D.N. CV 05 4006524 S	:SUPERIOR COURT
MICHAEL C. SKAKEL	:STAMFORD/NORWALK JUDICIAL :DISTRICT AT STAMFORD
VS	
STATE OF CONNECTICUT	:OCTOBER 25, 2007

MEMORANDUM OF DECISION

This case comes to this court as a petition for a new trial pursuant to Conn. Gen. Stat. § 52-270 and Practice Book § 42-55.

This court in rendering its decision has reviewed the entire transcript of the original trial, all relevant exhibits, all motions, briefs and draft findings of the parties in this case and all relevant pleadings.

PROCEDURAL HISTORY

On February 8, 2000, following a Grand Jury investigation, the state charged the petitioner, Michael Skakel, with murder pursuant to General Statutes §53a-54a (Rev. To 1975) for the October 30-31, 1975 death of Martha Moxley. The charge was originally brought to the juvenile division of Superior Court. After a hearing, the Juvenile Court (Dennis, J.) ordered the prosecution transferred to the criminal division of Superior Court. After briefing and argument, our Supreme Court held that the transfer order was not a final judgment and dismissed petitioner's appeal. *In re: Michael S.*, 258 Conn. 621, 784 A.2d 317 (2001). Following a trial before the Honorable John F. Kavanewsky, Jr. and a jury of twelve, the petitioner was found guilty. On August 29, 2002, the court sentenced the petitioner pursuant to General Statutes § 53a-35 (Rev. To 1975), to the custody of the Commissioner of Correction for a period of not less than twenty years nor more than life.

STANDARDS GOVERNING A PETITION FOR A NEW TRIAL

Connecticut General Statutes § 52-270 provides "the superior court may grant a new trial of any action that may come before it for the discovery of new evidence . . . or for other reasonable cause . . ."

"The standard that governs the granting of a petition for new trial based on newly discovered evidence is well established. The petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial. . . . This strict standard is meant to effectuate the underlying 'equitable principle that once a judgment is rendered it is to be considered final,' and should not be disturbed by post-trial motions except for a compelling reason. . . . In determining the potential impact of new evidence, the trial court must weigh that evidence in conjunction with the evidence presented at the original trial. . . . It is within the discretion of the trial court to determine, upon examination of all the evidence, whether the petitioner has established substantial grounds for a new trial, and the judgment of the trial court will be set aside on appeal only if it reflects a clear abuse of discretion." Asherman v. State, 202 Conn. 429, 434 521 A.2d 578 (1987).

As previously expressed, the first part of the Asherman test requires the petitioner to establish that the evidence is truly "newly discovered." Since at least 1836, our Supreme Court has stated that "a new trial will never be granted on the ground of newly discovered evidence, if that evidence might have been adduced, on the former trial, by the use of due diligence[.]" Lester v. State, 11 Conn. 415 (1836); see also Waller v. Graves, 20 Conn. 305 (1850); Summervile v.

Warden, 229 Conn. 397, 426, 641 A.2d 1356 (1994). "Due diligence does not require omniscience. . . . [It] means doing everything reasonable, not everything possible . . . . The petitioner for a new trial must be diligent in his efforts fully to prepare his cause for trial; and if the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted." Williams v. Commissioner, 41 Conn. App. 515, 528, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997).

Our Supreme Court provided substantial guidance in the application of the Asherman factors in Shabazz v. State, 259 Conn. 811, 827-28, 792 A.2d 797 (2002). Shabazz held that "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 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." (Citation omitted.) Id.

As our Supreme Court noted in Shabazz, supra, 259 Conn. 823:

> [W]hether a new trial should be granted does not turn on whether the evidence is such that the jury could extend credibility to it . . . The [petitioner] must persuade the court that the new evidence he submits will probably, not merely possibly, result in a different verdict at a new trial. . . . It is not sufficient for him to bring in new evidence from which a jury could find him not guilty - it must be evidence which persuades the judge that a jury would find him not guilty.

Accordingly a different result is an acquittal on retrial.

PLEADINGS

The plaintiff's revised substituted petition for a new trial dated May 1, 2006, consisted of nine counts. At trial, the petitioner proceeded only on Counts One, Two, Six and Nine. Count One was essentially the newly discovered evidence of third party culpability involving Gitano (Tony) Bryant, Adolph Hasbrouck and Burton Tinsley. The Second Count was newly discovered evidence directly contradicting the testimony of Gregory Coleman, one of the state's witness. Count Six was a claim of a pattern of non-disclosure of exculpatory information involving among other things, a sketch, profile reports of Thomas Skakel and Kenneth Littleton and the time lapse data. Count Nine was the allegation concerning a secret pact and book deal between the state's lead inspector, Frank Garr, and author Leonard Levitt. Also, there were allegations concerning Garrs' threatening conduct towards witnesses.

The state filed an answer dated June 14, 2006, addressing the issues, essentially denying all of the allegations.

All of the facts listed in this decision are the court's finding of fact.

COUNT TWO

In order to secure a new trial under the second count, the petitioner must establish that the evidence he offered to impeach state's witness Gregory Coleman was newly discovered, material, noncumulative, and likely to produce an acquittal on retrial. The court finds that this burden has not been sustained.

Coleman's testimony was from the probable cause hearing. While testifying at the Probable Cause Hearing, Coleman named three persons as possibly present when petitioner bragged he had

murdered Moxley. These possible witnesses were: John Simpson, Alton "Everett" James, and Cliff Grubin.

As to the efforts made to find these persons prior to trial, the petitioner's first attorney Michael Sherman, testified that he directed his investigator, Vito Collucci, to find all three of these men.

Collucci originally testified that he was unsuccessful in finding James. He testified that in searching for James he had not contacted the Elan School, or any of the numerous trial witnesses who had attended Elan around the same time as the petitioner and Coleman.

During the hearing, when shown a memorandum he had written prior to trial, Collucci recalled that he had found James prior to trial. He stated that he advised Attorney Sherman's office of the information he obtained.

Sherman stated that, although Collucci found an address for James in Virginia, "we just couldn't connect - couldn't connect on the phone with him in some way."

Collucci further testified that, after the verdict, he had been asked by replacement counsel to find John Simpson and Cliff "Rubin." At the probable cause hearing the name was transcribed as "Cliff Rubin." It is actually Grubin. He was unable to find either man.

In connection with the petition for new trial, petitioner's investigator, Keith Weeks, testified that he was able to find Grubin and Simpson. He found John Simpson by contacting Sara Peterson, an Elan alumna who had testified for the defense at the criminal trial. Peterson gave him information that put him in touch with Patricia Solio, who had been engaged to Simpson at one point. Solio told Weeks that Simpson had attended Pennsylvania State University.

Once he had that information, Weeks enlisted the help of a graduate of Penn State to access

the alumni website. There were four "John Simpsons" on the website. By estimating his age and graduation date using the dates he attended Elan, Weeks was able to find the correct Simpson's address and phone number.

As for Cliff "Rubin," Weeks testified that he first looked on an internet message board for persons who had attended Elan. After going through several screens of postings, he found a person who posted under the name "Cliff Grubin," and indicated he attended Elan from1978-80.

Although Weeks tried many other avenues of locating Grubin, he ultimately contacted him through the e-mail address listed on the Elan message board. Weeks testified that he could have found Grubin through that e-mail address without pursuing the other leads that ultimately proved fruitless. A week after he sent an e-mail he got a response from Grubin.

"When a [petitioner] seeks a new trial for newly discovered evidence, he must have been 'diligent in his efforts fully to prepare his cause for trial, and if the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted.' (Internal quotation marks omitted.) Williams v. Commissioner of Correction, 41 Conn. App. 515, 528-29, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 457, 692 A.2d 1231 (1997)." State v. Roberson, 62 Conn. App. 422, 427, 771 A.2d 224 (2001).

