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Docket Nos. CV05-4000409 and CV03-0004219 (Judicial District of Tolland)

RONALD TAYLOR	:	
v.	:	STATE OF CONNECTICUT
COMMISSIONER OF CORRECTION	:	
	:	APPELLATE COURT
GEORGE M. GOULD	:	
v.	:	MARCH 22, 2010
COMMISSIONER OF CORRECTION	:	

MOTION FOR REVIEW OF COURT'S RULING THAT AUTOMATIC STAY PROVISIONS OF PRACTICE BOOK § 61-11 DO NOT APPLY

Pursuant to Practice Book § 66-6, the respondent-commissioner hereby moves this Court for review of the habeas court's ruling that the automatic stay provisions of Practice Book § 61-11 do not apply to its judgment in this case. The habeas court's determination that its judgment is exempt from the automatic stay provisions and its order directing the respondent to immediately and unconditionally release the petitioners from confinement is in direct contravention of the provisions of § 61-11. Accordingly, this motion for review should be granted and the habeas court's order should be vacated to the extent that it holds that the automatic stay provisions of § 61-11 do not apply. In addition, this Court should direct the habeas court to conduct further proceedings in this case regarding the stay imposed by § 61-11(a) in compliance with the provisions of § 61-11(c).

I. BRIEF HISTORY OF THE CASE

The petitioners were charged by information with murder, in violation of General Statutes §53a-54a; felony murder, in violation of General Statutes §53a-54c; robbery in

the first degree, in violation of General Statutes §53a-134; attempted robbery in the first degree, in violation of General Statutes §§ 53a-134 and 53a-49; and conspiracy to commit robbery in the first degree, in violation of General Statutes §§53a-134 and 53a-48 in the Judicial District of New Haven. After trial by jury, the petitioners were found not guilty of murder but guilty of all other charges. On April 7, 1995, the trial court, *Fracasse, J.*, sentenced each petitioner to a total effective sentence of imprisonment for eighty years. The petitioners appealed their convictions separately to the Connecticut Supreme Court. The Supreme Court consolidated their appeals and affirmed the convictions on May 20, 1997. State v. Gould, 241 Conn. 1 (1997).

Thereafter, the petitioners filed habeas corpus petitions pursuant General Statutes §52-466(a) and Practice Book § 23-21 *et seq.* In their habeas petitions, the petitioners claimed that they had been denied their right to the effective assistance of counsel and that they were actually innocent of the crimes of which they were convicted. On March 17, 2010, following a joint hearing, the habeas court, *Fuger, J.*, denied the petitioners' claim of ineffective assistance of counsel but found that they had established that they were actually innocent. Memorandum of Decision, dated March 17, 2010, Taylor v. Commissioner of Correction, Docket No. CV05-4000409; and Gould v. Commissioner of Correction, Docket No. CV03-0004219, Judicial District of Tolland (Exhibit A).

The habeas court granted the petitions and ordered that the sentences imposed on the petitioners, the verdicts of guilty at their trials, the results of their hearings in probable cause and the arrest warrants issued for their arrest be set aside and vacated. Memorandum of Decision at 58. On March 22, 2010, the respondent filed petitions for certification to appeal in both cases pursuant to General Statutes §52-470(b).

II. SPECIFIC FACTS RELIED UPON

In its decision granting the petitioners' habeas corpus petitions, the habeas court stated that:

> In the instant matter, an automatic stay of this court's judgment would negate both the fundamental purpose of the Great Writ and have the effect of transforming meaningful relief into further illegal confinement. The disposition of this case as law and justice require, following this court's full inquiry into the cause of imprisonment, *must* result in the immediate release of the petitioners as there is no cause for imprisonment.

(Emphasis in original.) Memorandum of Decision at 57. In support of this conclusion, the habeas court cited the opinion of the New York Court of Appeals in People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 158 N.E. 613 (1927). The court, therefore, explicitly held that "there is no automatic stay barring the petitioners' immediate and unconditional release." Memorandum of Decision at 58. Consequently, the habeas court ordered the respondent to "*immediately and unconditionally release the petitioners from confinement.*" (Emphasis in original.) Id.

III. LEGAL GROUNDS RELIED UPON

The habeas court held that the automatic stay provisions of Practice Book § 61-11 do not apply to its decision granting the petitioners habeas corpus relief on their claims of actual innocence. When the plain language of § 61-11 and the decisions of other Connecticut courts that have ruled on the issue are considered, however, it is clear that the habeas court erred in holding that the automatic stay provisions do not apply in this case.

Practice Book § 61-11(a) provides in relevant part that "[e]xcept where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to take an appeal has expired. If an appeal is

filed, such a proceeding shall be stayed until the final determination of the cause." There is no statutory exception concerning stays in habeas actions, and the respondent is unaware of any "other law" which would controvert the plain language of § 61-11(a). Contrary to the habeas court's ruling, its order granting the petitioners habeas relief was automatically stayed until the time to take an appeal had expired. The time for taking an appeal in this case is twenty days from the habeas court's action on the respondent's petition for certification pursuant to General Statutes §52-470(b). See Practice Book §63-1.

Other Connecticut courts considering the issue have concluded that the automatic stay provisions apply in habeas corpus proceedings. See, e.g. Redway v. Warden, 13 Conn. Supp. 240 (1945) (court admitted to bail habeas petitioner after concluding that execution of an order of discharge following habeas judgment shall be stayed by Practice Book rule until final determination of appeal by the Supreme Court of Errors); Moulthrop v. Walker, 12 Conn. Supp. 35 (1942) (Practice Book rule concerning stay of execution of judgment applies to habeas corpus judgments). An order granting a habeas petition based upon a claim of actual innocence is no different from the judgment in any other habeas case and, therefore, should be equally subject to the automatic stay provisions. See Henry v. Warden, 2009 WL 415590, 1 (Conn. Super., 01/22/09, *dos Santos, J.*) ("In accordance with Practice Book § 61-11(a), a habeas court's judgment is automatically stayed during the pendency of the appeal unless the stay is terminated in accordance with § 61-11(c) and (d).")

The habeas court's reliance on the decision of the New York Court of Appeals in People ex rel. Sabatino v. Jennings, supra, is misplaced. The statutory scheme that was

at issue in Jennings bears little resemblance to the provisions of Practice Book § 61-11. In Jennings, the Court of Appeals noted that the warden had "relied upon section 570 of the Civil Practice Act, which provides that 'upon an appeal taken by the People of the State or by a state officer . . . the service of notice of appeal perfects the appeal and stays the execution of the judgment . . . .'" Jennings, 246 N.Y. at 259. The court concluded, however, that section 570 had "no application to appeal by a state officer from an order directing the unconditional discharge of a prisoner upon a writ of habeas corpus." Id., at 259-60. Rather, the court concluded that:

> The pertinent section in such a situation is section 1269, which provides that "A prisoner who has been discharged by a final order made upon a writ of habeas corpus or certiorari shall not be again imprisoned, restrained, or kept in custody, for the same cause.

Jennings, supra, 260. Because the statute on which the New York Court of Appeals based its decision has no counterpart in Connecticut law, Jennings lends no support to the habeas court's ruling.

The Jennings court did state in dicta that "[a] statute suspending the effect of the discharge by mere force of an appeal would be at war with the mandate of the Constitution whereby the writ of habeas corpus is preserved in all its ancient plenitude." Jennings, 246 N.Y. at 261. Sixty years before Jennings was decided, however, the Connecticut Supreme Court of Errors reached a contrary conclusion. In MacReady v. Wilcox, 33 Conn. 321 (1866), the Connecticut court held that a stay of a habeas corpus order during an appeal did not violate the United States Constitution. In MacReady, the petitioner claimed that his case was not "subject of review, from the fact that the delay occasioned thereby is in conflict with the provisions of the constitution of the United States which declares that 'the

privilege of the writ of habeas corpus shall not be suspended . . . ." MacReady, 33 Conn. at 329. The court rejected the petitioner's claim, stating that:

> The constitution has reference to a state of things in which the courts of the state . . . have no power to apply the remedy of habeas corpus, for its operation is suspended . . . and the citizens of the state therefore cannot resort to this mode of testing the legality of imprisonment when they are subjected to it. *It has no reference to a reasonable delay that may be occasioned in the disposition of such cases.*

(Emphasis added.) MacReady v. Wilcox, supra, 329. Accordingly, the habeas court's ruling has no basis in the requirements of the constitution.

Moreover, in interpreting the meaning of Practice Book rules, it is appropriate to use the statutory construction principles. See Thalheim v. Greenwich, 256 Conn. 628, 639 (2001) (rules of statutory construction apply with equal force to interpretation of rules of practice). Here, the habeas court's ruling violated "the well-established maxim that 'statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant.'" State v. Whitford, 260 Conn. 610, 641 (2002), quoting Nizzardo v. State Traffic Commission, 259 Conn. 131, 158 (2002). Practice Book § 61-11(b) sets forth the non-criminal matters to which the automatic stay provisions do not apply. If the Rules Committee had wanted to exclude habeas corpus matters in which relief is granted based on a finding of actual innocence, it could have done so. The habeas court's ad hoc exclusion of such cases from the automatic stay provisions renders § 61-11(b) to be "superfluous, void [and] insignificant." State v. Whitford, supra, 641.

Finally, the habeas court stated that "an automatic stay of [the] court's judgment and orders would negate both the fundamental purpose of the Great Writ and have the effect of transforming meaningful relief into further illegal confinement." Memorandum of Decision

at 57. In making this assertion, however, the habeas court overlooks the fact that Practice Book § 61-11 provides the trial court with discretion to lift the stay when the interests of justice so require.

Practice Book § 61-11(c) permits the trial court to terminate a stay pending appeal where "(1) . . . the appeal is taken only, for delay or (2) the due administration of justice so requires." The court may do so, however, only "after a hearing." Id. A hearing on the issue of whether the automatic stay should be terminated provides both sides with the opportunity to be heard, and, therefore, makes it more likely that the trial court's decision will truly be in the interest of justice. Moreover, a hearing ensures that an adequate record exists for subsequent review by this Court if either party deems it necessary. See Practice Book §§ 61-14 and 66-6.

Accordingly, the habeas court's attempt to exempt its ruling from the application of the rules of the Practice Book – rules promulgated to ensure the orderly administration of justice – is entirely without justification.

WHEREFORE, this Court should grant the respondent's motion for review, vacate the habeas court's ruling that the automatic stay provisions of Practice Book § 61-11 do not apply to the judgment in this case and direct the habeas court to apply § 61-11 and the other appropriate provisions of the Practice Book when ruling on stays in this case.

Respectfully submitted,

BRIAN K. MURPHY
COMMISSIONER OF CORRECTION
STATE OF CONNECTICUT

RESPONDENT

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CERTIFICATION

The undersigned attorney hereby certifies that this document complies with the provisions of Practice Book §66-3, and that a copy of the same was mailed, first class postage prepaid, to Attorney Peter Tsimbidaros, P. O. Box, 320482, Fairfield, Connecticut, 06825, Telephone: (203) 333-5111, Fax: (203) 333-5111; Attorney Joseph Visone, 41 Miscoe Road, Mendon, Massachusetts 01756, Telephone: (508) 634-9957; Starble & Harris, LLC, Avon Park South, One Darling Drive, Avon, Connecticut 06001, Telephone (860) 678-7775; and Senior Assistant State's Attorney John M. Waddock, Office of the State's Attorney, 245 Church Street, New Haven, Connecticut 06510, Telephone: (203) 6823, Fax: (203) 789-6400, on March 22, 2010.

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Docket Nos.: CV05-4000409 & CV03-0003933

George Gould	}	State of Connecticut
Inmate # 82915	}	Superior Court
Ronald Taylor	}	
Inmate # 224606	}	
vs.	}	Judicial District of Tolland
	}	at Somers
Commissioner of Correction	}	
State of Connecticut	}	March 17, 2010

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STATE OF CONNECTICUT
SUPERIOR COURT
T.R. 19

Memorandum of Decision

"This case rises and falls on the testimony of Doreen Stiles." [1]

Senior Assistant State Attorney James G. Clark

A senseless, cold-blooded, execution style murder was committed in the early morning hours of July 4th, 1993. Mr. Eugenio Deleon Vega went to the small *bodega* that he owned in the Fairhaven section of the City of New Haven named *La Casa Green*, to open up for the day. At 5:08 AM, he deactivated the alarm system on the front door. Before the hour of six AM, before he could even arrange the morning newspapers, he was dead. He had been

[1] No truer words have ever been spoken about both the underlying case and the habeas corpus proceeding now at bar. *State v. Gould, State v. Taylor*, 241 Conn. 1, fn7 at 3, (1997)

Exhibit A

executed, shot once in the left temple with a projectile from a .38 caliber semiautomatic pistol. These are indisputable facts.

