FST-CR19-0148553-T **FST-CR19-0167364-T** **FST-CR20-0241178-T**	:	**SUPERIOR COURT** **JUDICIAL DISTRICT OF**
STATE OF CONNECTICUT	:	**STAMFORD/NORWALK**
V.	:	
MICHELLE TROCONIS	:	**OCTOBER 11, 2022**

STATE'S MOTION TO DISQUALIFY ATTORNEY JON SCHOENHORN

The State of Connecticut, through undersigned counsel, and for the reasons set forth in its accompanying memorandum of law, hereby moves this Court to disqualify Attorney Jon Schoenhorn from his continued representation of the defendant, Michelle Troconis.

Respectfully submitted,

THE STATE OF CONNECTICUT

PAUL FERENCEK,
State's Attorney for J.D. of Stamford/Norwalk

By: _____
MICHELLE MANNING
Supervisory Assistant State's Attorney &

By: _____
RONALD WELLER
Senior Assistant State's Attorney &

By: _____
SEÁN P. MCGUINNESS
Assistant State's Attorney

ORDER:

THE FOREGOING **STATE'S MOTION TO DISQUALIFY ATTORNEY JON SCHOENHORN**, HAVING BEEN HEARD, IT IS HEREBY ORDERED:

GRANTED / DENIED / OTHER

_____ _____

Judge Gary White Date

CERTIFICATION

I hereby certify that a copy of the foregoing was emailed to counsel for the defendant, Attorney Jon Schoenhorn.

By: _____

SEÁN P. MCGUINNESS
Assistant State's Attorney

FST-CR19-0148553-T **FST-CR19-0167364-T** **FST-CR20-0241178-T**	:	**SUPERIOR COURT** **JUDICIAL DISTRICT OF**
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MICHELLE TROCONIS	:	**OCTOBER 11, 2022**

STATE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISQUALIFY ATTORNEY JON SCHOENHORN

The State of Connecticut, through undersigned counsel, and pursuant to Ullman v. State, 230 Conn. 698 (1994), and Rules 1.7 and 3.7 of the Rules of Professional Conduct, hereby moves this Court to disqualify Attorney Jon Schoenhorn (hereinafter Schoenhorn) from his continued representation of the defendant, Michelle Troconis. Schoenhorn should be disqualified because: (1) he is likely to be a necessary witness in the impending trial, and thus there is a compelling need for his testimony; and (2) he is laboring under a potential conflict of interest with a likelihood of it developing into a substantial actual conflict. In support of this motion, the undersigned states the following:

FACTS[1]

1. That, on the morning of May 24, 2019, Jennifer Farber Dulos (hereinafter Farber) drove her children to school and returned to her rented home located at 69 Welles Lane in New Canaan, Connecticut. Shortly after arriving home, Farber was attacked and murdered by her estranged husband, Fotis Dulos (hereinafter Dulos). To date, Farber's body has never been recovered despite an exhaustive effort by law enforcement. The defendant, who was

[1] The following factual recitation is based on facts gathered from law enforcement during the course of this investigation, as well as the best recollection of counsel for the State.

Dulos' live-in girlfriend at the time, has been charged with multiple offenses in connection with Farber's murder, to wit:

a. In docket FST-CR19-0148553-T, the defendant is charged with Hindering Prosecution in the Second Degree, in violation of C.G.S. section 53a-166, Tampering with Physical Evidence, in violation of C.G.S. section 53a-155, and Conspiracy to Tamper with Physical Evidence, in violation of C.G.S sections 53a-48 and 53a-155;

b. In docket FST-CR19-0167364-T, the defendant is charged with Tampering with Physical Evidence, in violation of C.G.S. section 53a-155, and Conspiracy to Tamper with Physical Evidence, in violation of C.G.S. sections 53a-48 and 53a-155;

c. In docket FST-CR20-0241178-T, the defendant is charged with Conspiracy to Commit Murder, in violation of C.G.S. sections 53a-48 and 53a-54a.

2. That, the defendant was initially represented on all matters by Attorney Andrew Bowman (hereinafter Bowman). However, on or about February 5, 2020, Schoenhorn filed a full appearance, in lieu of Bowman, in all three of the defendant's pending matters.

3. That, on March 21, 2021, the Court, *Blawie, J.*, over the defendant's objection, granted the State's Motion for Joinder and joined the defendant's three cases for a single trial.

4. That, the State intends to prove the following facts, *inter alia*, at the defendant's impending trial:

a. Dulos, born in Turkey, brought a bicycle, owned by him since adolescence, to the United States and kept it inside of the garage at his home located at 4 Jefferson Crossing in Farmington, Connecticut;

b. On the morning of May 24, 2019, approximately 5:35 a.m., residential surveillance footage captured Pawel Guminenny's (hereinafter Guminenny) 2001 Toyota

Tacoma pickup truck (hereinafter Tacoma) exiting the driveway of 80 Mountain Spring Road in Farmington, Connecticut. 80 Mountain Spring Road was a property owned by Dulos' company, Fore Group. Guminenny was an employee of Fore Group and told investigators that, during the week leading up to May 24, 2019, he left his Tacoma at 80 Mountain Spring Road and used Dulos' Ford Raptor. Dulos had the keys to the Tacoma;

c. New Canaan school bus video footage revealed that a red truck, consistent with the Tacoma, was parked in a turnout on Lampham Road in New Canaan, near Waveny Park and just north of the Merritt Parkway overpass, after 7:05 a.m. and before 7:40 a.m.;

d. At approximately 7:31 a.m., residential surveillance footage from Weed Street in New Canaan (hereinafter Weed Street Footage) captured a person, wearing dark colored clothing with a hood and a backpack, traveling in the direction of Farber's home on a bicycle that had a frame structure consistent with Dulos' bicycle;

e. At approximately 8:05 a.m., residential surveillance footage captured Farber's 2017 Chevrolet Suburban (hereinafter suburban) traveling eastbound on Welles Lane towards Farber's residence after she had dropped her children off at school;