The Roberson decision is instructive in evaluating Attorney Sherman's efforts to locate the three men named by Coleman. In Roberson, as here, the defense attorney knew the name of the "new" witness prior to trial. The trial attorney's efforts to locate the witness consisted of checking a telephone book and the city assessor's office. The attorney indicated he was unsure if he also examined motor vehicle records. Id. The Appellate Court characterized his efforts as a "scant search." It upheld the trial court's determination that petitioner had not shown that the "new"

evidence could not have been discovered prior to trial through the exercise of due diligence. Id.

As outlined above, Sherman testified that he asked Collucci to find these potential witnesses if he could. Collucci produced some documents showing his efforts to find James, but stated he had not been asked to find Simpson or Grubin. Although Collucci was successful in obtaining an address for James, Attorney Sherman asserted a problem "connecting" as the reason the defense did not contact James. This search is insufficient under the Roberson standard.

All three of these witnesses could have been found prior to trial by the same methods employed to find them after trial.

As to both Simpson and Grubin, the same methods used to locate them after trial were available to the defendant before trial. Where the alleged new evidence could have been discovered before trial by the same diligence used to discover it after trial, due diligence has not been shown. In re James, 55 Conn. App. 336, 346, 738 A.2d 749, cert. denied, 252 Conn. 907, 743 A.2d 618 (1999) ("[t]his alleged new evidence could have been discovered before trial by the same means and by the same diligence as it was discovered after the trial. The failure to discover the evidence before trial constitutes a lack of due diligence"). A motion for a new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto. Petitioner has failed to prove this evidence is "newly discovered" as required by the first prong of Asherman.

At the hearing, petitioner presented live testimony of Grubin, and deposition testimony of James and Simpson. Neither Grubin nor James offered any material, noncumulative evidence regarding Coleman. Simpson's testimony, while partially impeaching Coleman, is not so material

as to warrant a new trial. Importantly, Simpson also supports Coleman to some degree. In addition**,** Simpson and Grubin supplied new inculpatory statements by the petitioner**.**

Consideration of petitioner's evidence under Count Two in light of the evidence at trial reveals that it is, for the most part, cumulative. Even if not cumulative, however, it is not material and not likely to result in an acquittal on retrial.

Starting with James and Grubin, neither man offers much that is beneficial to petitioner that is not cumulative of other Elan testimony at trial. "Cumulative evidence is additional evidence of the same kind as that submitted at trial, submitted to prove the same point." 58 Am.Jur. 2d 337, New Trial § 349 (2002)]." Morant v. State, 68 Conn. App. 137, 148, 802 A.2d 93 (2002), cert. denied, 260 Conn. 914, 796 A.2d 558, overruled in part on other grounds, Shabazz v. State, supra, 259 Conn. 830 n.13. "A new trial is not required if the evidence is merely cumulative or duplicative. . . . Where essentially the same evidence is submitted with somewhat more detail, it is, ordinarily, nonetheless cumulative." (Citation omitted.) Ginsburg v. Cadle Co., 61 Conn. App. 388, 392, 764 A.2d 210, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

Both James and Grubin testified that they had never heard the petitioner confess to the murder. That testimony repeats the testimony of several defense witnesses at trial. (Sarah Peterson); (Michael Wiggins); (Donna Kavanaugh); (Angela McFillin). As such, it is cumulative and not likely to lead to an acquittal on retrial.

In addition, both men acknowledged that they were friendly with petitioner at Elan, with James stating they came from "similar backgrounds" and Grubin describing their relationship as "great friends." Although Grubin claimed he had not had any contact with petitioner since Elan, his statement to Weeks contradicted that statement. Grubin told Weeks that he talked to Skakel several

times after they left Elan.

Grubin's credibility is further undermined by his admission to Weeks that he would not testify truthfully if asked what petitioner told him about the murder. In fact, when asked on cross examination, Grubin insisted petitioner merely expressed concern for one of his brothers. This stands in contrast to his statement to Weeks that Skakel told him several times, in private, while at Elan and afterward, that his brother Tommy killed Moxley.

As for John Simpson, his testimony partially impeaches and partially supports Coleman. While he did not hear Skakel brag to Coleman that he killed Moxley, he stated that both men were to his left, and he is deaf in his left ear. Further he recalled that he was writing the nightly reports, a task which required attention to detail and would thus have kept him from focusing on the others' conversation.

While providing only minimal impeachment evidence regarding Coleman, Simpson did testify to two inculpatory statements by petitioner. Rather than sticking to his 1975 alibi where he professed to know where he was and what he did that night, or corroborate his later claims to Hoffman and others that he snuck out of the house and masturbated in a tree on the Moxley property, Skakel asserted that he had been drinking and partying and "there were . . . times that I may not, you know, remember . . . . but I certainly don't remember doing anything like that."

In light of the limited impeachment value of Simpson's testimony, petitioner has not proven it is either material or likely to result in an acquittal on retrial. As our Supreme Court has noted, "[n]ew trials [typically] are not granted upon newly discovered evidence which discredits a witness unless the evidence is [both] vital to the issues and . . . and strong and convincing. . . . The rule restricting the right to a new trial when one is claimed on the basis of newly discovered evidence

merely affecting the credibility of a witness is necessary because scarcely has there been an important trial . . . [after which a] diligent search would not have discovered evidence [to impeach] some witness. . . . Without such a rule, there might never be an end to litigation." (Citation omitted; internal quotation marks omitted.) Adams v. State, 259 Conn. 831, 839, 792 A.2d 809 (2002); accord State v. Roberson, 62 Conn. App. 422, 429, 771 A.2d 224 (2001) ("[w]here claimed newly discovered evidence would merely affect the credibility of a witness, it is not a ground for a new trial unless it is reasonably probable that on a new trial there would be a different result"); Turner v. Scanlon, 146 Conn. 149, 164, 148 A.2d 334 (1959) ("[w]hile the newly discovered evidence does tend to discredit the plaintiff's testimony, it cannot be said that the trial court abused its discretion in concluding that the evidence in all probability would not, if offered in a new trial, produce a different result, and that no injustice had been done"); Smith v. State, 139 Conn. 249, 251, 93 A.2d 296 (1952) ("[a] new trial will not ordinarily be granted because of the discovery of additional impeaching or discrediting testimony"); Shields. v. State, 45 Conn. 266, 270 (1877) ("[a] new trial will not be granted on the mere after-recollection of a former witness").

Furthermore, Coleman's testimony at trial was corroborated by both his widow, Elizabeth Coleman, and a fellow Elan resident, Jennifer Pease.

The evidence offered to impeach Coleman is far from convincing, in view of the case presented by the state at trial. Coleman's testimony was only one of the direct confessions admitted below. See T. 5/17 at 133-38 (Gregory Coleman); T. 5/16 at 179-182 (John Higgins); T. 5/21 at 32.

Thus, when the limited impeachment value of the new evidence is considered in view of the strong evidence of guilt presented at trial, it is apparent that it would not lead to an acquittal on retrial.

COUNT SIX

In the sixth count of petitioner's Revised Substituted Petition for New Trial, he alleges that the state suppressed two profile reports prepared during the course of the investigation of this homicide. These reports summarized the results of the investigation with regard to Kenneth Littleton and Thomas Skakel as suspects. A third report, prepared at the same time, summarized the results of the investigation of Michael Skakel as a suspect. He contends that information contained in these reports was exculpatory and material and that he is entitled to a new trial on this basis.

