressed to this Court and counsel for Petitioner, to retry Petitioner on the charges against him that are referred to in this Ruling." Ruling [Doc. # 283] at 68. For the reasons set forth below, the failure to grant such stay would prejudice the respondent on appeal.

I. PROCEDURAL BACKGROUND

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. On July 21, 1995, the petitioner was sentenced to one hundred and twenty years incarceration.

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." *State v. Lewis*, 245 Conn. 779, 781, 717 A.2d 1140 (1998) (hereinafter *Lewis I*). The petitioner also raised "several challenges to the trial court's jury instructions." *Id.* Specifically, he claimed "that the court improperly: (1) failed to charge the jury on self-defense; (2) refused to give the jury a missing witness instruction under *Secondino v. New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960); and (3) instructed the jury regarding reasonable doubt." *Lewis I,* 245 Conn. at 781. Finally, he claimed "that his protection against double jeopardy was violated because he was convicted and sentenced for both murder and felony murder as to each victim." *Id.* at 781-82. On August 4, 1998, the Connecticut Supreme Court reversed the judgment in part and remanded the case to the trial court "with direction to combine the defendant's convictions for the two counts of felony murder with his convictions for the two counts of intentional murder, and to vacate the felony murder sentences." *Id.* at 819. In all other respects, the Court affirmed the judgment of conviction. *Id.*

On August 18, 1998, the petitioner filed a petition for writ of habeas corpus with this court. *Scott T. Lewis v. George Wezner*, Case No. 3:98CV1666(JCH), U.S. District Court, District of Connecticut. The Court dismissed the petition "without prejudice for failing to exhaust state remedies" and judgment entered on February 19, 1999.

On March 19, 1999, the petitioner filed a petition for writ of habeas corpus in the Superior Court for the judicial district of New Haven. After a hearing on the merits of the petitioner's claims, the state habeas court denied those claims and dismissed the

petition on September 17, 2001. The petitioner appealed. On November 19, 2002, the Connecticut Appellate Court dismissed the petitioner's appeal. *Lewis v. Commissioner of Correction*, 73 Conn. App. 597, 808 A.2d 1164 (2002) (hereinafter *Lewis II*). The petitioner then sought discretionary review by the Connecticut Supreme Court. His petition was denied on January 14, 2003. *Lewis v. Commissioner of Correction*, 262 Conn. 938, 815 A.2d 137 (2003).

Three years later, on or about July 19, 2006, the petitioner initiated a second state habeas action. After a trial on the merits of his claims, the second habeas court denied his petition in a written memorandum of decision dated February 5, 2008. *Scott Lewis v. Warden, State Prison*, Superior Court, Judicial District of Tolland, Docket No. CV06-4001783, 2008 WL 544579 (Conn. Super. February 5, 2008). The petitioner appealed. On August 11, 2009, the Connecticut Appellate Court dismissed his appeal. *Lewis v. Commissioner of Correction*, 116 Conn. App. 400, 975 A.2d 740 (hereinafter *"Lewis III"*). The petitioner then sought discretionary review by the Connecticut Supreme Court. His petition was denied on November 10, 2009.[1] *Lewis v. Commissioner of Correction*, 294 Conn. 908, 982 A.2d 1082 (2009).

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[1] While the petitioner's second state habeas action was pending, the petitioner filed a motion to correct an illegal sentence pursuant to Connecticut's Practice Book § 43-22. On July 30, 2007, the state trial court found that it lacked jurisdiction to consider the petitioner's claims because they challenged the lawfulness of his conviction, not the legality of his sentence. *State v. Lewis*, Superior Court, Judicial District of New Haven, CR94-0402583, 2007 WL 2363454 (Conn. Super. July 30, 2007). The petitioner appealed. On June 17, 2008, the Connecticut Appellate Court

The petitioner initiated the instant proceedings under 28 U.S.C § 2254 on January 29, 2003. In his petition, the petitioner raised claims that (1) the state suppressed exculpatory evidence in the form of testimony by former detective Michael Sweeney, (2) a state's witness named Ovil Ruiz committed perjury at his criminal trial, and (3) the trial court erred in refusing to admit a police report containing multiple levels of hearsay. The respondent filed an answer and three memoranda in opposition to the petition on the ground that the first two claims were procedurally defaulted and not exhausted. Memoranda [Doc. # 15, 34 and 64].

