NO. HHD CV19-4091483S : STATE OF CONNECTICUT

TYRONE ROSA : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF HARTFORD

COMMISSIONER OF CORRECTION

NO. HHD CV20-6126344S
NO. HHD CV21-6138609S

TYRONE ROSA

v.

STATE OF CONNECTICUT : MAY 30, 2024

Memorandum of Decision

The petitioner, Tyrone Rosa, has filed a petition for a writ of habeas corpus and two petitions for a new trial attacking his 2017 convictions for murder, assault in the first degree, and criminal possession of a firearm. The court conducted a consolidated trial of these matters on February 14, March 11, and March 12, 2024 and received posttrial briefs through April 26, 2024. This memorandum constitutes the decision in the three cases.

I. HISTORY OF THE CASE

On appeal, the Appellate Court concluded that the jury could reasonably have found the following facts. "The victims, Dederick 'DJ' Jiminez and Hiram Sito Martinez, had been close friends since childhood. In 2009, Jiminez became friends with

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the defendant[1] while the two were incarcerated in the same prison. Jiminez knew the defendant by his nicknames of 'Flex' and 'Pipone.' Jiminez introduced the defendant to Martinez, who began selling drugs with the defendant.

"The defendant was friends with Joel 'Tuti' Gonzalez, who had a brother named Mariano 'Papa' Gonzalez. The defendant claimed to have never met Mariano Gonzalez, but when the police showed the defendant his photograph, the defendant identified him. On December 14, 2014, Mariano Gonzalez was murdered on Bond Street in Hartford, and the police suspected that Martinez was the perpetrator.

"On December 20, 2014, Jiminez and Martinez drove in Martinez' tan-colored Honda to an after-hours club on Francis Avenue in Hartford. [Footnote 2: 'Jiminez described the after-hours club as a "place where people go after the clubs are closed down."'] They arrived between 3 and 4 a.m. and encountered the defendant inside the club. The defendant was there with a close friend, Carlos 'Cuz Los' Mangual. At the club, the defendant began talking to Martinez. Jiminez walked away while Martinez and the defendant continued to talk. After Martinez and the defendant stopped talking, the defendant approached Jiminez and asked him what had happened on Bond Street. Jiminez believed that Martinez had just told the defendant that he was the one who had killed Mariano Gonzalez on Bond Street. Jiminez replied that Mariano Gonzalez 'got what he deserved' because he had tried to rob Martinez and had tried to 'run up in [Martinez']

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[1]All references to the "defendant" are to the petitioner Tyrone Rosa.

house with his family.' After hearing this information from Jiminez, the defendant's mood changed. He became quiet and no longer wanted to talk. Jiminez, at that time, was unaware that Joel Gonzalez and Mariano Gonzalez were brothers, although he knew that they were related. He also was unaware of the defendant's friendship with Joel Gonzalez.

"At about 5 a.m., as Jiminez and Martinez were leaving the after-hours club, the defendant approached them and asked if they had any cigarettes. When they responded that they did not, he asked them to give him a ride to get some. Jiminez refused because there was no room in the automobile's backseat, which was crowded with his possessions. Upon Martinez' insistence, however, Martinez and Jiminez made room for the defendant in the backseat of the automobile, behind the driver. The defendant got inside of the automobile in the space made for him. Jiminez got into the driver's seat and Martinez got into the front passenger seat.

"The defendant directed Jiminez to drive to the residence of the defendant's sister, which was located at the corner of Park Street and Hazel Street. After learning that no one inside of the house had any cigarettes, the defendant directed Jiminez to drive to a twenty-four hour convenience store at Park Street and Broad Street. When the three men arrived at the store, however, the defendant refused to go inside, insisting that Martinez go inside instead. Martinez refused, and he and the defendant argued until Jiminez got out of the car, went inside the store, and purchased cigarettes. After Jiminez purchased the cigarettes, the defendant directed him to drive to Hendricxsen Avenue. When they arrived

at Hendricxsen Avenue, adjacent to a vacant lot, the defendant told Jiminez to park the automobile because he needed to urinate. Jiminez complied and parked the automobile close to the street corner at which Hendricxsen Avenue and Masseek Street meet, and the defendant exited the automobile.

