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 SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

HUBERT J. SANTOS
TRENT A. LALIMA
LAW OFFICES OF HUBERT J. SANTOS
51 Russ St.
Hartford, CT 06106

MICHAEL A. FITZPATRICK
LAW OFFICES OF MICHAEL A. FITZPATRICK
10 Middle St.
Bridgeport, CT 06604

ROMAN MARTINEZ
Counsel of Record
GRAHAM E. PHILLIPS
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Respondent

QUESTION PRESENTED

In 2002, respondent Michael Skakel was wrongfully convicted of murdering his next-door neighbor 27 years earlier, when both were 15 years old. He served more than 11 years in Connecticut prison. In 2013, the state habeas court set aside his conviction in a comprehensive, highly fact-specific, 170-page opinion holding that his trial counsel had provided constitutionally deficient performance in no less than 10 different ways, three of which were prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). The Connecticut Supreme Court affirmed the ineffective-assistance holding in a 141-page opinion that considered virtually every aspect of counsel's performance and straightforwardly applied *Strickland* to the unique facts of the case.

The question presented by the State's petition is whether the Connecticut Supreme Court erroneously failed to consider the "overall performance" of respondent's trial counsel when assessing whether that performance was deficient under the first prong of the *Strickland* analysis.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page

INTRODUCTION

Respondent Michael Skakel has served more than 11 years in prison for a murder that the evidence now shows he did not commit. The jury convicted him because his trial counsel inexcusably failed to uncover and present powerful exculpatory evidence independently corroborating his alibi and implicating his older brother in the murder. The Connecticut courts vacated respondent's conviction after concluding that he did not receive a fair trial. There is no basis for this Court to upset that considered and highly fact-dependent state-court judgment.

In 2013, the Connecticut habeas court issued a comprehensive, 170-page opinion holding that respondent's trial counsel provided constitutionally deficient performance in no less than 10 different ways, three of which it deemed prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). Most importantly, the court concluded that counsel had "inexplicab[ly]" failed to investigate a "disinterested and credible" witness whose testimony at the habeas trial conclusively established that respondent was far from the crime scene at the time virtually everyone—including the State's investigators and its own forensic expert—concluded that the murder most likely took place. A-633, A-657-658. The court also held that respondent's counsel was ineffective for failing to introduce a "plethora" of evidence suggesting the murder was actually committed by respondent's older brother, Thomas Skakel. A-634.

In 2018, the Connecticut Supreme Court affirmed that decision in a similarly comprehensive 141-page opinion. The court "scrutinized every line of testimony in this case, and carefully evaluated each

and every exhibit, affording due consideration to the entire record." A-119. Based on that review, the court straightforwardly applied *Strickland* to the facts of the case. It concluded that counsel's failure to investigate the alibi witness was "inexcusable," "plainly deficient by any reasonable measure," and deeply prejudicial. A-8, A-82.

The State no longer disputes the Connecticut courts' conclusion regarding *Strickland*'s second prong—*i.e.*, that if the jury had been made aware of the alibi witness, there is a reasonable likelihood it would have acquitted respondent. The State nonetheless asks this Court to grant certiorari to address whether counsel's failure to investigate was "sufficiently egregious"—in light of his "overall performance"—to qualify as deficient under *Strickland*'s first prong. The State asserts that this Court should resolve alleged confusion and disagreement among federal and state courts over the role that counsel's "overall performance" must play when deciding whether a single error by counsel constitutes deficient performance.

This Court should deny the petition. There is no confusion among lower courts on this issue, and the State's asserted split of authority is entirely illusory. Indeed, in the proceedings below, the State did not even advance the core legal argument it makes here. Nor was the State's question presented here ever addressed by the Connecticut courts. This case would be a terrible vehicle for this Court to consider the State's arguments.

What the State actually wants is for this Court to second-guess the Connecticut courts' factbound application of *Strickland* to the unique circumstances of this case. But there is no need for such

intervention, because both Connecticut courts got it right: Both courts properly applied the familiar *Strickland* test. Both correctly held that counsel's failure to investigate the key alibi witness was inexcusable and prejudicial. And both rightly refused to uphold the flawed result of an unfair trial. The petition should be denied.

STATEMENT OF THE CASE

This case arises from the tragic murder of 15-year-old Martha Moxley in Greenwich, Connecticut, on October 30, 1975. Respondent—then also 15 years old—was a friend of Martha's who lived across the street with his father and six siblings. A-8, A-12. After an initial investigation, Greenwich police concluded that the killer was respondent's 17-year-old brother, Thomas Skakel. A-18-19. But the State Attorney refused to issue an arrest warrant for Thomas, and no one was prosecuted for decades. *See* A-18-19, A-761.

In the 1990s, journalist Dominick Dunne and disgraced Los Angeles police officer Mark Fuhrman—fresh off a perjury conviction for his testimony in the O.J. Simpson trial—revived interest in the Moxley case through a series of sensational books, articles, and television appearances accusing respondent of committing the murder. A-19-21, A-88-90, A-105, A-114; *see also* Conn. App. 97, 101.[1] In the wake of the renewed publicity, the State convened a one-man grand jury to reexamine the case. A-20-21. Respondent was charged in 2000, and a Connecticut jury found him guilty two years later. A-594-595.

---

[1] "Conn. App." refers to respondent's Separate Appendix in the Connecticut Supreme Court.

A. The Trial

1. According to the undisputed evidence presented at trial, Martha Moxley was last seen alive in the driveway of the Skakel home on the evening of October 30, 1975, between 9:00 and 9:30 p.m. A-12-13. At that time, she was "roughhousing in a flirtatious manner" with respondent's older brother Thomas. A-13.

Shortly before 9:30 p.m., respondent's brothers Rushton and John departed the Skakel home and drove with their cousin, James Terrien, to Terrien's home across town, approximately 20 minutes away. A-12, A-22, A-654. All three testified that respondent accompanied them on this excursion, although the State disputed that point at trial. A-23-25, A-654-656. After reaching Terrien's home, the group watched an episode of *Monty Python* from 10:00 to 10:30 p.m. A-12, A-657, A-659 n.35. The Skakel brothers did not return home from the Terrien residence until approximately 11:15 p.m. A-23, A-659 n.35.

Around noon the next day, Martha's body was found under a tree in her family's back yard. A-11, A-662. She had been beaten and stabbed with a golf club, and her pants were unbuttoned and pulled down. A-637 n.21, A-640-641. The golf club apparently belonged to a set owned by the Skakel family. A-11.

