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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

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

Palmer, Eveleigh, McDonald, Robinson, Espinosa,
Vertefeuille and D'Auria, Js.*

Argued February 24, 2016—officially released May 4, 2018**

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 filed by the respondent and the petitioner, and the respondent appealed and the petitioner cross appealed. *Affirmed.*

Susann E. Gill, former 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).

Opinion

PALMER, J. The sole issue now before us in this appeal by the respondent, the Commissioner of Correction, is whether the habeas court properly concluded that the petitioner, Michael Skakel, is entitled to a new trial because counsel in his murder case, Michael Sherman, rendered ineffective assistance by failing to obtain certain readily available evidence that Sherman should have known was potentially critical to the petitioner's alibi defense, that is, the testimony of a disinterested alibi witness whom the habeas court found to be highly credible. Because we agree with the habeas court both that Sherman's failure to secure that evidence was constitutionally inexcusable and that that deficiency undermines confidence in the reliability of the petitioner's conviction—a conviction founded on a case, aptly characterized by the habeas court as far from overwhelming, that was devoid of any forensic evidence or eyewitness testimony linking the petitioner to the crime—we affirm the judgment of the habeas court ordering a new trial.

This case comes to this court again under the following circumstances. In 2002, a jury found the petitioner guilty of the brutal murder of his fifteen year old neighbor, Martha Moxley (victim), whose bludgeoned and partially unclothed body was discovered on October 31, 1975, behind her parents' home in the Belle Haven section of the town of Greenwich. This court affirmed his conviction; *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, thereafter, the petitioner filed a petition for a writ of habeas corpus, principally claiming that his trial counsel, Sherman, had rendered ineffective assistance in numerous respects. The habeas court, *Hon. Thomas A. Bishop*, judge trial referee, agreed with several of the petitioner's claims, among them, that Sherman had performed deficiently in investigating and presenting the petitioner's alibi defense by failing to adduce the testimony of a truthful and crucial alibi witness, Denis Ossorio. The habeas court further concluded that, in light of the relative weakness of the state's case and the powerful support that Ossorio's testimony provided for the petitioner's alibi, Sherman's deficient performance had so seriously prejudiced the petitioner that it is reasonably probable that the outcome of the petitioner's criminal trial would have been different if the jury had heard from Ossorio. The habeas court therefore rendered judgment granting the petition, ordering a new trial for the petitioner, and the respondent appealed. On appeal, in a closely divided decision, this court reversed the judgment of the habeas court, concluding that the petitioner had failed to prove any of his claims of ineffective assistance. See *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 430–31, 531, 159 A.3d 109 (2016).[1] The petitioner thereafter filed a timely motion for reconsideration en banc, limited to

his claim that Sherman's performance with respect to the petitioner's alibi defense was constitutionally inadequate. We granted the petitioner's motion, and, upon reconsideration, we now conclude that the habeas court correctly determined that the petitioner is entitled to a new trial due to Sherman's failure to adequately investigate and present the petitioner's alibi defense, which rendered the petitioner's trial fundamentally unfair. Accordingly, we affirm the judgment of the habeas court.

I

FACTS AND PROCEDURAL HISTORY

The facts of this tragic case, which arises out of events that transpired more than forty years ago, are set forth in considerable detail in the habeas court's memorandum of decision and in this court's decision on the petitioner's direct appeal.[2] See *State* v. *Skakel*, supra, 276 Conn. 640–53. For present purposes, we focus our attention on those facts and procedural history that are most relevant to the respondent's claim that the habeas court incorrectly determined that Sherman rendered ineffective assistance of counsel in connection with his investigation and presentation of the petitioner's alibi defense. We more fully address all of the evidence presented in support of the conviction, however, later in this opinion when we consider whether Sherman's performance prejudiced the petitioner.