"Initially, Jiminez could not see where the defendant went because the defendant had left the automobile door open, which caused the interior dome light to remain on and obscure his view of the defendant. Once Jiminez had closed the door, however, he saw the defendant standing behind the automobile, by a fence. Jiminez heard the defendant talking on his cell phone as he returned to the automobile. Once he was back inside the automobile, the defendant asked Jiminez and Martinez if they wanted to go to the home of one of his friends and have a few drinks. Both of them agreed.

"As he waited for directions from the defendant to the friend's house, Jiminez checked his cell phone. He suddenly heard a loud bang from the backseat of the automobile. Stunned by the loudness of the bang, he brought his hands up to his ears and ducked down. He then felt his right arm fall to his side and realized that his arm did not feel right. He opened the driver's side door, got out of the automobile and ran. While running, he looked back and saw only the defendant standing outside of the automobile. He did not see Martinez exit the automobile and did not see anyone else on the street.

"Jiminez ran through a vacant lot, toward a building located at 62 Hendricxsen Avenue. A woman inside the building yelled to him that she was coming downstairs to

open the door. Jiminez went inside and lay down on the steps. The woman called 911.

"At approximately 5:40 a.m., Hartford Police Officer Christopher White was dispatched to 62 Hendricxsen Avenue, where he found Jiminez in the stairwell, bleeding and holding his shoulder. At approximately 5:41 a.m., Hartford Police Officer Matthew Steinmetz was dispatched to the area of Hendricxsen Avenue and Masseek Street on a report of a shooting and a victim inside a tan Honda. Steinmetz found the engine of the tan Honda running and Martinez slumped over the center console with a gunshot wound to the back left side of his head. He did not see any other people in the area.

"Martinez later was pronounced dead as a result of the gunshot wound that he had sustained to his head. Jiminez, who had been shot twice, underwent surgery to repair gunshot wounds to his shoulder and elbow. Physicians were unable to remove the bullet that was lodged in his shoulder without risking greater damage and had to place permanent plates and rods in his elbow, which had shattered. After surgery, Jiminez told the police that the defendant, whom he called 'Pipone,' had shot him. He gave a description of 'Pipone' that matched the defendant's appearance at the time of the shooting. Later, he gave a written statement to the police and selected the defendant's photograph from a sequential photographic array. Hartford police lifted the defendant's fingerprint from the interior handle of the rear door on the driver's side of the automobile, next to the seat where Jiminez had said the defendant was sitting when he fired the gun.

"After leaving the after-hours club, Mangual could not find the defendant and

repeatedly tried to call him. It was not until 5:36 a.m. that the defendant answered his phone. The defendant told Mangual to pick him up. Thereafter, Mangual picked up the defendant on Stonington Street in Hartford, which is near Hendricxsen Avenue, where the shootings occurred, and is separated from the scene of the crimes only by a vacant lot with a path running through it. Portions of the path are horseshoe shaped. When Mangual arrived to pick up the defendant, the defendant told him that he 'almost got shot.'

"After their initial investigation, the Hartford police suspected that the defendant had some involvement in the shooting of Jiminez and Martinez. At the request of the police, on December 31, 2014, the defendant was taken into custody by his parole officer and transported to the Hartford Police Department, where he consented to be interviewed. He provided the police with a fake cell phone number and falsely denied that one of his nicknames was 'Flex.' The police found a public Facebook profile for the defendant that reflected his use of that nickname. Although the defendant admitted that he knew Joel Gonzalez, he falsely denied associating with him. The defendant's cell phone records, which later were seized by the police, revealed that the defendant called Joel Gonzalez' phone fifty-one times between December 16 and December 20, 2014. The police also found an online video in which the defendant stated to Joel Gonzalez that he loved him and would die for him. The defendant admitted to the police that he was at the same after-hours club as Jiminez and Martinez on the morning of the shooting. He indicated, however, that although he had gotten into a gold automobile with them and had sat behind