At trial, "the substantial weight of the evidence" demonstrated that "the murder most likely was committed between 9:30 and 10 p.m. on October 30." A-66; *see also* A-13-18, A-63, A-65-66, A-94-95, A-661-666. That evidence included forensic analysis provided by a nationally-recognized pathologist and

the State's chief medical examiner, along with testimony from witnesses who heard dogs barking in an agitated fashion near the Moxley home at that time. A-13-18, A-661-666. Shortly after the murder, Greenwich police investigators embraced the 10 p.m. estimated time of death. A-18 n.5.

2. The State was unable to introduce any physical evidence linking respondent to the crime. A-95, A-114. Instead, the State focused on respondent's alleged motive, arguing that respondent had developed a romantic interest in Martha and was jealous to see her flirting with his brother Thomas. A-88-89 n.22. The State also presented several witnesses who claimed that respondent had incriminated himself in the years following the crime. A-95, A-99-118.

Perhaps the State's "most significant witness" was Gregory Coleman, who had overseen (and tormented) respondent at a boarding school for troubled youth that respondent attended from 1978 to 1980. A-667. At the school, respondent was "sadistically interrogated about the victim's murder over a period of months and brutally beaten whenever he proclaimed his innocence." A-99. Coleman—a "twenty-five bag a day heroin addict"—claimed that respondent had confessed to the murder during that period. A-105-108.

As the Connecticut Supreme Court later explained, however, Coleman's assertion was "persuasively" undermined by cross-examination revealing that Coleman had (1) waited decades to come forward with his blockbuster allegation, doing so only after learning of the "sizeable reward being offered in the case"; (2) given different versions of his story at different times; and (3) suffered from

"questionable" memory in light of his long history of drug abuse. A-88, A-424-426. The cross-examination also revealed that Coleman, "in connection with his testimony," had "asked the [S]tate for special treatment with pending criminal cases and for money." A-424. And the State's other examples of incriminating statements allegedly made by respondent were likewise "readily impeachable, subject to differing interpretations, or . . . both." A-100 n.24; *see generally* A-99-114.

3. Respondent's lead counsel during the grand jury proceedings and trial was Michael "Mickey" Sherman. A self-described "narcissist TV lawyer," Sherman leveraged his participation in the case to burnish his media profile, hobnob with celebrities, and take financial advantage of the Skakel family's ability to pay his fees—all at the expense of serious trial preparation. *See generally* Conn. App. 89; Skakel Conn. Sup. Ct. Br. 19-23.[2]

---

[2] Sherman revealed his attitude toward the representation in a remarkable speech delivered in Las Vegas in October 2001, when respondent's case was heading toward trial. Conn. App. 88-115. Sherman's remarks were an extended riff on how he was "hav[ing] too much fun" with respondent's case, *id.* at 90, and contained an endless series of colorful and name-dropping anecdotes illustrating how Sherman was personally capitalizing on his role in the case. *See, e.g.*, *id.* at 95-96 (bragging about how on the night respondent was arrested, Sherman spent a "hysterical" evening with cast members from *The Sopranos* instead of performing legal research); *id.* at 93 (describing how Sherman and Mark Fuhrman—perhaps the man most responsible for respondent's indictment—"have become good friends cause we do all these t.v. shows together and we scream at each other and then we go out to dinner and stuff like that"); *id.* at 103 (explaining that *Talk Magazine* editor Tina Brown ingratiated herself to Sherman by getting him invited to "all the

The centerpiece of Sherman's defense was that at the time the murder likely took place, respondent was at the Terrien home, approximately 20 minutes away, watching television with his cousin James Terrien and his brothers Rushton and John. A-22-24, A-56-60, A-65-67, A-665-666. James, Rushton, and John supported that defense and testified that all three Skakel brothers (including respondent) had remained at the Terrien home until around 11:00 p.m. A-23, A-654-656.

The State sought to undermine respondent's alibi defense by arguing that it relied exclusively on the testimony of respondent's own relatives and asserting that the Skakels had orchestrated a massive family cover-up to protect respondent. A-24, A-59, A-66, A-70-72, A-83-87, A-117, A-656-657. The trial court's jury instruction "echoed" the State's point that "all the alibi witnesses were related to [respondent]." A-656-657.

Notably, at the time of trial Sherman was aware of another potential witness—unrelated to respondent—who might have independently corroborated the alibi. A-21, A-57-61, A-67-68, A-77-79, A-659. Before trial, Sherman had reviewed the 1998 grand jury testimony of Georgeann Dowdle—James Terrien's sister and respondent's cousin. A-21, A-59. Dowdle had asserted that on the evening of October 30, she was at the Terrien home with her "beau," later identified as Denis Ossorio, a local psychologist. A-56, A-59. In her trial testimony,

---

A-parties in New York," including "the launch party for *Sex and the City*"); *id.* (describing how Sherman agreed to give Brown an interview about respondent's case in exchange for an invitation to the Academy Awards).

Dowdle reiterated that she was at home with a "friend." A-23-24. But Sherman never asked Dowdle for more information about her "beau"/"friend" or whether he might be able to corroborate respondent's alibi. A-59, A-76, A-656. Nor did Sherman make any other effort to locate or interview Ossorio, who in 2002 was living nearby and easily could have been called as a witness. A-67-68. No information about Ossorio was presented to the jury.[3]

4. Sherman did make a halfhearted effort to cast suspicion on the Skakel family tutor, George Littleton. A-349, A-351. But "the evidence against Littleton was scant at best." A-622. Sherman's closing argument disclaimed any belief that Littleton was guilty, and he did not ask the trial judge to instruct the jury on a third-party culpability defense. A-615-616 n.7, A-620-621.

Strikingly, Sherman made no attempt to argue that *Thomas* Skakel might have committed the murder. In fact, there was plenty of evidence unfavorable to Thomas. *See* A-633-651. Most importantly, Sherman knew that for decades Thomas had lied to police and others about his whereabouts between 9:30 and 10:15 p.m. on the night of the murder. A-634-637.

---

[3] The State also presented testimony from several witnesses who believed that respondent may not have gone to the Terrien home. A-24-25, A-654-656. But one of those witnesses had originally told police that she *did* believe respondent had gone to the Terrien home; her recollection had "completely changed" only after reading Mark Fuhrman's book. A-89-91 & n.23 (noting "corruptive" effect of Fuhrman's book on witness recollections decades after the murder). And the other two witnesses were not certain. A-24-25, A-71 & n.18, A-489-490, A-654-656.

