No. _____

In The
Supreme Court Of The United States

_____

STATE OF CONNECTICUT,
Petitioner,

v.

MICHAEL SKAKEL,
Respondent.

_____

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

_____

APPENDIX VOLUME II TO PETITION FOR WRIT OF CERTIORARI

_____

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Petitioner's Appendix

Skakel I

MICHAEL SKAKEL *v.* COMMISSIONER
OF CORRECTION
(SC 19251)

Palmer, Zarella, Eveleigh, McDonald, Espinosa,
Robinson and Vertefeuille, Js.*

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his criminal trial counsel had provided such inadequate representation that he was denied his constitutional right to have the effective assistance of counsel for his defense. The habeas court agreed with some of the petitioner's ineffective assistance claims and rendered judgment granting the petition. Thereafter, on the granting of certification, the respondent, the Commissioner of Correction, appealed, and the petitioner cross appealed. The petitioner, who was fifteen years old at the time of the crime, had been convicted of murder in connection with the death of the victim, who had been bludgeoned with a golf club and found dead

* This appeal originally was argued before a panel of this court consisting of Justices Palmer, Zarella, McDonald, Espinosa, Robinson and Vertefeuille. Thereafter, Justice Eveleigh was added to the panel. Justice Eveleigh read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

on the grounds of her family home in Greenwich in 1975. The habeas court determined that the petitioner's trial counsel was ineffective insofar as he failed to fully investigate and implicate the petitioner's brother, T, in the murder, to investigate and present an additional alibi witness, O, who, according to the petitioner, saw him at his cousin's house on the night of the murder, and to call three additional witnesses to impeach the credibility of C, who claimed that the petitioner had implicated himself in the murder while he was a resident at a residential treatment facility for troubled adolescents. The habeas court also concluded that trial counsel was deficient in several other respects but that none of those deficiencies, when considered separately, prejudiced the petitioner. *Held*:

1. Contrary to the determination of the habeas court, this court concluded that the petitioner's trial counsel rendered constitutionally adequate representation.
   a. Trial counsel's performance was not ineffective insofar as he chose to pursue a third-party culpability defense that focused on L, a tutor who lived with the petitioner's family, rather than on T, as counsel's decision was a reasonable trial strategy: there was no reasonable basis to conclude that trial counsel had admissible evidence available to him concerning the details of an alleged sexual encounter between T and the victim on the night of her murder, and, thus, the petitioner failed to demonstrate that counsel

would have had access to admissible evidence to support a third-party defense implicating T, without which counsel could not have implicated T at the petitioner's criminal trial; moreover, even if counsel had such evidence, he reasonably could have chosen not to pursue that defense because doing so might have harmed the petitioner's defense by supporting aspects of the state's case.

b. Trial counsel's performance was not ineffective insofar as he failed to identify and call O as an additional alibi witness at the petitioner's criminal trial when O testified at the habeas trial that he had seen the petitioner at his cousin's house on the night of the victim's murder: there was no evidence that trial counsel was aware, at any time prior to the petitioner's criminal trial, of O's existence or that O might have helpful information to give in support of the petitioner's alibi defense, the petitioner did not tell his trial counsel that O was present at his cousin's house on the night in question or that O might be able to support the petitioner's claim that he was there, and there was no evidence that anyone else at the cousin's home that night mentioned O's presence there; furthermore, given that the only way counsel could have known about O was through a singular reference in a grand jury transcript to another witness' "beau," it was not unreasonable for counsel either to have overlooked or disregarded any potential significance of this

singular reference in the grand jury transcript.

c. Trial counsel's performance was not ineffective insofar as he failed to locate, investigate and call three witnesses who might have impeached C's testimony at a probable cause hearing concerning one of the petitioner's confessions: the evidence presented at the habeas trial indicated that trial counsel attempted to find the witnesses, the record lacked details as to the extent of the investigation or about what efforts were made to find the witnesses, and this court could not assess the reasonableness of counsel's investigation and had to presume that counsel performed competently; moreover, although C provided evidence that the petitioner had confessed to murdering the victim and C claimed that certain witnesses might have overheard the confession, because counsel could not locate those witnesses before trial, his decision to use his cross-examination of C as the means to attack C's credibility was reasonable, the cross-examination having been strong and having highlighted numerous and significant admissions from C that raised questions about the truth of his claims and his credibility generally.

2. The petitioner could not prevail on the alternative grounds raised as a means for affirming the habeas court's judgment, as none of the alternative grounds pertaining to trial counsel's alleged ineffective assistance entitled the petitioner to habeas relief.

a. The habeas court correctly concluded that the petitioner failed to demonstrate that trial counsel's representation was deficient insofar as he failed to obtain a copy of a composite drawing depicting a person seen near the crime scene to bolster the petitioner's defense implicating L, and, even if counsel's representation was deficient insofar as he failed to obtain and use the drawing at trial, the petitioner was not prejudiced thereby, as the drawing would not have helped his defense.

b. Even if the habeas court correctly concluded that trial counsel's representation was ineffective insofar as he failed to investigate a certain tip received before trial about a witness who stated that he might know who killed the victim, the petitioner failed to prove prejudice, as the statement likely would not have been admissible at trial, it was insufficient to form the basis for a third-party culpability claim, and it was thus not helpful to the petitioner.

c. Trial counsel's representation was not deficient insofar as he failed to rebut certain evidence offered by the state concerning the reasons why the petitioner's family sent him to the residential treatment facility; counsel objected when the state sought testimony on the subject but was overruled, and counsel reasonably could have concluded that opening the door to evidence concerning an unrelated criminal charge, which the petitioner claimed was the reason he was sent to the residential treatment

facility, would not have been worth the risk that the state would introduce other misconduct evidence that otherwise would have been inadmissible.

d. Trial counsel was not required to present expert testimony to cast doubt on the reliability of the testimony from residents of the treatment facility who claimed that the petitioner had admitted his involvement in the murder; the petitioner failed to prove prejudice, as any expert testimony about the coercive nature of the treatment of the petitioner while at the facility would not have meaningfully assisted the petitioner's defense at trial given that there already was sufficient evidence before the jury about the coercive methods used at the facility, and the more important evidence against the petitioner was the testimony that he had privately confessed to other residents.

e. Trial counsel's performance was not objectively unreasonable insofar as he failed to challenge a certain juror from serving on the jury at the petitioner's criminal trial; counsel questioned the juror about potential grounds for bias, the juror's candid responses indicated a thoughtful understanding of the role of a juror and the importance of impartially considering all the evidence presented in court before returning a verdict, and there was no evidence that counsel's decision caused the defense any prejudice.

f. Trial counsel's closing argument was not constitutionally deficient, as his argument

amply covered the critical evidence supporting the petitioner's defense and addressed the key arguments raise by the state; furthermore, although certain comments of counsel, while legally objectionable, demonstrated strong advocacy on his part and reflected mistakes that a reasonable attorney might make, they did not constitute deficient performance.

g. The petitioner failed to show that he was prejudiced as a result of trial counsel's failure to suppress certain audio recordings of the petitioner narrating his activities on the night on the murder, which were in the possession of a writer who was helping the petitioner write his autobiography; even if trial counsel had sought to suppress the recordings, the petitioner failed to demonstrate that counsel's efforts would have succeeded, as the recordings, even if unlawfully seized by the police, would inevitably have been obtained by the grand jury pursuant to its subpoena power.

3. The petitioner could not prevail on his claim that he was denied his sixth amendment right to counsel because his fee arrangement with his trial counsel presented a conflict of interest that prevented his counsel from properly representing the petitioner; the habeas court properly concluded that the petitioner presented no evidence to establish that any claimed conflict caused him any harm or prejudice.

(*One justice concurring and dissenting*; *two*

justices dissenting in one opinion)

Argued February 24—officially released December 30, 2016*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Thomas A. Bishop*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment granting the petition; thereafter, the court granted in part the petitions for certification to appeal filed by the respondent, and the respondent appealed and the petitioner cross appealed. *Reversed; judgment directed.*

Susann E. Gill, supervisory assistant state's attorney, with whom were *James A. Killen*, senior assistant state's attorney, and, on the brief, *Kevin T. Kane*, chief state's attorney, *John C. Smriga*, state's attorney, *Leonard C. Boyle*, deputy chief state's attorney for operations, and *Jonathan C. Benedict*, former state's attorney, for the appellant-cross appellee (respondent).

Hubert J. Santos, with whom was *Jessica M. Walker*, for the appellee-cross appellant (petitioner).

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* December 30, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ZARELLA, J. In 2002, a jury found the petitioner, Michael Skakel, guilty of the 1975 murder of his neighbor, Martha Moxley (victim). After previous unsuccessful attempts to overturn his conviction, including two appeals to this court, the petitioner filed the habeas petition that is the subject of this appeal. In that petition, he principally claimed that his criminal trial counsel provided such inadequate representation that he was denied his constitutional right to have the effective assistance of counsel for his defense. The habeas court agreed with the petitioner on some of his claims and rendered judgment granting the petition. The respondent, the Commissioner of Correction, has appealed from the habeas court's judgment. Because we conclude that the petitioner's trial counsel rendered constitutionally adequate representation, we reverse the judgment of the habeas court and remand the case to that court with direction to render judgment denying the petition.[1]

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[1] The dissent reaches a contrary conclusion. Not comfortable relying on the facts as presented during the habeas trial, or the law governing ineffective assistance of counsel claims, the dissent attempts to distract the reader from both by characterizing the majority's analysis as "so blatantly one-sided as to call into question the basic fairness and objectivity of [that] analysis and [the majority's] conclusion," while at the same time misstating the majority's views. We will not rely on similar tactics.

I

FACTUAL BACKGROUND AND HABEAS COURT PROCEEDINGS

The facts relating to the petitioner's criminal conviction, as the jury reasonably could have found them, are set forth in detail in this court's decision on his direct appeal. See *State v. Skakel*, 276 Conn. 633, 640–53, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006). Our discussion here highlights the facts most relevant to the present proceedings and is based on our recitation of the facts in the petitioner's direct appeal, as supplemented by the record from the petitioner's criminal trial and the habeas proceedings.

A

State's Case Against the Petitioner

On October 31, 1975, the body of the fifteen year old victim was found lying face down under a large pine tree on her family's Greenwich estate. Id., 642. She had numerous injuries to her head and neck, and her pants were unbuttoned and pulled down, along with her underwear, below her knees, although the medical examiner found no evidence of semen present in her pubic region. Id., 642–43. She had been attacked elsewhere on the Moxley property, near the driveway, and then dragged to the pine tree where she was later found. See id., 642. Police found broken

pieces of a golf club nearby on the Moxley property. Id. An autopsy revealed that she had been attacked with the golf club, and authorities believe that it broke apart during the assault and that part of the club's shaft was used to stab the victim. Id., 644.

The victim had last been seen alive at about 9:30 p.m. the night before, October 30, 1975; see id., 641; which was the night before Halloween, commonly known as "mischief night ...." (Internal quotation marks omitted.) Id., 640. The victim's mother had reported her missing in the early morning hours of October 31, after the victim failed to return home the previous night.[2] Id., 641–42. The medical examiner could not establish a precise time of death, but he believed that the victim more likely was murdered closer to when she was last seen alive at around 9:30 p.m. on October 30, than when her body was found at about noon the next day. Id., 643. He testified, however, that the findings from the autopsy were consistent with a broad time span, including from 9:30 p.m. on October 30, to 1 a.m. on October 31.

The petitioner, who was also fifteen at the time of the murder, lived with his father and six siblings in a

[2] The victim's mother acknowledged that it was possible that the victim came home for a little while at about 9:30 p.m. on October 30, 1975, and then left again that night without her mother realizing that she had been in the house, although the victim's mother could not recall whether the victim had done that previously.

home across the street from the victim.[3] See id., 640 and n.4. The petitioner and some of his siblings, including his older brother, Thomas Skakel, had been seen with the victim at various times on the night of October 30, 1975. Id., 640–41. That night, the petitioner had gone out to dinner with his siblings and the family's recently hired live-in tutor, Kenneth Littleton. Id. 640. They returned to the Skakel home at about 9 p.m. Id. The petitioner, the victim, other Skakel siblings and neighborhood friends spent some time in the Skakel driveway until about 9:30 p.m., when the petitioner's older brother used a family car to drive a cousin, James Terrien,[4] to his home, where they planned to watch a television show. Id., 641. The petitioner told the police a few weeks after the murder that he also had gone along to the Terrien house to watch the show. Id., 645. He further claimed that, upon returning to his home at about 10:30 or 11 p.m., he went inside his home and did not leave for the rest of the night. Id.

Despite their efforts in the years after the murder, including extensive investigations into whether

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[3] The petitioner's mother was deceased at the time.

[4] James Terrien also went by the name of James Dowdle. After being adopted by his stepfather, George Terrien, he used his stepfather's last name during his youth. Thus, throughout the criminal trial, most witnesses who had known him during that time referred to him as Jimmy Terrien, even though he was using his birth name of Dowdle by the time of the criminal trial and testified under the name of James Dowdle. We hereinafter refer to him as James Terrien, as the habeas court did.

Thomas Skakel or Littleton was involved, the police were unable to connect anyone to the murder and did not make any arrests. See id., 639.

Nearly twenty-five years after the murder, however, the state charged the petitioner after a grand jury investigation. Id. The state's case against the petitioner consisted primarily of circumstantial evidence and numerous, incriminating statements made by the petitioner himself. See generally id., 639–52.

The state presented testimony from witnesses who testified that the petitioner had made statements in the years after the murder implicating himself in the crime. A few years after the murder, the petitioner's family sent him to the Elan School in Maine (Elan), a residential treatment facility for troubled adolescents. See id., 646. One of his fellow residents at Elan, Dorothy Rogers, testified that the petitioner told her that his family had sent him to the school because they were afraid he had committed the murder and wanted him away from the investigation in Greenwich. Id., 647–48. Another resident, Gregory Coleman, relayed that the petitioner once confided in him while they were at the school that he had killed a girl with a golf club in a wooded area, that the golf club broke apart during the attack, and that he had returned to the scene later and masturbated over the girl's body. Id., 648. Two other residents, Elizabeth Arnold and Alice Dunn, testified that, in another instance, the petitioner had been questioned during a

group therapy session about his involvement in the murder, and he told the group that he or one of his brothers might have committed the crime. See id., 648–49. Arnold recalled that the petitioner also had told the group that, on the night of the murder, "[h]e was very drunk and had some sort of a black-out," that he had discovered that "his brother had fool[ed] around with his girlfriend," and that he was not in "his normal state" that night. (Internal quotation marks omitted.) Id., 649.

With respect to motive, the state argued at trial that the petitioner had become enraged after seeing the victim flirting with his older brother, Thomas Skakel, on the night she was last seen alive. See id., 651–52. Friends who knew the petitioner and the victim around the time of the murder confirmed that the petitioner had feelings for the victim and had grown resentful of Thomas Skakel, who had developed a flirtatious relationship with the victim. Id., 651. Friends of the victim also testified that, on the night the victim was last seen alive, they saw the victim engaging in flirtatious horseplay with Thomas Skakel near the Skakels' driveway, shortly after others had left for the Terrien home, and they did not see her again after that. Id., 641, 651–52. Although the petitioner had told the police that he went along to the Terrien home, the state presented testimony from a neighborhood friend who testified that the petitioner had stayed at the Skakel property. Id., 645 and n.9.

The state also presented evidence that the petitioner had lied to the police about his activities on the night of the murder. Several years after leaving Elan, he separately told two people that, on the night the victim was last seen alive, after returning home from watching television at the Terrien home, he had left his house, climbed a tree on the victim's property, and masturbated while watching the victim through her bedroom window, contradicting his statements to the police that he had remained inside all night and suggesting that he had seen the victim *after* returning from the Terrien home sometime after 11 p.m.[5] Id., 645, 649–50. The petitioner reiterated many of these details in a recorded statement that he gave to an author helping the petitioner as a ghost writer for an autobiography. See id., 650–51. In that recording, the petitioner described his actions on the night of the murder in detail, in contradiction to his earlier statements to others that he could not remember what had happened that night. See id. He stated that, after returning from watching television at the Terrien home, he could not sleep and was sexually aroused, so he "snuck out" of his house and, after trying to spy on a woman who lived in the neighborhood, eventually went looking to "go get a kiss from [the victim]." (Internal quotation marks

[5] There was also evidence presented at the petitioner's criminal trial that one of the petitioner's brothers, John Skakel, heard someone in the mudroom of the Skakel home at about 11:30 p.m. on October 30, 1975. During their investigation, police investigators found other golf clubs from the set to which the murder weapon belonged in a barrel in the Skakel mudroom.

omitted.) Id., 650. He climbed a tree on the victim's property and masturbated for about thirty seconds while trying to look into her bedroom window. Id. He climbed down the tree and walked toward his home. Id. While crossing the victim's yard near her driveway, he claimed that he threw rocks toward the victim's driveway area and yelled, "[w]ho's in there?" Id., 651. He also shouted, "come on motherfucker, I'll kick your ass." He also stated that, the following morning, when the victim's mother came to his home looking for her, he had "a feeling of panic" because he was afraid he had been seen in the tree the night before. (Internal quotation marks omitted.) Id.

B

The Petitioner's Defense

The petitioner retained Attorney Michael Sherman to represent him in his criminal proceedings. At the time of the trial, Sherman had practiced in the area of criminal law for more than thirty years, both as a defense attorney and as a prosecutor. To prepare his defense, Sherman enlisted the help of at least three associate attorneys and received advice from other experienced criminal defense attorneys.[6] He also retained three private investigation firms and consulted with expert

[6] The attorneys with whom Sherman consulted included, among others, F. Lee Bailey, William F. Dow III, Richard Emanuel, David S. Golub, David T. Grudberg, and Barry Scheck.

witnesses to assist in gathering evidence in support of the petitioner's defense.

Sherman's strategy for defending the petitioner at trial was threefold: (1) establish an alibi for the time when the murder most likely occurred; (2) discredit witnesses claiming that the petitioner had made statements implicating himself in the murder; and (3) present evidence showing that another person, the live-in tutor, Littleton, might have committed the murder. See id., 652–53.

With respect to the alibi defense, Sherman presented evidence to show that the murder most likely occurred at about 10 p.m. on October 30, 1975, when, the petitioner claims, he was at the Terrien house watching a television show. As we explained in our decision on the petitioner's direct appeal, there was evidence presented that "residents in the neighborhood heard [dogs barking and voices] between 9:30 and 10 p.m. on October 30, 1975, near the Moxley property. [The victim's mother] testified that, around that time, she heard a commotion coming from the general direction of the area where the victim's body subsequently was discovered. She recalled hearing dogs barking and what sounded like excited young voices. [A neighbor] testified that her dog began to bark incessantly shortly after 9:30 p.m. [One of the petitioner's brothers] also recalled hearing dogs barking at approximately 10 p.m. that night." Id., 643 n.7. In addition, Sherman "adduced testimony from ... a forensic pathologist ... who

concluded that the time of the victim's death most likely was around 10 p.m. on October 30, 1975. [His] testimony was bolstered by the testimony of several people ... [who stated] that they had heard dogs barking in the vicinity of the crime scene at approximately that time." Id., 652 n.14.

To establish the petitioner's whereabouts from approximately 9:30 to 10 p.m. on October 30, 1975, Sherman called a number of witnesses who testified that, during that time frame, the petitioner was with them at the Terrien home, which was nearly a twenty minute drive from the victim's home. See id., 652 and n.14. These witnesses included the petitioner's cousin, Terrien, and one of the petitioner's older brothers, Rushton Skakel, Jr., who had gone to the Terrien home. They testified at the criminal trial that the petitioner had left the Skakel home with them at about 9:30 p.m. on October 30, and had ridden with them in a vehicle to the Terrien home where they watched a television show. They further testified that the petitioner and others did not return to the Skakel home until approximately 11 p.m. that night.[7]

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[7] Another one of the petitioner's brothers, John Skakel, testified that he had also gone to the Terrien home that night but that he could not recall many details about the evening when he testified at the criminal trial, including who exactly had gone to the Terrien home from the Skakel home. The court admitted into evidence, as a record of past recollection, a statement that John Skakel had given to the police in 1975, in which he explained that the petitioner had also gone to the Terrien home.

Sherman also sought to discredit the testimony from Elan residents who claimed that they had heard the petitioner incriminate himself. Sherman cross-examined the state's witnesses to impeach their credibility and cast doubt on their testimony, and also presented testimony from several other Elan residents who knew the petitioner while he was an Elan resident. These other residents testified to the brutal and abusive treatment of residents, including the petitioner. The witnesses explained that school staff frequently accused the petitioner of the murder and urged him to admit his involvement. When he refused to take responsibility, he was paddled, assaulted in a boxing ring, and forced to wear a sign that had written on it something to the effect of "please confront me on the murder of my friend, Martha Moxley ...." These witnesses also stated that the petitioner denied involvement in the victim's murder, and, when the abuse continued, he parried their accusations by stating that he either did not know or could not recall what happened; they never heard the petitioner confess to the crime.

Finally, Sherman sought to bolster the petitioner's defense by implicating another person in the crime. Sherman explained at the habeas trial that he did not want to use a "buffet table of alleged suspects," so he chose to focus on one person, Littleton. As we explained in our decision in the petitioner's direct appeal, "Littleton ... had been hired as a part-time tutor by the Skakel family, had taken up residence at the Skakel home on October 30, 1975, the day that

the victim was last seen alive, and had slept there with the Skakel children that night. Littleton testified [at the petitioner's criminal trial] that, after returning home from dinner at 9 p.m., he remained at the house all night, stepping outside briefly at approximately 9:30 p.m. only to investigate a disturbance. In addition, testimony adduced by [Sherman] revealed that Littleton, who began to manifest serious psychiatric and behavioral problems in the years following the murder, may have made a statement, several years after the killing, in which he implicated himself in the crime. Littleton emphatically denied that he had anything to do with the victim's death, however." (Footnote omitted.) *State v. Skakel*, supra, 276 Conn. 652–53.

At the conclusion of the petitioner's criminal trial, the jury found the petitioner guilty of murder. Id., 653. The trial court rendered judgment in accordance with the jury's verdict and sentenced the petitioner to a period of incarceration of twenty years to life. Id. The petitioner appealed from the judgment of conviction to this court, raising six separate grounds for reversing his conviction; id., 639–40; and this court affirmed the judgment. Id., 770. The petitioner later filed a petition for a new trial on the basis of newly discovered evidence and other claims, but the trial court denied the petition, and this court upheld the trial court's denial of the new trial petition. See *Skakel v. State*, 295 Conn. 447, 452, 991 A.2d 414 (2010).

C

Habeas Petition

Nearly eight years after his conviction, and after his prior unsuccessful challenges to his conviction, the petitioner filed the habeas petition at issue in the present case. He claimed, among other things, that Sherman rendered constitutionally ineffective assistance in numerous respects, depriving him of his right to the effective assistance of counsel. He also claimed that Sherman had a conflict of interest in representing him.

After a hearing, the habeas court granted the petition. The court agreed with some of the petitioner's ineffective assistance claims, concluding that Sherman was ineffective on three grounds: (1) by failing to fully investigate and implicate the petitioner's brother, Thomas Skakel, in the murder; (2) by failing to investigate and present an additional alibi witness, Denis Ossorio, who the petitioner claims saw him at the Terrien house on the night of October 30, 1975; and (3) by failing to call three additional witnesses to impeach the credibility of Gary Coleman, who claimed that the petitioner implicated himself in the murder while he was a resident at Elan. The habeas court also concluded that Sherman had acted deficiently in certain other respects but that none of those deficiencies, when considered separately, prejudiced the petitioner. Finally, the habeas court rejected the petitioner's

conflict of interest claim.

This appeal followed. Collectively, the parties have raised eleven separate issues for our resolution, each concerning whether Sherman provided effective assistance. On appeal, the respondent raises three issues, arguing that the habeas court incorrectly concluded that Sherman was ineffective by (1) failing to implicate Thomas Skakel, (2) failing to call an additional alibi witness, and (3) failing to call witnesses to impeach Coleman's testimony. For his part, the petitioner has raised seven alternative grounds for affirming the habeas court's judgment, each attacking a different aspect of Sherman's representation. Finally, the petitioner filed a cross appeal, claiming that the habeas court improperly rejected his conflict of interest claim, which we treat as an additional alternative ground for affirming the habeas court's judgment.

We first address the respondent's three claims. Because we conclude that the habeas court's conclusions as to each of those claims must be rejected, we also address each of the petitioner's alternative grounds for affirmance and his separate conflict of interest claim. Additional historical and procedural facts relevant to our resolution of each claim will be set forth as necessary.

II

THE RESPONDENT'S CLAIMS ON APPEAL

A

Standard of Review for Claims of Ineffective Assistance of Counsel

The sixth and fourteenth amendments to the United States constitution guarantee criminal defendants the right to have counsel for their defense in state prosecutions. This guarantee is essential to ensuring a fair trial. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 70, 53 S.Ct. 55, 77 L.Ed. 158 (1932). As the United States Supreme Court has explained, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the [s]ixth [a]mendment, [because] access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." (Internal quotation marks omitted.) *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Implicit in this guarantee is the right to have *effective* assistance of counsel.[8] Id., 686.

In *Strickland*, the United States Supreme Court set forth a two part standard for deciding whether a defendant can prevail on a claim that defense counsel

[8] The right to the effective assistance of counsel is also guaranteed by article first, § 8, of the Connecticut constitution. This section provides the same protection as the federal constitution, and the federal standard for judging effective assistance claims applies to any such claims under the state constitution. See, e.g., *State v. Arroyo*, 284 Conn. 597, 643, 935 A.2d 975 (2007).

rendered constitutionally ineffective representation: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components. 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. Second, the defendant must show that the deficient performance prejudiced the defense. This requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." Id., 687. Although the standard is composed of two components, a court need not address both if the defendant makes an insufficient showing as to either one. Id., 697. Moreover, "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.... Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Citations omitted; internal quotation marks omitted.) *Harrington v. Richter*, 562 U.S. 86, 110, 131 S.Ct.

770, 178 L.Ed.2d 624 (2011), quoting *Strickland v. Washington*, supra, 466 U.S. 686.

1

Performance Component

As to *Strickland*'s first component, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, supra, 466 U.S. 688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Citation omitted.) Id., 689.

Strickland directs courts assessing counsel's performance to be deferential to counsel's strategic decisions and to apply a strong presumption that such decisions are reasonable. "Because of the difficulties inherent in making [this] evaluation, a

court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.... At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and [to have] made all significant decisions in the exercise of reasonable professional judgment." Id., 690.

This deference applies equally to claims alleging that counsel unreasonably chose not to pursue possible defenses or to present certain evidence. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, [with application of] a heavy measure of deference to counsel's judgments." Id., 690–91.

2

Prejudice Component

With respect to the second component, even if counsel performs deficiently, a defendant is entitled to relief from his conviction only if he can prove that his counsel's unreasonable errors or omissions prejudiced his defense. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.... The purpose of the [s]ixth [a]mendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the [c]onstitution." (Citation omitted.) Id., 691–92.

In assessing a claim of prejudice, courts must consider the impact of counsel's errors in light of all the evidence presented at the original trial. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury....

Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id., 695–96.

The defendant has the burden to "affirmatively prove prejudice." Id., 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test ... and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (Citation omitted.) Id. "On the other hand ... a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 694. Put another way, "the question is whether there is a reasonable probability that, absent the

errors, the [fact finder] would have had a reasonable doubt respecting guilt." Id., 695. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' ... The likelihood of a different result must be substantial, not just conceivable." (Citation omitted.) *Harrington v. Richter*, supra, 562 U.S. 111–12, quoting *Strickland v. Washington*, supra, 466 U.S. 693, 697.

3

Standard of Review in Habeas Appeals

In reviewing the habeas court's decision as to an ineffective assistance claim, we defer to the habeas court's findings of historical fact concerning the representation but exercise plenary review over its conclusions about whether, based on those findings, counsel's performance was deficient and prejudicial. See, e.g., *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 469–70, 68 A.3d 624 (2013) ("[a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires ... plenary review by this court unfettered by the clearly erroneous standard" [internal quotation marks omitted]).

B

Failure To Implicate Thomas Skakel in the Murder

The respondent first claims that the habeas court incorrectly concluded that Sherman's performance was ineffective insofar as Sherman chose to pursue a third-party culpability defense focused on Littleton rather than on Thomas Skakel. We agree with the respondent and conclude that Sherman's decision not to pursue a defense implicating Thomas Skakel was a reasonable strategic decision made after adequate investigation. The petitioner did not establish that Sherman had access to admissible evidence to support a defense implicating Thomas Skakel. Moreover, even if Sherman had such evidence, he reasonably chose not to pursue this defense because doing so might have harmed the petitioner's defense by supporting aspects of the state's case.

1

Additional Background

We begin by reviewing the information then available to Sherman concerning his decision to raise a defense implicating Littleton and not Thomas Skakel. Sherman chose to focus the third-party defense on only one suspect. He explained during the habeas trial that he does not advocate putting out a "buffet table of alleged suspects," but, rather, prefers focusing a third-party culpability defense on only one

suspect. Although he considered implicating Thomas Skakel, he ultimately chose Littleton because he did not think there was enough evidence to connect Thomas Skakel to the murder and believed that there was a greater chance of creating reasonable doubt by implicating Littleton.

Sherman detailed the evidence he intended to present about Littleton's possible involvement in a pretrial motion seeking the court's permission to raise a defense implicating Littleton. In the motion, Sherman explained that he intended to present testimony showing that physical evidence connected Littleton to the crime scene and that Littleton may have confessed to the crime. According to Henry Lee, a forensic scientist and former state criminalist, two hairs found at the crime scene were microscopically similar to head hairs from Littleton. Sherman also intended to present evidence that Littleton may have admitted his involvement in the crime to his former wife, Mary Baker. With Baker's cooperation, investigators had recorded conversations between Littleton and Baker. In those conversations, Baker and Littleton discussed prior occasions when Littleton may have told Baker that he had murdered the victim and that, during the attack, the victim "wouldn't die" after being hit with the golf club, so he "had to stab her through the neck."

In the pretrial motion, Sherman explained that he also planned to show that Littleton had lied to the police in his initial statement about his activities on

the night the victim was last seen alive, October 30, 1975, and later had changed his account about his activities that night on several occasions. Littleton initially told police that he had returned to the Skakel house at about 9 p.m. after having dinner with the Skakel children at the Belle Haven Club and that he had not left the house again that night. He also reported that did not see or hear anything suspicious. About two months later, however, he changed his account and acknowledged that he had not stayed inside all night but had left the house at about 9:15 or 9:30 p.m., and walked around the Skakel property. The pretrial motion noted that this was about the time police believed the victim was leaving the Skakel property and returning to her home across the street.

Finally, Sherman planned to present evidence showing that Littleton's behavior changed " 'markedly' " after the murder. According to Sherman, investigators extensively documented records and other evidence cataloguing how Littleton was convicted of committing numerous crimes and had engaged in other "uncharged misconduct" in the months and years after the murder. Sherman also intended to present evidence of a telephone conversation years after the murder between Littleton and the victim's father, during which Littleton referred to the murder as their "mutual tragedy ...." (Internal quotation marks omitted.)

The trial court allowed Sherman to present a

defense implicating Littleton, and Sherman presented evidence at trial concerning Littleton's potential involvement in the murder. See, e.g., *State v. West*, 274 Conn. 605, 626, 877 A.2d 787 (trial court has discretion to decide whether to admit third-party culpability evidence at trial), cert. denied, 546 U.S. 1049, 126 S.Ct. 775, 163 L.Ed.2d 601 (2005). Because the jury ultimately found the petitioner guilty of the victim's murder, it necessarily must have rejected this defense.[9]

In his claim for habeas relief, the petitioner argued that Sherman was ineffective for not implicating Thomas Skakel in the murder, either instead of, or in addition to, implicating Littleton. Both Thomas Skakel and Littleton had previously

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[9] The jury must have discredited evidence that Littleton might have confessed. At the petitioner's criminal trial, Littleton testified during cross-examination by Sherman that Littleton had previously told his former wife, Mary Baker, that he had stabbed the victim in the neck. The state, however, presented evidence through Baker that Littleton had never actually confessed to her that he committed the crime. She testified that she had been cooperating with investigators and had *told* Littleton that he had confessed to her during a drunken blackout in an attempt to elicit incriminating statements from him while investigators recorded the conversation between them.

The habeas court made no findings about whether Sherman was aware before trial of Baker's claim that she had made up Littleton's admissions. Notably, however, even Littleton did not know until after the petitioner's criminal trial had started that Baker apparently invented Littleton's supposed admissions or that his conversations with her were recorded.

been suspects in the murder and were extensively investigated by the police. The petitioner claimed that the evidence against Thomas Skakel was strong enough that, if Sherman had presented a defense implicating Thomas Skakel, a jury likely would have found the petitioner not guilty.

The habeas court agreed with the petitioner and concluded that Sherman's strategic decision not to pursue a defense implicating Thomas Skakel in the murder had deprived the petitioner of effective assistance of counsel. The habeas court acknowledged that Sherman's choice to present a third-party culpability defense directed at only one suspect might be a reasonable strategy but nevertheless determined that Sherman's decision to pursue Littleton instead of Thomas Skakel was unreasonable. According to the habeas court, Sherman had strong evidence in his possession that could have supported an assertion that Thomas Skakel had murdered the victim, and Sherman's failure to do so was both deficient and prejudicial.

The habeas court found that Sherman had evidence available indicating that Thomas Skakel had lied to the police about his activities on the night the victim was last seen alive. The police first interviewed Thomas Skakel in the days after the murder. He told them that, after returning from dinner at the Belle Haven Club on the night of October 30, 1975, he sat in a vehicle owned by the Skakels and parked in the Skakels' driveway with

the petitioner and some friends, including the victim. At about 9:15 p.m., Thomas Skakel's older brother, Rushton Skakel, Jr., said he needed the car to take Terrien back to Terrien's house, and that Thomas Skakel and others, including the victim, exited the vehicle. Thomas Skakel told the police that, after the vehicle left, he spoke to the victim for a few moments and then went up to his room to complete a homework assignment until about 10:15 p.m., when he joined Littleton to watch part of a television show. The habeas court noted, however, that Sherman had evidence available to him demonstrating that Thomas Skakel was not assigned any homework of the kind that he had described. In addition, several years after the murder, in the 1990s, Thomas Skakel allegedly told a different story to an investigative firm known as Sutton Associates, which had been retained by the Skakel family's attorneys to further investigate the murder. According to a report supposedly authored by Sutton Associates (Sutton Report), Thomas Skakel stated that, after getting out of the vehicle that night, he and the victim spent some time talking and then both went to an area elsewhere on the Skakel property where they had a consensual sexual encounter. Thomas Skakel allegedly told Sutton Associates that he had fondled the victim's breasts and vagina, and that he did not remove her bra but had unbuttoned her pants and lowered them slightly. He further explained that they fondled each other's genitals until each reached orgasm and that, afterward, the victim buttoned her pants and walked across the Skakel property toward

her house. Thomas Skakel apparently reported that the encounter began at around 9:30 p.m. and ended at about 9:50 p.m. He claimed that, after the victim left, he went back inside his home and joined Littleton to watch television. The habeas court found the timing of the supposed encounter significant because the petitioner had argued at his criminal trial that the murder likely occurred sometime between 9:30 and 10 p.m., on the basis of evidence that some type of commotion had occurred during that time.

The habeas court also observed that Sherman could have argued that Thomas Skakel's story of his sexual encounter with the victim was consistent with some of the evidence found at the crime scene. According to testimony presented at the petitioner's criminal trial, the victim was found with her pants unbuttoned and with her pants and underwear pulled down below her knees. Testimony at the criminal trial indicated that they might have been pulled down before the assault began because blood spatter was found on the inside of the pants. The victim also had no defensive wounds or foreign DNA under her fingernails. According to the habeas court, Sherman could have used these facts to argue that the unbuttoning of her pants was consensual, giving credibility to Thomas Skakel's supposed claim of a consensual sexual encounter with the victim.

On the basis of this evidence, the habeas court explained that Sherman could have argued that

"what may have started as a consensual encounter between the victim and [Thomas] Skakel may have turned terribly bad." Although there was no direct evidence to establish that Thomas Skakel had attacked the victim during their meeting, the habeas court nevertheless noted that Sherman might have been able to rely on circumstantial evidence to imply that Thomas Skakel could have become violent. The habeas court cited to evidence that Thomas Skakel had romantic feelings for the victim and that she may have rebuffed his overtures. The court also noted that Sherman had a copy of an early suspect profile report from a Houston, Texas medical examiner, prepared at the request of police investigators. That report contained an opinion that "[the] attacker was someone known to her ... who has a probable unstable personality, homosexually inclined, [and] either panicked following what may have started out as a prank, or became so angry upon being rejected that he engaged in an 'overkill.' " Finally, the habeas court found that Sherman had "substantial background evidence available to him of [Thomas] Skakel's mental and emotional instability, and his penchant for violent outbursts."

The habeas court acknowledged, however, that much of the evidence that it had identified to implicate Thomas Skakel might not have been admissible at the petitioner's criminal trial. Most of the habeas court's conclusions concerning the evidence against Thomas Skakel were based on the Sutton Report and information contained in early

police reports, both of which the habeas court acknowledged would, in all likelihood, not have been admissible. Nevertheless, the habeas court explained that they provided Sherman with "an investigative gateway" to "seek and obtain admissible evidence on the [subject or subjects] covered." Notably, however, the habeas court did not explain or make any findings about how Sherman could have obtained admissible evidence or precisely what that evidence would have been.

