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S.C. 18732 and S.C. 18733 SUPREME COURT

GEORGE GOULD
RONALD TAYLOR

v.

COMMISSIONER OF CORRECTION JULY 14, 2011

**MOTION FOR RECONSIDERATION EN BANC AND MOTION FOR REARGUMENT**

Pursuant to Practice Book §§ 70-7(c) and 71-5 the petitioners in the above entitled action respectfully move this Honorable Court to reconsider en banc its reversal of the judgment of the habeas court. As explained more fully below, there are three reasons which require reconsideration: 1) the record on appeal contains a fundamentally sound basis to support the habeas court's findings that the petitioners "affirmatively" proved they are actually innocent; 2) the petitioners both alleged and briefed the claim that their convictions rested solely on perjured testimony in violation of their rights to due process; and 3) in the alternative, if the Court is not inclined to reconsider its findings then fundamental fairness does not require the extraordinary remedy of a full remand to the habeas court as this Court should remand instructing the habeas court, *Fuger, J.*, to review the evidence which was produced during the 16 day habeas court in adherence to this Court's clarification of the standard of "actual innocence."

## I. BRIEF HISTORY OF THE CASE

The petitioners, George Gould and Ronald Taylor were tried jointly in the Judicial District of New Haven. The state charged them in a five count information: count one, with intentional murder; count two, with felony murder; count three, with robbery in the 1st degree; count four, with attempted robbery in the 1st degree; and

count five, with conspiracy to commit robbery in the 1st degree. Following the joint trial, they were acquitted of intentional murder, but were convicted of the remaining counts including felony murder whose predicate was that a robbery had occurred in the store. On April 7, 1995, the criminal trial court sentenced Mr. Gould and Mr. Taylor each to a total effective sentence of 80 years imprisonment. Direct appeals followed the thrust of which was the trial court's decision allowing the jury carte blanch access to the videotaped hospital deposition of Doreen Stiles, the witness who the prosecuting attorney, James G. Clark, repeatedly vouched to the jury that the case "rises and falls on." This Court issued a mandate disavowing the practice of unfettered access to witness testimony in the future but nonetheless found harmless error.

Thereafter, the petitioners filed writs of habeas corpus specifically alleging ineffective assistance of counsel in count one, errors of the criminal trial court in count two, violation of their constitutional rights to due process in count three, and actual innocence in count four. The writs proceeded to 16 days of trial. The first 2 days consisted of the recantations of Doreen Stiles and Mary Boyd. The petitioners affirmatively proved in the 14 days which followed Stiles' and Boyd's testimony their actual innocence including direct eyewitness evidence of third party culpability including an uncontroverted 45 minute audio taped confession of an eyewitness to the murder, ballistics, medical, forensics, and DNA. On March 17, 2010, *Fuger, J.*, granted the writs finding that the affirmative evidence of actual innocence was so great that a "manifest injustice" had been done to these two men. The respondent filed this appeal which was transferred to this Honorable Court. This Court reversed the judgment of the habeas court and remanded for a new habeas trial.

## II. SPECIFIC FACTS RELIED UPON

### Argument 1

This Honorable Court reached its ultimate conclusion in part by reasoning that it is not a fact finding court and therefore it could not consider evidence which was presented during the habeas trial, even though that evidence tended to affirmatively prove actual innocence, if the habeas court's memorandum of decision failed to specifically mention reliance on that evidence. But this Court did precisely what it said it could not do. In discussing the first prong of the Miller standard, i.e., "affirmative" proof of actual innocence, the habeas court, *Fuger, J.*, made a specific finding of fact that the DNA evidence on the electrical cord which tightly bound the victim's wrists "exonerated the petitioners." (Record at 92).

Furthermore, this Court in concluding that the habeas court's decision rests "entirely on recantation evidence" as the sole support for actual innocence, has misread the habeas court's decision. The habeas court, *Fuger, J.*, does not conclude that the "real import" of the absence of the petitioners' DNA on the cord used to bind the victim's hands is to essentially "mark the case as closed" for the New Haven Police Department. The habeas court clearly states that the absence of the DNA on the electrical cord ***also "exonerates"*** the petitioners. (Record at 92).

What the habeas court said and what this Honorable Court misconstrued was that the "real import" of the third party culpability evidence including the absence of Carlos Deleon's DNA on the cord, taken together with the ***other*** third party culpability evidence introduced at the habeas trial, was not that it showed someone else committed the crime but rather 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

closed." Id. ***The absence of the petitioners' DNA on that cord is not third party culpability evidence, but is affirmative evidence of actual innocence.*** It should not be fatal to the petitioners' claim of actual innocence that the habeas court placed this statement about the DNA exonerating the petitioners in arguably the wrong section of the memorandum of decision.

