No. 18-185

In the Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

MICHAEL SKAKEL,

Respondent.

On Petition for a Writ of Certiorari to the Connecticut Supreme Court

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALASKA, ARIZONA, INDIANA, KANSAS, LOUISIANA, MARYLAND, NEBRASKA, NORTH CAROLINA, SOUTH CAROLINA, AND TEXAS SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. When a defendant contends that he received ineffective assistance of counsel, should courts judge the reasonableness of counsel's challenged conduct in isolation, or in the context of counsel's overall performance?

2. May defense counsel reasonably base investigative decisions on the information their client gives them?

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INTEREST OF *AMICI CURIAE*[1]

The States enact and enforce most criminal laws in this country. Securing criminal convictions and ensuring their finality promotes public safety. Finality often turns on a reviewing court's evaluation of defense counsel's performance under the Sixth Amendment. The States thus have important sovereign interests in knowing what standards govern that performance.

Where, as here, courts have interpreted the Sixth Amendment to impose fundamentally different duties in different jurisdictions, it undermines finality and, potentially, public safety. And excessive, after-the-fact scrutiny of defense counsel's performance—particularly scrutiny that might expose them to bar complaints for deficient performance—might shrink or eliminate the pool of attorneys willing to provide those constitutionally mandated services.

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[1] Counsel of record for all parties received notice at least ten days before this *amicus curiae* brief was due of the State's intent to file it. The State of Utah, as *amicus curiae*, may file this brief without leave of Court or consent of the parties. S. Ct. R. 37.4.

INTRODUCTION AND SUMMARY OF ARGUMENT

Strickland v. Washington, 466 U.S. 668 (1984), and its progeny pervade the criminal law in a way hard to overstate.[2] *Strickland* claims are the primary means by which defendants attack their convictions—particularly on collateral review—and thus uniquely influence the finality of criminal judgments. *Cf. Harrington v. Richter*, 562 U.S. 86, 105 (2011) (stressing need for deference to counsel's judgment to maintain integrity of adversary process at trial and on collateral review).

Strickland's touchstone for assessing counsel's performance is reasonableness. 466 U.S. at 687 ("[T]he proper standard for attorney performance is that of reasonably effective assistance.") (citation omitted); *see also id.* at 688-89; *Premo v. Moore*, 562 U.S. 115, 126 (2011) ("Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused.") (citing *Strickland*, 466 U.S. at 688). If counsel performs reasonably, the defendant

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[2] To illustrate, as of August 30, 2018, Westlaw shows 172,681 *Strickland* case citations. That is more than double the combined number of case citations to two other, and much older, seminal criminal cases—*Miranda v. Arizona*, 384 U.S. 486 (1966) (64,742 case citations), and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (8,772 case citations). It also dwarfs the number of citations to foundational civil cases such as *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938) (20,828 case citations) and *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. and Placement*, 326 U.S. 310 (1945) (23,267 case citations).

has received the assistance the Sixth Amendment guarantees.

Lower courts have split on *Strickland*'s reasonableness standard in two ways relevant here. First, should the reasonableness of counsel's action or omission be judged in isolation, or in the context of counsel's overall performance? Second, may counsel reasonably base investigative decisions largely—or even solely—on what a defendant says and does?

The Connecticut Supreme Court's decision deepens both splits in a way that disregards this Court's holdings and undermines the States' interests in finality and in meeting their constitutional obligations. This Court should grant review.

ARGUMENT

I. LOWER COURTS HAVE SPLIT ON WHETHER *STRICKLAND* REQUIRES THEM TO CONSIDER COUNSEL'S OVERALL PERFORMANCE WHEN DECIDING WHETHER COUNSEL PERFORMED DEFICIENTLY.