f. At approximately 10:25 a.m., residential surveillance footage captured the suburban traveling westbound on Welles Lane away from Farber's residence. The suburban would eventually be recovered unoccupied near Waveny Park and in proximity to where the red truck, consistent with the Tacoma, had been captured on school bus video footage;

g. At approximately 11:12 a.m., surveillance footage from the New Canaan Rest Area on the northbound side of the Merritt Parkway captured the Tacoma traveling

northbound, in a direction toward Farmington, and shows an object consistent with a bicycle rim in the bed of the Tacoma;

h. At approximately 12:22 p.m., residential surveillance footage captured the Tacoma pulling back into the driveway at 80 Mountain Spring Road;

i. The defendant told investigators that she was with Dulos at the 80 Mountain Spring Road property during part of the afternoon on May 24, 2019 because she was helping him clean "the house." During that time, the defendant saw the Tacoma and Dulos' bicycle on the 80 Mountain Spring Road property. She had never seen Dulos' bicycle on the 80 Mountain Spring property before, and she did not know how the bicycle got onto the property. Guminenny arrived later at the 80 Mountain Spring Road property in Dulos' Ford Raptor while the defendant and Dulos were still on the property;

j. Surveillance footage captured Dulos and the defendant in Dulos' Ford Raptor during the evening of May 24, 2019 in Hartford. Dulos is seen in the footage placing black garbage bags in trash receptacles. A bag containing a DNA profile which was consistent with Farber, Dulos, and the defendant being contributors was eventually recovered from inside one of the corresponding trash receptacles, in addition to other items of forensic value. It was also gleaned that two of the bags were taped together with what appeared to be a piece of black duct tape. Further analysis of the tape was conducted by forensic examiners at the Department of Public Safety, Division of Scientific Services, and the tape was removed from the bag and laid out to be photographed. The adhesive side of the tape read, "Special Tour De France" in reverse. An internet query by an investigator revealed an image of a "Special Tour De France" Mercier brand bicycle with a decal that appeared to be identical to the text

recovered from the black duct tape. Mercier is a company based in Mercier, France and produces a wide range of bicycles;

k. The defendant was shown a photograph from an internet search of a Mercier brand bicycle with a "Special Tour De France" logo, and she indicated that, while she did not recognize the logo, Dulos' bicycle could have been a Mercier brand;

l. Investigators determined that Dulos' bicycle was missing from where it was normally stored inside of the garage located at 4 Jefferson Crossing. To date, Dulos' bicycle has not been found;

m. Guminenny told investigators that, on Tuesday, May 28, 2019, he discovered a blue hoodie inside of a red bucket in the backseat of his Tacoma. He brought the bucket, with the hoodie still inside of it, into Dulos' home and placed it in the laundry room.

5. That, on Tuesday, March 23, 2021, at approximately 5:00 p.m., at the Office of the State's Attorney's request, State Police Detectives Corey Clabby and Nicholas Olivetti (hereinafter Clabby and Olivetti) responded to Attorney Tara Knight's office located in New Haven, Connecticut. The purpose of Clabby and Olivetti's visit was to retrieve a bankers box from Attorney Knight, who was claiming that the bankers box was related to the investigation into the murder and disappearance of Farber.

6. That, upon their arrival at Knight's office, the following additional people were present: (1) Attorney Tara Knight (hereinafter Knight)[2]; (2) Attorney Hugh Keefe, and (3) Attorney Noor Abu-Hantash. Knight brought a white cardboard bankers box into a conference room located inside her office and stated that she had received the box on March 22, 2021.

[2] Knight has since become a Superior Court Judge. For purposes of this motion, she is referred to by her title on March 22, 2021.

Knight, citing attorney-client privilege, refused to reveal who gave her the box or how it came into her possession. Knight did, however, state the following in sum and substance: She had not looked inside of the box; however, she had been assured by her "client" that the contents of the box had a direct connection to the investigation. She was unaware of the contents of the box and would not comment any further, answer any questions, or provide a statement to police. She avowed that she would have to be subpoenaed for further comment.

7. That, at approximately 5:03 p.m., Clabby took possession of the box, and while still inside of Knight's office, opened it to ensure that its contents were safe for transportation and storage. Upon opening the box, Clabby observed the following: (1) one letter from Schoenhorn to Knight, dated February 2, 2021; (2) one sealed Ziploc space bag with a white plastic clip containing a dark blue or black garment; (3) one black Husky flathead screwdriver; and (4) one black Husky wrench (hereinafter 3 & 4 are collectively referred to as the tools).

8. That, the letter dated February 2, 2021 and addressed to Knight from Schoenhorn to Knight indicated in its' subject line "Re: State v. Michelle Troconis, FST-CR19-0167364-T, CR19-0148533-T; and CR21-0241178-T." The body of the letter stated, "Dear Attorney Knight: *I am enclosing a blue sweatshirt that I received from another attorney.* Very truly yours, Jon. L Schoenhorn /ACD enclosure." The letter concluded, "Please acknowledge receipt of this sweatshirt on this _day of_, 2021. Tara Knight." (Emphasis added). Clabby showed Knight the letter. Knight questioned aloud why Schoenhorn would include the letter in the box, and she commented that Clabby and Olivetti were now aware of who gave her the box.

9. That, Clabby transported the box and items back to Troop G where he photographed and packaged the items. While doing so, Clabby removed the garment in the

Ziploc space bag and observed it to be a black and blue Original Weatherproof Vintage hooded sweatshirt, size L/G (hereinafter sweatshirt). Clabby also discovered, photographed, and secured an item that he believed to be a hair or fiber which was attached to the hood of the sweatshirt. All of the items, including the potential hair or fiber, were assigned evidence numbers and secured inside of the Troop G evidence room.

10. That, the sweatshirt, tools, and hair or fiber were transported to the Department of Public Safety, Division of Scientific Services for forensic analysis.

