DOCKET NO. CV02-0818542

RICHARD LAPOINTE	:	SUPERIOR COURT
vs	:	JUDICIAL DISTRICT OF TOLLAND
WARDEN, STATE PRISON,	:	July 9, 2007

PETITIONER'S PRETRIAL MEMORANDUM OF LAW

This pretrial memorandum is submitted for the purpose of apprising the court of the petitioner's position regarding certain issues that may arise during the habeas trial. The failure to brief additional issues should in no way be construed as a concession or an agreement that an allegation has merit.

STATEMENT OF THE MATTER INVOLVED

The petitioner maintains that during his criminal trial the State deprived the petitioner of due process of law when it suppressed exculpatory evidence that the "burn time" of the fire set in the decedent's apartment was between 30 and 40 minutes, making it impossible for the petitioner to have been the perpetrator. The petitioner also maintains habeas counsel

Theodore Vogt, during his first petition for writ of habeas corpus, despite being noticed of the suppression of the State's arson expert's opinion of the duration of the fire failed to raise it, in so doing provided ineffective assistance of counsel.

The petitioner also maintains habeas trial counsel Henry Theodore Vogt provided ineffective assistance of counsel during petitioner's first habeas trial: (1) by failing to present known, available and necessary proofs to establish the validity of constitutional claims alleged in Counts One, Two and Four of the Fifth Amended Petition; and (2) by failing to assert constitutional claims with the capacity to either individually or cumulatively, justify the issuance of the writ of habeas corpus.

STATEMENT OF THE CASE

The evidence at the petitioner's criminal trial established the following: shortly after 8:00 P.M. on March 8, 1987 Natalie Howard called the home of Richard and Karen Lapointe out of concern for her 88 year old mother Bernice Martin who did not answer her telephone

when she called her at 7:55 P.M. and a little after 8:00 P.M. Karen Lapointe, the petitioner's wife, was Bernice Martin's granddaughter and Natalie Howard's niece. [T.T. 5/13/92, 655, 662 (Howard)] Ms. Howard asked the petitioner to go to her mother's apartment to check on her. [id. 664] The Lapointe's lived at 75 Union Street, Manchester, Connecticut which was approximately 3/10ths of a mile from Ms. Martin, who lived alone in the Mayfair Gardens Complex, 251A North Main Street, a senior housing apartment complex. [T.T. 5/6/92, 4-5; 5/14/92, 655-656] According to the undisputed evidence at trial, the petitioner walked over to Mrs. Martin's apartment, received no response and proceeded to the apartment of Jeanette King, a neighbor of Mrs. Martin's in the housing complex. At Ms. King's the petitioner called both his wife, and Natalie Howard to report Mrs. Martin did not answer the door. [id. 664; T.T. 6/16/92, 148 to 150 (King)] Ms. Howard instructed the petitioner to return to Mrs. Martin's apartment, which he did, and he saw smoke coming from the residence prompting him to return to Mrs. King's apartment to call 911. The police records established the petitioner called 911 from Ms. King's apartment at 8:27 P.M. Almost immediately fire and police personnel arrived on the scene to find the petitioner standing in front of Mrs. Martin's

locked front door, calling to them, "This is it. This is the place." [T.T. 5/6/92, 6-7, (Tomkunas)] Michael Tomkunas, the first fire fighter to arrive on the scene, kicked in the front door but was unable to enter due to the "high heat and heavy smoke condition" present necessitating that the apartment be "vented" to allow the heat, smoke and hot gases to escape. [T.T. 5/6/92, 7-8 (Tomkunas)] Firefighter Douglas Boland "vented" the apartment by going to the back entrance to the apartment and opening the unlocked sliding glass doors. [T.T. 5/6/92, 4-5 (Boland)] Upon entering the apartment, on his hand and knees to minimize the impact of the still present smoke and heat, Mr. Tomkunas observed a body in the living room area 6 to 8 feet from a smoking burning couch, with very little flame. [T.T. 5/6/92, 9-10 (Tomkunas)] The 5'2", 160 pound Bernice Martin was pulled from her smoked filled apartment and according to Mr. Tomkunas possibly had a faint pulse. [id. at pp. 10 to 13; 5/7/92, 63, (Katsnelson)] Mrs. Martin was only partially dressed and had a piece of red fabric tied to a piece of bluish gray fabric wrapped and tied tightly around her neck. [T.T. 5/6/92, 12, (Tomkunas)] Michael Tomkunas stated "it was very hard" to untie the fabric around the decedent's neck. [id. at 12] Other fabric was wrapped around Ms.