A. Considering overall performance is an essential part of the deficient-performance inquiry.

Time and again, this Court has stressed that reviewing courts must assess counsel's alleged deficiency in the context of counsel's overall performance. *Strickland* itself tasks courts with deciding "whether, *in light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U.S. at 690 (emphasis added). *Kimmelman v. Morrison*, 477

U.S. 365 (1986), elaborated on this requirement, saying that it "will generally be appropriate for a reviewing court to assess counsel's *overall performance throughout the case*" to decide the deficient-performance element. *Id.* at 386 (emphasis added). *Kimmelman* even chided the lower courts for their "inadvisable" failure to do so. *Id. Richter* further emphasized the "difficult[y]" of proving ineffectiveness "when counsel's *overall performance* indicates active and capable advocacy." 562 U.S. at 111 (emphasis added).

1. Sixteen lower courts consider counsel's overall performance when resolving an ineffective-assistance claim.

Six circuits and ten states have taken this Court at its word. In addition to those cases that Petitioner cites (Pet. at 23-29), one additional circuit and six additional states take overall performance into account in assessing the reasonableness of counsel's performance. In *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), the defendant faulted his attorney for not calling certain witnesses at the sentencing phase of his capital trial. *Id.* at 1319-21. But before considering the alleged omissions, the court took care to "look at what the lawyer did in fact"—that is, it considered the alleged omissions in the proper context of counsel's overall performance. *Id.* at 1320.

The District of Colombia Court of Appeals likewise explained that "the analysis of counsel's performance typically must be comprehensive, *i.e.*, not narrowly limited to a review of counsel's failings." *Stratmon v. United States*, 631 A.2d 1177, 1182 (D.C. 1993) (citing *Kimmelman*, 477 U.S. at 386); *see also Mercer v. United*

States, 724 A.2d 1176, 1197 (D.C. 1999) ("In assessing counsel's performance, the court must look to the overall performance . . . . Mere errors of judgment or tactical decisions that go awry do not, by themselves, constitute ineffective assistance of counsel.") (citing *Kimmelman*, 477 U.S. at 386, and *Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985)).

Though the Michigan Supreme Court recognized that even a single error, "if sufficiently egregious and prejudicial," could constitute deficient performance, it stressed that "each error must be assessed in relation to counsel's overall performance, before and at trial." *People v. Reed*, 535 N.W.2d 496, 505 n.14 (1995) (cleaned up) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and *Kimmelman*, 477 U.S. at 386).

The supreme courts of California, Idaho, Pennsylvania, and Texas follow suit. *See People v. Cox,* 809 P.2d 351, 373 (Cal. 1991) ("[W]e must 'assess counsel's overall performance throughout the case'") (quoting *Kimmelman*, 477 U.S. at 386), *overturned on other grounds by People v. Doolin*, 198 P.3d 11, 33 (Cal. 2009); *State v. Hall*, 419 P.3d 1042, 1117 (Idaho 2018) ("Based upon this cross-examination, Hall has failed to establish either deficient performance or prejudice, particularly in light of his attorneys' 'overall performance,' which was 'active and capable advocacy.'") (quoting *Richter*, 562 U.S. at 111); *Commonwealth v. Boyden*, 517 A.2d 935, 937 n.2 (Pa. 1986) (noting the need to evaluate the reasonableness of counsel's conduct "in the context of counsel's overall performance") (citing *Kimmelman*, 477 U.S. 365); *Ex Parte Thomas*, case nos. WR-86,364-01 and -02, 2018 WL 3046314, *6 (Tex. Crim. App., June 20, 2018) ("The

attorney made mistakes, but error-free counsel is not required," particularly considering counsel's "overall performance") (citing *Richter*, 562 U.S. at 111); *see also Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013) ("Moreover, an accused is not entitled to representation that is wholly errorless, and a reviewing court must look to the totality of the representation in gauging the adequacy of counsel's performance.").

Two other states—Oregon and Tennessee—have acknowledged *Richter*'s direction to assess overall performance, but those courts' opinions do not apply it as expressly. *See Montez v. Czerniak*, 322 P.3d 487, 506 (Ore. 2014); *Kendrick v. State*, 454 S.W.3d 450, 472 (Tenn. 2015).