On February 23, 2011, the Court issued a decision on the respondent's procedural objections. Ruling [Doc. # 113]. The Court found that the petitioner's claims were exhausted. It further determined that the petitioner's perjury claim was procedurally defaulted, but that the *Brady* claim was not defaulted. The Court then ordered that an evidentiary hearing would be held as to the petitioner's *Brady* claim and his claim that the trial court erred in refusing to admit a police report.

The respondent moved for reconsideration regarding the Court's order for an evidentiary hearing. Motion [Doc. # 121]. The Court denied relief. In doing so, it noted that the petitioner "did develop the factual basis for his claims in state court" but "was

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affirmed the judgment of the state trial court. *State v. Lewis*, 108 Conn. App. 486, 948 A.2d 389 (2008). The petitioner did not seek discretionary review by the Connecticut Supreme Court.

prevented from presenting what might have been his most important evidence because Ovil Ruiz, a central figure in this matter, invoked his Fifth Amendment privilege against self-incrimination and refused to answer the Petitioner's questions." Ruling [Doc. # 163] at 5-6.

Meanwhile, the petitioner sought to amend his petition by adding new claims and raising additional allegations in support of his previous claims. Where the original petition alleged the suppression of information in the possession of Michael Sweeney, the amended petition claimed that the State suppressed six different types of exculpatory or impeachment evidence in violation of the principles established by *Brady* and its progeny. The respondent objected on the grounds that several of the new claims had not been exhausted in the state courts of Connecticut and were time-barred under § 2244(d). The Court granted the petitioner's motion to amend his petition. Ruling [Doc. # 171]. In so doing, the Court essentially held that, because all of the claims related to the alleged suppression of evidence by the State, they were exhausted and related back to the original petition.

In June 2013, the Court held an evidentiary hearing on the petitioner's *Brady* claims and his claim that the trial court erred in refusing to admit a police report containing multiple levels of hearsay. Thereafter, on December 16, 2013, the Court released its decision granting the writ. Specifically, the Court granted relief on the petitioner's claim that the State withheld exculpatory evidence in the form of Michael Sweeney's testimony that a state's witness, Ovil Ruiz, told Sweeney that he knew nothing about the murders of Ricardo Turner and Lamont Fields. It then ordered that

the petitioner be released from custody within sixty (60) days unless the State of Connecticut within those 60 days declares its written intention . . . to retry Petitioner on the charges against him that are referred to in this ruling." Ruling [Doc. # 283] at 68.

II. ARGUMENT

In this case, a stay of this Court's order is appropriate. Absent a stay, the State would have to retry the petitioner while its appeal is pending before the United States Court of Appeals for the Second Circuit. A retrial, however, could moot the appeal. Whether the petitioner is acquitted or convicted after such retrial, he would no longer be in custody as a result of the conviction that this Court has found to be infirm. In other words, the denial of a stay could leave the State without an opportunity for review. As this Court has noted, the petitioner has repeatedly raised claims in the state courts of Connecticut. Those courts have given his claims their attention and have rendered numerous decisions. *See* Ruling [Doc. # 283] at 7 (listing state-court decisions and orders). Before the rejection of their decisions is final, however, comity requires that the respondent have a full opportunity to obtain review. For this reason, the respondent requests that this Court grant its motion and stay the Court's order pending the respondent's appeal.

The United States Court of Appeals for the First Circuit has cautioned district courts that "if the case involves a constitutional issue of some difficulty and if . . . the petitioner's conviction had been reviewed and approved at the highest level of the state judiciary, comity usually suggests the advisability of granting the state at least a short respite during which" counsel for the respondent "may approach the federal appellate

court for a stay." *LaFrance v. Bohlinger*, 487 F.2d 506, 508 (1st Cir. 1973). Similarly, the Supreme Court has noted that "a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilty has been upheld by the appellate courts of the State. Although the decision of a district court granting habeas relief will have held that the judgment of conviction is constitutionally infirm, that determination itself may be overturned on appeal before the state must retry the petitioner." *Hilton v. Braunskill*, 481 U.S. 770, 779, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

These principles suggest that a stay be entered in the interests of comity and out of respect for the state's courts. In other words, this Court should afford Connecticut's Appellate and Supreme Courts enough respect that it allows their decisions to be defended on appeal without interference.