the driver's seat, he had not been driven anywhere in the automobile with them that morning. He told the police that after he left the after-hours club, he walked to the area of Capitol Avenue and Rowe Avenue in Hartford to visit a woman, but he could not provide the police with her name." [footnote 3: 'During his trial testimony, the defendant admitted that he had fabricated much of the information he gave the police during their interview of him, including his statements about his association with Joel Gonzalez and about not driving anywhere with Jiminez and Martinez in Martinez' car after he left the after-hours club on December 20, 2014.']

"During the interview, Hartford Police Detective Daniel R. Richter told the defendant that cell towers help the police track people's movements via their cell phones. After Richter made this statement to the defendant, Officer Luis Colon of the Department of Correction listened to and recorded a phone call the defendant made the very next day from prison to Joel Gonzalez, in which he instructed Joel to make sure that Mangual destroyed his cell phone 'because of [cell] towers.' Colon also listened to and recorded another call from the defendant to Joel Gonzalez on February 18, 2015, the day on which the defendant was arrested on the charges in this case. During that phone conversation, the defendant directed Joel Gonzalez to 'take a trip down memory lane,' go around the 'horseshoe,' and 'go make sure that within that trail there's nothing [there] .... But if you seen that trail and cheese, I see you,' make sure that there are no 'cheese, I see you.' The defendant's statement was significant evidence of his involvement in the crimes because

there was a horseshoe shaped area close to the shooting scene and 'cheese, I see you' is code for a surveillance camera. Thereafter, Richter returned to the area near the crime scene and checked several horseshoe shaped areas but did not find any additional evidence." (footnote added.) *State v. Rosa*, 196 Conn. App. 480, 482–88, 230 A.3d 677, cert. denied, 335 Conn. 920, 231 A.3d 1169 (2020).

The Appellate Court also recited the following procedural history. "The defendant testified at trial. His testimony concerning the events that occurred on the morning of December 20, 2014, was markedly different from the information that he previously had relayed to law enforcement personnel. He testified that, while he was standing at the fence at Hendricxsen Avenue and urinating, an unknown person put a gun to his head and told him not to move, yell or turn around. He stated that he then heard two loud 'pops,' a car door open and close, and a whistle. One minute later, he turned around, and, seeing no one, went back to the automobile. He saw that the driver's door was open but did not see anyone inside or on the street and so he ran away. The defendant admitted that he never told anyone about the presence of this unknown gunman prior to his trial testimony. He claimed that he did not do so and that he lied to the police during his interview because he did not want his parole violated. He also admitted that he did not testify to this version of events during his parole revocation hearing." [footnote 4: "In fact, when the defendant began referring to his encounter with an unknown gunman on Hendricxsen Avenue, the prosecutor declared she was surprised and had not been given any notification that the

defendant was going to assert a third-party culpability defense."] Id., 488.

On the basis of this evidence, the jury found the defendant guilty of murder, assault in the first degree, and criminal possession of a firearm. The trial court, *Baldini, J.,* denied the defendant's postverdict motion for a judgment of acquittal, entered a judgment of conviction, and sentenced him to seventy years of incarceration. Id., 488-89. On appeal, the Appellate Court affirmed and our Supreme Court denied certification. *State v. Rosa*, 196 Conn. App. 480, 230 A.3d 677, cert. denied, 335 Conn. 920, 231 A.3d 1169 (2020).

In his habeas petition, the petitioner raises four broad categories of claims: 1) the failure to disclose exculpatory evidence; 2) ineffective assistance of trial counsel Attorney Walter Hussey; 3) ineffective assistance of appellate counsel Attorney Daniel Krisch; and 4) actual innocence. In his petitions for a new trial, the petitioner alleges that there is newly discovered evidence that warrants a new trial. The court addresses these claims in turn.

II. FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

The petitioner's first claim is that the State failed to disclose exculpatory evidence pursuant to its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). *Brady* requires the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. See *Marquez v. Commissioner of Correction*, 330 Conn. 575, 592, 198 A.3d 562 (2019). "In order to prove a *Brady* violation, the

defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material...." *State v. Ouellette*, 295 Conn. 173, 185, 989 A.2d 1048 (2010). Evidence is "material" when "there would be a reasonable probability of a different result if it were disclosed .... A reasonable probability exists if the evidence could reasonably ... put the whole case in such a different light as to undermine confidence in the verdict." (Citation omitted; internal quotation marks omitted.) *Marquez v. Commissioner of Correction*, supra, 593.

The petitioner identifies three categories of evidence that the state allegedly suppressed in violation of *Brady*: 1) DNA evidence linked to another person on a sweatshirt found in the neighborhood of the crime; 2) lead particles found on the sweatshirt; 3) police reports concerning the murder of Mariano Gonzalez and a police-created timeline of events in both the Mariano Gonzalez and Hiram Martinez murders. The court addresses these three categories of evidence in turn.

A. The DNA Evidence

The petitioner's DNA-related *Brady* claim is that, either before his trial began or while the trial was ongoing, the state, via its agent, the Department of Emergency Services and Public Protection's division of scientific services (division), acquired new evidence that the state had a duty to disclose. The evidence was that the division's Combined DNA Index System (CODIS) identified a DNA profile from the swabbing of a

discarded sweatshirt found in the vicinity of the crime scene that matched a DNA sample collected from Javier Otero, a convicted felon. Prior to trial, the state did disclose the fact that police found the sweatshirt, but the division's computers did not register the CODIS match until February 15, 2017, one day after the verdict. The prosecutor trying the case, Assistant State's Attorney Robin Krawczyk, learned about the CODIS hit close to February 24, and disclosed the information to Hussey within four days. (2/14/24 Transcript (Tr.), pages (pp.) 26-27; 3/11/24 Tr., p. 15; Exhibit (Ex.) 39 (CODIS Hit notification)).

At the outset, the respondent commissioner of correction (hereinafter the state) argues that the doctrine of res judicata bars review of this claim because the petitioner raised it in his direct appeal to the Appellate Court. The petitioner responds that res judicata does not apply because he did not receive a full and fair hearing on the merits of the claim.

In the habeas context, res judicata does not necessarily bar every claim that could have been raised in the prior proceeding. See *Thorpe v. Commissioner of Correction*, 73 Conn. App. 773, 778 n.7, 809 A.2d 1126 (2002) ("we limit the application of the doctrine of res judicata in circumstances such as these to claims that actually have been raised and litigated in an earlier proceeding.") The claim on appeal in this case was that the state failed to disclose the CODIS hit. The claim in this court adds evidence, such as information about Otero, to the case for the materiality of that nondisclosure. Because the

court cannot say that the petitioner raised precisely the same claim on appeal as he does now, the court declines to apply the res judicata doctrine in this case.

The first element that the petitioner must prove under *Brady* is suppression after a request for disclosure. The request for disclosure is not an issue because the state had an open file policy. (2/14/24 Tr., pp. 29-31.) More important is the suppression component of the first element. The court sees no suppression here because the evidence of a CODIS match did not come into existence at the division until February 15, 2017, one day after the verdict. The state can hardly be accused of suppression during the trial of information that did not exist at the time. The petitioner has thus failed to prove the first element of his *Brady* claim. See *Commonwealth v. Caillot,* 454 Mass. 245, 262–63, 909 N.E.2d 1, 17 (2009) (no suppression when the material information that potentially was exculpatory—that discharged cartridge casings from the murder scene matched discharged cartridge casings from two firearms in State police possession—was not in the possession of the prosecutor or police until after the conclusion of the trial.), cert. denied, 559 U.S. 948 (2010).

The court will nonetheless address the materiality element of the *Brady* claim. The court first sets out the entire portion of the Appellate Court decision on this issue because it resolves most of the petitioner's claim.