2. Three courts—including the Connecticut Supreme Court—refuse to consider overall performance.

Notwithstanding *Strickland*, *Kimmelman*, and *Richter*'s plain terms, three courts—the Second Circuit, Wisconsin Supreme Court, and Connecticut Supreme Court—evaluate the reasonableness of counsel's decisions in isolation. Pet. at 29-30. That square split justifies plenary review.

On the merits, this Court should re-affirm what it said in *Strickland, Kimmelman,* and *Richter*: that counsel's overall performance is a necessary part of deciding whether counsel's decisions were reasonable.

A contrary approach—like the Connecticut Supreme Court's—is akin to judging a painting by an isolated brushstroke or a spot of blank canvas. To be sure, in an extreme case, one brushstroke might ruin a masterpiece; a moustache would irreparably mar the

Mona Lisa. But most errors or omissions will not have so outsized an influence on the work as a whole. And the larger view will almost always give enough context to distinguish the rare ones that do from the vast majority that don't.

B. Counsel may reasonably base investigative decisions on a defendant's statements and actions.

Amici also urge this Court to clarify a subsidiary question: whether defense counsel reasonably may base their investigative decisions on their competent clients' statements. This Court may properly consider that question because certiorari review encompasses not just the question presented but also "subsidiary question[s] fairly included therein." S. Ct. R. 14.1(a); *see, e.g., Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1656 (2018).

Judging counsel's overall performance necessarily requires taking stock of counsel's discrete decisions; to return to the metaphor, a painting comprises its brushstrokes. The Connecticut Supreme Court's decision here has deepened an existing split about the extent to which counsel may reasonably base investigative decisions on a defendant's statements and actions.

1. *Strickland* held—as thirteen lower courts recognize—that counsel can reasonably rely on what defendants tell (or don't tell) them.

The "reasonableness of counsel's actions may be *determined or substantially influenced* by the defendant's own statements or actions." *Strickland*, 466

U.S. at 691 (emphasis added). It is "quite proper[]" for counsel to base litigation decisions "on information supplied by the defendant," and the reasonableness of investigative decisions in particular "depends critically on such information." *Id.* Thus, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

Three Circuit courts and seven State supreme courts have followed this reasoning. For example, in *Cummings v. Secretary for Department of Corrections*, 588 F.3d 1331 (11th Cir. 2009), Cummings was charged with capital murder for breaking into his girlfriend's home and stabbing her to death. *Id.* at 1335. From early on, he instructed his counsel that if he were convicted, he "did not want to present any mitigation evidence." *Id.* at 1336. The trial court confirmed Cummings's competency and made sure that that's what he wanted. *Id.* at 1336-37.

After he was convicted, Cummings "softened a little bit" on the mitigation issue and allowed his counsel to call two family members to testify at the penalty phase. *Id.* at 1339. Even so, the jury sentenced him to death. *Id.* at 1342.

In state post-trial and post-conviction proceedings, Cummings claimed that his counsel was ineffective for not investigating other mitigation witnesses, including Cummings's mother, girlfriend, sister, son, niece, middle school principal, and childhood friend, as well as several mental health experts. *Id.* at 1343-44. The state courts denied relief. *Id.* at 1349-50, 1353.

Cummings raised the same ineffectiveness claims in federal habeas. *Id.* at 1354. The district court granted relief, but the Eleventh Circuit reversed, explaining that the state court's decision was permissible because counsel's decision not to investigate was properly based on Cummings's wishes. It cited *Strickland* to explain that the scope of counsel's investigative duties "is substantially affected by the defendant's actions, statements, and instructions." *Id.* at 1357 (citing *Strickland*, 466 U.S. at 691). Because Cummings "was competent and clearly, consistently, and adamantly insisted that he wanted no mitigation evidence presented," he could not now fault the state courts for holding that his counsel reasonably refrained from investigating. *Id.* at 1361-65.