Those facts are themselves rather extensive but may be summarized as follows. In the early afternoon of October 31, 1975, the victim's body was discovered under a pine tree behind her parents' home. She had been severely and repeatedly beaten with a golf club, which was later determined to have belonged to the petitioner's then deceased mother. The victim had been last seen at approximately 9:30 p.m. on October 30, 1975, standing with the petitioner's seventeen year old brother, Thomas Skakel, in the Skakel family's driveway. The location where the police determined that the victim was attacked was along what would have been the most direct route between where she was last seen and her parents' home, indicating that she was likely murdered as she made her way home from the Skakel driveway.

Earlier that evening, at approximately 6:30 p.m., the victim had left her house to celebrate mischief night—the night before Halloween—with her friend, Helen Ix, and other children from the neighborhood. When the victim left her house, the petitioner, then fifteen years old, and his six siblings, Rushton Skakel, Jr., Julie Skakel, Thomas Skakel, John Skakel, David Skakel and Stephen Skakel, together with their cousin James Terrien, their tutor Kenneth Littleton, and Julie Skakel's friend Andrea Shakespeare, were having dinner at the

Belle Haven Club. This group returned home from dinner shortly before 9 p.m., at which time the victim, Ix, and eleven year old Geoffrey Byrne came by the Skakel house to visit.

The petitioner immediately led the visitors outside, where they all climbed into the Skakel family's Lincoln Continental to talk and listen to music. Shortly thereafter, the petitioner's brother, Thomas Skakel, joined them in the Lincoln. At approximately 9:25 p.m., the group was interrupted by Rushton Skakel, Jr., John Skakel and the petitioner's cousin, Terrien, who told them that they needed to use the car to take Terrien home, where they planned to watch Monty Python's Flying Circus, a television show, at 10 p.m. At that point, the victim, Ix, Byrne and Thomas Skakel got out of the car, while Rushton Skakel, Jr., John Skakel and Terrien got into the car with the petitioner. Upon exiting the car, Thomas Skakel and the victim began roughhousing in a flirtatious manner, which made Ix uncomfortable, prompting her, along with Byrne, to leave. According to Ix, the Lincoln was pulling out of the driveway as she and Byrne began walking home, leaving Thomas Skakel and the victim alone in the driveway. That was the last time any of the victim's friends reported seeing her.[3]

Ix arrived home at about 9:30 p.m. and telephoned a friend. At approximately 9:45 p.m., Ix' dog, an Australian shepherd named "Zock," began barking violently near the entrance to the victim's driveway, located directly across the street from the entrance to Ix' driveway. The barking was so incessant and agitated that Ix put down the telephone and opened the door to call the dog inside. Although, previously, Zock had always come when called, that night he refused to come no matter how fervently and repeatedly Ix called to him. In interviews with the police following the murder, and in testimony at the petitioner's criminal trial twenty-seven years later, Ix stated that, prior to that evening, she had never seen her dog behave in such an agitated manner. Ix explained that his barking that night, which she described as "scared" and "violent," was very different from the way he usually barked, he "was definitely disturbed by something that was going on," and he "was basically barking in the direction of the site where [the victim's] body was found [the next day]." The police later determined, on the basis of blood spatter found at the scene, that the victim was initially attacked in or near her driveway.[4]

The victim's mother, Dorothy Moxley, reported hearing a similar commotion in her yard between 9:30 and 10 p.m. on the night of the murder. The victim's mother testified that the disturbance, which consisted of "excited voices" and "incessant barking," was so distracting that she stopped what she was doing to look out the window. According to the victim's mother, it

was "very, very cold and very dark" outside on the night in question. When she could not see anything, she turned on the porch light, but then immediately turned it off because she feared that whoever was there might steal the victim's new bike. The victim's mother grew worried when the victim hadn't returned by 11 p.m. and began calling all of the victim's friends, "everyone that [she] could think of," in an effort to locate the victim. When the victim still had not returned by 1 a.m., the victim's mother asked the victim's older brother, John Moxley, to go out and look for her. At 3:48 a.m., she finally called the Greenwich police to report the victim missing. During that telephone call, she stated that the victim had been "expected home at 9:30 p.m." She also stated 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 had "called the Skakel residence . . . and spoke to Thomas," who "informed [her] that he last saw [the victim] at approximately 9:30 the preceding night [and that the victim had] told him she was going home to do homework." At trial, the victim's mother testified that the victim was extremely reliable about coming home at a reasonable hour, which, as she recalled, was 9:30 p.m. on school nights and 10:30 p.m. on nonschool nights.