A. A Stay Is Warranted Under The Standards Set Forth In *Hilton v. Braunskill*

In determining whether to grant this motion, the Court should consider "the factors generally regulating the issuance of a stay" such as: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). After analyzing such factors, this Court should conclude that a stay of the petitioner's retrial is appropriate and must be ordered.

The first factor listed in *Hilton v. Braunskill* concerns the possible merits of the respondent's appeal. In Section II. B., below, the respondent demonstrates that he can make a strong showing of his likely success. The second factor concerns the injury to the respondent absent a stay. Injury will result if the respondent is forced to retry the petitioner while simultaneously appealing to the United States Court of Appeals for the Second Circuit. *House v. Bell,* 2008 WL 2235235, *2 (E.D.Tenn. 2008). Such dual proceedings expend scarce judicial and prosecutorial resources--the need for which may be mooted by an appeal. Indeed, a retrial could deprive the respondent of his right to an appeal by mooting the issues. Certainly, Congress intended the respondent to have an unobstructed right to appeal. Indeed, unlike habeas petitioners, the respondent is not required to obtain a certificate of appealibility before appealing. See *Aparicio v. Artuz*, 269 F.3d 78, 88 n.4 (2d Cir. 2001); Fed. R. App. P. 22(b)(3) ("certificate of appealability is not required when a state or its representatives . . . appeals"). Thus, in order to guarantee that the respondent can fairly exercise his right to review, this Court should grant this motion to stay the retrial.

As for the third factor–*i.e.,* the implications of the Court's order on other persons interested in the proceedings--the Court owes substantial deference to the state court's need to manage its calendar appropriately; *Rosa v. McCray,* 2004 WL 2827638 at *4 (S.D.N.Y. December 8, 2004); and to not have to expend scarce judicial resources on a retrial, the need for which may be obviated by the respondent's appeal. Indeed, it would be highly inefficient to attempt to compel the state court to conduct a trial which may be averted by the resolution of the appeal and "[t]here is no reason to believe that, if the

order is affirmed," the State of Connecticut "will not proceed promptly to retry petitioner. . . ." *Rosa*, 2004 WL at *6. Thus, in the interest of comity and out of respect to Connecticut's judiciary, this Court should grant a stay pending resolution of the respondent's appeal to the Second Circuit.

As for the "public interest," the public obviously has an overwhelming concern in the identification, investigation, and prosecution of criminal activity.

For the reasons set forth above, the factors approved by the Supreme Court for deciding whether to stay an order for habeas corpus relief all favor the granting of the respondent' s motion for a stay. Thus, the respondent requests that this Court grant this motion and stay its order that the petitioner be released unless, within 60 days, the State declares its written intention to retry the petitioner.

B. The Respondent Can Make A Strong Showing That He Is Likely To Succeed On The Merits

The first factor enumerated in *Hilton v. Braunskill* addresses "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Hilton*, 481 U.S. at 776. At this point in the proceedings, the respondent intends to appeal. The issues under consideration include:

(1) Whether the District Court erred in granting relief on a claim that has not been exhausted in the state courts of Connecticut?

(2) Whether the District Court erred in granting relief on a claim that was defaulted in the state courts of Connecticut?

(3) Whether the District Court erred in finding that the new claims raised in the amended petition were not time-barred?

(4) Whether the District Court erred in granting relief on a "mixed" petition—*i.e*., a petition raising both exhausted and unexhausted claims?

(5) Whether the District Court erred in finding that there was a *Brady* violation when the evidence affirmatively established that the petitioner had the information that he alleged was suppressed;

(6) Whether the District Court erred in finding that the state court improperly applied federal law?[2]

For the reasons discussed below, the respondent can make the required strong showing that he is likely to succeed on the merits.

1. The Court granted relief on a claim that has not been exhausted in the state courts

"[I]f anything is settled in habeas corpus jurisprudence, it is that a federal court may not grant the habeas petition of a state prisoner 'unless it appears that the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process; or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.' 28 U.S.C. § 2254(b)(1)." *Aparicio v. Artuz*, 269 F.3d 78, 89 (2d Cir. 2001). Indeed, the relevant statute provides that federal habeas corpus relief "*shall* not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ." (Emphasis added.) 28 U.S.C. § 2254(b)(1)(A). Thus, even if a

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[2] The respondent does not intend to limit itself to these issues on appeal.

petitioner can demonstrate a "clear violation" of his rights, federal relief is unwarranted unless available state remedies are exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981) (per curiam). This "exhaustion requirement springs primarily from considerations of comity." *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982). It requires that federal courts refrain from exercising "habeas review of a state conviction unless the state courts have had an opportunity to consider and correct any violation of federal law" and, thus, demonstrates "respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions." *Id*. A claim is not "exhausted" unless it has been presented to the highest state court. *Daye*, 696 F.2d at 190 n.3.