The Fifth and Tenth Circuits have held likewise. *See Boyd v. Johnson*, 167 F.3d 907, 910-11 (5th Cir. 1999) (holding counsel can reasonably rely on "impressions," "observations and interactions" with defendant in deciding not to investigate mental illness); *Coleman v. Brown*, 802 F.2d 1227, 1233 (10th Cir. 1986) ("The reasonableness of an attorney's decision not to conduct an investigation is directly related to the information the defendant has supplied.") (citing *Strickland*, 466 U.S. at 691); *see also United States v. Manriquez-Rodriguez*, case no. 98-2203, 1999 WL 345505, *5 (10th Cir., June 1, 1999) ("Defendant cannot deprive her counsel of the tools necessary to carry out a reasonable investigation and later claim prejudice when she is convicted.").[3]

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[3] Some pre-*Strickland* cases in the First, Third, and D.C. Circuits use similar reasoning. *See United States v. Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980) (holding that when "a client has failed to

The Pennsylvania Supreme Court addressed facts instructive here in *Commonwealth v. Peterkin*, 513 A.2d 373, 383 (Pa. 1986). Peterkin killed two people during a gas station robbery. *Id.* at 376-77. He told his counsel about a single alibi witness ("Cynthia") whose last name and previous address he could not remember, and who had moved to a place in Texas he did not know. *Id.* at 382. With such vague information, counsel—unsurprisingly—could not find her. On appeal, Peterkin claimed that his counsel was ineffective for not looking harder for "Cynthia," and that had counsel done so, he would have found her landlady, who could have in turn given information on "Cynthia's" whereabouts. *Id.* at 383. The Pennsylvania Supreme Court, citing *Strickland*, held that counsel's limited investigation into "Cynthia" was reasonable based on the limited information that Peterkin gave him about her. *Id.*

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apprise his counsel of information crucial to his defense," it would "decline to find counsel's failure to act upon such undisclosed information" amounted to ineffective assistance); *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) ("Realistically, a defense attorney develops his case in large part from information supplied by his client" and "choices based on such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others."); *United States ex rel. Green v. Rundle*, 452 F.2d 232, 235 (3d Cir. 1971) (holding defense counsel reasonably relied on his client's representations when making tactical decisions).

Pre-*Strickland* federal cases are informative because the *Strickland* test derived from precedent in the federal courts of appeals. *See Strickland*, 466 U.S. at 687 ("As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.").

The California, Florida, Georgia, Montana, Vermont, and Wyoming supreme courts have also followed *Strickland* on this point. *See In re Crew*, 254 P.3d 320, 336 (Cal. 2011) (holding that a defendant can limit counsel's investigative efforts both through affirmative statements and through omissions); *Cummings-El v. State*, 863 So.2d 246, 271 (Fla. 2003) (holding that counsel's truncated investigation reasonably followed the defendant's wishes); *Bradshaw v. State*, 792 S.E.2d 672, 676 (Ga. 2016) (holding counsel acted reasonably by not pursuing a line of investigation where defendant did not give counsel the necessary information); *State v. Prindle*, 304 P.3d 712, 716-17 (Mt. 2013) (holding that a defendant's expressed desire to plead guilty narrows the scope of counsel's investigative duties); *In re Cohen*, 640 A.2d 34, 38 (Vt. 1994) (holding defense investigation reasonable where based on the defendant's lies); *Hodge v. State*, 355 P.3d 368, 373 (Wyo. 2015) (holding counsel acted reasonably in not investigating contents of the defendant's computer for pictures where defendant never told counsel that pictures existed); *see also Broadnax v. State*, 130 So.3d 1232, 1257-58 (Ala. Crim. App. 2013) (holding that defendant's not giving counsel alibi information cabined counsel's investigative duties).

2. Two courts—including the Connecticut Supreme Court—have imposed unworkable standards on defense counsel.

Sharply departing from *Strickland*, the Connecticut Supreme Court held that even though counsel investigated every alibi witness that Skakel (and the other alibi witnesses) said were present, and called

those witnesses to testify at trial, counsel's investigation was still unreasonable because he did not unearth a fourth partial alibi witness. Pet. App. A-65-A-82. This was so, the court reasoned, because counsel has an independent investigative duty "irrespective of whether the defendant is helpful to counsel by providing information pertinent to his defense or whether he provides no such assistance." Pet. App. A-46.