Martin's wrists and stomach. [T.T. 5/6/92, 56 (Cusson)]

Bruce Kramer, a fireman and a certified EMT, arrived on the scene as Ms. Martin was being dragged out of the apartment and placed on the ground by the sidewalk. [T.T. 5/6/92, 33, 36, (Kramer)] Mr. Kramer helped Mr. Tomkunas untie the tightly knotted cloth from around Ms. Martin's neck and ascertained that she "definitely was not breathing" and had no pulse. [id. At 37, 41-44] According to Mr. Kramer, normally when an individual is unconscious they are very limp "because the muscles tend to be relaxed." He observed that Ms. Martin's hands "were almost in a rested position like so, over the chest area and stomach area," and in his experience with unconscious people "their hands are down at their sides." He testified the position of her hands was especially "peculiar" and "strange" given she was "rather obese or large." [id. At 41-42]

According to both Kenneth Cusson, a firefighter paramedic, and Donald Turner, a police officer, when they arrived on the scene at 8:33 P.M., CPR was being administered to Mrs. Martin, and the fire in the decedent's apartment was extinguished. [T.T. 5/6/92, 46, 48 (Cusson); 5/7/92, 21, 24, 25, 30 (Turner)] Mr. Cusson employing a defibrillator monitor on

Ms. Martin determined there was no electrical activity in her heart. [5/6/92, 48-49 (Cusson)] Ms. Martin was taken from the scene to the hospital where she was pronounced dead. [T.T. 5/7/92, 57-58 (Cusson)]

A pair of men's gloves, having no evidentiary connection or link to the petitioner, State's Trial Exhibits 24 to 25, were found in the decedent's bedroom, one on the floor the other in the bed. [T.T. 5/8/92, 200 to 201, 224; T.T. 5/11/92, 415 to 419 (Bates)] Head hairs on the gloves were determined to be similar to the decedent's head hairs. [T.T. 5/12/92, 592 to 593, (Novitch)] A pubic hair, microscopically dissimilar to both the decedent's and the petitioner's pubic hairs, was recovered from a blue sweater on the bedroom floor. [id. 593 to 597; T.T. 5/13/92, 644 (Novitch)]

The decedent's bedspread contained a large blood stain, and a semen stain. [T.T. 5/8/92, 224 (Bates); T.T. 5/12/92, 595 to 596 (Novitch)] A knife blade, which was never directly connected to the attack on the decedent, was discovered in the bedding and the knife's charred handle was recovered in the livingroom. [T.T. 5/8/92, 224, 236 to 237 (Bates)]

The medical examiner, Dr. Arkady Katsnelson testified Mrs. Martin suffered premortem second degree burns on her face, neck and back and premortem first degree burns in the area of her abdomen and back. [T.T. 5/7/92, 67 to 68] In addition, Mrs. Martin suffered a three inch deep stab wound to the abdomen, ten less severe stab wounds on the back, and two superficial scrape type abrasions in the abdominal area. There were also superficial lacerations and contusions on the front of her vagina, around her urethra and the opening of the vagina which Dr. Katsnelson opined were evidence of blunt trauma to the area. The cause of death was determined to be a combination of asphyxia by strangulation, possibly by means of pressure with a blunt object to the right side of the neck, and smoke inhalation. [id., 85-86, 91] All of Mrs. Martin's wounds were suffered premorten, i.e., while she was alive, as established by the extensive hemorrhaging in the areas of the wounds. [id. 68 to 70; 76] In addition, Dr. Katsnelson testified Mrs. Martin had cyanide and 43% carbon monoxide in her blood, along with soot in her airways and bronchi all of which were byproducts of the fire, and established Mrs. Martin was alive and breathing when the fire occurred. [T.T. 5/7/92, 88 to 89]