Following the murder, the Greenwich police retained Joseph Jachimczyk, then the chief medical examiner for Harris County, Texas, and a nationally renowned pathologist and criminalist, to assist them in their investigation. Jachimczyk, who testified as a defense witness at trial, determined that the victim's time of death was approximately 10 p.m. based on the contents of her stomach, the extent of rigor mortis, the time that she was expected home, and the report of dogs barking at the crime scene. Harold Wayne Carver II, who, at the time of trial, was the state's chief medical examiner, testified that he did not participate in the victim's autopsy, which had been performed by Elliot Gross, formerly the state's chief medical examiner, but that he was able to form an opinion about certain aspects of the victim's death on the basis of the record of the autopsy. In particular, Carver explained that, although he could not determine the time of death precisely on the basis of the condition of the victim's body, he believed that the victim died between 9:30 p.m. on October 30, 1975, and 12 or 1 a.m. the next morning. Carver further opined that it was likely that the victim died closer to 9:30 p.m. on October 30 than to when she was found the next day.

That time of death was also consistent with testimony adduced at trial establishing that the victim did not return home on the night of the murder when she was expected and that no one saw her alive after she was last seen in the Skakel driveway at 9:30 p.m. For example, one of the victim's friends who was with her that

evening, Jackie Wetenhall, testified that she returned home at 9 p.m. and that it was her understanding that the victim also had a curfew. As we previously noted, the victim's mother testified that the victim did not return home as expected and that her failure to do so was out of character. She further testified that, after the victim failed to return home by 11 p.m., she called every one of the victim's friends, and her own friends, as well, in an effort to locate the victim, but without success. Thomas G. Keegan, the detective in charge of the investigation for the Greenwich police, testified that the police canvassed the entire area after the murder in an effort to locate anyone who could shed light on the victim's time of death and whereabouts after 9:30 p.m., but also to no avail.[5]

Following the murder and for many years thereafter, the petitioner's brother, Thomas Skakel, was the prime suspect in the murder, not only because he was the last person to be seen with the victim, but also because, shortly after the murder, investigators determined that he had been untruthful about his activities on the night the victim was murdered.[6] In 1976, the police sought permission from the state's attorney to apply for an arrest warrant for Thomas Skakel, but permission was denied because the state's attorney did not believe that the facts set forth in the warrant application were sufficient to establish probable cause to believe that Thomas Skakel had committed the murder. For a number of years, the Skakels' tutor, Littleton, was also a prime suspect, but, after considerable investigation, he was exonerated. Ultimately, the case went cold.

In the early 1990s, several events led to the reopening of the investigation and eventually resulted in the petitioner's arrest and conviction. Notable among them was the publication, in 1993, of "A Season in Purgatory," Dominick Dunne's best-selling novel in which Dunne depicted Thomas Skakel as the murderer. Because of the renewed scrutiny on his family, the petitioner's father, Rushton Skakel, Sr., hired a private security firm, Sutton Associates, to investigate the murder in the hope of exonerating his family. As part of that investigation, investigators from Sutton Associates interviewed Thomas Skakel and the petitioner, both of whom disclosed that they had lied to the police in 1975 about their activities on the night of the murder. Thomas Skakel told the investigators that, after his brothers left to take his cousin, Terrien, home at approximately 9:30 p.m., he and the victim had spent about twenty minutes in his backyard engaged in heavy petting and mutual masturbation. The petitioner, for his part, told the Sutton Associates investigators that, after returning from the Terrien home at around 11 p.m., he went back out, at around 12 a.m., to peep in the window of a woman who lived nearby. On the way home, he stopped at the victim's house, climbed a tree adjacent to the house, and masturbated. The petitioner later told the same

story to Richard Hoffman, a ghost writer whom the petitioner hired in 1997 to assist him in writing his autobiography.