11. That, on or about July 8, 2022, Forensic Science Examiner 2 Kristen A. Madel authored a supplemental DNA report detailing the results of her analysis on swabbing of the items. The report stated, *inter alia*, that:

a. A DNA profile was obtained from what Madel identified as "human hair" located on the sweatshirt. The profile is consistent with being a mixture of two contributors, and the profile is at least one billion times more likely to occur if it originated from the defendant and one unknown contributor as opposed to two unknown contributors;

b. A DNA profile was obtained from swabbing of sweatshirt-exterior, upper left and right sleeves. The profile is consistent with a mixture of four contributors with at least one of them being male. Assuming four contributors, the DNA profile is at least 1,900 more times likely to occur if it originated from the defendant and three unknown individuals and at least 100 billion times more likely to occur if it originated from Guminenny and three unknown individuals than if it originated from four unknown individuals;

c. A DNA profile was obtained from swabbing of sweatshirt-interior, neck opening. The profile is consistent with being a mixture of four contributors with at least one of them being male. The results are inconclusive as to whether the defendant could be a

contributor, and the profile is at least 100 billion times more likely to occur if it originated from Guminenny and three unknown individuals than from four unknown individuals;

d. A DNA profile was obtained from a swabbing of the shank of a screwdriver. The profile is consistent with being a mixture of four contributors, and the profile is at least 160 million times more likely to occur if it originated from the defendant and three unknown individuals than if it originated from four unknown individuals. Guminenny was eliminated as being a contributor;

e. A DNA profile was obtained from a swabbing of the shank of a wrench. The profile was consistent with being a mixture of two contributors, and the profile is at least 1,400 times more likely to occur if it originated from the defendant and one unknown individual than if it originated from two unknown individuals. Guminenny was eliminated as being a contributor;

f. Farber and Dulos were eliminated from the DNA profiles obtained from the swabs of the sweatshirt and tools which were appropriate for comparison. However, multiple DNA profiles obtained were too complex for comparison but were consistent with being a mixture of multiple male contributors.

12. That, on July 8, 2022, Assistant State's Attorneys Michelle Manning and Seán McGuinness (hereinafter Manning and McGuinness) spoke with Schoenhorn over Microsoft Teams, and the following was said in sum and substance: Schoenhorn stated that, should the Court allow the State to introduce the Weed Street Footage capturing the bicyclist in dark clothing into evidence, he would seek to introduce evidence of the sweatshirt and Guminenny's DNA being present on it, to rebut the inference that it was Dulos riding the bicycle. Manning and McGuinness expressed their concern that Schoenhorn could become a necessary witness

should he attempt to introduce said evidence because the circumstances of where the sweatshirt came from, how it came into his possession, and how it was handled were unknown. Schoenhorn stated, "I know where it came from," but instead of revealing where it came from, Schoenhorn encouraged Manning and McGuinness to ask Guminenny.

13. That, on or about Monday, August 8, 2022, Manning spoke to Schoenhorn over the telephone, and the following was said in sum and substance: Manning, once again, expressed her concern that Schoenhorn would be a witness during the trial if he sought to introduce the sweatshirt. Manning asked Schoenhorn if he would be willing to submit to an interview with an Inspector in the State's Attorney's Office to discuss the circumstances in which the sweatshirt and box came into his possession. Schoenhorn replied that he was "not legally in a position" to reveal that information but felt he was "ethically" required to turn the sweatshirt over to the police. Manning stated that, given Schoenhorn's position, the State would likely have to pursue a motion to disqualify him from his continued representation of the defendant.

14. That, on August 18, 2022, Guminenny submitted to an interview with State Police Sergeant Michael Beauton (hereinafter Beauton). Also present was Guminenny's attorney, Lindy Urso. Beauton showed Guminenny the sweatshirt and tools. The following was said in sum and substance: Guminenny, noting the passage of time, could not say whether or not the sweatshirt had belonged to him, but he acknowledged that he does own similar shirts and jackets and that he does purchase the same size when he buys clothing. Guminenny's "best guess" was that the hoodie or jacket he saw in the red bucket on May 28, 2019 was a lighter color than the sweatshirt, but he had not paid careful attention. Guminenny did not recognize the tools.

15. That, on September 6, 2022, Schoenhorn and an associate attorney from his office came to Stamford/Norwalk Superior Court for a prescheduled, off-the-record, hearing in the above captioned matter and met with Manning and McGuinness. The following was said in sum and substance:

a. Manning informed Schoenhorn that she did not believe that the parties should go forward with anything else related to the case until the issue of whether Schoenhorn should be disqualified was resolved. Manning again asked if Schoenhorn would be willing to submit to an interview regarding the box. Schoenhorn declined and claimed both attorney-client and work-product privilege as a basis for not submitting to an interview. Schoenhorn, citing State v. Peeler, 265 Conn. 460 (2003), expressed his disagreement with the State's contention that he was a necessary witness at trial;

b. McGuinness inquired whether Schoenhorn was claiming attorney-client privilege with respect to the defendant or the unidentified lawyer whom he claimed in his letter to Knight he had received the sweatshirt from. Schoenhorn replied that he would not be "any more specific";

c. Schoenhorn intimated that his "office" came into possession of the sweatshirt approximately one year before he realized that it should be turned over to authorities. He continued that, only after the State turned over certain discovery, did he conclude that he should turn the sweatshirt over to law enforcement. Schoenhorn suggested that the sweatshirt had been in different places and handled by "several" other persons prior to his "office" receiving it. Schoenhorn stated that, upon seeing the Weed Street footage, he believed that the sweatshirt should be turned over to the police. Schoenhorn stated that he recently filed another motion for a bill of particulars, in part, to determine whether the State was

alleging that Guminenny was a coconspirator, and he referenced Guminenny's statement to police, wherein Guminenny discussed finding a blue sweatshirt inside of a red bucket in his Tacoma. Schoenhorn reminded Manning and McGuinness that he had encouraged them to ask Guminenny about the sweatshirt, and Manning informed Schoenhorn that the State had already inquired, but Guminenny could not confirm whether it was his sweatshirt or not;

d. McGuinness stated to Schoenhorn that the defendant's hair was found on the sweatshirt, and the defendant's DNA was on a tool located in the box. Schoenhorn replied that he did "not know anything about tools in the box." McGuinness stated that Schoenhorn's contention about the tools was a "problem" because a letter authored by Schoenhorn to Knight was found inside of the box with the tools. Manning eventually informed Schoenhorn that, because he would not reveal any additional information relating to the sweatshirt, the State would be pursuing a motion to disqualify to him. Schoenhorn asserted that he would not stipulate to "anything" and that an evidentiary hearing on his disqualification will be necessary.