Stephen Igoe, an arson expert, assigned to the State Fire Marshal's Office at the time of the incident testified at trial on behalf of the State. [T.T. 5/8/92, 283, 285-286 (Igoe)] According to Mr. Igoe he arrived on the scene around 2:20 A.M. on March 9, 1987 and was met by Detective Michael Ludlow of the Manchester Police Department and Sgt. Grant Gould of the State Attorney's Office, Major Crime Squad. [id. 286] Upon completing his investigation Mr. Igoe determined there were three separate fires set in the apartment. The major fire was in a couch located in the living room, and the two other fires were on the refrigerator door handle, and around a kitchen drawer handle both of which caused only very light and minor burning. Mr. Igoe found no evidence of the use of an accelerant, although he conducted no scientific tests to determine whether there was evidence of an accelerant present, and he concluded, because there were three separate fires, that the fires were not the result of an accident or careless smoking. [id. 286, 194, 298] At the scene Mr. Igoe took a piece of the couch cushion and ignited it with a match in order to see if the material burned rapidly or slowly. He concluded based upon his test that the fire was "slow burning" with very small flames, which created "a lot of smoke." [id. 300; 5/11/92, 318-319 (Igoe)]

The smoke from the couch fire "caused the walls and ceilings ... to be blackened [and] ... the heat ... affected different things by melting them ..." [id. 305] He stated that in the living room, where the couch was, the damage to the wall began approximately 4 feet above the floor and went up to the ceiling. [T.T. 5/8/92, 288, 291-292 (Igoe)] He observed that the fire burned the seat cushion material down its wood frame, lightly blackening it, with no deep charring to the frame. [id. 299]

After two years no arrests were made in the case and in March 1989, Detective Paul Lombardo of the Manchester Police Department replaced Detective Michael Ludlow, who was promoted and transferred, as the lead investigator on the case. [H.T. 2/24/00, 12-24 to 14-23 (Ludlow)] Detective Lombardo immediately zeroed in on the petitioner as his sole suspect. Once it was determined, through the testing of the petitioner's saliva, that the petitioner had Type A blood, was a secretor, and had had a vasectomy Lombardo was convinced the petitioner committed the crimes, because a semen stain found on the decedent's bedspread contained no sperm, which was consistent with, among several possibilities, the semen of an individual who had had a vasectomy, and came from a person

who was a secretor with Type A blood. [T.T. 5/19/92, 1064, 1172-1173, 1215, 1220-1221 (Lombardo)]

The petitioner, who suffers from Dandy-Walker Syndrome, a congenital brain malformation, which severely affects the brain, was never considered a real suspect before Lombardo took over the investigation, because it was established he had an alibi, he was home with his wife and child from 4:00 P.M. until Natalie Howard called worried about her mother a little after 8:00 P.M. [T.T. 5/19/92, 1191-1192 (Lombardo); H.T. 3/30/00, 19-24 (Dennis)] Karen Lapointe testified, during the pretrial hearing to suppress statements made by the petitioner to the police on July 4, 1989, she was physically in the presence of her husband from 7:00 P.M. until the time her aunt Natalie Howard called reporting an inability to reach Bernice Martin by telephone, and that the petitioner was home at all times, from 4:00 P.M. until a little after 8:00 P.M., except for a 20 minute period of time when he walked the dog prior to the family sitting down to dinner at 5:15 P.M. [S.T. 1/30/92, 2090 to 2091 (Lapointe)] During the entire time between 4:00 P.M. and a little after 8:00 P.M., the only time the petitioner was out of Karen Lapointe's eyesight was when he walked the dog

before dinner, and between 6:15/6:30 and 7:00 P.M. when he was downstairs and she was upstairs bathing the couple's eight(8)year old son, Sean. At 7:00 P.M. when their son was finished bathing Ms. Lapointe and the boy came downstairs to join the petitioner in watching TV. [id. 2098 to 2099, 2117]

On July 4, 1989 Detective Lombardo asked the petitioner to come down to the police station to talk to him and once there he told the petitioner the police believed he murdered Bernice Martin. [T.T. 5/15/92, 923-924 (Lombardo)] At the same time Detective Michael Morrissey went to petitioner's apartment to interview Karen Lapointe, who the police "considered possibly a hostile witness" in an unsuccessful attempt to shake her recollection of the events of March 8, 1987 which made it impossible for the petitioner to have been the murderer. [T.T. 5/21/92, 1482-1484 (Morrissey)] The petitioner was questioned for eight or more hours by Detectives Lombardo and Morrissey, and signed three separate statements, each of which the State contended constituted a confession. The petitioner's statements formed the core of the State's capital case at trial, which the defense maintained were the product of coercive police tactics, which included a threat to arrest his wife and make his eight

year old son a ward of the State, and a mistaken belief by the defendant that if he agreed with the police they would let him go home. [T.T. 5/15/92, 915, 969]