The alleged suppression of these reports was an issue in petitioner's appeal. The Supreme Court summarized the record with regard to this claim as follows:

> On May 13, 2002, John F. Solomon, a former supervisory inspector with the office of the state's attorney in the judicial district of Fairfield, testified outside the presence of the jury concerning issues that were raised in a motion then pending before the court. During his testimony, Solomon referred to a copy of a report that he had prepared in connection with the investigation of the victim's murder. Solomon characterized that report, which he wrote in 1992, as a profile of Littleton summarizing why, at the time the report was written, Littleton was considered a suspect. Immediately after Solomon referred to the report, the defendant's trial counsel requested a copy, to which the court responded: "Not right now. You are talking about examining the witness." At that same proceeding, the state elicited testimony from Solomon indicating that he had prepared a similar profile of Thomas Skakel, who, at one time, also was a suspect in the victim's murder.
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> The defendant failed to renew his request for those reports before the conclusion of the trial, and his original motion for a new trial, which was timely filed on June 12, 2002, did not refer to the two reports. The defendant did raise the issue, however, in his amended motion for a new trial, which was filed on August 26, 2002, claiming that the state had withheld the profiles of Littleton and Thomas Skakel in violation of its obligation under Brady to disclose exculpatory evidence. At the August 28, 2002 hearing on the defendant's amended motion for a new trial, the state asserted that the defendant's claim was time barred because it had not been raised until long after the expiration of the five day period for the filing of such motions prescribed by Practice Book § 42-54, and just prior to the sentencing hearing that also was scheduled to commence on that same day. The state also maintained that the two reports were internal office documents and, therefore, exempt from discovery under Practice Book § 40-14 and the work product

> doctrine, and that it had turned over to the defendant all of the factual information contained in the reports prior to trial, in accordance with the court's discovery order. After reviewing the two reports in camera, the trial court rejected the defendant's claim, concluding that: (1) the defendant had failed to renew his request for the reports during trial; (2) the claim otherwise was untimely because it had not been made within the five day period specified by Practice Book § 42-54, and the defendant had proffered no justification for the untimely claim; and (3) the reports appeared to be work product that is exempt from discovery under Practice Book § 40-14. The court also noted that it had no reason to question the state's representation that the state had provided the defendant with all of the data contained in the two reports during pretrial discovery. Because the discovery documents containing those data had not been filed with the court, however, the court also observed that it had not conducted an independent review of the documents to confirm the accuracy of the state's representation. The court further indicated that, in light of that fact, its rejection of the defendant's claim did not rest on the state's contention that the defendant previously had been provided with all of the factual information contained in the two reports. Finally, at the conclusion of the hearing and after the court had denied the defendant's amended motion for a new trial, the defendant requested permission to file with the court the 1806 pages of documents that the state had turned over to him during pretrial discovery. The trial court granted the defendant's request, and the documents were marked for identification only.

State v. Skakel, 276 Conn. 633, 707-710, 888 A.2d 985 cert. denied, ___ U.S.___ , 127 S. Ct. 578 (2006).

Based on the above, the Supreme Court held that petitioner was aware of the profile reports during trial, yet failed to make a timely request for them. Id., 710. It concluded that "the trial court acted within its discretion in rejecting the defendant's claim on the ground that the defendant had failed to raise it in a timely manner under Practice Book § 42-54. Although the defendant became aware of the two reports during trial, he did not raise a *Brady* challenge to the state's failure to provide him with the reports until two and one-half months after the five day limitation period of Practice Book § 42-54 had expired." Id.

In light of the criminal trial record regarding when petitioner became aware of the reports, and his untimely request for them, this evidence cannot be considered "newly discovered." Further, in this proceeding, Attorney Sherman admitted that he had met with John Solomon, the Littleton report's author, extensively prior to trial and Solomon told him about the profile reports. Sherman indicated he did not specifically request the reports in his discovery requests. Because this evidence

was known to petitioner at trial, and petitioner failed to pursue a copy of the reports with due diligence, this court finds the evidence was not newly discovered. *See* Joyce v. State's Attorney, 84 Conn. App. 195, 200, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A.2d 578 (2004); State v. Roberson, *supra*, 62 Conn. App. 428*;* Williams v. Commissioner, *supra*, 41 Conn. App. 529. It should be noted that, during the course of discovery on this action, the state provided petitioner's counsel with copies of these profile reports.

COUNT NINE - THE BOOK

Count Nine is very broadly drafted, and on a first reading appears that it is merely an attempt to tie into a final count all of the original eight counts. Somewhat like a prayer for relief that says, for all of the foregoing reasons a new trial should be granted. When the court read this count, it believed that the petitioner was just tying in all of the allegations of Counts One through Eight. It became clear as the petition for a new trial evolved, that it was primarily focused on Lead Inspector Garr, the book and Garr's conduct. The state has objected claiming that the court cannot consider anything other than the allegations in Counts One, Two and Six.

The court finds the Ninth count broad enough to consider other evidence. Paragraph 18 of the Eighth Count states that "based upon information and belief, the petitioner is entitled to a new trial based upon newly discovered evidence, and including but not limited to the information previously alleged in the First Count through the Eighth Count." This allegation is broad enough to include the allegations of Mr. Garr, the Lead Investigator. The modern trend, which Connecticut follows, is to construe pleadings broadly and realistically rather then narrow and technically. The pleadings must nevertheless provide sufficient notice of the facts claimed and the issues to be tried. This court finds that this pleading meets that standard. The court finds that a variance between pleadings and proof may not be fatal because only material variances, those that disclose or depart from the allegation in some essential way to the charge or claim, warrant the reversal of a judgment. This claim is a mere variance. Accordingly, the court will consider those claims.

On or about May 21, 2001, petitioner's original attorney, Michael Sherman, filed a Motion for Discovery and Inspection. In paragraph 13 of that motion he requested "[e]vidence that any officer, investigator, witness or other agent of the state, did have, or now has, a pecuniary or other interest in the development and/or outcome of this case, including, but not limited to, any contract, agreement, or on-going negotiations, which relate to the preparation of any book, or the making of any movie, or which relate to contracts or agreements pertaining to future employment based upon such person's knowledge of this case, whether such person's interest is, or has been, negotiated directly or indirectly, via any family member, friend, corporation, or other business entity, in which said person, family member, or friend, has an interest." Exh. 78, p. 199-200.

On August 15, 2001 the Court (Kavanewsky, J.) ruled on this request as follows:

> THE COURT: All right; my thinking is that information regarding the pecuniary interest of a witness in the outcome of the case, a witness, is relevant for impeachment purposes, to show possible bias or motive. But, I don't see the same rationale applying to non-witnesses.
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> So your –
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> MR. SHERMAN: Excuse me, may I ask the court, how about rebuttal witnesses?
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> THE COURT: Witnesses, I am including chief and rebuttal witnesses in the same group. I don't think Mr. Benedict would have an objection to that if there is a rebuttal witness later disclosed that has such claims. So, I am denying the request in its present form, granted as amended to witnesses in both chief and rebuttal only. That's my ruling as to number 13.

During the course of the trial, Inspector Frank Garr testified outside the presence of the jury. At the close of defendant's examination of Garr, the following exchange occurred:

MR. SHERMAN: Have you got a book deal?

MR. BENEDICT: Objection, irrelevant.

MR. SHERMAN: Nothing further.

THE COURT: Anything further?

T. 5/10/02 at 156.

At the hearing on the petition for new trial, the petitioner presented three witnesses Leonard Levitt, Frank Garr and Michael Sherman concerning the relationship between Garr and Levitt and the circumstances under which Levitt wrote *Conviction.*

Leonard Levitt testified that he began covering the Moxley homicide as a reporter in 1982. He began thinking of writing a book about the case. He stated that his association with Garr did not begin until late in 1995.