Shortly after the murder, Thomas told police and the victim's family that he had said goodbye to Martha at approximately 9:15 p.m. on October 30 and returned to his bedroom to do homework until 10:15 p.m., when he briefly watched television with Littleton, the family tutor. A-634-635. But years later, Thomas confessed to private investigators that he had lied. A-636-638. Thomas stated that instead of returning home at 9:30 p.m., he had actually engaged in a consensual sexual encounter with Martha in the Skakel back yard, not far from the Moxley driveway, from 9:30 until approximately 9:50 or 9:55 p.m. A-636-637. Thomas admitted that he had unbuckled and pushed down Martha's pants in the course of the encounter. *Id.*

Notably, Thomas himself directly repeated that confession to Sherman, days before respondent's trial, in the presence of Thomas's attorney Emmanuel Margolis and Sherman's associate Jason Throne. A-639. Thomas made clear that he would invoke the Fifth Amendment if called to testify. *Id.* But Sherman made no effort to introduce Thomas's highly incriminating admissions through the testimony of either Throne or Margolis.

Nor did Sherman marshal other available evidence implicating Thomas. That evidence established that (1) Thomas had been acting in a "strange" and "very aggressive" manner towards Martha in the weeks before the murder; (2) Martha had repeatedly rebuffed Thomas's sexual advances; and (3) Thomas had a history of "mental and emotional instability" that manifested itself in "frequent and quite sudden" incidents of "severe physical violence, incontinence, and threats against [his] siblings." A-644-646, A-648-650; *see also* A-562

(noting that Thomas had previously "put his fist through a door," "beat the crap" out of a soccer opponent, and "stabbed his brother in the head with a fork").

5. Respondent was found guilty and sentenced to 20 years to life in prison. A-595. His conviction was affirmed on direct appeal. *See Connecticut v. Skakel*, 888 A.2d 985 (Conn.), *cert. denied*, 549 U.S. 1030 (2006). Respondent's subsequent motion for a new trial was also unsuccessful. A-596-598; *see Skakel v. Connecticut*, 991 A.2d 414 (Conn. 2010).

B. The State Habeas Proceeding

1. In 2010, respondent sought a writ of habeas corpus in Connecticut Superior Court. A-600. Among other claims, respondent asserted that Mickey Sherman had rendered ineffective assistance of counsel, most importantly by (1) failing to track down and present testimony from Dowdle's "beau," Denis Ossorio; and (2) failing to introduce evidence that Thomas Skakel had committed the murder. A-601-602. In 2013, the habeas court conducted a two-week habeas trial in which it heard testimony from 20 witnesses. A-27.

Most significantly, Ossorio independently corroborated respondent's alibi defense. Ossorio testified that he had been present at the Terrien home on the evening of October 30 and had seen and talked with respondent and his brothers at various points as they watched *Monty Python* between 10:00 and 10:30 p.m. A-657-659 & n.35. Ossorio also stated that he had lived in the Greenwich area at the time of respondent's trial and "would have readily been available to testify" if only Sherman had contacted him. A-658.

Sherman himself also testified. He conceded that respondent's alibi was "[a]bsolutely" his "principal defense" at trial, that it would have been "very important" to present an alibi witness who was unrelated to respondent, and that if he had been aware of such testimony, he would have presented it "[w]ithout a doubt." A-59. Sherman also admitted to having read Dowdle's grand-jury testimony mentioning her "beau." *Id.* When asked why he never investigated the "beau," Sherman stated that he "had no reason to suspect" that the "beau" had seen respondent or could provide helpful testimony. *Id.*

Sherman also confirmed that shortly before trial, Thomas Skakel had told him—in the meeting also attended by Throne and Margolis—about lying to the police and covering up his sexual encounter with the victim at the likely time of the murder. A-634-640. Sherman stated that he did not try to implicate Thomas at trial because he believed there was insufficient evidence to present a third-party culpability defense. A-633, A-652 n.33.

2. In October 2013, the habeas court issued a 170-page opinion vacating respondent's conviction on multiple grounds, including Sherman's failures to investigate Ossorio and present a third-party culpability defense implicating Thomas Skakel. A-593-762. As to each, the court explained that under *Strickland v. Washington*, 466 U.S. 668 (1984), respondent had established (1) that Sherman's performance was constitutionally deficient, and (2) that the deficiency was prejudicial. A-604-608. The court concluded that Sherman's failures were "fatal to a constitutionally adequate defense" and resulted in a conviction "that lacks reliability." A-761-762.

a. With respect to respondent's alibi, the habeas court fully credited Ossorio's testimony that respondent was at the Terrien house at the likely time of Martha's death:

> Ossorio was a disinterested and credible witness with a clear recollection of seeing [respondent] 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 [respondent] there, but that he lived in the area throughout the time of the trial and would have readily been available to testify if asked.

A-657-658. The court further emphasized that "Ossorio was a powerful witness in support of [respondent's] alibi claim." A-658.

The habeas court also found that Dowdle's grand jury testimony had put Sherman "on notice" about Ossorio's presence at the Terrien home and that Sherman would have discovered and utilized Ossorio if he had conducted a "reasonable inquiry" at the time of trial. A-659-661. It rejected the notion that Sherman's failure to investigate reflected any sort of "strategic decision." A-660.

Finally, the habeas court held that Sherman's failure to investigate Ossorio undermined the fairness and reliability of the trial. A-665-666. The court emphasized the evidence establishing that Martha was killed at around 10:00 p.m. on October 30. A-661-666. The court noted that the State itself had acknowledged the strength of that proof during its closing statement. A-661-662. It also emphasized that the jury's requests during deliberations indicated

a keen interest in whether respondent had accompanied his brothers to the Terrien home. A-662, A-665.

The court concluded that "the importance of [respondent's] alibi defense . . . cannot fairly be discounted" and that Ossorio's testimony would have "greatly enhanced" the "persuasiveness" of the defense. A-665-666. It ultimately held that if Sherman had introduced that testimony, there was a reasonable probability that respondent would have been acquitted. A-666.

b. The habeas court also held that Sherman was constitutionally ineffective for failing to implicate Thomas Skakel. A-633-653. The court characterized Sherman's decision as "inexplicable" in light of (1) "the strength of evidence regarding [Thomas's] direct involvement with the victim at the likely time of her death"; (2) the "circumstantial evidence of [Thomas's] sexual interest in the victim"; and (3) Thomas's "history of emotional instability." A-633-634; *see* A-634-653 (cataloguing the evidence against Thomas).