In order to satisfy the exhaustion requirement, "'[i]t is not sufficient merely that the [petitioner] has been through the state courts.' . . . Rather the petitioner's claims must be fairly presented so that the state has the opportunity to correct any alleged constitutional violations. . . ." (Citations omitted.) *Ellman v. Davis*, 42 F.3d 144, 147 (2d Cir. 1994). Indeed, the U.S. Supreme Court has explained that to "protect the integrity of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts. . . ." (Emphasis in original.) *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). "A petitioner meets the fair presentation requirement if the state court rules on the merits of his claims, or if he presents his claims in a manner that entitles him to a ruling on the merits." *Gentry v. Lansdown*, 175 F.3d 1082, 1083 (8th

Cir. 1999) citing *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). *See also Howard v. Sullivan*, 185 F.3d 721, 725 (7th Cir. 1999) (fair presentment "requires the petitioner to have given the state courts a meaningful opportunity to pass upon the substance of the claims she later presses in federal court"). A petitioner has "fairly presented" a claim if he has "'informed the state court of both the factual and the legal premises of the claim he asserts in federal court.' *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc).

Here, the Court granted relief on the petitioner's *Brady* claim relating to testimony given by Michael Sweeney. In the state courts, the petitioner raised a *Brady* claim based on Sweeney's testimony in a post-conviction proceeding brought by his co-defendant, Stefan Morant. The state habeas court denied relief and the petitioner appealed. On appeal, the petitioner refused to file the transcripts of the five-day trial before the state habeas court. The Connecticut Appellate Court determined that it could not review his claim, in part, because he refused to file the transcripts. The Court explained that "[o]ur role is not to guess at possibilities, but to review claims based on a complete factual record developed by a [habeas] court." *Lewis II*, 73 Conn. App. at 599. Thus, because the petitioner did not provide the Court with an adequate record, it refused to review his claim. The petitioner then sought review by the Connecticut Supreme Court. In doing so, he raised two claims. As his first claim, he challenged the Appellate Court's determination that his claims were not reviewable because he did not address the denial of certification and did not file transcripts of the habeas trial. He then raised a second claim that, if the answer to the first question was "Yes", (1) the denial of

certification constituted an abuse of discretion and (2) the record was adequate for review.

This Court determined that the petitioner's *Brady* claim was presented to the Connecticut Supreme Court and, therefore, was exhausted. In reaching this conclusion, the Court selected a few words and phrases from the petitioner's petition seeking discretionary review and found that they referred to a *Brady* claim and "alerted the reader to potential federal constitutional violations." See Ruling [Doc. # 113] at 6-7; Appendix K to respondent's resubmission [Doc. # 109]. Although a few words were scattered throughout the petitioner's petition, he did not ask the Connecticut Supreme Court to review or consider his *Brady* claim. Likewise, he did not argue that the state habeas court's decision on his *Brady* claim was erroneous. Rather, he argued that the certification requirement was not jurisdictional and that he supplied the Connecticut Appellate Court with all of the materials necessary to review the decision of the state habeas court. Because he never asked that the Connecticut Supreme Court to review the state habeas court's denial of his *Brady* claim, that claim was not exhausted in the courts of Connecticut. Thus, the petitioner has not exhausted his *Brady* claim.[3]

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[3] Although the Court "adopted Petitioner's counsel's argument that Respondent has judicially admitted that Petitioner exhausted his *Brady* claim"; Ruling [Doc. # 113] at 7 n.2; no such admission occurred. In Paragraph 11 of the respondent's answer of July 31, 2003, the respondent that "[i]t appears that the petitioner has not exhausted first and second claims by failing to present them to the Connecticut Supreme Court in a petition for certification to appeal the decision of the Connecticut

2. The Court granted relief on a claim that was defaulted in the state courts

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. *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 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).