Moreover, what this Honorable Court did is essentially make its own finding of fact and in the process supplanted the habeas court's assessment of the credibility of the DNA evidence with that of its own. It is clear to the petitioners that this Court either overlooked or misread the record and thereby embraced the unfounded argument proffered by the respondent on appeal and at oral argument that the DNA found on the electrical cord that was used to bind the victim's wrists is unreliable because the DNA of the victim Eugenio Vega is not found on the electrical cord. (See footnote 12 of this Court's decision). This is tinged with irony when it is considered that the respondent espoused the exact contrary position during the habeas trial whereby the respondent vouched for the validity of the DNA evidence in exonerating Carlos DeLeon. The respondent at the time of the habeas proceeding presented evidence that the son's DNA was not found on the cord and then went one step further in corroborating the reliability of the DNA evidence by arguing in its post trial brief that the DNA evidence on the cord obliterated the claim of third party culpability against DeLeon in its entirety.

This Honorable Court makes it clear through footnote 12 of its decision that this Court has made a finding of fact of its own and has concluded that the DNA evidence found on the electrical cord which was admitted at the habeas trial, ***which the habeas court specifically found as exonerating the petitioners***, should be discredited therefore in this Court's eyes there is no "affirmative proof" that the petitioners did not

commit the felony murder. It is abundantly clear, however, from the undisputed testimony of Dr. John Schienman, who conducted the DNA testing of the electrical cord at the state lab, that ***only*** two portions of the cord were tested for the presence of DNA and that logically the victim's DNA ***should not*** be found on those two ***eight inch in length*** portions. Habeas Transcript 8/13/2009 at 94, 105, 107-108. According to Dr. Schienman, he only tested the portions on either side of the knot because the person who tied the knot would necessarily have had to grasp those opposing sections of the cord and apply force in order to pull the knot tight.[1] Id. After testing those two sections of the cord used to pull the cord, Dr. Schienman concluded that the probability of excluding the petitioners as being the source of the DNA which was found on those two eight inch opposing sections of the cord tested was ***"100 hundred percent."*** Id. at 96. Dr. Schienman went onto testify that even if the perpetrators were wearing gloves when they tied the knot, that would not necessarily preclude the deposition of their DNA on the cord if their DNA was transferred to the exterior of the gloves when the hands were placed into the gloves. Id. at 119. However, the record contains no evidence that the perpetrator was wearing gloves during the commission of the murder and to assume otherwise would be rank speculation.

The respondent's argument on appeal that because the victim's DNA was not found on the electrical cord, the DNA result is not to be considered reliable, "affirmative" proof of actual innocence is totally contradicted by the record. The record inescapably leads to the conclusion that Mr. Eugenio Vega's DNA would not be expected to be

[1] It is logical to conclude based on the testimony of Medical Examiner Dr. Edward McDonough, who conducted the autopsy with an aim to preserve the knot for future evidentiary testing including DNA, that the cord was tied after Mr. Vega was shot and dead. No defensive wounds or bruising on the wrists where the cord was tied tightly

present on those two portions of the cord which were tested by Dr. Schienman. It is obvious that Mr. Vega did not bind his own wrists and even if we were Harry Houdini, the cord was most likely tied after he was shot. Furthermore, the crime scene photograph which was taken before Mr. Vega's body was disturbed clearly shows that the two sections of the cord which were tested ***were not in physical contact with Mr. Vega's wrists***. Photo attached as A-1; State's Exhibit 7. Therefore, Mr. Vega's DNA would not be present on those two eight inch portions of the cord which Dr. Schienman tested. Had Dr. Schienman tested the portion of the cord that was tightly wrapped around Mr. Vega's wrists, Mr. Vega's DNA would most certainly have been detected on that section of the cord because that section is obviously in contact with Mr. Vega's wrists according to the photo. The petitioners' appellate brief at pages 45-47 clearly references this crucial flaw in the respondent's argument which this Honorable Court apparently overlooked.