The court explained that Thomas's confessions to lying to police and covering up his sexual encounter with the victim at the approximate time of the murder would have been admissible at trial, either through the "readily available" testimony of Sherman's associate (Throne), or through other means. A-639-640 & n.23. It ultimately concluded that there was a "reasonable probability" that the jury would have acquitted respondent if Sherman had attempted to implicate Thomas. A-652-653.

c. Beyond the two grounds discussed above, the habeas court also deemed Sherman constitutionally ineffective for failing to identify and present

testimony from various witnesses who could have decisively refuted Coleman's testimony about respondent's alleged confession. A-666-680. Furthermore, the court held that Sherman had provided "deficient performance" under *Strickland*'s first prong in seven *other* ways. *See* A-27 & n.9, A-616-633, A-685-711, A-718-729, A-752-756.

The court gave a scathing assessment of those other aspects of Sherman's performance, concluding that they revealed "inexcusable lapse[s]," "inexcusable inaction," and a "significant and impactful lack of judgment." A-694, A-724, A-670. The court also agreed with respondent's expert that Sherman's closing argument to the jury was "disjointed," "unfocused," "improper," and "one of the poorest he had seen in his career." A-725. It nonetheless held that none of these individual failings could satisfy *Strickland*'s second prong on its own, though it left open the possibility that they were prejudicial when considered on cumulative basis. A-752-761.

Finally, the court held that Sherman had violated his ethical duties and created a potential conflict of interest by handling respondent's fees in a manner that exposed those funds to IRS tax liens on Sherman's property. A-736-743. The court nonetheless held that the arrangement did not violate the Sixth Amendment, because respondent had not proven any actual adverse effect on the representation. A-743-744.[4]

---

[4] Sherman later pled guilty to failing to pay more than $300,000 in taxes and was sent to prison. A-740-741.

C. The Connecticut Supreme Court's Decisions

1. The State appealed the habeas court's decision to the Connecticut Supreme Court. In a 4-3 decision released in December 2016, that court initially reversed the habeas court's ruling and reinstated respondent's conviction. A-341. The majority did not challenge the habeas court's conclusion that if Sherman had investigated Ossorio, there was a reasonable probability that respondent would have been acquitted. Instead, it held only that Sherman's failures did not sink below the constitutional minimum. A-388-389, A-410.[5]

2. Respondent timely moved for reconsideration of the Connecticut Supreme Court's holding with respect to Ossorio. In May 2018, that court granted reconsideration and affirmed the habeas court's decision vacating respondent's conviction, again by a 4-3 vote. This time, the court agreed with the habeas court that Sherman's failure to investigate and present Ossorio's testimony was "constitutionally

---

[5] The court also overturned the habeas court's determination that Sherman was ineffective for failing to raise a third-party culpability defense implicating Thomas Skakel. A-362-389. But as Justice Palmer's dissent explained, that holding erroneously assumed that Throne would not have remembered Thomas Skakel's inculpatory statements if called to testify at trial, A-570-572, 580-581, and it also impermissibly relied on a "'*post hoc* rationalization' for [Sherman's] decisionmaking that contradicts the available evidence of counsel's actions," *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (citation omitted); *see generally* A-547-591.

inexcusable" and "undermines confidence in the reliability of [respondent's] conviction." A-8.[6]

a. The Connecticut Supreme Court rooted its analysis in *Strickland*'s familiar two-prong test for analyzing Sixth Amendment claims of ineffective assistance of counsel, which requires showings of both (1) "deficient performance" and (2) "prejudic[e]." A-42. The court emphasized that "[t]he 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." A-41-42 (alteration in original) (quoting *Strickland*, 466 U.S. at 686).

With respect to the "deficient performance" prong, the court made clear that it must conduct an overall assessment of whether "'counsel made errors so serious that "counsel" was not functioning as the counsel guaranteed . . . by the [S]ixth [A]mendment.'" A-42-43 (quoting *Strickland*, 466 U.S. at 687). Critically, the court recognized that "to establish deficient performance by counsel, a defendant must show that, *considering all of the circumstances*, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." A-43 (emphasis added) (citing *Strickland*, 466 U.S. at 687-88). The court acknowledged that such review is "highly deferential" and must be conducted without "the distorting effects of hindsight," lest courts too readily

---

[6] The Connecticut Supreme Court's May 2018 decision specified that it superseded the court's initial December 2016 decision only "on the issue for which reconsideration en banc was granted [*i.e.*, the Ossorio issue]." A-1 nn.*-**.

"conclude that a particular act or omission of counsel was unreasonable." A-43-44 (quoting *Strickland*, 466 U.S. at 689). The court also made clear that in order to apply *Strickland* here, it had "scrutinized every line of testimony in this case, and carefully evaluated each and every exhibit, affording due consideration to the entire record in light of the parties' claims and arguments." A-119.

b. After carefully explaining the *Strickland* standard—and based on its comprehensive review of the entire record—the Connecticut Supreme Court held that Sherman's failure to investigate and present Ossorio's exculpatory alibi testimony was "plainly deficient by any reasonable measure." A-82.

The court began by accepting the habeas court's factual finding that Sherman's failure to investigate Dowdle's beau "'cannot be attributed to any strategic decision'" but was instead due "to oversight or inattention." A-61 n.17 (quoting A-660); *see also* A-146-147; *Wood v. Allen*, 558 U.S. 290, 300-03 (2010) (whether counsel's conduct was attributable to strategy is a question of fact). The court then explained that Sherman's unthinking failure to investigate a crucial alibi witness was constitutionally deficient in light of four broader considerations relating to Sherman's trial strategy and the overall nature of the case.

First, the court emphasized that respondent's alibi—placing him at the Terrien home until approximately 11:15 p.m.—"was his primary defense" at trial. A-64-65. Notwithstanding the State's contention that the victim might have been murdered as late as 1 a.m., the court concluded that "the substantial weight of the evidence indicated that the murder most likely was committed between 9:30 and

10 p.m." A-66. The court noted that the State's "vigorous[]" efforts to "discredit" respondent's evidence placing him at the Terrien home in this period "underscored" the potential importance of independently corroborating the alibi. *Id.* Sherman's overarching decision to showcase respondent's alibi made it essential to fully investigate Ossorio.