In 1994, an employee of Sutton Associates stole the firm's files on the case, including detailed suspect profiles, and gave them to Dunne and to Leonard Levitt, a journalist who previously had written extensively about the case. On November 26, 1995, Levitt published the first of a series of newspaper articles in which he disclosed that the petitioner and Thomas Skakel had changed their stories with respect to their activities on the night of the murder. Dunne later gave the stolen Sutton Associates files to Mark Fuhrman, the former Los Angeles police detective who was notorious for his allegedly perjurious testimony at the Orenthal James (O.J.) Simpson murder trial. In 1998, Fuhrman published a book in which he accused the petitioner of the victim's murder and the victim's family of conspiring to cover it up. In his book, Fuhrman urged that a grand jury be empaneled immediately to investigate his theory.

Shortly thereafter, in September, 1998, a grand jury was convened to investigate the case, and the petitioner hired Sherman to represent him in connection with that proceeding. Numerous witnesses were called to testify before the grand jury, including the petitioner's cousin, Georgeann Dowdle, James Terrien's sister, who, at the time of the murder, lived with Terrien in their mother's home. Significantly, Dowdle testified that she was at home with her young daughter and her "beau" on the night of the murder[7] and heard her brother and Skakel cousins talking, but, given the passage of so much time, she could not recall whether she actually saw them. She further testified, however, that she gave a statement to the police several days after the victim's murder in which she explained that she had observed the petitioner and his two brothers at her home on the evening of October 30, 1975. Dowdle also testified that her statement to the police was truthful and accurate in all respects.

Following the publication of the Levitt articles in 1995, and Fuhrman's book in 1998, several witnesses came forward claiming that, at various times and in different ways, the petitioner had incriminated himself in the victim's murder. Two such witnesses, Gregory Coleman and John Higgins, claimed that the petitioner had confessed to the murder in the late 1970s, while they were students with the petitioner at the Elan School (Elan), an alcohol and drug rehabilitation facility for troubled adolescents in Maine. Their testimony, which we discuss more fully in part V C of this opinion, would become the cornerstone of the state's case against the petitioner.

At trial, the petitioner raised an alibi defense predicated on two separate but related factual assertions,

first, that it was nearly certain that the victim was murdered between 9:30 and 10 p.m. on October 30, 1975, and, second, that he was at his cousin's house, a fifteen to twenty minute car ride from the scene of the crime, at the time of the murder. With respect to the time of the murder, the petitioner relied on the testimony of Jachimczyk, the forensic pathologist who had assisted the Greenwich police in their investigation and determined that the time of death was 10 p.m. He also relied on the testimony of the victim's mother concerning the time the victim was expected to be home, the fact that the victim invariably returned home when expected, and the loud commotion and incessant barking that she had heard in her yard between 9:30 and 10 p.m. In addition, the petitioner relied on Ix' testimony regarding her dog's bizarre behavior near the crime scene beginning at approximately 9:45 p.m., which, Sherman argued to the jury, effectively "time stamps when this crime occurred." Because no one reported seeing the victim alive after she left the company of Thomas Skakel at 9:30 p.m., Sherman also argued that it was unreasonable to think that the victim had remained outside in the cold, all alone, well after she was expected home and after all of her friends had gone home, until sometime after 11 p.m., when the petitioner returned from the Terrien home.