GENERAL ANTICIPATED TRIAL PROOFS

The proofs at trial will establish that by letter dated June 21, 1999 JoAnne Sulik, Assistant State's Attorney forwarded to Attorney Vogt copies of Detective Michael Ludlow's handwritten notes authored during the time he led the investigation into the murder of Bernice Martin. The notes consisted of 34 pages, including two pages of computer generated printouts, and on the bottom of page 11 of the notes the following was written:

"CSP - Steve Igoe
Joe Roy Fire Marshals

30 - 40 mins poss.
-Slow burn smolder
-No char on wood of couch
-Fabric burn test - slow
-Soot on Window
-High heat above couch area"

[Exhibit A][1]

[1]Detective Ludlow identified the third page of the notes as being in his handwriting. [H.T. 2/24/00, p. 23] Page 3 and page 11, the page containing the suppressed

The "Ludlow note" represents an undisclosed and suppressed exculpatory expert opinion of Fire Marshals Stephen Igoe and Joe Roy opining that the fire's burn time was between 30 and 40 minutes. The proofs will establish Trooper Igoe's expert opinion, that the fire was between 30 and 40 minutes long, was never disclosed to criminal trial counsel despite a demand to the State for the disclosure of all exculpatory evidence. The proofs will also establish that Attorney Vogt, in failing to recognize the contents of the note, failed to raise, the following constitutional issues arising as a result of the State's suppression of the note at the criminal trial: (a) the note constituted exculpatory evidence, because the fire's burn time of 30 to 40 minutes made it impossible for the petitioner to have set the fires, and the State's failure to disclose the note deprived the petitioner of due process of law; (b) the suppression of the note deprived the petitioner of his right to counsel by eliminating critical information counsel needed in making strategic choices, e.g. whether to call Karen Lapointe as

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exculpatory evidence, appear to have been written by the same individual.

an alibi witness; and (c) the discovery of the note demonstrated criminal trial counsel failed to adequately investigate the issues arising from the setting of the fires and as a result deprived the petitioner of his Sixth Amendment right to effective assistance of counsel by foreclosing him from establishing it was impossible for him to have set the fires.

There will be no dispute that Detective Ludlow's note contains arson expert Stephen Igoe's opinion because the note tracks Stephen Igoe's trial testimony, given over 5 years after his investigation on the night of the crime's discovery, excepting for his opinion regarding the fire's burn time which he was never directly asked. [See Infra, ¶21, pp. 14 to 15]

The petitioner will also present the expert testimony of Gerald J. Kelder, Jr., an expert in the causes and origins of fires, in which he opines that the burn time for the fire was 45 minutes to 60 minutes, and the opinion of Howard C. Adelman, M.D., a forensic pathology expert in which he states that the decedent was possibly dead for approximately 30 minutes by the time she was pulled from the burning apartment. The burn time of the fires and the decedent's approximate time of death make it impossible for the petitioner to have been the perpetrator, because he was home with his wife and son when the fires in the decedent's

apartment had to have been set. [S.T. 1/30/92, 2098 to 2099, 2117]

The fact that Attorney Vogt had the "Ludlow Note" and failed to recognize its significance deprived the petitioner of the opportunity of presenting to the court evidence that established his innocence, the State's violation of his rights to due process of law through the suppression of exculpatory evidence, and the violation of his right to effective assistance of counsel by virtue of criminal trial counsel's failure to adequately investigate the case by consulting experts in pathology and arson to establish that it was impossible for the petitioner to have committed the offenses alleged.

The proofs will also establish that prior habeas counsel failed to do the following: (a) to present an arson expert to testify to the cause, origin and burn time of the fire; (b) to present a forensic pathology expert to testify to the impact of the fire on the decedent and to estimate the time of the decedent's death; (c) to raise as a claim of criminal trial counsel's ineffective assistance of counsel, the failure to consult and present at trial an arson expert and forensic pathology expert to corroborate the petitioner's alibi by establishing it was impossible for him to have set the fire based upon the fire's burn time; and (d) to raise a host of claims

regarding criminal trial counsel's failure, as exemplified in the "Petition for Second Writ of Habeas Corpus," at ¶63 to ¶101.