Second, the court emphasized that obtaining Ossorio's testimony "could hardly have been easier," if only Sherman had made any modicum of effort. A-67. As the court explained, Sherman merely had to "pick up the telephone and ask Dowdle," who would have identified her beau as Ossorio, then living "just a few miles from Sherman's office." A-67-68. Indeed, "the most elementary and obvious of inquiries by Sherman or his investigator would have revealed that Ossorio was a critical alibi witness." A-68; *see also* A-67 (quoting *Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005), for proposition that the "easy availability" of relevant evidence "heighten[s]" the unreasonableness of failing to try to procure it).

Third, the court held that Sherman's failure to investigate Ossorio was especially unreasonable given the obvious and critical value of "an independent and unbiased witness with no motive to lie about seeing [respondent] at the Terrien home." A-69-70. Respondent's other alibi witnesses were all "either siblings or cousins," and the prosecution "emphatically and persistently maintained that the jury should not credit [respondent's] alibi" because these "closely related" witnesses "were lying to protect him." *Id.* In this context, the court explained, "[t]estimony from a neutral, objective and credible witness like Ossorio" would have been key to (1) bolstering respondent's other witnesses,

(2) refuting the State's witnesses (all of whose recollections were "equivocal in some respects"), and (3) undermining the State's broader allegation of a family conspiracy to cover up respondent's supposed guilt. A-71-72 & n.18.

And fourth, as part of its consideration of "all the circumstances" (A-44 (quoting *Strickland*, 466 U.S. at 691)), the court emphasized that respondent was on trial for murder and risked being sent to prison for the rest of his life. A-72. "In such circumstances, the responsibilities of defense counsel are especially great" and he "must be particularly attentive to detail, because the defendant's life is on the line." *Id.* Given this context, "in failing even to contact Dowdle after reading her grand jury testimony and learning that her beau was at the Terrien home," Sherman "clearly did not live up to professional norms." *Id.*[7]

c. The Connecticut Supreme Court also "fully agree[d]" with the habeas court's conclusion that respondent was prejudiced by Sherman's defective performance. A-83. The majority explained that if Sherman had located Ossorio and called him to testify, there was a "reasonable probability" that respondent would have been acquitted, insofar as Ossorio's "[i]ndependent and objective" testimony

---

[7] The Connecticut Supreme Court also considered—and rejected—various counterarguments that the State advanced in defense of Sherman's performance, including (1) the notion that Sherman had no duty to investigate Ossorio simply because he had not been mentioned by respondent or various other alibi witnesses; and (2) the idea that Sherman could have reasonably inferred "that Ossorio either saw nothing or would remember nothing about" the night in question. A-73-80.

would have "refute[d] th[e] central thesis of the [S]tate's case against him." A-83, A-86.

In reaching that conclusion, the court highlighted the overall weakness of the State's case against respondent, which was "entirely circumstantial" and devoid of eyewitnesses, forensic evidence, and motive. A-87-91, A-95-99, A-114. The court also dissected the State's excessive reliance on unreliable assertions that respondent had incriminated himself in various statements over the decades following the murder. A-99-114. The court ultimately concluded that respondent was "deprived of a fair trial" in violation of his Sixth Amendment rights. A-141.[8]

REASONS FOR DENYING THE WRIT

The State's petition for certiorari should be denied, for three overarching reasons. First, the State has no serious argument that the Connecticut Supreme Court committed any legal error, much less one that warrants this Court's review. The Connecticut Supreme Court correctly stated and applied *Strickland*'s familiar two-prong test, and it did so in precisely the same way that this Court has repeatedly done in cases involving egregious errors. The State is wrong to assert that the Connecticut Supreme Court erroneously failed to consider Sherman's overall performance. It is also wrong to claim that defendants must satisfy a heightened "egregiousness"

---

[8] Justice D'Auria joined the majority opinion and also wrote separately to emphasize the deference owed to the habeas court's assessment of Ossorio's credibility and his testimony's likely effect on the jury. A-146-149. Justices Eveleigh, Espinosa, and Vertefeuille dissented. A-158-332.

standard for establishing ineffectiveness in cases involving a single error.

Second, the State's alleged split of authority is illusory. All of the jurisdictions the State invokes apply *Strickland*'s well-settled totality-of-the-circumstances approach to assessing whether counsel's performance was deficient. None holds that counsel's "overall performance" is categorically irrelevant to that analysis. Indeed, the cases the State cites for that assertion all concern aspects of *Strickland*'s *prejudice* inquiry that are outside the scope of the State's petition.

Finally, this case is an exceptionally poor vehicle for addressing the question presented. As the State concedes, the Connecticut Supreme Court did not directly pass upon that question, and the State forfeited its principal arguments here by failing to advance them below. In any event, Sherman's performance was deficient under *any* plausible standard, and his failure to present a third-party culpability defense centered on Thomas Skakel is an independent basis for affirming the judgment.

For any, or all, of these reasons, the petition should be denied.

A. The Connecticut Supreme Court's Decision Is Correct

The State's principal claim is that the Connecticut Supreme Court committed legal error when analyzing Sherman's performance under *Strickland*'s first prong. Pet. 14-15, 35-39. That is mistaken: The court's 141-page opinion was meticulous in setting forth the correct legal standard and applying it to the unique facts of respondent's case. None of the State's arguments have merit.

1. The Decision Below Properly Applied *Strickland*

As explained at length above, the Connecticut Supreme Court straightforwardly applied *Strickland*'s "deficient performance" analysis to the facts at issue here. *See supra* at 15-19.

The court first explained that the overarching purpose of the *Strickland* inquiry is to determine "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." A-41-42 (quoting *Strickland*, 466 U.S. at 686). It then noted that a finding of "deficient performance" is appropriate when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [S]ixth [A]mendment." A-42 (quoting *Strickland*, 466 U.S. at 687). It emphasized that the defendant must therefore "show that, *considering all of the circumstances*, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." A-43 (emphasis added) (citing *Strickland*, 466 U.S. at 687-88). And it stressed that a court's review of counsel's performance "'must be highly deferential'" and avoid "'the distorting effects of hindsight.'" A-43-44 (quoting *Strickland*, 466 U.S. at 689). *See generally supra* at 16-17.

After correctly stating the governing standard, the court applied it to the unique facts of this case. The court made clear that it had "scrutinized every line of testimony" and "carefully evaluated each and every exhibit," giving "due consideration to the entire record." A-119. Based on that review, the court held

that Sherman's performance was "plainly deficient by any reasonable measure." A-81-82. The court placed special emphasis on "[1] the importance of [respondent's] alibi defense, [2] the significance of Denis Ossorio's testimony to that defense, [3] the ease with which Ossorio could have been located, and [4] the gravity of the charges and potential punishment that [respondent] faced." A-65; *see generally* A-65-82 (addressing each point in detail); *supra* at 17-19.