Therefore, the DNA evidence which the habeas court specifically credited as the fact finder and found as a matter of undisputable fact "exonerates" the petitioners for the reasons stated herein constitutes reliable, ***"affirmative"*** proof of the petitioners' actual innocence. The undersigned need not supply a Webster's definition of the verb "exonerates" which the habeas court used. It is implicit by the habeas court's choice of the word that the habeas court relied on the DNA evidence as "affirmative" proof of actual innocence. To conclude otherwise is simply not grounded in logic or reason. This Honorable Court has clearly and unequivocally stated in its opinion that DNA evidence would certainly constitute one variety of evidence that would "affirmatively prove" actual innocence. Accordingly, in the interests of justice, this Court must now

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were found to suggest otherwise. Habeas Transcript 9/10/09 at 12-19.

reconsider its decision and affirm the habeas court's decision granting the writ because contrary to this Court's finding that the habeas court relied ***exclusively on the recantation evidence*** in finding actual innocence, the habeas court ***did expressly rely*** on the DNA evidence and so stated that in its memorandum of decision.

A meaningful discussion of the DNA evidence and the interests of justice can not be concluded without an analysis of the 45 minute audiotape of Pamela Youmans. According to Dr. John Schienman, the DNA on the two portions of the electrical cord which he tested was consistent with that of a female's. During oral argument, this Court commented that it listened to the 45 minute audiotape of Pamela Youmans in which she confessed to witnessing and aiding Carlos DeLeon shoot his father in the head. She stated that ***she touched the cord*** which reasonably accounts for the presence of a female DNA's. She further stated that she has not come forward before because Carlos DeLeon "petrified" her and that she was afraid that he would kill her too.

This Court stated during oral argument that she sounded like a "scared" woman, but this Court then refused to consider her audio taped confession as "affirmative proof" of actual innocence reasoning in its decision that it could not do so because "[a]ppellate courts never act as fact finders." Fundamental fairness then requires this Court to reconsider its decision because that is precisely what this Court did regarding the DNA evidence found on the cord. It is unfair for this Court to supplant the habeas court's fact finding and reliance of the DNA evidence as "affirmative proof"' which "exonerates" the petitioners with that of its own and then refuse to consider the 45 minute audio taped confession of Pamela Youmans in which she gives a harrowing account of the murder as "affirmative" evidence. It must be noted that before admitting the audio tape, the habeas court made a threshold determination and found it to be

reliable in accordance with the strict Whelan doctrine. It is reasonable and logical to infer then that the habeas court considered the audio tape credible, as did the respondent at the time of trial,[2] and as "affirmative proof" of the petitioners' actual innocence.

**Argument 2**

An examination of the petitioners' amended petitions clearly reveals that in addition to actual innocence, the petitioners also specifically claimed in the third count of their petitions relief in that their convictions violate the due process clause of both the United States Constitution and the Connecticut Constitution. Count one of the amended petitions consist of 58 paragraphs all of which were incorporated into count three where the due process violation was clearly alleged. Paragraph 15 of count one specifically states that ***"[b]ased largely"*** on the evidence offered through Doreen Stiles, the petitioners ***"were convicted."*** Paragraph 20 of count one establishes that the prosecution relied on the testimony of Doreen Stiles to convict the petitioners:

> "The prosecutor repeatedly emphasized in closing argument: 'This case rises and falls on the testimony of Doreen Stiles.' The prosecutor exhorted in reference to Stiles: 'Here's somebody who's trying their best to give you evidence that tells about a crime that still scares her.' The state repeatedly asked the jury to view the videotape [deposition of Doreen Stiles.]'"

Paragraph 22 of count one states that Doreen Stiles has since ***"recanted"*** her criminal

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[2] Immediately upon receipt of the tape, the undersigned apprised the respondent and provided a copy of the audio tape. The respondent found it credible enough that ten days later, for the first and only occasion in the course of the six year long proceeding and countless invitations from the undersigned to work together, sent an inspector from the New Haven State's Attorney Office to locate Pamela Youmans. Habeas Transcript 9/29/09 at 98-104.

trial testimony" and that in reference to her criminal trial testimony, it was ***"fabricated."*** Paragraph 25 of count one states that Mary Boyd ***"like Doreen Stiles recanted her trial testimony...that her testimony [implicating the petitioners] was entirely false."*** Paragraphs 26 and 27 of count one which were incorporated into count three specifically allege in reference to perjured testimony, that "the only link used by the state to establish the predicate felony" was "false."