In addition, in the Fourth Count of the Fifth Amended Habeas Corpus Petition, the instrument upon which the Petitioner's First Habeas Corpus trial was held, it was alleged petitioner's criminal trial counsel provided constitutionally infirm representation by failing: (1) to establish "Mr. Lapointe's disabilities and the implications of his disabilities with respect to the accusations against him;" (2) to advise Mr. Lapointe not to testify; (3) to adequately investigate the case; (4) to adequately employ the information available to the defense; (5) to adequately object to prosecutorial misconduct; and (6) to properly preserve issues which were not specified in the petition. Nevertheless, Attorney Vogt failed to present any competent evidence on any of the claims despite the existence of such evidence, as demonstrated by the decision of the Court in denying the petitioner's first petition for a writ of habeas corpus.

In denying the petitioner's ineffective assistance of counsel claim the trial judge repeatedly cited habeas trial counsel's failure to reconstruct the circumstances of trial counsel's conduct. For example it was contended during the habeas trial, that gloves found in the

decedent's house, were not the petitioner's because they were much too big and criminal trial counsel should have used them to argue reasonable doubt. [H.T. 3/23/00, 45-24 to 26 (Grudberg)] In denying this claim the court noted, as follows:

> "Two men's gloves found at the scene and admitted into evidence contained hairs similar to the victim's. The petitioner was not asked about the ownership of the gloves. Attorney Culligan was not asked about the gloves at the habeas trial. The court, therefore, is left to speculate why Attorney Culligan did not argue about the ownership of the gloves. It can only conclude indulging in the strong presumption that his conduct was within the range of acceptable professional assistance, that this act was not proven to be ineffective conduct."
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> [LaPointe v Warden, Dkt. No. CV 97-0571161, unpublished opinion, dated 9/6/00, pp. 25 to 26]

In regard to a claim that it was ineffective for trial counsel to fail to argue that hairs of unknown origin, and a knife, found at the scene, which was not involved in the stabbings suffered by the decedent, raised a reasonable doubt of the petitioner's guilt, the court stated "Culligan [criminal trial counsel] was never asked at the habeas trial about these items so, again, the court was left to speculate about petitioner's claim." [id, at p.26] At trial the

medical examiner testified the injuries suffered by the decedent in her vaginal area were caused by a blunt object, and it was alleged in the habeas trial, that criminal trial counsel failed to raise as an argument to the jury that the injuries were caused by a foreign object and not attempted penile penetration, as stated by the petitioner in his alleged confession. [T.T. 5/22/92, 1511 to 1512 (Morrissey)] The trial court stated, as follows, "No explanatory testimony was elicited from Attorney Culligan ... as to why he chose this tactic." [id, at pp. 26 to 27] Lastly, during the criminal trial, without any objection by defense counsel, evidence equating the petitioner's demeanor during the July 4, 1989 police interrogation with guilt was introduced, and during the habeas trial it was contended the failure to object constituted ineffective assistance of counsel. [T.T. 5/15/92, 924-926] In denying this claim the court stated,"Here still again, Culligan was never asked to explain his non-action." [id, at p. 27]

The petitioner will also prove, prior habeas counsel failed to raise significant instances of criminal trial counsel's ineffectiveness, which included, amongst others, the following: (a) the failure to investigate, consult, retain and present an arson expert to establish the fire's "burn time;" (b) the failure to investigate, consult, retain and present a pathologist to establish

the sequence of the injuries suffered by the decedent, the impact of the fire upon the decedent and the decedent's time of death; (c) the failure to produce Karen Lapointe to testify to the petitioner's whereabouts on the day of the murder; (d) the hearsay presentation of Karen Lapointe's July 4, 1989 statement to Detective Michael Morrissey and the agreement with the State permitting the hearsay statement to be introduced; (e) the failure to impeach Detective Morrissey when he testified at trial that he did not threaten Karen Lapointe with the loss of her son during the July 4, 1989 interview; (f) the failure at trial to impeach Detective Michael Morrissey with his testimony during the suppression hearing in which he falsely denied discussing evidence with Karen Lapointe during his July 4, 1989 interview of her and falsely represented evidence existed which did not in an effort to get her to implicate the petitioner in the murder; (g) the failure to object to prejudicial and inflammatory demeanor and opinion testimony concerning the credibility of Karen Lapointe; and (h) the repeated introduction of prejudicial hearsay testimony during the cross-examination of Detective Lombardo concerning an alleged statement he received from Jeanette King to the effect that she observed the petitioner walking his dog in the vicinity of the Mayfair Gardens Complex around 7:00 P.M. on

March 8, 1987.