On the basis of its review of the evidence available to Sherman, the habeas court determined that he had rendered ineffective assistance of counsel to the petitioner. With respect to the performance component of *Strickland*, the court concluded that Sherman's choice to pursue Littleton instead of Thomas Skakel was unreasonable and thus deficient: "[G]iven the strength of evidence regarding [Thomas] Skakel's direct involvement with the victim at the likely time of her death, consciousness of guilt evidence concerning [Thomas] Skakel's activities on the evening in question, the circumstantial evidence of his sexual interest in the victim, and [Thomas] Skakel's history of emotional instability, [Sherman's] failure to pursue a third-party claim against [Thomas] Skakel cannot be justified on the basis of deference to strategic decision making. If ... Sherman was, in fact, committed to the notion that only one third-party culpability defense should be asserted, a proposition [the habeas] court believes may well be within [Sherman's] informed discretion, he

unreasonably chose a third party against whom there was scant evidence and ignored a third party against whom there was a plethora of evidence."[10] As to the prejudice component of *Strickland*, the habeas court further concluded that this deficiency prejudiced the petitioner's defense because, if Sherman had presented a defense implicating Thomas Skakel, the jury likely would have had a reasonable doubt about the petitioner's guilt.

2

Analysis

We take as the starting point of our analysis the "strong presumption" that counsel's strategic decisions—including whether to pursue a third-party culpability defense—are an "exercise of reasonable professional judgment." *Strickland v. Washington*, supra, 466 U.S. 689, 690. Because of this presumption, decisions made by counsel after adequate investigation are "virtually unchallengeable ...." Id., 690. The petitioner has the burden to overcome this strong presumption of competence by demonstrating that there was no objectively reasonable justification for counsel's

[10] We are hard-pressed to understand what the "plethora" of evidence was in light of the habeas court's concession that the evidence presented to implicate Thomas Skakel would not have been admissible at the petitioner's criminal trial but would simply have provided "an investigative gateway" to possibly discovering admissible evidence. The admissible evidence that Sherman supposedly could have found was not presented at the habeas trial.

decision: "As a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no ... tactical justification for the course taken." (Internal quotation marks omitted.) *Mozell v. Commissioner of Correction*, 291 Conn. 62, 79, 967 A.2d 41 (2009). Counsel's decision need not have been the best decision, or even a good one; it need only fall within the wide range of reasonable decisions that a defense attorney in counsel's position might make. See, e.g., *Harrington v. Richter*, supra, 562 U.S. 110; *Strickland v. Washington*, supra, 689. Thus, as long as there is some reasonable basis for counsel's decision, we may not second-guess counsel's choice after that defense has proven a failure, and we must defer to counsel's exercise of professional judgment. *Strickland v. Washington*, supra, 689–91.

Applying these principles to the present case, we conclude that Sherman's decision to implicate Littleton instead of Thomas Skakel was reasonable and, therefore, not constitutionally deficient for at least two reasons.

i

Lack of Admissible Evidence Implicating Thomas Skakel

First, we agree with the respondent that Sherman did not have admissible evidence available to him to present a third-party defense implicating Thomas

Skakel. To raise a third-party culpability defense, defense counsel must be able to present evidence at trial that directly links the third party suspect to the crime alleged. E.g., *State v. Hernandez*, 224 Conn. 196, 202, 618 A.2d 494 (1992) ("The defendant must ... present evidence that directly connects a third party to the crime with which the defendant has been charged .... It is not enough to show that another had the motive to commit the crime ... nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." [Citations omitted; internal quotation marks omitted.]). To prove that Sherman was deficient for failing to implicate Thomas Skakel, the petitioner thus needed to show that Sherman had admissible evidence available to him to support that defense at trial. See, e.g., *Bryant v. Commissioner of Correction*, 290 Conn. 502, 515, 964 A.2d 1186 (defense counsel cannot be deemed deficient for failing to present third-party defense when there is insufficient evidence to support it), cert. denied sub nom. *Murphy v. Bryant*, 558 U.S. 938, 130 S.Ct. 259, 175 L.Ed.2d 242 (2009); see also *Floyd v. Commissioner of Correction*, 99 Conn.App. 526, 532, 914 A.2d 1049 (rejecting ineffective assistance claim when "the petitioner failed to prove that the witnesses were available to testify at trial, what they would have testified about or that their testimony would have had a favorable impact on the outcome of the trial"), cert. denied, 282 Conn. 905, 920 A.2d 308 (2007). The petitioner failed to meet this burden.

To have any hope of directly linking Thomas Skakel to the murder, Sherman first needed admissible evidence that confirmed that Thomas Skakel had a sexual encounter with the victim on the night of October 30, 1975. Sherman also needed evidence to establish details about how the encounter unfolded, including the time it occurred, and that Thomas Skakel had unbuttoned and pulled the victim's pants down during their meeting. Evidence of the time the encounter took place—between 9:30 and 9:50 p.m.—would be needed to place Thomas Skakel with the victim at or around the time the petitioner had claimed she was murdered—between 9:30 and 10 p.m.[11] Evidence showing that Thomas Skakel unbuttoned and pulled the victim's pants down would be necessary to establish the tenuous connection the habeas court noted between Thomas Skakel's alleged description of their encounter and the crime scene evidence. Without these details, there could be no possibility of implicating Thomas Skakel because Sherman would have been able to prove only that Thomas Skakel was the last person to have seen the victim alive—a fact made known at trial and hardly enough to directly connect him to the victim's

[11] Although the petitioner relied on this time of death during his criminal trial, the state argued at the trial that the time of death could have been later. Among other evidence, the state relied on testimony from the medical examiner indicating that the time of death could have been as late as 5 a.m. on October 31, 1975, and that a time of death of 1 a.m. would be just as consistent with the medical evidence as a time of death at 10 p.m. on October 30.

murder. [12] See *Mukhtaar v. Commissioner of Correction*, 158 Conn. App. 431, 448–50, 119 A.3d 607 (2015) (counsel was not ineffective for declining to present third-party defense when evidence showed only that third party was present at crime scene).

The record before the habeas court fails to demonstrate that Sherman had access to admissible evidence to prove these details at the petitioner's criminal trial. The details about Thomas Skakel's encounter with the victim, as the habeas court relayed them, come from the Sutton Report, which describes an interview during which Thomas Skakel allegedly discussed the encounter. The habeas court acknowledged, however, that the Sutton Report likely would not have been admissible at the petitioner's trial; indeed, the report itself would have constituted double hearsay and possibly have been privileged. Sherman also could not have introduced the details of the encounter through Thomas Skakel because his counsel told Sherman before trial that, if called as a witness, Thomas Skakel would assert his privilege against self-incrimination and decline to testify. Thomas Skakel was not called as a witness at either the criminal trial or the habeas trial, and, thus, the record is devoid of proof that Thomas Skakel would

[12] Of course, even if Sherman had evidence of these details, it is far from certain that the trial court would have allowed Sherman to raise a third-party defense, or that Sherman could be faulted for failing to pursue it, given that there is no evidence that their encounter, if it occurred, was anything but consensual. Cf. *Mukhtaar v. Commissioner of Correction*, 158 Conn.App. 431, 448–50, 119 A.3d 607 (2015).

have testified at the criminal trial and, if he did, what the substance of his testimony would have been.

The habeas court found that counsel could have presented evidence about the encounter through one of the petitioner's attorneys, but this finding is not supported by the record. Evidence presented at the habeas trial shows that, just one week before the beginning of the petitioner's criminal trial, Sherman and Jason Throne, another attorney representing the petitioner, met with Thomas Skakel and his attorney. The habeas court found that, at this meeting, Thomas Skakel recounted the specifics of his sexual encounter with the victim to Sherman and Throne. Based on this determination, the habeas court concluded that Throne could have withdrawn as the petitioner's counsel—just days before trial—and could have testified as a witness about what Thomas Skakel had said at that meeting.

This finding is unsupported by the evidence in the record, however, because Throne testified at the habeas trial that he had no recollection of any discussion by Thomas Skakel during their meeting about his sexual contact with the victim.[13] "[A]

[13] Sherman testified at the habeas trial that Thomas Skakel mentioned having sexual contact with the victim but that he did not provide any specific details of the encounter, and Sherman could not recall any mention of the time it allegedly took place. For example, Sherman testified that Thomas Skakel had "basically repeated" the information in the Sutton Report during their meeting, but, when Sherman was asked whether Thomas Skakel had told Sherman "that [Thomas Skakel and the victim]

finding of fact is clearly erroneous when there is no evidence in the record to support it ...." (Internal quotation marks omitted.) *Orcutt v. Commissioner of Correction*, 284 Conn. 724, 742, 937 A.2d 656 (2007). In the present case, Throne recalled that Thomas Skakel said only that he had seen the victim later on the evening of October 30, 1975, but Thorne could not recall whether Thomas Skakel made any mention of the time that meeting occurred. Nor did Throne recall Thomas Skakel's discussing any sexual contact between him and the victim.[14] The habeas record

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engage[d] in sexual conduct, as reflected in the Sutton Report," Sherman answered, "I don't think he was as specific as [the Sutton Report], only that there was some sexual conduct." Even if we assume that Sherman's memory is more accurate than Throne's, the most that Sherman or Throne could have testified to was that Thomas Skakel admitted to having sexual contact with the victim on October 30, 1975, but without any details about when, where, or how it unfolded—details that, as we have mentioned, would have been necessary to establish the tenuous link, which the habeas court observed, between Thomas Skakel's statements in the Sutton Report and the crime scene evidence.

Nevertheless, Sherman's testimony about his own memory of an event that occurred eleven years beforehand cannot, itself, be used as proof of what Throne would have known and recalled about that event, or what the substance of Throne's testimony concerning that event would have been if Throne had been called as a witness at the petitioner's criminal trial. The petitioner does not argue that Sherman should have withdrawn from representing the petitioner one week before his criminal trial so that Sherman could testify about his meeting with Thomas Skakel.

[14] At the habeas trial, the petitioner's habeas counsel asked Throne whether Thomas Skakel had discussed his alleged

thus contains no other evidence on which the habeas court could properly base any findings about what Throne's testimony would have been if he had been called as a witness at the petitioner's criminal trial in 2002. [15] Any finding concerning the details that

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sexual encounter with the victim during Sherman and Throne's meeting with Thomas Skakel. Throne replied: "I don't recall during that meeting talking about the, you know, the [sexual] contact. I am aware, obviously, from other reports of what, you know, had taken place, but I don't recall as I sit here today actually discussing that in detail when we were with [Thomas Skakel] at that time." When asked to clarify what other reports he was speaking of, Throne explained: "The information—or I believe, you know, it was reported that—I think they described it as mutual masturbation, so I believe we were aware of that information, but I can't recall ... discussing that specifically with [Thomas Skakel] at that time at that meeting."

Sherman testified at the habeas trial that Throne had taken notes during their meeting with Thomas Skakel and that he believed that Throne may still have had the notes, but no such notes were entered into evidence at the habeas trial; nor did the petitioner's habeas counsel ask Throne whether he had taken notes during that meeting, whether he still had them, or whether they might refresh his recollection.

[15] The habeas court briefly surmised that one of the investigators for Sutton Associates might have been able to testify about the details of Thomas Skakel's encounter with the victim on the basis of the interview between Thomas Skakel and Sutton Associates, but this assumption is nothing more than speculation.

Prior to trial, Sutton Associates invoked the attorney-client privilege and attorney work product privilege, thereby declining to testify about the content of its communications with Thomas Skakel. Even if we assume that Sherman could somehow have defeated a claim of privilege by Sutton Associates, the record is silent about the content of the testimony that a Sutton

Associates investigator might have provided. No one from Sutton Associates testified about the content of Thomas Skakel's communications with Sutton Associates in any proceeding in this case.

Without additional evidence, we cannot assume that someone who interviewed Thomas Skakel would have been available to testify at the petitioner's criminal trial and that they would have testified in pure conformity with the alleged content of the Sutton Report. That report was not authenticated by anyone from Sutton Associates and was apparently drafted several years before the petitioner's criminal trial. See, e.g., *Johnson v. Commissioner of Correction*, 285 Conn. 556, 584, 941 A.2d 248 (2008) ("[i]n a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation ... but by demonstrable realities" [internal quotation marks omitted]); see also *Lewis v. Commissioner of Correction*, 89 Conn.App. 850, 860–61, 877 A.2d 11 (petitioner could not establish content of missing witness' testimony through seven year old statement when witness did not testify at habeas trial and petitioner presented no evidence that witness would have testified at criminal trial), cert. denied, 275 Conn. 905, 882 A.2d 672 (2005).

The dissent suggests that Sherman also could have called Emanuel Margolis, Thomas Skakel's attorney, who was also present at the meeting with Thomas Skakel, Sherman, and Throne, to testify about what Thomas Skakel had said during that meeting. This is entirely speculative. The petitioner did not present any evidence of what Margolis might have testified to if he had been called as a witness at the petitioner's criminal trial—Margolis passed away before the habeas trial—and the habeas court made no findings about whether Margolis would have been available or willing to testify, or what the substance of his testimony might have been. There is, therefore, no basis in the record for concluding that Margolis could have testified about the details of Thomas Skakel's encounter with the victim if Margolis had been called to testify at the petitioner's criminal trial. See, e.g., *Johnson v. Commissioner of Correction*, supra,

Throne could have relayed to the jury about Thomas Skakel's alleged encounter with the victim would therefore be entirely speculative and inconsistent with the evidence actually presented at the habeas trial. The petitioner, as the party with the burden of proof at the habeas trial, was required to prove that Sherman would have had access to admissible evidence to support this theory. When the petitioner's claim rests on the argument that counsel should have called a certain witness to establish a defense, the petitioner must present to the habeas court what the substance of the witness' testimony would have been. See, e.g., *Thomas v. Commissioner of Correction*, 141 Conn.App. 465, 472, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013). Consequently, if the petitioner intended to rest the strength of his claim on the notion that Throne could have provided significant details to support a third-party culpability defense implicating Thomas Skakel, it fell on the petitioner to proffer evidence to show what Throne's testimony at the criminal trial would have been. Because Throne's testimony at the habeas trial failed to establish what he would have testified to if he had been called to testify at the petitioner's criminal trial, the petitioner failed to meet this burden.

Thus, there is no reasonable basis to conclude that Sherman had admissible evidence available to him concerning the details of Thomas Skakel's alleged

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285 Conn. 584; *Lewis v. Commissioner of Correction*, supra, 89 Conn.App. 860–61.

sexual contact with the victim.[16] Without this significant threshold evidence, Sherman would not have been permitted to implicate Thomas Skakel at the petitioner's criminal trial and, therefore, could not have been found to be ineffective for failing to do so. See, e.g., *Bryant v. Commissioner of Correction*, supra, 290 Conn. 515 ("[i]t is not ineffective assistance of counsel ... to decline to pursue a [third-party] culpability defense when there is insufficient evidence to support that defense").

ii

Sherman Reasonably Could Have Chosen Not To Implicate Thomas Skakel

Second, even if we were to assume, for the sake of argument, that Sherman had access to admissible evidence detailing Thomas Skakel's alleged sexual encounter with the victim, we nevertheless would conclude that Sherman reasonably could have chosen to forgo a defense implicating Thomas Skakel because of a lack of stronger evidence to tie him to the crime, especially in light of the possible risks

[16] The habeas court itself also surmised that Sherman could have argued that Thomas Skakel suffered from psychological problems and had a violent temper, but, as the habeas court acknowledged, the petitioner did not present any evidence to support these assertions at the habeas trial that would have been admissible at the petitioner's criminal trial. Any reliance on this evidence would similarly be speculative. See, e.g., *Lewis v. Commissioner of Correction*, 89 Conn.App. 850, 860–61, 877 A.2d 11, cert. denied, 275 Conn. 905, 882 A.2d 672 (2005).

associated with presenting the evidence needed to support such a defense.

The evidence available to Sherman, as reviewed by the habeas court, might place Thomas Skakel with the victim around the time the petitioner claims she was murdered, but it does not establish that their meeting turned violent. Witnesses who saw Thomas Skakel with the victim shortly before the alleged sexual encounter took place characterized Thomas Skakel's interactions with the victim as "playful" and "flirtatious ...." Perhaps Sherman might have tried to cast doubt on Thomas Skakel's claim of an entirely consensual encounter by referring to evidence that the victim had previously rebuffed his flirtatious advances, or could have argued that Thomas Skakel had something to hide given that he had concealed from the police his story of a sexual encounter with the victim. But to connect Thomas Skakel to the murder, one would have to speculate that, despite evidence that the victim was openly and playfully flirting with him, and might even have allowed him to unbutton her pants, he nevertheless became so enraged that he retrieved a golf club and beat her to death.[17] Additionally, unlike with Littleton and the

[17] Moreover, Littleton told the police during their investigation, and later testified at the petitioner's criminal trial, that he watched television with Thomas Skakel on the night of October 30, 1975, beginning at about 10:15 p.m., within twenty to thirty minutes after the time the petitioner now asserts that Thomas Skakel might have killed the victim. Littleton was clear, however, that, when he saw Thomas Skakel at about 10:15 p.m., Thomas Skakel was wearing the same

petitioner, there is no evidence that Thomas Skakel has ever claimed involvement in the victim's murder. Moreover, Sherman had no forensic evidence linking Thomas Skakel to the murder, unlike in the case of Littleton, whose hair was determined to be similar to hairs found around the victim's body. And unlike with the petitioner—who admitted to wandering around the victim's property and being in the area of the crime scene on October 30, 1975—there is no evidence to place Thomas Skakel at the scene where the victim was attacked or where her body was found.

Instead of choosing to ask the jury to make the leap over this evidentiary lacuna as a means of finding reasonable doubt, defense counsel in Sherman's position reasonably could have concluded that it was better to pursue a suspect who had at least arguably implicated himself in the crime. Counsel might reasonably have feared that blaming Thomas Skakel, the petitioner's own brother, without any stronger evidence linking him directly to the murder could cause the jury to doubt the credibility of the defense case generally, or could appear desperate.

This concern appears all the more reasonable in light of the significant risks associated with

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clothes he had on earlier that evening, there was nothing suspicious about him, and there was no blood on his clothing. This information renders the petitioner's claim implicating Thomas Skakel, which rests on the assertion that he committed the murder between approximately 9:45 and 10 p.m. that night, all the more speculative.

implicating Thomas Skakel. See, e.g., *Crocker v. Commissioner of Correction*, 126 Conn. App. 110, 131–32, 10 A.3d 1079 (declining to second-guess counsel's decision not to present certain evidence when that evidence might have also inculpated petitioner), cert. denied, 300 Conn. 919, 14 A.3d 333 (2011); see also *Harrington v. Richter*, supra, 562 U.S. 108–109 (counsel's representation was not unreasonable when counsel elected not to use evidence that might have harmed petitioner's case); *Greiner v. Wells*, 417 F.3d 305, 324 (2d Cir. 2005) ("[w]e cannot fault [defense counsel] for refusing to introduce evidence of [third-party culpability] in light of its 'significant potential downside' ... [namely] that it would have opened the door to a prosecution line of inquiry harmful to the defense" [citation omitted]), cert. denied sub nom. *Wells v. Ercole*, 546 U.S. 1184, 126 S.Ct. 1363, 164 L.Ed.2d 72 (2006). Evidence confirming a sexual encounter between Thomas Skakel and the victim on the night of October 30, 1975, would have also strengthened the state's case against the petitioner by providing the state with additional evidence of the petitioner's motive to commit the crime, such as jealously, and by corroborating details in some of the petitioner's own self-incriminating statements. The state's evidence concerning the petitioner's confessions, together with the petitioner's statements about his activities that night, were the state's primary evidence of guilt. Sherman's principal defense against this evidence was to discredit it. Introducing evidence that might corroborate some of the petitioner's incriminating

statements thus presented the risk of strengthening the state's case.

The state's theory of motive centered on evidence that the petitioner had been infatuated with the victim and implied that he had become upset with her relationship with Thomas Skakel, leading him to attack her in a jealous rage. See *State v. Skakel*, supra, 276 Conn. 651–52. The state possessed evidence, made known to the defense through pretrial discovery, establishing that the petitioner had made statements claiming that, on the night the victim was last seen alive, he had discovered that Thomas Skakel had a sexual encounter with the victim, and that the petitioner had blacked out and could not remember what happened that night. For example, a June 23, 2000 police report indicated that a witness who knew the petitioner from Elan told the police that, during a group session, the subject of the victim's murder came up and the petitioner "announced that his brother [Thomas Skakel] had fucked his girlfriend" and that he "had been running around outside, that he was drunk, had blacked out and that the next morning he woke up and [the victim] was dead." The state had additional evidence demonstrating that the petitioner had made similar statements to another person on a separate occasion, specifically, that he had killed a girl that he liked with a golf club after discovering that his brother "Tommy" had a sexual encounter with her.[18]

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[18] The notion that the petitioner might have murdered the victim after discovering that she had engaged in sexual activity

Presenting evidence that Thomas Skakel had admitted to engaging in a consensual sexual encounter with the victim would have significantly bolstered the state's evidence of motive and added credibility to the state's case by corroborating evidence of the petitioner's own incriminating

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with Thomas Skakel had also been raised in the media after the Sutton Report was leaked to media sources several years before the grand jury had convened to investigate the murder.

For example, before the grand jury convened in 1998 to investigate the victim's murder, retired Los Angeles Police Detective Mark Fuhrman published a book about the crime and implicated the petitioner. Sherman testified at the habeas trial that he had read this book before the petitioner's criminal trial.

In the book, Fuhrman argues that the petitioner most likely killed the victim after discovering a sexual encounter between the victim and Thomas Skakel. M. Furhman, Murder in Greenwich (1998) pp. 197, 215. In support, the book includes the following quote, which it attributes to the Sutton Report: "We have found considerable evidence to show [that the petitioner] had been involved in a relationship with [the victim]. According to one source, [the petitioner] and [Thomas Skakel] even fought over her. Along the blurry lines of teenage romance, [the petitioner] was even known to be [the victim's] boyfriend for some time. Coupled with our extensive knowledge of just how vehemently they fought with each other, this information suggests [that the petitioner] had more than ample reason to [be] extremely upset when [Thomas Skakel] was carrying on with [the victim] by the side of the house just before 9:30 p.m." (Internal quotation marks omitted.) Id., p. 215. The book further quotes the Sutton Report as stating: "We know practically nothing of how [the petitioner] reacted to all this, and it is a glaring omission. For certainly, he had a reaction, and it may have been extreme." (Internal quotation marks omitted.) Id., p. 216.

statements. Without admissible evidence of Thomas Skakel's supposed statements, the state did not have evidence to confirm a sexual encounter between Thomas Skakel and the victim on the night of October 30, 1975. The state thus had to rely on the petitioner's self-incriminatory statements, together with evidence from eyewitnesses who had seen Thomas Skakel and the victim engaging in flirtatious horseplay, to establish its theory of motive. Evidence confirming a sexual encounter would undoubtedly have been more compelling and corroborative than evidence of flirting.[19]

In concluding that Sherman provided inadequate representation for not implicating Thomas Skakel, the habeas court did not examine the possible risks of doing so; it focused instead on the potential arguments counsel might have made to implicate Thomas Skakel and the potential benefits of such a defense. But tactical decisions of this kind require consideration of both the potential benefits and *the potential risks* of pursuing a particular strategy. *Strickland* requires "that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

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[19] The petitioner argues that the testimony concerning his self-incriminating statements lacked credibility. Given the jury's verdict, however, the jury likely found them credible. Providing the jury with additional evidence corroborating these statements would have further bolstered their credibility to the jury.

perspective at the time." *Strickland v. Washington*, supra, 466 U.S. 689. Courts reviewing a defense attorney's decision, years after it was made and after it proved unsuccessful, must take a highly deferential approach and examine all of the circumstances surrounding counsel's choice to ensure that there is *no* reasonable basis for counsel's choice before second-guessing it. See id.

Applying this deferential approach, we conclude, contrary to the habeas court, that Sherman's performance was not deficient and thus could not have deprived the petitioner of a constitutionally adequate defense. Given the perils of implicating Thomas Skakel and the lack of admissible evidence supporting this defense, a defense attorney in Sherman's shoes reasonably could have concluded that implicating Thomas Skakel was simply not worth the risks, at least not without stronger evidence to directly link him to the murder. There were risks and benefits to implicating either Thomas Skakel or Littleton. Certainly, the case against Littleton also had its own drawbacks. Although the strength of the evidence concerning Littleton's supposed admissions was uncertain, at best, the trial court nevertheless concluded that there was enough evidence to connect Littleton to the murder and allowed Sherman to present a third-party culpability defense implicating Littleton. And, in deciding to implicate Littleton, Sherman knew that he would be able to cross-examine Littleton before the jury, permitting the jury to assess Littleton's credibility in

person. Implicating Thomas Skakel, by contrast, would give the jury no similar opportunity to observe Thomas Skakel's demeanor in court, under examination. Rather, under the petitioner's theory, the key facts supporting a defense implicating Thomas Skakel would be presented through hearsay testimony from a former attorney who represented the petitioner. In hindsight, we know that Sherman's choice to implicate Littleton was not a winning strategy. But, viewing the evidence from the point of view of a reasonable defense attorney at the time Sherman formulated his strategy, it was not unreasonable for counsel in Sherman's position to have concluded that highlighting Littleton's own doubts about his involvement was a more prudent option for sowing reasonable doubt. We thus need not address the issue of prejudice under *Strickland*'s second prong and conclude that the petitioner failed to meet his burden of proving ineffectiveness on this basis.

C

Failure To Identify and Call Additional Alibi Witness

The respondent next claims that the habeas court incorrectly concluded that Sherman's representation was ineffective insofar as he failed to present testimony from an independent alibi witness, Dennis Ossorio. We agree with the respondent that Sherman's performance in this regard was not ineffective.

Additional Background

The petitioner's claim of an alibi was strongly contested by the state at his criminal trial. At trial, the petitioner argued that the murder likely occurred between 9:30 and 10 p.m. on October 30, 1975, at a time when he claimed to be at Terrien's home. The habeas court described the trial evidence concerning the petitioner's alibi as follows. On the evening of October 30, "the petitioner, with his siblings Rushton [Skakel], Jr., Thomas [Skakel], John [Skakel], Julie [Skakel], David [Skakel] and Stephen [Skakel], their cousin ... Terrien ... [Julie Skakel's] friend Andrea Shakespeare, and the family tutor ... Littleton, left the Skakel residence in [the Greenwich neighborhood of] Belle Haven for dinner at the Belle Haven Club at approximately 6:15 p.m. and returned to the Skakel home shortly before 9 p.m. ... [Meanwhile, before] 9 p.m., the victim had been out with her friend, Helen Ix, in the neighborhood enjoying the activities of 'mischief night.' Shortly after the group returned from the Belle Haven Club, the victim and Ix came to the Skakel residence, and, soon thereafter, the petitioner, a friend, Geoffrey Byrnes, the victim, and Ix entered [a car] to talk and listen to music. They were soon joined in the car by [Thomas] Skakel. Soon thereafter, at approximately 9:15 p.m., Rushton [Skakel], Jr., John Skakel ... and Terrien came to the car and indicated they needed to use it to take Terrien to his home, approximately twenty minutes

away. It [was] undisputed that, when Terrien, Rushton [Skakel], Jr., and John Skakel entered the [car], [Thomas] Skakel, Ix, Byrnes and the victim alighted from it, and that Ix and Byrnes shortly [thereafter] left for their respective homes, leaving [Thomas] Skakel and the victim standing together in the Skakel driveway. Whether the petitioner remained in the [car] en route to the Terrien home or got out of the car at the Skakel residence was significantly contested at trial because this issue related directly to the petitioner's alibi defense. [The petitioner] claimed, in sum, that he could not have committed the crime because the victim was murdered between 9:30 and 10 p.m. while he was still at ... Terrien's home. While Terrien, Rushton [Skakel], Jr., and John [Skakel] indicated that the petitioner went with them to the Terrien home, Ix testified that she could not remember. Her testimony on this point was significantly contested. On direct [examination], she indicated her uncertainty. On [cross-examination] by ... Sherman, she stated that she thought the petitioner was in the car as it left but she was not positive. After Ix testified, the state presented testimony from Shakespeare that the petitioner was at the Skakel home after the [car] departed. And, in rebuttal, the state presented testimony from Julie Skakel relevant to whether ... the petitioner had left in the [car]. When Julie Skakel testified at trial to an uncertain memory of the events of the evening, the state was able to use ... pursuant to *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d

598 (1986), the fact that she had testified at earlier hearings that, at approximately 9:20 p.m., she saw a figure darting by just outside the house to whom she called out: 'Michael, come back here.' Even though Julie Skakel testified that she did not know who the darting figure was, the jury was given the clear indication that, at least at that moment on October 30, 1975, she must have thought it was the petitioner. The state also adduced evidence that, at the same point in time, Julie [Skakel] was unable to state whether any cars remained in the driveway. The import of this evidence was the suggestion that, since Julie Skakel thought she saw the petitioner dart past the house at a point in time after the [car] had left the area, he did not, in fact, go to the Terrien residence. From the state's perspective, [Julie Skakel's] testimony could be harmonized with [Shakespeare's], who, as noted, testified to her belief that the petitioner had not gone to the Terrien home on the evening in question.

"The contest regarding whether the petitioner had left the area in the [car] continued with the testimony of Terrien, Rushton [Skakel], Jr., and Georgeann Dowdle, Terrien's sister. While Terrien and Rushton [Skakel], Jr., testified that the petitioner was present in the Terrien home, Dowdle could only say that she heard the Skakel cousins' voices because she was in a different room and only within hearing range. She did say, however, that she had earlier told the police that the petitioner was there that evening.... Dowdle [also] testified before the grand jury in 1998 that she

had been in the company of her 'beau' at the Terrien residence when the Skakel cousins were there."

"Even though ... Sherman was privy to ... Dowdle's testimony before trial from his access to the transcript of her grand jury testimony, he did not ... attempt to learn the identity of Dowdle's 'beau.' During closing arguments, both the state and [Sherman] pointed to trial evidence on the disputed question of whether the petitioner was away from Belle Haven between the hours of approximately 9:15 and 11:15 p.m. In [its] challenge to the petitioner's alibi claim, [the state] ... argued that all the alibi witnesses were related to the petitioner, a point that was echoed by the court in its charge regarding the credibility of witnesses and in the specific context of the petitioner's alibi claim." (Footnote omitted.)

In his habeas petition, the petitioner claimed that Sherman was deficient insofar as he did not identify and present the testimony of Dowdle's "beau," who may have been able to provide additional information about who was at the Terrien home on the night of October 30, 1975. In support of his habeas claim, the petitioner presented the testimony of Ossorio, the "beau" referenced by Dowdle, who testified that he had seen the petitioner at the Terrien home. The habeas court gave the following description of Ossorio's habeas trial testimony: "Ossorio, [who was] seventy-two years old [at the time of the habeas trial], testified that, in 1975, he, as a psychologist, was operating a program for women. He indicated that he

then had a personal connection to Dowdle and that he had been at the Terrien home in the evening hours of October 30, visiting with Dowdle and her daughter. He testified that, while there, he had visited with the Skakel brothers, including the petitioner, and Terrien, while they were watching [Monty Python's Flying Circus (Monty Python)] on television. He indicated that he was in and out of the room where the others were watching Monty Python while Dowdle was putting her daughter to bed. Finally, he indicated that he left the Terrien residence at about midnight and was not sure whether the Skakels had left before him. Thus, Ossorio's testimony supported the petitioner's claim that, during the likely time of the murder, the petitioner was away from [the] Belle Haven [neighborhood], as he indicated."

The habeas court found that "Ossorio was a disinterested and credible witness with a clear recollection of seeing the petitioner at the Terrien home on the evening in question. He testified credibly that not only was he present in the home with Dowdle and that he saw the petitioner there, but that he lived in the area throughout the time of the trial and would have readily been available to testify if asked. He indicated that, while he was aware of the general parameters of the state's claim against the petitioner, he did not pay close attention to the trial, and he did not come forward because he was unaware of the significance of the particular information he possessed. He indicated that he had not been contacted by ... Sherman or by the state in

conjunction with the investigation or trial. To the court, Ossorio was a powerful witness in support of the petitioner's alibi claim."

The habeas court concluded that Sherman's performance was deficient insofar as he did not identify Ossorio and present Ossorio's testimony at the petitioner's criminal trial. According to the habeas court, "[e]ven though ... Sherman testified at the habeas [trial] that the petitioner had never informed him of Ossorio's presence and, indeed ... had never heard Ossorio's name until shortly before the habeas [trial], he was on notice from Dowdle's grand jury testimony that she was in the company of another person at the Terrien home, and she had identified this person as her 'beau.' ... Had ... Sherman read and considered Dowdle's grand jury testimony, which was made available to him before the trial, he would have learned of the presence of an unrelated person in the Terrien household. And, had ... Sherman made reasonable inquiry, he would have discovered Ossorio and gleaned that Ossorio was prepared to testify that the petitioner was present at the Terrien home during the evening in question. He would have learned, as well, that Ossorio was a disinterested and credible witness." The court added that Sherman's failure to identify and call Ossorio as a witness could not be attributed to a strategic decision because the petitioner had asserted an alibi defense about which other family members had testified, and, therefore, "Sherman's failure to follow up on information available to him in support of that

defense, that there was an unrelated and identifiable person in the Terrien home in addition to Skakel relations, was deficient because [Sherman] knew or should have known of the presence of an unrelated person in the Terrien home under the particular circumstances of this case."

The habeas court also concluded that Sherman's failure to present Ossorio's testimony prejudiced the petitioner's alibi defense because there was a reasonable probability that, if the jury had heard his testimony together with the petitioner's other evidence suggesting that the victim may have been killed when the petitioner was allegedly present at the Terrien home, it would have found the petitioner not guilty.

The respondent argues that Sherman's performance should not be deemed deficient because of Sherman's failure to attribute significance to a passing reference to Dowdle's "beau" in a transcript in light of the information known to Sherman at the time. Specifically, the respondent argues that the information Sherman learned of during his investigation indicated that Rushton Skakel, Jr., John Skakel, and their cousin Terrien were the only people who claimed to have watched television with the petitioner at the Terrien home and who could verify his presence there, and, despite Sherman's repeated inquires, none of them indicated to Sherman that anyone else was with them or could verify the petitioner's presence at the Terrien home

that evening. The respondent also argues that, even if Sherman's performance was deficient insofar as he failed to investigate and to call Ossorio as a witness, the petitioner has failed to show prejudice because Ossorio's testimony, even if credible, provides only a *partial* alibi. According to the respondent, the physical evidence indicates that the victim may have been murdered after the time when the petitioner would have returned from the Terrien home, that some of the petitioner's own incriminating statements indicate that he saw her later in the evening, and that the petitioner's evidence of a commotion in the neighborhood is hardly persuasive given that it was mischief night and teenagers were out around the neighborhood.[20] The respondent also notes that several aspects of Ossorio's testimony were inconsistent with other testimony in the case, which might have led a jury to discredit Ossorio, notwithstanding the habeas court's conclusion that he was a credible witness. We agree that Sherman's performance was not deficient by virtue of his failure to identify and call Ossorio as a witness, and we do not consider whether that alleged deficiency prejudiced the petitioner.

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[20] The state had argued at the petitioner's criminal trial, and the trial court instructed the jury, that it could find the petitioner guilty of the murder, even if it found that he went to the Terrien home, if it credited the state's evidence concerning the time of death rather than the defendant's.

Analysis

The petitioner's claim is one of inadequate investigation. The petitioner asserts that Sherman's performance was deficient because he unreasonably failed to investigate the identity of Dowdle's "beau" and consequently did not learn of his potentially exculpatory testimony and call him as a witness. To establish deficiency for failure to identify and call a witness in support of a defense, a petitioner generally must show that his attorney was informed of the existence of the witness, the substance of the testimony the witness might have to offer, and that the testimony would likely be helpful. See, e.g., *State v. Talton*, 197 Conn. 280, 297–98, 497 A.2d 35 (1985) ("[A petitioner claiming ineffective assistance for failure to call a witness must show that he] informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it.").

Sherman's failure to identify and call Dowdle's "beau" as an alibi witness was not unreasonable under the circumstances. There is no evidence that Sherman was aware, at any time prior to the petitioner's criminal trial, of Ossorio's existence or

that he might have helpful information to give in support of the petitioner's alibi defense. As part of his work to develop the petitioner's alibi claim, Sherman undertook an investigation to identify potential witnesses who were with the petitioner at the Terrien home on the night of October 30, 1975, and who could verify the petitioner's presence there.[21] Sherman testified at the habeas trial that he had specifically asked his client "on many occasions" who else was at the Terrien home watching television on the night of October 30, but the petitioner did not tell Sherman that Ossorio was present at the Terrien home that night, or that Ossorio might be able to support the petitioner's alibi claim.[22] In addition, no one else who

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[21] In addition to attempting to identify witnesses who were with the petitioner at the Terrien home, Sherman also identified and ultimately presented evidence at the criminal trial aimed at showing that the victim was murdered when the petitioner was allegedly at the Terrien home. That evidence included expert testimony from a forensic pathologist and testimony from witnesses who heard dogs barking and voices in the neighborhood sometime between 9:30 and 10 p.m. on October 30, 1975. See, e.g., *State v. Skakel*, supra, 276 Conn. 643 n.7; id., 652 n.14.

[22] The petitioner testified at the habeas trial that he gave Sherman the names of two persons, Ossorio and Ian Kean, who purportedly were boyfriends of Dowdle and could verify the petitioner's presence at the Terrien residence on the night of the murder, but the habeas court rejected this testimony when it referred in its memorandum of decision to the "failure of the petitioner to bring [Ossorio] to ... Sherman's attention." The habeas court thus appears to have believed Sherman's testimony that he had asked the petitioner "[o]n many occasions" who else was at the Terrien house watching

claimed to have been watching television with the petitioner at the Terrien home that night had ever mentioned that Ossorio was also there, either to investigators or to Sherman. Three others were supposedly with the petitioner watching television that night—Rushton Skakel, Jr., John Skakel, and their cousin, Terrien. Sherman interviewed each of them when preparing for trial, but Sherman testified at the habeas hearing that none of them mentioned Ossorio or suggested that Ossorio was with them that night. They had also been interviewed by the police in the weeks after the murder, but reports of interviews naming those present at the Terrien home that night similarly contain no mention of Ossorio or that anyone else was watching television with them. Indeed, even at the criminal trial, when Rushton Skakel, Jr., was specifically asked who else was in the room watching television beside himself, the only persons he named were Terrien and his brothers, John Skakel and the petitioner. If Ossorio had come in and out of the room where the others were watching the television show and spoke with them, as he claimed, he certainly would have been observed by them; yet, none of them mentioned him to investigators or to Sherman. Nor did Dowdle tell

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television and that he did not recall the petitioner ever telling him that Ossorio was there. The petitioner has not challenged the habeas court's conclusion as clearly erroneous on appeal. In addition, the petitioner did not call Terrien, Rushton Skakel, Jr., or John Skakel to testify at the habeas trial about whether they had recalled whether Ossorio was at the Terrien home, or whether they had ever had told Sherman that Ossorio might have been there that night.