Their association began when Levitt had an article published in Newsday which recounted the findings of Sutton Associates, a private investigation firm hired by Rushton Skakel. Levitt reported that both Tommy and Michael Skakel had given Sutton Associates a different account of their activities the night of the murder than they had told the police in 1975. Shortly after Levitt's article on the Sutton report was published, Garr called him. Garr did not have access to the Sutton Report at that time, and was interested in the new information Levitt had obtained. Garr and Levitt eventually became friends.

Levitt stated that his interest in writing a book about the case continued. He made some inquiries prior to the Grand Jury in 1998. He believed he may have drafted a book proposal in 2000. He stated that although it is always hard to get a book published, he was also concerned about writing about the case until he knew how the whole thing would end. He wanted to tell a complete story.

Levitt stated that he undoubtedly told Garr about his interest in writing a book at some point in their association. In addition, he stated that he had asked Garr to help him in that endeavor. Garr's response was always consistent, however, saying he could not help him in any way until after the case was over. Levitt stated there were no conversations between he and Garr regarding compensation until after the conviction.

Petitioner's counsel asked Levitt numerous questions about a passage in his book in which he stated that at the lowest ebb, he and Garr made a "pact" to tell their story. In the book, Levitt also wrote about another time when he promised that when the case was over, no matter which way it went, he would tell their story, his and Garr's.

Levitt explained that the lowest ebb was probably the period after Mark Fuhrman's book was published and Fuhrman and Dominick Dunne were appearing on television shows saying disparaging things about the official investigation. He stated that he did not think about dividing the books profits with Garr at the time he vowed to tell their story. After the conviction, it seemed fair to him to share the proceeds with Garr. Levitt was explicit in his testimony in saying that money never came up until after the conviction. Levitt stated that although he likes to make money for his work, money was the "last thing [he] was interested in" with this book.

Garr testified that he considered Levitt's use of the word "pact" to be literary license. In his view, all he ever said prior to trial was he would talk about helping with the book after the case was over.

Levitt stated that prior to sentencing, Garr never shared any information from the state's file with him. Even though Levitt tried to get information from Garr all the time, he never got anything.

Levitt stated that they never worked together on the case, but rather Garr worked on it as a detective, and he as a reporter. Levitt said he was always pushing Garr for information but never got anything out of him. Even during the trial, Levitt said that Garr never gave him access to the state's files or evidence.

After the trial, Levitt did begin working on his book. In February 2003, Garr and Levitt entered into an agreement where Levitt agreed to give Garr 50% of the profit from his book. Levitt explained that he was paying Garr for his time and his insights.

Petitioner's counsel also asked Levitt about a passage he wrote saying that Garr had threatened, cajoled, and harassed witnesses. Levitt explained that what he meant was that Garr told witnesses if they did not come voluntarily, the state would subpoena them. Garr explained in his testimony that many of the witnesses in this case were reluctant to testify. He allowed that he might be guilty of harassment, by which he meant he was persistent in his efforts to secure their testimony. He stated unequivocally, however that he never told a witness what to say or encouraged them not to tell the truth.

Garr testified that he did not write a single sentence in Levitt's book. He further stated that he had no power to make changes to the book, although he did point things out to Levitt that he thought were inaccurate. Garr stated that during the time Levitt was writing the book, they would meet after work, before work, or on the weekends to discuss it. Sometimes Levitt would show him drafts that he would review. Garr testified that he never worked on the book during his regular work day.

He agreed that prior to trial he was aware Levitt hoped to write a book, and he may well have told Levitt that he would try to help him when the case was over. He stated that he never gave Levitt information from the state's file prior to sentencing. Garr explained that, in his mind, the case was over following Skakel's sentencing in August, 2002. To his way of thinking, there was no further investigation to be done at that point.

Garr explained that while he had told Levitt prior to trial that he would help him with his book when all was said and done, he had no expectation of a financial reward at that time.

Petitioner's counsel questioned Attorney Sherman about a passage in Mark Fuhrman's book where Fuhrman contacted Garr and asked for his help in writing his book. Fuhrman wrote that Garr would not help him, or even meet with him. Fuhrman also stated that Garr remarked he had been thinking of writing a book.

Garr stated that he could not recall saying the words Fuhrman attributed to him. He explained that he could not imagine saying anything like that but if he said it, it was intended to politely "blow off" Fuhrman.

Michael Sherman offered his opinion that, prior to trial, he had "pretty good information" from three persons – Tim Dumas, Mark Fuhrman, and Dominick Dunne, all of whom had written books about the case – that Garr had a "book deal." Sherman admitted, however, that Levitt never made any such assertion. In his testimony, Sherman explained that his information regarding the alleged "book deal" consisted of rumors circulated by the persons he named. He admitted he had no "hard evidence" of any such deal. Nevertheless, he filed the discovery request.

Sherman stated that he did ask Garr whether he had a book deal when Garr was on the stand. Sherman recalled that he got what he perceived to be a "really bad glare" from Judge Kavanewsky. He explained that he did not seek a ruling from the court when the state objected because of what he perceived as the court's reaction to his question.

He never attempted to make an offer of proof to Judge Kavanewsky regarding the rumors he had heard, or the passage in Fuhrman's book where Fuhrman claimed Garr said he was thinking of writing a book. Sherman also stated he did not pursue the issue further at trial.

Sherman claimed that if he had known about the "pact" Levitt mentioned in his book he would have made Garr's alleged financial motive a "central theme" of his case. He admitted, however, that "pact" does not necessarily have financial connotations.

Sherman further testified that he spoke to the state's witnesses prior to trial, and felt that Garr's treatment of some witnesses was "heavy handed." He claimed he was aware that Garr "threatened and cajoled" witnesses. He asserted that if he had had the information about a "pact" which implied a financial motive on Garr's part, he would have "blown it up as big as I could." He stated that nothing prevented him at trial from calling witnesses who felt Garr was being difficult, and bringing that to the jury's attention.

Petitioner has not established that any evidence regarding Garr and Levitt was unknown or undiscoverable through the exercise of due diligence at or prior to trial. As the evidence produced at the hearing revealed, Sherman had heard "rumors" of a book deal involving Garr. As brought out on cross, all three of the persons named as possible sources for those rumors – Tim Dumas, Dominick Dunne and Mark Fuhrman – attended the criminal trial in 2002. Nothing prevented Sherman from inquiring further to see if any of those persons had information regarding an alleged book deal.

Further, Judge Kavanewsky granted petitioner's discovery request regarding information of potential pecuniary gain by state's witnesses. Therefore, it is apparent that if petitioner had requested a ruling from the court when he asked Garr if he had a book deal, the court would have overruled the state's objection. Based on the evidence in this proceeding, however, Garr's answer

would have been "no."

Petitioner's failure to elicit this testimony at trial constitutes either a lack of due diligence or a strategic decision. Petitioner may not have pursued the issue at trial because he knew, or knew it was likely, that Garr did not have a book deal. Rather than press for an answer, he may have preferred that the question remain unanswered, but suggestive.

There is no evidence that, at the time of the trial, Garr had any expectation of financial gain from a book his friend Levitt might one day write. Both Garr and Levitt were clear about this. In fact, both men were clear that Levitt's interest in writing the book, and Garr's agreement to help him, was not about money. Rather, both men felt that the true story of this case needed to be told. They felt there was a lot of misinformation in the media and they wanted the public to know the truth.

As Garr explained, he wanted to help Levitt if he could because he felt his book would be the most accurate.

Garr and Levitt confirmed that Garr never supplied Levitt information from the state's files prior to trial. In fact, Levitt said he was surprised after trial to find out how much information Garr had withheld from him.