"In this case, the defendant failed to prove that the CODIS match constituted material evidence. The defendant did not testify that the alleged unknown gunman was

wearing a sweatshirt, and the sweatshirt was not found at the actual crime scene but more than half a block away [footnote 19: 'The defendant does not dispute that the sweatshirt was 600 feet away from where Martinez' vehicle was stopped on Hendricxsen Avenue at the time of the shootings.'] at the corner of Hendricxsen Avenue and Curcombe Street. There is no evidence to indicate how long the sweatshirt had been there or that it was even present when the police first responded to the crime scene. There is no indication that the sweatshirt contained any signs of gunpowder residue or blood.[2] [Detective] Richter, who did not arrive at the crime scene until 7:43 a.m. on the morning of December 20, 2014, testified at trial that he alerted [Detective Jason] Lee to the sweatshirt. As depicted in photographs taken by Lee near the crime scene, the sweatshirt was found next to a sidewalk and in front of a fence surrounding an apartment complex, an area that is reasonably likely to be traversed by the public.

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"[I]n the present case, although defense counsel provided documentation to the trial court that Otero was not in prison at the time of the crimes, there is no indication that he was in the vicinity of the crime scene on or about December 20, 2014, or that he had any connection to the victims, let alone a motive to harm them.[3] Without a clear link between Otero and the crimes, the defendant would not have been able to successfully

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[2]The court discusses below evidence later discovered that the petitioner claims is consistent with gunshot residue.

[3]The court discusses below Otero's testimony at the habeas trial.

raise a third-party culpability defense, assigning blame to Otero. In the absence of other evidence that connected Otero to the crime, it is reasonable to conclude that the sweatshirt at issue, which was located more than half a block from the crime scene, could have been left as a result of innocuous activity, rather than by someone involved in the commission of the shootings. See *State v. Gray-Brown*, 188 Conn. App. 446, 474, 204 A.3d 1161 (evidence of partial fingerprint of third person on vehicle victim was driving at time of robbery raised only bare suspicion that third party committed crime and was not relevant to jury's consideration; defendant needs to demonstrate direct connection between third party and crimes to warrant giving third-party culpability instruction to jury), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019).

"Even though, at the time of the trial, defense counsel did not know of the CODIS match, which linked Otero to the sweatshirt, he nonetheless was aware of the existence of the sweatshirt and the fact that it did not contain the defendant's DNA. In fact, in closing argument, defense counsel argued to the jury that it should question why it had heard nothing from the state about evidence found at or near the crime scene, but which testing revealed not to belong to the defendant. Defense counsel referred to the sweatshirt, fingerprints, and a cigarette butt. Obviously, it was not necessary for defense counsel to know about the CODIS match to suggest to the jury that the sweatshirt found up the street near the scene of the crimes belonged to someone other than the defendant in order to bolster his claim that some unknown person committed the shootings. He could have

cross-examined Richter, who testified that the sweatshirt revealed no useful evidence, in more depth and asked him to explain in detail what forensic analysis, if any, the state had performed and, specifically, whether the division had created a DNA profile from a swabbing of the sweatshirt, whether that profile was compared to the defendant's DNA profile, and what the results were. See *United States v. Alston*, 899 F.3d 135, 147 (2d Cir. 2018) (to extent that defendant argues exculpatory testimony was material because it bolstered his reasonable perception that third party was legitimate businessman, defendant had opportunity to make that argument to jury through evidence already admitted, specifically, third party's trial testimony), cert. denied, —— U.S. ——, 139 S. Ct. 1282, 203 L. Ed. 2d 292 (2019).

"Although the defendant places great weight on the fact that Otero was a convicted felon, Otero's felony conviction was for larceny in the second degree, not for a violent crime. If Otero's felony history presumes a propensity to commit the crimes in this case, the same could be said of the defendant's criminal history, for he admitted in his testimony that he had several prior felony convictions, several for larceny.