Sherman about the possibility that anyone else beside Rushton Skakel, Jr., John Skakel, and Terrien could corroborate the petitioner's presence at the Terrien home. Indeed, Sherman was asked at the habeas trial: "Did [the petitioner] or any of his brothers or his cousin [Terrien] or his cousin [Dowdle] ever tell you that there was a man watching [television] with them at the [Terrien] house that night?" Sherman responded: "No." Sherman was then asked: "Did they ever give you any indication that there was anybody at the house who could corroborate the alibi?" Sherman answered: "Other than the family members, no."[23] In sum, neither the petitioner, nor Rushton Skakel, Jr., John Skakel, or Terrien, who told Sherman that they were with the petitioner at the Terrien home, ever suggested to Sherman the possibility that there was *anyone else* who might have verified the petitioner's presence at the Terrien home that night, despite Sherman's inquiries; to the contrary, the information that Sherman received indicated that Rushton Skakel, Jr., John Skakel, and Terrien were the only witnesses who could claim to have seen the petitioner at the Terrien home that night.

As a result, the only way Sherman could possibly have discovered Ossorio was through the singular

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[23] Sherman's associate, Throne, also testified at the habeas trial that neither the petitioner nor anyone else who claimed to have been with the petitioner at the Terrien house that night had mentioned the presence of Ossorio or any other nonfamily member at the Terrien home.

reference in the grand jury transcript to Dowdle's "beau." When Dowdle was asked during the grand jury proceedings whether she recalled seeing her brother, Terrien, on the night of October 30, 1975, she responded: "I'm not sure that I saw him. I think I heard him. I was in my mother's library, which [is] off the living room, and I was in there with my beau at the time, and I didn't really venture out." She said nothing else about him to the grand jury. She also testified, however, that she heard voices of the Skakel brothers, but could not be sure who the voices belonged to and could not recall who was there, apparently because she had not left the library. Dowdle's passing reference is the *only* reference to her "beau" in the materials that were available to Sherman before trial. The petitioner has not identified any other mention of her "beau" during the grand jury proceedings or in any of the hundreds of pages of materials disclosed by the state to the defense prior to the petitioner's criminal trial.

Sherman was not present during the grand jury proceedings but had access to the transcripts and testified at the habeas trial that he had reviewed them. Sherman testified at the habeas trial that, in light of Dowdle's grand jury testimony and the information from the petitioner, Rushton Skakel, Jr., John Skakel, and Terrien, he "had no reason to suspect that [the "beau"], in fact, would be helpful" in establishing whether the petitioner was at the Terrien home on the night of October 30, 1975, even if Ossorio had been present somewhere inside the

Terrien home.

Sherman did not act unreasonably in failing to attribute significance to or to further investigate this singular reference. Dowdle's single mention of her "beau" itself cast doubt on the likelihood that he might have seen who was at the Terrien home that night. Her testimony strongly suggested that, because she was together with her "beau" in the library and did not venture out or see Terrien or the Skakels, neither did her "beau."[24] Sherman thus could reasonably have concluded that her "beau" had also not seen any of the Skakels at the Terrien home that night and that, more than twenty years after the night in question, the "beau," having never been interviewed or come forward, likely would have no reliable memory of who was at the Terrien residence that evening.

The reasonableness of this conclusion is reinforced by the fact that neither the petitioner nor anyone else who was watching television at the Terrien home that night had ever mentioned the "beau" as being present, either to police investigators or to Sherman. Sherman's conclusion that Dowdle's "beau" had not seen the petitioner at the Terrien home that night was not speculation; it was the conclusion most consistent with information provided to Sherman by

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[24] The record indicates that the Terrien home was "a large estate" and that the library of the home was "in another section of the house" from where Terrien was watching television that night.

the petitioner, Terrien, Rushton Skakel, Jr., and John Skakel. Considered together with all of the information available to Sherman before trial, Dowdle's reference to her "beau" would seem unlikely to lead to helpful information. When assessing the reasonableness of counsel's investigation, we must apply "a heavy measure of deference to counsel's judgements" and uphold counsel's decisions as long as they find some reasonable basis in the record. *Strickland v. Washington*, supra, 466 U.S. 691. Although it is possible that some defense attorneys might have discerned some import from this reference and pursued it, despite the information received from their clients, "the right to counsel is the right to effective assistance, and not the right to perfect representation." *Michael T. v. Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012). Counsel has not performed deficiently simply for failing to unearth every possible lead in a case. See, e.g., *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The [s]ixth [a]mendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); cf. *Gaines v. Commissioner of Correction*, 306 Conn. 664, 681–87, 51 A.3d 948 (2012).

In these circumstances, we conclude that it was not unreasonable for Sherman either to overlook or disregard any potential significance of this singular reference in the grand jury transcripts in light of the information Sherman had learned from the petitioner

and others during his investigation, which indicated that no one else beside Rushton Skakel, Jr., John Skakel, and Terrien were with the petitioner watching television at the Terrien home on the night in question. See *Strickland v. Washington*, supra, 466 U.S. 691 ("when a defendant has given counsel reason to believe that pursuing certain investigations will be fruitless ... counsel's failure to pursue those investigations may not later be challenged as unreasonable").

Our conclusion is consistent with the decisions of several federal courts that an attorney's performance is not deficient as a result of the attorney's failure to identify and interview witnesses when the defendant has not given their names and addresses to counsel or advised counsel that the witnesses might possess potentially exculpatory information. For example, in *United States v. Farr*, 297 F.3d 651 (7th Cir. 2002), in which the defendant claimed that his attorney's performance was deficient because he failed to locate and interview several witnesses, even though the defendant had not given his attorney their names and addresses or advised him of specific exculpatory information they might possess, the court concluded: "A defense attorney is not obligated to track down each and every possible witness or to personally investigate every conceivable lead.... An ineffective assistance of counsel claim cannot rest [on] counsel's alleged failure to engage in a scavenger hunt for potentially exculpatory information with no detailed instruction on what this information may be or where

it might be found." (Citation omitted.) Id., 658.

The Eighth Circuit Court of Appeals reached the same conclusion in *Battle v. Delo*, 19 F.3d 1547, 1555 (8th Cir. 1994), amended on other grounds, 64 F.3d 347 (8th Cir. 1995), cert. denied sub nom. *Battle v. Bowersox*, 517 U.S. 1235, 116 S.Ct. 1881, 135 L.Ed.2d 176 (1996). In *Battle*, the court determined that counsel's failure to call a potential witness when the witness was listed once in the police reports by her first name and once by her first name and incorrect last name did not constitute deficient performance. Id. The court reasoned that the petitioner did not provide counsel with the name of the potential witness before trial, did nothing to help counsel locate those who could assist in his defense, and there was no evidence that counsel had notice of the identity of the witness. Id.; see also *Harris v. Bowersox*, 184 F.3d 744, 756–57 (8th Cir. 1999) (failure to call eyewitness when name of witness was listed in police report by first name, age, and by first and incorrect last name did not constitute deficient performance under *Battle* when counsel was not made aware of existence of witness before trial), cert. denied, 528 U.S. 1097, 120 S.Ct. 840, 145 L.Ed.2d 706 (2000).

Like the defendants or the petitioners in these federal cases, the petitioner in the present case and his family members not only failed to provide Sherman with Ossorio's name, but never suggested that they saw Dowdle's unnamed "beau" at the Terrien home or that the unnamed "beau" could

provide testimony that would have corroborated his alibi. See, e.g., *Toccaline v. Commissioner of Correction*, 80 Conn. App. 792, 817, 837 A.2d 849 (counsel's performance was not deficient as result of his failure to investigate possible witness when client did not mention witness to counsel), cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline v. Lantz*, 543 U.S. 854, 125 S.Ct. 301, 160 L.Ed.2d 90 (2004).

Correspondingly, in cases in which courts have determined that counsel's performance was deficient for failing to investigate a potential alibi witness, counsel had been provided with the witness' identity and had reason to believe that the witness might have helpful information to give. Thus, this court determined in *Gaines v. Commissioner of Correction*, supra, 306 Conn. 664, that defense counsel's performance was deficient because the petitioner gave counsel the names of the potential witness as one of only two persons in the area where the crime occurred that the petitioner knew, which could have been significant in light of the petitioner's inability to explain where he was at the time of the shooting. In other words, it would have been logical for counsel to determine whether the petitioner was with the potential witness, who was named by the petitioner, when the murder had occurred. See id., 683–87; see also *Mosley v. Atchison*, 689 F.3d 838, 849 (7th Cir. 2012) (failure to investigate and call two alibi witnesses known to counsel who would place petitioner across street at time fire started amounted

to deficient performance); *Vazquez v. Commissioner of Correction*, 107 Conn.App. 181, 185–87, 944 A.2d 429 (2008) (failure to call alibi witnesses known to counsel who would testify that petitioner was asleep in his apartment at time of armed robbery amounted to deficient performance). In the present case, the incredibly limited information available to Sherman about Dowdle's "beau" indicated that he likely would be of little help to the petitioner's defense, especially considering that neither the petitioner nor anyone who was allegedly watching television with the petitioner at the Terrien home mentioned his presence there.[25]

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[25] The petitioner argues generally in an introductory section of his brief that counsel has a duty to investigate. He also argues that counsel's duty to investigate is not governed solely by the information provided by a client because counsel has an independent duty to explore potential defenses and favorable witnesses. In this regard, the petitioner cites *Rompilla v. Beard*, 545 U.S. 374, 377, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), for the proposition that "the United States Supreme Court firmly and explicitly established ... that [an] attorney must go beyond what his client advises him in order to comply with the requirements of effective representation guaranteed by the sixth amendment." *Rompilla*, however, was not a case involving counsel's failure to investigate an alibi witness or, for that matter, any type of witness, and, thus, is not applicable in the present context. In *Rompilla*, the petitioner's attorneys made limited efforts to obtain additional mitigation evidence concerning the petitioner's childhood after he advised them that his childhood was "unexceptional ...." Id., 379. Evidence in the habeas proceeding, however, established that, if the petitioner's counsel had reviewed a file in the prosecution's possession concerning a prior conviction, which the prosecution intended to use to establish an aggravating factor, counsel would have

Furthermore, the dissent relies on, among other cases, a Second Circuit case, namely, *Pavel v. Hollins*, 261 F.3d at 219 (2d Cir. 2001), which, according to the dissent, demonstrates that the petitioner in the present case is entitled to relief. The dissent quotes the case at length but omits with ellipses the portion of the decision in which the court explains that defense counsel in that case was specifically made aware, in advance of trial, both of the identity of the witness and the important information the witness had to give—facts that distinguish *Pavel* from the present case. See id., 220 ("[Defense counsel] was familiar with the basic contours of [the witness'] testimony before the trial—presumably because he had spoken about the matter with [his client]. But [defense counsel] never [followed up] on what he

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uncovered leads that would have led to substantial evidence that the petitioner had a terrible childhood, which could have been presented as mitigation evidence. See id., 383–84. The court in *Rompilla* thus determined that counsel was ineffective because, "once counsel had an obligation to examine the file, counsel had to make reasonable efforts to learn its contents; and once having done so, [counsel] could not reasonably have ignored mitigation evidence or red flags simply because they were unexpected." Id., 391 n.8. Accordingly, *Rompilla* stands for the proposition that counsel has a duty to review information he knows the prosecution has and intends to introduce at trial, and that case is not directly applicable to counsel's duty to investigate potential alibi witnesses. See id., 377; see also *Hannon v. Secretary, Dept. of Corrections*, 562 F.3d 1146, 1155 (11th Cir.) ("*Rompilla* requires 'reasonable efforts to obtain and review material counsel knows the prosecution will probably rely on as evidence' "), cert. denied sub nom. *Hannon v. McNeil*, 558 U.S. 997, 130 S.Ct. 504, 175 L.Ed.2d 358 (2009).

learned of [the witness'] putative testimony with [the witness] herself ...."). If the petitioner, Rushton Skakel, Jr., John Skakel, or Terrien had told Sherman that Ossorio was with them and had seen the petitioner at the Terrien home on the night of October 30, 1975, *Pavel* might be more analogous to the present case. Of course, the information available to Sherman from those allegedly with the petitioner at the Terrien home that night indicated that no one else was with them and that Dowdle's "beau" thus had not seen the petitioner that night and could not corroborate his alibi. We therefore find *Pavel*—and for similar reasons the remaining case law on which the dissent relies—to be inapposite to the factual circumstances of the present case.

In sum, given the strong presumption that counsel has rendered adequate assistance, and relying on the well established principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"; (internal quotation marks omitted) *Johnson v. Commissioner of Correction*, 285 Conn. 556, 577, 941 A.2d 248 (2008); we conclude that the habeas court incorrectly determined that Sherman's performance was deficient under the first prong of *Strickland*. We thus need not address the issue of prejudice.

D

Failure To Call Witnesses To Impeach Gregory Coleman's Testimony

The habeas court also faulted Sherman for failing to locate, investigate, and call three witnesses who might have impeached the testimony of Coleman concerning one of the petitioner's confessions. The respondent argues that this conclusion was incorrect because Sherman's performance did not fall below an objective standard of reasonableness. We agree with the respondent that Sherman's performance was not deficient and therefore not ineffective. Although Coleman provided evidence that the petitioner had confessed to murdering the victim, Sherman acted reasonably in concluding that he could sufficiently attack Coleman's credibility directly through cross-examination and without the need to pursue additional witnesses.

1

Additional Background

Coleman testified for the state at a number of pretrial hearings in the petitioner's criminal case, including before the grand jury, at the petitioner's juvenile transfer hearing, and again for two days at the petitioner's probable cause hearing. He testified that the petitioner had explicitly confessed to murdering the victim. Coleman died about one year

before the petitioner's criminal trial, and, thus, he did not testify before the jury. Instead, the state had his probable cause hearing testimony read into the record at the criminal trial.

At the probable cause hearing, Coleman testified that he had been a resident at Elan when the petitioner was also a resident there. While there, he was assigned to guard the petitioner one evening because the petitioner had tried to escape from the facility. Coleman testified that, during that evening, the petitioner told him that he was going to get away with murder because he was a member of the "Kennedy" family. Coleman asked the petitioner what he meant, and, according to Coleman, the petitioner explained that "he had made advances [toward] this girl where he lives and that she spurned his advances and that he drove her skull in with a golf club." Coleman also claimed that the petitioner told him that the attack occurred in a wooded area, the golf club had broken during the attack, and that, two days after the murder, he "had gone back to the body and masturbated on [it]." Coleman also recalled another occasion at Elan when the petitioner was in a group therapy session, the subject of murder was brought up, and the petitioner was instructed to repeat the words "I am sorry" as a means of "get[ting] in touch" with his feelings of guilt.

Sherman cross-examined Coleman at the probable cause hearing and obtained a number of admissions from Coleman that raised questions concerning the

truthfulness of his testimony about the petitioner's confession and his credibility as a witness generally.

Coleman admitted under questioning that his testimony at the probable cause hearing was different from his testimony at prior hearings and that his recollection about the petitioner's confession had changed. At the prior grand jury hearing, Coleman testified that the petitioner had personally confessed to him five or six times. At the probable cause hearing, however, Coleman claimed that the petitioner confessed only twice—once when Coleman was guarding the petitioner, and another time when the petitioner was instructed to apologize for the murder during a group therapy session, which Coleman thought was akin to a confession. At the earlier grand jury hearing, Coleman also testified that the petitioner said that he had used a driver type of golf club to attack the victim. But, during the probable cause hearing, Coleman testified that the petitioner had not said anything about the type of club used and claimed that it was just Coleman's "impression" that the petitioner had used a driver based on the petitioner's statement to Coleman that he "drove" the victim's skull in.[26] And, as another example, Coleman told the grand jury that the petitioner had confessed while he and the petitioner were talking about their families and why they had been sent to Elan. But, at the probable cause hearing, Coleman denied that he had been talking to the petitioner when the petitioner confessed. Instead,

[26] The club used in the murder was not a driver.

Coleman related that he had neither met nor spoken with the petitioner before he confessed, and he claimed that the petitioner's comment about getting away with murder because he was a part of the "Kennedy" family was the first thing the petitioner ever said to him.

Coleman blamed the changes in his story on a "[l]apse of memory." Under questioning, Coleman acknowledged that his recollection was "questionable" at times because his conversation with the petitioner had occurred more than twenty years before and because he had heavily abused illegal drugs for many years in the interim. He admitted that he was high on heroin when he testified before the grand jury, having injected himself with the drug at his hotel about one hour before he testified. On the second day of his probable cause testimony, Coleman also disclosed under questioning that he had been ill from opiate withdrawal on the first day of his probable cause testimony and, afterward, had to be taken to the hospital for methadone treatment. He also admitted to having last used heroin just two days before he testified at the probable cause hearing.

Sherman also questioned Coleman about his delay in coming forward with the petitioner's confession. Although Coleman claimed that the petitioner confessed sometime in 1978, Coleman said he did not remember telling anyone about the confession until twenty years later. Coleman explained that, sometime in 1998, he was with his wife watching a

"tabloid" television show about the murder when he remembered the petitioner's confession from twenty years before and told his wife about it. He did not call the police after remembering but, instead, called a national television network after seeing yet another television program about the case, and, when he did not reach anyone at the network, he called a local television station. Coleman was interviewed by the local station about his role in the case before he gave his probable cause testimony. He also testified that he had watched three separate television programs about the case before testifying at the probable cause hearing and admitted that he could not be sure that his memory was unaffected by the content of the programs. When Sherman asked if anyone else could verify his claims about a confession, Coleman said that someone else had guarded the petitioner with him when the petitioner confessed. He gave the names of three individuals who might have been the other person there—John Simpson, Alton Everette James, or Cliff Grubin—although Coleman said that he could not remember who was there and did not know whether the other person had even heard the petitioner's confession.

With respect to Coleman's character for truthfulness, generally, Sherman elicited admissions from Coleman that he was a frequent user of illicit drugs, had been convicted of committing multiple crimes, and had even served prison time in New York. Coleman also acknowledged that, after investigators for the state contacted him about his

story, he asked them to help with criminal charges he had in New York and for financial assistance from the state, although he said he never received either.

The petitioner's counsel elicited testimony during the habeas trial that Sherman, in preparing for the petitioner's criminal trial, directed his investigator to look for Simpson, James, and Grubin, but the investigator was not able to locate or contact them before the criminal trial, and thus Sherman did not learn the content of any testimony they might have been able to provide. Neither the petitioner nor the respondent asked the investigator at the habeas trial about the extent of the efforts he used to find these witnesses; the investigator testified only that he was directed to locate them, he made efforts to do so, was unable to find them, and that no further efforts were made after that. Despite not finding the witnesses, Sherman testified during the habeas trial that he did not believe that their testimony would have made a difference, even if it would have been favorable to the petitioner. According to the habeas court, Sherman felt that "he so completely destroyed Coleman's credibility on cross-examination that he believed no reasonable jury would credit [Coleman's] tale."

At the petitioner's criminal trial, the court allowed Coleman's probable cause hearing testimony, including Sherman's cross-examination of Coleman, to be read into the record before the jury. Sherman relied on his cross-examination of Coleman as the means of attacking the credibility of his claim that

the petitioner had confessed. Neither the state nor Sherman presented testimony at the criminal trial from any of the three individuals who Coleman thought might have been the person guarding the petitioner when the petitioner confessed. To support Coleman's credibility, however, the state presented testimony at trial from Coleman's widow, who testified that Coleman had twice told her that someone named "Mike Skakel" from Elan had confessed to murder. She claimed that Coleman first told her about the confession when they were dating in 1986, and then again in 1998 when Coleman saw the "tabloid" television show about the murder.

Also, during the criminal trial, another witness came forward for the first time and claimed that Coleman told her about the petitioner's confession sometime in 1979. The state called her as a rebuttal witness. The witness testified that, while she and Coleman were both residents at Elan, Coleman told her that another resident, the petitioner, told Coleman he was related to the Kennedy family and had murdered a girl with a golf club. She also testified that she thought Coleman was one of the "good people" at Elan, that she had shared secrets with him, and that, to her knowledge, he had kept those secrets in confidence. She also testified that it was common knowledge among Elan residents that the petitioner was there because he had murdered someone.

In his habeas petition, the petitioner claimed that

Sherman's representation was ineffective insofar as he failed to locate, interview, and call as witnesses the three individuals named by Coleman—Simpson, James, and Grubin. According to the petitioner, Sherman unreasonably relied on his cross-examination to discredit Coleman's testimony, and he argued that Sherman was required to call these three individuals as witnesses to contradict Coleman's story. The petitioner also claimed that Sherman's lapse prejudiced his defense because, if the jury had heard the testimony of these individuals, there is a reasonable probability that it would have discredited Coleman's testimony and found the petitioner not guilty.

In support of his claim, the petitioner presented testimony from the three individuals, which had been given during an earlier posttrial hearing. Each had testified that they had not heard the petitioner ever confess to the murder.

Notably, Simpson recalled having guarded the petitioner with Coleman one evening but disputed Coleman's claim that the petitioner had confessed while being guarded. Simpson explained that, while guarding the petitioner that night, he was busy drafting reports while Coleman watched the petitioner. At some point during the evening, Coleman exclaimed that the petitioner admitted to having killed a girl. Simpson asked the petitioner if it was true, but the petitioner denied it. Simpson asked Coleman why he thought the petitioner had

confessed. Coleman explained that he had asked the petitioner if he killed a girl, apparently in response to rumors about the petitioner's involvement in a murder, but the petitioner did not deny responsibility and had smiled with a "shit eating grin ...." When Simpson pressed Coleman about his claim that the petitioner confessed, Coleman said that was the petitioner's "reaction, the fact that he didn't say no" in response to Coleman's question. Simpson acknowledged, however, that he had not paid attention to any of Coleman's conversation with the petitioner until Coleman exclaimed that the petitioner confessed. He also testified that he is deaf in his left ear and that Coleman and the petitioner had been to his left.

Simpson also recalled a separate occasion when, shortly after leaving Elan in 1980, he was speaking with the petitioner about the murder and asked him if he had killed the victim. According to Simpson, the petitioner said "[n]o, I didn't do it," and explained that he had been "drinking and partying that night" and that "[t]here were ... times that I may not ... remember ... but I certainly don't remember doing anything like that."

The habeas court agreed with the petitioner and concluded that Sherman's representation was ineffective in that he failed to find and call as witnesses the three people who Coleman thought might have been with him when the petitioner confessed. Although the habeas court acknowledged

the strength of Sherman's cross-examination, it nevertheless concluded that "Sherman's decision not to pursue Simpson, James, and Grubin reflected a significant and impactful lack of judgment." The habeas court also concluded that Sherman's deficient performance prejudiced the petitioner's defense: "Sherman's failure to investigate and present the testimony of [the three individuals] left the core of Coleman's testimony only tangentially challenged.... With [their] testimony ... there is a reasonable likelihood that Coleman's testimony would have been discredited, substantially weakening the state's prosecution. In the absence of credible testimony from Coleman tying the petitioner to the murder, there is a reasonable likelihood that the outcome of the trial would have been different."

2

Analysis

Sherman did not succeed in locating the three potential witnesses named by Coleman, and so he used his cross-examination of Coleman from the probable cause hearing as the means of impeaching Coleman's testimony. The petitioner has, however, failed to prove that Sherman's efforts to locate the three individuals were unreasonable and that Sherman's decision to use his cross-examination of Coleman in the absence of the witnesses' testimony was deficient.

The law governing ineffective assistance of counsel claims gives counsel substantial discretion to decide how to present a defense; this discretion includes determining which evidence to present and which witnesses to call to support the defense. See, e.g., *Bryant v. Commissioner of Correction*, supra, 290 Conn. 521. Counsel's decisions must be based on reasonable investigations, but "counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Internal quotation marks omitted.) *Gaines v. Commissioner of Correction*, supra, 306 Conn. 683. Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, supra, 466 U.S. 690–91. In addition, in assessing counsel's decisions about how to present a defense, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id., 689.

In the present case, the petitioner and the habeas court faulted Sherman for proceeding to trial without first locating any of the witnesses named by Coleman. The evidence presented at the habeas trial indicates, however, that Sherman *did* try to find them. Sherman, his associate Throne, and his investigator each testified that efforts were made to find these witnesses. The record lacks details, however, as to the extent of the investigation. The petitioner's counsel asked the investigator at the habeas trial whether he searched for the witnesses and whether he found them, but presented no evidence about what efforts the investigator made. Without that evidence, we cannot assess the reasonableness of counsel's investigation. There is, however, some evidence in the record indicating that the witnesses were extremely difficult to find, suggesting that Sherman's failure to locate them prior to the petitioner's criminal trial very well might not be the result of a poor search but due to the difficulty in locating those witnesses.[27]

The petitioner had the burden to present evidence demonstrating that Sherman's investigation was constitutionally inadequate. In the absence of this evidence, we must presume that Sherman performed

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[27] Sherman's investigator testified at the habeas trial that he had been told by the investigator who found the witnesses after trial that it was one of the most difficult assignments he had ever conducted. One of the witnesses was out of the country during the relevant time period and another had the same name as thousands of individuals.

competently. See id., 688–91. Without any evidence to establish that Sherman's efforts on behalf of the petitioner were unreasonably deficient, the petitioner has not met his burden of establishing that Sherman had failed to conduct a reasonable investigation.[28]

Moreover, because Sherman could not locate the witnesses before the petitioner's criminal trial, his decision to use his cross-examination of Coleman as the means to attack Coleman's credibility was reasonable. Because Coleman died before the criminal trial, Sherman would have known that any presentation of Coleman's assertions to the jury would be through his prior testimony from the probable cause hearing and would include his

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[28] In its memorandum of decision, the habeas court appears to have presumed that Sherman did not make any effort to pursue the witnesses that Coleman named, but that presumption is unsupported by the record at the habeas trial; the evidence is in fact to the contrary. The only evidence in the habeas record relating to whether Sherman pursued these witnesses indicates that he *did* make efforts to look for them, although we do not know what those efforts were. Even if the habeas court had discredited this testimony, it was not at liberty to reach an opposite finding without some evidence from the petitioner to show that Sherman had, in fact, decided not to look for them. See *State v. Hart*, 221 Conn. 595, 605, 605 A.2d 1366 (1992) ("[w]e have consistently stated ... that [a fact finder] may not infer the opposite of a witness' testimony solely from its disbelief of that testimony"). Thus, even if the habeas court discredited the uncontradicted testimony of Sherman, Throne, and the investigator, it would be left without any evidence concerning whether Sherman searched for these witnesses and would be able to conclude only that the petitioner had not sustained his burden of proof.

cross-examination. Sherman's cross-examination was strong and highlighted numerous, significant admissions from Coleman that raised questions about the truth of his claims and his credibility generally.

Under questioning by Sherman, Coleman admitted that he changed his story about what the petitioner had told him in several respects: that his memory was questionable and might have been affected by drug use; that he had been under the influence of heroin at a prior hearing and suffering from withdrawal at the probable cause hearing; that he did not tell anyone about the petitioner's confession until after seeing a television show about the case decades later; that his first call to report the confession was to a television network and not to the police; that he could not be sure that what he saw on television had not influenced his memory; that he had asked the state for special treatment with pending criminal cases and for money in connection with his testimony; and that he was a convicted felon who had served time in prison. Coleman's admissions during cross-examination permitted Sherman to persuasively argue that Coleman was not a credible witness, that his story could not be trusted, and that he might have invented his claims after hearing about the case on television as a means to obtain attention, profit, or leniency with regard to pending criminal matters.

In addition, Sherman also would have known

that, because of Coleman's death, his cross-examination would be presented to the jury as it happened at the probable cause hearing, without the state having any additional opportunity to alter its examination of Coleman to blunt the impact of his admissions or to block certain testimony through new objections to Sherman's questions. We also note that, unlike in other cases, in which we have found ineffectiveness for failure to present witnesses, Sherman's inability to locate the potential witnesses prior to trial did not prevent him from challenging Coleman's testimony. In cases in which we have found ineffectiveness, counsel's failure to locate or call certain witnesses has been deemed deficient when counsel's failure left a petitioner without the means to present certain defenses. For example, in *Bryant v. Commissioner of Correction*, supra, 290 Conn. 508–509, 517–18, counsel's failure to call certain witnesses known to counsel deprived the petitioner in that case of a "plausible" third-party culpability defense. And, in *Gaines v. Commissioner of Correction*, supra, 306 Conn. 673–74, 685–87, the petitioner gave counsel names of the only people he knew in the area where the crime was committed, but counsel did not interview them or present their testimony, and this failure deprived the petitioner of an alibi defense at trial. In the present case, by contrast, Sherman's use of his cross-examination, in light of his inability to locate Simpson, James, and Grubin, did not leave Coleman's testimony unimpeached—counsel had a strong means to impeach Coleman though critical admissions made

by Coleman himself.

On the basis of the evidence in the habeas record, the petitioner has failed to prove that Sherman's inability to locate the potential witnesses was the result of professional incompetence and thus has not shown that his performance under the circumstances was unreasonable. We therefore disagree with the habeas court that Sherman's performance was constitutionally deficient in this regard.

III

THE PETITIONER'S ALTERNATIVE GROUNDS FOR AFFIRMING THE HABEAS COURT'S JUDGMENT

We have determined that the habeas court incorrectly concluded that Sherman's representation was ineffective for the three reasons identified previously. Consequently, we next must consider whether the habeas court's judgment may be affirmed on one of the alternative grounds urged by the petitioner. The petitioner has offered seven alternative grounds, claiming that Sherman rendered ineffective assistance for reasons in addition to those that we have already discussed. He has also claimed that he is entitled to habeas relief because Sherman had a conflict of interest in representing him. We conclude that none of these alternative grounds entitles the petitioner to habeas relief.

A

Alternative Grounds Relating to Third–Party Culpability Defense

The first alternative ground offered by the petitioner relates to his third-party culpability defense. The petitioner claims that, even if Sherman was not constitutionally required to implicate Thomas Skakel, Sherman should have done a better job in implicating Littleton and also should have implicated two other individuals. We reject these arguments.

1

Sherman's Handling of the Defense Implicating Littleton

The petitioner claims that Sherman mishandled the defense implicating Littleton. His claim is based on a composite drawing created in the days after the murder and used at trial. The petitioner argues that the drawing depicts a person seen about one block away from the crime scene around 10 p.m. on October 30, 1975, at or around the time when the petitioner claims the murder likely occurred. According to the petitioner, the person depicted in the drawing resembles Littleton. Although the drawing was referenced in police reports that Sherman reviewed before trial, he did not specifically ask the state to produce it. The petitioner argues that Sherman

should have obtained a copy of the drawing from the state before trial and used it to bolster his defense implicating Littleton by arguing that Littleton was spotted near the crime scene at about 10 p.m. that night, contradicting Littleton's claim that he was inside watching television at that time. Sherman's failure to do so, the petitioner contends, was constitutionally deficient performance that prejudiced his defense.

The habeas court rejected the petitioner's claim. It determined that Sherman's performance was deficient but concluded that any deficiency did not cause any prejudice to the petitioner. According to the habeas court, the issue raised concerning the drawing was "somewhat of a nonstarter" because the drawing does not depict the person seen later at 10 p.m. but depicts someone seen earlier in the evening who had been cleared by the police of any involvement in the murder. Because the drawing was not of the person seen at 10 p.m., the habeas court concluded that it would be of no help in determining whether Littleton was the person seen walking in the area of the crime scene that night.

After reviewing the parties' briefs and the portions of the record pertaining to this claim, we agree with the habeas court's conclusion that the petitioner failed to establish prejudice. The habeas court explained that the police reports referencing the drawing strongly indicated that it depicted a local resident who was not involved in the victim's murder.

Sherman thus reasonably could have decided that expending additional resources to track down the drawing would not be worth the effort. Moreover, as the habeas court concluded, even if Sherman's performance was deficient by virtue of his failure to obtain and use the drawing at trial, we agree that the drawing would not have helped the petitioner's defense for the reasons advanced by the habeas court. Because the petitioner has failed to show any prejudice, his claim cannot succeed, and we need not also consider whether the habeas court properly determined that Sherman performed deficiently. See *Strickland v. Washington*, supra, 466 U.S. 697 ("[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.").

2

Sherman's Failure To Investigate Additional Third–Party Suspects

The petitioner also raised a claim that Sherman's performance was ineffective insofar as he failed to investigate a tip received before trial that someone named Gitano "Tony" Bryant might have known who killed the victim. The information from Bryant also formed the basis of a claim the petitioner made in his

new trial petition. See *Skakel v. State*, supra, 295 Conn. 465. The facts concerning Bryant's information are set forth in detail in our decision in the petitioner's appeal from the denial of his motion for new trial. Id., 468–77. For present purposes, it suffices to say that, after the petitioner's criminal trial, Bryant gave a statement to the petitioner's investigators in which he claimed to have been in Greenwich the evening of October 30, 1975, and that two of his friends who were with him that night later confessed to him that they were responsible for the victim's murder. See id., 472. The petitioner claimed during the proceedings on his motion for a new trial that Bryant's story was newly discovered evidence, not known to the defense before trial. Id., 465. The trial court rejected the petitioner's claims based on Bryant's story; see id., 473–77; and we affirmed. Id., 522.

At the habeas trial, the petitioner contradicted his earlier position, claiming instead that Bryant's story was not new information but was known to Sherman before the petitioner's criminal trial. According to testimony presented for the first time at the habeas trial, one of the victim's childhood friends, Marjorie Walker Hauer, called Sherman in the weeks before the criminal trial and alerted him to something she had heard from her brother, who was a friend of Bryant's. Hauer explained that her brother had told her that Bryant claimed to have been in Greenwich on the evening of October 30, 1975, with two friends, and that his friends admitted to Bryant that they

killed the victim. Hauer testified that Sherman responded that he was aware of the story and that it was not credible, although Sherman could not recall this conversation when he testified at the habeas trial.

The habeas court credited Hauer's testimony and found that Sherman knew of the tip and performed deficiently when he failed to investigate it. Nevertheless, the habeas court concluded that Sherman's lapse did not prejudice the petitioner because, even if he had investigated, his efforts would not have provided any benefit to the defense. The court first explained that Sherman might not have been able to obtain any useful information from Bryant before the petitioner's criminal trial, noting that Bryant had later refused to repeat his story when placed under oath. The habeas court next concluded that, even if Bryant had given Sherman some information before trial, it likely would not have been enough to assert a third-party culpability claim against the two individuals whom Bryant named because the petitioner failed to prove that Sherman would have had enough evidence to directly connect those two individuals to the murder. Finally, the habeas court also concluded that, even if a jury heard Bryant's claims, it was unlikely to give them any credit. Bryant's claims were not meaningfully corroborated by other evidence and were, in fact, inconsistent with other evidence. Bryant also had a reputation for deceit.

Assuming without deciding that the habeas court correctly concluded that Sherman's representation was deficient, we agree with the habeas court that the petitioner failed to prove prejudice for the reasons given by that court. In addition to those reasons, we also observe that Bryant's statement to the petitioner's investigators likely would not have been admissible at trial, let alone sufficient to form the basis for a third-party culpability claim. See *Skakel v. State*, supra, 295 Conn. 523–24 (*Zarella, J.*, concurring) (explaining why Bryant's out-of-court statements were inadmissible hearsay). We therefore agree with the habeas court's conclusion that, even if Sherman had pursued the tip he received, "it likely would not have been helpful to the petitioner." Because the petitioner has failed to show any prejudice from this alleged lapse, we reject this alternative ground for affirmance.

B

Sherman's Handling of the Evidence About Why the Petitioner Was Placed at Elan

For his next alternative ground for affirmance, the petitioner claims that Sherman's representation was ineffective insofar as he failed to rebut the state's argument that the petitioner's family sent him to Elan because they thought he might be responsible for the victim's murder and thus wanted to keep him out of the Greenwich area and away from investigators. The petitioner claims that he was sent

to Elan, not because of anything to do with the murder, but because of his poor grades in school and because he was charged with driving under the influence in New York. The petitioner argues that Sherman should have objected to the admission of evidence about why he was sent to Elan or, alternatively, presented evidence showing that he was sent to Elan for reasons entirely unrelated to the victim's murder. He argues that Sherman's failure to do either was unreasonable and prejudicial. We disagree.

The petitioner enrolled at Elan in 1978, about three years after the murder, when the petitioner was about seventeen or eighteen years old. It was at Elan that the petitioner purportedly made a number of inculpatory statements about the victim's murder, including his statement to Coleman that he had drove the victim's skull in with a golf club because she had spurned his advances.

At the petitioner's criminal trial, the state presented evidence about why the petitioner had been sent to Elan. The state first asked the petitioner's father, Rushton Skakel, Sr., about his placement there. Sherman objected to the state's question on the ground that it sought irrelevant information and inadmissible misconduct evidence, but the trial court overruled the objection. Nevertheless, Rushton Skakel, Sr., who was apparently suffering from dementia at the time of trial, could not remember the reason. The state later

presented evidence from other Elan residents who claimed that the petitioner told them why he was sent to Elan. One witness, Rogers, testified that, while at Elan, the petitioner told her that his family might have placed him there because they were afraid he committed a murder in Greenwich and were trying to hide him from the local police. Another witness, Coleman, who had testified that the petitioner confessed to killing a girl with a golf club, also testified that the petitioner had told him that he was sent to Elan because of the murder.