Within a month, two men, Ronald Taylor and George Gould, had been arrested by the New Haven Police Department and charged with his murder. Messrs. Gould and Taylor were both addicted to crack cocaine and had apparently spent much of the night and early morning hours of July 3rd and July 4th committing small unrelated street robberies to obtain money for more crack. They were tried in a joint trial before a jury in the Superior Court of the Judicial District of New Haven, convicted, and sentenced to lengthy prison terms. They have remained incarcerated from the date of their initial arrest in 1993 through today. These two men, whose fates have been inextricably bound together since that July morning in 1993, are now the petitioners in this unusual joint habeas proceeding in which they allege that their incarceration is illegal. The matter was tried before this Court over a six-month period in 2009.[2] It is now an inescapable conclusion that a manifest injustice has been done to these two men, a manifest injustice that adversely affects each and every stage of these proceedings. George Gould and Ronald Taylor have been convicted and spent over sixteen years in the custody of the state of Connecticut Department of Correction for a crime that, based upon all of the available evidence, they did not commit.

The petitioners allege in nearly identical petitions for a Writ of Habeas Corpus initially filed on April 23, 2003 and amended for the final time on August 30, 2004, that their convictions and resultant sentences were defective under both the United States Constitution and the Constitution of the State of Connecticut and that as a result they are

[2] There were sixteen days of trial testimony during this period.

entitled to have these convictions and sentence set aside. This Court agrees and will order appropriate relief.

Findings of Fact

1. The petitioners were defendants in criminal cases (joined together for trial) proceeding in the Judicial District of New Haven in which they were charged with committing the crimes of: Intentional Murder in violation of CGS §53a-54a, Felony Murder in violation of CGA §53a-54c, Robbery in the 1st degree in violation of CGA §53a-134(a)(2), attempted Robbery in violation of CGS §§53a-49 and 53a-134(a)(2) and conspiracy to commit robbery in the 1st degree in violation of CGS §§53a-48 and 53a-134.
2. In the 1997 decision upholding the petitioners' convictions, our Supreme Court found that the jury could reasonably have concluded that the following facts were true. "On July 4, 1993, at approximately 5:35 a.m., the defendants entered *La Casa Green*, a retail store, on Grand Avenue in New Haven. The owner, Eugenio Vega, had opened the store shortly after 5 a.m. and was the only person in the store. The defendants tied up Vega's hands with electrical cord, placed him in the store's cooler, and fatally shot him in the head. The defendants took money and jewelry from Vega's safe and searched through Vega's wallet.
3. "The state's principal witness was Doreen Stiles. She testified that after she observed Gould enter the store, she hid in the alleyway next to the store. From her hiding place, Stiles heard the voices of three people arguing in the store, including Vega, who was screaming. She distinctly heard Vega and the defendants arguing about money and

opening the safe. After a couple of minutes, Stiles heard a single gunshot. She then observed both of the defendants leave the store.[3] ...

4. "Susana Negron, the victim's daughter, testified that she did the bookkeeping for her father's store. At the beginning of each week, Negron would make deposits for her father of receipts totaling between $3000 and $10,000. The week before her father's murder, however, she did not make a deposit. Her father had instructed her not to make a deposit that week because he planned to use those receipts to make a down payment on a building that he intended to purchase. Negron further testified that during December, 1992, before her father's murder, she had seen the contents of the floor safe in the back of *La Casa Green*, and that the safe contained jewelry, documents, papers, cash and coins. The jewelry included a 'beautiful diamond earring' that Vega intended to leave for his wife, but Negron never saw the earring again after her father's death.

5. "Officer Keith Wortz of the New Haven police department was the first officer to enter *La Casa Green* following the shooting. Wortz testified that after finding no one in the front of *La Casa Green*, he entered the back area of the store. There he saw an open floor safe with items on the floor outside of the safe and leaning on the open door. Wortz also saw a wallet on a box next to the safe. He then entered the cooler and found Vega's still warm body.

6. "Detective Chris Grice of the New Haven police department then arrived at the store. Grice testified that he found the cash register keyed on with coins and bills inside. He

[3] *State v. Gould, State v. Taylor*, 241 Conn. 1, 5, 695 A.2d 1022 (1997).

stated that there did not appear to be any money missing from the cash register. In the back of the store, however, he observed bank statements and a paper band, of the type used to wrap money, on the floor. The safe was open and there were jewelry boxes inside, but there was no money or jewelry in the safe. Grice also found Vega's wallet, which did not contain any money, although Vega had $1800 in the front pocket of his trousers." [4]

7. The petitioners' cases were tried to a jury, and while the petitioners were acquitted of the charge of Intentional Murder, they were nonetheless convicted of the other four counts.

8. Thereafter, on April 7, 1995, the Court, *Fracasse, J.* sentenced both petitioners to a total effective sentence of eighty years to serve.

9. Doreen Stiles testified at the habeas trial. She is now a woman of 51 years of age. She is confined to a nursing home and a wheelchair. She is, at long last, drug free. In 2009, Ms. Doreen Stiles testified, under oath, that she had indeed lied, also under oath, when she said that she had seen the petitioners in *La Casa Green* on that fateful morning of July 4th, 1993. The truth that she now says she *should* have testified to in 1993 was that she was not at the scene of the murder at all. That she never saw George Gould crossing the street with a mean look on his face. That she never heard anyone screaming. That she never heard a demand that the safe be opened. That she never heard any argument. That she never heard a gunshot. That she never saw both George Gould and Ronald Taylor exit the store and proceed on their way.

[4] *State v. Gould, State v. Taylor*, supra, 241 Conn. 7-8.

10. At the habeas trial, evidence was admitted that shows that the electrical cord used to bind Mr. Vega's hands was tested for DNA. While there was human DNA found on the cord, the DNA analysis conclusively eliminates Gould, Taylor and the victim as the source.

11. Additional facts will be discussed, as necessary, in subsequent portions of this decision.

Discussion

The petitioners now come before this Court seeking to have this court set aside their convictions of guilty to the charge of felony murder in violation of CGS §53a-54c; Robbery in the 1st degree in violation of CGS §§53a-8 & 53a-134(a)(2); Attempted Robbery in the 1st degree; and Conspiracy to commit Robbery in the 1st degree in violation of CGS §§53a-8, 48(a) and 134(a)(2). Both petitioners seek an order of this Court that they be released. It is important to understand that this instant proceeding is an action seeking the issuance of a writ of habeas corpus. These cases, having already been tried before a jury in the Superior Court and appealed to the Connecticut Supreme Court, are now in what has been called the "court of last resort." A petition for a writ of habeas corpus is, therefore, an application for *extraordinary* judicial relief in which, contrary to the prior proceedings in the criminal trial court, the burden of persuasion rests with the petitioners.[5]

Claims of Actual Innocence

[5] This may seem to be difficult for a layman to accept, given the oft-repeated phrase that "one is innocent until proven guilty." However, in a habeas corpus proceeding, the petitioner is not innocent and has, in fact been already proven guilty beyond all reasonable doubt. Moreover, a habeas petitioner has more likely than not had the opportunity to have at least one appellate court review the case to determine of there have been any errors of law that were made by the trial court. Given that a habeas petition is often called the "court of last resort" it should not be unexpected that the burden of showing an irregularity must now rest with the petitioner.

In *Summerville v. Warden*, 229 Conn. 397, 421, 641 A.2d 1356 (1994), our Supreme Court addressed the question of "whether habeas corpus permits the granting of a new trial pursuant to a petitioner's claim of actual innocence, unadorned by an antecedent showing of a constitutional violation that affected the fairness of his criminal trial[,]" and concluded that it does.

The *Summerville* court emphasized that "[h]abeas corpus is the ultimate inquiry into the fundamental fairness of a criminal proceeding." Id. The court then went on to hold "that a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial. This holding is consistent with the mandate of §52-470 (a) that the habeas court 'dispose of the case as law and justice require.' Even the strong interest in the finality of judgments, and the state's interest in retrying a defendant with reasonably fresh evidence, does not require the continued imprisonment of one who is actually innocent. This holding is also consistent with our [Supreme Court's] prior statements that habeas corpus is designed to remedy fundamental miscarriages of justice. ... The continued imprisonment of one who is actually innocent would constitute a miscarriage of justice." (Citation omitted.) Id., 422.

The Supreme Court in *Summerville* discussed the differences between a petition for a new trial, that has a three-year statute of limitations, except when premised on newly discovered

DNA evidence, and a petition for a writ of habeas corpus, for which there is *no* applicable statute of limitations.[6] Id., at 426-27; CGS § 52-582.[7]

"Principally because of the absence of any statute of limitations governing the writ of habeas corpus[,] ...the standards governing the issuance of the writ based on a claim of actual innocence are not, however, necessarily the same as those governing a petition for a new trial based upon newly discovered evidence. Employing the same standard for both petitions would ignore the legislative determination embodied in the statute of limitations. The principal purpose of the writ of habeas corpus is to serve as a bulwark against violations of fundamental. ... Whether there has been such a violation must be determined, not only with regard to the petitioner's claim, but also with regard to the effect of the issuance of the writ on the strong interest in the finality of judgments ... and the other interests embodied in the statute of limitations. ...

"[The Supreme Court has], therefore, imposed on a habeas corpus petitioner certain requirements that reflect these policy interests. For example, [it has] imposed a heavy burden of proof on the petitioner to establish that he is entitled to a new trial. ... [The Supreme Court has] also adopted the 'cause and prejudice' standard for the reviewability in a habeas corpus proceeding of constitutional claims not adequately preserved at trial ... because of a procedural default.

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[6] Although there is a sort of *de facto* statute of limitations in that a habeas petitioner must be "in the custody of the commissioner," in order for the Court to have jurisdiction. See *Lebron v. Commissioner of Correction*, 274 Conn. 507 (2005).

[7] General Statutes § 52-582 mandates that: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence." Interestingly, the first clause does not mention newly discovered evidence.

"Those requirements, which stem largely from the fact that a habeas corpus petition may properly be brought at any time,[ ] rest in significant part on the costs to the public interests that are incurred when the state is required to retry a defendant many years after the events in question. ... The wholesale transplanting of the petition for a new trial standard to a habeas corpus petition based on a claim of actual innocence would not give due respect to those considerations. The petitioner who thinks that there is newly discovered evidence sufficient to overturn his verdict would have no incentive to bring that evidence before the court within the three year limitations period, and there would be no consequence of his failure to do so.[8] ... Thus, just as a habeas corpus petition may not be employed as a substitute for a direct appeal ... a habeas corpus petition is not a surrogate for a time barred petition for a new trial." (Citations omitted; footnote omitted.) *Summerville v. Warden*, supra, 229 Conn. 427-28.

Several years after *Summerville*, the Supreme Court decided *Miller v. Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108 (1997). *Miller* "... present[ed] a question that [the court had] found unnecessary to answer in *Summerville*, namely, 'what is the legal standard [of persuasion] that must be met by a habeas corpus petitioner claiming actual innocence in order to gain a new trial at which his guilt or innocence will again be determined?' ..." (Citation omitted.) Id., at 746.

The *Miller* court began its consideration of the standard of proof with the following remark: "In doing so, we assume without deciding that the petitioner's claim must be based

[8] Accordingly, the requirement in actual innocence claims raised via habeas corpus of 'newly discovered' evidence may be viewed as another requirement that reflects the same policy reasons. § 52-582 does not state that non-DNA based claims must be premised on newly discovered evidence. Thus, the petition for a new trial with the three-year statute of limitations does not require newly discovered evidence; the petition for a writ of habeas corpus with no statute of limitations requires newly discovered evidence.

on 'new evidence,' that is, evidence that is not cumulative, was not available to the petitioner at his criminal trial, and could not have been discovered by him at that time through due diligence. See *Summerville v. Warden*, supra, 229 Conn. 426. We make this assumption for the purposes of the present case because: (1) the habeas court applied that requirement to the petitioner in this case, and determined that the petitioner's evidence met that requirement; (2) the petitioner agreed that this should be one of the components of his burden; and (3) the parties do not dispute that the petitioner's evidence is newly discovered. We recently certified for appeal the specific question of whether a freestanding claim of actual innocence must be based on new evidence. *Williams v Commissioner of Correction*, 240 Conn. 547, 548, 692 A.2d 1231 (1997). We subsequently dismissed that certified appeal as having been improvidently granted, however, because the petitioner in that case also agreed with the 'new evidence' requirement. Id., 548-49." *Miller v. Commissioner of Correction*, supra, 242 Conn. 789 n.29.