Levitt's decision to split the proceeds 50/50 with Garr was not made until after the trial. Levitt explained that he paid Garr for his time in reviewing drafts, and his insights. Because Levitt's decision to share profits with Garr was not made until after trial, it could not have affected Garr's performance of his duties prior to and during the trial.

Although petitioner questioned both men extensively about a passage in Levitt's book in which he proclaimed that he and Garr made a "pact" to tell their story, petitioner did not produce any evidence that the pact was anything more than an agreement to tell their story. Sherman indicated a pact does not necessarily have financial connotations. As to the other source of numerous questions by petitioner, Levitt's statement that Garr had "threatened, cajoled and harassed" witnesses, Levitt explained he was referring to the fact that Garr had told some witnesses if they did not come to testify voluntarily, the state would subpoena them. Garr explained that he might be guilty of "harassment"

in that he was persistent in dealing with recalcitrant witnesses.

Sherman's testimony that he would have made Garr's financial motive a centerpiece of his case has less probative value since there is no substantial evidence of a financial motive. Sherman stated that he had spoken to the state's witnesses prior to trial and was aware that some considered Garr difficult. No such evidence was produced at trial.

If petitioner had presented this evidence at trial, Garr's acknowledgment that he told his friend if he wrote a book he would try to help him, but he could not do anything until the case was over, is not evidence that would have swayed the jury as to lead it to acquit.

THE COMPOSITE SKETCH

In count five of the Revised Substitute Petition for New Trial, dated May 1, 2006, petitioner alleged that the state suppressed a composite sketch of a man seen walking in Belle Haven the night of the murder. Petitioner further alleged that this sketch, which he claims to have seen for the first time after the verdict, resembles Kenneth Littleton, a person who was present at the Skakel house the night of the murder and who the petitioner, at trial, suggested as a third party suspect. Petitioner alleged that the sketch is "newly discovered" evidence that would likely have produced a different verdict had it been available during trial.

After the state filed a Motion for Summary Judgment, petitioner withdrew Count Five. However, petitioner introduced evidence at the hearing regarding the sketch, alleging it was part of a "pattern of nondisclosure" by the state. The state objected to this evidence at trial.

The sketch was known to petitioner at trial. Thus, it was not suppressed and cannot be considered "newly discovered" or part of a pattern of nondisclosure. In his appeal from the judgment of conviction to the Connecticut Supreme Court, petitioner claimed that the state had suppressed this same composite sketch. *See* State v. Skakel, 276 Conn. 633, 693-707, 888 A.2d 985, cert. denied, 127 S. Ct. 578 (2006). He argued that the state's alleged failure to disclose this sketch deprived him of his right to a fair trial in violation of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Id. at 693-4.

In rejecting the petitioner's claim, our Supreme Court examined the record with regard to what the defendant/petitioner knew about the sketch and when he knew it. See State v. Skakel, supra, 276 Conn. 694-699.

In the trial on this petition, Frank Garr testified that when the case was re-opened in 1991, he had crime scene photographs and other related matters re-photographed or redeveloped because they were "showing their age." The Morganti sketch was among the matters reproduced.

Garr further stated that following Skakel's arrest in 2000, his attorney, Michael Sherman, and his associates, Jason Throne and Mark Sherman, came to the State's Attorney's Office several times for purposes of examining the state's file. On at least one occasion, they were given a prosecutor's office in which to work. On a separate occasion, they were given a conference room. They were given complete privacy when conducting their review of the state's file.

Garr stated that, between the time of the arrest and the beginning of trial (when the entire case was transferred to the Norwalk courthouse for trial), the state kept its file in a five shelf metal cabinet in the office. The cabinet was kept locked; Garr had the key. Garr stated that when Sherman and his associates came to view the file, the cabinet was unlocked and "completely available to them."

Garr explained that the Morganti sketch was kept with other photographs and things in a 8" by 11" cardboard box in the cabinet. When petitioner's new counsel requested the sketch after the verdict, Garr retrieved it from that box.

Garr also testified that in addition to the over 1800 pages of police reports and related documents that he copied and delivered to Sherman, he also delivered a box of photographs and other things. To the best of his recollection, the sketch was in that box.

Attorney Sherman testified that, although he had all the police reports referring to the sketch, he did not have the sketch prior to trial. He also offered his opinion that the sketch looks like Kenneth Littleton. Sherman stated that if he had the sketch at trial, he would have passed it to the jury.

Former Inspector John Solomon, who Sherman met with prior to trial, and who Sherman believed was fully convinced Littleton was the killer, stated that he knew Littleton in 1975. He stated

that he had never told anyone the sketch looked like Littleton.

As petitioner's trial counsel conceded, he received, prior to trial, the 1975 and the 1994 reports referring to the creation of the composite sketch. Our Supreme Court relied on this representation in holding that the sketch was not suppressed.

In so doing, it stated that it was willing to presume, for purposes of appeal, that the state did not provide a copy of the sketch to counsel prior to trial. State v. Skakel, supra, 276 Conn. at 701. The state claims that the sketch was among the materials made available to the petitioner prior to trial. The court recognized, however, that despite this assumption, the sketch would not be suppressed as that term is understood in *Brady* if the defendant or his counsel "reasonably was on notice of the drawing's existence but nevertheless failed to take appropriate steps to obtain it." Id.

In light of trial counsel's admission that he had the pertinent reports prior to trial, the Supreme Court affirmed the trial court's finding that the defendant had actual notice of the existence of the sketch. Consequently, the court concluded that "the defendant was obliged to supplement his general *Brady* request with a specific request for that particular piece of evidence." Id.

The Supreme Court rejected defendant's argument that although he knew of the drawing's existence prior to trial, he could not have know of its exculpatory value until he had a chance to compare it with a picture of Littleton from that time period. The court found that "the defendant had a duty to request the composite drawing because it was *potentially* exculpatory. . . . [T]he defendant could not wait until the completion of the trial to ascertain the value of the drawing to his defense; rather he was obligated to obtain that evidence and to evaluate its utility prior to trial." Id. at 705

The court also rejected petitioner's claim that "he could not be faulted for failing to make a specific request for the composite drawing, despite references to the drawing in the reports he did receive, because he was entitled to conclude that, in light of the state's open file policy, the state would have produced the drawing if it existed." Id. at 705. In response to this, the court noted that it was unaware of any case where "a defendant had notice of the existence of potentially exculpatory evidence but nevertheless was excused by the court from taking reasonable steps to obtain it." Id. at

706. It declined to adopt such an approach because "there is simply no reason why a defendant who is aware of such evidence should not be required to seek it at a point in time when any potential constitutional infirmity arising from the state's failure to provide the evidence can be avoided without the need for a new trial." Id.

Because petitioner knew of the sketch prior to trial, it cannot be considered "suppressed" or part of a "pattern of non-disclosure." In light of the fact that petitioner had knowledge of the sketch prior to trial, and the Supreme Court's conclusion that he was obligated to specifically request it, if, as he claims, it was not among the materials made available to him by the state, the sketch is not "newly discovered" evidence such as would entitle petitioner to a new trial. *See* Joyce v. State's Attorney, 84 Conn. App. 195, 852 A.2d 841, cert. denied, 271 Conn. 923, 859 A,2d 578 (2004) (affirming grant of summary judgment on petition for new trial where it was undisputed that evidence claimed to be newly discovered was known to petitioner's attorneys during the underlying criminal trial).

The petitioner's claim that the composite sketch is exculpatory rests on his contention that it resembles Ken Littleton as he appeared in 1975. The petitioner has failed to produce sufficient, credible evidence to support this contention. Attorney Sherman's opinion that the picture resembles Littleton is entitled to minimal weight. Sherman did not know Littleton in 1975 and hence has no personal knowledge of his appearance at the time.