For his part, Sherman elicited testimony from the petitioner's sister, Julie Skakel, that the petitioner was enrolled at Elan because of problems he had in other schools that he attended. She explained that the petitioner had been diagnosed with dyslexia, had trouble listening in school, and that his inability to pay attention was perceived as a behavioral problem. She further testified that the petitioner had a "turbulent" relationship with their father at the time, and was abusing alcohol and illegal drugs, and had been dismissed from several other schools before going to Elan.

In its closing argument, the state acknowledged that the petitioner's behavior and substance abuse problems might have contributed to his enrollment at Elan, but the state also offered an additional reason. It argued that the petitioner's own statements to Rogers and Coleman established that he might have been sent there in part because of his role in the

murder, providing additional evidence of his guilt.

The petitioner claims that Sherman's representation was ineffective in that he failed to defend against the state's evidence on this issue. The petitioner first argues that Sherman should have objected to the state's offering of evidence about why the petitioner was sent to Elan. He also argues that, in the absence of any such objection, Sherman should have presented information contained in a Greenwich police report indicating that the petitioner was sent to the school after being charged with driving under the influence (DUI) in New York. The report was based on information received from the Windham, New York police, and explained that the petitioner "was driving on a local road, at which time he was signaled by a standing police officer investigating an accident to stop, at which time [the petitioner] attempted to run down the police officer, fled the scene, was chased and eventually hit a telephone pole." After appearing in court, the petitioner pleaded guilty to motor vehicle charges and, "later that afternoon, [an airplane] arrived at the local airport, and [the petitioner] was handcuffed and taken by two attendants and a [physician] to [Elan] in Maine." The petitioner claims that Sherman should have used the information in this report to argue that the petitioner was sent to Elan solely because of his school problems and his DUI charge, and not because of any alleged involvement in the murder.

The habeas court determined that Sherman's

failure to object to or to use the police reports constituted deficient performance but concluded that Sherman's deficient performance did not prejudice the petitioner because the reasons for the petitioner's placement at Elan were, at best, tangential to the question of the petitioner's guilt.[29]

We conclude, contrary to the habeas court, that the petitioner failed to prove that Sherman's performance was deficient. First, Sherman *did* object when the state sought testimony on this subject, but the objection was overruled. And it was after this objection was overruled that the state elicited testimony from the Elan witnesses about the

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[29] The habeas court also noted that Sherman could have used police reports to rebut another aspect of the state's argument at trial. According to the habeas court, the state argued at the petitioner's criminal trial that Elan staff members must have learned about the petitioner's potential involvement in the murder through the petitioner or his family because the police never had contact with Elan staff. The habeas court noted that some of the police reports indicate that investigators had spoken with Elan staff about the petitioner's presence there and determined that Sherman should have used these reports to rebut the state's argument that these contacts never occurred. We disagree, however, because the state did not argue that the police had *no* contact with Elan staff. Instead, the state argued that the police did not disclose any details about the investigation or the petitioner's potential involvement to Elan staff. This argument was supported by testimony from one of the police investigators, who testified that the police had not shared any details of their investigation with Elan staff and that the petitioner was not considered a suspect at the time he was at Elan.

petitioner's own statements concerning the reasons he was sent to Elan. Second, as to Sherman's failure to present evidence about the petitioner's DUI charge, Sherman reasonably could have concluded that opening the door to the circumstances surrounding that charge would not be worth the risks. We do not know precisely why Sherman chose not to present evidence concerning the DUI charge because the petitioner's habeas counsel did not directly ask Sherman about it at the habeas trial.[30] Counsel did ask him why he chose not to put on other witnesses, including the Skakel family attorney, who might have explained the reasons that the petitioner

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[30] There were no questions posed to Sherman concerning the police report referencing the DUI charge, likely because the petitioner did not include a claim in his habeas petition about Sherman's handling of the evidence concerning why the petitioner was sent to Elan. During the habeas trial, habeas counsel nevertheless asked Sherman why he had not presented testimony from other witnesses to rebut the state's evidence that the petitioner was sent to Elan because of the murder, but did not specifically ask him about why he chose not to present evidence concerning the DUI charge. The respondent's counsel asked follow-up questions about witnesses that Sherman could have called, but also did not discuss the police report. After the habeas trial, the habeas court found the police report referencing the DUI charge when reviewing documents in the record and inquired of counsel whether it related to any of the claims in the habeas petition. The court ultimately determined that the petitioner had failed to plead a claim concerning Sherman's handling of evidence relating to the petitioner's enrollment at Elan but that the issue was properly before the court because both the petitioner's counsel and the respondent's counsel had asked questions on this issue during the habeas trial.

was sent to Elan. Sherman responded that he was concerned about "opening doors" that might allow the state to introduce otherwise inadmissible misconduct evidence, including evidence that the petitioner suffered from psychiatric problems and had a history of cruelty toward animals. Counsel in Sherman's position reasonably could have concluded that introducing information from the police report about the DUI charge would present a similar risk. It likely would have permitted the state to put the report into evidence and to further inquire about its contents, thus putting before the jury evidence that the petitioner had once tried to run down a police officer with his vehicle. Because Sherman was able to elicit testimony that the petitioner's performance and behavior in school led to his enrollment at Elan, it would not be unreasonable for defense counsel to avoid presenting additional evidence on this topic that might invite the state to present otherwise inadmissible and potentially prejudicial misconduct evidence. We therefore conclude that the petitioner failed to prove deficient performance and do not address whether the habeas court correctly determined that the petitioner did not suffer prejudice from Sherman's failure to present evidence concerning the petitioner's DUI charge.

C

Sherman's Failure To Use Expert Testimony Regarding the Coercive Environment at Elan

The petitioner next claims that Sherman unreasonably failed to present expert testimony to explain how the coercive environment at Elan rendered any statements to other residents about his involvement in the murder unreliable. Testimony adduced at the petitioner's criminal trial established that, after the petitioner tried to escape from Elan, he was subjected to a "general meeting" before the other residents at which the facility director confronted the petitioner about the murder and at which other residents were allowed to scream and curse at him. This meeting lasted several hours. The petitioner was later placed in a boxing ring, pummeled by other residents, and paddled by the director while being asked about the murder in front of other residents. The petitioner initially denied involvement in the victim's murder, but, after being subjected to repeated verbal and physical attacks, the petitioner cried and responded that he could not remember what had happened or that he might have been involved but did not remember, at which time the attacks would cease. As we noted previously, in addition to these statements made in a group setting, the petitioner also privately made inculpatory statements to certain other residents, including two separate admissions that he had killed the victim.

According to the petitioner, Sherman should have called an expert witness to explain to the jury that the psychological pressure and physical punishment imposed by the Elan staff forced the petitioner to adopt a compromise strategy, whereby he gave up

denying involvement and instead claimed to have no memory of the murder, as a means to stop his adverse treatment by Elan staff and other residents. The petitioner also argues that Sherman should have presented expert testimony to cast doubt on the reliability of the testimony from Elan residents who claimed that the petitioner admitted his involvement in the murder.

To support his claim, the petitioner presented testimony from an expert at the habeas trial, Richard Ofshe, a psychologist, who testified that the coercive treatment at Elan likely forced the petitioner to stop denying involvement in the murder when he was confronted about it in group sessions as a means to avoid further punishment. Ofshe acknowledged, however, that his theory about the effect of Elan's coercive methods on the truthfulness of the petitioner's statements in group settings could not explain why he voluntarily made explicit confessions to other residents, like Coleman, in private settings.

The habeas court concluded that Sherman's representation was deficient insofar as he failed to present expert testimony on these topics but found that the petitioner was not prejudiced by Sherman's omissions. The habeas court determined that Ofshe's testimony might have helped explain why the petitioner claimed a lack of memory about the victim's murder in group settings but that his testimony would not have meaningfully assisted the jury in assessing the reliability of the testimony

concerning the petitioner's inculpatory statements made in private settings.

After considering the arguments of the parties and reviewing the relevant portions of the record, we agree, on the basis of the reasons given by the habeas court, with its determination that any expert testimony about the coercive nature of Elan's treatment of the petitioner would not have meaningfully assisted the petitioner's defense at trial. Certainly, there are situations in which expert testimony might be required to present a constitutionally adequate defense; see, e.g., *Michael T. v. Commissioner of Correction*, supra, 307 Conn. 100–101; but this case is not one of them. Expert testimony on this subject would have been of little additional value because there already was sufficient evidence before the jury about Elan's coercive methods. The jury was given firsthand accounts from other residents about the severe and even violent manner in which Elan's director and other residents treated the petitioner when confronted about the murder. Even the state readily conceded in its closing argument at the petitioner's criminal trial that Elan had a "concentration camp type atmosphere" that was "equivalent to the lower circles of hell." Expert testimony is not necessary to explain to a jury the commonsense notion that a person being accused of committing murder while being subjected to psychological and physical abuse might stop denying involvement in the crime and feign ignorance solely as a means to stop the abuse.

In addition, the importance of the evidence concerning the petitioner's statements during group sessions was limited, at best. During those sessions, the petitioner, while being psychologically and physically abused, did not confess to the murder but said only that he could not remember what had happened. Even the state acknowledged during closing argument that "it is perfectly clear [that] the [petitioner] admitted nothing in that awful general meeting." The more important evidence against the petitioner was the testimony that he had privately confessed to other residents. And we agree with the habeas court's conclusion that Ofshe's testimony "would not have been of particular use" in attacking the credibility of other Elan residents, including Coleman, who testified that the petitioner had made inculpatory statements to them in private settings rather than in coercive group settings. Indeed, hearing from an expert that the petitioner's private admissions were not consistent with the expert's coercion theory might have hurt the petitioner's defense. We therefore conclude that the habeas court correctly determined that the petitioner failed to prove prejudice, and we do not consider whether Sherman's performance in this regard was deficient.

D

Sherman's Performance During Jury Selection

The petitioner argues that Sherman also rendered ineffective assistance by not challenging a potentially

biased juror who served on the jury at the petitioner's criminal trial. The petitioner claims that Sherman should have challenged the selection of a certain juror, referred to as B.W.,[31] because (1) he was a police officer, (2) he knew one of the detectives who originally investigated the victim's murder, namely, James Lunney, (3) he thought that the testimony of Lee, who testified for the state, would carry "some weight" based on his reputation, and (4) Sherman had once cross-examined B.W.'s wife in a previous case and had successfully obtained accelerated rehabilitation for a client accused of assaulting B.W. over B.W.'s objection. In support of his claim, the petitioner's habeas counsel submitted B.W.'s answers to questions during jury selection and questioned Sherman about his decision not to challenge B.W., but did not call B.W. as a witness during the habeas trial.

The habeas court determined that Sherman's representation was deficient insofar as he did not challenge B.W. for cause or, if that failed, for not using a preemptory challenge, because no reasonably competent defense attorney would have accepted B.W. as a juror. Nevertheless, the habeas court concluded that the petitioner failed to prove that he was prejudiced thereby. According to the habeas court, B.W.'s responses to Sherman's questions during jury selection indicated that his profession,

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[31] To protect the identities and privacy interests of jurors, we refer to B.W. by his first and last initials. See, e.g., *State v. Peeler*, 267 Conn. 611, 620 n.9, 841 A.2d 181 (2004).

familiarity with one of the state's witnesses, knowledge of Lee's reputation, and past encounters with Sherman would not impact his impartiality or prevent him from considering the testimony of all witnesses in the same, impartial manner.

We disagree with the habeas court's determination that Sherman's failure to challenge B.W. as a juror was constitutionally deficient. Counsel's choice in selecting jurors is a strategic decision entitled to great deference under *Strickland*. See, e.g., *Beverly v. Commissioner of Correction*, 101 Conn. App. 248, 252, 922 A.2d 178, cert. denied, 283 Conn. 907, 927 A.2d 916 (2007). Choosing a jury is as much an art as it is a science, and it requires counsel to rely on intuition in addition to the substance of the potential juror's answers to questions. See, e.g., *Lugo v. LaValley*, 601 Fed.Appx. 46, 49 (2d Cir.) (jury selection necessarily depends on counsel's "assessment of juror demeanor and credibility"), cert. denied, —— U.S. ——, 136 S.Ct. 110, 193 L.Ed.2d 89 (2015); see also *Strickland v. Washington*, supra, 466 U.S. 693 (characterizing criminal defense as "an art"). Counsel is in a better position than a reviewing court to assess potential juror bias because, unlike the court, counsel was present at voir dire and able to gauge the juror's demeanor and sincerity in his responses. We therefore strongly presume that Sherman's decision not to challenge B.W. was reasonable.

The petitioner has not overcome this presumption.

Just as any competent defense counsel would do, Sherman questioned B.W. at length about potential indicators of bias. Although there were certainly aspects of B.W.'s answers that might lead some defense attorneys to assert a challenge, his answers to Sherman's questions provided a valid basis for Sherman to conclude that B.W. would nevertheless judge the case impartially.

When Sherman asked about whether B.W.'s profession as a police officer would impact his judgment, B.W. responded that he would be fair and consider all the evidence. He acknowledged that some defense attorneys might be hesitant to select a police officer but explained that his experience in law enforcement had taught him that there are "always two sides to a story" and that, when responding to a report of a crime, one must listen to "both sides ...." He also stated that he understood that both the state and defendants make mistakes. Moreover, he explained that he would find the petitioner not guilty if the state did not prove the petitioner's guilt beyond a reasonable doubt and was not troubled about what his fellow officers might think if he voted not guilty because he would explain to them, "you weren't in the courtroom, you didn't hear all the evidence ...."

With respect to his familiarity with Detective Lunney, B.W. stated that he had known Lunney for about five years and that they met because they were members of the same motorcycle club. According to B.W., Lunney never discussed the investigation or

any of the evidence in the case with him. B.W. represented that he would evaluate Lunney's testimony just as any other witness' testimony and denied that knowing Lunney would impact his decision.

Likewise, with Lee, although B.W. thought his reputation "carries some weight," he agreed that he would evaluate Lee's testimony based on its content rather than on Lee's reputation. He had never dealt with Lee in connection with a case but might have seen him give a lecture once. He agreed that the state's decision to call Lee as a witness did not alone indicate that its case was a strong one. In fact, B.W. explained that he could not remember which side Lee was testifying for until Sherman indicated that Lee was testifying for the state.

Finally, with respect to B.W.'s prior encounters with Sherman, B.W. acknowledged that he had known Sherman for about ten or eleven years, ever since Sherman represented a client charged with assaulting B.W. He recalled that Sherman helped his client get accelerated rehabilitation; B.W. acknowledged, however, that he had no bad feelings toward Sherman as a result of the case. B.W. also recalled that Sherman had cross-examined his wife and that she had been nervous about possibly being "intimated" or "grilled" because Sherman was a good attorney. B.W. explained, however, that his wife was neither intimidated nor upset with Sherman's cross-examination of her. In sum, B.W. testified to

having no misgivings about serving as a juror in the case, and he represented that he would fairly consider the evidence presented by both sides and would vote to acquit if the state failed to prove its case beyond a reasonable doubt.

Sherman's performance was not objectively unreasonable by virtue of his failure to challenge B.W. as a juror. Sherman questioned B.W. about potential grounds for bias, and B.W.'s candid responses indicated a thoughtful understanding of the role of a juror and the importance of impartially considering all the evidence presented in court before returning a verdict. Sherman was familiar with B.W. and had an opportunity to observe his demeanor in court. Certainly, some defense attorneys would have challenged B.W. as a juror, but we do not think that Sherman was constitutionally required to do so. Even the habeas court acknowledged that B.W.'s answers indicated a lack of any actual bias. Although it relied on that conclusion to determine that the petitioner failed to prove any prejudice, we think this conclusion also demonstrates that Sherman's decision not to challenge B.W. as a juror was not without a reasonable basis. Simply put, counsel's performance should not be deemed constitutionally deficient when he accepted a juror he reasonably believed would be unbiased. See, e.g., *Beverly v. Commissioner of Correction*, supra, 101 Conn.App. 252 (refusing to "second-guess" counsel's professional judgment to accept jurors on basis of their answers to questions about potential bias); see also *Lugo v. LaValley*,

supra, 601 Fed.Appx. 49 (when no juror bias is shown, court is not precluded from recognizing counsel's acceptance of juror as reasonable, strategic decision).

In any event, it is clear that the petitioner also cannot prevail on this alternative ground because he has presented *no* evidence of prejudice. The petitioner argues that he has shown prejudice because Sherman's failure to challenge led to the seating of a biased juror. We disagree. Juror bias may be actual or conclusively presumed. See, e.g., *State v. Kokoszka*, 123 Conn. 161, 164–65, 193 A. 210 (1937). The petitioner has presented no evidence to prove any actual bias; the record is in fact to the contrary. The petitioner argues that we may presume that B.W. was biased given his answers to Sherman's questions, but there is no basis in the record to presume bias in this case. Bias will be presumed only when the juror has a close relationship with one of the parties, has an interest in the outcome of the case, had conferred with one of the parties about the merits of the case, or had formed an opinion about its merits. See, e.g., id., 164; see also *Lugo v. LaValley*, supra, 601 Fed. Appx. 49–50 (in case alleging ineffective assistance in jury selection, bias will be presumed only if juror is related to party or was victim of alleged crime). The petitioner has not proven any of these grounds for applying a presumption of bias in the present case. He therefore has failed to establish that Sherman's decision caused his defense any prejudice.

E

Sherman's Closing Argument

The petitioner next argues that Sherman's closing argument was constitutionally deficient and prejudiced his defense. The habeas court agreed that Sherman's closing argument was deficient, concluding that it was "disjointed, unfocused," that Sherman did not respond to certain aspects of the state's case, and that Sherman unreasonably made arguments that drew objections from the state. The habeas court nevertheless concluded that any deficiency in the closing argument did not prejudice the petitioner because the trial court had instructed the jury that it was obligated to focus on the evidence when deciding guilt, and the habeas court presumed that the jury followed the trial court's instructions. We disagree that Sherman's closing argument was constitutionally deficient.

Courts must be highly deferential when reviewing a claim that a closing argument was constitutionally ineffective. "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should sharpen and clarify the issues for resolution by the trier of fact ... but which issues to sharpen and how best to clarify them are questions with many reasonable answers." (Citation omitted;

internal quotation marks omitted.) *Yarborough v. Gentry*, supra, 540 U.S. 5–6. "Even if some arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach." Id., 7. We believe that the habeas court acknowledged but ultimately failed to apply this deference in its analysis.

Our review of Sherman's closing argument convinces us that it did not fall outside of the broad range of permissible arguments that counsel might make. Sherman was allotted ninety minutes of argument to cover fifteen days of testimony and evidence. In addition, because the state had given its closing statement immediately before Sherman, he could not simply give a scripted argument but needed to work in a rebuttal to the state's argument with no additional time to prepare it. Despite these constraints, Sherman's closing argument amply covered the evidence concerning the key issues in the case.

Sherman began his argument by summarizing the essence of the defense, emphasizing that the petitioner did not commit the crime and had never confessed. He attacked the state's case as a desire for a conviction in search of evidence rather than a search for the truth, noting that the state had gone through a number of prior suspects before settling on the petitioner. Sherman also noted that the defense,

in response to the state's case, had not tried to present a "boutique" defense using "high tech delivery" or "fancy theories." He emphasized that the state had not presented evidence to prove its claim that that the petitioner was "disturbed" or to demonstrate that he had become "a demonic killer one night on Halloween." He also contended that much of the testimony presented by the state's witnesses raised more questions than answers.

Sherman then turned to a critique of the physical and forensic evidence presented. He began by noting that the state had not presented any forensic or physical evidence to tie the petitioner to the murder. He reminded the jury that Lee acknowledged that there was no direct evidence to connect the petitioner to the crime, even though the killer would have been in close contact with the victim and likely would have been covered in blood after the assault. Sherman also recounted testimony demonstrating that the state was still testing forensic evidence just days before the trial began, and he argued that the state was apparently still trying to determine who was responsible for the crime, even though it already had put the petitioner on trial. Sherman candidly added that, although he did not know who committed the murder, the state's continued last minute forensic testing demonstrated that the state still did not know either. He noted that, although there was no physical evidence connecting the petitioner to the crime, Lee had explained that two hairs were found that potentially connected Littleton to the crime scene.

With respect to the golf club used in the attack, which came from a set of golf clubs in the Skakel home, Sherman reminded the jury of testimony from one of the investigators that it was reported that golf clubs were often left outside all about the Skakel property. He reminded the jury that one of the police investigators admitted that the state's physical evidence against the petitioner was "zilch." As an aside, he added that that same investigator had once tried to obtain an arrest warrant for Thomas Skakel for the murder.

Sherman next addressed the state's argument that the petitioner had a motive to murder the victim. He attacked the state's theory that the petitioner murdered the victim after she rebuffed his romantic advances, pointing out that entries in the victim's diary and witnesses who knew the petitioner and the victim at the time established that the petitioner's feelings for the victim were that of an ordinary teenager, not a jealous murderer. Sherman also criticized the state for pulling its motive argument from theories pushed by a celebrity book written about the case for money and by tabloid magazines.

Sherman next pivoted to Littleton. Sherman acknowledged he did not know whether Littleton had committed the crime but used uncertain evidence about whether Littleton had ever confessed to show that "a confession ain't always a confession" and that the evidence against the petitioner was no better than that against Littleton. He recounted evidence

that the state had spent significant time trying to pin the crime on Littleton and argued that the state's attempts to secure a confession from Littleton laid bare the lengths to which the state would go to "get somebody to say, 'I did it.' " He also compared Littleton's uncertain confession to those that the petitioner supposedly made, arguing that Littleton's alleged confessions were no "less compelling" and no "less persuasive" than the "garbage" presented against the petitioner from Coleman and other witnesses who claimed the petitioner had made incriminating statements. Sherman then reminded the jury that Littleton himself admitted on the stand that he had told his former wife that he stabbed the victim in the neck.

Sherman then attacked the state's evidence with respect to the time of death. He criticized the state's experts for being unable to pin down a more narrow time frame for the victim's death and reviewed testimony from a number of witnesses, including the victim's mother, that there was a commotion and incessant barking by dogs sometime between 9:30 and 10 p.m. on October 30, 1975. He recalled testimony from the victim's mother that, around that time, she also thought she may have heard the victim's voice. To bolster the testimony from these witnesses, Sherman recounted the testimony of a medical examiner, who originally worked in connection with the state's investigation of the case and testified that the murder likely occurred about 10 p.m.

Tying the defense theory of the time of death to the petitioner's alibi, Sherman next reviewed the testimony establishing that the petitioner had gone to the Terrien home at about 9:30 p.m. and did not return until around 11 p.m., placing him out of the neighborhood during the time period he claimed that the murder had occurred. Sherman gave the jury reasons to credit the petitioner's alibi witnesses and explained why witnesses who thought that the petitioner had not gone to the Terrien home were mistaken in their recollection.

Sherman turned to attacking the state's theory that the Skakel family and possibly its attorneys had tried to cover up the petitioner's involvement in the murder and invent an alibi. The weekend following the murder, Littleton had taken many of the Skakel siblings to the family's vacation home in New York. The state argued that the purpose was to remove the petitioner from the investigation and insinuated that, during that trip, the Skakel family developed the petitioner's alibi story. But Sherman reminded the jury that Littleton testified that he, rather than the Skakel family or its attorneys, had brought up the idea of taking the Skakel siblings out of town. He noted that police investigators initially had concluded that the petitioner was among those who went to the Terrien home. And Sherman also recounted how some of the Skakel siblings had candidly testified that they could not remember precisely who had gone to the Terrien home, indicating that, if there was a Skakel family conspiracy, it was "the worst run

conspiracy [he had] ever seen."

Turning to the subject of the petitioner's confessions, Sherman went through each, detailing at length the reasons that each was not credible. For example, he noted that many of the witnesses had delayed decades in reporting the confessions, that some of the details they claimed the petitioner relayed to them were inconsistent with the evidence, that one witness recanted, that one admitted his recollection was questionable, and that many of them had questionable motives for coming forward, including the potential of receiving reward money. He recounted Coleman's history of drug use, including his drug use at the time he testified, as well as his criminal history. And he reminded the jury of the cruelty that the petitioner experienced at Elan to demonstrate why anything the petitioner said while he was there was wholly unreliable. Sherman also noted that, despite the harsh treatment of the petitioner at Elan, witnesses who were with the petitioner at Elan testified that he had continually denied any involvement in the murder.

On the subject of the petitioner's statements about his activities later on the night of October 30, 1975, including his claim of masturbating in a tree, Sherman rebutted the state's argument that the petitioner had changed his story about the tree in which he was sitting in order to potentially explain the presence of any DNA that might be found at the crime scene. He first explained why the petitioner did

not initially tell the police about his activities during the initial investigation, indicating that the petitioner concealed his activities because he was afraid that his father would hear about them. He also recounted testimony from witnesses demonstrating that, once the petitioner revealed his activities that night, he was consistent with his story about which tree he was sitting in. Sherman explained that the argument that the petitioner had changed his story about which tree he was sitting in was based entirely on an assumption made by a witness about which tree the petitioner was referring to when he told his story on one particular occasion.

Sherman concluded by reminding the jury that the state had believed that other suspects committed the murder and spent years trying to build cases against them, and that the state finally settled on the petitioner, despite having no physical evidence to tie the petitioner to the crime. Sherman stressed that the state's case consisted solely of questionable claims that the petitioner had confessed. He characterized the state's evidence as "not acceptable" for supporting a conviction because there were simply "too many questions" still surrounding the case. He cautioned the jurors that there were few times they would ever make a decision as consequential as deciding the petitioner's guilt and that they should not find the petitioner guilty on the basis of such little reliable evidence.

Sherman might not have had time to review all of

the evidence presented in his closing argument, but he succeeded in addressing the critical evidence supporting his defense and responded to the key arguments raised by the state. The habeas court, in concluding that Sherman's argument was professionally incompetent, acknowledged that counsel is afforded substantial deference in formulating a closing argument given the broad range of options counsel has for argument and the constraints under which it is made, but we conclude that the habeas court did not apply that deference in its review of the petitioner's claim.

The habeas court characterized Sherman's closing argument as "disjointed" and "unfocused," but we do not share that view. To the contrary, Sherman organized his discussion of the evidence around the central topics of the petitioner's defense, focusing on his alibi, the competing evidence against Littleton, and the lack of credibility of the confession witnesses. Sherman also addressed other aspects of the state's case, including its theory of a family cover-up and the petitioner's alleged motive.

The habeas court faulted Sherman for his "failure to provide the jury a road map to an understanding of the state's burden of proof" and the concept of reasonable doubt, but we disagree that Sherman was incompetent in this regard. There is no requirement that defense counsel explain these concepts during closing argument. And counsel might reasonably conclude that doing so would be a poor use of limited

argument time considering that the court provides its own detailed instructions about the concept of reasonable doubt to the jury. See *Yarborough v. Gentry*, supra, 540 U.S. 10 ("[t]o be sure, [counsel] did not insist that the existence of a reasonable doubt would require the jury to acquit—but he could count on the judge's charge to remind [the jury] of that requirement" [emphasis omitted]). Moreover, before Sherman gave his closing argument, the state had already acknowledged, in its initial closing argument, its burden to prove all allegations in the information beyond a reasonable doubt.

The habeas court also determined that Sherman's representation was ineffective insofar as he "fail[ed] to explain the relevance of the third-party culpability evidence [against Littleton] to the issue of reasonable doubt," but that assessment is belied by the record. As we already explained, Sherman used the evidence against Littleton to explain that the evidence against the petitioner was no better. He also used it to discredit the integrity of the state's investigation by pointing out the investigators' role in attempting to extract a confession from Littleton. See footnote 9 of this opinion. He argued that the state's conduct vis-à-vis Littleton demonstrated that even the state could not be sure who committed the crime, and he urged the jury that there were simply too many questions outstanding to permit a guilty verdict. As the United States Supreme Court has observed, urging the jury that no one, not even the state, could be sure about who killed the victim is "the very essence of a

[reasonable doubt] argument." *Yarborough v. Gentry*, supra, 540 U.S. 10.

The habeas court criticized Sherman for admitting that he did not know whether Littleton murdered the victim and for expressing some sympathy for Littleton, but such a tactic hardly bespeaks incompetence. Given the uncertainty surrounding Littleton's confession, counsel reasonably could have decided that blaming and degrading Littleton might have caused the jury to discredit the defense. Sherman did not act unreasonably in deciding that the better course was to candidly acknowledge the uncertainty surrounding Littleton's guilt and then to argue that the same uncertainty clouded the evidence against the petitioner. See id., 10–11 (counsel was not ineffective for acknowledging that he did not know truth about what occurred and arguing that no one else could be sure either). By doing so, he set up Littleton as a sympathetic victim of the state's desire to convict someone of the murder and then attempted to portray his client as another of the state's failed suspects.

The habeas court also determined that Sherman had failed to rebut the state's argument that the petitioner used his story about masturbating in a tree to possibly explain the presence of DNA if it were ever found, but, again, this is not supported by the record. As we explained, Sherman confronted this claim directly by arguing that the evidence on which the state relied to demonstrate that he altered his story

was in fact nonexistent and based solely on unsupported assumptions.

The habeas court next observed that Sherman did not directly address the state's argument that the petitioner's family sent him to Elan to remove him from the police investigation. Although this determination is supported by the record, we disagree that it amounts to incompetence. Sherman can hardly be faulted for not spending valuable argument time addressing an issue that even the habeas court separately had concluded was "tangential to the main issues in the case." And Sherman indirectly addressed this throughout his closing argument when he argued that the state's theory of a Skakel family cover-up, which involved the purported invention of an alibi and concealment of evidence, simply was not supported by the testimony in the case.

Finally, the habeas court faulted Sherman for making improper comments during closing argument that caused the trial court to caution the jury to disregard the comments. For example, during his closing argument, the trial court twice interposed that the jury should disregard certain remarks Sherman had made. In addition, the state filed a motion after closing arguments, asking for additional curative instructions, which the trial court granted. According to the trial court, Sherman had stated that he did not know who murdered the victim, and the trial court instructed the jury to disregard that

remark because it represented counsel's personal opinion. The trial court also instructed the jury to disregard Sherman's remark that the petitioner did not know who committed the murder because the petitioner had not actually testified, but the court further instructed the jury that it could draw no adverse inference from the petitioner's decision not to testify. Finally, the state asserted that Sherman had implied during his closing argument that the state attempted to conceal evidence by raising objections and failing to produce certain witnesses. The court instructed the jury that it should rely on its own recollection about whether Sherman made those arguments, and, to the extent he did, those arguments should not be considered during deliberations.

We disagree with the habeas court that these comments, which were made during a long and detailed closing argument, amount to professional incompetence. Although drawing objections of this type during a closing argument might not get counsel an "A" for trial advocacy, our task is not to "grade counsel's performance" but to determine whether counsel's actions fell below the acceptable range of professional performance. *Strickland v. Washington*, supra, 466 U.S. 697. Attorneys commonly ask questions and make comments during a trial that draw objections from the opposing party, and those objections are often sustained and can lead to curative instructions. In our view, Sherman's comments, while legally objectionable, demonstrated

strong advocacy on Sherman's part and reflected mistakes that a reasonable attorney might make, not ineffective assistance.

F

Sherman's Failure To Attempt To Suppress an Audio Recording of the Petitioner's Statements to His Ghost Writer

At the petitioner's criminal trial, the state entered into evidence an audio recording of the petitioner narrating his activities on the night of October 30, 1975, to his ghost writer, Richard Hoffman. Hoffman was helping the petitioner write an autobiography, which would include a chapter about the victim's murder. While the grand jury investigation was still pending, the state learned of the arrangement between the petitioner and Hoffman, including the intended chapter on the murder. At the state's request, the grand jury subpoenaed Hoffman to testify before the grand jury and to bring with him any materials in his possession relating to the petitioner's autobiography project, including any audio recordings. Detective Frank Garr went to Hoffman's residence to serve him with the subpoena. Although the subpoena only required Hoffman to appear and bring materials with him to the grand jury proceeding, Garr asked Hoffman to immediately turn over the materials in his possession that were requested in the subpoena. According to Hoffman, Garr told him he could do it "the easy way" by

handing over the materials, or "the hard way," apparently by forcing Garr to get a warrant allowing Garr to seize them immediately. Hoffman testified at the habeas trial that, despite Garr's statement about the easy way or the hard way, he thought his entire discussion with Garr was otherwise amicable, and he turned over to Garr the materials, including the audio recordings later used by the state. Hoffman testified that he believed that he was required to turn them over because of the subpoena.

The petitioner claimed in his habeas petition that Sherman should have tried to have the audio recordings suppressed because they were the product of an illegal seizure. According to the petitioner, Hoffman and the petitioner had signed an agreement making the recordings the sole property of the petitioner and preventing Hoffman from disclosing information relating to the autobiography project. Thus, the petitioner claimed that he had an expectation of privacy in the recordings, which would have provided Sherman standing to challenge their illegal seizure by Garr. He also asserted that, if Sherman had moved for suppression, the trial court likely would have granted the motion, thereby preventing the state from using the recordings as evidence at the petitioner's criminal trial. If the recordings had been suppressed, the petitioner asserted, there is a reasonable likelihood that the outcome of the trial would have been different.

The habeas court agreed that Sherman should

have tried to suppress the recordings but concluded that the petitioner had failed to prove prejudice. The court determined that Garr's seizure of the recordings was unlawful because he had "intimidated and coerced Hoffman" into surrendering the recordings immediately. The habeas court also concluded that, even though the recordings were seized from Hoffman, the petitioner would have had standing to challenge their seizure because of the confidentiality and ownership agreement giving the petitioner sole ownership of them. Nevertheless, because the petitioner had not shown that the recordings would, in fact, have been suppressed, the habeas court found no prejudice. The habeas court determined that neither the petitioner's confidentiality agreement nor Garr's unlawful seizure would have prevented the grand jury from obtaining the recordings through its subpoena power, which would have led to their discovery and use by the state.

We do not address whether Sherman's representation was deficient insofar as he did not seek to suppress the recordings because we agree with the habeas court that, even if Sherman had sought their suppression, the petitioner has not demonstrated that Sherman's effort would have succeeded, and, therefore, the petitioner has failed to show prejudice. [32] The petitioner, citing the

[32] We do note, however, that the habeas court's determination that the petitioner failed to show that Sherman could have successfully suppressed the recordings calls into

exclusionary rule, claims that Sherman would have succeeded in suppressing the recordings because they were illegally seized and, therefore, would have been excluded from evidence. But, even if we accept the habeas court's determination that Garr's seizure of the recordings was unlawful, it is clear that a court would not suppress them because they would inevitably have been obtained by the grand jury pursuant to its subpoena power. The petitioner has not cited any authority to show that unlawful police activity nullifies a *preexisting* grand jury subpoena; relevant authority is to the contrary.[33] See, e.g., *United States v. Vilar*, 729 F.3d 62, 85 (2d Cir. 2013) (government can use subpoena to establish inevitable discovery exception to exclusionary rule), cert. denied, —— U.S. ——, 134 S.Ct. 2684, 189 L.Ed.2d

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question the habeas court's determination that Sherman nevertheless was required to seek suppression of them in the first place. If the efforts were unlikely to succeed, then Sherman might reasonably have determined that attempting to suppress the recordings was not worth the resources that would have been expended in doing so.

[33] Courts have questioned whether the government can rely on a subpoena to establish the inevitable discovery exception to the exclusionary rule when, unlike in the present case, the subpoena was issued *after* the illegal police activity occurred and may have been based on information discovered through the illegal activity. See, e.g., *United States v. Vilar*, 729 F.3d 62, 85 (2d Cir. 2013), cert. denied, —— U.S. ——, 134 S.Ct. 2684, 189 L.Ed.2d 230 (2014). There is no dispute in the present case that the grand jury subpoena was issued before Garr seized the recordings from Hoffman.

230 (2014). The petitioner has not demonstrated that either he or Hoffman would have been able to quash the subpoena. The grand jury subpoena was issued before the allegedly unlawful police activity occurred, and the recordings sought were relevant to the grand jury's investigation. Irrespective of Garr's actions, the subpoena required Hoffman to appear before the grand jury and to turn over relevant materials in his possession, including the recordings. And there is no basis for concluding that the petitioner's private confidentiality and ownership agreement with Hoffman could prevent the grand jury from obtaining the evidence. Consequently, we agree with the habeas court that the recordings would have been admitted into evidence, even if Sherman had moved to suppress them. The petitioner has failed to show that Sherman's omission caused him any harm and, therefore, cannot satisfy his burden of demonstrating prejudice.[34]

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[34] In seeking a new trial on the basis of Sherman's purportedly deficient performance, the petitioner also asserts that, even if any one of his claims of prejudice alone is not sufficient to meet his burden, we should aggregate the harm caused by Sherman's errors to find that those errors, considered together, prejudiced the petitioner. We do not consider this argument, however, because, even if we did recognize the cumulative error theory, as the petitioner asserts—a question that we have not previously addressed directly—the petitioner still cannot prevail on his claims.

With respect to most of the petitioner's ineffectiveness assistance claims, we have determined that the petitioner failed to prove the first element of the *Strickland* standard, namely, that Sherman performed deficiently. See parts II B and C, and III B, D and E of this opinion. Because the petitioner did not

prove that Sherman committed any error in the context of these claims, the claims necessarily must be rejected, and there is no need to address whether the alleged errors, considered together, caused the petitioner prejudice.

With respect to the other ineffectiveness assistance claims presented by the petitioner, we have not considered Sherman's performance because it was evident from the record and the habeas court's decision that, even if Sherman had performed deficiently, any alleged error caused no harm to the petitioner's defense. See parts III A, C and F of this opinion. Accordingly, there is no harm to aggregate when considering prejudice for these claims.