16. That, on September 22, 2022, Manning spoke to Bowman, the defendant's earlier attorney, over the telephone, and the following was said in sum and substance: Manning inquired as to Bowman's knowledge of a bankers box containing the sweatshirt. Bowman indicated that he turned over his entire file to Schoenhorn, and the box was included in that transfer of files. Bowman stated that he did not receive the box from the defendant; however, he did not presently recall who had given the box to him. Bowman stated it may have come from Attorney Norm Pattis, who had represented Dulos prior to his death, or someone else. Manning asked if Bowman would try to recall additional details about the box and its contents and to let her know if he would speak to an Inspector in the State's Attorney's

Office about that knowledge. Bowman agreed to think about it and indicated that he would call Manning in the future regarding those issues. To date, the State has not heard from Bowman.

ARGUMENT

I. THIS COURT SHOULD DISQUALIFY SCHOERNHORN BECAUSE HE IS LIKELY TO BE A NECESSARY WITNESS IN THE IMPENDING TRIAL, AND THUS THERE IS A COMPELLING NEED FOR HIS TESTIMONY.

"It is well settled that the guarantee of assistance of counsel under the sixth amendment to the United States constitution encompasses the right to select one's own attorney." State v. Peeler, 265 Conn. 460, 470 (2003), cert. denied, 541 U.S. 1029 (2004). "The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate." Id. at 471. "The right to retain private counsel also serves to assure some modicum of equality between the Government and those it chooses to prosecute." Id.

The right to counsel of choice, however, "is not absolute" and is qualified by other concerns. State v. Peeler, 265 Conn. at 470-74; Id. at 481-82 (Zarella, J., dissenting); United States v. Richardson, 894 F.2d 492, 496 (1st Cir.1990); United States v. Friedman, 849 F.2d 1488, 1490 (D.C. Cir.1988). "When a defendant's selection of counsel seriously endangers the prospect of a fair trial, a trial court justifiably may refuse to agree to the choice." State v. Peeler, 265 Conn. at 473. Indeed, the "essential aim" of the sixth amendment, "is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (Citations omitted; internal quotation marks omitted) Wheat v. United States, 486 U.S. 153, 159 (1988). Thus, although there is "a presumption in favor of [the defendant's] counsel of choice"; Id. at 164; "a trial court may, in certain situations, reject a defendant's choice of counsel on the ground of a potential

conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process." State v. Peeler, 265 Conn. at 473.

"The trial court must examine whether the concern is substantiated and whether that concern outweighs the defendant's right to counsel of his choosing." Id. In this regard, the trial court "has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court. . . . In its execution of this duty, the Superior Court has broad discretionary power to determine whether an attorney should be disqualified for an alleged breach of confidentiality or conflict of interest." Brown v. City of Hartford, 160 Conn. App. 677, 694, cert. denied, 320 Conn. 911 (2015); State v. Webb, 238 Conn. 389, 417 (1996). The trial court also has complete discretion as to "any decision whether or not to allow an attorney to be called" as a witness at trial. Ullmann v. State, 230 Conn. 698, 721 (1994).

One instance in which an attorney should be disqualified is where he or she is "likely to be a necessary witness" in the case. See ABA Model Rule of Professional Conduct section 3.7, Annotation (Rule 3.7 requires disqualification when it is "likely" the lawyer will be a "necessary" witness). Section 3.7, entitled, Lawyer as Witness, provides that:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

See Disciplinary Rule (DR) 5-102(A) (pre-1986 Code of Professional Responsibility which required a lawyer to withdraw from the "conduct of the trial" when lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client").

> [W]henever counsel for a client reasonably foresees that he will be called as a witness to testify on a material matter, the proper action is for that attorney to withdraw from the case. . . . Where, however, an attorney does not withdraw, a court exercising its supervisory power can enforce the mandate of DR 5–102(A) [now Rule 3.7] and disqualify the attorney.

(Citations omitted; internal quotation marks omitted) Enquire Printing & Publishing Co. v. O'Reilly, 193 Conn. 370, 376 (1984).

Because of the importance of the sixth amendment's right to counsel, and the potential for abuse as a litigation tactic; State v. Peeler, 265 Conn. at 473-74; the State recognizes that the disqualification of an attorney is a "drastic measure," to be imposed only when "absolutely necessary." Weeks v. Samsung Heavy Indus. Co., 909 F. Supp. 582, 583 (N.D. Ill. 1996); City of Akron v. Carter, 942 N.E.2d 409, 416 (Ohio App. 2010); see Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2nd Cir. 2009) (to guard against "opportunistic abuse," motions to disqualify under Rule 3.7 are "subject to fairly strict scrutiny").

In determining whether an attorney should be disqualified as a likely witness at trial, this court "should determine whether counsel's testimony is, in fact, genuinely needed." State v. Peeler, 265 Conn. at 474 (framing as "compelling need" test); see also Ullmann v. State, 230 Conn. 698, 718 (1994) (adopting "compelling need" test); DiNardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp., 153 Conn. App. 10, 49, cert. denied, 314 Conn. 947 (2014).

> A necessary witness is not just someone with relevant information, . . . but someone who has material information that no one else can provide. . . . A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence. . . . [Thus,] [t]here is a dual test for necessity. First the proposed testimony must be relevant and material. Second, it must be unobtainable elsewhere.

DiNardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp., 153 Conn. App. at 49; Cope v. Auto-Owners Ins. Co., 437 F. Supp. 3d 890, 906 (D. Colo. 2020). The party seeking disqualification

"bears the burden of concretely establishing the necessity of disqualification." Mills v. Hausmann-McNally, S.C., 992 F. Supp. 2d 885, 891 (S.D. Ind. 2014).

Applying the foregoing standards, this Court should disqualify Schoenhorn from his role as attorney in this case because he is likely to be a necessary witness in this trial, and thus there is a compelling need for his testimony, as certain testimonial evidence that the State will seek to present at trial cannot be obtained elsewhere. Before setting forth its analysis, the State will briefly review the facts by which Attorney Schoenhorn will likely become a necessary witness in this case.

The State's theory is that on May 24, 2019, Dulos, having conspired with the defendant to murder Farber, did murder Farber and thereafter tried to conceal the crime with the assistance of the defendant. On that day, Dulos drove from Farmington to New Canaan in Guminenny's Tacoma. He parked the Tacoma on a road near Waveny Park in New Canaan, so that the Tacoma would not be spotted near Farber's home. Dulos then rode his bicycle there and attacked Farber shortly after she arrived home. Dulos then loaded Farber's body, along with the bicycle, into the suburban and drove it to Waveny Park. During its investigation, the State acquired video of a person wearing dark garments riding a bicycle in New Canaan near the time, and in the vicinity, of the murder. The jury reasonably could infer that the person riding the bicycle was Dulos.

On March 23, 2021, the State Police seized a bankers box which contained, among other items, a dark blue hooded sweatshirt. Schoenhorn believes that the sweatshirt is evidence in the case because he stated that he was "ethically" bound to turn over the sweatshirt to the police. See ABA Standard § 4-4.7(d) & (e) ("Defense counsel should not take possession of . . . physical evidence . . . [and may be] legally obligated to turn over such

physical evidence" to law enforcement"). Indeed, during a virtual meeting with prosecutors, Schoenhorn indicated that, should the State introduce the Weed Street footage to suggest that Dulos was riding the bicycle, he would seek to introduce the sweatshirt to suggest that Guminenny, whose DNA was on the sweatshirt, was riding the bicycle – presumably to show that Guminenny is the "real" murderer. Although Schoenhorn indicated that he "knew where [the sweatshirt] came from," he refuses to reveal such information, invoking the privileges of attorney-client and work product.

Given these facts, Schoenhorn would become a necessary witness in this case should he, as he has indicated, seek to introduce the sweatshirt, and there is a compelling need for his testimony because the State is entitled to explore at trial the circumstances of where the sweatshirt came from, how it came into his or his office's possession, and how it was handled by him or anyone else while he was its custodian for approximately one year.[3]

> Once a lawyer takes possession of, moves from the original locale, tests or otherwise meddles with evidence of a crime, information about its original location and condition loses any confidentiality protections. *Counsel may be compelled to disclose the original situs and condition of the evidence, even if the information came from confidential client communications.* The lawyer also could be forced to testify about the chain of custody of the evidence, and risks disqualification.

(Emphasis added; footnote omitted) E. Jenness, Ethics and Advocacy Dilemmas – Possessing Evidence of a Client's Crime, 34 Champion 16, 19 (Dec. 2010).

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[3] Indeed, Schoenhorn claims to not know "anything" about the tools that were in the box *with the sweatshirt and his letter.* His assertion presents even more unanswered questions that the State is entitled to explore with Schoenhorn under oath, such as, *inter alia*: Were the tools in the box when he received it? If not, how did the tools get in the box? Was the box secured while it was in his possession? Were the tools inside the box when Schoenhorn's letter was placed in the box? Were they removed and put back inside the box at some point?

Thus, when a lawyer takes possession of evidence in a criminal case, he or she faces two distinct consequences. First, he or she incurs the ethical obligation of disclosure to police, which overrides attorney-client privilege. See Hitch v. Pima County Superior Ct., 708 P.2d 72, 76-77 (Ariz. 1985) (because "[b]oth sides must have equal access to the relevant information," attorney's obligation to client must give way to "attorney's obligation as an officer of the court, which requires him "[to aid] in determining truth whenever possible"). As noted by one court:

> any requirement that the defendant's attorney turn over to the prosecutor physical evidence which may aid in the conviction of the defendant may harm the attorney-client relationship. We do not believe, however, that this reason, by itself, is sufficient to avoid disclosure. We have stated that "[t]he duty of an attorney to a client . . . is subordinate to his responsibility for the due and proper administration of justice. In case of conflict, the former must yield to the latter.

Hitch v. Pima County Superior Ct., 708 P.2d at 77-78; See ABA Standards of Criminal Justice Section 4-4.7.

Second, the attorney also subjects himself to becoming a witness in the case as to how he or she obtained evidence, and as to their care and custody of that evidence while in his or her possession. See Greenfield v. Newman Univ., Inc., 2019 WL 2250143 at 7-8 (D. Kan. 2019) (court disqualifies lawyers at pretrial stage where they obtained evidence which, if admitted at trial, would reveal the attorney to be both advocate and witness); State ex rel. Karr v. McCarty, 417 S.E.2d 120, 124 (W. Va. 1992) (prosecutor whose testimony necessary to establish chain of custody of taped telephone conversations, integrity of which was contested, was properly disqualified); People v. Meredith, 631 P.2d 46, 53-54 (Cal. 1981) (communication from defendant to lawyer about location of victim's wallet protected by attorney-client privilege, however, when lawyer took control of wallet, attorney-client privilege did not bar requiring lawyer to testify about original location and condition of wallet); State v.

Douglass, 20 W. Va. 770, 790-91 (1882) (lawyer's observations of location of client's pistol are protected by attorney-client privilege, but firearm itself and fact it was found in attorney's trunk are admissible); Hitch v. Pima County Superior Ct., 708 P.2d at 79 (if attorney fails to stipulate as to the chain of possession then he may become witness and may need to withdraw as counsel for the defendant).