Now, more than a decade after deciding *Miller*, the Supreme Court still has not had occasion to address the 'new evidence' requirement. Even as recently as 2009, the court observed that it had "... stated [in *Clarke v. Commissioner of Correction*, 249 Conn. 350, 358, 732 A.2d 754 (1999),] that whether a claim of actual innocence must be based on newly discovered evidence is still an open question in our habeas jurisprudence. In the present case, both parties and the habeas court acknowledge, explicitly and implicitly, that our appellate courts do require a claim of actual innocence to be based on newly discovered evidence. *Johnson v. Commissioner of Correction*, 101 Conn. App. 465, 470-71, 922 A.2d 221 (2007). Because the respondent does not challenge the petitioner's claim on those grounds

and the habeas court proceeded as if the evidence was newly discovered, we are not called upon to resolve this question. See *Miller v. Commissioner of Correction*, supra, 242 Conn. 789 n. 29 (assuming, without deciding, that actual innocence claim must be based on new evidence)." *Mozell v. Commissioner of Correction*, 291 Conn. 62, 81 n.10, 967 A.2d 41 (2009).

The Appellate Court, unlike our Supreme Court, has held that newly discovered evidence *is* necessary to pursue an actual innocence claim via a habeas corpus petition. "[A] claim of actual innocence must be based on newly discovered evidence. *Clarke v. Commissioner of Correction*, 43 Conn. App. 374, 379, 682 A.2d 618 (1996), appeal dismissed, 249 Conn. 350, 732 A.2d 754 (1999). [A] writ of habeas corpus cannot issue unless the petitioner first demonstrates that the evidence put forth in support of his claim of actual innocence is newly discovered. *Williams v. Commissioner of Correction*, 41 Conn. App. 515, 530, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997). This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Batts v. Commissioner of Correction*, [85 Conn. App. 723, 726-27, 858 A.2d 856, cert. denied, 272 Conn. 907, 863 A.2d 697 (2004).]" *Johnson v. Commissioner of Correction*, supra, 101 Conn. App. 470. Consequently, even though the final resolution of the newly discovered evidence standard has yet to be addressed by the Supreme Court, it is beyond argument that insofar as any Superior Court considering a claim of actual innocence in a habeas petition, the matter is closed. The Appellate Court has spoken and that precedent is binding in Superior Court unless and until changed by the Supreme Court.

To summarize, then, the newly discovered evidence requirement is satisfied if the evidence is: (a) not cumulative; (b) was not available to the petitioners at the time of their criminal trial; and, (c) could not have been discovered by them at that time through the exercise of due diligence.

The newly discovered evidence in these petitions is comprised of the recantations by the witnesses at the original trial, Doreen Stiles and Mary Boyd. The more important and relevant of these two recantations is that of Ms. Stiles, as she testified both at the probable cause hearing and at the criminal trial, and was the only "eyewitness" who places the petitioners at *La Casa Green* at the time of the murder. Clearly, Ms. Stiles' present-day testimony—the recantation—is not cumulative, was not available to the petitioners at the criminal trial, and could not have been discovered at the time of trial. The recantation itself was entirely within the sole control of Ms. Stiles and that recantation did not come to light until something like 2006.

While our Appellate Court has addressed other habeas corpus claims of actual innocence, that court has not yet had the occasion to address an actual innocence claim premised almost entirely, if not solely, on a recantation.[9] Recently, in *Lewis v. Commissioner of Correction*, 116 Conn. App. 400, 411-12, 975 A.2d 740, cert. denied, 294 Conn. 908, ___ A.2d ___ (2009), the "petitioner appear[ed] to argue..., on appeal, that the allegedly perjured testimony [presented by a witness during the criminal trial] violated his due process rights.... He did not, however, allege a violation of any constitutional right in connection with his perjury claim before the habeas court. He similarly did not explain to the habeas

[9] Recantation is not an altogether uncommon, nor particularly favored, ground for granting a new trial. "Recantation as grounds for a new trial has always been viewed with skepticism." *Channer v. State*, 54 Conn. App. 620, 629, 738 A.2d 202, cert. denied, 251 Conn. 910, 739 A.2d 1247 (1999).

court, in his petition or at his habeas hearing, precisely how the alleged perjury affected the outcome of his trial. We are unaware of any precedent where either this court or our Supreme Court has held that an allegation of perjury, unaccompanied by an antecedent constitutional violation or an explanation of how that perjury affected the result of a trial, is a proper ground for seeking habeas relief. ..." (Emphasis added.) (Footnotes omitted.) The Appellate Court then went on to affirm holding that "... the habeas court's conclusion that the perjury count of the petitioner's complaint failed to state a claim on which habeas corpus relief can be granted is legally and logically correct." Id., at 412.

Nevertheless, the Appellate Court did note the following in *Lewis*: "[i]n his appellate brief, the petitioner relie[d] on a case from the United States Court of Appeals for the Second Circuit, in which a habeas petitioner sought relief on the ground that his murder conviction was obtained on the perjured testimony of a purported witness to the crime. See *Ortega v. Duncan*, 333 F.3d 102, 103-104 (2d Cir. 2003). We note that the petitioner in that case, unlike the petitioner in the present case, alleged in his habeas petition that the allegedly false testimony at his trial violated his due process rights. Id., 105-106.

"Our conclusion that a freestanding perjury allegation is not a proper habeas claim is supported by the Ortega court's statement that '[a] claim based on newly discovered evidence ha[s] never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . We have held that a showing of perjury at trial does not in itself establish a violation of due process warranting habeas relief. . . . Instead, when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only if the

testimony was material and the court [is left] with a firm belief that *but for the perjured testimony*, the defendant would most likely not have been convicted.' (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 108.

"Our review of the petitioner's habeas petition and the transcript from the hearing shows that the petitioner did not claim before the habeas court that the alleged perjury violated his due process rights under the legal test outlined in Ortega or in any other state or federal case. In the absence of such a claim, a habeas court is unable to determine whether an allegedly false testimony was material and whether, but for that testimony, the petitioner would most likely not have been convicted." *Lewis v. Commissioner of Correction*, supra, 116 Conn. App. 412 n.9.

Lewis, involved an alleged due process violation premised on a freestanding perjury allegation, and thus is readily distinguishable from the freestanding actual innocence claims authorized by *Summerville, Miller* and progeny. It is worth noting, however, that the petitioner in *Lewis* relied on the 2nd Circuit opinion in *Ortega v. Duncan*. That decision, as well as several other decisions from the 2nd Circuit, e.g., *United States v. Gallego*, 191 F.3d 156, 166 (2nd Cir. 1999), *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988), and, *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987), emphasize the skepticism with which courts should view recantations. Employing such skepticism is particularly important when a recantation is critical to determining whether a court should grant a new trial. This is true whenever a new trial is sought, be it by way of a petition for a new trial, or a petition for a

writ of habeas corpus.[10] Notwithstanding, such skepticism does not operate as a bar to prevent recantations from being considered "newly discovered evidence" such that they justify the granting of a new criminal trial.

In *Shabazz v. State*, 259 Conn. 811, 812, 792 A.2d 797 (2002), an appeal resulting from a petition for a new trial, "[t]he dispositive issue ... [was] whether the trial court, in deciding this petition for a new trial on the basis of newly discovered evidence, properly engaged in a credibility assessment of the proffered newly discovered evidence in order to determine whether it was likely to produce a different result in the event of a new trial." (Footnote omitted.) "In his petition for a new trial, the petitioner alleged that an eyewitness had come forward after the petitioner's conviction with evidence 'relevant and material to the issue of the [petitioner's] guilt . . . and to his [claim] of self-defense.' An affidavit of the witness, Lorin Fraziet, was attached to the petition, in which Frazier stated that he had met the victim on the New Haven Green the day of the murder and observed the events leading up to his death." Id., at 816-17.

"The trial court held an evidentiary hearing regarding the petition for a new trial, in which four witnesses testified on behalf of the petitioner: George Lemieux, a private investigator; Patricia King, one of the petitioner's trial attorneys; Germano Kimbro, a counselor for a substance abuse program in which Frazier participated; and Frazier. Lemieux and King testified regarding their independent attempts to identify and secure witnesses who may have been helpful to the petitioner's defense at trial. Neither of their investigations had led to Frazier. Kimbro testified that, after the trial and during his

[10] *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003) (habeas corpus petition); *U.S. v. Gallego*, 191 F.3d 156 (2nd Cir. 1999) (motion for new trial); *Sanders v. Sullivan*, 863 F.2d 218 (2nd Cir. 1988) (habeas corpus petition); *United States v. DiPaolo*, 835 F.2d 46 (2d Cir. 1987) (motion for new trial).

participation in a drug treatment program, Frazier confided that he had witnessed the encounter between the petitioner and the victim; Kimbro then contacted the petitioner's counsel to inform him of this. Frazier's testimony at the hearing on the petition was consistent with his prior sworn statement.

"The cumulative testimony of Lemeiux, King and Kimbro was offered to show that Frazier's existence as a witness to the incident was not known to the defense at the time of trial, despite the exercise of due diligence, and that his testimony therefore constituted newly discovered evidence. The petitioner argued, moreover, that Frazier's testimony, in and of itself, substantiated his theory of self-defense and was therefore likely to produce a different result in the event of a new trial. The petitioner specifically pointed to Frazier's statement that he had heard the victim shout that he was going into the trashcan for a gun as corroborating his own trial testimony to the same effect. Moreover, according to the petitioner, Frazier's statement supplies the only reasonable explanation for why the victim sacrificed his only chance at escape by stopping to reach into the trashcan. The petitioner contended that Frazier's testimony, coupled with his own statements, would constitute persuasive evidence that when the petitioner stabbed the victim, he did so under a reasonable belief that the victim was about to use deadly force in return." Id., at 817-18.

"After hearing all of the evidence adduced in support of the petition, the trial court denied the requested relief. The court based its decision, in pertinent part, on its express finding that Frazier was not a credible witness, given his criminal record, history of drug abuse, and inconsistent testimony." Id., at 820.

The Connecticut Supreme Court then discussed the applicable standard in petitions for a new trial, as established in *Asherman v. State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). "Under *Asherman v. State*, supra, ... a court is justified in granting a petition for a new trial when it is satisfied that the evidence offered in support thereof: (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial." Id., at 820-21. The Supreme Court noted that "[t]he roots of this test can be traced back as far as 1850[.]" Id., at 821, citing *Waller v. Graves*, 20 Conn. 305, 310 (1850).

"Prior case law confirms that a trial court must engage in some form of credibility analysis in order to determine, under *Asherman*, whether the newly discovered evidence offered in support of a petition is likely to produce a different result on retrial." *Shabazz v. State*, supra, 259 Conn. 822." "This articulation of the petitioner's burden of proof assigns to the trial court, in the first instance, the responsibility of evaluating the credibility of the evidence in order to decide properly whether a new trial would produce a different result. In elaborating on this point, [the Supreme Court] explicitly approved of Judge Cardozo's concurring opinion in *People v. Shilitano*, 218 N.Y. 161, 180, 112 N.E. 733 (1916), wherein he stated that 'a judge, faced with conflicting stories [on a petition for a new trial], should [not] abandon the search for truth and turn it over to a jury. . . . [Rather] it [is] the duty of the trial judge to try the facts, and determine as best he [can] where the likelihood of the truth lay. . . . He [is] not at liberty to shift upon the shoulders of another jury his own responsibility.' (Internal quotation marks omitted). *Lombardo v. State*, supra, 172 Conn. 391.

Thus, *Lombardo* acknowledged that it is not only proper, but often necessary, for a trial court to assess the credibility of newly discovered evidence [[11]] in the context of a petition for a new trial. Id." *Shabazz v. State*, supra, 259 Conn. 824.