For example, the petitioner claimed that Sherman should have located and used a drawing of someone allegedly seen in the neighborhood of the crime scene on the night of October 30, 1975. But the habeas court determined that the drawing would have been of "no use" to the petitioner in implicating Littleton because police reports established that the drawing almost certainly depicted a local resident who had been seen in the neighborhood much earlier in the evening and who had nothing to do with the victim's murder. The petitioner also claimed that Sherman should have implicated two other individuals in the murder on the basis of information conveyed by Bryant, but the habeas court determined that the trial court would not have permitted the petitioner to raise a defense at trial based on Bryant's information, so the jury would never have heard this evidence. With respect to the petitioner's claim that Sherman should have presented expert testimony about the coercive nature of Elan's group meetings, the habeas court determined that this testimony "would not have been of particular use" in assessing the credibility of the evidence of the petitioner's private confessions to other residents of Elan, and the state conceded that the petitioner never confessed during any of the group meetings. Finally, with respect to the recordings seized from Hoffman, the habeas court concluded that the trial court would not have suppressed them, meaning that they would have been admitted into evidence at trial regardless of whether Sherman had sought to exclude them. Because each of these

IV

CONFLICT OF INTEREST CLAIM

Finally, we address the petitioner's separate claim that he was denied his sixth amendment right to counsel because his fee arrangement with Sherman presented a conflict of interest that prevented Sherman from properly representing the petitioner. The habeas court rejected this claim, and we agree with the habeas court's resolution of this claim.[35]

The habeas court found the following facts relevant to this claim. The petitioner originally agreed to pay Sherman an hourly rate for his services and to cover all expenses incurred for the defense. Several years after Sherman began representing the petitioner, and about five months before trial, the petitioner and Sherman changed their billing agreement to a flat fee arrangement. In entering into

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alleged errors had no impact on the outcome of the trial, there is no harm to aggregate when considering the prejudice stemming from these alleged errors.

[35] The petitioner raised this claim in his cross appeal, but we instead treat it as an alternative ground for affirmance because the petitioner was not aggrieved by the decision of the habeas court. The habeas court vacated his conviction and ordered a new trial on other grounds, and that is precisely the same relief he seeks in connection with his conflict of interest claim. See *Sekor v. Board of Education*, 240 Conn. 119, 121 n.2, 689 A.2d 1112 (1997); see also *State v. Preston*, 286 Conn. 367, 373 n.4, 944 A.2d 276 (2008) (issue raised by nonaggrieved appellant treated as alternative ground for affirmance).

this arrangement, the petitioner was represented by different counsel. Under the arrangement, Sherman was paid a flat fee to cover all outstanding amounts then owed to him and for his future services. Sherman was required to pay for any expenses incurred for the defense out of the flat fee payment that he was to receive from the petitioner. Sherman treated the funds as having been earned and transferred them to his firm's general operating account. Unbeknownst to the petitioner at that time, Sherman was behind in income tax payments to the Internal Revenue Service (IRS). The habeas court determined that Sherman's placement of the funds in the firm account, instead of a client funds account, put the funds at risk of being seized by the IRS, but the IRS never seized the funds.

The habeas court determined that the flat fee agreement and Sherman's handling of the funds created a "substantial risk" that Sherman would be burdened by a conflict of interest. First, the habeas court determined that the possibility that the IRS could seize the funds might prevent Sherman from paying defense expenses. Second, the habeas court determined that the up-front payment to Sherman created an incentive for him to minimize defense expenses, including expenses for expert witnesses and investigations, so that he could retain more of the funds to help pay his tax debt. Nevertheless, the habeas court determined that the petitioner could not prevail on his conflict of interest claim because he had not presented any evidence to demonstrate that

the potential conflicts had any adverse impact on his defense.

After considering the briefs, the record, and the habeas court's decision, we conclude that the petitioner's claim must be rejected because, irrespective of whether Sherman was burdened by a potential conflict of interest, the habeas court correctly determined that the petitioner presented no evidence to establish prejudice.[36] To demonstrate that a conflict of interest denied a petitioner the effective assistance of counsel, he must show both that a potential conflict of interest existed and that his defense was adversely impacted on the basis of

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[36] We doubt that the petitioner established the existence of a conflict of interest sufficient to demonstrate a sixth amendment violation, substantially for the reasons advanced by the respondent's expert witness, Attorney Mark Dubois, during the habeas trial. As we explained, the IRS did not seize any of the funds that might have been needed for defense expenses, so no conflict ever materialized on that basis. With respect to the petitioner's claim that the flat fee agreement encouraged Sherman to avoid investing in the defense, the petitioner has provided no authority holding that this potential incentive amounts to a conflict of interest. Indeed, every billing arrangement between counsel and a client has some potential to create diverging interests between them. The petitioner presented no evidence to demonstrate that Sherman was actually conflicted because of this potential incentive not to spend funds on the defense. Nevertheless, we need not decide whether Sherman was burdened by a conflict because, even if he was, it is clear that the petitioner has not shown any prejudice.

that conflict.[37] We agree with the habeas court that the record contains no evidence that either claimed conflict caused the petitioner any harm. The IRS did not seize the funds and thus did not prevent their use for defense costs. And, although the petitioner claimed that Sherman had an incentive to avoid incurring additional expenses so that he could keep a greater share of the funds to pay his tax debt, the petitioner has presented no evidence to show that Sherman diverted funds for the defense to cover his tax debt, or that this concern caused Sherman to otherwise alter his defense strategy. Consequently, we agree with the habeas court that the petitioner's conflict of interest claim fails.

The judgment is reversed and the case is

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[37] The respondent argues that the habeas court applied an incorrect standard for determining prejudice in connection with a conflict of interest claim of this kind in light of the United States Supreme Court's decision in *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). The habeas court applied a less demanding prejudice standard from *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), but the respondent argues that, in light of *Mickens*, the standard set forth in *Cuyler* applies only to cases in which counsel represents more than one defendant and not to other types of conflicts, including when counsel has a personal conflict that burdens his representation of a client. In cases of personal conflicts, the respondent argues that the *Strickland* prejudice standard should control under *Mickens*. We need not address this argument, however, because it is clear that the petitioner's claim fails even under the less demanding standard set forth in the *Cuyler*, standard, which we have previously applied to similar claims. See, e.g., *Phillips v. Warden*, 220 Conn. 112, 133, 595 A.2d 1356 (1991).

remanded with direction to render judgment denying the habeas petition.

In this opinion EVELEIGH, ESPINOSA and VERTEFEUILLE, Js., concurred.

ROBINSON, J., concurring in part and dissenting in part. I agree with the majority's conclusion, in part II B of its opinion, that the habeas court improperly concluded that Michael Sherman, the attorney who represented the petitioner, Michael Skakel, at his criminal trial, rendered ineffective assistance of counsel by failing to raise a third-party culpability defense against Thomas Skakel. I also agree, however, with Justice Palmer's conclusion in part I of his comprehensive and thoughtful dissenting opinion that the habeas court properly concluded that Sherman rendered ineffective assistance of counsel by failing to locate and investigate the possible testimony of Denis Ossorio, the "beau" of the petitioner's cousin, Georgeann Dowdle. Because I agree with Justice Palmer's conclusion that this critical failure by counsel constituted the ineffective assistance of counsel that entitled the petitioner to a new trial under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), I respectfully dissent.

First, as to the third-party culpability issue, I think that it was a reasonable, strategic decision for Sherman to make Kenneth Littleton the subject of this defense, rather than Thomas Skakel. Under *Strickland*, great deference must be given to trial counsel's strategic decisions. Id., 689. "Under both the federal constitution and the state constitution,

however, the right to counsel is the right to counsel's effective assistance, and not the right to perfect representation ...." *Washington v. Meachum*, 238 Conn. 692, 732, 680 A.2d 262 (1996). Under the well established "objective standard of reasonableness" set forth in *Strickland v. Washington*, supra, 466 U.S. 688, a reasonable attorney might have chosen to present a third-party culpability defense implicating Littleton, rather than Thomas Skakel, despite the rather scarce evidence against Littleton. As the majority observes, Sherman fully explained his thinking and reasoning as to why he pursued Littleton rather than Thomas Skakel, including his belief that the evidence against Thomas Skakel posed risks to the petitioner. Although I believe that the evidence implicating Thomas Skakel is much greater than the evidence implicating Littleton, I note that the trial court thought there was enough evidence implicating Littleton to allow for Sherman to raise the third-party culpability defense. Given the great deference afforded to trial counsel's strategic decisions, it does not appear that Sherman's decision to implicate Littleton rather than Thomas Skakel was objectively unreasonable and, as such, did not amount to ineffective assistance of counsel under *Strickland*.

My agreement with the majority does not, however, extend to the alibi witness issue. I agree with Justice Palmer's assessment of the question of whether it was objectively reasonable for Sherman not to speak with Ossorio, a disinterested witness, in

order to determine whether he recalled events from the night of the murder or might have information helpful to the petitioner's alibi. This requires us to "directly assess" Sherman's "decision not to investigate" further "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id., 691. Even affording Sherman's decision making the appropriate deference, I cannot think of a single reasonable, strategic reason why Sherman would not at least attempt to track down Ossorio to see what, if anything, he remembered from the night of the murder, especially in light of the fact that the petitioner's main defense was that he had an alibi for the likely time of death of the victim, Martha Moxley. This is particularly so given Sherman's own view that having an alibi witness not related to the petitioner would have significantly strengthened that defense.

At the habeas trial, Sherman admitted that he had been aware of Dowdle's "beau," but chose not even to attempt to contact Ossorio because he did not believe that Ossorio would recall the events from more than twenty years prior, and that, because Dowdle testified that she remained in a separate part of the home on the night in question and did not see whether the petitioner was there, similarly, Ossorio must also have remained in a separate part of the home. I believe that, rather than rely on these speculative assumptions, Sherman should have made further inquiry into Ossorio, a potential disinterested alibi witness who would have been critical for the

defense. In my view, the circumstances quite clearly demonstrate that Sherman's performance did not meet *Strickland*'s objective standard of reasonableness, thus amounting to ineffective assistance of counsel. I fully agree with Justice Palmer that this omission was prejudicial under *Strickland* because "there is a reasonable probability" that, had Sherman adequately investigated Ossorio and presented his testimony at the criminal trial, "the fact finder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, supra, 466 U.S. 695.

Because I would affirm the judgment of the habeas court ordering a new trial for the petitioner, I respectfully concur in part and dissent in part.

PALMER, J., with whom McDONALD, J., joins, dissenting. In the more than forty years since fifteen year old Martha Moxley (victim) was brutally murdered near her home in Greenwich, this tragic case has given rise to numerous investigations, suspects, petitions, hearings, appeals—as well as many articles, books, documentaries, and movies—and, of course, the trial that is the subject of this appeal. Unfortunately, none has brought any real closure or clarity to the case. One thing, however, is perfectly clear: the habeas court was absolutely right in concluding that the petitioner, Michael Skakel, did not receive a fair trial because, in numerous respects, the representation that he received from his chief trial counsel, Michael Sherman, fell far below the range of competence necessary to satisfy the petitioner's right to the effective assistance of counsel guaranteed by the sixth amendment to the United States constitution.[1] In fact, in its thorough and well-reasoned decision, the habeas court identified *ten* separate and distinct areas in which Sherman's performance did not meet professional standards. With respect to three of them, the court found that Sherman's deficient performance

[1] This right is made applicable to state prosecutions through the due process clause of the fourteenth amendment. E.g., *Davis v. Commissioner of Correction*, 319 Conn. 548, 554, 126 A.3d 538 (2015), cert. denied sub nom. *Semple v. Davis*, —— U.S. ——, 136 S.Ct. 1676, 194 L.Ed.2d 801 (2016).

was so prejudicial as to undermine confidence in the verdict and, therefore, require a new trial.[2] I agree with each and every one of those determinations, which are fully borne out by the record.

I address only two of them here, however, namely, Sherman's manifestly incompetent and prejudicial handling of the petitioner's alibi defense and the petitioner's third-party culpability defense. The former, of course, involves Sherman's failure to follow up on the grand jury testimony of Georgeann Dowdle, one of the petitioner's alibi witnesses, that her "beau," subsequently identified as Denis Ossorio, was with her and the petitioner at her home on the evening of the murder. If Sherman had taken the trouble simply to ask Dowdle about Ossorio, Sherman would have learned that Ossorio could provide critical, credible and independent testimony corroborating the petitioner's alibi, which otherwise was predicated on the testimony of only Skakel family members. The second issue involves Sherman's decision to present a third-party culpability defense centered around Kenneth

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[2] With respect to the other seven areas in which Sherman was found to have represented the petitioner incompetently, the habeas court was unable to conclude that the prejudice flowing from that inadequate representation was so great as to warrant a new trial. In his cross appeal, the petitioner contends that the habeas court incorrectly concluded that he was not sufficiently harmed by those seven areas of deficient performance to warrant a new trial. In view of my conclusion that the petitioner is otherwise entitled to a new trial, I need not address the claims that the petitioner raises in his cross appeal.

Littleton, even though there was no evidence—none—linking Littleton to the murder, and even though a third-party culpability defense implicating the petitioner's brother, Thomas Skakel, in the murder, would have been truly compelling. I limit my analysis to these two areas of deficient performance because, in my view, it could hardly be more apparent that each one of them deprived the petitioner of a fair trial.

Before commencing that review, however, I wish to underscore one aspect of the majority opinion, pertaining to the alibi issue, that is so blatantly one-sided as to call into question the basic fairness and objectivity of the majority's analysis and conclusion. As I discuss more fully hereinafter, the majority concludes that Sherman's decision to forgo any inquiry into Ossorio in furtherance of the petitioner's alibi defense was reasonable because the facts supported Sherman's belief that any further investigation probably would not be productive. See part II C of the majority opinion. Even though the case law is perfectly clear that *all* of the relevant facts and circumstances are to be considered in evaluating the objective reasonableness of such a decision; see *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (explaining that, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness *in all the circumstances*" [emphasis added]); accord *Gaines v. Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012); the majority's

review of the alibi issue begins and ends with its conclusion that Sherman reasonably believed that it was likely that no investigation into Ossorio would be fruitful. At no time does the majority even *acknowledge*, let alone evaluate, the powerful, countervailing considerations that militate strongly *in favor* of the habeas court's determination that the sixth amendment required Sherman to conduct some additional investigation. These considerations are obvious, and include the paramount importance of the petitioner's alibi defense, the enormous significance of an unbiased and credible witness who could corroborate the alibi testimony of the Skakel family members, the ease with which such a witness promptly could have been located, and the gravity of the charge that the petitioner faced. I can conceive of only one reason why the majority refuses to take those highly relevant considerations into account: they are incompatible with the majority's conclusion that Sherman's performance was reasonable under the circumstances.[3]

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[3] The majority expresses its displeasure with my characterization of its analysis of the alibi issue as transparently one-sided and unfair, and also accuses me more generally of misstating its views. See footnote 1 of the majority opinion. With respect to the former, there is no euphemistic way to describe the majority's analysis: it completely ignores the countervailing considerations that the habeas court found to be decisive and provides no reason or justification for doing so. With respect to the latter, the majority does not identify any of the views that it claims I have misstated, and I know of none.

I

SHERMAN'S FAILURE TO LOCATE AND INTERVIEW A CRITICAL ALIBI WITNESS CONSTITUTED DEFICIENT REPRESENTATION UNDER THE SIXTH AMENDMENT

I could not disagree more with the majority's conclusion rejecting the habeas court's decision that Sherman failed to conduct a constitutionally adequate investigation into the petitioner's alibi defense, resulting in extreme prejudice to the petitioner. In fact, I believe that the majority's analysis and conclusion represent an unprecedented and indefensible deviation from settled sixth amendment principles.

As I explain hereinafter, there are a number of serious errors in the majority's analysis that lead to its palpably wrong conclusion, but two obvious and fundamental flaws skew its entire analysis. First, the majority employs an improper legal standard in determining that Sherman's handling of the petitioner's alibi defense comported with the petitioner's sixth amendment right to the effective assistance of counsel. More specifically, the majority concludes that Sherman's failure to interview Ossorio was not constitutionally deficient because Sherman reasonably *could have inferred* from all of the circumstances that Ossorio would not be able to provide any useful testimony. Contrary to the majority's decision, the sixth amendment does not

permit defense counsel to forgo any inquiry into the testimony of a potentially critical witness like Ossorio merely because counsel *thinks* or *believes* that the witness will not be helpful; counsel has a duty to his client to take reasonable steps to find out what the witness knows, and not to rely on inference, belief or educated guess. Indeed, federal courts are unanimous on this point. Consistent with that precedent, one searches the majority opinion in vain for a case with contrary reasoning, or one that presents a fact pattern even remotely similar to this case, in which the petitioner was not awarded a new trial. I submit that none exists.

Second, as I mentioned previously, the majority considers only those factors that support its conclusion justifying Sherman's failure to follow up on Dowdle's testimony, and chooses to ignore *all* of the compelling considerations that militate in favor of the habeas court's determination that Sherman had a clear duty to undertake a further inquiry into Dowdle's "beau." By any fair measure, Sherman's decision to simply disregard Dowdle's grand jury testimony and to make no effort to find Ossorio was particularly unreasonable and professionally irresponsible under the facts and circumstances that the majority simply ignores. The charge that the petitioner faced—murder, which carried a maximum sentence of life imprisonment—could not be more serious, and the importance of corroborative alibi testimony—from an independent, nonfamily member witness like Ossorio—cannot be overstated. Sherman

reasonably could not have ruled out the possibility that Ossorio would be able to provide such testimony, and he would have confirmed that Ossorio could, in fact, do so merely by asking Dowdle to identify her "beau," who, at that time, lived within miles of Sherman's law office, and then by contacting Ossorio, who was ready, willing and able to testify—credibly, as the habeas court found—on the petitioner's behalf. As the United States Supreme Court has observed in a case involving this very issue, "[w]hen viewed in this light, the '[reasonable] decision' the [majority and the state both] invoke to justify counsel's [failure to pursue] mitigating evidence resembles more a post hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to [trial]." *Wiggins v. Smith*, 539 U.S. 510, 526–27, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Not surprisingly, both Sherman and his associate, Jason Throne, testified without contradiction that an objective and unbiased witness would have been critical to the petitioner's alibi defense, and that they were very eager to locate a witness who met that profile. And yet, when Sherman and Throne learned by reading the grand jury testimony of *their own witness*, Dowdle, that just such an independent and unbiased witness—her former "beau"—was at the home of James Terrien, with Dowdle, on the evening of October 30, 1975, they did *nothing* in response to that testimony. Nevertheless, the majority concludes that Sherman and Throne reasonably decided that it just was not worth the effort to follow up on Dowdle's

testimony, even though it would have entailed nothing more than a couple of telephone calls.

It is perplexing, to say the least, that the majority endorses an investigative approach that reflects such a gross lack of attention and effort, one that created such a serious and needless risk that the petitioner's case would be severely prejudiced because of counsel's cavalier refusal to pursue a potentially critical lead. In fact, I cannot fathom why the majority sets the bar so low, or why it employs such a skewed and one-sided analysis in doing so.

A

The Facts

The relevant facts and procedural history pertaining to this issue are largely undisputed. Within hours of the discovery of the victim's body around 12:30 p.m. on October 31, 1975, the police began interviewing those persons who might be able to provide useful information about the events surrounding the victim's murder. In one of those interviews, Thomas Skakel informed the police that he had been with the victim until approximately 9:30 p.m. on October 30, at which time both of them departed for their respective homes. Thomas Skakel also told the police that, at about that same time, the petitioner left for the Terrien home, which is about a twenty minute car ride from the Skakel home, in Thomas Skakel's father's Lincoln Continental,

accompanied by his brothers John Skakel and Rushton Skakel, Jr., and their cousin, Terrien.[4] In his interview with the police, the petitioner also stated that he had gone to the Terrien home around 9:30 p.m., watched television there, and did not return home until approximately 11 p.m. Interview reports of others who were questioned by the police soon after the discovery of the victim's body do not indicate whether those persons were questioned about the activities and whereabouts of Thomas Skakel and the petitioner in the general time frame of the murder. In the weeks following the murder, however, everyone who expressed any knowledge about the comings and goings of the petitioner and Thomas Skakel corroborated the statements that they had given to the police. Among those who did so in their police interviews were John Skakel, Rushton Skakel, Jr., and Terrien. In addition, Terrien's sister, Dowdle, told the police that the petitioner was at the Terrien home (where she resided) on the evening of October 30, 1975, along with her brother and her cousins, John Skakel and Rushton Skakel, Jr.

Shortly after the murder, the prime suspect in the victim's death was Thomas Skakel, for whom the Greenwich police sought permission from the Office of the State's Attorney to apply for an arrest warrant. Permission was denied because the state's attorney did not believe that the evidence set forth in the warrant application and affidavit constituted

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[4] Testimony established that the Terrien home is about a twenty minute car ride from the Skakel home.

probable cause to believe that Thomas Skakel had committed the murder. Although the investigation into the victim's death continued for some time,[5] the petitioner did not become a suspect until sometime in the mid–1990s. As a consequence, for at least twenty years following the victim's death, investigators had no reason to focus their attention on the petitioner or his activities, and did not do so.

Apparently prompted by information gleaned from a report prepared by Sutton Associates, a private security firm, sometime in the mid–1990s,[6]

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[5] For example, at one point, Littleton was a suspect, but he ultimately was cleared of any possible involvement in the murder. Indeed, prior to the petitioner's criminal trial, Littleton was given immunity from prosecution by the Office of the State's Attorney, presumably so that he would be willing to testify at the petitioner's criminal trial to rebut the petitioner's contention that he, Littleton, might have killed the victim. See part II of this opinion.

[6] The petitioner's father, Rushton Skakel, Sr., who is now deceased, hired Sutton Associates to investigate the victim's murder in the apparent hope of exonerating his family members. According to Leonard Levitt, a journalist who has written extensively about the case, Rushton Skakel, Sr., gave those investigators free rein to pursue the investigation wherever it led them, purportedly assuring them that, if it turned out that a member of his family was responsible for the victim's murder, the family would publicly acknowledge it. In 1994, an employee of Sutton Associates stole the firm's files on the case, including detailed suspect profiles of Thomas Skakel and the petitioner, and gave them to Levitt and Dominick Dunne, an author, who, in turn, gave them to Mark Fuhrman, the former detective famous for perjurious testimony in the

those investigators undertook to develop a case against the petitioner. Because of this investigation, in July, 1998, the petitioner retained Sherman to represent him.

In connection with that renewed investigation, a grand jury was empaneled at the state's request for the purpose of acquiring additional evidence about the murder and, in particular, evidence linking the petitioner thereto. Numerous people were called to appear before the grand jury, one of whom was Dowdle. On September 22, 1998, she testified before the grand jury under oath that she was home on the evening of October 30, 1975, when her brother, Terrien, and cousins, the Skakels, arrived around 9:30 p.m. to watch television. Because she was in her mother's library putting her daughter to bed, and Terrien and the Skakels were in a room located off the library, she could say only that she heard the Skakels' voices but could not recall, given the passage of time, whether she actually saw the petitioner. Dowdle also testified, however, that, when interviewed by the police shortly after the murder, she told them that the petitioner had been at her home that evening. She further testified that her

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Orenthal James (O.J.) Simpson murder trial. In 1998, Fuhrman published a book in which he purported to solve the long unsolved murder of the victim by accusing the petitioner based on one of several theories of the murder posited by Sutton Associates investigators and contained in the stolen files, namely, that the petitioner may have had a relationship with the victim and become jealous upon seeing her and Thomas Skakel "carrying on" in the Skakel driveway.

"beau" was with her that evening at her home. Sherman, however, never followed up on Dowdle's testimony that she had a companion, her "beau," that evening.

Following completion of the grand jury investigation, in January, 2000, the petitioner was charged with the victim's murder, and the petitioner's criminal trial commenced in early May, 2002. In their trial testimony in support of the petitioner's alibi defense, Rushton Skakel, Jr., and Terrien explained, consistent with their grand jury testimony and the statements that they had given to the police some twenty-seven years earlier, that they and the petitioner, along with John Skakel, had driven to the Terrien residence at around 9:30 p.m. on October 30, 1975, remained there until about 11 p.m., and then returned home. John Skakel also testified at trial but stated that he could not recall whether the petitioner had gone to the Terrien home that evening. When asked, however, whether the statement he had given to the police soon after the murder accurately reflected what he knew at the time—that is, that the petitioner was at the Terrien home with other family members that evening—John Skakel responded in the affirmative. Finally, Dowdle's trial testimony mirrored her grand jury testimony. In fact, during questioning of Dowdle by State's Attorney Jonathan Benedict about her grand jury testimony, Dowdle expressly reiterated that a "friend" was with her at the Terrien home on the evening of October 30, and, in addition, while she was

still on the stand, a portion of her grand jury testimony containing the reference to her "beau" was read and published to the jury. Again, Sherman took no action with respect to the identity, availability or potential testimony of Dowdle's "beau."

Benedict sought to rebut the petitioner's alibi defense with the testimony of three witnesses, Helen Ix, Andrea Shakespeare, and Julie Skakel, all of whom were present at the Skakel residence from approximately 9 to 9:30 p.m. on October 30, 1975. Ix and the victim, Ix' close friend, had gone to the Skakel home together, arriving shortly after 9 p.m. Ix remained there until approximately 9:30 p.m., when she left and went home. On direct examination, Ix testified that she was uncertain whether the petitioner was in the car when it headed for the Terrien residence; on cross-examination, however, she indicated that she thought that he was in the car, but she was not sure in light of the passage of time.

Shakespeare, a good friend of Julie Skakel's, had been with the Skakel family at dinner that evening and returned with the family members to the Skakel residence at about 9 p.m. Initially, on direct examination by the state, Shakespeare asserted that the petitioner had remained at home when the Skakel brothers left for the Terrien residence. Thereafter, however, upon being recalled to testify by the Sherman, she acknowledged that she had given a tape-recorded statement to the police in 1991, the relevant portion of which was played for the jury, in

which she stated that she did not see the car when it left for the Terrien residence and that she therefore did not see whether the petitioner was in the car. She further told the police that, although she believed that the petitioner had gone to the Terrien residence, she had no independent recollection of the events in question and that her belief was based on what others had told her had occurred on the evening of October 30, 1975.

Finally, Julie Skakel, the petitioner's sister, testified that she was uncertain about the events of that evening. In light of that testimony, the state was permitted to introduce a statement that she had made in a prior proceeding in which she stated that, at around 9:20 p.m. on October 30, 1975, she saw an unidentified person run by, just outside a window in the Skakel residence, and that she called out, "Michael, come back here." The significance of this testimony was to demonstrate that, at least at that moment in time, Julie Skakel believed that the figure she observed through the window was the petitioner.

At the conclusion of the evidence, Benedict, in his closing argument to the jury, acknowledged that the petitioner's proffered alibi was the "cornerstone of the defense ...." In fact, according to Benedict, the alibi was the key component of a scheme, hatched by the petitioner's father, Rushton Skakel, Sr., and furthered by the entire Skakel family, all of whom, Benedict alleged, siblings and cousins alike, knew that the petitioner had murdered the victim, to shield

the petitioner from the consequences of his heinous crime. Benedict argued that the family plot to protect the petitioner commenced "on October 30, 1975, with the disappearance ... [and] disposal" of incriminating evidence, including "the golf club, the shaft and any other evidence of the crime" within "thirty-six hours" of its commission. The cover-up continued the day after the murder, when Littleton was "ordered" to take the petitioner, Thomas Skakel, John Skakel, and Terrien for an overnight visit to the Skakel family home in Windham, New York, the place where the conspiracy allegedly "took shape." In the state's view, the family's effort to "advance" this "produced" and "concocted" alibi continued during the grand jury proceedings and at the petitioner's criminal trial, at which the petitioner's witnesses all gave intentionally false testimony in asserting that the petitioner was at the Terrien residence when, according to the great weight of the evidence, the victim was being murdered. Finally, Benedict repeatedly and forcefully reminded the jurors that the petitioner's alibi witnesses were all family members, emphasizing that "[n]o independent witness [could] say what happened once [the] Lincoln [Continental] backed out of the driveway" of the Skakel home at about 9:15 p.m. on October 30, 1975. Benedict's argument evidently was convincing, because the jury, after expressly requesting that the testimony of Ix, Shakespeare and Julie Skakel be read back—the only testimony offered by the state that even arguably tended to refute the petitioner's

alibi—found the petitioner guilty.[7]

Thereafter, following an unsuccessful appeal from the judgment of conviction; see *State v. Skakel*, 276 Conn. 633, 770, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006); and from the denial of his petition for a new trial; see *Skakel v. State*, 295 Conn. 447, 452, 991 A.2d 414 (2010); the petitioner commenced the present habeas action. I now briefly summarize testimony from the habeas trial that is pertinent to the petitioner's contention that Sherman failed to conduct a constitutionally

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[7] Although Benedict observed in closing argument, more or less in passing, that the jury was not required to reject the petitioner's alibi defense in order to find him guilty—because the forensic evidence indicated that she conceivably could have been alive as late as 5:30 a.m. on October 31, 1975—he made no effort to explain where the victim conceivably could have been after 9:30 p.m. on October 30, when she was due home. Indeed, not one of the hundreds of persons interviewed by the police since the crime was committed ever saw the victim after 9:30 p.m., when she was last seen with Thomas Skakel. Neither did Benedict proffer a credible explanation as to why several people, including the victim's mother, heard dogs barking agitatedly and other unusual noises between 9:30 and 10 p.m. on October 30. Moreover, although Benedict asserted that the victim could have been alive after 10 p.m., Benedict himself acknowledged that there is no reasonable likelihood that the victim was alive after 1 a.m. on October 31. In any event, if the petitioner could have demonstrated to the satisfaction of the jury that he was not anywhere near the scene of the crime between 9:30 and 10 p.m. on October 30—indeed, if he could have raised a reasonable doubt in the jurors' minds as to his whereabouts at that time—it is highly unlikely that he would have been found guilty of the victim's murder.

adequate investigation of his alibi defense.

The petitioner elicited testimony from Ossorio, a psychologist who was seventy-two years old at the time of the habeas trial, that he was visiting Dowdle at the Terrien residence during the evening of October 30, 1975, and until around midnight on October 31, and that the petitioner and several others also were there that evening, watching television in the library. Ossorio testified that, although he was visiting Dowdle, who was caring for her child, he "was in and out" of the room in which the petitioner and the others who were there that evening were watching television. Ossorio, who further testified that he resided in Greenwich at the time of the petitioner's criminal trial, stated that neither the police nor the defense had ever sought to interview him regarding his presence at the Terrien residence on that date, and that he had never come forward because he did not pay close enough attention to the trial to appreciate that his presence at the Terrien residence, and his recollection of the evening's events, would have been important to the case. The habeas court expressly credited Ossorio, who it characterized as a "disinterested," "powerful," and "credible" witness.

The petitioner also presented the testimony of Michael Fitzpatrick, a prominent Connecticut attorney and past president of the Connecticut Criminal Defense Lawyers Association who specializes in criminal defense and civil litigation.

Fitzpatrick testified that he had spent more than 200 hours reviewing all of the transcripts and other materials relevant to the petitioner's habeas claims, and, on the basis of his expertise and experience in the field of criminal law, it was his opinion that a reasonably competent criminal defense attorney, after receiving and reviewing Dowdle's grand jury testimony, "absolutely" would have ascertained Ossorio's identity and then made reasonable efforts to locate and interview him. That investigation was required, according to Fitzpatrick, because it was incumbent on Sherman to confirm that Ossorio was present at the Terrien residence on October 30, 1975, and, if so, whether his recollection of the events would strengthen the petitioner's alibi defense. In particular, Fitzpatrick explained that, if Ossorio recalled that the petitioner was present at the Terrien home that evening, that testimony would have "[made] it impossible for the state to argue in summation that there [was] not a single independent [alibi] witness in the case, which was one of the chief grounds the state asserted for rejecting the alibi." Fitzpatrick further testified that Sherman's failure to identify and interview Ossorio "absolutely prejudiced" the petitioner because "it deprived [him] ... of the opportunity to present an independent alibi witness, and we know by way of fact ... that he was convicted, [and] that the jury unanimously rejected the alibi."

Throne, an associate in Sherman's office who served as cocounsel for the petitioner along with

Sherman, also was a witness at the habeas trial. Among other subjects, Throne testified about the petitioner's alibi, explaining that it was "extremely important" to the petitioner's overall defense of the charge against him. When asked if the petitioner's trial counsel were "eager to find anyone who could corroborate [the alibi]," Throne responded, "[a]bsolutely, without question." Throne further stated that, "even more importantly," the petitioner's counsel were "especially eager to find a nonfamily member who could corroborate [the petitioner's alibi]." He elaborated on that testimony by noting the "obvious concern" that the petitioner's counsel had because all of the alibi witnesses were family members, and because of the likelihood that "the jury would perceive all of those witnesses as having bias and a motivation to lie or distort facts or truth, which wasn't the case.... I wish that we had even a single witness that wasn't blood related to include in that group that could have testified to the same facts that everyone else testified to, to establish that [the petitioner] was not there the night of the murder." According to Throne, the testimony of an independent, nonfamily alibi witness would have been "critical" to the petitioner's alibi defense.

Finally, Sherman testified at the habeas trial. When asked whether the alibi was the petitioner's "principal defense" at his criminal trial, Sherman responded, "[a]bsolutely," and, thereafter, characterized the alibi defense as "our mainframe." He also stated that it would have been "very

important" to have an alibi witness who was not related to the petitioner and that, if he had located one, he would have had him testify in support of the petitioner's alibi, "[w]ithout a doubt." In response to questioning from the state, and with reference to Dowdle's grand jury testimony, Sherman indicated that, because Dowdle had testified that she "really didn't venture out" of the library on the evening of October 30, 1975, Ossorio, her guest, might well have stayed in the library, as well. Sherman further agreed that, because Dowdle recalled hearing but not seeing the Skakel relatives in a nearby room, Ossorio also may not have seen the Skakels. Sherman also acknowledged that he had read Dowdle's grand jury testimony prior to trial, testimony that included her statement that her "beau" was with her that evening at the Terrien home. When Sherman was asked why he had never inquired into the identity of Dowdle's "beau," Sherman explained simply that, "I had no reason to suspect that he, in fact, would be helpful in that he saw [the petitioner] and the rest of the boys."

B

The Applicable Law

As the majority notes, the sixth amendment guarantees criminal defendants the effective assistance of counsel; *Strickland v. Washington*, supra, 466 U.S. 687; and that guarantee "is beyond question a fundamental right." *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S.Ct. 2574, 91

L.Ed.2d 305 (1986). "The [s]ixth [a]mendment recognizes [this right] because it envisions [that counsel will play] a role that is critical to the ability of the adversarial system to produce just results." (Internal quotation marks omitted.) Id., 394. "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." (Internal quotation marks omitted.) Id., 384. Consequently, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (Internal quotation marks omitted.) Id., 377.

These general principles are no less applicable to the investigative stage of a criminal case than they are to the trial phase. Indeed, the United States Supreme Court has explained that the foregoing "standards require no special amplification in order to define counsel's duty to investigate .... [Simply stated], strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, supra, 466 U.S. 690–91. That is, counsel's decision to forgo or truncate an investigation "must be directly assessed for reasonableness in all the circumstances ...." Id., 691. "In assessing the reasonableness of an attorney's

investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, supra, 539 U.S. 527. In addition, in contrast to our evaluation of the constitutional adequacy of counsel's strategic decisions, which are entitled to deference, when the issue is whether "the investigation *supporting* counsel's [strategic] decision" to proceed in a certain manner "was itself reasonable"; (emphasis altered) id., 523; "we must conduct an *objective review* of [the reasonableness of counsel's] performance ...." (Emphasis added.) Id. Thus, "deference to counsel's strategic decisions does not excuse an inadequate investigation ...." *Williams v. Stephens*, 575 Fed.Appx. 380, 386 (5th Cir.), cert. denied, —— U.S. ——, 135 S.Ct. 875, 190 L.Ed.2d 709 (2014). Finally, because a thorough pretrial investigation is so often an essential component of the defense of a criminal case—especially if the case is complex or involves particularly serious charges—"[c]ourts have not hesitated to find ineffective assistance in violation of the [s]ixth [a]mendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client." *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005).

Although the reasonableness of any particular investigation necessarily depends on the unique facts of any given case; see, e.g., *Strickland v. Washington*,

supra, 466 U.S. 688–89; counsel has certain baseline responsibilities that must be discharged in every criminal matter. "It is the duty of the [defense] lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case ...." (Internal quotation marks omitted.) *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); see also, e.g., *McCoy v. Newsome*, 953 F.2d 1252, 1262–63 (11th Cir.) ("[w]hen a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective assistance of counsel" [internal quotation marks omitted]), cert. denied, 504 U.S. 944, 112 S.Ct. 2283, 119 L.Ed.2d 208 (1992). This duty exists irrespective of whether the defendant is helpful to counsel by providing information pertinent to his defense or whether he provides no such assistance. See *Rompilla v. Beard*, supra, 381 (although petitioner was unwilling to assist counsel in pretrial preparation and "was even actively obstructive by sending counsel off on false leads," counsel nevertheless had independent obligation to conduct thorough investigation); *Daniels v. Woodford*, 428 F.3d 1181, 1202–1203 (9th Cir. 2005) ("[e]ven though [the petitioner] refused to speak to his counsel, [counsel] still had an independent duty to investigate [and prepare]" because "[p]retrial investigation and preparation are the keys to effective representation of counsel" [internal quotation marks omitted]), cert. denied sub nom. *Ayers v. Daniels*, 550 U.S. 968, 127 S.Ct. 2876,

167 L.Ed.2d 1152 (2007). Thus, "[a]n attorney's duty of investigation requires more than simply checking out the witnesses that the client himself identifies." *Bigelow v. Haviland*, 576 F.3d 284, 288 (6th Cir. 2009); see also id., 288–89 ("[Defense counsel] had no reasonable basis for assuming that [the petitioner's] lack of information about still more witnesses meant that there were none to be found.... With every effort to view the facts as a defense lawyer would have [viewed them] at the time, it is difficult to see how [defense counsel] could have failed to realize that without seeking information that could either corroborate the alibi or contextualize it for the jury, he was seriously compromis[ing] [his] opportunity to present an alibi defense." [Citations omitted; internal quotation marks omitted.]).