"Viewing the evidence as a whole, the state's case against the defendant was strong. It included Jiminez' eyewitness identification of the defendant, a person with whom he was familiar, as the shooter. Jiminez also testified that he exited the car immediately after being shot and ran in the direction of the apartment building in front of which the sweatshirt was discarded but that he saw no one else except the defendant in

the area.

"There also was evidence of a motive. The jury reasonably could have found that the defendant's mood at the after-hours club suddenly changed when he became aware that Martinez had admitted to killing Mariano Gonzalez, and the defendant was very close with Mariano Gonzalez' brother, Joel Gonzalez. The defendant himself testified that he had vouched for Martinez with the Los Solidos gang after Martinez had said the gang suspected him of killing someone. [footnote 20: 'The defendant testified that he had once been a member of the Los Solidos street gang.']

"There also was significant consciousness of guilt evidence implicating the defendant. There was evidence that he repeatedly lied to the police during his interview with them, by giving an incorrect number for his cell phone and by denying that one of his nicknames was Flex, that he associated with Joel Gonzalez, and that he drove anywhere with Jiminez and Martinez on the night of the shootings. There was evidence that he called Joel Gonzalez to ask him to tell Mangual to get rid of the defendant's cell phone after the police told him they could track phone locations via cell towers. He also called Joel Gonzalez a second time to ask him to go to an area close to the crime scene, the 'horseshoe,' to see if there were any surveillance cameras present.

"Particularly damaging to the defendant's testimony that an unknown gunman was the perpetrator was his admission on cross-examination that he previously did not describe that version of events when he was interviewed by the police or when it would

have behooved him to do so at his parole revocation hearing, which resulted from his having violated his parole by committing the crimes in this case. His testimonial version of the events that transpired also lacks credibility in certain areas. As a matter of logic, certain unanswered questions undermine the defendant's version of events. For example, how could he look into the car when the driver's side door was open and not see the dying, or already deceased, Martinez slumped over the front console? And, why would he have told his friend, Mangual, who picked him up near the crime scene early that morning, only that he 'almost got shot,' and why wouldn't the defense have asked Mangual, on cross-examination, to corroborate that conversation?

"There was strong evidence inculpating the defendant, including the eyewitness testimony of Jiminez, the evidence that he had a motive to commit the crimes, and evidence that he was conscious of his guilt. Although the defendant presented his own testimony concerning an unknown shooter, a version of events that he did not previously relate to the police or to parole officials, such evidence was very weak. Additionally, the jury was made aware of the fact that a sweatshirt and a pair of sweatpants had been discovered near the crime scene but that these items were not connected to the defendant. Also, the defendant is unable to demonstrate any actual connection between Otero and the victims in this case. On the basis of the foregoing, there is no reasonable basis to conclude that the lack of the evidence of the CODIS match during the defendant's trial undermined its fairness and resulted in a verdict not worthy of confidence." (Footnotes

added.) *State v. Rosa*, supra, 196 Conn. App. 504–09.

The additional evidence that the petitioner produced at the habeas trial does not alter the conclusion that the CODIS match was not material. The main component added at the habeas trial was the testimony of Javier Otero. However, the petitioner was unable to elicit from Otero that he was wearing the sweatshirt at the time of the crime, that he ever had a similar sweatshirt, or that he was otherwise in the area at that time. Otero added that he did not know the victims, the petitioner, or the petitioner's friends, thus negating any motive he could have had to commit the shootings. (3/11/24 Tr., pp. 125-28.) Thus, the petitioner failed to show that the CODIS match was material evidence that the state suppressed.