Finally, the court determined that respondent suffered prejudice. A-83-118. Given the weaknesses of the State's case, the court determined—in a finding the State does not contest here—that the jury would have been reasonably likely to acquit respondent if Ossorio had testified. *Id.*; *supra* at 19-20.

The Connecticut Supreme Court's articulation of the *Strickland* test was correct, and its analysis of the relevant facts was amply supported by the evidence. Its decision should stand.

2. The State's Attack On The Decision Below Lacks Merit

According to the State, the Connecticut Supreme Court's analysis of *Strickland*'s deficient-performance prong was flawed because (1) it did not expressly analyze Sherman's "overall performance," and (2) it did not consider whether Sherman's failure to investigate Ossorio was an "egregious" error. *See* Pet. 14-15, 36-37. Both arguments lack merit.

a. The State contends that defense counsel's "overall performance" is necessarily the "focus" of *Strickland*'s deficient-performance inquiry. Pet. 15, 23, 34. Indeed, the State asserts that "This Court Has Stated Numerous Times That Overall Performance Is The *Central Focus* Of The First *Strickland* Prong."

Pet. 15 (emphasis added). The State thus appears to believe that *Strickland* categorically requires an express assessment of defense counsel's "overall performance" in every ineffective-assistance case.

The State is mistaken. This Court has cited *Strickland* in well over 100 decisions. Of those, only *four* have ever used the phrase "overall performance" at all. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011); *Massaro v. United States*, 538 U.S. 500, 505 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986); *United States v. Cronic*, 466 U.S. 648, 666 n.41 (1984). One of those cases—*Cronic*—twice acknowledges that an ineffective-assistance claim can challenge *either* counsel's "overall performance" *or* "particular errors or omissions." 466 U.S. at 667 n.41; *see also id.* at 657 n. 20. Indeed, *Cronic* directly states that "[o]f course, the type of breakdown in the adversarial process that implicates the Sixth Amendment *is not limited to counsel's performance as a whole*—specific errors and omissions may be the focus of a claim of ineffective assistance as well." *Id.* at 657 n.20 (emphasis added). *Cronic* therefore squarely refutes the State's claim that "overall performance" must be the "central focus" of the deficient-performance inquiry in every case.[9]

Of the three remaining decisions, only *Harrington* and *Kimmelman* link "overall performance" to

---

[9] The State tries to dismiss *Cronic*'s statements as mere "*dicta*" that are somehow inconsistent with *Strickland*. Pet. 17 n.2. But below, the State *embraced* this aspect of *Cronic*, as part of its (mistaken) argument that *Strickland* prejudice must be established as to each asserted error, and not cumulatively. State Conn. Sup. Ct. Br. 239. The State neither acknowledges nor tries to justify its change of position.

Strickland's first prong in any way. And neither says that such performance is the "focus" of that prong (let alone the "*central* focus"). Far from having stated "numerous times" that overall performance is the "central focus" of *Strickland*'s first prong, this Court has never said it even once.

The State's erroneous view appears to grow out of its misreading of *Kimmelman*. There, this Court reiterated *Strickland*'s requirement that courts assess counsel's performance "in light of all the circumstances." 477 U.S. at 386 (quoting 466 U.S. at 690). Accordingly, the Court explained, "[i]t will generally be appropriate for a reviewing court to assess counsel's *overall performance* throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Id.* (emphasis added) (quoting *Strickland*, 466 U.S. at 690). "[U]nless consideration is given to counsel's overall performance," courts might too readily "conclude that a particular act or omission of counsel was unreasonable." *Id.* (quoting *Strickland*, 466 U.S. at 689).

Kimmelman thus does not say that overall performance is the "central focus" of *Strickland*'s first prong. It simply makes clear that overall performance is part of the totality of the circumstances that courts must consider when determining whether the particular "identified acts or omissions" of counsel are objectively unreasonable. *Id.*

Harrington reflects the same principle. There, the Court observed in passing that "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."

562 U.S. at 111. But that truism is simple common sense: When counsel's overall performance is strong, it will be harder for a defendant to show—"considering all of the circumstances"—that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Neither *Kimmelman* nor *Harrington* embraces any categorical rule requiring a rigid and express inquiry into counsel's "overall performance" in every case.

Properly understood, *Kimmelman* and *Harrington* are thus consistent with the decision below. The Connecticut Supreme Court expressly stated that it was judging Sherman's performance in light of "all of the circumstances." A-43-44. Indeed, the court made clear it had "scrutinized every line of testimony," "each and every exhibit," and the "entire record in light of the parties' claims and arguments." A-119. Moreover, its assessment of Sherman's failure to investigate Ossorio rightly looked to the broader context of the case—including the centrality of the alibi to Sherman's overall trial strategy and the nature of the charges—when concluding that his performance was deficient. *Supra* at 17-19.

In short, even though the court did not use the phrase "overall performance," its 141-page decision clearly considered the entirety of Sherman's actions. The court simply concluded that, in the totality of the circumstances, the "particular act or omission of counsel" at issue here—Sherman's inexplicable failure to investigate a potentially critical alibi witness shoring up the only identified weakness in respondent's primary defense—was "unreasonable." *Strickland*, 466 U.S. at 689. That highly factbound conclusion reflects a correct application of this Court's

Sixth Amendment precedent and does not warrant further review.

b. The State grudgingly concedes that even a single error by counsel can constitute deficient performance under *Strickland*'s first prong. Pet. 28. But it nonetheless appears to argue that courts must analyze single-error claims under a heightened "egregiousness" test that is somehow different from the ordinary standard. *See* Pet. 15, 35-37.

Here too the State is mistaken. In *Murray v. Carrier*, this Court observed that a federal habeas petitioner could potentially excuse his procedural default by showing that his state counsel had rendered constitutionally ineffective assistance. 477 U.S. 478, 496 (1986). The Court noted in passing that the Sixth Amendment right to effective assistance can "be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Id.* In making this observation, however, the Court was not establishing a heightened "egregiousness" standard for single-error claims. By "sufficiently egregious," the Court simply meant bad enough to satisfy *Strickland*'s first prong—which is why this Court cited *Strickland* to support its point. *Id.* (citing 466 U.S. at 693-96).