Count one of the amended petition spells out two things, one that Doreen Stiles and Mary Boyd provided false, i.e. perjured, testimony which was then relied upon to convict the petitioners. And two, that the petitioners are seeking relief based on the credible recantations of Stiles and Boyd. Again, paragraph 22 clearly states that Doreen Stiles' 1995 criminal trial testimony implicating the petitioners was a complete fabrication. Therefore, since her trial testimony was given under oath and constitutes what the respondent concedes is the sole evidence of the petitioners' guilt—it was perjury. Count three of the amended petition specifically states ***that it incorporates by reference paragraphs 1-58, of count one, into count three***. When the paragraphs of count one including the aforementioned 15, 20, 22, 25, 26, and 27 are read along with the remaining averments in count three, ***as they must be,*** the amended petitions clearly and unequivocally claim that the due process violations suffered by the petitioners was the introduction of perjured testimony as the sole basis of their convictions. Moreover, the petitioners' 58 page post trial brief discusses the issue exhaustively. Specifically, the petitioners' appellate brief at page 12 clearly addresses and rebuts the argument which the respondent made on page 29 of its brief that **"the habeas court is without authority to grant relief on a free standing claim of perjury."** The petitioners therein argued in their brief that unlike the petitioner in Lewis

v. Commissioner of Correction, 116 Conn. App. 400 (2009) which was relied upon by the respondent as support for its claim, Mr. Gould and Mr. Taylor were entitled to relief on a due process claim of perjury because they met the factors of enunciated in Lewis. The petitioners ***did allege*** in count three of their amended petitions that the their convictions violate due process based on the perjured testimony of Doreen Stiles, and since the perjury was the only evidence linking the petitioners to the murder as the respondent conceded at oral argument, it necessarily affected the outcome of their trial.

Even if this Honorable Court believes that a due process violation based on perjured testimony was not explicitly alleged in count three with the magic words, for the reasons stated above, the Court should find, and has so in the past found, that it is ***implied.*** For example, in Small v. Commissioner, 286 Conn. 707, 719 (2008), this Court said:

> "We note that the parties in the present case ***have not expressly*** requested that we revisit Bunkley. ***The petitioner, however, has done so implicitly***. In his supplemental brief, he urges us not to apply the higher standard for prejudice enunciated in Strickland, which we applied to a claim of ineffective assistance of appellate counsel in Bunkley...." (Emphasis added).

This Court went on to not only revisit Bunkley but to overrule it and in the process to establish a new standard in Connecticut for a claim of ineffective assistance of appellate counsel. If this Honorable Court can overrule its own legal precedent based on an ***implied*** invitation to do so, the interests of justice cry out for this Court to do so in the instant case where this Court in its own words so aptly stated: "A large shadow of doubt has been cast over the reliability of the petitioners' convictions."

This Court has historically safeguarded the rights which should have been afforded during the criminal proceeding and so accordingly has placed its emphasis on the alleged injustice suffered by the petitioner. Husted v.Mead, 58 Conn. 55, 64 (1889). "The opportunity for a new trial when new evidence comes to light provides a defendant

[a]...critical procedural mechanism for remedying an injustice." Santiago v. State, 261 Conn. 533, 544 (2002). To this end, this Honorable Court can overlook some normally prejudicial "procedural quagmire" when a man's life is at stake. State v. Myers, 242 Conn. 125, 136 (1997). The normal technical rules of pleading "are qualified in their application to a capital case in the light of the principles laid down in Anderson v. State, 43 Conn. 514, 517 (1876) that 'in a case where human life is at stake, justice, as well as humanity, requires us to pause and consider before we apply those rules in all their rigor.'" Taborsky v. State, 142 Conn. 619, 623 (1955).

**Argument 3**

This Honorable Court has stated that this is a unique case for a number of reasons. The critical condition of Ronald Taylor is one of them and this Court is mindful of it. This Court should remand the matter back to the habeas court, *Fuger, J.,* with instructions to apply the law in accordance with this Court's interpretation of the Miller standard to the still fresh evidence. It must be noted again that the respondent conceded during oral argument there is no evidence of guilt absent the testimony of Doreen Stiles and that the recantation of perjured testimony is a valid due process claim pursuable through the mechanism of a writ of habeas corpus. Therefore it would appear the facts are not in dispute, but what is merely in dispute is the habeas court's application of the appropriate legal standard in accordance with Miller. In this context, another 16 days of habeas trial whereby essentially the same evidence is presented a second time around is not necessary and would not serve the interests of justice.

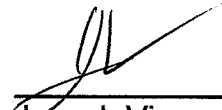
**III. LEGAL GROUNDS RELIED UPON**

This motion is being filed pursuant to P. B. §§ 70-7(c) and 71-5.