"Although, as [prior] cases demonstrate[d], [the Supreme Court] previously [had] established that a credibility determination is a necessary part of a trial court's analysis under the fourth prong of *Asherman*, [the court] never [had] defined the proper parameters of such a determination. In this regard, [the court noted] that the extent to which a trial court properly assesses the credibility of the newly discovered evidence is informed, in large part, by two well-defined and, often, competing interests. First, the state has a general interest in preserving final judgments of conviction that have been fairly obtained and in ensuring that appropriate deference is 'given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility. . . .' (Internal quotation marks omitted.) *Miller v. Commissioner of Correction*, [supra, 242 Conn. 793] (1997). This interest is heightened, moreover, when the state is faced with the possibility of having to re-litigate the question of the petitioner's guilt or innocence in a second trial, 'when its evidence . . . may be less reliable and persuasive than it was' originally. Id., 792. Second, the petitioner has an interest, **shared by the state *and* the judiciary**, in ensuring that a wrongful conviction does not stand. Id. Indeed, even in situations in which the ultimate question is not one of

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11 "[The Supreme Court noted] that such evidence may consist, for example, of the testimony of a newly discovered eyewitness, as in the present case; of newly discovered impeachment evidence; of newly discovered scientific evidence; of newly discovered expert testimony; or of ***recantation of the testimony of a prior witness***, to name several types of such evidence." (Emphasis added.) (Footnote renumbered.) An additional aspect of the recantation itself being newly discovered evidence is that if the recantation is found to be credible, then what is now previously committed perjury also may be considered newly discovered evidence. See, e.g., *Ortega v. Duncan*, supra, 333 F.3d 109.

total guilt or innocence, the petitioner has an interest in ensuring that he is not wrongfully convicted of a more serious crime than is justified by the facts of the case.

"[The Supreme Court's] formulation of the trial judge's role in passing on the credibility of newly discovered evidence must strike the appropriate balance between these two interests. If, on the one hand, [the court] were to limit the trial court solely to a determination of whether the newly discovered evidence would be admissible in a new trial and whether it might result in a different verdict, the trial court would be stripped of its legitimate fact-finding function on the petition and be relegated to the role of gatekeeper of the evidence. Such a result would render judgments of conviction unduly susceptible to collateral attacks, thereby giving insufficient weight to the state's legitimate interest in finality. Alternatively, were [the court] to hold that the trial court always acts as the final and sole arbiter of credibility in evaluating the evidence alleged to justify a new trial, [the court] would be impeding the petitioner's legitimate interest in establishing that a wrongful conviction does not stand. For example, there may be cases in which the trial court is justified in determining that the newly discovered evidence is sufficiently credible and of such a nature that, in order to avoid an injustice, a second jury, rather than the trial court itself, should make the ultimate assessment of its credibility.

"[The Supreme Court] therefore conclude[d] that, in order to give due weight and consideration to these important interests, and in order to provide sufficient flexibility to accommodate the wide variety of types of newly discovered evidence that may be offered in support of a petition for a new trial, trial courts should utilize the following approach when applying the fourth element of the *Asherman* test. The trial court must always consider the

newly discovered evidence in the context of the evidence presented in the original trial. In so doing, it must determine, first, that the evidence passes a minimum credibility threshold. That is, if, in the trial court's opinion, the newly discovered evidence simply is not credible, it may legitimately determine that, even if presented to a new jury in a second trial, it probably would not yield a different result and may deny the petition on that basis. ... If, however, the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result or otherwise avoid an injustice, the fourth element of the *Asherman* test would be satisfied." (Emphasis added.) (Citation omitted.) *Shabazz v. State*, supra, 259 Conn. 825-28.

The Supreme Court stressed that "... the majority of [its] case law .... has not differentiated among types of newly discovered evidence when reviewing a trial court's decision on a petition for a new trial. [[12] Finally, because the interests implicated in a

[12] "In fact, [the Supreme Court's own] research revealed that, to date, [it had] decided only one case involving a petition for a new trial based on recantation evidence, namely, *Smith v. State*, 139 Conn. 249, 93 A.2d 296 (1952). Following his conviction for murder, the defendant in *Smith* sought a new trial on the ground that an eyewitness who had testified for the state at trial had come forward and declared, under oath in a deposition, that her trial testimony had been false. *Id.*, 251. The trial court had denied the petition, reasoning that 'the plaintiff failed to prove (1) that the [witness'] testimony on the trial was false, (2) that without it the jury might have reached a different conclusion, or (3) that the element of surprise, under the circumstances, entitled him to a new trial.' *Id.* The petitioner appealed from the judgment of the trial court to this court. Although [the court] affirmed the judgment, [it] did so, not by reference to [any specific test], but rather by reference to the more general principle that 'if upon reading the testimony [adduced at trial] ... in connection with the new testimony produced, no injustice is apparent and the newly discovered evidence is insufficient to render a different result upon a new trial probable, a new trial should not be granted.' ... *Gannon v. State*, 75 Conn. 576, 583, 54 A. 199 (1903). In reaching [its] decision, [The Supreme Court had] also noted that '[a] new trial will not ordinarily be granted because of the discovery of additional impeaching or discrediting testimony'; *Smith v. State*, supra, 251; especially where such testimony consists of 'something so inherently unreliable and untrustworthy as a recantation.' *Id.*, 252-53. Thus, even in the sole instance in which [the Supreme Court had] have identified the nature of the newly discovered evidence at issue as falling within the category of 'false trial testimony,' [the court had] not expressly endorsed [a specific test]." (Internal citations omitted.) (Footnote renumbered.)

petition for a new trial remain the same irrespective of the nature of the newly discovered evidence at issue, [the court could] conceive of no principled basis for maintaining ... different tests." Id., at 829-30. This final point is important because *Shabazz* involved a petition for a new trial and not a habeas corpus petition. Nevertheless, the test a habeas court should apply to determine whether evidence is newly discovered has its roots in the fourth prong of the *Asherman* test.

A return to *Summerville*, the case in which the Supreme Court first addressed a freestanding claim of actual innocence raised via a habeas corpus petition, shows the relevance and importance of the fourth *Asherman* prong.

"Both the petition for a new trial standard and the ... standard [for ineffective assistance of counsel] rely essentially on a determination by the reviewing court — either the trial court passing on a petition for a new trial, or a habeas court passing on a claim of ineffectiveness of counsel — that, considering the evidence and claims now brought before it, together with the evidence produced at the original trial, there is a probability of a different result. Because neither of those standards appropriately fits the interests at stake in this type of habeas petition [raising an actual innocence claim], [the Supreme Court] conclude[d] that the standard should be more demanding than a probability of a different result. None of our prior habeas corpus jurisprudence, however, supplies us with a ready standard for this type of case. ...

"The issue then becomes the determination of the correct standard. Such a determination must recognize the tension inherent in the mandate of the statute that the habeas court 'dispose of the case as law and justice require.' General Statutes 54-470 [52-

470](a). What 'law and justice require' is not a one-sided question. The standard must strike an appropriate balance between, on one hand, the risk that an actually innocent person may be incarcerated, despite his conviction after a fair trial, and, on the other hand, the risk that an actually guilty person, fairly convicted, may nonetheless be set free years later, principally because of the effect of the passage of time on the state's evidence and on the reliability of the fact-finding process.

"The issue of the determination of the correct standard for this type of case can be divided into two components. The first question is: what is the legal standard that must be met by a habeas corpus petitioner claiming actual innocence in order to gain a new trial at which his guilt or innocence will again be determined? Put another way, what does 'a substantial claim of actual innocence' mean in this context? The second question is: applying that standard, what evidence adduced by such a petitioner claiming actual innocence is sufficient to trigger the requirement of the habeas court to evaluate that evidence, together with and in light of the evidence produced at the petitioner's criminal trial, and, as a result of that evaluation, to permit the habeas court to issue the writ? [The *Summerville* court] conclude[d], under the circumstances of [that] case, that [it] need not answer the first question, and need not elaborate on the second question, because the petitioner's evidence was insufficient under any of the standards presented to us by the parties in this case or by other appropriate habeas corpus jurisprudence." (Footnote omitted.) *Summerville v. Warden*, supra, 229 Conn. 431-33.

Miller later presented the Supreme Court with the opportunity to address what it did not have to address in *Summerville*. As part of its determinations in *Miller*, the Supreme Court

"... address[ed] the second component of the standard of proof for a claim of actual innocence that the jurists and courts that have considered the question have included in one form or another. That component requires some determination by the habeas court of what a second fact finder — normally, a jury — is likely to do if presented with the same evidence, original and new, that was presented to the habeas court. That component has been expressed in various ways. ... [The *Miller* court] ... conclude[d] that the most appropriate standard [to apply is whether no reasonable fact finder, considering all of the evidence in the same way that the habeas court considered it, and drawing the same inferences that the habeas court drew, would find the petitioner guilty of the crime of which he stands convicted. ... This formulation, moreover, is consistent with the remedy of a new trial upon a successful habeas petition, because on the new trial the fact finder would be free to draw inferences contrary to those drawn by the habeas court and thereby find the defendant guilty beyond a reasonable doubt." (Footnote omitted.) *Miller v. Commissioner of Correction*, supra, 242 Conn. 799-800.

"[A]pplying this second component in this fashion is consistent with our habeas jurisprudence regarding a petition for a new trial based on newly discovered evidence. In that context, in which 'the primary test is whether an injustice was done . . . [we ask whether] on a new trial a different result would be reached.' *Taborsky v. State*, 142 Conn. 619, 623, 116 A.2d 433 (1955). Thus, in that context, we focus on the likely effect of the newly discovered evidence on a second fact finder." *Miller v. Commissioner of Correction*, supra, 242 Conn. 802. Or, as stated in *Asherman's* fourth prong, the court must decide whether the newly discovered evidence is likely to produce a different result in the event of a new trial.

The Unique Position of this Habeas Court

While the judge who sits on a habeas corpus petition is often privy to testimony and evidence that the original trial jury has not had the opportunity to view or consider, the habeas judge is often (in truth, almost always) deprived of the benefit afforded to the original jury that viewed the testimony and demeanor of the witness as originally presented. The habeas court is most frequently confined to the reading of a somewhat sterile transcript of the testimony that was presented in the trial court. The words that are spoken may well be properly preserved, but what is inevitably lost is the inflection with which those words were said, the emphasis placed upon certain syllables and the ability to observe the physical demeanor of the witness while testifying. Human beings communicate not simply through the words that are used, but through modulations of voice as well as body language. As a consequence, the true meaning of a particular set of words (even words meticulously and accurately transcribed), and the message being communicated, may well be lost or subject to misinterpretation. This, of course, is the basis for the extraordinary deference often afforded to the finder of fact in all tribunals by habeas courts and appellate courts. However, the trial of this habeas petition has presented a singularly unique opportunity for this Court to see and hear *both* the testimony of Doreen Stiles in the habeas trial *as well as her trial testimony exactly as it was presented to the original jury.*

Ms. Stiles was in hospital with a serious life threatening condition at the time of the trial of the charges against the petitioners. She was suffering from endocarditis[14] and was unable

[14] Endocarditis is an infection or inflammation (response to injury of the cells) of the valves of the heart or of the endocardium, the inner lining of the heart chambers. Endocarditis is a serious condition that can cause

to attend the trial in person. Even though she had testified in person at the Hearing in Probable Cause and the transcript of that testimony would have been available for use at the trial on the merits, the state sought to further preserve her testimony and to present it to the jury by way of videotape.[15] Consequently, the trial judge, the defendants, the court monitor and lawyers assembled at the hospital where Ms. Stiles was undergoing treatment and conducted a direct and cross examination of her. The videotape was edited to address issues involving objections by the counsel and then presented to the jury. It is this identical videotaped testimony that was played before this Court in the habeas trial. Consequently, this habeas court has had the identical experience, *vis a vis* the testimony of Doreen Stiles, as did the original jury.

Mendacity and Veracity, The Testimonies of Doreen Stiles[16]

If there was a single critical comment made in the course of the entire legal proceedings involving the murder of Mr. Vega and the subsequent prosecutions of Mr. Gould and Mr. Taylor, it can clearly be attributed to Senior Assistant States Attorney James G. Clark, the prosecutor assigned to the cases. In his closing argument to the jury he offered the opinion that "this case rises and falls on the testimony of Doreen Stiles." Petitioner's Exhibit 11 (Tr. January 30, 1995), at pg. 25. No truer statement has ever been spoken. When one examines the totality of the evidence produced in all of the courts in which this issue has been

heart failure, stroke, kidney failure, and death. *Journal of the American Medical Association*, JAMA. 2002;288(1):128 (doi:10.1001/jama.288.1.128).