With respect to the petitioner's whereabouts when the victim was murdered, Sherman presented the testimony of the petitioner's brothers, Rushton Skakel, Jr., and John Skakel, and his cousins, Terrien and Dowdle. Consistent with their grand jury testimony and the statements that they had given to the police in 1975, Rushton Skakel, Jr., John Skakel and Terrien testified that, on the night of the murder, they and the petitioner left in the Skakels' Lincoln at approximately 9:30 p.m. and drove to the Terrien residence, where the petitioner and his two brothers remained until approximately 11 p.m., watching television and talking. Dowdle's trial testimony essentially mirrored her grand jury testimony. In particular, she again confirmed the accuracy and truthfulness of the statement that she had given the police in 1975, namely, that she had "observed" the petitioner and his brothers at her home on the evening of October 30, 1975. When the state's attorney asked whether she previously had testified before the grand jury that she was at home with her "husband" on the evening in question, Dowdle responded that she actually was with a "friend" that evening, referring to the person she previously had characterized as her "beau" in her grand jury testimony. That portion of Dowdle's grand jury testimony was introduced into evidence at the petitioner's criminal trial.

To rebut the petitioner's alibi, the state's attorney aggressively sought to discredit each of the petitioner's alibi witnesses, arguing that, as members of the petitioner's family, they all had a strong motive to lie and that,

in fact, they all were lying. Repeatedly, in closing argument, he implored the jury to "[c]onsider who the alibi witnesses are, all siblings or first cousins, *not one single independent alibi witness*." (Emphasis added.) According to the state's attorney, the alibi was not only concocted, it was an integral part of a decades' long Skakel family conspiracy, orchestrated by the petitioner's father, Rushton Skakel, Sr., to protect the petitioner at all costs from the consequences of his heinous crime.

To support his contention that the petitioner did not go to the Terrien home on the night of the murder, the state's attorney presented the testimony of Shakespeare, Julie Skakel's high school friend, Julie Skakel, and Ix. Shakespeare testified that she was at the Skakel residence that evening and that, to her recollection, the petitioner did not leave to go to Terrien house as claimed. Julie Skakel testified that, shortly after the murder, she informed the police that, on the night of the murder, at approximately 9:20 p.m., a person darted through her yard as she was getting into her car to drive Shakespeare home. Julie Skakel further acknowledged that she had told the police at the time of the murder that, although it was dark and she did not see the person's face, she assumed it was the petitioner and yelled, "Michael, come back here," but the person kept on running. When Julie Skakel was asked whether the Lincoln was still in the driveway when she saw this individual, she replied that she could not remember. Finally, the state's attorney elicited testimony from Ix, who stated that, although it was her impression that the petitioner was in the Lincoln when it pulled out of the driveway, she was not absolutely certain and would not have known if the petitioner had jumped out of the car after it left the driveway. In closing argument, the state's attorney relied on this testimony to underscore the point that, whereas "[n]o independent witness [could] say what happened once [the] Lincoln backed out to the driveway," Julie Skakel's testimony "certainly suggests" that the petitioner was not still in the Lincoln when it arrived at the Terrien residence.

The state's attorney further argued, however, that, even if the jury believed that the petitioner was at the Terrien home watching television that evening and did not return home until approximately 11 p.m., it could still find him guilty of the victim's murder because the forensic evidence did not rule out the possibility that the murder occurred as late as 5:30 a.m. on October 31, 1975. The state's attorney conceded, however, that the victim was likely murdered much earlier than that and in no event later than 1 a.m., because, by then, her family was out searching for her. Despite raising the possibility that the victim was murdered after 11 p.m., the state's attorney never proffered any evidence to establish, or made any argument to explain, where or with whom the victim might have been from 9:30 p.m., when she was last seen by friends, until shortly after

11 p.m. Nor did the state's attorney offer an alternative explanation as to what had caused the agitated barking and other unusual noises in the victim's yard between 9:30 and 10 p.m.[8] Instead, the state's attorney simply maintained that the jury was required to find the petitioner guilty even if some jurors rejected the petitioner's alibi and others accepted the alibi, as long as all twelve jurors concluded beyond a reasonable doubt that the petitioner had killed the victim, as the state alleged.