In the present case, Schoenhorn certainly is the only person who can provide answers to the care and custody of the sweatshirt while in his possession and whether the sweatshirt was appropriately preserved or subjected to contamination in any way. Schoenhorn is "uniquely positioned," State v. Pederson, 196 Conn. App. 646, 668 (2020), to answer those questions, and thus there is a compelling need for his testimony. These inquiries are particularly important where the defense plans to introduce DNA testing results from the sweatshirt. Schoenhorn has also indicated that he knew where the sweatshirt came from and suggested that the sweatshirt had been in different places and handled by "several" other persons prior to his "office" receiving it. These are issues that the State has the right to explore at trial to undercut the relevancy of not only the sweatshirt but also the DNA results. Once defense counsel took possession of possible evidence in the case, "he necessarily deprive[d] the prosecution of the opportunity to observe that evidence in its original condition or location." People v. Meredith, 631 P.2d at 53. As such, the State has a right to inquire of Shoenhorn into these areas to determine the relevance of the sweatshirt and the reliability of the test results.

The State anticipates that Schoenhorn may argue that this issue can be avoided by the State not introducing the Weed Street footage. Yet, "the prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove every

essential element of the crime by the most convincing evidence it is able to produce." State v. Rivera, 129 Conn. App. 619, 637, cert. denied, 302 Conn. 922 (2011); see also State v. Smith, 185 Conn. 63, 88 (1981) (same); State v. Abdo, 911 N.W.2d 738, 745 (S. Dak. 2018) ("[t]he State has the right to present its case in any manner it sees fit so long as it stays within evidentiary rules"). "Within the law of evidence, relevance is a very broad concept. Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks, citations omitted) State v. Wilson, 209 Conn. App. 779, 822 (2022). Here, the Weed Street footage is *highly* probative to identifying Dulos as the murderer and thus makes it more likely that Dulos conspired with the defendant to murder Farber and conceal evidence. This is especially so given the rest stop surveillance footage showing what appears to be a bicycle rim in the bed of the Tacoma, the defendant's admission that Dulos' bicycle was on the 80 Mountain Spring Road property with the Tacoma on the day that Farber was murdered, the duct tape with the "Special Tour De France" logo being found amongst items the defendant and Dulos were disposing of in Hartford, the defendant's acknowledgment that Dulos' bicycle may have been a Mercier brand, and Dulos' bicycle never having been located.

Notwithstanding the fact that Schoenhorn injected himself into this case as a witness, the State anticipates that, to avoid disqualification, he will invoke the "substantial hardship" exception under Rule 3.7(a)(3), which does not bar an attorney from acting, at trial, as both advocate and witness if "[d]isqualification of the lawyer would work substantial hardship on the client." "The burden is on the attorney who invokes this exception to prove that his or her services in the case would work a substantial hardship on the client and that his or her

services would provide a distinctive value." Amos v. Cohen, 806 N.E.2d 1014, 1018 (Ohio App. 2004). Schoenhorn cannot meet his burden in this case because: (1) this court can disqualify Schoenhorn even if his client suffers a hardship; and (2) disqualification in this case would not result in a substantial hardship to the client.

First, even if this court finds that the defendant would suffer "substantial hardship" from Schoenhorn's removal, this court may, "*despite that substantial hardship, [order that] counsel should still be disqualified* from representing [the defendant] at trial" based on a finding that Schoenhorn is likely to be a necessary witness in this case, and thus there is a compelling need for his testimony. (Emphasis added) In re Thompson, 2006 WL 1598112 at *2 (11th Cir. 2006). Indeed, this question ultimately devolves to a balancing test "between the interests of the client and those of the tribunal and the opposing party." ABA Model Rule of Professional Conduct section 3.7, Annotation; G. Sirilla et. al., Advice of Counsel-Defense or Dilemma? Friend or Foe?, 81 J. Pat. & Trademark Off. Soc'y 376, 385 (1999). In this case, protecting the integrity of the judicial process is paramount to any client hardship. Murray v. Metropolitan Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009).

Thus, if this court finds both: (1) that Schoenhorn is likely to be a necessary witness, and thus there is a compelling need for his testimony; and (2) that the defendant would suffer a substantial hardship from his disqualification, this Court can still order disqualification based on balancing the equities in the case.[4] See In re Est. of Buoni, 2006 WL 2988737 at *2 (Cal. App.

[4] To the extent that this court, upon balancing the equities, denies disqualification due to a finding of "substantial hardship," but also finds Schoenhorn to be a necessary witness, and thus a compelling need for his testimony, it must still permit the State to call him as a witness at trial, which would allow Schoenhorn to act as advocate and witness at trial. Although this may be permissible under Rule 3.7, such a scenario may raise numerous conflicts of interest issues, as discussed below, which would provide a separate basis for disqualification.

2006) ("In ruling on a disqualification motion, the court may need to balance competing policy considerations"); Abhari v. Victory Park Cap. Advisors, Inc., 2020 WL 6750566 at *2 (C.D. Cal. 2020) ("Disqualification ultimately involves a conflict between a client's right to chosen counsel and the need to maintain ethical standards of professional responsibility"), aff'd, 2022 WL 1689252 (9th Cir. 2022). And, as part of that balancing process, this court must consider the "ultimate reason for disqualification: harm to the integrity of the judicial system," which is paramount to any client hardship, which can be alleviated by securing new counsel. Murray v. Metropolitan Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009). Indeed:

> the paramount concern must be the preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar. Consequently, the recognizably important right to choose one's counsel must yield to the ethical considerations that embody the moral principles of our judicial process.

Abhari v. Victory Park Cap. Advisors, Inc., 2020 WL 6750566 at *2.