In support, the Connecticut court cited *Bigelow v. Haviland*, 576 F.3d 284 (6th Cir. 2009). Pet. App. A-46. Bigelow was charged with kidnapping, assault, and arson for carjacking a woman at razor-blade point and lighting her car on fire. *Haviland,* 576 F.3d at 286. Leading up to trial, Bigelow told his attorney about several alibi witnesses who could testify that he was in another city at the time of the crimes, but only one had a sufficiently specific recollection to be useful to the defense. *Id.* at 286-87. She testified at trial, but Bigelow was still convicted. *Id.*

In federal habeas, Bigelow claimed that his attorney was ineffective for not investigating beyond his client's representations and finding more alibi witnesses than his client said existed. *Id.* at 286. The Sixth Circuit agreed. Even though counsel had tracked down and interviewed each alibi witness that his client told him about, the court held that the Sixth Amendment required more: "An attorney's duty of investigation," the court opined, "requires more than simply checking out the witnesses that the client himself identifies." *Id.* at 287-88.

In imposing on counsel an independent duty to investigate every possible lead—no matter how

speculative, and irrespective of what their client tells them—both the Sixth Circuit in *Bigelow* and the Connecticut Supreme Court purported to rely on *Rompilla v. Beard*, 545 U.S. 374 (2005). *Bigelow*, 576 F.3d at 288; Pet. App. A-46. Those courts misunderstood *Rompilla*; that case does not require counsel to craft their investigation without regard to what their clients have told them.

Rompilla was convicted of capital murder for killing a man by stabbing him repeatedly and setting him on fire. *Rompilla*, 545 U.S. at 377-78. During the penalty phase, the State relied on three aggravators to justify a death sentence: committing murder while committing another felony, torturing the victim, and a history of violence. *Id.* at 378. Rompilla was thoroughly uninterested in assisting counsel, and "was even actively obstructive" of their mitigation efforts by sending them "off on false leads." *Id.* at 381. Even so, the defense counsel did what they could, consulting three mental health experts (though they ultimately could not offer mitigating testimony), and presenting brief mitigating testimony from five of Rompilla's family members. *Id.* at 378, 382. The jury found that the aggravators outweighed the mitigators and sentenced Rompilla to death. *Id.* The conviction and sentence were upheld on direct appeal and state post-conviction review. *Id.*

In federal habeas, Rompilla argued that his counsel were ineffective for relying on his statements that he had an "unexceptional background" and not independently investigating "pretty obvious signs" of childhood troubles, mental illness, and alcoholism. *Id.* at 379 (cleaned up). He also faulted counsel for not

looking at the court files on the prior convictions that the State said it would rely on at the penalty phase. *Id.* at 383. The district court granted relief, but the Third Circuit reversed, holding that counsel reasonably limited their investigation because Rompilla "gave no reason to believe the search would yield anything helpful." *Id.* at 379.

In this Court, the majority commented that there was "room for debate about counsel's obligation to follow at least some of" the leads that Rompilla claimed they should have. *Id.* at 383. But that was not the holding or even part of the holding. Rather, the Court held that counsel were deficient because they did not look at court files of Rompilla's prior convictions, despite two specific warnings that the State would rely on that information in aggravation at the penalty phase. *Id.* Though the Court thought it "common sense" that "counsel must obtain information that the State has and will use against a defendant," it also cited to an American Bar Association guideline on counsel's duty to "secure information in the possession of the prosecution and law enforcement authorities"—a duty that existed "regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." *Id.* at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). And the State's files contained information that would have alerted Rompilla's counsel that what their client told them about available mitigation evidence was not correct.

The upshot of *Rompilla* is that counsel has a duty to examine evidence that the State intends to rely on. But that was not the takeaway for the *Skakel* and *Bigelow*

courts. Rather, they (incorrectly) cited *Rompilla* for a broader proposition: that counsel acts unreasonably when she limits her investigation based on her client's own statements. Pet. App. A-46; *Bigelow*, 576 F.3d at 288. But such an undefined duty disregards what *Rompilla* actually held, and has no rational end point.