Of course, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, supra, 545 U.S. 383. In other words, counsel is not required to conduct an investigation that "promise[s] less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." Id., 389. But "[p]retrial investigation and preparation are the keys to effective representation of counsel"; (internal quotation marks omitted) *Daniels v. Woodford*, supra, 428 F.3d 1203; see also *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir.) ("[p]retrial investigation,

principally because it provides a basis [on] which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation"), cert. denied, 469 U.S. 870, 105 S.Ct. 218, 83 L.Ed.2d 148 (1984); and counsel is therefore not free to simply ignore or disregard potential witnesses who might be able to provide exculpatory testimony. See, e.g., *Blackmon v. Williams*, 823 F.3d 1088, 1105 (7th Cir. 2016) ("Just one [potential] witness might have been able to give [the petitioner] a true alibi. At a minimum, all of [the potential witnesses] could have bolstered his [alibi] claim.... It is not reasonable strategy to leave such possible testimony unexplored under these circumstances."); *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007) ("[h]aving ... recognized the possibility that the three witnesses could provide testimony beneficial to [the petitioner], it was objectively unreasonable" for counsel to terminate his pretrial investigation before learning what those witnesses had to say); *Gersten v. Senkowski*, 426 F.3d 588, 610 (2d Cir. 2005) (defense counsel rendered ineffective assistance in concluding investigation prematurely because he "never discovered any evidence to suggest one way or another whether [further investigation] would be counterproductive or such investigation fruitless, nor did counsel have any reasonable basis to conclude that such investigation would be wasteful"), cert. denied sub nom. *Artus v. Gersten*, 547 U.S. 1191, 126 S.Ct. 2882, 165 L.Ed.2d 894 (2006); *Pavel v. Hollins*, 261 F.3d 210, 220–21 (2d Cir. 2001) ("First, there is simply no suggestion in the record that there was any

reason not to put [the witness] on the stand, and an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it.... And, second, [defense counsel's failure to put her] on the stand was based on an inadequate investigation.... [Defense counsel] never contacted [the witness] with regard to her putative testimony, and never inquired into whether she might be willing to testify on [the petitioner's] behalf.... [In cases in which a critical issue is the relative credibility of the party's witnesses] it should be perfectly obvious that it will almost always be useful for defense counsel to speak before trial with [readily available] fact witnesses whose noncumulative testimony would directly corroborate the defense's theory of important disputes. Accordingly, when [defense counsel] learned before trial that [she] might well be such a witness, he should have taken affirmative steps to discuss the case with her.... But [defense counsel] ... did not contact [the witness]. Indeed, there is no indication in the record that [counsel] conducted *any* substantial, affirmative investigation into [the witness'] potential testimony." [Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.]).

Similarly, a decision by counsel to forgo an investigation into the possible testimony of a potentially significant witness is constitutionally unacceptable unless counsel has a sound justification for doing so; speculation, guesswork or uninformed

assumptions about the availability or import of that testimony will not suffice. Instead, counsel must seek to interview the witness—or have the witness interviewed—to determine the value of any testimony that he may be able to provide. See, e.g., *Ramonez v. Berghuis*, supra, 490 F.3d 489 ("[c]onstitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of 'strategy'— based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation"); *Pavel v. Hollins*, supra, 261 F.3d 221 (defense counsel never contacted potentially favorable witness because counsel was "confident as to what [that] witness would say," but "counsel's anticipation [of that testimony] does not excuse the failure to find out" [internal quotation marks omitted]); *United States v. Moore*, 554 F.2d 1086, 1093 (D.C. Cir. 1976) ("counsel's anticipation of what a potential witness would say does not excuse the failure to find out; speculation cannot substitute for certainty").[8] In the same vein, when counsel's failure

[8] See also *Heard v. Addison*, 728 F.3d 1170, 1180 (10th Cir. 2013) ("[a] decision not to investigate cannot be deemed reasonable if it is uninformed" [internal quotation marks omitted]); *Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012) ("[i]f [defense counsel] ... never found out what [the] testimony [of the potential witnesses] would be, he could not possibly have made a reasonable professional judgment that their testimony would have been [unnecessary] and could not have chosen not to call [the witnesses] as a matter of strategy"); *Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008) ("It is difficult to call [defense counsel's] decisions 'strategic' when they failed to seek

to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, no deference or presumption of reasonableness is warranted. See, e.g., *Carter v. Duncan*, 819 F.3d 931, 942 (7th Cir. 2016) ("[t]he consequences of inattention rather than reasoned strategic decisions are not entitled to the

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rudimentary background information about [the potential witness]. Strategy is the result of planning informed by investigation, not guesswork. The record does not support the suggestion that [defense counsel's] investigation met prevailing professional standards."), cert. denied, 558 U.S. 835, 130 S.Ct. 81, 175 L.Ed.2d 56 (2009), and cert. denied, 558 U.S. 932, 130 S.Ct. 58, 175 L.Ed.2d 232 (2009); *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) ("[counsel cannot rely] exclusively on ... assumptions divined from a review of the [s]tate's files," and "[w]ithout so much as contacting a witness, much less speaking with him, counsel is ill-equipped to assess his credibility or persuasiveness as a witness" [internal quotation marks omitted]); *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999) (counsel improperly relied on his "vague impression" that police investigators who interviewed three potential key defense witnesses did not find them credible because "[f]ew decisions a lawyer makes draw so heavily on professional judgment as whether ... to proffer a witness at trial," and "counsel cannot make [that judgment] about a witness without looking him in the eye and hearing him tell his story"), cert. denied sub nom. *Lambert v. Lord*, 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 118 (2000); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir.) (" '[c]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when [he] has not yet obtained the facts on which such a decision could be made' " but, instead, bases that decision on unsupported assumptions), cert. denied sub nom. *Delo v. Kenley*, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450 (1991).

presumption of reasonableness" [internal quotation marks omitted]); *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009) (errors warranting determination of sixth amendment violation include "omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but [rather, that] arose from oversight, carelessness, ineptitude, or laziness" [internal quotation marks omitted]).

As I previously indicated, in determining whether counsel's pretrial investigation satisfied existing professional norms, we consider the nature and extent of the investigation in light of all relevant circumstances. *Strickland v. Washington*, supra, 466 U.S. 691. One such consideration is whether defense counsel undertook any investigation with respect to the particular witness involved, and, if so, at what point and for what reason did counsel decide to forgo any further investigation. A complete failure to take even the most elementary investigative steps with respect to a potential defense or witness is frequently deemed to be constitutionally inadequate. See, e.g., *Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008), cert. denied, 558 U.S. 835, 130 S.Ct. 81, 175 L.Ed.2d 56 (2009), and cert. denied, 558 U.S. 932, 130 S.Ct. 58, 175 L.Ed.2d 232 (2009); *Ramonez v. Berghuis*, supra, 490 F.3d 489; *Towns v. Smith*, supra, 395 F.3d 259; *Soffar v. Dretke*, 368 F.3d 441, 473–74 (5th Cir.), amended in part on other grounds, 391 F.3d 703 (5th Cir. 2004).

Finally, with specific regard to the duty to

investigate a defendant's alibi defense, counsel is obligated to make all reasonable efforts to identify and interview potential alibi witnesses. See, e.g., *Towns v. Smith*, supra, 395 F.3d 259 ("Without even attempting to interview [the witness], counsel simply decided not to call him as a witness. That decision was objectively unreasonable because it was a decision made without undertaking a full investigation into whether [the witness] could assist in [the petitioner's] defense.... By failing even to contact [the witness] ... counsel abandoned his investigation at an unreasonable juncture, making a fully informed decision with respect to [whether to have the witness testify] impossible." [Citation omitted; internal quotation marks omitted.]); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) ("[A]n attorney must engage in a reasonable amount of pretrial investigation and at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances in the case.... [W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and ascertain whether their testimony would aid the defense." [Citations omitted; internal quotation marks omitted.]).

Furthermore, the failure to conduct a thorough investigation of an alibi defense is perhaps most damaging when "the missing witness is disinterested in a case in which the other witnesses have a relationship to the defendant." *Carter v. Duncan*, supra, 819 F.3d 943; see also *Blackmon v. Williams*,

supra, 823 F.3d 1104–1105 (explaining that unreasonableness of counsel's failure to investigate was compounded by "significant potential benefits of obtaining alibi testimony from witnesses unimpaired by family ties to [the petitioner]"; *Montgomery v. Petersen*, 846 F.2d 407, 413 (7th Cir. 1988) (characterizing disinterested alibi witness who defense counsel unreasonably failed to identify and locate as "extraordinarily significant" when all twelve alibi witnesses were either relatives or close friends of petitioner).

In light of these general principles, it is readily apparent that Sherman's decision to disregard Dowdle's grand jury testimony about her "beau"—a decision based solely on Sherman's belief that any inquiry into that subject matter would not have been fruitful—was profoundly unreasonable under the circumstances. As a result, Sherman failed by a wide margin to satisfy *Strickland*'s requirement that a decision to forgo or truncate a particular pretrial investigation must flow from an informed professional judgment.

Accordingly, the habeas court properly reached the only conclusion that the facts and law support: Sherman could not reasonably have elected simply to ignore Dowdle's grand jury testimony and do nothing to contact her former "beau," because all of the other alibi witnesses were close relatives of the petitioner, and Sherman knew both that the state would argue that those witnesses were all lying to protect the

petitioner and that an independent alibi witness, with no ties to the petitioner or his family, would have enhanced the credibility of the petitioner's alibi immeasurably.

C

The Flaws in the Majority's Conclusion That the Habeas Court Incorrectly Concluded That Sherman Rendered Ineffective Assistance in His Handling of the Petitioner's Alibi Defense

The habeas court's memorandum of decision is meticulous and thoughtful, and that court's conclusion is fully supported by the facts and the law governing claims alleging ineffective assistance of counsel. Unfortunately for the petitioner—and, more generally, for the interests of justice—the same cannot be said of the majority opinion.

That majority identifies four reasons for rejecting the habeas court's conclusion that Sherman's handling of the petitioner's alibi defense did not satisfy constitutional standards. First, the majority asserts that Sherman reasonably could have believed that, despite Dowdle's testimony to the contrary, her unnamed "beau" was not, in fact, at the Terrien home on the evening of October 30, 1975, because neither the petitioner nor any of his alibi witnesses had told Sherman about the presence of Dowdle's "beau" at the Terrien home that evening. The majority next claims that it was not unreasonable for Sherman

either to have "overlook[ed] or disregard[ed]" Dowdle's testimony about her "beau" because there was no reference to any such person in any of the interview reports and other materials that had been turned over to Sherman in discovery, and Dowdle's reference to her "beau" was therefore aberrational. Third, even if Dowdle's "beau" was at the Terrien home that evening, it was reasonable for Sherman to infer that, like Dowdle herself, he more or less stayed in the library, where he, Dowdle and her child were located, and, consequently, it also was reasonable for Sherman to assume that the "beau" did not go into the nearby room where the Skakel brothers and Terrien were watching television. Finally, the majority contends that, more than twenty years later, it was not unreasonable for Sherman to think that Dowdle's "beau," having never been interviewed or otherwise having come forward, likely would not have a reliable memory of the events of the evening of October 30, 1975. The majority asserts that, because these considerations provided Sherman with legitimate reasons to think that Dowdle's "beau" would not be able to provide helpful alibi testimony, Sherman's decision to take no action of any kind to identify the "beau" also was reasonable.

As I explain hereinafter, these considerations fall far short of justifying Sherman's failure to take even the most preliminary investigative steps to ascertain whether Dowdle's "beau" could offer valuable alibi evidence. But, before doing do, I first explain the majority's use of an improper standard to determine

whether Sherman was constitutionally required to make a reasonable inquiry into what, if anything, Dowdle's "beau" knew about the petitioner's whereabouts on the evening of October 30, 1975. I then discuss the multiple, compelling reasons why no competent attorney would have failed to conduct such an obvious and simple investigation in the present case. Thereafter, I return to the four reasons on which the majority relies to support its conclusion that Sherman acted reasonably in doing nothing to follow up on Dowdle's testimony about her "beau."

1

The Majority Employs the Wrong Legal Standard

The standard that the majority uses for determining whether Sherman performed competently in declining to act on Dowdle's grand jury testimony concerning her "beau" is whether Sherman reasonably could have concluded that such an investigation more than likely would not result in the discovery of any favorable testimony. According to the majority, under *Strickland*, Sherman had no constitutional duty to try to learn anything at all about Dowdle's "beau" because Sherman reasonably believed, in light of all the relevant circumstances, that her "beau" probably would not be able to provide any useful alibi testimony. On first reading, this reasoning might seem persuasive because it arguably was reasonable for Sherman to think that there was a better than even chance that Dowdle's "beau" either

would not be available to testify, or that he did not see the petitioner at the Terrien home on the evening of October 30, 1975, or that he could not recall the relevant events of that evening. The majority's test, however, is patently unsupportable because whether Sherman had a duty to investigate Ossorio's potential value as an alibi witness does not depend on whether Sherman reasonably may have believed or inferred that Ossorio more likely than not had no useful information. The proper standard, rather, is whether, under all the circumstances, a competent attorney would have undertaken reasonable efforts to *determine* whether Ossorio had any such information. It is perfectly clear that, by doing absolutely nothing to ascertain Ossorio's potential value as an alibi witness, Sherman failed woefully to meet that standard.

Accordingly, even if the reasons proffered by the majority support a reasonable inference that Ossorio might well not have been able to assist the petitioner's defense, that inference would not remotely justify Sherman's failure to ascertain Ossorio's identity from Dowdle and to learn, from Ossorio himself, whether he saw the petitioner at the Terrien residence on the evening of October 30, 1975. As long as the facts and circumstances known to Sherman gave rise to a *reasonable possibility* that Ossorio might be able to provide valuable testimony, Sherman inarguably had an obligation to make a reasonable effort to find Ossorio and to ask him. As I explain hereinafter, those facts and circumstances

leave no doubt that Sherman violated the petitioner's constitutionally protected right to counsel by not making such an effort.

The reasonable inference or belief standard that the majority adopts has no legal precedent and is entirely inadequate to protect the sixth amendment rights of an accused. Under that standard, a defense attorney would be free to refuse to initiate a reasonable investigation into the possible testimony of a potentially important witness, even in cases in which there remains a reasonable prospect that the witness will be able to provide vital defense evidence. Indeed, under the majority's standard, defense counsel could abdicate any duty to investigate eyewitness testimony whenever conditions render it reasonably likely that the witness' ability to observe or recall could have been impaired—for example, due to darkness, the consumption of alcohol, or the like. That simply cannot be the standard contemplated by the sixth amendment, as it would give defense attorneys far too much leeway to decline to investigate potential witnesses when there is still a reasonable chance that the witness will be able to provide valuable testimony. Due to the significance of the pretrial investigation stage of a criminal case, the right to the effective assistance of counsel must include the right to have counsel conduct a reasonable investigation into any potentially important witness unless defense counsel can rule out any reasonable likelihood that the witness may be able to provide favorable testimony. That

standard, in stark contrast to the majority's approach, affords criminal defendants an appropriate level of protection because, under that test, defense counsel must take reasonable steps to follow leads for which there is a real and legitimate possibility that the investigation will yield favorable results, yet, at the same time, counsel permissibly may decide against initiating or continuing an investigation when doing so would simply be a waste of time; see *Rompilla v. Beard*, supra, 545 U.S. 383; tantamount to a "scavenger hunt for potentially exculpatory information with no detailed instruction on what this information may be or where it might be found"; *United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002); or otherwise "pointless"; *United States v. Weaver*, 882 F.2d 1128, 1138 (7th Cir.), cert. denied sub nom. *Schmanke v. United States*, 493 U.S. 968, 110 S.Ct. 415, 107 L.Ed.2d 380 (1989); "futile"; *United States v. Six*, 600 Fed.Appx. 346, 350 (6th Cir. 2015); or "harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 108, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

The sixth amendment does not mandate perfect counsel, of course, but it does require more of counsel during the pretrial investigation stage of the case than merely picking the lowest hanging fruit. Consequently, even if the reasons proffered by the majority justified the belief that Ossorio more than likely would not have been able to provide evidence favorable to the petitioner, that inference does not justify Sherman's failure to make reasonable efforts

to find out whether Ossorio was in a position to do so. This is hardly a case in which additional investigation would have been an exercise in futility or a waste of time. On the contrary, this is a case "in which the [petitioner's] attorneys failed to act while potentially powerful mitigating evidence was staring them in the face ...." (Citations omitted.) *Bobby v. Van Hook*, 558 U.S. 4, 11, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009). When, as in the present case, a defendant is being tried for murder and defense counsel knows of a potential witness who may be able to provide testimony critical to the defendant's primary defense, counsel may not rely on inferences, beliefs or deductions in deciding to forgo even the most rudimentary investigation into whether that witness can corroborate that defense.

2

Under the Proper Standard, Why There Are Compelling Reasons Why Sherman Was Required To Make Reasonable Efforts To Locate Ossorio

The reasonableness of Sherman's decision not to investigate whether Dowdle's "beau" could provide testimony favorable to the petitioner turns on the facts of the case and the circumstances pertaining to the witness. As I previously indicated, there are several compelling reasons why it was absolutely necessary for Sherman to have made reasonable efforts to find out whether Ossorio could corroborate the petitioner's alibi, all of which the majority

ignores. These reasons include (1) the firsthand nature of the source of the information to be investigated, (2) the importance of the petitioner's alibi defense, (3) the significance of Ossorio's testimony to that defense, (4) the import of Ossorio's testimony to rebut the state's claim of a longstanding family cover-up, (5) the ease with which Sherman could have discovered that Ossorio clearly remembered that the petitioner was at the Terrien home on the evening at issue, and (6) the gravity of the criminal charges and the magnitude of the sentence that the petitioner faced. In light of these considerations, it was inexcusable for Sherman to do nothing to ascertain Ossorio's identity, locate him, and then, upon doing so, either rule him out as an alibi witness or secure his testimony for trial if, as it has now been established, he could credibly corroborate that alibi.

Before I address these considerations, it bears emphasis that the habeas court reviewed them, along with the reasons proffered by the respondent, the Commissioner of Correction, for concluding that Sherman was not unreasonable in failing to follow up on Dowdle's grand jury testimony, and found, quite properly, that they outweigh the countervailing factors advanced by the respondent. Inexplicably, however, the majority *does not even mention* the considerations on which the habeas court and the petitioner relied; nor does the majority explain why they are not substantially more weighty and consequential than Sherman's belief that there

probably was no point in even trying to determine whether Dowdle's "beau" would be able to corroborate the petitioner's alibi defense. The court in *Strickland* made clear that, if counsel elects not to undertake a particular investigation, that decision itself must be reasonable under all of the circumstances. *Strickland v. Washington*, supra, 466 U.S. 691. As I discuss hereinafter, the reasons that the majority proffers to justify Sherman's decision not to follow up on Dowdle's testimony are mere makeweights—indeed, they smack of the same kind of after the fact rationalization of counsel's conduct that the United States Supreme Court rejected in *Wiggins v. Smith*, supra, 539 U.S. 526–27—and pale by comparison to the following, truly compelling considerations that support the petitioner's contention that Sherman's failure to take any action in regard to Ossorio violated the petitioner's sixth amendment right to counsel.

The first such consideration is the firsthand nature of the information provided by Dowdle in her grand jury testimony. Although Dowdle gave no indication one way or the other in that testimony whether Ossorio knew of the petitioner's presence at the Terrien home on the evening of October 30, 1975, Dowdle did have direct knowledge that another identifiable and presumably independent person, Ossorio, was there that evening. Thus, Dowdle's information about Ossorio's presence was not based on hearsay or speculation; she had personal knowledge that Ossorio was at the Terrien home that

evening.

Second, the petitioner's alibi was his primary defense to the state's case against him. Although the state contended that it was possible that the victim was murdered as late as 1 a.m. on October 31, 1975, the substantial weight of the evidence indicated that the murder most likely was committed between 9:30 and 10 p.m. on October 30. Consequently, because the state was required to disprove the petitioner's alibi beyond a reasonable doubt; see, e.g., *State v. Butler*, 207 Conn. 619, 631, 543 A.2d 270 (1988) (defendant in criminal case is entitled to instruction that state must rebut alibi defense beyond reasonable doubt); if the jury believed the petitioner's alibi witnesses—indeed, even if the petitioner's witnesses merely raised a reasonable doubt in the jurors' minds as to the petitioner's whereabouts between 9:30 and 10 p.m.—there is a very good likelihood that the petitioner would have been acquitted. See footnote 7 of this opinion.

The importance of the petitioner's alibi defense is also reflected in how vigorously the state opposed it. State's Attorney Benedict claimed that it had been concocted by the Skakel family and founded on the perjurious testimony of the petitioner's alibi witnesses. Benedict spent a considerable amount of time, both in adducing testimony from the state's witnesses and in cross-examining the petitioner's witnesses, as well as during closing argument, attempting to demonstrate that the petitioner's alibi

had been fabricated. It is likely that Benedict challenged the petitioner's alibi so aggressively because, as the Supreme Court of New Jersey has observed, "few defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of [the jurors than an alibi]." (Internal quotation marks omitted.) *State v. Porter*, 216 N.J. 343, 353, 80 A.3d 732 (2013).

Next, the testimony that Ossorio could have provided was unquestionably essential to the petitioner's alibi defense. That testimony, which the habeas court expressly credited, placed the petitioner at the Terrien residence during the relevant time frame on the evening of October 30, 1975, thereby fully corroborating the testimony of the petitioner's other alibi witnesses. But Ossorio's testimony, while corroborative, certainly was not cumulative, because the petitioner's other alibi witnesses were either siblings or cousins of the petitioner. Although Ossorio was friendly with Dowdle in the mid–1970s, there is no indication that he had maintained any ties to her or the Skakel family over the years, and, thus, he would have been an independent and unbiased witness with no motive to lie about seeing the petitioner at the Terrien home on the evening of October 30. Benedict emphatically and persistently maintained that the jury should not credit the petitioner's alibi because all of the alibi witnesses were closely related to the petitioner and were lying to protect him. In light of this contention by the state, credible testimony from Ossorio would have been

absolutely critical, both to establish the credibility of the alibi generally and to demonstrate the credibility of the petitioner's witnesses more specifically. Indeed, if believed, Ossorio's testimony would have disproved Benedict's contention that the Skakel family had created the fictitious alibi to protect the petitioner and then continually lied, under oath and otherwise, in furtherance of the fraudulent scheme. Thus, with respect to the petitioner's alibi defense, the quantum of evidence already known to Sherman—evidence marked by the weakness inherent in any alibi defense comprised solely of the testimony of family members—should have prompted Sherman to investigate the lead provided by Dowdle. See, e.g., *Wiggins v. Smith*, supra, 539 U.S. 527 ("[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

In addition, as I discussed previously, the state adduced testimony from Ix, Shakespeare, and Julie Skakel in an effort to discredit the petitioner's alibi defense. Testimony from a neutral, objective and credible witness like Ossorio would have gutted the testimony of those state witnesses, testimony that no doubt appeared far more significant in light of the state's contention that the petitioner's alibi witnesses all were lying. In fact, it seems clear that the jury was influenced by the testimony of Ix, Shakespeare and Julie Skakel because the jury, during its

deliberations, asked that the testimony of those witnesses, insofar as it related to the petitioner's alibi, be read back.

Along the same lines, Ossorio's testimony also would have refuted Benedict's claim that the alibi was an integral part of a broader Skakel family scheme to cover up for the petitioner. According to Benedict, this scheme was hatched immediately after the victim's murder and began with the disposal of incriminating evidence and the trip to Windham, New York, continued with the petitioner's enrollment at the Elan School in Maine, and, thereafter, was exemplified by his allegedly self-serving statements to Richard Hoffman, the ghostwriter assisting the petitioner with his book, and, finally, culminated in the perjurious grand jury and trial testimony of the petitioner's alibi witnesses. Because the allegedly fraudulent alibi provided the foundation for Benedict's claim of a grand family scheme, Ossorio's credible testimony demonstrating the validity of the alibi also would have debunked Benedict's broader conspiracy theory.

Yet another consideration that the majority fails to consider is the ease with which Sherman could have ascertained that Ossorio had critical alibi testimony to offer, such that even the most rudimentary of inquiries would have led Sherman directly and immediately to Ossorio. See, e.g., *Rompilla v. Beard*, supra, 545 U.S. 389–90 (explaining that "[t]he unreasonableness of

attempting no more than [counsel] did was heightened by the easy availability of the [material evidence]"). Upon reading Dowdle's grand jury testimony and learning that her "beau" was with her at the Terrien residence on the evening of October 30, 1975, all Sherman had to do was pick up the telephone and ask Dowdle—his own alibi witness—to identify her "beau." And then, after learning that her "beau" was Ossorio, it would have been easy for Sherman to locate and speak to him—indeed, a look in the telephone listings and another telephone call would have sufficed—because he lived just a few miles from Sherman's office. As in all criminal cases that involve the issue of defense counsel's failure to interview a potential witness to ascertain what he or she has to say, counsel has no absolute obligation "to actually track down" the witness, "only that he put in a reasonable effort to do so." *Avery v. Prelesnik*, 548 F.3d 434, 438 (6th Cir. 2008), cert. denied, 558 U.S. 932, 130 S.Ct. 80, 175 L.Ed.2d 234 (2009); see also id. ("There is no reason based on professional judgment why [defense counsel] would not have pursued speaking to [the potential alibi witness]. The [D]istrict [C]ourt correctly concluded that [defense counsel] was under a duty to reasonably investigate, which entails, at the bare minimum, asking for [the potential alibi witness' telephone] number or address and reasonably attempting to contact him." [Internal quotation marks omitted.]). In the present case, the most elementary and obvious of inquiries by Sherman or his investigator would have revealed that Ossorio was a critical alibi witness, and

Sherman's unwillingness to take even those modest steps unreasonably deprived the petitioner of Ossorio's crucial trial testimony.

Consequently, this is not a case that required Sherman to devise a plan "to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, supra, 562 U.S. 89; see also *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir.) ("[the] correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources"), cert. denied, 513 U.S. 899, 115 S.Ct. 255, 130 L.Ed.2d 175 (1994). Taking his investigation into Ossorio's identity, whereabouts and possible testimony one step at a time, Sherman would have been able to successfully complete the investigation in two easy steps and at negligible expense. But, even if that were not so painfully apparent, the petitioner paid Sherman more than $2 million in legal fees, and so the cost of undertaking reasonable steps to locate Ossorio, a potentially critical witness, certainly was not an issue.

Finally, as a general matter, an adequate pretrial investigation is required in all criminal cases. But common sense dictates that, when the stakes are highest— when the criminal charges are most serious, exposing the defendant to the most lengthy of prison terms—the importance of a thorough pretrial investigation is that much greater. In the present case, both the gravity of the charged offense, murder,

and the magnitude of the potential maximum sentence, life imprisonment, are obvious. In such circumstances, the responsibilities of defense counsel are especially great, commensurate with the heightened exposure, concerns and expectations of the defendant. Defense counsel must be particularly attentive to detail, because the defendant's life is on the line. Of course, the gravity of the murder charge placed Sherman on notice that he needed to put appropriate time, thought and effort into the case. He clearly did not live up to professional norms, however, in failing even to contact Dowdle after reading her grand jury testimony and learning that her "beau" was at the Terrien home, with her, on the evening of October 30, 1975.

3

The Majority Cannot Justify Sherman's Grossly Inadequate Handling of the Petitioner's Alibi Defense

The majority goes to great lengths in trying to rationalize Sherman's indefensible failure to follow up on Dowdle's grand jury testimony, which identified her "beau" as a potential, independent alibi witness. The majority's attempt to justify Sherman's decision to forgo even the most rudimentary and self-evident steps to find out if Ossorio could corroborate the petitioner's alibi—steps that, if taken, would have put Sherman in touch with Ossorio immediately—is both unavailing and troubling.

The majority first argues that it was reasonable for Sherman to believe, in spite of Dowdle's testimony to the contrary, that her unnamed "beau" actually was not present with her at the Terrien residence on the evening of October 30, 1975, because neither the petitioner nor his alibi witnesses had mentioned anything to Sherman about Dowdle's "beau." Even if this argument was predicated on an accurate rendition of the facts,[9] it is based on a fundamental misunderstanding of the timeline of this case.

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[9] With respect to the factual premise of the respondent's argument, I disagree with the majority's assertion that the habeas court credited Sherman's testimony that the petitioner had not told him about Ossorio's presence at the Terrien residence on the evening of October 30, 1975, and discredited the petitioner's contrary testimony that he had, in fact, brought that fact to Sherman's attention. The habeas court made no such finding, explaining, instead, that it made no difference whether the petitioner had informed Sherman about Ossorio because Sherman was on notice, by virtue of Dowdle's grand jury testimony, that her "beau" was, in fact, at the Terrien residence. In essence, the habeas court simply assumed that the petitioner had not told Sherman about Ossorio and then proceeded to explain why Dowdle's grand jury testimony was more than sufficient to place Sherman on notice of Ossorio as a potential independent alibi witness. I fully agree with the habeas court that, in light of Dowdle's grand jury testimony, it matters not whether the petitioner told Sherman about Ossorio. If, however, it truly matters to the majority, I would urge the majority to obtain an articulation from the habeas court on this issue because I firmly believe that the majority is mistaken in its reading of the habeas court's decision. Because, however, the majority proceeds on the premise that the petitioner did not apprise Sherman about Ossorio, and because it makes no difference for purposes of my analysis, I assume that such was the case.

It is undisputed that the petitioner was never considered a suspect in the victim's murder before the mid–1990s; rather, he was considered only a potential witness before that time. Indeed, State's Attorney Benedict acknowledged this fact at trial, noting that, until the 1990s, no witness had ever been asked to account for the petitioner's whereabouts or movements on the night of the murder because the police never suspected his involvement in the crime. Two events occurred in the 1990s that caused the petitioner to fall under suspicion: the theft of the Sutton files, in 1995, which revealed that the petitioner had changed his account of his activities on the night of the murder, and the publication of a book by Mark Fuhrman, in 1998, in which Fuhrman claimed to have solved the long, unsolved murder by being the first to suspect the petitioner's involvement in it. Fuhrman urged that a grand jury be empaneled immediately to investigate his theory. Shortly thereafter, a grand jury was empaneled, and, in July, 1998, the petitioner hired Sherman to represent him in connection with that proceeding. Dowdle was called before the grand jury two months later, on September 22, 1998, at which time she was asked about her recollection of the evening of October 30, 1975. Dowdle explained that she was at home with her "beau."

Accordingly, and contrary to the assertion of the majority, the existence of a potential, independent alibi witness for the petitioner was revealed *as soon as the petitioner became a suspect in the murder*, by

the only person who was likely to recall after so many years that such a person even existed. Given the belated development of the case against the petitioner, Sherman should have known that it was possible—even likely—that neither the petitioner nor the other alibi witnesses recalled or had given any thought to whether Ossorio—or anyone else—was at the Terrien residence on the evening of October 30, 1975. It is apparent, for instance, that even Dowdle failed to appreciate the significance of Ossorio's presence at her home, either when she testified before the grand jury or when she again mentioned him at the petitioner's criminal trial four years later. In any event, there are many reasonable explanations why the petitioner and his alibi witnesses did not volunteer information about Ossorio to Sherman immediately after he was retained by the petitioner, but there is simply no justification for Sherman to have concluded that Dowdle was mistaken about the presence of her "beau" at the Terrien home, or, if her "beau" was there with her, that he would not know whether the petitioner also was present at that time. The only rational thing for Sherman to do to clarify any confusion that he may have had about Dowdle's testimony would have been to speak to her about the matter.[10] This is especially true in view of the fact

[10] The majority makes much of the fact that, according to Sherman's testimony at the habeas trial, none of the petitioner's alibi witnesses ever told him that Ossorio or anyone else was present at the Terrien home on the evening of October 30, 1975. The majority's reliance on this testimony is misplaced. First, the

that, at the petitioner's criminal trial, Dowdle *again* testified that she had a companion with her on the evening of October 30, 1975, this time characterizing him as a "friend." Inexplicably, Sherman failed to follow up on either reference.

The majority also contends that, despite Dowdle's reference to her "beau" in her grand jury testimony, Sherman reasonably could have believed that Ossorio was not at the Terrien home on the evening of October 30, 1975, because he had never been named in the many police reports that were generated after the murder. The majority asserts that the absence of Ossorio from these reports rendered Dowdle's reference to him as aberrational and, therefore,

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habeas court never made any findings with respect to the credibility of that testimony, and so the majority has no basis to treat it as accurate. Second, the issue is not whether the witnesses volunteered information about Ossorio to Sherman because, as I have explained, there are many reasons why they would not have known that Ossorio was a potentially important witness. Indeed, the fact that Dowdle was unaware of Ossorio's importance is reflected in her matter-of-fact grand jury and trial testimony about Ossorio. Third, Sherman was questioned at the habeas trial whether *he had asked* the family alibi witnesses about the presence of anyone else at the Terrien residence on the evening of October 30. With respect to Rushton Skakel, Jr., and John Skakel, Sherman could say only, "[p]robably." When asked the same question about Terrien and Dowdle, Sherman answered, "I would assume I did." In fact, Sherman's "assum[ption]" that he had questioned Dowdle on the issue was patently incorrect; the habeas court expressly found that, *if* Sherman *had asked* Dowdle about her "beau," she would have identified him as Ossorio. Sherman, however, never did inquire about Dowdle's beau.

somehow insignificant. This contention, too, is baseless, and for much the same reason. Because the petitioner did not become a suspect until more than twenty years after the murder, police investigators simply were not concerned about the petitioner's whereabouts during the twenty year period in which the vast majority of the police interviews were conducted. Until the petitioner became a suspect, there was never any reason for the police to seek a complete accounting of all individuals present at the Terrien home on the evening of October 30, 1975. Thus, the majority is unable to cite a single report in which Ossorio likely would have been identified in the course of the interview. In fact, there is no such report because, as Benedict expressly acknowledged at trial, until the 1990s, witnesses had never been asked to account for the petitioner's whereabouts on the night of the murder for the simple reason that no one who indicated being at the Terrien home on the evening of October 30, including the petitioner, ever was a suspect before that time. In other words, the majority's suggestion that Dowdle's reference to her "beau" is aberrational assumes without any evidentiary support that there was a context in which Ossorio's name—or the name of anyone else who was visiting or working at the Terrien home on October 30—would have come up during the first twenty years of the investigation. The simple fact of the matter is that Ossorio's name would have come up *only* if the police had suspected that the petitioner, Rushton Skakel, Jr., John Skakel, or Terrien did not go to the Terrien home as reported and, therefore,

had asked them whether anyone could vouch for their presence there.

In this respect, the present case is governed by the principles announced in *Rompilla v. Beard*, supra, 545 U.S. 383, in which defense counsel was deemed to have rendered constitutionally deficient assistance by failing to review more thoroughly certain evidence in the prosecutor's possession. In addressing the dissent's primary argument, the court stated: "The dissent would ignore the opportunity to find this [mitigating] evidence on the ground that its discovery ... rests on serendipity .... But once counsel had an obligation to examine the file, counsel had to make reasonable efforts to learn its contents; and once having done so, they could not reasonably have ignored mitigation or red flags simply because they were unexpected." (Citation omitted; internal quotation marks omitted.) Id., 391 n.8. That is precisely the situation in the present case: Sherman concededly had an obligation to review Dowdle's grand jury testimony with reasonable care, and once having done so, he could not ignore the obvious red flag raised by that testimony, namely, that Dowdle was accompanied by her "beau" at the Terrien residence on the evening of October 30, 1975.[11]

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[11] The majority tries to distinguish *Rompilla* from the present case on the ground that *Rompilla* did not involve an alibi defense. The majority's argument presents a classic example of a distinction without a difference. The fact that *Rompilla* is not an alibi case is completely irrelevant, and the majority provides no explanation for its contrary assertion. *Rompilla* is highly relevant to the present case because it

The majority next tries to convince us that it was reasonable for Sherman to infer that, because Dowdle indicated in her grand jury testimony that she mostly stayed in the library that evening and had not seen the Skakel brothers herself, Ossorio, too, did not have occasion to see who was watching television in an adjacent room. This argument, too, is based on the unsupported assumption that Ossorio stayed put in the library all evening, even when Dowdle went to put her daughter to bed. The fact is that Sherman had no idea whether Ossorio remained in the library, wandered around the house, spent time in the television room or otherwise bumped into the Skakel family members during the ninety minutes or so that they were all together in the Terrien residence. Of course, the only way for Sherman to have found out is to have asked Ossorio, but, inexplicably, he made no effort to do so.

The majority also asserts that Sherman reasonably could have believed that Ossorio likely would not be able to recall what occurred on the evening of October 30, 1975, because Sherman could not have interviewed him until Sherman was retained in 1998, some twenty-three years after the relevant events. To buttress this argument, the

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underscores the fact that counsel has an obligation to make reasonable inquiry into facts in mitigation or other red flags when reviewing discovery materials, even when those facts or red flags are unexpected. Dowdle's testimony concerning her "beau" is precisely the kind of red flag that competent counsel would have recognized and pursued further.

majority observes that Ossorio had not been questioned or otherwise come forward in those twenty-three years, lending support to the inference that he would not be able to remember who was present at the Terrien home that evening. Again, although Ossorio might not have remembered whether the petitioner was at the Terrien home on October 30, he well might have. And, indeed, he did. Sherman obviously could not rule out that possibility, and he made no effort to do so—if he had, he would have learned that Ossorio did, in fact, see the petitioner there that evening. Under the majority's logic, Sherman had no duty to make *any* effort to follow up on *any* lead about *any* new or additional alibi witness—or any kind of witness, for that matter—because he reasonably could have concluded that no such witness was likely to remember events from more than two decades beforehand. Of course, the case concerned events long in the past, and, so, both the state and the defense were required to do their best to develop facts based largely on memory and recall. Indeed, this case never could have been brought but for the state's ability to locate witnesses who could remember and testify about events that had occurred decades earlier. Sherman's job in defending the petitioner necessarily required him to undertake the same investigation. The majority, however, agrees with the respondent that it was reasonable for Sherman to forgo an investigation into Ossorio due to the lapse of time. This argument makes no sense to me, and I simply cannot see why the majority finds it persuasive.