Here, the petitioner defaulted his *Brady* claim by failing to address the denial of certification before the Connecticut Appellate Court and refusing to file the transcripts of

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Appellate Court." Answer [Doc. # 14]. *See also* Respondent's Memorandum of December 16, 2009 [Doc. # 64] at 1-7.

the state habeas trial. The Appellate Court refused to review his claims pursuant to independent and adequate state procedural rules. Thus, federal habeas review was unwarranted unless the petitioner could demonstrate good cause for the default and actual prejudice arising therefrom or that the failure to consider the claim would result in a fundamental miscarriage of justice.

In ruling on the respondent's procedural objections, the Court found the petitioner's refusal to file the transcripts rendered his perjury claim defaulted but did not result in his *Brady* claim being defaulted. Ruling [Doc. # 113] at 11-13. Essentially, the Court held that the Connecticut Appellate Court did not require the transcripts in order to rule on the *Brady* claim. In doing so, the Court substituted its own judgment on an issue of state appellate procedure for that of the Connecticut Appellate Court. In analyzing a procedural default, a federal court should not consider whether the state court properly applied its default rules to the petitioner's facts. *Poland v. Stewart*, 169 F.3d 573, 585 (9th Cir. 1998); *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997) (it is not the office of the federal habeas court to determine if the state court made a mistake of state law in applying a procedural bar). Rather, once a state court has refused to review a claim on state procedural grounds, a federal court determines whether the procedural rule was independent of the federal question and adequate to support it. *Coleman v. Thompson*, 501 U.S. 722, 731-32, 111 S.Ct. 2546, 2553-2554, 115 L.Ed.2d 640 (1991). Because the Connecticut Appellate Court's determined that the petitioner's refusal to file the transcripts rendered his claim unreviewable, this Court erred in assessing the propriety of that default.

3. The Court erred in granting relief on the petitioner's claim based upon the testimony of Michael Sweeney

On appeal, the respondent intends claim that the Court erred in finding that the state habeas court: (1) incorporated a due diligence requirement into its *Brady* analysis; (2) "accepted the truth of Sweeney's account of events"; and (3) rejected the respondent's claim that the defense knew of Ruiz's denials through Ellen Knight's interview with him.

In resolving the § 2254(d) inquiry in the petitioner's favor, the Court determined that the state habeas court's decision was contrary to clearly established federal law because it "included the defense's exercise of due diligence as an alternative basis. . . ." Ruling at 18. Such finding, however, does not take into account that the petitioner characterized this evidence as "newly discovered." In Count Two of his petition to the state habeas court, the petitioner raised claims regarding the suppression of information concerning the "Torres shooting," the Jacqueline Shaw murder investigation, that Ovil Ruiz committed perjury at the probable cause hearing, and testimony given by Sweeney Appendix G at 7-14 to Resubmission [Doc. # 109]. He concluded this count of the petition by alleging that his "imprisonment is illegal in that he was deprived of his right to due process of law and that he is actually innocent based on newly discovered evidence."[4] *Id*. at 14. Given that the petitioner presented Sweeney's testimony as both

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[4] Similarly, in his brief to Connecticut's Appellate Court, the petitioner wrote, "The plaintiff – appellant files a habeas corpus (amended) petition dated January 2,

Brady material *and* as "newly discovered evidence," the state habeas court did not incorporate a due diligence requirement in *Brady*. Rather, it addressed all of the allegations raised by the petitioner.

The Court further determined that the state habeas court's ruling that "all exculpatory evidence was furnished to the defense, was erroneous and unreasonable." Ruling at 18. To reach this conclusion, the Court, without citation to any authority, held that that "Lewis is entitled to a conclusion by the federal court that the State court record establishes the reliability and truth of Michael Sweeney's account of his own conduct and that of Ruiz and Raucci during the night of January 13-14, 1991." Ruling [Doc. # 283] at 17. The state habeas court, however, rejected all of the petitioner's claims based upon the transcript of Sweeney's prior testimony as unproven. Thus, there is no evidence that the state court found Sweeney's testimony to be either reliable or truthful.

The state habeas court first addressed Sweeney's testimony in the context of the petitioner's claim of perjured testimony, as follows:

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2001, which alleges the following 1) the state's witness committed perjury at the criminal trial, 2) The state suppressed exculpatory information 3) actual innocence.

"These claims were based on 'newly discovered evidence' "

Appendix H at iii to Resubmission [Doc. # 109].

> 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).
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> The petitioner has filed a post trial brief which discussed the statement taken from Ovil Ruiz on January 14, 1991. He argues that Detective Sergent 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).
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> 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.