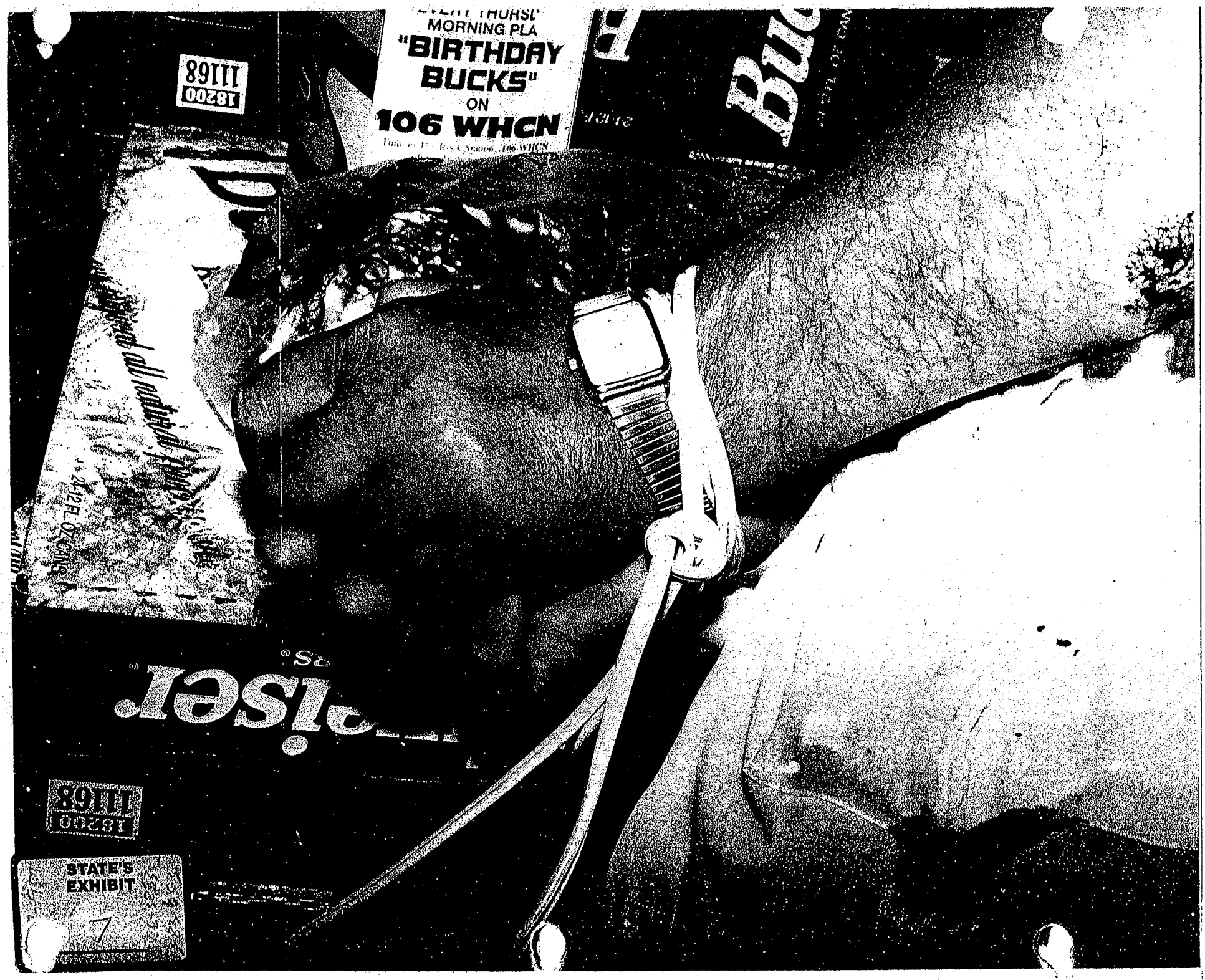
THE PETITIONERS-APPELLEES

BY: 

Peter Tsimbidaros, Esq.
P.O. Box 320482
Fairfield, CT 06432
(203)333-5111
Juris No. 410371

BY: 

Joseph Visone, Esq.
41 Miscoe Road
Mendon, MA 01756
(508)488-6230
Juris No. 416585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**CERTIFICATION OF SERVICE**

This is to certify, pursuant to Practice Book § 62-7, that on the 14th day of July, 2011, a copy of the motion for reconsideration en banc and reargument was mailed, first class postage prepaid, to all counsel of record, to wit: Supervisory Assistant State's Attorney John Waddock, Office of the State's Attorney, 235 Church Street, New Haven, CT 06106, Tel. (203) 503-6823, Fax. (203) 789-6400; and Supervisory Assistant State's Attorney Michael E. O'Hare, Civil Litigation Bureau Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT. 06067, Tel. (860) 258-5807, Fax. (860) 258-5828.

Peter Tsimbidaros

Joseph Visone

Counsels further certify that this motion complies with the provisions of P.B. § 66-3.

Peter Tsimbidaros

Joseph Visone