John Solomon did know Littleton in 1975. He firmly believed that Littleton was the killer. Yet, despite the great lengths to which he went trying to find evidence again Littleton (i.e. the attempt to link him to unsolved female homicides), Solomon never said the sketch resembled Littleton.

Therefore, the weight of the evidence does not favor the petitioner on this point. Petitioner has failed to establish that the sketch resembles Littleton.

Even if this Court assumes the sketch resembles Ken Littleton, petitioner has not proven that it is material and likely to lead to an acquittal on retrial.

ARREST WARRANT OF TOMMY SKAKEL

The petitioner, in his reply brief of September 14, 2007, has indicated that "the Petitioner makes no claim regarding the Tommy Skakel arrest warrant application in his petition." Accordingly, the court does not address this issue.

ADVERSE INFERENCES

In reviewing this issue, the court looks to the civil rather than criminal case law for guidance. No adverse inference may be drawn against the state. The prevailing rule in Connecticut is that a trier may draw an adverse inference against a *party* for his or her invocation of the Fifth Amendment. Olin Corporation v. Castells, 180 Conn. 49, 53-54, 428 A.2d 319 (1980). In fact, when it is the plaintiff who refuses to answer relevant questions, dismissal may be appropriate.

The Second Circuit has recognized that an adverse inference may be taken against a nonparty witness under certain circumstances, the considerations that support that inference are absent in this case. In Libutti v. United States, 107 F.3d 110, 123 (2d Cir. 1997), the court suggested the following nonexclusive factors to guide a trial court in determining if the inference is appropriate: 1) the nature of the relevant relationships; 2) the degree of control of the party over the non-party witness; 3) the compatibility of the interest of the party and nonparty witness in the outcome of the litigation; and 4) the role of the nonparty witness in the litigation.

Applying these factors to the present case, it is clear that Bryant, Hasbrouck and Tinsely have no relationship to the State of Connecticut – the party against whom petitioner seeks to draw an inference. They are not, as has been found significant in other cases, current or former employees of a party; see Brinks, Inc. v. New York, 717 F.2d 700, 710 (2d Cir. 1983)(holding that ex-employees refusal to testify could be considered admissions of their former employer); or the chair of a corporation which administers the party's property. Rosebud Sioux Tribe v. A &P Steel, Inc., 733 F.2d 509, 522-23 (8th Cir.), cert. denied, 469 U.S. 1072 (1984). In fact they have no relationship to the state outside of what any citizen may have.

Bridgeport v. Kaspar Group, Inc., 278 Conn. 466, 899 A.2d 523 (2006), on which petitioner relies in his Memorandum of Law in Support of the Admission of the Deposition Transcripts of Gitano Bryant, Adolph Hasbrouck and Burton Tinsley, dated April 16, 2007, follows Brinks in permitting an adverse inference against a party where the witness is closely aligned with that party. In Kaspar Group, the nontestifying witness had been a 99 percent shareholder of the defendant. Id., 480, n.8.

As to the degree of control the State has over the witnesses, it is apparent there is none. Bryant is more closely aligned with the petitioner than the State. He provided petitioner with an out- of- court statement implicating Hasbouck and Tinsely in the crime for which petitioner was convicted.

For the foregoing reasons, this court draws no adverse inference against the state.

As our Supreme Court has recognized, "[t]he weight of authority permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and to refuse to testify about the subject matter which formed the basis of his conviction." Martin v. Flanagan, 259 Conn. 487, 496 n.4, 789 A.2d 979 (2002)

This court previously ruled during the deposition that the petitioner Michale Skakel would be entitled to take the Fifth Amendment. Connecticut is one of those states that places no numerical limit on the number of post-conviction proceedings a petitioner may bring. If the petitioner is successful in this matter, then incriminating statements made by him in these proceedings could be used against him at a later date.

Accordingly, for the purposes of these proceedings, this court finds that the petitioner's appeal is not final. The state has offered immunity to the petitioner. The state claims that this was sufficient to compel his testimony, and that this court should draw an adverse inference from his failure to testify. The court finds that the offer of use immunity is not founded in any statutory support. It cannot be reasonably relied upon by the petitioner. Section 54-47a provides the circumstances under which the immunity may be exercised. The state's authority to grant use

immunity is limited in three important respects: (1) the existence of a pending criminal proceeding, (2) that the information is not available by other means, and (3) that an application first be made to the appropriate court. Thus, in this present civil proceeding, this court would be without any authority to direct the petitioner's testimony pursuant to the statute, even if the state made such an application. The court draws no adverse inference from his failure to testify since such an inference would improperly force him to choose between this Fifth Amendment right not to testify, and his Sixth Amendment right to a fair trial.

BRYANT STATEMENTS

The state filed a motion in limine concerning the claimed hearsay statements of Gitano Bryant**,** hereinafter called Bryant. The parties agreed that the issue concerning the admissibility would be reserved until after trial. Evidence was put on concerning the statements subject to the court's review. The court finds the statements of Gitano Bryant are admissible under exceptions to the rule against hearsay. The court heard the video evidence at trial.

The statement in essence contains the following based on the interview with Vito Colucci on August 24, 2003. In that interview, Bryant indicated the following:

- At the time of the murder, Bryant, who lived in New York, attended the Brunswick School in Greenwich, Connecticut, and socialized with many of the children around Belle Haven.
- On October 30, 1975, Bryant visited Belle Haven with two other friends from New York, Adolph Hasbrouck and Burton Tinsley. Hasbrouck and Tinsley had visited Belle Haven with Bryant often, at one point attending a street fair where they met Martha Moxley.
- Hasbrouck, who was around fifteen years old in 1975, "was big and he was explosive," very strong, about 6'2" tall and weighed about 200 pounds.
- Adolph Hasbrouck was obsessed with Martha Moxley, and "wanted to go caveman on her," meaning that he would club her, drag her away by the hair and sexually

assault her.

- On the night of the murder, Bryant, Hasbrouck and Tinsley walked around Belle Haven with golf clubs from the Skakel residence, with Hasbrouck stating that he had his "caveman club" and that he would not leave Belle Haven unsatisfied.
- Bryant further recalls that this began to make him feel uncomfortable, and that he left the two others and took the train back to New York.
- When Bryant saw Hasbrouck and Tinsley the Monday following the murder, they told him that "I got mine," " we did what we had to do," and that "we achieved the caveman."
- While neither mentioned Martha Moxley by name, Bryant indicated that he knew who they were talking about, given both Hasbrouck's infatuation with the victim, as well as reading about the murder in the New York Times.

It is claimed that Bryant's account of these activities on October 30, 1975, provide the motive, opportunity, and means for Hasbrouck and Tinsley to have committed the crime of murder. The claim is, Bryant's information constitutes newly discovered evidence that was not available to the petitioner or his counsel at the time of his criminal trial, nor could it have been discovered by the exercise of due diligence. The claim further is, that this evidence of third-party culpability would be material and likely to produce a different result at a new trial. Finally, the petitioner claims that these statements should be allowed in and presented to a jury at the new trial.

This court adopted the petitioner's suggestion that the court review the Bryant testimony under the review of a motion to strike the hearsay statements for the reasons enumerated in the in limine motion. This court has adopted that procedure.