[15] This was one of the principal issues on appeal.

[16] Of course, Ms. Stiles is not the only witness to have changed her testimony. Mary Boyd, who in 1993 had a drug habit, is now also drug-free and admits to lying to the police to avoid prosecution and prevent DCF from taking her children. Her recantation and habeas testimony in 2009 is deemed credible. Less space is devoted to an analysis of her recantation because she is a less central figure than Ms. Stiles.

litigated, it is crystal clear, beyond any dispute, that Eugenio de Leon Vega was indeed murdered on July 4th 1993. Notwithstanding, what is also crystal clear is that the ***sole*** piece of evidence, the ***only*** thread that links George Gould and Ronald Taylor to this senseless murder is *the testimony of Doreen Stiles.* If this tether breaks, then there is absolutely ***nothing*** that implicates these two men. At the trial of the case in 1995, the case rose because Doreen Stiles made that linkage; at the trial of the habeas petition in 2009, the case must fall, once again, based upon the testimony of Doreen Stiles. So a key question before this Court is just where does the question of her credibility stand?

To begin this analysis, we must recognize that we know, to an absolute moral certainty, that Doreen Stiles has, indeed, committed perjury. There simply is no way to reconcile her testimonies in 1993 and 1995 with her testimony in 2009 without concluding that she has at one point lied under oath. Her testimony at the criminal trial and her testimony at the habeas trial are diametrically opposed. One version is false; the other version is true. Both were given under oath so whichever version this Court chooses to believe, the other version is perjurious. Consequently the *only* conclusion available is that Doreen Stiles perjured herself either now, or in the past.

There is a statute of limitations regarding perjury that must be considered in determining the credibility of this witness. CGS §53a-156 provides that "a person is guilty of perjury if, in any official proceeding, he intentionally under oath, makes a false statement, swears, affirms or testifies falsely, to a material statement which he does not believe to be true."[17] As set forth in CGS §54-193(b) "no person may be prosecuted for any offense ... for which

[17] The punishment for perjury is confinement for a period not to exceed five years.

the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed." This means that if the testimony that Ms. Stiles provided to the criminal trial was false, then the ability of the state to prosecute her on that false testimony expired in the year 2000. On the other hand, if the testimony presented to the habeas court was false, then the statute of limitations within which the state must initiate a prosecution will not expire until mid 2014. The argument that the Court should not give her habeas testimony credibility because she waited until after she was free from the risk of prosecution before she recanted her trial testimony is unconvincing. Indeed, while a recantation made during the period of statute of limitations might carry *some* added credibility because the witness is willing to come into court and risk prosecution in order to correct false testimony, the same rationale applies here as well. Ms. Stiles is free and clear from any liability for false testimony in 1995. On the other hand, if she now comes forward in 2009 to recant her earlier testimony and *is lying about that recantation*, she once again subjects herself to potential prosecution for perjury. Consequently, the expiration of the statute of limitations for the earlier testimony and her voluntary submission to a potential perjury prosecution for her current testimony leads this Court to conclude that her 2009 testimony is more worthy of belief.

Oftentimes the demeanor of the witness while testifying is a critical factor in the fact-finder's assessment of credibility. That is true in this case as well. This habeas Court has had the opportunity to view the identical testimony that the jury viewed in the original criminal trial as well as the live testimony of the witness at the habeas trial. In a nutshell, this Court finds that the demeanor of Doreen Stiles on the witness stand in the habeas trial

is far more conducive to finding her to be credible when she recanted her earlier testimony than when she initially delivered that earlier testimony.

In her videotaped testimony from 1995, Ms. Stiles looked drawn, haggard, and was clearly annoyed at the whole proceeding. She was combative in her answers, hostile to the courtroom personnel, and complaining about some of the questions with which she was confronted. In contrast, her 2009 habeas testimony was significantly different. First, Ms. Stiles, although in a wheelchair due to her disability, appeared healthy and no longer had a combative, impatient air about herself. She answered all of the questions put to her by both the petitioners' counsel and by the respondent's counsel. She was polite, thoughtful, in no way evasive and presented clear and uncompromised testimony. Even when subjected to vigorous cross-examination, she was non-combative and attempted to answer questions as completely as possible. Her demeanor in 2009 appears far more sincere than her 1995 videotaped testimony and thus this court will credit her testimony at the habeas trial as being the more credible. With this, we move on to discuss the pre-habeas testimonies of Stiles and Boyd.

The Pre-Habeas Testimonies of Doreen Stiles and Mary Boyd

Doreen Stiles testified at the hearing in probable cause and at the criminal trial; Mary Boyd testified only at the criminal trial. Their pre-habeas trial testimonies allow the construction of time lines that both clearly and convincingly show that the events Stiles and Boyd fabricated could not have transpired. What follows are summaries of key events and times, as distilled from the transcripts.

Hearing in probable cause[18]

Doreen Stiles

During early morning hours of July 4, 1993, Stiles walked from Grand Avenue and Ferry Street (Grand and Ferry) to *La Casa Green*. (Pg. 15.) According to Stiles, about a five minute walk. (Pg. 16.) She left Grand and Ferry at about 5:30 a.m.; that time was obtained by her from the bank clock on the corner of Grand and Ferry. (Pg. 16.)[19] After Stiles arrived in the area of *La Casa Green*, she first saw a black girl, who was in front of *La Casa Green*, after which a large black male coming from across the street caught her attention. (Pgs. 16-17.) A large black male was walking "with serious intent, ... scary", from across the street toward *La Casa Green*. (Pg. 17; also see pg. 18 for description of male as looking "very mean", "like he was going to hurt her", as well as pgs. 19-20.) Stiles became scared by the large black male and his demeanor and hid on the side of the store. (Pg. 17.)

Stiles confirmed the time was approximately 5:30 a.m., "just about daylight." (Pg. 19.) Per Stiles, large black male went into store while she stayed at the side of *La Casa Green*. (Pg. 20.) Stiles heard arguing coming from inside the store. (Pg. 20.) Stiles testified she heard Mr. Vega's voice, speaking in Spanish, and that he sounded scared. (Pg. 20.) Stiles again

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[18] Petitioner's Exhibit 1, (Tr. October 14, 1993). Taylor waived hearing in probable cause; see pgs. 2-4. Taylor then entered 'not guilty' pleas. Consequently, hearing in probable cause only as to Gould, who waived his right to be present because of the subsequent identification to be made by Doreen Stiles. See pg. 10.

[19] The court notes that the times Stiles testified to at the October 14, 1993 hearing in probable cause are *consistent* with the times she provided in her July 29, 1993 statement to the police. As detailed below, the times provided in 1993 are different from those Stiles testified to in the 1995 criminal trial. The July 29, 1993 statement contains the following: "Q. Now, how did you know it was 5:35. Will you please explain that to me? A. Yes. I was on the corner of Grand and Ferry. Uh, there's a bank there and the bank has a clock, and the clock is a half hour slow. So I know that it takes me five minutes to walk from there to the store, and I had left at 5:30 and I got to the store at 5:35." Criminal Trial Exhibit Taylor F. In accordance with Practice Book § 23-36, the court will treat this exhibit as part of the record before this habeas court.

identified her location as being in the alleyway between *La Casa Green* and the adjacent barber shop. (Pgs. 20-21.)

When individuals in the store started raising their voices, after previously speaking with muffled voices, Stiles was able to hear "I want the money in the safe, open the safe." (Pg. 21.) Stiles identified three voices: Mr. Vega and two other voices. (Pg. 21.) After what Stiles described as an argument that was not very long, she heard a gunshot. (Pg. 22.) She saw two black males leaving the store and going across the street. (Pg. 22.) One black male was the individual she had previously seen crossing the street and entering the store; the other was described as being smaller. (Pg. 23.) Stiles saw the two men's faces clearly because they looked in her direction as they were exiting the store. Stiles saw the men go across the street and she kept walking back in the direction from which she had come from. Stiles saw a black girl across the street from *La Casa Green*. (Pg. 23.) Per Stiles, black girl is Mary Boyd, and is with two white guys sitting in front of another store across the street from *La Casa Green*. (Pg. 24.) Stiles testified that she has seen the smaller black man before in the neighborhood, about six times within a couple of weeks before the murder. (Pgs. 24-25.) Stiles left that area and went to the Dunkin' Donuts on Ferry Street. Stiles lived in the area and was arrested on Ferry Street, close to where she lived and near *La Casa Green*. (Pg. 35.)

On cross-examination, Stiles confirmed she was at intersection of Grand and Ferry at about 5:30 a.m. (Pg. 43.) After going to bed at midnight and getting up at about 4 a.m., Stiles left her house at about 4:30 a.m. and arrived at Grand and Ferry at about 4:50 a.m. to get some coffee and a doughnut at the Dunkin' Donuts. (Pgs. 44-45.) According to Stiles, Dunkin' Donuts on Ferry Street is not close to *La Casa Green*. (Pg. 45.) She often went to

La Casa Green to say hello to Mr. Vega, see how he was doing, and get cigarettes. (Pg. 45.) It was not her intention to go to the *La Casa Green* for similar reasons on July 4, 1993. (Pg. 46.), but after leaving her place and stopping at Dunkin' Donuts, decided after awhile to say hello to Mr. Vega. (Pg. 46.)

Stiles was then asked about how far Dunkin' Donuts is from *La Casa Green*. Per Stiles, Dunkin' Donuts on Ferry Street was not very far away from *La Casa Green* on Grand Avenue, and it takes her about five minutes to walk that distance. (Pg. 51.) The bank clock indicated 5:30 a.m. and, due to the five-minute walk, that is how Stiles estimated the 5:35 a.m. arrival time at *La Casa Green*. (Pg. 52.)

The black girl Stiles saw as she arrived at *La Casa Green* was not Mary Boyd. (Pg. 53.) Stiles had lived in that area for about three years. (Pgs. 53-54.)

Stiles indicated that what she heard standing in the alleyway next to *La Casa Green* was "Give me the money, open the safe" and heard some of Mr. Vega's voice in Spanish. (Pg. 61.) The talking she overheard lasted less than a minute, according to Stiles. (Pg. 61.) She heard the shot shortly after hearing "Give me the money, open the safe." (Pg. 61.) The sounds/voices appeared to be coming from the middle to the back of the store. (Pg. 62.) Stiles indicated that she was already out of the alleyway and turned around and, after turning around, saw the two black males exit the store. (Pgs. 63-64.) She only very quickly glanced their faces from about twenty feet away. (Pg. 64.) Mary Boyd also left the area at the same time as Stiles, also heading toward Grand and Ferry. (Pg. 66.) Boyd was ahead of Stiles and walking on the sidewalk of the other side of Grand Avenue.

Criminal trial

Doreen Stiles[20]

On direct examination, Stiles testified that she left her place at about 4 a.m. (Pg. 7.) She stated that she was on her way over to the store and got to Grand and Ferry. (Pg. 7.) Stiles confirmed it was her intent to go to the store when she left her home, but then added that she was also thinking about going for doughnuts and coffee at Dunkin' Donuts at Grand and Ferry. (Pg. 8.) Per Stiles, she arrived at the corner of Grand and Ferry at about "twenty-five of five," or 4:35 a.m. (Pg. 9.) Stiles knew that was the time because of the bank clock, which she said was not very accurate and might have been off by 5-6 minutes, even though she did not wear a watch. (Pg. 9.)

Stiles walked from Grand and Ferry intersection towards *La Casa Green.*[21] Her estimate was that it took her about fifteen minutes to get to where she could see the *La Casa Green store.* (Pg. 10.) That is, she was approaching the store, still about a block away, fifteen minutes after departing Grand and Ferry. (Pg. 10.) As she approached the store at that time, Stiles saw a black male who appeared menacing to her. (Pg. 10.) Stiles then recalled, after her recollection was refreshed with the PC hearing transcript, that she first saw a thin black female in front of *La Casa Green.* (Pgs. 11-12.)

Stiles walked to the side of the building as quickly as her disability would permit and hid out of fear. (Pg. 17.) She stood very close to the building, almost leaning on it. (Pgs. 18-19.) Stiles heard a commotion, arguing, but could not hear too well through the wall; the sounds

[20] Petitioner's Exhibit 5 (Tr. January 19, 1995). This is the transcript of the entire (i.e., unedited) proceeding conducted at the hospital. The video tape shown to the jury was edited to remove sustained objections. The foregoing summary is from the uncdited proceeding.