That understanding of *Carrier* is confirmed by *Smith v. Murray*, 477 U.S. 527 (1986). There, the Court clarified that "sufficiently egregious" means "of such magnitude that it rendered counsel's performance constitutionally deficient under [*Strickland*]." *Id.* at 535. Thus, "sufficiently egregious" is just another way of saying "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.

Other decisions by this Court further undermine the State's argument for a heightened "egregiousness" standard in single-error cases. Most notably, this Court has decided multiple such cases in recent years, but it has never engaged in any special egregiousness analysis different from the ordinary *Strickland* test.

In *Hinton v. Alabama*, for example, the Court held that counsel rendered ineffective assistance based on a single error—his mistaken belief that state law provided only $1,000 for expert witness fees. 134 S. Ct. 1081, 1089 (2014) (*per curiam*) (describing this as "[t]he only inadequate assistance of counsel here"). The Court found that this error constituted deficient performance without discussing counsel's "overall performance" or analyzing whether the error was "egregious." *See id.* at 1088-89.

The same is true of *Rompilla*. There, the Court found deficient performance based on a single "dispositive" omission—counsel's failure "to examine the court file on Rompilla's prior conviction." 545 U.S. at 383. Once again, the Court did not mention "overall performance" or "egregiousness." It sufficed that counsel's one particular failure "fell below the level of reasonable performance." *Id.*

This Court's cases thus offer no support for the State's attack on the decision below. Those cases make clear that a single error can constitute deficient performance—and that whether it does so is judged by the ordinary reasonableness standard announced in *Strickland*. That is the standard the Connecticut Supreme Court applied here. A-43, A-65, A-73; *see supra* at 16-17.

B. There Is No Split Of Authority On The Question Presented

The State contends that there is a three-way split among federal and state courts concerning the relevance of "overall performance" to *Strickland*'s first prong. Pet. 22-32. That is incorrect. The State mischaracterizes the cases in each of its categories and cannot identify any actual conflict regarding the deficient-performance prong. The asserted split is illusory.

1. The State first contends that the Fourth, Fifth, Seventh, and Tenth Circuits, as well as Arizona, Kentucky, Missouri, and New York appellate courts, all hold that "overall performance is the central focus of *Strickland*'s first prong." Pet. 23. They do not.

Just as no decision of this Court describes overall performance as the "central focus" of *Strickland*'s first prong, none of the decisions the State cites in this first category does either. Instead, these cases simply apply the principle set forth in *Kimmelman*: that because *Strickland* requires performance to be assessed "in light of all the circumstances," courts must consider counsel's "overall performance" as part of the assessment. *Kimmelman*, 477 U.S. at 386. Courts must do so, however, "in order to determine whether the 'identified acts or omissions'"—that is, the *specific* errors alleged—were objectively unreasonable. *Id*. All of the cases in the State's first category (Pet. 23-29) consider overall performance in the context of assessing whether particular errors were objectively unreasonable—and none says that overall performance is *itself* the "focus" of the inquiry.

Notably, the State concedes that none of these decisions "hold[s] that a single error by counsel can

never be sufficiently egregious" to satisfy *Strickland*'s first prong. Pet. 28. And indeed, three of the cited decisions in this first category found deficient performance on the basis of a single error. *See Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011); *People v. Turner*, 840 N.E.2d 123 (N.Y. 2005); *Deck v. State*, 68 S.W.3d 418 (Mo. 2002) (en banc). The State asserts that these decisions provide a degree of guidance about "egregiousness" that "this Court's jurisprudence currently is lacking" (Pet. 28-29), but it does not explain what that guidance is or why it is more helpful than the guidance provided by this Court's decisions in cases like *Hinton* and *Rompilla*.

2. The State next contends that the Second Circuit and the Wisconsin Supreme Court "have expressly held that overall performance should *not* be evaluated." Pet. 29. But the State reaches that conclusion only by misreading its key authorities.

The first is *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005). The State describes *Henry* as criticizing a New York state court "for finding [that] counsel's overall performance was constitutionally adequate, regardless of the challenged error," and as "declaring that 'reliance on counsel's competency in all other respects[] . . . fail[s] to apply the *Strickland* standard at all.'" Pet. 29 (alterations in original) (quoting *Henry*, 409 F.3d at 72). But the quoted passage from *Henry* concerns *prejudice*, not deficient performance. The Second Circuit's point was that "counsel's competency in all other respects" is not relevant to whether given instances of deficient performance are *prejudicial* under *Strickland*'s second prong. *See* 409 F.3d at 71-72. That proposition (1) is correct, (2) does not conflict with any other decision cited by the State, and (3) has nothing to do with the State's question

presented, which concerns only the *first Strickland* prong.[10]

The State also misreads *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003). The State claims that *Thiel* "held that courts should *not* 'assess the overall performance of counsel.'" Pet. 30 (quoting *Thiel*, 665 N.W.2d at 323). But the State lifts this out-of-context snippet from *Thiel*'s discussion of the *prejudice* inquiry, where the Wisconsin Supreme Court said: "The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel is not to assess the overall performance of counsel but to ensure that the adversarial process functions fairly and reliably." 665 N.W.2d at 323. The court's point was that, however deficient counsel's performance has been, there is no Sixth Amendment violation if those deficiencies did not prejudice the defendant in a way that calls the result into doubt. *See id.* ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is not implicated." (quoting *Cronic*, 466 U.S. at 658)). Like *Henry*, *Thiel* says nothing about *Strickland*'s performance prong that conflicts with any other decision the State cites.

3. Finally, the State posits a third category of jurisdictions—those that have found *Strickland*'s first prong satisfied by a single error but improperly

---

[10] The State alleges a "disagreement" between the Second Circuit and New York courts (Pet. 29-30), but—as the cited decision makes clear—any such divergence of views relates only to *Strickland*'s *prejudice* prong, not its deficient-performance prong. *See Rosario v. Ercole*, 601 F.3d 118, 124 (2d Cir.), *reh'g en banc denied*, 617 F.3d 683 (2d Cir. 2010), *cert. denied*, 563 U.S. 1016 (2011).

"omit[] any discussion of counsel's overall efforts, or even any acknowledgment of that controlling principle." Pet. 31-32 (pointing to *Rivera v. Thompson*, 879 F.3d 7 (1st Cir. 2018); *Bey v. Superintendent Greene SCI*, 856 F.3d 230 (3d Cir. 2017); and the decision below). But as explained above, no such "controlling principle" exists. This Court's own decisions, including *Rompilla* and *Hinton*, refute the notion that there is a categorical rule requiring courts to expressly address counsel's "overall performance" in every case. *Supra* at 28. And the State does not even attempt to show that counsel's errors in *Rivera* and *Bey* would not have qualified as deficient performance under any other jurisdiction's understanding of *Strickland*. There is no split of any kind here.