B. The Lead Particles Found on the Sweatshirt

At the habeas trial, the petitioner introduced a division report of a March 3, 2015 scanning electron microscope (SEM) analysis that found particles of lead on the right sleeve and front of the sweatshirt. (Ex. 41) The state failed to disclose this report during the trial. Although the court finds that the nondisclosure was inadvertent, the petitioner has nonetheless established the suppression element of his *Brady* claim. See *State v. Bryan*, 193 Conn. App. 285, 317, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

The petitioner, however, did not prove materiality. The petitioner claims that the lead particles on the sweatshirt reveal gunshot residue and suggest that someone other

than the petitioner did the shooting in this case. However, the state's witness from the division testified credibly that, following contemporary standards, the state lab no longer reports a finding of lead, without a finding of the other two elements in gunshot residue - barium and antimony - as commonly associated with gunshot residue. (3/12/24 Tr., pp. 107-09.) Even the petitioner's own expert testified that the presence of lead alone is "inconclusive" concerning any gunshot residue. (3/11/24 Tr., pp. 102, 108-09, 111-12.) Thus, this evidence adds virtually no weight to the petitioner's proof of materiality and does not undermine confidence in the verdict.

C. Police Reports concerning the Murder of Mariano Gonzalez and the Police-Created Timeline

The final group of items that the petitioner claims the State failed to disclose under *Brady* consists of police reports concerning the murder of Mariano Gonzalez on December 14, 2014 and a police-created timeline of events in both the Gonzalez and the Hiram Martinez murders. The petitioner identifies these items as Exhibits 42, 46, 50, and 52. (Petitioner's Brief (Pet. Br.), p. 14.) It is not entirely clear whether the state disclosed all of these items. (2/14/24 Tr., pp. 138-44.) In any case, the state argues that they were not material.

The petitioner's only statement about the contents of these materials in the *Brady* section of his opening brief is that they "provide additional links between Dederick Jiminez and the Mariano Gonzalez homicide and could also have been used to cross-examine the investigating officers regarding the thoroughness of their investigations."

(Pet. Br., p. 16.)[4] In his reply brief, the petitioner reiterates that the police reports and the timeline "would have provided additional fodder to cross-examine both Dederick Jiminez and Detective Richter during the petitioner's trial, and could have served only to improve his chances at securing an acquittal." (Pet. Reply Br., p. 5.). Apparently, the petitioner seeks to show that Dederick Jiminez was involved in the murder of Mariano Gonzalez.

How the possibility that Jiminez was involved in the murder of Gonzalez tends to exonerate the petitioner from the murder of Martinez and the shooting of Jiminez is simply unclear. In any case, the court has independently reviewed these exhibits and finds nothing favorable to the petitioner or anything that undermines confidence in the verdict. The court concludes that the petitioner has failed to prove any *Brady* violations because the nondisclosed items, either individually or collectively, do not establish materiality.

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[4]The petitioner also states in the *Brady* section (part IV.A) that "the DNA report, SEM report, and the police materials that implicate Dederick Jiminez in the Mariano Gonzalez homicide are all material, as described above in Part III of this brief." (Pet. Br., p. 15.) But a careful examination of part III (pp. 7-11) reveals that the petitioner does not discuss or cite these police materials. The petitioner does mention these materials in part IV.B of his brief in connection with his claim of ineffective assistance of trial counsel, but merely states again that they "would have only provided additional ammunition for Mr. Hussey's cross-examination of Sergeant Rykowski (who testified that there was no reason to believe that Mr. Jiminez was involved in Mariano Gonzalez' homicide) and Mr. Jiminez himself." The petitioner then briefly discusses the contents of Exhibits 42 and 46. There are no further citations to Exhibits 50 and 52. (Pet. Br., p. 21.)

III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. Trial-Related Claims

The petitioner claims that his trial counsel, Attorney Walter Hussey, rendered ineffective assistance in his performance at trial and because he had a conflict of interest. The court addresses the performance-related claims first. Under *Strickland v. Washington,* 466 U.S. 668 (1984), a criminal defendant seeking habeas relief for ineffective representation of trial counsel must prove two elements. "First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Maia v. Commissioner of Correction*, 347 Conn. 449, 460, 298 A.3d 588 (2023). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ... Furthermore, the right to counsel is not the right to perfect counsel." (Citations omitted; internal quotation marks omitted.) *Foster v. Commissioner of Correction*, 217 Conn. App. 658, 667–68, 289 A.3d 1206, cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

Second, the defendant must show that "the deficient performance prejudiced the defense." (Internal quotation marks omitted.) *Maia v. Commissioner of Correction*, supra, 347 Conn. 460. "To satisfy the prejudice prong, a claimant must demonstrate that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Jordan v. Commissioner of Correction*, 341 Conn. 279, 287, 267 A.3d 120 (2021).