POINT ONE

THE STATE'S SUPPRESSION OF THE LUDLOW NOTE DEPRIVED THE PETITIONER OF DUE PROCESS MANDATING THE ISSUANCES OF HIS SECOND WRIT OF HABEAS CORPUS

In State v Floyd, 99 Conn. App. 526, 533-534 (2007), the court stated, the following:

> "In [Brady v Maryland, supra, 373 U.S. at 83, 83 S.Ct. 1194] ... the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. To establish a Brady violation, the [petitioner] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [petitioner], and (3) it was material [either to guilt or to punishment.]"

At the petitioner's criminal trial the State contended the same person, who sexually abused Bernice Martin, stabbed her 11 times, tied a cloth ligature around her neck and bound her arms with cloth materials, also set the fire in her apartment. If the petitioner was not the person who set the fires he could not have been the individual who stabbed, sexually abused and bound the decedent. At trial the State clearly knew the petitioner was relying on an alibi defense, contending he was home with his wife and son when the crimes were committed,

and that he was intimidated into making false inculpatory statements.

Stephen Igoe's, the State's arson expert, suppressed opinion that the fire was burning for between 30 and 40 minutes established it was impossible for the petitioner to have committed the crimes alleged. A fire of that length of time meant the petitioner had to have been home when it was set, because (a) the fire was completely extinguished by 8:33 P.M. when Kenneth Cusson and Donald Turner arrived on the scene, [T.T. 5/7/92, 21 (Cusson), id., 25, 30 (Turner)]; (b) the evidence petitioner was home a little after 8:00 P.M. when Natalie Howard called and asked him to walk over to her mother's house to check on her, [T.T. 5/13/92, 655, 662, 664 (Howard)]; and (c) after receiving the Howard call the petitioner had to walk the 3/10ths of a mile between his house and the decedent's apartment. Before the fires were set the assaults upon the decedent had to have occurred, because the fires necessarily would have forced the perpetrator out of the apartment. The assaults were extensive and had to have taken a considerable period of time to commit.

Furthermore, the assaults had to have occurred before 8:00 P.M. given the fires' "burn time." Finally, before the fires were set cloths had to be tied around the refrigerator door

handle, and the kitchen cabinet drawer. It was undisputed that between the time the petitioner left his home sometime after a little past 8:00 P.M. and 8:27 P.M. when he called 911, he walked from his apartment to the decedent's apartment, and once there made two separate visits to Jeanette King's apartment from where he made three separate telephone calls to Natalie Howard, Karen Lapointe and 911. The petitioner neither had sufficient time to set a fire that burned for 30 to 40 minutes, nor sufficient time to perform all the acts the perpetrator committed against the decedent, beginning from the time Natalie Howard called his home to the time he called 911. [T.T. 6/16/92, 148 to 151 (King)] Furthermore, because the petitioner was home with his wife and son from 7:00 P.M. until a little after 8:00 P.M. and did not have sufficient time to have set a fire that burned 30 to 40 minutes, it eliminated any theory that he first assaulted the decedent, left the apartment and returned to set the apartment on fire after receiving the Howard phone call.[2]

Fire Marshal Igoe's expert opinion that the fire burned for between 30 and 40 minutes

[2]It was never the State's theory that the perpetrator made two separate entries into the apartment, once to assault the decedent and once to set the apartment on fire.

established that the fire was not set at anytime around 7:00 P.M., the time Karen Lapointe and the eight year old Sean Lapointe came downstairs to watch television with the petitioner, and, therefore, destroyed any State's theory that the petitioner set the fires while his son was being bathed between 6:15/6:30 and 7:00 P.M. [S.T. 1/30/92, 2098 to 2099, 2117 (Lapointe)]