Appendix G at 44-45 to Resubmission [Doc. # 109].

Thereafter, the state habeas court addressed the petitioner's *Brady* claim, as follows:

> 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.
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> 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 to Resubmission [Doc. # 109].

In the proceedings in this Court, the Court had the opportunity to review the notes of Ellen Knight's, an investigator for the public defender who originally represented the petitioner in the state criminal matter, interview with Ovil Ruiz conducted well before the petitioner's criminal trial. Having reviewed those notes, the

Court found that the "defense knew about Knight's interview with Ruiz and what Ruiz, a trouble and self-contradicting young man, said during its rambling course." Ruling at 48. In that interview, Ruiz told Knight that he denied any knowledge of the murders when questioned by the police. He further told her that he had been offered a reward by the police. Certainly, Lewis' defense attorneys had this information "prior to trial for their use in cross-examining Ruiz, the State's key witness." *Id*. They also had Ellen Knight, who could have testified that Ruiz made such statements to her. Nevertheless, the Court found that the "value" of the information was greater if it came from Sweeney than if it came from Ruiz. Thus, despite the fact that the defense had this information, the Court held that it was suppressed.

Brady and its progeny concern the disclosure of exculpatory or impeachment information. Disclosure is not required, however, if the defendant knew or should have known the essential facts permitting the defendant to take advantage of the exculpatory evidence. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990); *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) (same). See also *Thompson v. Cain*, 161 F.3d 802, 807 (5th Cir. 1998). *United States v. Willis*, 997 F.2d 407, 412-13 (8th Cir. 1993).

Here, of course, the petitioner had information from Ellen Knight as well as the Ruiz's two statements. In the January statement, Ruiz reported that he overheard a conversation between the petitioner and Stefan Morant. In the May statement, however, Ruiz admitted his own involvement which included obtaining the murder weapons and driving the petitioner and Morant to the victims' apartment. He indicated that he saw them enter the residence, heard shots, and then the two men returned. The

mere fact that Ruiz did not include these latter events in his January statement, coupled with Ellen Knight's interview, provided the defense with more than sufficient information to take advantage of the relevant material. For this reason, the Court erred in finding that the information provided by Sweeney was suppressed.

In the proceedings in this Court, the Court had the opportunity to review the notes of Ellen Knight, an investigator for the public defender who originally represented the petitioner in the state criminal matter, who conducted an interview with Ovil Ruiz well before the petitioner's criminal trial. Having reviewed those notes, the Court found that the "defense knew about Knight's interview with Ruiz and what Ruiz, a trouble and self-contradicting young man, said during its rambling course." Ruling at 48. In that interview, Ruiz told Knight that he denied any knowledge of the murders when questioned by the police. He further told her that he had been offered a reward by the police. Certainly, Lewis' defense attorneys had this information "prior to trial for their use in cross-examining Ruiz, the State's key witness." *Id*. They also had Ellen Knight, who could have testified that Ruiz made such statements to her. Nevertheless, the Court found that the "value" of the information was greater if it came from Sweeney than if it came from Ruiz. Thus, despite the fact that the defense had this information, the Court held that it was suppressed.

Brady and its progeny concern the disclosure of exculpatory or impeachment information. Disclosure is not required, however, if the defendant knew or should have known the essential facts permitting the defendant to take advantage of the exculpatory evidence. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990); *United States v.*

Gaggi, 811 F.2d 47, 59 (2d Cir. 1987) (same). See also *Thompson v. Cain*, 161 F.3d 802, 807 (5th Cir. 1998). *United States v. Willis*, 997 F.2d 407, 412-13 (8th Cir. 1993).

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III. CONCLUSION

For the reasons set forth above, the respondent requests that this Court grant its motion and stay the Court's order that "the State of Connecticut is directed to release the Petitioner from the custody of the State of Connecticut within sixty (60) days of the date of this Ruling and Order, unless the State of Connecticut within those 60 days declares its written intention, addressed to this Court and counsel for Petitioner, to retry Petitioner on the charges against him that are referred to in this Ruling." Ruling [Doc. # 283] at 68.

Respectfully submitted,

RESPONDENT–COMMISSIONER OF CORRECTION

By: /s/ JO ANNE SULIK .

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CERTIFICATION

I hereby certify that on December 31, 2013 a copy of this memorandum was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ JO ANNE SULIK .
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