It is well settled that "[a] court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Internal quotation marks omitted.) *Hickey v. Commissioner of Correction*, 329 Conn. 605, 618, 188 A.3d 715 (2018). As stated in *Strickland*, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies." *Strickland v. Washington*, supra, 466 U.S. 697.

The petitioner summarizes his performance-based claim of ineffectiveness as one alleging that "Attorney Hussey failed to marshal the items of evidence identified [in the petitioner's *Brady* claim], along with the relevant police materials from the Mariano Gonzalez case, in support of the petitioner during his criminal trial." (Pet. Br., p. 18.) This general theme contains criticisms of how Hussey handled a wide spectrum of matters, such as the CODIS DNA match, the lead particle evidence, the police materials concerning the Gonzalez murder, and certain surveillance videos from the area of the crime.

The DNA match, the lead particle evidence, and possibly some of the police materials concerning the Gonzalez murder were items that Hussey did not have during the

trial and now are the subject of a failure to disclose claim under *Brady*. Logically, if Hussey did not have these materials, he could not have used them. Moreover, the petitioner did not prove that Hussey was ineffective by not obtaining these materials. Indeed, the DNA match did not even exist at the time of trial. The other items were apparently not in the state's file and thus were not available to Hussey notwithstanding the state's open file policy. (2/14/24 Tr., pp. 29-31, 34, 43.)[5]

Further, as the court has already discussed in the *Brady* section , these items were simply not "material" in the sense that their use would have made a difference in the case. Again, the Appellate Court concluded that "[t]here was strong evidence inculpating the defendant, including the eyewitness testimony of Jiminez, the evidence that he had a motive to commit the crimes, and evidence that he was conscious of his guilt." *State v. Rosa,* supra, 196 Conn. 509. The additional items did not point directly to any other suspect or establish in any way that the petitioner could not have committed the crime. Thus, the petitioner has failed to "demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Jordan v. Commissioner of Correction*, supra, 341 Conn. 287.

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[5]Despite not having the evidence of a DNA match to Otero, Hussey knew that the sweatshirt did not contain the defendant's DNA. Accordingly, Hussey did argue to the jury that "it should question why it had heard nothing from the state about evidence found at or near the crime scene, but which testing revealed not to belong to the defendant." *State v. Rosa,* 196 Conn. App. 507.

The petitioner also claims that Hussey did not make sufficient use of certain surveillance videos from the neighborhood of the crime taken shortly before and after it. (Exs. 62, 63, 68, 71.) Although Hussey did have these materials, there was no ineffectiveness in not using them. The court has reviewed the videos and concludes that they have no exculpatory value. The videos merely show a few additional vehicles in the general area of the shootings and one additional person. They do not show the actual shooting, nor do they even reveal any suspicious activity or suggest an additional suspect. Accordingly, the petitioner has not proven any ineffectiveness in or prejudice from Hussey's failure to introduce the surveillance videos.

B. Conflict of Interest Claim

The court next addresses the petitioner's claim that Hussey rendered ineffective assistance because he had a conflict of interest. That conflict allegedly arose because Hussey simultaneously represented the petitioner and Joel Gonzalez at a time when Gonzalez was a possible witness.

Although the right to the effective assistance of counsel includes the right to be represented by an attorney free from conflicts of interest; *Phillips v. Warden*, 220 Conn. 112, 132, 595 A.2d 1356 (1991); a different variant of the *Strickland* test applies to conflict of interest claims. "Where ... the defendant claims that his counsel was burdened by an actual conflict of interest the defendant need not establish actual prejudice.... Where there is an actual conflict of interest, prejudice is presumed because counsel [has]