[21] Stiles' testimony during the criminal trial does not establish a specific departure time.

were muffled. ((Pg. 22.) She could discern three separate, distinct voices, recognizing one as Mr. Vega's. (Pg. 22.) Stiles distinctly heard words about opening the safe, about money, and then Mr. Vega became very upset. (Pg. 23.) According to Stiles, she knew Mr. Vega was upset because he was screaming in Spanish at the top of his lungs. (Pg. 23.)

Stiles then got very nervous because of her lack of speed, concern for her safety, and even concern for her life. (Pg. 23.) While she described Mr. Vega's voice as screaming, the other two voices were angry and argumentative. (Pg. 23.) After a couple of minutes, Stiles heard a single gun shot. (Pg. 24.) She froze out of fear, but tried to get away as best as she can, given her bad disability. (Pg. 24.) Stiles left the alleyway and the two black men exited *La Casa Green*. (Pg. 24.) The two black men looked around, but not directly at Stiles, so that there was no eye contact. (Pg. 25.) Stiles saw the two men go across the street and head back in the direction they came from. (Pg. 30.) Stiles started walking toward the Dunkin' Donuts at Grand and Ferry, saw Mary Boyd on the other side of the street, but farther ahead. (Pg. 31.)

On cross-examination, Stiles indicated that because she did not have a watch, she was uncertain that she left her house at approximately 4 a.m. (Pg. 47.) She assumed it was around that time because when she first arrived at the corner of Grand and Ferry, the bank's clock indicated the time was "twenty-five of five." (Pgs. 47-48.) Stiles again confirmed the time on the clock, located on top of the Bank of Boston at the corner of Grand and Ferry, which was "twenty-five of five." (Pg. 48.) The bank clock had four faces. The times on the faces were always different from each other. (Pg. 49.) The clock facing Grand was indicating 4:35 a.m. and was 5-6 minutes off, according to Stiles. (Pgs. 50-51.)

Stiles was at the corner of Grand where the clock was, and had not gone as far as the Dunkin' Donuts. (Pg. 51.)

Stiles was able to see the two black men coming out of the store from where she stood and observed them crossing the street. The two men in a general way glanced in her direction, allowing Stiles to see their faces for one or two seconds. (Pg. 53.)

When asked to tell, as best as she could, how much time passed between the time she saw the black male entering the store and the time the two black males left *La Casa Green*, Stiles indicated ten minutes. (Pgs. 74-75.) Stiles was unable to pinpoint a precise time when she saw the black male enter *La Casa Green*. (Pgs. 75-76.)

Stiles did not feel the danger presented by the threatening black male who crossed the street and entered *La Casa Green* had passed when he entered the store. (Pgs. 83-84.) She felt the danger to her by the single black male would continue until "they" left the store and her possible encounter with them. (Pgs. 83-84.) Stiles did not know that there was more than one black male until she overheard the voices from her location in the alleyway. (Pgs. 84-85.) After hearing the shot and still frightened, Stiles left the alleyway and headed toward Grand Avenue. (Pg. 86.)

When asked how long it takes her to walk from *La Casa* Green to the Dunkin' Donuts, Stiles indicated fifteen or twenty minutes. (Pg. 87.) Atty. DeMarco asked a series of questions pertaining to the discrepancy between the five and fifteen minute estimations of how long it took Stiles to walk this distance. (Pgs. 126-131.) Stiles indicated that of the four clocks above the bank, three were very inaccurate and one, although still inaccurate, was closer to the correct time and only off by several minutes. According to Stiles, she went by

the clock that was only off by several minutes. (Pg. 133.) Stiles testified that all the individuals who hung around that area and needed to know the time knew that the most accurate of the four clocks was about five or six minutes fast. (Pg. 133.)

Maty Boyd[22]

On direct examination, Boyd testified that she was out-and-about on the streets at approximately 5:30 a.m., July 4, 1993. (Pg. 39.) She resided within several blocks of *La Casa Green*. (Pg. 40.) Boyd was outside *La Casa Green*, across the street from the store, and saw individuals in the store. (Pg. 43.) After she saw the individuals in the store, Boyd continued walking down Grand Avenue and ran into Tasha Williams near James Street. (Pgs. 47-48.) Boyd and Williams talked briefly and then Boyd continued to James Street and stayed in that location for approximately five to eight minutes. (Pgs. 49-50.) Boyd then headed back up Grand Avenue to *La Casa Green*. (Pg. 50.)

Boyd went into *La Casa Green* after arriving there. Boyd picked up a roll of Scott tissue, yelled out to Mr. Vega, but got no response. The store appeared empty to her. (Pgs. 50-51.) Boyd checked areas in the store, including the aisles and the bathroom, but could not locate Mr. Vega. (Pg. 51.) After this search, Boyd exited the store and went to Mr. Vega's van to see if he was there, but could not locate him there either and went back into the store. Boyd noticed the freezer, which she did not know was in the back of the store, with the door closed. Boyd then left the store again and yelled for Tasha Williams, and sought her assistance in checking the freezer because something seemed wrong with the store left unattended. (Pgs. 51-52.)

[22] Petitioner's Exhibit 6 (Tr. January 20, 1995).

Boyd talked to Williams, who was up in her apartment and spoke to Boyd from the window, and who indicated she would not go into the store. Boyd again went into the store and placed a call to 911. (Pg. 52.)

Boyd, who knew Stiles, did not see Stiles on any of these various trips in and out of the store, nor did she see Stiles upon walking away from the *La Casa Green* area. (Pgs. 69-70.)

On cross-examination, Boyd testified she knew Stiles very well and had seen her many times in the area. (Pg. 72.) According to Boyd, it took her about ten minutes to walk from *La Casa Green*, after she made the 911 call, to a drug house on the corner of James and Grand. (Pg. 83.) Boyd left *La Casa Green* around 5:45 a.m. and arrived at the drug house at about 5:55 a.m. (Pg. 83.)

Boyd estimated that if she walked from the corner of Grand and Ferry to *La Casa Green*, it would take her approximately six or seven minutes. (Pgs. 88-89). Although she was not wearing a watch, Boyd felt the times she was indicating were "pretty close." (Pg. 90.) Boyd reiterates that she left her house around 5:45 a.m. and saw the individuals in the store between 5:45 a.m., but before 6:00 a.m. (Pgs. 96-97.)

Boyd's search for Mr. Vega inside the store, which she had been in many times, resulted in her for the first time discovering that there was a walk-in freezer. Boyd did not, however, see the open safe immediately outside the freezer door. (Pgs. 104-105.) According to Boyd, it was during her second trip into the store that she noticed the freezer for the first time. (Pg. 105.)

The True Testimony of Doreen Stiles presented at the Habeas Trial

As previously found, this Court assigns full credit to the testimony of Ms. Stiles as to what took place on the morning of July 4th, 1993 to be that version offered at the habeas trial, her 2009 testimony. In this version, we find that Ms. Stiles, then approximately 35 years of age, drug addicted and living with her boyfriend at 142 Humphrey Street, New Haven, CT arose around 3:00 AM and prepared for "work." She left her home around 4:00 AM and headed down Lombard Street, ultimately ending up at the Dunkin' Donuts on the corner of Grand and Ferry. She ordered some coffee and saw from the clock on the bank building across the street that it was something like 4:30 AM in the morning when she arrived. Officer Wortz of the New Haven Police Department came in to buy coffee at about the same time. He was on foot patrol in the area. After Ms Stiles finished her coffee she then proceed up Ferry Street to Chatham Street where she engaged in prostitution, soliciting sex for money. She had one "client," at approximately 5:00 AM. After that encounter, she continued to walk up and down Ferry Street soliciting sex for money so she could purchase heroin. She was never in the vicinity of *La Casa Green* on the morning of July 4th, 1993. Consequently, all of her testimony that she saw the petitioners, Gould and Taylor, committing the murder is completely and utterly falsified.

The falsity can also be distilled from the times provided by Stiles and Boyd, as outlined above in their pre-habeas testimonies. There are two critical times that are known with precision: 5:08 a.m., when the alarm system in *La Casa Green* was deactivated;[23] and 5:42

[23] See State's Exhibit 53, the state's and petitioners' stipulation from the criminal trial. In accordance with Practice Book § 23-36, the court will treat this exhibit as part of the record before this habeas court.

a.m., when Mary Boyd made the call to 911.[24] These two times establish a thirty-four minute window in which Mr. Vega was murdered.

According to her criminal trial testimony, Boyd was outside *La Casa Green* at 5:30 a.m. Stiles testified at the criminal trial that she left the corner of Grand and Ferry at 4:35 a.m., as indicated by the one bank clock that was off by 5-6 minutes. If the clock was 5-6 minutes fast, then her departure time in reality was 4:29-4:30 a.m.; if the clock was 5-6 minutes slow, then her departure time in reality was 4:40-4:41 a.m. Per Stiles, it took her at least fifteen, possibly up to twenty minutes, to walk from Grand and Ferry to *La Casa Green*. Using even the latest departure time (4:41 a.m.) and travel time (twenty minutes), results in Stiles arriving at the store several minutes *before* the alarm was deactivated at 5:08 a.m. Her testimony that she witnessed the single black male crossing the street and then enter the store, with the other black male and Mr. Vega already in the store with the alarm not yet deactivated, is not just implausible but impossible.

The other times provided by Stiles, those in her July 29, 1993 statement and testimony at the October 14, 1993 hearing in probable cause, also show that Stiles could not have witnessed the events. According to the statement and hearing in probable cause, Stiles left the Grand and Ferry intersection at 5:30 a.m.[25] and, after a five-minute walk, arrived at *La Casa Green* at 5:35 a.m. Then, once there, about ten minutes elapsed between Stiles seeing the one black male enter *La Casa Green* and the two black males exiting the store. This scenario has Stiles arriving seven minutes prior to Boyd's 911 call and on the scene as Boyd

[24] See State's Exhibit 54; the state's and petitioners' stipulation from the criminal trial. As with State's Exhibit 53, the court will also treat this exhibit as part of the expanded record.

[25] Stiles indicated in her statement that she knew it was 5:35 a.m. because she looked at the bank clock. The bank clock ran half an hour slow, per Stiles, resulting in an actual time (*if* the clock was 30 minutes slow) of about 5:05 a.m.

is going in-and-out of the store several times searching for Mr. Vega. Boyd did not, however, see Stiles during her trips in-and-out of *La Casa Green*. As with the other time line provided during the criminal trial, the statement/hearing in probable cause time line is not just implausible but impossible.

Given the varying times and estimations of times by witnesses, all imprecise and conflicting, it is understandable why the jury focused on Stiles' credibility as to what she heard and saw outside *La Casa Green*, as well as her in-court identifications of the two petitioners. Attorney DeMarco very effectively highlighted the foregoing time inconsistencies in his closing arguments to the jury. See Petitioner's Exhibit 11 (Tr. January 30, 1995), at pgs. 71-87, 126-29. Nevertheless, the precise times that events occurred were not critical for the jury to reach its verdicts, as the times in general were used primarily to help undermine Stiles' credibility. It is now rather apparent that Stiles was evolving her story so that she was "present" at *La Casa Green* at or around the time the murder occurred. Now, subsequent to the credible recantation, the very same times that show Stiles could not have witnessed the events also show the total implausibility of Stiles being at the scene and seeing the petitioners. State somewhat differently, the times, now buttress this court's finding that the present-day recantations are credible.

There is no doubt in this Court's mind that the criminal trial testimony of Doreen Stiles, the witness upon whom the prosecution's case rises and falls, was perjurious. The Court so specifically finds.

Why did Doreen Stiles Lie at the Petitioners' Original Trial?

Having concluded that Ms. Stiles testified falsely in 1995, the question remains: why would she do so? Simply put, Ms. Stiles, in 1993, was a deeply troubled woman, addicted to heroin (10 bags a day), and engaging in prostitution to fuel her habit. Enter the New Haven Police Department seeking to solve the murder of Mr. Vega. Having been provided with information that a woman meeting the description of Doreen Stiles was seen in the vicinity,[26] the New Haven Police began to look for her in order to find out what she knew about this murder. On July 29th, 1993, Ms. Stiles was pursuing her trade on Ferry Street in New Haven when she was arrested for prostitution by an undercover police officer and transported to the New Haven Police Department around 6:15 PM for processing. Upon arrival, she was taken up to the third floor where the detectives are housed and encountered Detectives Sullivan and Gleason. They asked Ms. Stiles if she knew anything about the murder on July 4th, 1993. Ms. Stiles replied that she did not know anything about what had taken place. She was then informed by the Detectives that they had a statement from Mary Boyd that showed Ms. Stiles was present and that if she did not tell them what they needed to hear, that she would be taken downstairs and booked on the charge of prostitution.