II. FURTHER PERCOLATION WOULD SERVE NO PURPOSE.

The time is right to review these splits on the merits. Further percolation will only bring about the harms that *Strickland* foretold.

First, *Strickland* cautioned that "[c]ounsel's performance . . . could be adversely affected" by "[i]ntensive scrutiny" and "rigid requirements." 466 U.S. at 690. Yet if the Sixth Circuit and Connecticut Supreme Court were correct, *Strickland* imposed precisely what it decried—intrusive scrutiny and inflexible requirements. That type of review would only "interfere with" counsel's performance, *id.*, harming defendants and the adversary process. That would also make convictions perpetually subject to collateral attack, endangering the State's and victims' finality interests.

Second, further percolation could create significant problems for defense counsel's planning a trial strategy and preparing for trial. This Court has been clear that counsel can and must triage—"balanc[ing] limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 89. The lower court's standard, by contrast, would require defense counsel to not "leave the smallest stone unturned," lest a later hindsight inquiry notice one and reverse. *Decoster*, 624

F.2d at 210. It goes "too far to insist" that the Sixth Amendment mandates such a course. *Id.* The Sixth Amendment requires reasonably competent assistance, not "superhuman representation." *Stratmon*, 631 A.2d at 1184.

Third, the decision below could "adversely affect[]" counsel's "willingness to serve." *Strickland*, 466 U.S. at 689. If leaving an unknown stone unturned will result in a finding of incompetent representation—the natural consequence of the Connecticut/Sixth Circuit standard—attorneys might be unwilling to risk their licenses or reputations to represent indigent defendants. Those concerns implicate even the rare case where the client has the resources to fund Herculean defense efforts. For every criminal trial bears the risk that—no matter the defendant's resources—some small thing will go undone that the defendant can later claim would have made all the difference.

Fourth, reducing the number of available defense counsel is not the only potential harm the rule below creates for defendants. As *Richter* recognized, pursuing some lines of investigation carries the "serious risk[]" of proving that the defendant is lying. 562 U.S. at 108. Counsel is ethically bound not to present perjured testimony. *See Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986). Because the defendant's testimony is often the only available source for claims like alibi or self-defense, knowing that the defendant is lying may prevent putting on those defenses at all.

That would obviously limit a defendant's options. But it could also undermine, to some extent, a defendant's autonomy. Defendants alone make the

most fundamental decisions affecting their case—such as whether to plead guilty, testify, waive a jury trial, or appeal. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Determining the ends necessarily limits the means, as there are only so many ways of reaching a given destination. If counsel can—or even must—disregard his client in making investigative decisions, counsel would lack not only a strategic map, but a destination.

In sum, the Connecticut/Sixth Circuit standard does no favors for either defense counsel or their clients. If a reviewing court looks only at counsel's alleged mistakes exclusive of counsel's entire performance, counsel will think twice before putting their licenses and reputations at risk. And disallowing counsel's reliance on the information their clients provide would force counsel to expend time and resources investigating possibilities to the point of distraction at best, and of undermining their clients at worst.

Finally, the Connecticut Supreme Court's standard would impose impossible costs on the States, which already spend billions of dollars annually on indigent defense. *See* American Bar Association, *State, County[,] and Local Expenditures for Indigent Defense Services Fiscal Year 2008* at 8, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf (last accessed Aug. 7, 2018). Requiring defense counsel to exhaust every lead, no matter how speculative or inconsistent with their client's story, would only encourage the waste of the State's indigent defense funds.

CONCLUSION

This Court has repeatedly said that counsel's decisions must be judged in light of their overall performance, and that counsel acts reasonably when they base investigative decisions on the information that their client does—or does not—give them. The decision below deepened lower court splits on both issues. This Court should grant review and reverse.

Respectfully submitted.

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