Finally, from my perspective, the majority's attempt to rehabilitate Sherman's representation of the petitioner misses the point altogether. As I discussed previously, when a defense attorney represents a defendant in a murder case involving an alibi, the dictates of the sixth amendment—that the attorney take reasonable steps to advance that alibi—are coextensive with common sense; after all, reasonableness and common sense are closely related. And it defies common sense to conclude that it was perfectly reasonable for Sherman to decide that he need not even speak to Dowdle about her "beau" because he felt there was a likelihood that any such inquiry would prove to be unproductive. The fact is, of course, that there was absolutely no reason for Sherman even to attempt to evaluate the likelihood that Ossorio could or could not provide important alibi testimony; the *only* reasonable thing for Sherman to do was to *ask* Ossorio, which he readily could have done but elected not to do. That the majority defends Sherman's inexplicably poor and prejudicial decision making with respect to Ossorio, and concludes that it somehow comports with the petitioner's right to the effective assistance of counsel, is indeed baffling.

4

The Majority's Position Has No Support in Applicable Precedent

In support of its argument that, under all the facts

and circumstances, it was reasonable for Sherman to "overlook or disregard" Dowdle's "singular reference" to her "beau" in her grand jury testimony, the majority suggests that courts have not found counsel ineffective for failing to interview an alibi witness when the defendant did not bring that witness to the attention of counsel. The majority is entirely mistaken both in its ultimate conclusion and in its reading of the relevant case law.

As the majority appears to concede, it is generally *not* reasonable for counsel to fail to investigate potential alibi witnesses identified by a client. See, e.g., *Mosley v. Atchison*, 689 F.3d 838, 849 (7th Cir. 2012); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991); *Vazquez v. Commissioner of Correction*, 107 Conn. App. 181, 185–86, 944 A.2d 429 (2008). By the same token, "[d]efense counsel is not required ... to investigate everyone whose name happens to be mentioned by the defendant." (Internal quotation marks omitted.) *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985). The majority is manifestly incorrect, however, insofar as it appears to assert that counsel is not ineffective in failing to investigate an alibi witness *unless* the defendant provides counsel with the witness' name. Contrary to the majority's suggestion—and to common sense, as well—the key consideration is not whether the client has mentioned the witness to counsel but whether a reasonably diligent and effective lawyer, once apprised of the existence of a potentially critical witness, could make a "reasonable professional

[judgment]" that it was nonetheless unnecessary to contact the witness or otherwise to pursue that line of defense. (Internal quotation marks omitted.) *Wiggins v. Smith*, supra, 539 U.S. 533. Of course, the answer to that question is "no."

The majority cites *Gaines v. Commissioner of Correction*, supra, 306 Conn. 664, in particular, for the proposition that counsel's failure to investigate an alibi witness renders his performance deficient only when he has been provided with the witness' identity and has "reason to believe that the witness might have helpful information to give." *Gaines* stands for no such proposition and cannot arguably be read as the majority does. In that case, the petitioner, Norman Gaines, was completely unable to remember his whereabouts on the night of the crime or to remember a single witness who might attest to them. *Gaines v. Commissioner of Correction*, supra, 675. Nonetheless, this court found that his defense attorney's representation was ineffective insofar as he failed to interview either of the only two individuals that Gaines mentioned as people he knew in Bridgeport, where the crime occurred, even though Gaines *never suggested that they might have information helpful* to his defense. Id., 685–87.

Gaines, therefore, hardly stands for the proposition that counsel need not investigate witnesses who have not been identified by the client. To the contrary, *Gaines* clearly illustrates why Sherman was manifestly ineffective insofar as he

failed to look into Dowdle's "beau." First, in *Gaines*, we noted how easy it would have been to contact the potential witnesses. See id., 685–86 ("no ... extensive investigation, based wholly on conjecture, was necessary to discover or to contact [the witness]"). In the present case, as I explained, it can hardly be said that contacting Ossorio would have been any more difficult.[12] Second, in *Gaines*, we emphasized that counsel was responsible for making a context specific assessment of the value of potential witnesses, completely apart from the assessment made by Gaines. See id., 684 ["[Gaines'] failure to indicate explicitly that [the witness] possessed information that would be helpful to his case did not relieve [counsel] of his duty to interview [the witness]. Criminal defendants are guaranteed effective assistance of counsel, including adequate pretrial investigation, because they require the skill and knowledge of an individual trained in the adversarial process to identify the most important witnesses and evidence in order to present the most effective defense."). In the present case, just as in *Gaines*,

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[12] Ease of access, rather than whether the petitioner supplied the name of the witness, was the focus of the court's analysis in *Gaines*. Given our previous recognition that counsel may be required to investigate leads not supplied by a client; see *Siemon v. Stoughton*, 184 Conn. 547, 557, 440 A.2d 210 (1981) (counsel was ineffective for failing to interview witnesses of related incidents presented by investigator); whether a name was supplied is simply irrelevant. In both *Gaines* and the present case, counsel made a conscious decision not to investigate an identifiable witness whose testimony might well have been helpful.

Sherman immediately should have recognized the potential value of Ossorio's testimony, even though he was not identified by the petitioner. Indeed, the possibility that a person identified as being *at the scene* in question would remember who else was there—like in the present case—is hardly more remote than the possibility, as in *Gaines*, that a person that Gaines knew, though *not placed with him* on the night of the crime, would in fact have been moving her belongings with Gaines on a particular night five months earlier, and would also happen to remember that fact. See id., 671, 686–87. Furthermore, just as in *Gaines*, the fact that Ossorio *might not* have ended up providing useful information is entirely beside the point. Given the potential value of his testimony and the ease with which it might have been acquired, there is simply no justification— none whatsoever—for Sherman's decision not to investigate further.

In fact, the majority's unsupported contention to the contrary notwithstanding, courts have consistently recognized that effective counsel cannot limit his investigation to those leads presented by the client himself, but, rather, counsel has an independent duty to investigate potential alibi witnesses not suggested by the client. In *Bigelow v. Haviland*, supra, 576 F.3d 284, for instance, the Sixth Circuit held that counsel "had no reasonable basis for assuming that [the petitioner's] lack of information about still more [alibi] witnesses [aside from one already identified by the petitioner] meant that there

were none to be found." Id., 288. The court observed that an attorney has a duty of investigation that goes beyond what the client himself identifies and concluded that counsel's representation was ineffective insofar as he failed to pursue such additional investigation as would have revealed the alibi witnesses. Id., 288–89. Federal case law is replete with such examples. See, e.g., *Stitts v. Wilson*, 713 F.3d 887, 893 (7th Cir. 2013) ("When a defendant's alibi is that he was at a nightclub at the time of the shooting, where there are presumably many people, we cannot fathom a reason consistent with [United States] Supreme Court precedent that would justify a trial counsel's decision to interview only a single alibi witness without exploring whether there might be others at the venue who could provide credible alibi testimony. There is simply no evidence in the record to suggest that exploring the possibility of other alibi witnesses 'would have been fruitless' under these circumstances." [Emphasis omitted.]), cert. denied, —— U.S. ——, 134 S.Ct. 1282, 188 L.Ed. 2d 299 (2014); *United States v. Gray*, 878 F.2d 702, 711–12 (3d Cir. 1989) (counsel was ineffective when he failed to interview unnamed potential eyewitnesses to altercation, in addition to several known witnesses); *Sullivan v. Fairman*, 819 F.2d 1382, 1391–92 (7th Cir. 1987) (counsel was ineffective when he made merely "perfunctory" efforts to interview witnesses noted in police reports).

The facts of this case illustrate the need for just such an independent duty. By the late 1990s, it is

entirely unsurprising that the petitioner failed to recall the transitory presence of his older cousin's boyfriend nearly twenty-five years earlier. In such a situation, counsel must probe harder—to seek to fill in the gaps when the foibles of memory are likely to interfere with a defendant's full recollection of the past. See *Bigelow v. Haviland*, supra, 576 F.3d 288 (counsel's duty to look beyond witnesses identified by client is especially significant when client may have trouble remembering them himself). Courts have reasonably recognized, moreover, that such duties grow increasingly acute as the gravity of the crimes charged increases. See *Gaines v. Commissioner of Correction*, supra, 306 Conn. 684 ("[g]iven the seriousness of the charges that his client faced [and the other relevant considerations], it was unreasonable for [defense counsel] not to recognize the potential that [the witness] might possess information helpful to the petitioner's case"); see also *Gregg v. Rockview*, 596 Fed.Appx. 72, 77 (3d Cir. 2015) ("[e]specially given the gravity of the criminal charges [the petitioner] was facing, counsel could not have reasonably elected to rely exclusively on [one witness] and forgo any investigation into [another]"); *Raygoza v. Hulick*, 474 F.3d 958, 964 (7th Cir.) ("[i]n a [first-degree] murder trial, it is almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly"), cert. denied sub nom. *Randolph v. Raygoza*, 552 U.S. 1033, 128 S.Ct. 613, 169 L.Ed.2d 413 (2007); *Bryant v. Scott*, supra, 28 F.3d 1417–18 ("given the seriousness of the offense and the gravity of the punishment, counsel

should have tried to investigate the potential alibi witnesses"); *Coleman v. Brown*, 802 F.2d 1227, 1234 (10th Cir. 1986) ("[i]n light of the strong case against [the petitioner] and the seriousness of the charges, it was improper for his attorney to fail to investigate what was perhaps [the petitioner's] sole line of defense"), cert. denied, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987).

Thus, there is no question that Sherman's performance was not rendered effective merely by virtue of any inability on the petitioner's part to recollect the presence of Dowdle's "beau." If Sherman was aware of Ossorio's presence and believed that his testimony might be useful, Sherman had an independent duty to investigate, regardless of whether the petitioner pointed him in that direction. The majority argues, nonetheless, that Sherman, having examined the grand jury testimony with reasonable care,[13] could justifiably have declined to investigate the potential witness on the assumption that Ossorio would not have possessed useful information. Myriad cases point in the opposite direction.

In fact, courts have often criticized attorneys who

[13] To do otherwise when reviewing testimony pertaining directly to the petitioner's alibi in a case relying largely on an alibi defense would itself clearly amount to ineffective assistance of counsel, and the majority does not contend otherwise. On the contrary, the majority sets forth the reasons why, in its view, Sherman's conscious decision not to pursue the Ossorio lead was reasonable.

fail to investigate potential witnesses on the basis of flawed assumptions about their usefulness. See *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005) ("[a]n outright failure to investigate witnesses [as opposed to the decision not to call such witnesses after investigation], is more likely to be a sign of deficient performance"); *Black v. Larson*, 45 Fed.Appx. 653, 655 (9th Cir. 2002) ("[a]lthough generally we defer to counsel's decision not to proffer a witness at trial, that decision is entitled to less deference when the attorney fails to interview the witness"); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972) (counsel was ineffective for failing to investigate and subpoena alibi witnesses because, among other things, "he did not believe [that] a person could remember that long ago"). In *Blackmon v. Williams*, supra, 823 F.3d 1105, for instance, the Seventh Circuit concluded that counsel's representation was ineffective insofar as he failed to investigate potential alibi witnesses who had attended a barbeque with the petitioner at a time relevant to the crime alleged. The Seventh Circuit roundly criticized the state court for "appear[ing] to assume that counsel knew, somehow, that the additional alibi witnesses would offer purely cumulative testimony." Id., 1104. Rather, the court observed that, "[i]f counsel never learned what the witnesses would have said, he could not possibly have made a reasonable professional judgment that their testimony would have been cumulative." (Internal quotation marks omitted.) Id.; see also *Anderson v. Johnson*, 338 F.3d 382, 392–93 (5th Cir. 2003)

(counsel was ineffective for assuming, after reviewing state's file but without further investigation, that witness would not provide useful testimony). Courts have been similarly critical of assumptions made about a witness' ability or willingness to testify on behalf of the defendant. See *Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002) ("[Counsel] ... failed to identify these potential witnesses because he thought that some of the people might not make the best appearance before a jury, and because his investigator ... told him ... that some witnesses had been uncooperative. That witnesses *might* not cooperate or make the best appearance at trial are unreasonable bases not to identify or attempt to interview them, however. A lawyer has a duty to investigate what information ... potential [eyewitnesses possess], even if he later decide[s] not to put them on the stand." [Emphasis in original; internal quotation marks omitted.]), cert. dismissed, 538 U.S. 919, 123 S.Ct. 1571, 155 L.Ed.2d 308 (2003); *Schlup v. Bowersox*, United States District Court, Docket No. 4:92CV443 (JCH) (E.D. Mo. May 2, 1996) ("The record lacks evidence supporting trial counsel's assumption that interviewing eyewitnesses would have been fruitless because no eyewitnesses would have discussed the murder .... In the absence of evidence supporting trial counsel's assumption, his complete failure to interview eyewitnesses to the crime falls below an objective standard of reasonableness. Trial counsel did not have a sufficient basis for believing that investigating eyewitnesses would not benefit the defense.").

In the present case, it is readily apparent that the potential value of Ossorio's testimony was far too high for Sherman to dismiss Dowdle's reference—even a single reference—without reasonable investigative effort.[14] As the Eighth Circuit has observed, "[o]nce a defendant identifies potential alibi witnesses, it is unreasonable not to make some effort to contact them to ascertain whether their testimony would aid the defense." *Grooms v. Solem*, supra, 923 F.2d 90. In that case, counsel failed to investigate a potential alibi that arose at the beginning of trial on the assumption that he would be precluded from offering any alibi witnesses on state procedural grounds. See id. In the present case, Sherman faced no such procedural barrier; he merely assumed, on the basis of the petitioner's twenty-five year old recollection, that Ossorio would be able to offer no useful testimony. Such an assumption is patently unreasonable in the circumstances presented.

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[14] I again underscore the minimal effort that would have been required of Sherman to locate Ossorio, as well as the potentially great reward of a disinterested alibi witness. See, e.g., *Montgomery v. Petersen*, supra, 846 F.2d 413 (counsel was ineffective by failing to track down "extraordinarily significant" testimony of single disinterested alibi witness in case). By way of analogy, we are not asking Sherman to waste his time panning for gold on a miner's chance of striking it rich. We are simply asking him to check the number on his bingo card to see if it matches the winning draw. Whereas the former might reasonably be characterized as a fool's errand, the failure to do the latter is neither rational nor reasonable.

In reaching a contrary conclusion, the majority relies on cases involving facts that bear no resemblance to the present case. It suggests, first, that, as in *United States v. Farr*, supra, 297 F.3d 658, Sherman did not act unreasonably in failing to engage in a " 'scavenger hunt' " for potentially exculpatory information with no reason for knowing what the information was or where it might be found. In *Farr*, however, the defendant had refused to cooperate with his attorney; see id., 654; and could not, on appeal, "name a single witness who could help his cause, much less identify the substance of their alleged testimony." Id., 656. Thus, the court had no reason to decide whether the defendant's counsel was ineffective; without any sense of who the witnesses were or what they might say in his defense, the court could conclude only that the defendant was not prejudiced by the missing testimony. Id., 659. In the present case, by contrast, the location and import of the potentially exculpatory information is—and always has been—beyond question. Sherman simply needed to speak to Dowdle and ask her who her "beau" was.

The majority also refers to two Eighth Circuit cases to illustrate the significance of the petitioner's failure to precisely identify Ossorio or to help Sherman locate him. But, once again, the majority fails to ascribe any value to *identifiability*, focusing narrowly on the formality of whether the defendant has fully identified the witness for the benefit of counsel. What these cases stand for, in fact, is the

proposition that counsel is not required to conjure up a witness of uncertain value when that witness is not reasonably identifiable.[15] In those cases, unlike in the present case, each witness was misidentified in the police reports—a barrier to investigation that, without the aid of the defendant, counsel had failed to surmount. See *Battle v. Delo*, 19 F.3d 1547, 1555 (8th Cir. 1994), amended on other grounds, 64 F.3d 347 (8th Cir. 1995), cert. denied sub nom. *Battle v. Bowersox*, 517 U.S. 1235, 116 S.Ct. 1881, 135 L.Ed.2d 176 (1996). Furthermore, counsel in at least one of these cases, unlike Sherman, *did* make efforts to investigate the misidentified witness. See *Harris v. Bowersox*, 184 F.3d 744, 756–57 (8th Cir. 1999), cert. denied, 528 U.S. 1097, 120 S.Ct. 840, 145 L.Ed.2d 706 (2000). In any event, both cases are inapposite: in the present case, there was no impediment to investigation. Sherman, unlike counsel in *Harris*, simply failed to try.[16]

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[15] Moreover, as the Third Circuit has explained, incomplete knowledge of a witness' name does not render the witness unidentifiable. See *Gregg v. Rockview*, supra, 596 Fed.Appx. 77 (counsel acted unreasonably in failing to ascertain identity of alibi witness merely referenced by petitioner as "Weezy").

[16] *Toccaline v. Commissioner of Correction*, 80 Conn. App. 792, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline v. Lantz*, 543 U.S. 854, 125 S.Ct. 301, 160 L.Ed.2d 90 (2004), which the majority also cites for the proposition that counsel's representation is not deficient when he fails to investigate witnesses not mentioned by the client, is similarly inapposite. In that case, although the habeas court *was* presented with the testimony of the missing witness, there was nothing to indicate that the witness was identifiable by

This failure to investigate, as I explained, was not the product of strategic thinking; it was the result of unfounded and unsupportable assumptions about the value of a potentially critical alibi witness in a murder case. However sparse the references to Ossorio, this is not a case in which counsel was at liberty to ignore them or to risk miscalculating their potential significance. Rather, it was his constitutional responsibility to take reasonable steps to ascertain Ossorio's identity and to determine his value as a witness. Sherman knew that Ossorio was the only unrelated alibi witness; see *Montgomery v. Petersen*, supra, 846 F.2d 413 (failure to interview only disinterested alibi witness was unreasonable); and he had no real basis, aside from conjecture, for concluding that Ossorio would not prove to be a useful witness. See, e.g., *State v. Sanford*, 24 Kan. App.2d 518, 523, 948 P.2d 1135 (failure to question potential witnesses was unreasonable when counsel merely "believed that they would be hostile witnesses"), review denied, 262 Kan. 967 (1997). Armed with the knowledge of a potentially critical breakthrough, it is inconceivable that a competent attorney would decline to make even perfunctory efforts to contact such a witness. In cases like these, courts have not hesitated to find that counsel's

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counsel at the time of trial. Instead, the habeas court suggested that counsel *might have discovered* the witness with a properly attuned line of questioning, a suggestion that the Appellate Court reasonably rejected. See id., 816–17. Such a fact pattern is entirely distinct from one involving the failure to investigate a readily *identifiable* witness, as in the present case.

assistance did not satisfy the requirements of the sixth amendment. Neither should we.

D

Conclusion

When Sherman learned from Dowdle's sworn grand jury testimony that another person, subsequently identified as Ossorio, was present at the Terrien home on the evening of October 30, 1975, Sherman simply elected to disregard that testimony. He did so, even though he did not know whether Ossorio could corroborate the petitioner's alibi and even though he could have found out in no time and with virtually no investigative effort that Ossorio could, indeed, provide critical alibi testimony. In not bothering to follow up on Dowdle's testimony, Sherman disregarded his professional obligation to investigate critical prosecution evidence, thereby engendering "a breakdown in the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, supra, 466 U.S. 696. It is nothing short of astonishing that the majority approves of Sherman's game of Russian roulette, with the petitioner's freedom at stake, as consonant with the constitutional guarantees of a fair trial and the effective assistance of counsel.

II

SHERMAN'S FAILURE TO RAISE A THIRD–PARTY CULPABILITY DEFENSE AGAINST THOMAS SKAKEL

I also must register my strong objection to the majority's determination that the habeas court incorrectly concluded that Sherman's representation was constitutionally deficient insofar as he failed to pursue a third-party culpability defense[17] against Thomas Skakel in light of Thomas Skakel's highly incriminating admissions in Sherman's presence and in the presence of Sherman's associate, Throne, on the eve of the petitioner's criminal trial. Eight days before that trial, Thomas Skakel admitted to Sherman and Throne that he had lied to the police in 1975 when he told them that the victim left his house at 9:30 p.m. Thomas Skakel admitted that, in fact, he and the victim had a sexual encounter in his backyard that lasted until at least 9:50 p.m., placing

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[17] As the majority explains, to put forth a third-party culpability defense, the defendant "must ... present evidence that directly connects a third party to the crime with which the defendant has been charged.... It is not enough to show that another had the motive to commit the crime ... nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Citations omitted; internal quotation marks omitted.) *State v. Hernandez*, 224 Conn. 196, 202, 618 A.2d 494 (1992). Third-party culpability evidence is admissible, therefore, when the evidence is sufficient to give rise to a reasonable doubt about the defendant's guilt. See, e.g., *State v. Baltas*, 311 Conn. 786, 810–11, 91 A.3d 384 (2014).

Thomas Skakel with the victim at the likely time of her death. Indeed, the victim was found with her pants and underwear down around her knees, which is completely consistent with Thomas Skakel's statement about his sexual contact with her.

The majority concludes that Sherman's decision to implicate Littleton rather than Thomas Skakel was objectively reasonable, but not because the evidence implicating Littleton was strong. It was not. In fact, it was nonexistent. The majority concludes, rather, that the evidence adduced at the habeas trial did not support the habeas court's finding that Thomas Skakel discussed his sexual encounter with the victim when he met with Sherman and Throne in 2002 and, therefore, that the evidence did not support the habeas court's finding that Sherman could have called Throne to the stand to testify about Thomas Skakel's admissions. The majority also concludes that the habeas court's finding that Throne could have testified about the admissions was "entirely speculative" in light of Throne's inability, at the petitioner's 2013 habeas trial, to remember the specifics of what was discussed at the 2002 meeting, apart from the fact that Thomas Skakel admitted to having lied to the police about when he last saw the victim. The majority finally concludes that, even if Thomas Skakel discussed his sexual liaison with the victim with Throne and Sherman, and even if Throne would have recalled that discussion long enough to testify about what Thomas Skakel told them at the petitioner's criminal trial one week later, Sherman's

decision not to pursue a third-party defense inculpating Thomas Skakel was objectively reasonable as a strategic matter. Specifically, the majority contends that apprising the jury that Thomas Skakel had changed his story after twenty years and admitted to having a sexual encounter with the victim minutes before her death ran the risk of strengthening the state's theory regarding the petitioner's motive for killing the victim. None of the majority's conclusions withstands scrutiny.

Before addressing each of the majority's conclusions in turn, however, it is necessary to compare the evidence implicating Littleton with that which pointed to Thomas Skakel as the killer. The majority's recitation of that evidence omits many essential facts that bear directly on the objective reasonableness of Sherman's decision to raise a third-party culpability defense against one and not the other. When such a comparison is made, however, it is manifestly clear that Sherman's decision to implicate Littleton was entirely unreasonable given the dearth of evidence connecting him to the murder and the multitude of facts pointing to Thomas Skakel's involvement, all of which were known to Sherman before the petitioner's criminal trial. See, e.g., *Bryant v. Commissioner of Correction*, 290 Conn. 502, 513, 964 A.2d 1186 ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" [internal quotation marks omitted]), cert.

denied sub nom. *Murphy v. Bryant*, 558 U.S. 938, 130 S.Ct. 259, 175 L.Ed.2d 242 (2009).

It is also clear that Sherman's decision prejudiced the petitioner because it deprived him of the opportunity to demonstrate to the jury that someone other than he had the motive, means and opportunity to kill the victim, the raison d'être of a third-party culpability defense. No such argument could be made against Littleton, and Sherman's meager attempt to do so was justifiably excoriated—even ridiculed—by the state. And with good reason: as the habeas court observed, "Sherman essentially abandoned any third-party culpability claim in his jury argument," whereas the halfhearted argument that he did make "actually harmed the defense" because it communicated to the jury that Sherman himself put no stock in it.

A

The Kenneth Littleton Evidence

At the time of the victim's murder, Littleton, a then twenty-four year old graduate of Williams College with no known history of mental illness or violence, was completing his second month of teaching and coaching at the Brunswick School (Brunswick), a private school in Greenwich. Shortly after his arrival at Brunswick, the headmaster informed him that the petitioner's father, Rushton Skakel, Sr., was in need of a live-in tutor for his

children. Littleton accepted the position and, as fate would have it, spent his first night in residence at the Skakel home on October 30, 1975, the night of the murder, arriving there at approximately 4:30 p.m. Because Rushton Skakel, Sr., was out of town at the time, Littleton's duties included babysitting for the younger Skakel children, nine year old Stephen Skakel and twelve year old David Skakel, until their father's return. There is no evidence that Littleton, who had just moved to Greenwich to teach, had ever been to the Skakels' neighborhood prior to the evening of October 30, 1975, or had ever met or laid eyes on the victim. This fact alone eliminated him as a suspect for most of the officers involved in the investigation based on the widely held belief that only someone familiar with the victim and the neighborhood would have known to conceal the victim's body under the pine tree behind her parents' house, or would have been able to locate that tree in the dark. Sherman was also aware that the petitioner's sister, Julie Skakel, had observed Littleton in the Skakels' kitchen, at approximately 10 p.m., the victim's time of death as established by the substantial weight of the evidence at trial, and as argued by the defense.

The Greenwich police followed numerous leads in the months and years following the murder. In 1976, the police prepared an arrest warrant charging Thomas Skakel with the victim's murder based, in part, on false statements that he had given to them following the murder, his history of mental instability

and violence, and because he was the last person to be seen with the victim prior to her death. The warrant was never approved, however, and the case ultimately went cold for nearly fifteen years.

At the most basic level, therefore, Littleton made for an unlikely target, and, for a long period of time, he was treated as such. In 1991, however, the Office of the State's Attorney reopened the investigation, and suspicion soon fell on Littleton, who, in the intervening years, had developed a severe alcohol addiction and had been diagnosed with bipolar disorder, which caused him to act erratically at times. In 1991, Detective Frank Garr and Inspector John F. Solomon traveled to Canada to interview Littleton's former wife, Mary Baker, in the hope that she might be able to shed light on the investigation. Baker agreed to assist Garr and Solomon because she "thought it was the right thing to do," even though she did not believe Littleton had anything to do with the victim's murder. Initially, Baker simply recorded her telephone conversations with Littleton, during which she would ask him questions about the murder. According to Garr, he and Solomon "guided [Baker with respect to] how to proceed with these conversations between her and her [former] husband in the attempt to get him to open up and discuss the crime and possibly his complicity in it." Specifically, Garr and Solomon "suggested to her" what to say "to see what type of a response" it would elicit from Littleton. According to Garr, this approach never elicited a single incriminating response.

In December, 1991, Baker agreed to go to Boston, Massachusetts, and meet with Littleton in person, at a hotel, under the pretext of discussing the possibility of getting back together with him. The plan called for Baker to tell Littleton that the reason she was reluctant to get back together with him was because, several years earlier, while she and he were driving through Connecticut on their way to Massachusetts, he had confessed to the victim's murder during a drunken blackout.

Littleton, who wanted very much to reunite with Baker, agreed to the meeting. A transcript of their conversation, which was secretly recorded by the police, was provided to Sherman prior to trial. As planned, Baker began the conversation by telling Littleton about his so-called admissions. Shocked by the news, Littleton strenuously denied any involvement in the victim's murder, insisting that he never laid eyes on her "that night or ever ...." Littleton also told Baker that he was willing to do whatever it took to convince her of his innocence, including submitting to a "sodium pentothal" test administered by the Greenwich police, which he hoped might finally answer a question that had vexed the police at the time of the murder. Littleton explained that "the key thing that they were interested in [was] what [Thomas Skakel] was wearing when he came into the room to watch [television later in the evening]. And I couldn't tell them that." Littleton testified that "this was a big key point they really hammered ... but I couldn't

remember [if Thomas Skakel] was wearing something different ... versus what he was wearing earlier in the evening."

After his meeting with Baker, Littleton agreed to meet with Kathy Morall, a forensic psychiatrist retained by the Greenwich police to evaluate him as a possible suspect. At the time of their meeting, Littleton was unaware of the ruse that the police and Baker had played on him in Boston. During their first meeting, Littleton told Morall of the "frightening" news that he had received from Baker. Specifically, Littleton informed Morall that Baker had told him that, during a trip through Connecticut, "I was blacked out for about [one] hour to [one] hour and fifteen minutes.... [Baker] said that I was in the backseat.... She told me that I said I did it." At their next meeting, while discussing the same car ride, Littleton reminded Morall, "I told you this, you know, it's kind of frightening but ... this is when I said, I did it.... [Baker] heard me." This statement, "*this is when I said, I did it*"; (emphasis added); provided the crux of Sherman's third-party culpability defense against Littleton. During his cross-examination of Littleton at the petitioner's criminal trial, Sherman asked Littleton whether he had ever told Morall that he had told Baker, "I did it," meaning that he had murdered the victim. Littleton answered, "[y]es." Littleton explained, however, that he had only said that to Morall because that is what Baker had told him, not because he had any memory of confessing to the victim's murder. Littleton testified that it never

occurred to him at the time of his meeting with Morall that Baker, a person whom he loved and trusted, would lie to him about such a thing.

Convinced beyond any conceivable doubt that Littleton had absolutely nothing to do with the murder, the state granted him full immunity—effectively exonerating him in the eyes of the jury—and, at trial, completely discredited Sherman's unpersuasive attempt to depict Littleton as a suspect. The state's task was not a difficult one in light of Baker's testimony, corroborated by Garr and Solomon, that everything she had told Littleton was part of a ruse, as State's Attorney Benedict put it, "to dupe [a] psychologically fragile person to confess to [a] crime [he did not commit] ...." Benedict explained that, in 1992, Garr and Solomon got it into their heads that they were "going to break the case by tricking ... Littleton into confessing.... There is no question that [their plan] ... was a complete flop." Benedict further argued that, obviously, "the evidence of Littleton's interview by Morall was simply a product of his having been hoodwinked in Boston. For counsel to suggest to you here that what Littleton said to Morall is a confession is really treating you no differently than the police treated Littleton ... in 1992."

By the end of the petitioner's criminal trial, Sherman himself effectively conceded that his attempts to inculpate Littleton were not merely fruitless for his client but fundamentally baseless as

a strategic matter, as evidenced by his assertion that he had "no clue, no clue" whether Littleton was responsible for the victim's murder. Moreover, Sherman stated, in referring to Littleton's so-called "confession," "[a]t the very least, what we learned from ... Littleton is, you know, a confession ain't always a confession, is it," clearly expressing the view that Littleton's supposed confession was hardly that. In fact, at one point during his closing argument, Sherman quite reasonably stated that "whoever did [commit] this crime ... should rot in hell." But shortly thereafter, when again discussing Littleton, Sherman stated that, "I thought that he was a very pathetic creature. I felt very badly for him. I don't think I beat him up too much on the stand." At another point, Sherman argued to the jury that the state should be "comforted by the fact" that it "didn't make the wrong decision by arresting ... Littleton." One is left only to observe that it is hard to imagine a closing argument that does more to undermine a key aspect of a party's claim. [18] As the habeas court generously noted,

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[18] The majority intimates that Sherman was unaware of the futility of a third-party culpability defense predicated on Littleton's commission of the murder, observing that the habeas court made no finding that Sherman was aware before the petitioner's criminal trial that the core of his third-party culpability defense against Littleton—Littleton's purported admissions—was the result of a ruse that had been played on him by state and local investigators. No such finding was required, however, because the record establishes that Sherman was made aware of this fact by the state's pretrial motion to preclude him from raising a third-party culpability defense against Littleton on the ground that there was no evidence connecting Littleton to the murder.

Sherman's bizarre closing argument "essentially eviscerated" any third-party culpability defense predicated on Littleton's commission of the murder,[19] and was itself deficient.[20]

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[19] In light of the complete absence of evidence suggesting that Littleton had played a role in the victim's murder, it is difficult to understand why the trial court permitted Sherman to raise a third-party culpability defense predicated on Littleton's commission of the murder. Perhaps it is because before the Littleton evidence actually was presented in open court to the jury, it appeared to the court that Littleton might have made some potentially incriminating statements to Baker or Morall. As the real story emerged, however, it became crystal clear that Littleton never did any such thing. By that point, of course, Sherman was stuck with his ill-advised decision to present the Littleton third-party culpability defense.

[20] Sherman also sought to implicate Littleton on the basis of certain additional facts, but none of these facts would have created the slightest doubt in the minds of the jurors as to the wisdom of the state's decision to grant Littleton immunity from prosecution. Indeed, none of them even connected Littleton to the murder. For example, the majority states that Sherman presented the testimony of state criminalist, Henry Lee, that "two hairs found at the crime scene were microscopically similar to head hairs from Littleton." Contrary to the majority's assertion, however, the hairs in question were not found at the crime scene but, rather, on sheets that were brought to the crime scene, by responding officers, who used them to cover the victim's body for transport to the morgue. As a result, it could not be determined whether the hairs were present during the commission of the crime or whether they were brought to the crime scene with the sheets. Sherman was also aware before the petitioner's criminal trial that mitochondrial DNA testing of one of the hairs had conclusively eliminated Littleton as the source of that hair. Although insufficient DNA material was obtained from the second hair to permit similar testing, all of the trial

As the habeas court further concluded, when the Littleton evidence is compared to the powerful evidence implicating Thomas Skakel, Sherman's failure to assert a third-party culpability defense against Thomas Skakel "was and is inexplicable" and "cannot be excused as a reasonable exercise of

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experts agreed that the hair showed both similarities and dissimilarities to Littleton's hair such that the most that could be gleaned from a comparison of the two was that Littleton could not be excluded from the class of potential donors.

Sherman also introduced evidence of Littleton's erratic behavior in the years following the murder, the apparent result of alcoholism and an untreated bipolar disorder. But he utterly failed to present an intelligible connection between that behavior, which occurred many years after the murder, and any possible involvement by Littleton in the murder. In one incident, for example, which took place in the 1990s, Littleton was arrested for drunk and disorderly conduct after climbing a tower in Florida and delivering President John F. Kennedy's "Iich bin ein Berliner" speech. During his arrest, Littleton identified himself as "Kenny Kennedy, the black sheep of the Kennedy family." On the basis of this evidence, Sherman argued that Littleton once identified himself as "Kenny Kennedy because [John F. Kennedy] was his hero. He painted himself as the black sheep of the Kennedy family. How does that figure in here? I don't know." It is unlikely the jury knew either. The majority also notes that Sherman, in the petitioner's pretrial motion for permission to present a third-party culpability defense, indicated that he "planned to show that Littleton had lied to the police in his initial statement about his activities on the night [of the victim's murder] ... and later had changed his account about his activities that night on several occasions." Sherman appeared to abandon this argument at the petitioner's criminal trial, however, as there is no mention of it in his closing argument; nor does there appear to be any evidence to support it.

judgment or [as] a matter of trial strategy." Even "[i]f Sherman was, in fact, committed to the notion that only one third-party culpability defense should be asserted, a proposition [that] may well be within trial counsel's informed discretion, he unreasonably chose a third party against whom there was scant evidence and ignored a third party against whom there was a plethora of evidence." I turn to the latter evidence now.

B

The Thomas Skakel Evidence

At the time of her death, the victim had been acquainted with Thomas Skakel and the petitioner for approximately eight weeks. It is undisputed that Thomas Skakel was the last person to be seen with her prior to her death. Seven different witnesses reported seeing them alone in his driveway at approximately 9:30 p.m. In a tape-recorded interview following the murder, the victim's friend, Ix, reported that, on the night of the murder, at approximately 9:15 p.m., she, the victim, the petitioner and an eleven year old boy named Geoffrey Byrne were seated in the Skakels' Lincoln Continental in the Skakel driveway talking, when Thomas Skakel came outside and joined them. At that time, the petitioner's older brothers, John Skakel and Rushton Skakel, Jr., and their cousin, Terrien, approached the car and told them that they needed to use it to drive Terrien home. When asked by the police whether everyone

got out of the car at that point, Ix responded: "Not everyone. Just [Thomas Skakel], and me, and [the victim and Byrne]." Ix reported that she and Byrne then left for their respective homes, and, as they were leaving, the victim stated, "I'm going home in a few minutes," too. Both Ix and Byrne reported that, as they were walking out of the driveway, "they observed Thomas [Skakel] push [the victim]," causing her to "[trip] over a small steel curbing surrounding a planted area." Ix and Byrne "reported that they did not see [the victim] return to the driveway" after that.

The victim's mother telephoned the Greenwich police at 3:48 a.m. on October 31, 1975, to report the victim missing. During that telephone call, she reported that the victim had been "expected home at 9:30 p.m." and "had never been late like this before." She also reported that she had called several of the victim's friends before calling the police and had been told by one to "check with the ... Skakels ...." The victim's mother reported that she then "called the Skakel residence ... and spoke to Thomas [Skakel]," who told her that he last saw the victim at approximately 9:30 p.m. on October 30, and that the victim had told him that she was going home to do her homework. At trial, the victim's mother testified that her daughter "always came home" when expected and that her failure to do so on the night of the murder was "an aberration."