[26] It is also significant that this tidbit of information is derived from the 1993 New Haven Police Department interviews of Ms. Mary Boyd, another drug addicted person known to frequent the location near *La Casa Green*. Ms. Boyd has likewise come into this habeas court and recanted her testimony at the original criminal trial insofar as it went to identify Ms. Stiles as being seen in the vicinity of *La Casa Green* on the morning of the murder. Ms. Boyd who has now made major changes in her lifestyle and is drug free stated at the habeas trial that when she was interviewed by the New Haven police in 1993 regarding what she knew about this matter, she had been threatened with having her children taken away by DCF if she did not provide the information that the police were looking for.

At this point, it had been some time since Ms. Stiles had ingested heroin. In her words, she was becoming "dopesick"[27] and simply wanted to go home. Nevertheless, the detectives, in particular, Det. Brian Sullivan, kept pressing her to tell them what she knew, even in the face of the repeated denials of any knowledge by Ms. Stiles. As the evening progressed, Ms. Stiles reported her symptoms began to worsen and that she only wanted to go home, yet the police continued to interrogate her for as much as six or seven hours. Ultimately, Detective Sullivan told her that he would assist her to buy heroin if she told them what happened. The detectives than showed her some photographs. When Ms. Stiles was shown photos of the petitioners, she testified that the detectives began to smile at each other and asked her if she had ever seen these men. Picking up on these not-so-subtle hints, she understood that these photos were of the persons the police wanted to arrest, so Ms. Stiles falsely said she had seen the men at *La Casa Green*. She provided further details, in response to the suggestive questions of the police, about what happened at the store on the morning of July 4th 1993. Approximately six hours after her arrival, Ms. Stiles was finally allowed to leave the police station. She reports that she did so in the company of Detectives Sullivan and Gleason who gave her $60.00 and drove her to Wolcott Street where she purchased heroin with the money she was given. Afterwards they drove her home.

Ms. Stiles did testify in person at the Hearing in Probable Cause. The night before her appearance at the courthouse, Detectives Sullivan and Gleason arrived at her home to pick

[27] Ms. Stiles describes "dopesick" as being terrible. There is cramping, watering eyes, vomiting, sneezing, one gets hot, one gets cold, etc.. Notwithstanding this testimony, the habeas Court did listen to an audiotape of Ms. Stiles talking to the police for the sole purpose of how it might be relevant to her claim of being "dopesick." Ms. Stiles's voice on this audiotape does not sound as if she were in acute distress.

up both Ms. Stiles and her boyfriend (he was also a heroin addict). They took them to the Park Plaza Hotel (a fancy, if not swank, hotel in New Haven). The detectives took Ms. Stiles and her boyfriend out for dinner that night where she had a dinner of stuffed shrimp. During the early morning hours, Ms. Stiles and her boyfriend were in need of more heroin, so she testified that the police took her out to buy some.

The counsel for the Respondent introduced the testimony of several New Haven Police Detectives at the habeas trial. What is most interesting about this testimony is that the police officers confirm most of the testimony that Doreen Stiles provided to this habeas court, although, to be sure, the police did deny providing Ms. Stiles with money to buy drugs. Even the late night trips that Ms. Stiles related in her testimony were confirmed by the testimony of the police, although where Ms. Stiles said the purpose of these trips was to purchase heroin, the police indicate that it was for the purpose of picking up clothing at her home.

The Problems with the State's Case

The state alleged that the petitioners committed this crime while they were robbing Mr. Vega. The state theory is that the petitioners were two crack addicts who had been committing several small street robberies to obtain money with which to buy crack cocaine. There are several key facts that cause this Court to question the robbery motive as to why Mr. Vega was murdered.

First is the fact that the cash register for the store was open and had something like $100.00 in it. It is illogical to believe that two crack addicted thugs whose main concern was to get some money with which to buy more drugs would pass up this highly visible,

easily taken, source of quick cash. Nevertheless, the cash register was undisturbed. Moreover, the police found the victim with a wad of bills in his pocket totaling something like $1,800.00. To be sure, Mr. Vega's wallet had been rifled and no cash was found in it.[28] With the motive to commit robbery in order to get money for drugs, it seems odd that these easy sources of cash would have been passed by. There are no signs of any struggle having taken place in the store.

Second, there are no signs of any struggle or heated argument having taken place. Nothing in the store was out-of-place, no boxes or groceries were thrown to the floor. The victim's clothing was not at all disheveled. He appears to have been quietly tied up as if he was most cooperative.

The state did theorize that the safe contained some expensive jewelry that had been stolen and that this was used to purchase drugs. There are several problems with this as well. First, the evidence of the safe containing the jewelry was sketchy at best with only the victim's daughter testifying that she had last seen the contents of the safe as much as six months earlier. Second, there is no evidence of any of the missing jewelry ever having been recovered. There was no evidence that the New Haven Police had canvassed local pawnshops and found anyone matching the petitioners' descriptions pawning jewelry. There is, therefore no concrete evidence that the jewelry was present in order to be stolen by the murderer or murderers. The petitioners were not found to be in possession of any

[28] Petitioner's Exhibit 22 is the video shot by Det. Grice of the crime scene. The wallet can be observed neatly propped up against a box in plain view. None of the other papers in the money compartment of the wallet appear out of place. While somewhat speculative, the manner in which this wallet is observed almost appears that it was deliberately placed in that position in order to be observed. It makes more sense for a robber to have taken the cash out of the wallet, and in the process disturbing the other papers and then dropping the wallet to the floor.

weapons. The petitioners did not have any money on them. There was no testimony of them having money with which to buy crack. No fingerprints of the petitioners were found in the store or on Mr. Vega and no DNA evidence linking the petitioners to the crime has ever been found.

The petitioners were also able to present credible evidence at the habeas trial that seemingly implicates the victim's son as a possible perpetrator of this crime. Mr. James Stephenson testified as an expert in the field of firearms examination. He had access to and performed an analysis upon the projectile that killed Mr. Vega and concluded that it was a .380 caliber projectile[29] that had been fired from a gun capable of producing rifling characteristics identified as six left. This means that there were six lands and grooves on the projectile that twisted in the left hand direction. With this information, Mr. Stephenson was able to opine that the weapon that fired the fatal projectile was fired from either a Colt .380 semi-automatic pistol or a 9mm Colt semi-automatic pistol. This testimony is essentially what was conveyed to the jury in the petitioners' criminal trial. What was new at the habeas trial was the opinion that another gun manufacturer's product could also have been capable of producing a projectile with the same rifling characteristics; that weapon is an AMT .380 semi-automatic pistol. Mr. Stephenson further testified that he could match the projectile with a particular weapon only if he had the weapon to test fire it.[30]

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[29] Mr. Stephenson also admitted in his testimony that a .380 cartridge is also called a 9mm short round.

[30] It is a critical fact in this case that *no murder weapon* has ever been recovered in this case. As a result, there is no way to definitively match the projectile in this case with a particular weapon. Mr. Stephenson offered his estimate that there may be as many as 100,000 or more weapons that could have been used to murder Mr. Vega and that he felt the murder weapon was most likely manufactured by Colt firearms, although he could not rule out a pistol manufactured by the AMT company.

On September 10, 2009, the petitioners produced the testimony of Trooper Barbara Mattson of the Connecticut State Police. She is assigned to the Special License and Firearms unit. She located the records of firearms owned by the victim's son, Carlos Deleon Vega. The Connecticut State Police records show that Mr. Deleon Vega owned several firearms, including an AMT .380 semi-automatic pistol. He purchased this weapon on July 27, 1988 and according to the records of the Connecticut State Police and the federal Bureau of Alcohol, Tobacco and Firearms, he was *still* the registered owner of this weapon as of the date of Trooper Mattson's appearance at the habeas trial.[31]

At the next court date, the petitioners produced the testimony of Mr. Joseph Pagliaro who owned the building across the street from *La Casa Green*. The testimony was that shortly before his murder, the deceased was interested in purchasing this building and went so far as to give Mr. Pagliaro a check for $50,000.00 as a down payment. Unfortunately, the check was returned from the bank for insufficient funds. Mr. Pagliaro visited with the victim over at *La Casa Green* and returned the check to him. Mr. Vega appeared surprised that this check did not clear because he stated that there was enough money in the account to cover the check. Indeed, Mr. Vega went so far as to show him the check register that had an adequate balance such that the check should have been paid. Mr. Pagliaro apologized and told Mr. Vega that the bank did not agree. Mr. Vega stated that he would

[31] Interestingly, this .380 AMT semi-automatic pistol is and remains unaccounted for. This Court heard no evidence as to its current whereabouts, condition, or who may have had possession of it from July 4, 1993. Subsequent to a felony conviction unrelated to this murder, Mr. Deleon Vega was placed on probation and was required to surrender his firearms to his probation officer. According to the testimony of the probation officer, Mr. Robert Santoemma, Mr. Deleon Vega did not turn over any firearms to him. However, on September 4, 2006, Officer Monique Cain of the New Haven Police Department stated that Mr. Deleon Vega did turn in a 9mm Ruger pistol and a .25 cal. AMT Ranger pistol. The AMT .380 pistol that could possibly have produced the rifling characteristics found on the projectile found at the crime scene was never taken by the New Haven Police Department, nor was it ever tested to see if it had fired the fatal shot.

get back to Mr. Pagliaro about this. Of course, he was not ever able to do so because of his death something like a month later.

The next witness was a Ms. Margaret Anderson, the former branch manager at the now defunct Shawmut Bank. She testified that her branch handled the commercial accounts for *La Casa Green*. She was not familiar with the decedent, however she was familiar with Carlos Deleon Vega who was a frequent visitor to the bank and made the deposits for *La Casa Green*. Ms. Anderson did report meeting Mr. Vega one time and that was shortly before his death when he came into the bank in order to investigate the missing $50,000.00. Mr. Vega was agitated and waving papers around. As a result of this meeting, Ms. Anderson discovered that the reason the $50,000 check bounced was because there were several other checks written on the account that were for cash and had been negotiated in the branch.[32] Mr. Vega was informed that in order to pursue the matter further, he would have to agree to cooperate in a prosecution of whoever might be found to be the perpetrator. Mr. Vega never pursued reimbursement or prosecution because he was murdered a fairly short time[33] after this meeting.

On the basis of this evidence, one *could* conclude that Carlos Deleon Vega should have been a suspect in his father's murder. The evidence suggests that he had a motive to commit this crime. The testimony suggests that Mr. Deleon Vega may have been

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[32] There was little to no documentary evidence available to be introduced at the habeas trial about this incident, although Ms. Anderson did testify with a remarkable degree of detail. She stated that this was one of five missing funds cases in which she was involved in her banking career so she had a very good recall of the events. Ms. Anderson testified that she did conduct her own investigation into what was happening and she found that there were several checks that appeared to be signed by Mr. Eugenio Vega however Mr. Vega denied issuing the checks. She knew who Carlos Deleon Vega was. She called him flamboyant and one who usually drew attention to himself when he came into the bank. He went most frequently to one teller, Ms. Wendy Sullivan. She confirmed to Ms. Anderson that these checks were for cash.

[33] Ms. Anderson testified that it was within a month of his death.

embezzling money from his father. The son had the means to commit this crime in that he owned an AMT .380 pistol that was capable of producing rifling similar to the crime scene projectile. However, despite this circumstantial evidence that could point at Mr. Deleon Vega, there is no forensic evidence that directly ties him to this murder.[34] No murder weapon was recovered, none of his fingerprints were found at the crime scene, and of paramount importance, his DNA was not on the extension cord that was used to bind his father's hands. As succinctly stated by counsel for the Respondent in the post-trial brief, the absence of Mr. Deleon Vega's DNA on the cord "would eviscerate Petitioners' third party culpability claim." As much as Mr. Deleon Vega is exonerated by the DNA analysis, *so too are the petitioners exonerated*, as their DNA *also* is not on the electrical cord.