In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court recognized an exception to the hearsay rule for a trustworthy declaration against penal interest. This exception has long been based on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. Id., 299. Following the Supreme Court's

ruling, Connecticut's Code of Evidence similarly recognized the inherent reliability of these statements, and extended the exception to both criminal and civil cases where the declarant is unavailable to testify and the statement has been shown to be sufficiently trustworthy. See Conn. Code of Evid. § 8-6 (4); Reilly v. DiBianco, 6 Conn. App. 556, 563-64, cert denied, 200 Conn. 804 (1986). "In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest." Conn. Code of Evid. § 8-6 (4); State v. Pierre, 277 Conn. 42, 68 (1006). "[I]t is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." State v. Lopez, 254 Conn. 309, 316 (2000). See also State v. DeFreitas, 179 Conn. 431, 454 n.11 (1980) ("[N]o single factor in the test we adopt . . . is necessarily conclusive. . . . The particular circumstances of each case must govern which factor or factors are to be weighed most heavily."); State v. Reis, 33 Conn. App. 521, 529, cert. denied, 229 Conn. 901 (1994); State v. Gold, 180 Conn. 619, 633-34 (1980). "The determination as to whether a third party declaration against penal interest is trustworthy is left to the sound discretion of the trial court." State v. DeFreitas, 179 Conn. at 452. Nevertheless, "the trial court does not have to find [a statement against penal interest] absolutely trustworthy because if this were so, the province of the jury as the finder of fact and weigher of credibility would be entirely invaded." State v. Hernandez, 204 Conn. 377, 390 (1987).

In the present case, full consideration of the totality of the circumstances supports the admissibility of Mr. Bryant's statements. Mr. Bryant's statements were made under circumstances which support admission, are corroborated by sufficient evidence, and are clearly against his penal interest.

In this case, as opposed to typical cases assessing the time of the statement, there are actually two sets of disclosures relevant to this factor; first, the disclosure from Hasbrouck and

Tinsley to Bryant, and second, from Bryant to Esme Dick, Crawford Mills, Neal Walker, Robert F. Kennedy, Jr., and Vito Colucci. In the first instance, the statements by Hasbrouck and Tinsley were made immediately following the commission of the crime, which fits well within the traditional view of a timeframe indicative of trustworthiness. See State v. Lopez, 254 Conn. 309, 314 (2000); State v. Hernandez, 204 Conn. 377, 392 (1987). In the second instance, the timeframe of Mr. Bryant's later disclosure, prompted by the Petitioner's criminal case, is similar to the delayed disclosure that occurred with many of the witnesses the State relied upon at the Petitioner's criminal trial.

In State v. Bryant, 202 Conn. 676, 699 (1987), the Connecticut Supreme Court stated that "[w]e recognize that the focus on time appears to arise from the belief that declarations made soon after the crime suggest more reliability than those made after a lapse of time where a declarant has a more ample opportunity for reflection and contrivance." State .v Bryant, 202 Conn. 676, 699 (1987). Thus, in a typical case assessing the trustworthiness of a statement against penal interests, declarations made shortly after the commission of the crime (i.e., within a day) are generally considered more trustworthy than those statements which were made after enough time for reflection and fabrication (i.e., several weeks or months). Id. In Bryant, the court assessed a number of the declarant's statements against penal interest, from statements made shortly before the crime all the way to statements made near the date of the defendant's preliminary hearing eight months later. In concluding that the statements met the minimum threshold of trustworthiness, the court concluded that, "[i]n context, this time span does not attenuate the temporal aspect of our inquiry into trustworthiness." Id.

Beyond the initial disclosure of Hasbrouck and Tinsley to Bryant, though, the timeline of the present case is far from typical. The context of the longer time span in the present case is tied into the twenty-five year delay in reopening the investigation of Martha Moxley's murder. This unique circumstance, rather then a twenty-five year opportunity for reflection and contrivance, is the central factor that distinguishes it from typical cases where investigation and prosecution of the

defendant does not even approach the length of time present here.

Another distinguishing factor of the present case from those that the Respondent cites is that the declaration in the present case is alleged to be newly discovered evidence. Inasmuch as the statement is "newly discovered," it is logically probable that such a disclosure would also have come much later than in a normal case.

Thus, because it is reasonable for newly discovered evidence to be disclosed late, the more relevant inquiry for the Court's determination on this factor focuses on the reasons that Mr. Bryant did not disclose his story earlier.

Because of the length of the State's investigation, Mr. Bryant had an incentive to keep himself out of a case that he reasonably thought would never be solved. Mr. Bryant indicates that even after the Petitioner was arrested and brought to trial, he still refused to come forward because he thought there was no way that he would be convicted. Bryant said, "I sat on this story the whole time during the trial, because there was no way, there was no way we ever thought that Michael Skakel would get convicted. No way." At the time of the murder in 1975, Mr. Bryant was a fourteen year old black male who was suddenly faced with information that, by his own admission, was clearly against his penal interest:

> Q. Through all those early years, why didn't you come forward then?
> A. For one thing, I was afraid of being automatically pinned in as a suspect. My family didn't have money to defend me from a lawsuit that, you know - it would be easy. If they can convict Michael Skakel on circumstantial evidence, I think it would be an easier conviction than Michael.

Combined with Mr. Bryant's knowledge that there is no statute of limitations on murder, his reluctance to tell his story is reasonable. Mr. Bryant further continues, "You have to understand for someone who tried to, just as a teenager, I wanted to run away from this. And as an adult, I try to block it out, because I felt that it wasn't - it wasn't my place."

Consideration of the individuals to whom Mr. Bryant made his statements supports their trustworthiness. In general, statements made by the declarant to someone with whom they have a close and confidential relationship are deemed more trustworthy than statements made to an

individual with whom the declarant has a less intimate relationship. State v. Pierre, 277 Conn. at 69-70.

In the present case, the fact that Mr. Bryant's first disclosure regarding the details of his whereabouts on October 30, 1975, was to Crawford Mills supports the trustworthiness of his statement. Bryant and Mills shared a connection to the facts of this case, dating back to their shared experiences at Belle Haven during the time leading up to the murder. Following this disclosure to a friend that he trusted, Bryant repeated the events of October 30, 1975, to Robert Kennedy, Jr. and a defense investigator, which further confirm its trustworthiness.

Thus, there is no per se requirement that a statement against penal interest needs be made to a person to whom the declarant would naturally confide; rather, "the focus on the party to whom the statement was made is consistent with the requirement that the declarant be aware of the disserving quality of the statement." Laumer v. United States, 409 A.2d at 201 n.15.

In the present case, Bryant made his statement to the Petitioner's investigator who explicitly informed Bryant that he was being sought out in connection with a court proceeding. Bryant was further aware that his statements were being videotaped, and that the recording was clearly being made in anticipation of being presented in court. Bryant graduated from the University of Tennessee Law School. Bryant's knowledge of the investigator's official role provides a greater indication of trustworthiness than the normal individual with whom the declarant does not have a close relationship.

A complete analysis of both the time that the statements were made and the people to whom they were made, considered in the context of the unique circumstances of the present case, meets the minimum threshold of trustworthiness to warrant the admission of Bryant's statements as a statement against penal interest.

The extent to which a statement against penal interest must be corroborated by other evidence in the case is largely undefined by Connecticut's Code of Evidence. Section 8-6(4) of the Code suggests that this threshold is largely left in the province of the trial court stating that "[i]n

determining the trustworthiness of a statement against penal interest, the court shall consider . . . the existence of corroborating evidence in the case."