The police interviewed Thomas Skakel following the discovery of the victim's body, and he told them

that, on the night of the murder, at approximately 9:15 p.m., he went outside to his father's Lincoln Continental to get an audio cassette. When he got to the car, the petitioner, Ix, Byrne, and the victim were sitting inside the car, talking, and he decided to join them. After a few minutes, his brothers John Skakel, Rushton Skakel, Jr., and his cousin, Terrien, approached the car and told them that they were going to take Terrien home. Consistent with Ix' statement to the police, Thomas Skakel reported that he, Ix, Byrne, and the victim got out of the car and that John Skakel, Rushton Skakel, Jr., and Terrien got into the car with the petitioner and departed for Terrien's house. Thomas Skakel further stated that after he, Ix, Byrne, and the victim got out of the car, Ix and Byrne went home, leaving Thomas Skakel and the victim alone in the driveway. Thomas Skakel reported that "he talked to [the victim] for a few minutes, said goodnight, and entered [his] house [through] the side door." Thomas Skakel's sister, Julie Skakel, reported to the police that she observed Thomas Skakel enter the side kitchen door at approximately 9:25 to 9:30 p.m., as she was leaving to take her friend Shakespeare home. According to Thomas Skakel, he then went to his bedroom to complete a homework assignment on Lincoln Log cabins. Thomas Skakel further stated that, at approximately 10:15 p.m., he went to his father's bedroom and watched television with Littleton for approximately fifteen minutes. When confronted with the fact that Ix and Byrne had seen him push the victim into the bushes, Thomas initially denied that

he had done so but then admitted to "horse playing." When asked whether he kissed or attempted to kiss the victim, or had had any sexual desire for the victim, Thomas Skakel answered, "no."

Thomas Skakel became the prime suspect in the victim's murder after the police learned from his teachers that he had lied about his homework assignment, and learned from Littleton that Thomas Skakel was not in his bedroom at 10 p.m. In the course of their investigation, the police also learned from a number of witnesses that Thomas Skakel was an emotionally unstable teenager who was prone to "frequent and quite sudden outbursts of severe physical violence," the apparent result of a traumatic head injury, which made him "impulsive and [susceptible] to precipitous outbursts of anger. He would rant and rave, be extremely noisy, and, on one occasion, [he] put his fist through a door." (Internal quotation marks omitted.) On other occasions, he reportedly "stabbed his brother in the head with a fork," ripped a telephone out of a wall, and "beat the crap" out of an opponent during a soccer game. Witnesses also informed the police that Thomas Skakel frequently walked around the neighborhood carrying a golf club[21] and that, shortly after the

[21] The Skakel family chauffeur, Franz Wittine, reported to the police that, "on several occasions he observed Thomas [Skakel] leave his house to take a walk, carrying a golf club. He also reported that he had observed Thomas [Skakel] in outbreaks of rage." Another witness, "Jackie Wetenhall, one of [the victim's] close friends ... observed Thomas [Skakel] ... walking ... at night, carrying a golf club."

victim's murder, his father committed him to Yale–New Haven Hospital for two weeks of psychiatric evaluation. Sherman also was aware that Thomas Skakel, by his own admission, had consumed "about four or five" beers and "one or two scotches" in the space of two or three hours on the night of the murder.

Entries in the victim's diary further revealed that, in the weeks preceding her murder, Thomas Skakel had made unwanted sexual advances toward her. In one such entry, dated October 4, 1975, the victim wrote that "[Thomas Skakel] was being an ass. At the dance he kept putting his arms around me and making moves." Allison Moore, a friend of the victim's, corroborated the victim's account of Thomas Skakel's interest in the victim, reporting to the police that, "just prior to [her death], [the victim] informed her that ... Thomas [Skakel] wanted to date her, but that [the victim] had refused. [Moore] reported that [the victim] told her that Thomas [Skakel] was aggressive, and that [the victim] thought [Thomas Skakel was] strange." Another friend, Christine Kalan, reported that she also "was aware of the fact that Thomas [Skakel] wanted to date [the victim] but that [the victim] just liked [him] as a friend."

The timeline of the murder established by the Greenwich police was also highly incriminating with respect to Thomas Skakel. The police believed that the victim was attacked on her way home from the Skakel driveway sometime between 9:30 and 10 p.m.,

a conclusion based on forensic analysis of the victim's body,[22] the extreme agitation of two neighborhood dogs at the edge of the crime scene,[23] and a loud commotion heard by the victim's mother between

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[22] Joseph Jachimczyk, a physician and then Chief Medical Examiner for Harris County, Texas, assisted the Greenwich police in their investigation and determined that the time of the victim's death was 10 p.m., which determination was based, in part, on the contents of her stomach and the extent of rigor mortis that had set in by the time her body was discovered. Harold Wayne Carver II, the state Chief Medical Examiner in 2002, testified that, although the victim could have died as late as 5:30 a.m. on October 31, 1975, in his opinion, she died "closer to 9:30 p.m." on October 30.

[23] The record establishes that, at approximately 9:45 p.m., a dog belonging to the Ix family became extremely agitated at the foot of the family's driveway, directly across the street from the entrance to the victim's driveway. It was later determined, on the basis of blood spatter found at the scene, that the victim was initially assaulted at that location. Ix reported to the police that, when she returned from the Skakel driveway at 9:30 p.m., she immediately telephoned a friend. Ix reported that, while she was talking on the telephone, at approximately 9:45 p.m., her dog began to bark incessantly and "violently" in the direction of the victim's driveway. Ix went outside to call the dog, but the dog refused to come even though it always came when she called him. Ix testified that the dog "was kind of frozen in the road like he didn't [want to] go any closer," and that she had never seen him so "scared" or agitated. After about twenty or twenty-five minutes of constant barking, the family's housekeeper had to go out and force the dog inside. Another of the victim's neighbors, Robert Bjork, reported that, although he did not appreciate the significance of his dog's behavior at the time, he observed his dog, at approximately 10 p.m., run back and forth between where the victim's blood was found on the driveway and the tree where the victim's body was discovered.

9:30 and 10 p.m. in the victim's yard. The commotion, which consisted of "excited voices" and "incessant barking," was so distracting that the victim's mother stopped what she was doing to look out the window. On the basis of this and other information, the police concluded: "Our assumption is that death occurred about 10 p.m., October [30], as the investigation shows that two neighborhood dogs were highly agitated shortly before 10 p.m. We feel that, even though there was no school the next day, the [victim] left the Skakel house and was headed home because her friends were not going to remain out any longer that night. We have interviewed [400] people, and no one saw the [victim] after 9:30 p.m. on the night in question. It seems highly unlikely ... that a ... fifteen year old female would [wander the neighborhood alone] at night."

In 1994, after Rushton Skakel, Sr., hired Sutton Associates to investigate the victim's murder; see footnote 6 of this opinion; Thomas Skakel admitted to the Sutton investigators that he had lied to the police in 1975. Although he had originally told the police that he last saw the victim in his driveway at 9:30 p.m., Thomas Skakel now confessed that, after his brothers left to take Terrien home, he went inside the house briefly and then rejoined the victim for a sexual encounter in his backyard that lasted until 9:50 or 9:55 p.m., during which he ejaculated. When first interviewed by the investigators, Thomas Skakel stated that the victim initially "rejected" his advances but then acquiesced. In a follow-up interview,

however, he portrayed the victim as the aggressor, stating that it was the victim who pursued him because "maybe she wanted more of Tommy."

Of course, Thomas Skakel's admissions to the Sutton investigators, later repeated to Sherman and Throne, placed him with the victim *after* the neighborhood dog began its frantic and violent barking a few feet from the crime scene. See footnote 23 of this opinion. Although State's Attorney Benedict, at trial, tried to minimize the import of the dog's behavior relative to the timing of the victim's murder, its significance was not lost on the Greenwich police or on any of the forensic investigators who advised them in their investigation; all of them believed that the dog's aberrant behavior corresponded with the time of the attack. Sherman also considered it a crucial piece of evidence because he argued to the jury that the dog's violent barking at 9:45 p.m. "time stamps when this crime occurred." According to the defense's own theory of how the crime unfolded, therefore, Thomas Skakel's admissions to the Sutton investigators placed him with the victim at the time of the attack.

In the course of their investigation, Sutton investigators interviewed Thomas Skakel's sister, Julie Skakel, whose account of the evening further cast doubt on Thomas Skakel's innocence. She reported that, on the night of the murder, at approximately 1:30 a.m., she received the first of several telephone calls from the victim's mother, who

was trying to locate the victim. According to Julie Skakel, she went to Thomas Skakel's room to ask him if he knew where the victim might be so that she could report back to the victim's mother. Julie Skakel stated that Thomas Skakel told her that the victim had left at 9:30 p.m. and that he had to "study for a test" that night. In their suspect profile of Thomas Skakel, the Sutton investigators noted that, while there may have been an innocuous reason for Thomas Skakel to lie to the police about his sexual encounter with the victim after learning of her murder, that motive "would originate after Thomas [Skakel] knew [the victim] had been murdered.... When Julie [Skakel] came into his room at 1:30 a.m., however, Thomas [Skakel] was untruthful about [having a] test and when he had last seen [the victim].... Many divergent and damning conclusions can be drawn when speculating about the significance of [these lies]," which were told at a time when presumably only the killer knew that the victim was dead. Thomas Skakel also lied to the victim's mother when he spoke to her in the early morning hours of October 31, 1975. As I previously indicated, Thomas Skakel told her that the victim had left his house at 9:30 p.m., stating that she was going home to do homework.

Sherman also had firsthand knowledge of Thomas Skakel's admissions because he and Throne met with Thomas Skakel and his attorney, Emanuel Margolis, on the eve of the petitioner's criminal trial. At that time, according to Sherman's habeas trial testimony,

Margolis "allowed [Sherman and Thorne] to speak to [Thomas Skakel] about anything [they] wanted ...." Both Sherman and Throne testified at the habeas trial that they had read the Sutton Report prior to their meeting with Thomas Skakel and were aware of the information contained in it relative to him. Sherman specifically acknowledged that he was aware that, "[o]n October 7, 1994, Thomas [Skakel] broke down in tears and informed [the] Sutton [i]nvestigators that he had, in fact, spent at least an additional twenty minutes with [the victim] behind his house.... They began an extended ... twenty [minute] kissing and fondling session, which include[d] mutual fondling ... and ... concluded when both masturbate[d] [the other] to orgasm. At [that] point, approximately 9:50 p.m., both [the victim] and [Thomas Skakel] rearranged their clothes, and [the victim] ... is last seen by [Thomas Skakel] hurrying across the rear lawn [toward] her home. [Thomas Skakel] stated that ... he opened [the victim's] pants, slightly pushing them down, [and] fondled her vagina .... Thomas [Skakel] ... stated [that] he soiled his clothing ... when [the victim] brought him to ... orgasm using her hand on his penis." Sherman testified that "[Thomas Skakel's] discussion with [him] was consistent with what was in the Sutton Report.... He repeated the version of events as you recited [from] the Sutton Report." Sherman stated, moreover, that he and Throne took notes during the meeting.

Throne also testified at the petitioner's habeas

trial about his and Sherman's 2002 meeting with Thomas Skakel. Although he could not remember the specifics of what was said at the meeting, he did recall that it made a "significant impression" on him because Thomas Skakel admitted to having lied to the police about when he last saw the victim. In particular, Throne remembered that Thomas Skakel told them that he and the victim were together after the time that the police believed that they had parted ways.

At the habeas trial, the petitioner's habeas counsel asked Sherman why, in light of the litany of evidence implicating Thomas Skakel in the victim's murder, he did not pursue a third-party culpability claim against him, particularly given the defense's theory that the victim was attacked at 9:45 p.m. Sherman responded that Thomas Skakel "was going to invoke the fifth amendment [privilege] no matter what we did, and I [did not think] ethically I could put him on the stand knowing that he was going to invoke the fifth amendment privilege." Sherman further testified: "I told [Thomas Skakel's attorney], I'm calling him as a witness. [Thomas Skakel's attorney] told me in no uncertain terms that he's not going to testify because he will claim the fifth amendment privilege." Specifically, Sherman stated: "I'm sorry. [I was] not the one trying ... to protect [Thomas] Skakel, but he would not testify, and I don't think the third-party culpability issue would have worked [otherwise]." Although Sherman acknowledged that he did not believe in "putting out

a buffet table of alleged suspects," he emphasized that his "[p]rime" reason for not implicating Thomas Skakel was that he did not think it would have been successful without Thomas Skakel's testimony. Sherman explained: "My client was [the petitioner]. I bore no allegiance; I bear no allegiance to anyone but [the petitioner]. If I had ... something that I deemed was credible enough to pass [the court's] third-party culpability threshold, I would have used it.... I don't think we reached that threshold [with Thomas Skakel]. I don't think it was there. I wish it was."

But it was there. As the habeas court concluded, Thomas Skakel's statements against penal interest could have been presented to the jury through Throne, who readily could have been called to testify about them.[24] Of course, it would have been preferable for Sherman to have had a nonattorney witness present when interviewing Thomas Skakel because Throne could not participate in the trial both as counsel and as a witness. In this case, however, Throne undoubtedly was more valuable to the petitioner as a witness than as Sherman's inexperienced third chair at trial.[25] If necessary,

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[24] One might think that Thomas Skakel's admissions, or statements against penal interest, would have been admissible through a witness from Sutton Associates. Issues relating to the attorney-client and work product privileges, however, ultimately prevented any such use of the Sutton Report or its authors.

[25] Throne testified that he was "fresh out of law school," with no prior experience in the area of criminal law, when

Sherman also could have called Margolis to testify, since Thomas Skakel's admissions in the presence of third parties would not have been protected by the attorney-client privilege. See, e.g., *State v. Cascone*, 195 Conn. 183, 186, 487 A.2d 186 (1985) ("Communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.... By contrast, statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality." [Citations omitted.]); see also *Ullmann v. State*, 230 Conn. 698, 713, 647 A.2d 324 (1994) (attorney-client privilege "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege" [emphasis omitted; internal quotation marks omitted]); *Ullmann v. State*, supra, 710 (attorney-client privilege "is strictly construed because it tends to prevent a full disclosure of the truth in court" [internal quotation marks omitted]).

It is apparent, therefore, that Sherman could have put Thomas Skakel's highly incriminating admissions before the jury, either through Throne or Margolis, and that he wanted to do so as a key component of a third-party culpability defense built around Thomas Skakel. But he was unaware that the law permitted him to do so; he thought that the only way that he could make the jury aware of those admissions was through Thomas Skakel's direct

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Sherman hired him to work on the petitioner's case. Sherman's son, Mark Sherman, was second chair.

testimony. It is well established that the influence of a mistake of law on an attorney's decision making cannot be characterized as a matter of trial strategy under *Strickland*. See, e.g., *Hinton v. Alabama*, —— U.S. ——, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*"); *Williams v. Taylor*, 529 U.S. 362, 373, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (petitioner was denied right to effective assistance of counsel when defense counsel failed to investigate and present substantial, mitigating evidence during sentencing phase of capital murder trial, not for any tactical reason, but because he erroneously believed that law did not permit him to present such evidence). Thus, insofar as Sherman's decision not to present a third- party culpability defense centered on Thomas Skakel resulted from Sherman's mistaken belief that that defense required Thomas Skakel's testimony, the decision was not reasonable under *Strickland*.

The importance of Thomas Skakel's admissions to the defense was great. The great weight of the trial evidence established that the victim was attacked at approximately 9:45 p.m. Unlike Thomas Skakel, who could not account for his whereabouts between 9:30 and 10:20 p.m., the petitioner had a strong alibi for that time frame, which is why the state took the bold position that the petitioner's alibi witnesses were all

lying to protect him. If the defense had offered the jury a plausible third-party culpability suspect, however, the jury would have viewed the state's speculative argument concerning the petitioner's alibi in a far different light.

As the habeas court noted: "[Sherman's] task ... would not have been to convince the jury that [Thomas] Skakel committed the murder; rather, he needed only to argue that the direct and circumstantial evidence regarding [Thomas] Skakel's potential culpability should, at least, create a reasonable doubt in the minds of the [jurors] as to the petitioner's guilt. As presented, [Sherman's] defense deprived the petitioner of an opportunity for the jury to hear [Thomas] Skakel's admission of a sexual encounter with the victim, and for ... Sherman to point out the compatibility of some aspects of this story with the physical crime scene findings regarding the victim's [state of undress].... Sherman deprived the petitioner of an opportunity to present [Thomas] Skakel's consciousness of guilt [in his] change of stories, his growing sexual interest in and aggressiveness toward the victim leading to the date of her murder, and the police awareness that he had a history of emotional instability."

The habeas court further noted: "At trial, the jury heard only that when the Lincoln [Continental] left the Skakel property, [Thomas] Skakel and the victim were standing together in the driveway. Significantly, the jury heard nothing regarding a

sexual encounter between [Thomas] Skakel and the victim. However, it is reasonable to conclude that, in a competently presented third-party culpability claim regarding [Thomas] Skakel, a jury would have heard testimony that [Thomas] Skakel claimed that he had been engaged with the victim in a consensual sexual encounter to the rear of the Skakel property [until 9:50 p.m.] on October 30, 1975, during which he unfastened her [pants] and partially lowered [them] while [they both] engaged in mutual masturbation; that no living person could account for [Thomas] Skakel's whereabouts between 9:15 p.m. and approximately 10:17 p.m., when [Thomas Skakel] joined Littleton to watch [television]; that [Thomas] Skakel initially had lied to the Greenwich police about his whereabouts and activities after approximately 9:15 p.m. that evening; and [that] he had lied to [the police and] Littleton about having worked on a homework assignment in his father's room. The jury would also have heard that no one ever reported seeing the victim alive after she and [Thomas] Skakel were seen together in the Skakel driveway as the Lincoln [Continental] left for the Terrien home at approximately 9:15 p.m. Based on the availability of this evidence to ... Sherman, [there is] little doubt that the trial court would have permitted the petitioner to assert a third-party culpability claim regarding [Thomas] Skakel." (Footnote omitted.)

Indeed, on the basis of the evidence known to Sherman at the time of the petitioner's criminal trial,

Sherman could have argued persuasively to the jury as follows. Finding herself alone with Thomas Skakel in the driveway at 9:25 p.m., the victim told him that she had to leave, too, because she was due home at 9:30 p.m. Thomas Skakel then offered to walk the victim home and asked her to wait while he grabbed a jacket, or used the bathroom, since he had been drinking heavily. Such a scenario was consistent with Julie Skakel's testimony that she saw Thomas Skakel enter the house through the side door at 9:30 p.m. Thomas Skakel then rejoined the victim outside, grabbing a golf club from the bucket by the door as he left the house, as was his custom according to various witnesses. While en route to the victim's house, an intoxicated Thomas Skakel made a pass at the victim, and what may or may not have been initiated as a consensual sexual encounter between them turned suddenly violent when the victim rejected his advances or withdrew her consent for further physical contact. Infuriated by her rejection, Thomas Skakel struck the victim with the golf club, which, in his rage, became a weapon of convenience. Consistent with the forensic evidence, the victim was able to get away from Thomas Skakel after the initial assault, but Thomas Skakel caught up with her, struck her repeatedly with the golf club and then dragged her lifeless body to the pine tree behind her house. Thomas Skakel's assault on the victim was undoubtedly the commotion that the victim's mother heard between 9:30 and 10 p.m., and the event that caused one of the neighborhood dogs to commence its incessant and plaintive barking at the entrance to the

victim's driveway. Thomas Skakel then ran home, which would have taken him less than one minute according to the evidence adduced at trial, removed his bloodstained clothing and, thirty minutes later, joined Littleton to watch television with him, in an effort to establish an alibi.

Testimony by Thomas Skakel's family, friends and teachers regarding his violent temper would only have strengthened Sherman's argument, as would the victim's diary and the testimony of her friends regarding Thomas Skakel's aggressiveness toward her before her death. To reinforce his argument, Sherman needed only to remind the jury that Thomas Skakel, by his own admission, had placed himself with the victim after the neighborhood dog began its violent barking at 9:45 p.m., that he was hospitalized for two weeks shortly after the murder for psychiatric evaluation, that he had lied about his whereabouts between the hours of 9:30 and 10:20 p.m. not only to the police, but also to his sister and the victim's mother before anyone knew that the victim was dead. Sherman could have argued that Thomas Skakel's guilt was consistent not only with the forensic evidence but with the victim's last words to Ix at 9:25 p.m., that she was "going home" soon, and with the victim's mother's statement to the police that the victim had been due home at 9:30 p.m.

Finally, and perhaps most important, Sherman could have argued to the jury that this scenario required no more speculation—indeed, I would argue

that it required considerably less speculation—than the state's argument with respect to the petitioner, namely, that all of his alibi witnesses were lying and that the petitioner must have jumped out of the Lincoln Continental after it left the driveway, found a golf club lying about in the dark, waited for the victim near her house, and then bludgeoned her as she entered the driveway, all because he had seen her "carrying on" with Thomas Skakel, as Benedict characterized Thomas Skakel's conduct. In short, in stark contrast to Sherman's claim that Littleton may have murdered the victim—a claim for which there was absolutely no support in the evidence—the evidence against Thomas Skakel provided an opportunity for Sherman to present a coherent and compelling third-party culpability defense—a defense that he, for no legally or strategically valid reason, failed to employ.[26]

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[26] I also note that Sherman did not request a jury instruction on the petitioner's third-party culpability defense, and the trial court did not give one. Nor did Sherman undertake to explain the legal significance of the defense in closing argument. As this court determined in *State v. Arroyo*, 284 Conn. 597, 609, 935 A.2d 975 (2007), a defendant is entitled to an instruction on a third-party culpability defense if requested. Perhaps because *Arroyo* was decided after the petitioner's criminal trial, the petitioner has not claimed that Sherman's representation was ineffective insofar as he failed to request such an instruction. However, whether the jury fully understood that the state bore the burden of rebutting the defense beyond a reasonable doubt—and that it was not the petitioner's burden to establish Littleton's guilt—is not clear. In any event, the fact that the Littleton third-party culpability defense had no basis in fact doomed it from the very start; under the circumstances,

C

The Majority's Conclusions

The majority rejects the habeas court's determination that Sherman's failure to implicate Thomas Skakel in the victim's murder was objectively unreasonable, but not for any of the reasons that Sherman gave at the petitioner's habeas trial. Rather, because, in the majority's view, the evidence did not support the habeas court's finding that Thomas Skakel discussed "the details" of his sexual encounter with the victim when he met with Sherman and Throne in 2002, the habeas court incorrectly concluded that Sherman could have put Throne on the stand to testify about Thomas Skakel's admissions. The majority also concludes that the habeas court's finding that Throne could have testified about the admissions was "entirely speculative" in light of Throne's inability, at the petitioner's 2013 habeas trial, to remember the specifics of what was discussed at the 2002 meeting, apart from the fact that Thomas Skakel admitted to having lied to the police about when he had last seen the victim. The majority is mistaken on both counts.

First, it is abundantly clear that Thomas Skakel *did* discuss the details of his sexual encounter with the victim. After the petitioner's habeas counsel read aloud from the portion of the Sutton Report

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Sherman's failure to apprise the jury of its legal import was inconsequential.

describing when, where and how the sexual encounter unfolded, Sherman stated that Thomas Skakel "basically repeated ... the version of events as you recited or read [from] the Sutton Report ...." Sherman later confirmed that "his ... discussion with [him] was consistent with what was in the Sutton Report." Sherman also testified that Thomas Skakel "recounted" his sexual encounter with the victim at the meeting. At another point, Sherman testified that it was not his impression from talking to Thomas Skakel that the encounter involved sexual intercourse, only "sexual play," something of the nature of "touching, masturbation, mutual masturbation, that kind of stuff." Sherman further testified that the encounter occurred "ten minutes before ... 10 p.m."

The majority does not explain what additional details about the sexual encounter were required for Sherman to assert a strong third-party culpability claim against Thomas Skakel. The fact is that Sherman had all of the information he needed. Indeed, it was not the precise nature of Thomas Skakel's purported sexual encounter with the victim that mattered. It was the fact that he had one at *all* that mattered because it allowed Sherman to argue to the jury that Thomas Skakel had lied to the police when he told them that there had been no such encounter and that the victim had left his house at 9:30 p.m. In any event, it is readily apparent that the habeas court's finding that Thomas Skakel discussed his sexual encounter with the victim when he met

with Sherman and Throne in 2002 is supported by the habeas trial record. It is the majority's finding to the contrary that is belied by the record.

The majority also concludes that "[a]ny finding concerning the details that Throne could have relayed to the jury about Thomas Skakel's alleged encounter with the victim would ... be entirely speculative" in light of Throne's inability to recall, in 2013, what was discussed at the 2002 meeting, beyond the fact that Thomas Skakel's admission had made a significant impression on him because Thomas Skakel acknowledged that he was with the victim much longer than what he had told the police. The majority must do better than this. It simply cannot be the position of this court—or any court—that it is entirely speculative to conclude that defense counsel would remember bombshell revelations favorable to his or her client long enough to be able to testify about them at the client's murder trial a few days later, if called on to do so. If competent counsel has a duty under *Strickland* that "includes the obligation to investigate all witnesses who may have information concerning [the defendant's] guilt or innocence"; *Towns v. Smith*, supra, 395 F.3d 258; it is axiomatic that he also has a duty *to remember* what those witnesses tell him—at least long enough to act on the information for the benefit of his client. This applies in spades to a witness as important to the defense as Thomas Skakel, for years the prime suspect in the victim's murder, and who, in accordance with their own

timeline of the crime, Sherman and Throne had every reason to believe was with the victim at the time of her death.

Accordingly, Throne's inability to recall in 2013 the specifics of what was discussed at the 2002 meeting is simply irrelevant. The only issue that matters is whether he would have remembered what was discussed immediately following the meeting. That is when the petitioner claims that Sherman's representation was ineffective insofar as he failed to call Throne as a witness to repeat Thomas Skakel's admissions. The habeas court was absolutely correct that, under *Strickland* and its progeny, there is only one answer to that question and that is, of course, that he would have remembered.

The majority finally contends that, even if Throne could have testified as to Thomas Skakel's admissions, Sherman reasonably could have decided to forgo implicating Thomas Skakel in the victim's murder because there was no evidence that his sexual encounter with the victim turned violent, or because implicating Thomas Skakel ran the risk of strengthening the state's theory that the petitioner murdered the victim in a jealous rage. The majority thus suggests that "defense counsel in Sherman's position reasonably could have concluded that it was better to pursue a suspect [Littleton] who had at least arguably implicated himself in the crime." Again, neither of these contentions holds water.

First, Littleton inarguably did *not* implicate himself in the victim's murder, a fact that, as Benedict argued at the petitioner's criminal trial, would not have been lost on a child much less on a jury of twelve adults. Indeed, even Sherman could not make a straight-faced argument tying Littleton to the murder.

Moreover, the facts simply do not support the majority's low estimation of the strength of the evidence implicating Thomas Skakel. Indeed, one is hard-pressed to find a Connecticut case—or a case from any other jurisdiction—in which the evidence of third-party culpability was any stronger. The majority certainly has not cited one. Not even Sherman claimed that asserting a third-party claim against Thomas Skakel was not in the petitioner's best interest. While Sherman had plenty of evidence against Thomas Skakel, he mistakenly believed that, without Thomas Skakel's testimony, he did not have enough admissible evidence to satisfy the threshold for raising such a claim.

Second, it is simply absurd for the majority to suggest that Sherman reasonably could have decided against asserting a powerful and compelling third-party culpability defense against Thomas Skakel out of concern that it would bolster the state's tenuous theory that the then fifteen year old petitioner murdered the victim in a jealous rage. As the respondent acknowledges, the evidence adduced at trial to support that theory was scant at best.

Indeed, the respondent can identify only two pieces of evidence that supported it. The respondent first points to a telephone conversation between Geranne Ridge and a friend, which the friend secretly recorded for Garr, during which Ridge claimed to have met the petitioner at a party, and that the petitioner told her within minutes of their meeting about "masturbating in a tree" and murdering the victim because she had had sex with Thomas Skakel. At the petitioner's criminal trial, however, Ridge testified that, although it was true that she had once been introduced to the petitioner at a party, she did not actually speak to him, and everything that she had told her friend on the telephone was gleaned from "magazines, newspapers and from [the tabloids]," like the "Star, Globe, Inquirer, those kinds of things." An embarrassed Ridge testified that she had lied to her friend because he "was always bragging about who he knew" and Ridge just wanted to seem "more knowledgeable than [she] was" about the petitioner's case.

The only other evidence that the respondent cites in support of the theory regarding the petitioner's motive is the trial testimony of Elizabeth Arnold, who stated that, in 1978, while she and the petitioner were enrolled at Elan School,[27] the petitioner told her "that his brother [fucked] his girlfriend ... well,

[27] The petitioner was sent to Elan School, an alcohol and drug rehabilitation facility for troubled adolescents in Poland, Maine, in 1978, as part of a plea agreement after the petitioner was charged with driving under the influence in New York.

they didn't really have sex but they were fooling around." On cross-examination, Arnold was asked why, when testifying before the grand jury, she had failed to mention that the petitioner had told her that Thomas Skakel had fooled around with his girlfriend. Arnold responded that she did not remember it at the time but that reading Fuhrman's book afterward had refreshed her recollection.

Fuhrman's book, an entirely speculative account of how the murder *could* have unfolded, appears to have refreshed the recollections of many witnesses for the prosecution, several of whom came forward only after reading it, or after reading or watching a news story about it. One key witness, Shakespeare, completely altered her account of the night of the murder after reading it.[28] The central thesis of the book, borrowed from one of several theories posited in the stolen Sutton files, was that the petitioner and the victim were boyfriend and girlfriend and that the petitioner flew into a rage upon seeing the victim in a sexual encounter with Thomas Skakel. See M. Furhman, Murder In Greenwich (1998) p. 215. Indeed, in the book, Fuhrman claimed that unnamed sources had told him that the petitioner and the victim were once boyfriend and girlfriend. Id.

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[28] The majority also relies on Fuhrman's book to support its conclusion that Sherman reasonably could have decided to forgo implicating Thomas Skakel out of fear that it might bolster the state's theory as to the petitioner's motive. See footnote 18 of the majority opinion. Such reliance only reflects the thin reed on which the majority's argument rests.

Fuhrman also claimed that the victim's diary "clearly stated that both Skakel boys were romantically interested in her. [The victim] also said that while she liked Thomas [Skakel], she had to be careful of [the petitioner]." Id. The victim's diary, of course, says nothing of the sort. Nor does it appear that Sherman read it; if he had, he would have used it to rebut the state's dubious claim as to the petitioner's motive.[29]

Indeed, in her diary, the victim wrote candidly about her boyfriends and social exploits during the fifteen months that she lived in Greenwich. She was an avid chronicler of her adolescent life and enjoyed writing about boys—the ones she liked, the ones she did not like, the ones she suspected liked her, and so on and so forth. If the victim and the petitioner were in a relationship during the eight weeks that they knew one another, or if the victim suspected that the petitioner liked her during that time period, it is safe to say that it was the *only* time that the victim did not write about such matters in her diary. It is clear, therefore, that the state's theory as to motive could have been easily rebutted by a minimally competent defense attorney using the resources available to him, and that it presented no obstacle whatsoever to

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[29] It is unfortunate that the majority has seen fit to rely on Fuhrman's speculative account of a relationship between the victim and the petitioner as a basis for reversing the habeas court's judgment. Although the possibility of such a relationship was one of several theories posited by the Sutton investigators in the mid–1990s, no credible evidence was adduced at the petitioner's 2002 criminal trial in furtherance of it.

Sherman's ability to present a compelling third-party culpability defense implicating Thomas Skakel. The habeas court was absolutely right to conclude that, by failing to assert such a defense, Sherman simply was not acting as the competent counsel guaranteed by the sixth amendment.

III

PREJUDICE

There can be little doubt that the petitioner was severely prejudiced by Sherman's deficient performance in his presentation of the petitioner's alibi and third-party culpability defenses. To satisfy the prejudice prong of *Strickland*, "[the petitioner] 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.) *Janulawicz v. Commissioner of Correction*, 310 Conn. 265, 268 n.1, 77 A.3d 113 (2013). In this context, a reasonable probability that the result of the trial would have been different "does not require the petitioner to show that counsel's deficient conduct more likely than not altered the outcome in the case.... Rather, it merely requires the petitioner to establish a probability sufficient to undermine confidence in the outcome." (Citation omitted; internal quotation marks omitted.) *Bunkley v. Commissioner of Correction*, 222 Conn. 444, 445–46, 610 A.2d 598 (1992). Moreover, "[i]n making this

determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury.... Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (Internal quotation marks omitted.) *Gaines v. Commissioner of Correction*, supra, 306 Conn. 688–89.

In the present case, as the habeas court observed, "[i]t would be an understatement to say that the state did not possess overwhelming evidence of the petitioner's guilt. An unsolved crime for more than two decades, there was evidence that initially the Greenwich police sought the arrest of [Thomas] Skakel without success and then focused on Littleton to no avail before finally turning to the petitioner. The evidence adduced at trial was entirely circumstantial, consisting ... [primarily] of testimony from witnesses of assailable credibility who asserted that, at one time or another and in one form or another, the petitioner made inculpatory statements. The state also adduced, as consciousness of guilt evidence, testimony that the petitioner changed his initial account to the police of his movements on the evening of the murder."

Not only was there no physical evidence

connecting the petitioner to the crime and no eyewitnesses, few of the witnesses who did testify were interviewed by the police at the time of the events in question. Almost all of the state's witnesses, in fact, testified based on their recollections of those events some twenty-five years after the fact. While this would be a concern in any murder case, it was especially problematic in the present one given the extensive pretrial publicity surrounding the case. The risk inherent in prosecuting a murder case on the basis of twenty-five year old memories filtered through such a potentially corruptive lens is obvious. Memories rarely improve over time, even under the best of conditions. The state's evidence, which, as the habeas court noted, consisted largely of the testimony of witnesses of suspect credibility who did not come forward until decades after the events in question, was hardly so convincing as to render harmless the kinds of grievous errors committed by Sherman in his conduct of the petitioner's criminal trial.

In the intervening years since the petitioner's conviction, unsettling questions have also arisen over the veracity of core tenets of the state's central thesis relative to the petitioner's guilt, weakening what was to begin with a less than persuasive case. As the habeas court explained in connection with the petitioner's claim that Sherman's representation was ineffective insofar as he failed to challenge one such fundamental aspect of the state's case against him, information contained in the state's own investigative file and available to Sherman before trial revealed

that the state's argument was baseless, and, yet, it went unchallenged by the defense.[30]

No argument, however, was more central to the state's theory of guilt or damaging to the petitioner than that of the alleged conspiracy by the petitioner's family to fabricate an alibi for him. Thus, the prejudicial impact of Sherman's failure to locate and interview Ossorio, a critical independent alibi witness with no ties to the petitioner's family, is virtually incalculable because it deprived the petitioner of the opportunity to disprove the state's central thesis. Cf. *Gaines v. Commissioner of Correction*, supra, 306 Conn. 689. ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture" [internal quotation marks omitted]). Moreover, in presenting a far weaker alibi defense than would have been put forward by competent counsel—one that left the door wide open for the state to argue that the alibi was predicated

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[30] The aspect of the case identified by the habeas court pertains to State's Attorney Benedict's argument at trial that the petitioner was sent to Elan School as part of the Skakel family's broader cover-up to hide him from the police, who were kept in the dark regarding his whereabouts. This contention is belied by police investigative reports, which make clear that the police knew full well that the petitioner was at Elan School and had been in direct contact with the school. This point is important because Benedict also argued at trial that administrators at Elan School, who repeatedly accused the petitioner of having murdered the victim, learned of the petitioner's involvement in the murder from the petitioner's own family, and not from the police.

solely on the testimony of close family members, all of whom were lying to protect the petitioner—Sherman's performance harmed the petitioner in yet another way, "for it is generally acknowledged that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt." (Internal quotation marks omitted.) *Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005), cert. denied, 547 U.S. 1040, 126 S.Ct. 1622, 164 L.Ed.2d 334 (2006); see also id. ("[T]here is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even [when] the prosecution's case is weak." [Internal quotation marks omitted.]).

Sherman's deficient performance resulting from his failure to present a powerful third-party culpability defense predicated on evidence that the victim was killed by the petitioner's brother, Thomas Skakel, a longtime suspect in the victim's murder, also caused the petitioner serious prejudice: it deprived him of the opportunity to provide the jury with convincing evidence that someone other than the petitioner had the motive, means and opportunity to kill the victim. This is particularly true in light of the fact that Sherman had startling new and highly incriminating evidence linking Thomas Skakel to the crime, namely, Thomas Skakel's own statement acknowledging both that he had lied to investigators about the time that he and the victim departed on the evening of October 30, 1975, and that he had had a

sexual encounter with the victim at the scene of the murder when it most likely was committed. Such a compelling third-party culpability defense focusing on Thomas Skakel—in contrast to the foolhardy attempt to implicate Littleton—no doubt would have raised a reasonable doubt in the jurors' minds as to who murdered the victim. Although the prejudice flowing from Sherman's incompetent handling of the petitioner's third-party culpability defense is alone more than sufficient to require a new trial, when that prejudice is considered along with the prejudice flowing from Sherman's deficient handling of the alibi defense, it strains credulity to believe that the petitioner's trial resulted in a verdict worthy of confidence.

IV

CONCLUSION

Under our constitution and system of laws, a defendant is presumed innocent until he has been found guilty beyond a reasonable doubt after a fair trial. A critical component of a defendant's right to a fair trial is the right to the effective assistance of counsel. As the habeas court aptly observed, counsel's "defense of a serious felony prosecution requires attention to detail, an energetic investigation and a coherent plan of defense capably executed." When counsel has not performed competently in one or more of these respects—in the present case, defense counsel was deficient in all three areas—and when,

as in the present case, a review of the record also leads to the conclusion that, because of counsel's deficient performance, confidence in the guilty verdict has been undermined, the conviction is not sufficiently reliable and cannot be permitted to stand. Nothing short of a new trial will suffice to vindicate the defendant's right to a proceeding that leads to a reliable outcome.

In recognition of these core principles, more than fifty years ago, the United States Supreme Court stated that, "if the right to counsel guaranteed by the [c]onstitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and ... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Today, this court shirks its responsibility to maintain such standards by upholding a guilty verdict reached only after a trial literally riddled with highly prejudicial attorney incompetence. One can only trust that the petitioner will receive a fairer hearing, one in which his right to the effective assistance of counsel is accorded due consideration, in the federal courts.