The real import of the "third party culpability" evidence is *not* that it establishes that someone else committed the crime, but that it shows that the New Haven Police Department seized upon the false testimony of Doreen Stiles and then used it to essentially mark the case as cleared. Thereafter, the police investigation took on the status of gospel as the case made its way through the criminal justice process. For Doreen Stiles, as the case progressed, her exposure for revealing that she had lied and the loss of the "benefits" that the police were willing to extend her to keep her cooperative combined to keep her from revealing the truth. It bears pointing out that this Court is convinced that none of the governmental officials involved in this prosecution of these two men actually falsified any evidence, although had they been a bit more skeptical as to what Doreen Stiles provided in 1993, perhaps these erroneous convictions could have been prevented.

[34] It is interesting that this circumstantial evidence is stronger than the evidence that points to Gould and Taylor when the Doreen Stiles testimony is removed.

As previously noted, the evidence of a murder having taken place is clear.[35] What is not proven is that it was Ronald Taylor and George Gould who committed this crime. There was no fingerprint evidence, there was no murder weapon recovered, there were no "fruits of the crime" recovered and there was no DNA evidence at the crime scene that in any way linked the petitioners to this crime. Particularly telling is the testimony of Detective Leroy Dease of the New Haven Police Department. At the habeas trial, Detective Dease, the lead investigator on this case was asked what evidence, aside from the testimony of Doreen Stiles, linked either of the petitioners to the crime[36] and Detective Dease responded, *"Right now, I cannot answer that question right now. But, through our...through our investigation...uh...through our interview...uh... with certain people led us to believe...led us to believe these two individuals committed this crime."* This answer shows that, indeed, the Doreen Stiles statement is the keystone of the evidence upon which these convictions rest.[37]

Moreover, upon closer examination of the criminal trial testimony of Doreen Stiles and Mary Boyd, now considered in the light of the recanted testimonies of both women, it can clearly be seen that the story told by Ms. Stiles in 1993-1995 simply cannot be true.

There is a critical difference between the legal status of a person who has been accused of a crime as opposed to one who has been convicted of a crime. While the person who

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[35] As an aside, it should be noted that the petitioners were charged with murder, yet were acquitted of that crime by the jury. This seems an odd result that the jury would not find that the elements of murder were established given that Mr. Vega was found seated in his cooler with his hands bound and shot execution-style. It would seem that the facts strongly support a finding that a murder did, in fact, take place.

[36] Judge Fuger: "Now I want you to take some time to think about this. Aside from the statements given by Mary Boyd and Doreen Stiles, what evidence, either direct or circumstantial, did you find or develop that linked Mr. Gould and Mr. Taylor to this murder?"

[37] A keystone is a good analogy, the definition of which is "a central stone at the summit of an arch, locking the whole together." If one removes the keystone, the arch falls.

has been accused of a crime is entitled to a presumption of his or her innocence, the petitioner in a habeas corpus petition is not. "It is undoubtedly true that '[a] person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 385, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).' *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 859, 122 L. Ed. 2d 203 (1993). ...The presumption of innocence, however, does not outlast the judgment of conviction at trial." *Summerville vs. Warden*, 229 Conn. 397 at 422-423 (1994). Consequently, even though our courts have recognized that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial," *Summerville vs. Warden*, 229 Conn. 397 at 422 (1994), the burden of proving entitlement to the grant of a writ rests with the petitioner. "Thus, in the eyes of the law, [the] petitioner does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law." *Summerville vs. Warden, infra.* at 422.

The writ of habeas corpus is an ancient and time-honored component of our Anglo-American jurisprudence, "We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus *ad subjiciendum*, in Anglo-American jurisprudence: 'the most celebrated writ in the English law.' 3 Blackstone Commentaries 129. It is 'a writ antecedent to statute, and throwing its root deep into the genius of our common law. ... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of

immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."[38] *Fay vs. Noia*, 372 U.S. 391 at 399 (1963). When the United States achieved independence from England, the writ was embodied in our law as well. "Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, § 14, 1 Stat. 81-82, habeas corpus was early confirmed by Chief Justice John Marshall to be a 'great constitutional privilege.' *Ex parte Bollman and Swartwout*, 4 Cranch 75, 95." *Fay vs. Noia, infra* at 400 (1963).

Issuance of a writ of habeas corpus is a remedy whose "most basic traditions and purposes are to avoid the grievous wrong of holding a person in custody in violation of the federal constitution and thereby protect individuals from unconstitutional convictions and help guarantee the integrity of the criminal process by ensuring that trials are fundamentally fair." *O'Neal vs. McAnnich*, 513 U. S. 432 at 442 (1995). Moreover, when a court reviews a petition for habeas corpus, "it must decide whether the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter." *Coleman vs. Thompson*, 501 U.S. 722 at 730 (1991). So, the writ of habeas corpus "has been for centuries esteemed the best and only sufficient defense of personal freedom." *Lonchar vs. Thomas*, 517 U. S. 314 (1996).

[38] Edward I reigned in England in the late 13th century AD.

Ineffective Assistance of Trial Defense Counsel

A criminal defendant has an absolute Constitutional right to persist in a plea of not guilty, even in the face of seemingly insurmountable obstacles and overwhelming evidence. He or she has an absolute right to hold the government to its justifiably high burden of proof and take the matter to a jury of his or her peers. The Constitution of the United States, the Bill of Rights, and the Constitution of the State of Connecticut collectively guarantee the fundamental right of a person to plead not guilty and have his or her case decided before a jury of his or her peers. Our common law has interpreted these Constitutional guarantees as requiring that the government seeking to deprive a person of freedom must first prove that person's guilt *beyond all reasonable doubt.*[39] Moreover, all criminal defendants are entitled to the representation of counsel. The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense." The sixth amendment right of confrontation and right to counsel is made applicable to the states through the due process clause of the fourteenth amendment. See *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), respectively. The Sixth amendment right to counsel is the right to an effective counsel.

[39] "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt.'" *In re Winship*, 397 U.S. 358 at 361 (1970).

Any claim of ineffective assistance of counsel must satisfy both prongs of the test set forth by the United States Supreme Court in *Strickland vs. Washington*, 466 U. S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 674, reh. denied 467 U. S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d (1984) before the Court can grant relief. Specifically, the petitioner must *first* show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, infra* at 687. If, and only if, the petitioner manages to get over the first hurdle, then the petitioner must clear the second obstacle by proving "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland, infra* at 687. In short, the petitioner must show both deficiency and prejudice. A failure to prove both, even though counsel's trial performance may have been substandard, will result in denial of the petition.

As already noted, a criminal defendant is entitled to the representation of trained and competent legal counsel. Notwithstanding, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. See *Bell v. Cone*, 535 U.S. 685 at 702 (2002); *Kimmelman v. Morrison*, 477 U. S. 365, 382 (1986); *Strickland v. Washington*, 466 U.S. 668, 689; *United States v. Cronic*, 466 U. S. 648, 656 (1984)." *Yarborough v. Gentry*, 540 U. S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). This court sincerely doubts that any defense attorney has ever conducted the perfect criminal trial.

Trial in this Court of a habeas petition is not an opportunity for a new counsel to attempt to re-litigate a case in a different manner. A habeas court "may not indulge in hindsight to reconstruct the circumstances surrounding the challenged conduct, but must evaluate the acts or omissions from trial counsel's perspective at the time of trial." *Beasley vs. Commisioner of Corrections*, 47 Conn. App. 253, 264, 704 A.2d 807 (1997), cert. den. 243 Conn. 967, 707 A.2d 1268 (1998). "A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances to counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Henry* vs. *Commissioner of Correction*, 60 Conn. App. 313, 317, 759 A.2d 118 (2000).

The petitioners have alleged that their trial defense counsel were ineffective in their representation. This Court disagrees, however. Despite the fact that this habeas Court is convinced with clear and convincing evidence that the petitioners are actually innocent of the charges in this case and will grant relief on that basis, the Court does not find that the trial defense counsel were ineffective. There have been no acts of deficient performance proven in this habeas trial. The fact that Doreen Stiles lied and kept that to herself for all of these years does not mean that the original trial defense counsel were in any way guilty of deficient performance.

In regard to prejudice, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, infra* at 694. "To mount a successful collateral attack on his conviction, a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal. *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417, *reh. denied*, 369 U.S. 808, 82 S.Ct. 640, 7 L.Ed.2d 556 (1962). *D'Amico v. Manson*, 193 Conn. 144, 156-57, 476 A.2d 543 (1984); see also *Bowers v. Warden*, 19 Conn. App. 440, 441, 562 A.2d 588, cert. denied, 212 Conn. 817, 565 A.2d 534 (1989). In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Internal quotation marks omitted.) *Buckley v. Commissioner of Correction*, 222 Conn. 460-61." *Summerville vs. Warden*, supra, 229 Conn. 419.

Given the significance of the recanted testimony of Doreen Stiles and its high probability to induce reasonable doubt in the minds of the jury, this Court finds that the reliability of the petitioner's conviction has, indeed, been undermined. However, this is *not* the result of deficient performance on the part of the trial defense counsel. While it makes for good television drama for the trial attorney to conduct a withering cross-examination of the state's star witness who inevitably breaks down in a cathartic confession on the witness stand in open court, such scenes are rare, if nonexistent in the harsh reality of the courtroom. To be sure, there were some facts available to the trial defense counsel that *could* lead one to conclude that the testimony of Doreen Stiles at the original trial was false because there simply was insufficient time to permit it to be true. Nevertheless, this,

standing by itself, without the power of the recantation does not arise to the level of deficient performance by trial defense counsel.

This Court is aware of the "fact that in many cases an order for a new trial may in reality reward the accused with complete freedom from prosecution because of the debilitating effect of the passage of time on the state's evidence." *Summerville vs. Warden*, supra. Furthermore, this Court understands that there is a strong societal interest "in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility." *Id.* This Court does not undertake to cast aside the verdict of a twelve-person jury except under the most compelling of circumstances. Notwithstanding, there simply is no doubt in this Court's mind that the 1995 conviction of the petitioners is in error because these two men are actually innocent of this crime.

The respondent notes in his post trial brief that even if this Court concludes that Doreen Stiles has lied at the petitioners' criminal trial (as indeed it has), that this does not undermine the reliability of the petitioners' convictions. That is, in one narrow sense, true because not only does the recantation by Doreen Stiles of her 1993-95 testimony mean that the jury convictions of Messers. Gould and Taylor are totally unreliable, it also means that there was *no evidence* by which the judge that held the hearing in probable cause could have concluded that they should be tried for murder in the first place; it means that the arrest warrant application signed by a judicial authority was without probable cause and should have been rejected; it means that the New Haven Police Department accused the wrong men and now

(1982), the root principle underlying ... [the federal statute governing habeas] is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under [the federal statute] differs in many respects from its common-law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, e. g., *Moore v. Dempsey*, 261 U.S. 86 (1923); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Waley v. Johnston*, 316 U.S. 101 (1942); *Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, 372 U.S. 391 (1963)." *Murray v. Carrier*, 477 U.S. 478, 516-17, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (*Brennan, J.*, and *Marshall, J.*, dissenting).

In the instant matter, an automatic stay of this court's judgment and orders would negate both the fundamental purpose of the Great Writ and have the effect of transforming meaningful relief into further illegal confinement. The disposition of this case as law and justice require, following this court's full inquiry into the cause of imprisonment, *must* result in the immediate release of the petitioners, as there is no cause for imprisonment. As Justice Cardozo so eloquently noted, "[i]t would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal, prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty." *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260, 158 N.E. 613, 63 A.L.R. 1458. That court went on to "... hold that the notice of appeal to this court is ineffective as a stay." *Id.*, at pg. 261.

Similarly, this court explicitly holds that there is no automatic stay barring the petitioners' immediate and unconditional release. General Statutes § 52-470 (a).

The Petitions for a Writ of Habeas Corpus are, therefore, granted; the sentences imposed by the court are set aside and vacated; the verdicts of guilty shall be set aside and vacated; the results of the Hearing in Probable Cause binding the petitioners over for trial are vacated; and the arrest warrants ordering their arrest shall be vacated. *The Commissioner of Correction is hereby ordered to immediately and unconditionally release the petitioners from confinement.* The court's judgment and orders are, of course, subject to review in accordance with the law and established procedures.

It is so ordered.

S. T. Fuger, Jr., Judge