Not only did the State's suppression of the Fire Marshal's opinion deprive the jury of a critical piece of evidence, it also had to have impacted upon trial counsel's strategy. At the petitioner's first habeas trial Attorney Patrick Culligan testified he did not produce Karen Lapointe as a defense witness because she said during the pretrial suppression hearing that the petitioner was downstairs, out of her sight, when she was bathing the couple's eight year old son, Sean, from 6:15/6:30 P.M. to 7:00 P.M. [H.T. 3/8/00, 46-2 to 49-00 (Culligan); S.T. 1/30/92, 2088 to 2128 (Lapointe)] Defense counsel's decision not to call Karen Lapointe to testify was made in the absence of knowledge of Fire Marshal Igoe's estimate of the "burn time," a lack of knowledge which was unjustifiably compounded by defense counsel

himself in failing to retain an arson expert to learn exactly how long the fire in Bernice Martin's apartment burned. All defense counsel knew was that according to Fire Marshal Igoe the fire was slow burning, what that meant in actual time he did not know because he was unaware of the State's arson expert's estimate of the "burn time." [T.T. 5/8/92, 300, 5/11/82, 318-319 (Igoe)] For example, "slow burning" could have meant the fires were burning since 7:00 P.M., the time Karen Lapointe came back downstairs and joined the petitioner in watching TV? The result of the State's suppression of Fire Marshal's Igoe's opinion was defense counsel did not know the critical time frame within which the crimes against Bernice Martin were committed, which could only have been calculated by working back in time using the "burn time" to fix the time the fire was set. Once the time the fire was set was known, the time the assailant exited the apartment could be established, based upon an assumption the assailant would have had to leave the burning smoldering apartment. This would mean the assaults upon the decedent had to have occurred before the fires were set or sometime prior to 8:00 P.M. when the petitioner was home. Because defense counsel did not know the critical time frame when the crimes were committed he miscalculated, to the detriment of the

petitioner, the significance of Karen Lapointe's suppression testimony that the petitioner was downstairs when she was upstairs bathing their son between 6:15/6:30 and 7:00 P.M. to the detriment of the petitioner.

Point Two

THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF HABEAS COUNSEL AND AS A CONSEQUENCE DEPRIVED OF HIS ABILITY TO PROVE HIS DEPRIVATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CRIMINAL TRIAL

Under Strickland v Washington, 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2052 (1984), a convicted defendant's claim that his trial or habeas attorney failed to provide him with effective assistance of counsel has two components.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown

> in the adversary process that rendered the result unreliable." id at p. 687.

The court went on to state,

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." id., at p. 689

In judging the claim, the court stated, at p. 690, the following:

> "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

During the petitioner's habeas trial Attorney Vogt failed to "reconstruct the circumstances of counsel's challenged conduct" through Attorneys Patrick Culligan and Christopher Cosgrove who represented the petitioner during his criminal trial, despite calling

them as witnesses. Attorney Vogt asked the attorneys no questions regarding their competence as the petitioner's trial counsel, and blocked the State from cross-examining Attorney Culligan on the subject of the petitioner's ineffective assistance of counsel claim, arguing questioning of trial counsel on the subject would cause the witness to disclose "work product with respect to his representation of Mr. Lapointe." [3/8/00, p. 87-25 to 88-2]

By way of example of habeas counsel's failure to "reconstruct the circumstances of counsel's challenged conduct" he failed to ask criminal trial counsel any questions concerning their failure to adequately employ available information despite alleging it in the habeas petition. No questions were asked of the criminal trial lawyers about any of the following items: (a) evidence that the screen door of the decedent's neighbor, Yvonne Cassista was cut indicating someone tried to gain entry into her apartment; (b) evidence that gloves were found in the victim's apartment which were too large to belong to either the petitioner or the decedent; (c) evidence that hairs were discovered in the decedent's apartment which did not belong to either the decedent or the petitioner; (d) evidence that a blunt object and not a man's erect penis caused the decedent's injuries in the area of her vagina; and (e) evidence

that a "disheveled" looking man came "running out from the apartments" "like he was being chased by a pack of dogs" and almost hit by Paulette De Rocco as she drove past the decedent's apartment. [H.T. 3/1/00, p. 26-3 to 27-5; 27-23 to 28-11]

Similarly, no questions were asked of criminal trial counsel concerning their advice and discussions with the petitioner concerning whether he should testify at trial or their decision to have the petitioner testify at trial.

Attorney Vogt's failure to "reconstruct the circumstances of counsel's challenged conduct," Strickland, supra, at p. 689,combined with his failure to raise other significant claims of criminal trial counsel's ineffectiveness, resulted in the denial of the petition despite the existence of evidence establishing criminal trial counsel's ineffectiveness.

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