Second, Schoenhorn cannot show that his client will suffer "substantial hardship" from his removal in this case. When assessing the "substantial hardship" inquiry, *"the lawyer's care in attempting to anticipate or avoid the necessity of testifying"* is a significant factor. (Emphasis added) Restatement (Third) of The Law Governing Lawyers, An Advocate as a Witness §108, Comment; Brand v. Steenson, 2018 WL 5880921 at *7. Here, Schoenhorn did not exercise sufficient care to avoid being a witness in this case because he held onto the sweatshirt for approximately one year before turning it over to the police pursuant to his ethical obligations. It should have been apparent to Schoenhorn when he received the sweatshirt from the defendant's former counsel, and took on the role of custodian, that he would likely become a

witness in this case.[5] Had he timely turned over the sweatshirt, the State would have been in a position to file this motion long ago. Schoenhorn's decision to provide the sweatshirt to authorities through Knight, with whom he had apparently formed an attorney-client relationship with to shield their communications, is strong circumstantial evidence that Schoenhorn realized his possession of the sweatshirt would make him a necessary witness in the case. This factor strongly militates against a finding of substantial hardship.

In addition:

> Despite a party's right to representation by counsel of his or her choice, the phrase "substantial hardship on the client because of the distinctive value of the lawyer" . . . *contemplates more than intimate familiarity with the case or the risk of added expenses*. . . . Rather, an attorney must show that he or she possesses some expertise in a specialized area such as patent law. . . . [Additionally,] financial hardship [i]s insufficient to demonstrate the substantial hardship contemplated by the code.

(Emphasis added) Amos v. Cohen, 806 N.E.2d at 1018-19. Although Schoenhorn is an accomplished and prominent lawyer, he brings no distinctive value to this case above what other experienced criminal defense lawyers may bring. Moreover, courts have held that "increased expenses for the client do not constitute a substantial hardship." Mentor Lagoons, Inc. v. Teague, 595 N.E.2d 392, 396 (Ohio App. 1991).

Furthermore, when evaluating hardship, courts consider the timing of the request and whether the case was set for trial. Rule of Professional Conduct section 3.7, Annotation; Brand v. Steenson, 2018 WL 5880921 at *8 (Conn. Super. 2018). Here, the case is not ready for trial and discovery is still ongoing. See Zang v. Zang, 2012 WL 3778218 at *3 (S.D. Ohio 2012) (no

[5] To the extent that Schoenhorn claims that he did not realize the evidentiary nature of the sweatshirt, or his ethical obligation to turn it over to police until he received certain discovery from the state, that assertion is belied by the fact that he took, and kept, possession of that item from the defendant's former counsel. At that point, Attorney Schoenhorn should have been aware of the potential evidentiary value of the item.

substantial hardship in disqualifying attorney where no trial date set and discovery ongoing). While the case is not in its infancy, it is not so far along that new private counsel cannot familiarize him/herself with the case in time for trial.[6] Id. And any prejudice "can be attenuated by an orderly process of change of counsel." JP Morgan Chase Bank, N.A. v. Montanaro, 2018 WL 7568650 at *1 (Conn. Super. 2018).

Finally, the State is bringing this motion now in an effort to avoid a change of counsel on the eve of, or during, trial. Schoenhorn may argue that this motion is premature because the admissibility of the Weed Street footage, and the sweatshirt, has not yet been litigated. To that end, since Schoenhorn will not even reveal where the sweatshirt came from, it is unclear whether the defendant will be able to establish the relevancy of the sweatshirt at trial. If, however, this Court delays its decision on disqualifying Schoenhorn until trial, and the defendant introduces the sweatshirt into evidence, a mistrial will be likely since Schoenhorn will undeniably be compelled to testify as to the circumstances surrounding his custody of the sweatshirt and the box. The origin of the sweatshirt and the integrity of the DNA evidence will be critical issues given Schoenhorn's "third party culprit" theory. Therefore, the State will be grossly prejudiced if it is not afforded the opportunity to examine Schoenhorn in front of the jury so that it can adequately test the reliability of the evidence that ***was under his control for***

[6] In fact, Schoenhorn is currently litigating the case of Schoenhorn v. Moss, S.C. 20710, in which Schoenhorn, in his individual capacity, claims that a court reporter erroneously denied his access to a transcript in the divorce proceeding involving Dulos and Farber. That case is currently in the briefing stage in the Connecticut Supreme Court and likely will not be scheduled for argument until next year. Presumably, Schoenhorn is pursuing that claim because he believes the transcript is relevant, in some way, to his client's defense in this case. Given that briefing still needs to be completed, the matter argued, and a decision issued by the Supreme Court, this case does not appear to be headed for trial in the immediate future.

approximately one year.[7] At that critical juncture, Schoenhorn's dual role as an advocate and a witness will present the unbearable risk of undermining confidence in the integrity of the proceeding and create a manifest necessity for a mistrial. Indeed, Schoenhorn may very well provide damaging testimony against the defendant under oath and then be put in the precarious position of arguing to the *same jury* that the State has not met its burden of proof.[8]

The admissibility of evidence at trial is fluid, and the Court is tasked with examining, and reexamining, the probative value of specific evidence in the context of other evidence that is introduced. The uncertainty surrounding what evidence will be introduced and how the Court might rule at trial necessitates the disqualification of Schoenhorn *now*. The search for Farber has never stopped, and the investigation is ongoing. Thus, the State may seek to introduce evidence of the sweatshirt and tools depending on what additional evidence comes to its attention or what evidence is admitted at trial. Even dealing with this issue by way of motions *in limine* will not suffice because a party can always open the door, or waive their objection, to previously excluded evidence, and the Court is always free to reserve ruling or revisit any ruling it makes. It would be improvident to delay the disqualification of Schoenhorn until the eleventh hour. Thus, this motion should be viewed as preemptive in nature, not premature. As one prescient trial court explained:

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[7] Importantly, there are unknown contributors to the DNA profiles obtained from the swabs taken from the sweatshirt and tools. It may be necessary to seek and execute a search warrant for Schoenhorn's DNA to determine whether he is a contributor to any of those profiles.