In the present case, there is corroborating evidence:

- Bryant went to the Brunswick School, and was classmates with the children in the Belle Haven neighborhood.
- Several witnesses, including Crawford Mills and Neal Walker, confirm that Bryant socialized at Belle Haven.
- At the hearing, witnesses confirm that Bryant indicated that he was present in Belle Haven on the night of the murder.
- One witness recalls seeing Mr. Hasbrouck and Mr. Tinsley in Belle Haven with Bryant during the Fall of 1975.
- Both Hasbrouck and Tinsley admitted to Robert F. Kennedy, Jr. that they had been in Belle Haven with Bryant on several occasions.
- Bryant also provides detailed descriptions of the layout of Belle Haven, including accurate recitations of where people in the neighborhood lived.
- According to Bryant, Hasbrouck was 6'2", at least 200 pounds on the date of the homicide, and "very strong."
- Bryant stated that Adolph Hasbrouck was obsessed with Martha Moxley, and "wanted to go caveman on her," meaning that he would club her, drag her away by the hair and sexually assault her.
- On the night of the murder, Bryant stated that he, Hasbrouck and Tinsley walked around Belle Haven with golf clubs from the Skakel residence, with Hasbrouck stating that he had his "caveman club" and that he would not leave Belle Haven unsatisfied.
- The victim had suffered multiple and severe injuries to her head and stab wounds to her neck which were consistent with being caused by a piece of golf club shaft. Pieces of the golf club found near the victim's body were the same brand of golf club found at the Skakel residence. Evidence presented at the Petitioner's criminal trial shows that these clubs were commonly left about the Skakel property.

Corroboration of Bryant's statements can be found in the very reason that he is unavailable to testify. In the present case, Bryant, Hasbrouck, and Tinsley have all invoked their fifth amendment right not to incriminate themselves after being served with subpoenas to testify at a deposition.

The foregoing supports the minimum threshold of trustworthiness to warrant their admission

under the exception.

The definition of "against penal interest" includes "not only confessions, but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime." State v. Bryant, 202 Conn. 676, 695 (1987). (declarant's statement that he had burglarized the home of a woman on the same night she had been sexually assaulted sufficiently against his penal interest). See also State v. Gold, 180 Conn. 619, 642 (1980) ("[w]e are persuaded of the logic and soundness of [federal rule 804(b)(3)] and the trend to reject a narrow and inflexible definition of a statement against penal interest in favor of a definition which includes not only confessions, but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime").

In the present case, one of the reasons Bryant's testimony is trustworthy is because Bryant places himself in Belle Haven, on the night of the murder, in the company of Martha Moxley, discussing assaulting Moxley with Hasbrouck and Tinsley and in possession of golf clubs belonging to the Skakel family. Efforts to explain away possible physical evidence indicate a consciousness of guilt. Mr. Bryant attempts to explain away the possibility that his fingerprints might be found on the murder weapon or another golf club nearby.

> Q. That night that Martha died, did anybody walk around with a golf club in their hand?
>
> A. There were a couple people.
>
> Q. Like who?
>
> A. I had a club. I had picked one up and swung it. Everybody. I'm telling you, those clubs went through tons of people's hands.
>
> Q. Now, swinging at a golf ball or just holding it and walking with it or what?
>
> A. There were some kids that picked them up and starting walking with them. I know that -I'm not going to sit here and fabricate, but I picked up one. Burr picked up one. Adolph picked up one. Geoff Byrne picked up one. And we were like goofing around.

Considered with the fact that Bryant has asserted his fifth amendment right after being served with a subpoena to testify at a deposition, the totality of the circumstances indicates that Mr.

Bryant's story is against his penal interest.

Bryant's statements against penal interest are admitted into evidence, and his self-serving statements go to their weight and will not preclude their admissibility under this exception.

Based on this ruling, there is no need to address the Residual Exception to the Hearsay Rule.

COUNT I - USE OF THE BRYANT STATEMENT BY THE TRIER OF FACT

There is a substantial difference between the standard of review to determine admissible evidence and the use by the trier of fact of that evidence that is introduced. Count one relies on the declarations of Bryant. Bryant's statements substantially set forth the claims made by Hasbrouck and Tinsley all as previously set forth. In admitting that evidence this court finds it to be a close call and that reasonable judges could find otherwise.

The fourth prong of the standard in Connecticut General Statutes § 52-270, a petition for a new trial, is that the new evidence is "likely to produce a different result." Asherman v. State, 202 Conn. 429, 434 (1987). In determining whether a new trial should be granted, it is not sufficient for the petitioner to bring new evidence from which a jury could "find him not guilty." It must be evidence which persuades the judge that a jury would "find him not guilty." Consequently, this court must always consider the newly discovered evidence in the context of the evidence presented in the original trial. In doing so, it must determine first that the evidence passes a minimum credibility threshold. That is, if it is the court's opinion that the newly discovered evidence is simply 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 the court may deny the petition. Shabazz v. State, 259 Conn. 811, 8267 (2006). This court finds that Bryant's statements are admissible, but they are not credible. On analysis, they are merely claims of information of a crime accompanied by his alibi. The statements appear to be minimally against his interest. Under the Shabazz review the statements were made to two former junior high school classmates with whom Bryant maintained only casual contact over the years. Although Bryant acquired his information within days of the offense, he, as a trained lawyer, kept it to himself for over one quarter of a century. On

finally disclosing, he insisted upon anonymity. He did not come forward voluntarily, rather it only happened when Clifford Mills informed Robert Kennedy, Jr. of this information. The corroboration for Bryant's claim is minimal. There was some indication of the knowledge of the geography of Belle Haven, but it is clear that he was there before. Of all the persons in Bryant's circle of Greenwich acquaintances at the time, none of them other than Walker and Mills recalled his two companions. Not even Martha Moxley's closest friends have any recollection of any association between Moxley and Bryant, Hasbrouck and Tinsley. No one puts Martha Moxley in the company of Bryant and his companions on the night of October 30, 1975. There is no testimony that the three were in her company on any other occasion. Importantly, witnesses testify as to Martha Moxley's activities until 9:30 p.m. No one has any recall of ever seeing Bryant and his companions in Belle Haven on the night of the murder.

The claim that Hasbrouck and Tinsley went "caveman style" is not supported by the evidence. There was no evidence of the victim being dragged by the hair. Missing from Bryant's statement is anything concerning the breaking of the club or the stabbing of the victim. The testimony of Bryant is absent any genuine corroboration. It lacks credibility, and therefore, would not produce a different result in a new trial.

In this case because of the invocation by all three of the fifth amendment, the state was not able to cross examine them. Cross-examination is an essential tool in the administration of justice. Absent that opportunity, the state was unable to find out the details of the uncontradicted statement. Cross-examination would have allowed inquiry into any interest that Bryant may have had in the outcome of the case. Cross-examination would have allowed inquiry into the presence of any bias or prejudice for or against any party. Cross-examination would have allowed questioning concerning opportunities to observe. Cross- examination would have allowed questions concerning reasons to remember or forget. Cross-examination would have allowed questioning into the inherent probability of the story. Cross-examination would have allowed questioning concerning consistency or lack of consistency. Cross-examination would have allowed questioning as to

whether the story is supported or contradicted by other credible evidence. In addition, a trier of fact may find that if a witness has lied on any material point, the trier of fact may disbelieve the witnesses' entire testimony. The standard of review for a trier of fact is the nature, quality and accuracy of the evidence. The trier of fact may consider whether a witness is worthy of belief by considering the witnesses' intelligence, motive, state of mind, demeanor and manner while on the stand. These items were missing from this hearing since the court was only given a transcript and a video presentation. There was no in person testimony.

Accordingly, Bryant's testimony would not likely produce a different result in a new trial.

CONCLUSION

For all the foregoing reasons, the court finds that the Petitioner has failed to prove the allegations in Counts One, Two, Six and Nine of the Complaint by a preponderance of the evidence.

Therefore, the petition for a new trial is denied.

SO ORDERED.

EDWARD R. KARAZIN, JR.
SUPERIOR COURT JUDGE