C. This Case Is A Poor Vehicle For Resolving The Question Presented

This is, in any event, an exceedingly poor vehicle for addressing the State's question presented. The State forfeited its "overall performance" and "egregiousness" arguments by failing to make them below, and the Connecticut Supreme Court therefore understandably did not expressly consider them. And respondent would be entitled to relief even under the State's preferred test.

1. As the State itself acknowledges (Pet. 32, 36-37), the Connecticut Supreme Court did not directly address (1) the role of Sherman's "overall performance" in the *Strickland* analysis, or (2) whether a heightened "egregiousness" test applies when a defendant is asserting ineffective assistance of counsel based on a single error. That in itself makes this case a poor vehicle for review.

What's worse is the reason the Connecticut courts did not address these arguments: The State forfeited its contentions by failing to advance them below. Although the State's opening brief quoted *Harrington*'s statement that it is generally difficult "to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy," State Conn. Sup. Ct. Br. 25 (quoting 562 U.S. at 111), it did *not* argue for a categorical rule that "overall performance" must be expressly analyzed in every case. Nor did it assert that the habeas court had erred because Sherman's failure to investigate Ossorio was insufficiently "egregious" to qualify as deficient performance under *Strickland*.

The State's forfeiture was even more glaring in its opposition to respondent's motion for reconsideration of the Connecticut Supreme Court's initial decision. As the State acknowledges (Pet. 11-12), that motion focused on only a single error: Sherman's failure to investigate Ossorio. But the State's rehearing opposition did not claim that Sherman's overall performance made it impossible for respondent to prevail on the basis of this single error. Nor did it argue that the Ossorio error was subject to a special "egregiousness" analysis. *See* State Opp. to Reconsideration 7-12 (Jan. 17, 2017).

At no point, therefore, did the State properly present either of the core legal arguments that it now blames the Connecticut Supreme Court for failing to address. This Court should not be the one to consider those arguments in the first instance.

2. This case is also a poor vehicle because Sherman's performance was deficient even under *the State's* test. As noted above, the State concedes—as it must—that a single error by counsel can constitute

deficient performance if it is "sufficiently egregious." Pet. 28; *Smith*, 477 U.S. at 535. And for the reasons meticulously catalogued by the Connecticut Supreme Court, Sherman's error here was egregious under any standard.

To reiterate: Respondent's alibi—that he was at the Terrien home when the murder almost certainly occurred—"was his primary defense" at trial. A-65. Any evidence to bolster that account was therefore critical. And in light of the State's contention that testimony from respondent's family-members could not be trusted, the testimony of an unrelated, independent witness would have been gold. A-70-72. Georgeann Dowdle's grand jury testimony revealed to Sherman that just such a witness might exist—her beau. But in the face of this critically important possibility, Sherman failed to undertake even "the most elementary and obvious of inquiries," including "pick[ing] up the telephone and ask[ing] Dowdle." A-67-68. Moreover, that failure had nothing to do with strategy, but was wholly attributable "to oversight or inattention." A-61 n.17. To completely fail to investigate such a clearly important lead for no reason at all when a client's "life is on the line" (A-72) is manifestly "egregious" under any conceivable analysis.

The other failures identified by the habeas court only confirm that Sherman's overall performance fell far short of what the Sixth Amendment requires. Most significantly, Sherman chose not to pursue a third-party culpability defense implicating respondent's brother, Thomas Skakel. The habeas court rightly concluded that whereas the State's case against respondent was weak, there was a "plethora" of evidence implicating Thomas. A-634. Sherman

could almost certainly have generated reasonable doubt by introducing evidence of (1) Thomas's unwanted advances toward the victim (as related in her diary); (2) his record of uncontrolled rages leading to violence; (3) his decades-long lies to the police about his whereabouts the night of the murder; and (4) his pre-trial confession that he was *with the victim*, engaged in a sexual encounter, during the exact window of time when she likely was killed. *Supra* at 8-10. For these reasons, the habeas court correctly held that Sherman's failure to implicate Thomas was an entirely independent basis for vacating respondent's conviction. *Supra* at 13, 15 n.5.

The habeas court also rightly found Sherman's performance defective in eight other ways, including (1) his failure to make more than "minimal efforts" to locate identifiable witnesses whose "testimony would have put the lie to" the account of "the state's key witness" (A-751-752); (2) his decision to select a juror who was not only a police officer "but one who was friendly with . . . a lead investigator for the Greenwich police and a principal state's witness" in respondent's case (A-755); and (3) his delivery of a "disjointed, unfocused, and, at times, improper" closing argument that never "even mention[ed] [respondent's] entitlement to the presumption of innocence, the concept of reasonable doubt, or the state's obligation to prove guilt beyond a reasonable doubt" (A-725, A-621). *See* A-27 n.9; *supra* at 13-14. The court also held that Sherman's fee arrangements created an ethical conflict of interest incentivizing him to shortchange the representation. A-736-744.

In short, Sherman's overall representation of respondent was deficient under any conceivable standard for applying *Strickland*'s first prong.

Indeed, focusing on Sherman's overall performance only makes respondent's claim of ineffective assistance *stronger*. Granting review will thus not have *any* material effect on the outcome of this case, regardless of how the Court answers the question presented. It will, however, require this Court, like the courts below, to "scrutinize[] every line of testimony in this case, and carefully evaluate[] each and every exhibit, affording due consideration to the entire record," A-119, in order to fully evaluate counsel's performance. There is no reason for this Court to devote its scarce resources to that massive undertaking.

* * *

Our Constitution demands that those accused of crimes receive reasonably competent representation. That did not happen here. Respondent has served 11 years in prison because his own lawyer failed to introduce readily available evidence supporting his innocence. The Connecticut Supreme Court vacated his conviction based on its careful, heavily fact-dependent application of this Court's precedents to the relevant facts. There is no basis to disturb that decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROMAN MARTINEZ
Counsel of Record
GRAHAM E. PHILLIPS
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

HUBERT J. SANTOS
TRENT A. LALIMA
LAW OFFICES OF HUBERT J. SANTOS
51 Russ St.
Hartford, CT 06106

MICHAEL A. FITZPATRICK
LAW OFFICES OF MICHAEL A. FITZPATRICK
10 Middle St.
Bridgeport, CT 06604

Counsel for Respondent

November 26, 2018