[8] A conflict is likely to arise if Schoenhorn both testifies and acts as advocate at trial because any mention of the sweatshirt in closing argument could be viewed as bolstering his own testimony, which is improper. Of course, to the extent that his testimony inculpates his client, he violates his oath of zealous representation as an advocate. See State v. Crespo, 246 Conn. 665, 690-91 (1998). Schoenhorn's potential conflict of interest will be addressed in greater detail below.

> [W]aiting until the present matter comes to trial would only forestall the inevitable regarding the necessity for [counsel] to withdraw voluntarily or face disqualification at the time of trial. . . . The court does not wish for the defendants to lose time and money in finding new counsel . . . Additionally, the court does not want the quest for new counsel to become a reason for any delay in scheduling a trial date.

JP Morgan Chase Bank, N.A. v. Montanaro, 2018 WL 7568650 at *2 (Conn. Super. 2018), citing Jean v. Angle, 2008 WL 2168873 at *7 (Conn. Super. 2008).[9] Here, the State's motion to disqualify is hardly premature. "*Judicial economy and the parties' efficiency in litigating this case are best served by addressing the issue now.*" (Emphasis added) Greenfield v. Newman Univ., Inc., 2019 WL 2250143 at *7-8 (D. Kan. 2019).

Thus, given Schoenhorn is a likely to be a necessary witness in the impeding trial, and thus there is a compelling need for his testimony, his disqualification is required.

II. EVEN ASSUMING, *ARGUENDO*, THAT SCHOENHORN IS NOT A NECESSARY WITNESS IN THE IMPENDING TRIAL, THIS COURT SHOULD STILL DISQUALIFY HIM BECAUSE HE IS LABORING UNDER A POTENTIAL CONFLICT OF INTEREST WITH A LIKELIHOOD OF IT DEVELOPING INTO A SUBSTANTIAL ACTUAL CONFLICT.

Schoenhorn's potential conflict of interest necessitates his disqualification because of its likelihood of developing into a substantial actual conflict. "Although an attorney facing a possible conflict in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial; this consideration does not transfer to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict." (Internal citations, quotations omitted) State v. Taylor, 177

[9] In J.P. Morgan Chase, Judge Jennings recognized his mistake twelve years earlier in a different case, noting "[t]his case is not yet at the trial phase. Rather than simply deny the motion to disqualify as premature as I did twelve years ago in [a different case] the court will adopt in part the approach of Judge Arnold in Jean v. Angle." JP Morgan Chase Bank, N.A. v. Montanaro, 2018 WL 7568650 at *2.

Conn. App. 18, 38 (2017). "When a defendant's selection of counsel seriously endangers the prospect of a fair trial, a trial court justifiably may refuse to agree to the choice. Thus, a trial court may, in certain situations, reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process." State v. Peeler, 265 Conn. at 473. "There are many situations in which a court can determine that disqualification of counsel is necessary." (Internal citations, quotations omitted) State v. Taylor, 177 Conn. App. at 39. Where there is "both the likelihood and the dimensions of the feared conflict are substantial," State v. Peeler, 265 Conn. at 473, disqualification of counsel is required.

Even if Schoenhorn is not ultimately called as a witness, "he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, [Shoenhorn] may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination." United States v. Locasio, 6 F.3d 924, 933 (2nd Cir. 1993). Conversely, given that the defendant's hair was found *attached to the sweatshirt* that Schoenhorn apparently seeks to offer as exculpatory evidence, the jury may very well infer that Schoenhorn deliberately attempted to conceal his possession of it, question the relevancy and reliability of the DNA evidence, and attribute a nefarious motive to Schoenhorn or the defendant. Thus, there is a substantial danger that the jury will be troubled by Schoenhorn's presence at counsel's table because of his relationship to the events in question and hold it against the defendant.

Additionally, in the event that Schoenhorn decides not to introduce the sweatshirt to avoid this issue, there would exist a conflict of interest to the extent that his decision is based on a desire to continue as the defendant's attorney thereby subjecting him to an ineffective assistance of counsel claim should Troconis be convicted. First, if the sweatshirt is deemed to lack a foundation, or is otherwise inadmissible, at trial due to Schoenhorn's refusal to provide necessary testimony, a conflict of interest is likely to arise. Second, a conflict of interest is likely to emerge with respect to Schoenhorn's advice to his client on whether to testify at trial, especially if that advice is informed by the chain of possession of the sweatshirt, which Schoenhorn refuses to disclose and which his client could be a part of given that her hair was found on the sweatshirt. Simply put, if Schoenhorn puts his own interests ahead of this client's interest, there will be an actual conflict of interest with respect to the admission of the sweatshirt. See Rule of Professional Conduct § 1.7 ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of [a client] . . . will be materially limited by . . . a personal interest of the lawyer"). Under such circumstances, a trial court has a duty to inquire into any such conflict. See In re Christina M., 280 Conn. 474, 493 (2006) ("trial court has a duty to inquire with respect to a conflict of interest . . . when there has been a timely conflict objection at trial or when the trial court knows or reasonably should know that a particular conflict exists").

Thus, given there is a likelihood that Schoenhorn will have a conflict of interest during the trial and the dimensions of his feared conflict are substantial, his disqualification is required.

CONCLUSION

For the foregoing reasons, the State requests that this Court disqualify Attorney Schoenhorn from his continued representation of the defendant.

Respectfully submitted,

THE STATE OF CONNECTICUT

PAUL FERENCEK
State's Attorney
Judicial District of Stamford/Norwalk

By: _____
MICHELLE MANNING
Supervisory Assistant State's Attorney &

By: _____
RONALD WELLER
Senior Assistant State's Attorney &

By: _____
SEÁN P. MCGUINNESS
Assistant State's Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing was emailed to counsel for the defendant, Attorney Jon Schoenhorn.

By: _____

SEÁN P. MCGUINNESS
Assistant State's Attorney