At the conclusion of the petitioner's criminal trial, the jury found the petitioner guilty of murder, and the court sentenced him to a term of imprisonment of twenty years to life. Following an unsuccessful appeal from the judgment of conviction; see *State* v. *Skakel*, supra, 276 Conn. 640; and from the denial of his petition for a new trial based on newly discovered evidence; see *Skakel* v. *State*, 295 Conn. 447, 452, 991 A.2d 414 (2010); the petitioner commenced the present habeas action, claiming that Sherman's trial performance was deficient in myriad ways. After a two week trial, the habeas court granted the petition, concluding, in a comprehensive memorandum of decision, that Sherman's performance fell below the standard required by the sixth and fourteenth amendments to the federal constitution in ten separate and distinct respects. The habeas court further concluded that three of those deficiencies, one of which was Sherman's failure to adequately present the petitioner's alibi defense, were sufficiently prejudicial to render his trial fundamentally unfair, thereby requiring a new trial.[9]

The respondent appealed, and this court, in a four to three decision, reversed the judgment of the habeas court after concluding, contrary to the determination of that court, that the petitioner had failed as a matter of law to prove any of his ineffective assistance claims.[10] See *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 430–31. Immediately after the issuance of our opinion announcing the decision of the court, Justice Zarella, the author of the majority opinion, retired from the Judicial Branch. Thereafter, the petitioner filed a timely motion seeking en banc reconsideration, limited to our determination that Sherman's failure to identify and call Ossorio as an alibi witness did not violate the petitioner's right to the effective assistance of counsel.[11] Following a vote of the remaining panel members, we granted the petitioner's motion for reconsideration en banc, and, in accordance with that vote, Justice D'Auria, who, during the pendency of the petitioner's motion, had been appointed to fill the vacancy on this court created by Justice Zarella's retirement, was added to the panel. For the reasons set forth hereinafter, on reconsideration en banc, we agree with the petitioner that the habeas court correctly concluded that he is entitled to a new trial due to Sherman's deficient performance in investigating and presenting the petitioner's alibi defense.[12] Before addressing the merits of this

appeal, however, we turn first to the threshold issue raised by the petitioner's motion for reconsideration en banc, namely, the composition of the panel for purposes of deciding the motion.

II

MOTION FOR RECONSIDERATION EN BANC

In his motion for reconsideration en banc, the petitioner requested that the six remaining panel members add a seventh judge to the panel to replace Justice Zarella, who, as we have explained, retired from the Judicial Branch before that motion was filed. Upon consideration of the petitioner's request, as well as the respondent's objection, a majority of those six remaining panel members, namely, Justices Palmer, McDonald, Robinson and Vertefeuille, voted to grant the petitioner's request, and, consequently, Justice D'Auria was added to the panel. The decision to add Justice D'Auria reflects this court's strong and long-standing preference for resolving appeals and related motions, whenever possible, on their merits, a preference that is thwarted when, as in the present case, a tie vote on the merits would have resulted in a deadlock. The discretion vested in this court to add a seventh justice to the panel derives from the court's inherent supervisory authority over the administration of justice; see, e.g., *State* v. *Baltas*, 311 Conn. 786, 824, 91 A.3d 384 (2014) (appellate courts possess inherent supervisory authority over administration of justice); see also Practice Book § 60-2 ("[t]he supervision and control of the proceedings [on appeal] shall be in the court having appellate jurisdiction from the time the appeal is filed, or earlier, if appropriate"); authority that dates back to the seventeenth century. *State* v. *DeJesus*, 288 Conn. 418, 451, 953 A.2d 45 (2008). This discretion is undisputed.

Notably, as a general rule, this court's practice of undertaking steps to avoid a deadlock resulting from a tie vote in any appeal or related motion so that a decision on the merits may be reached is required by the plain language of General Statutes § 51-209. That statute provides in relevant part: "No ruling, judgment or decree of any court may be reversed, affirmed, sustained, modified or in any other manner affected by the Supreme Court or the Appellate Court unless a majority of the judges on the panel hearing the cause concur in the decision. No cause reserved, where no verdict has been rendered, judgment given or decree passed, shall be determined unless a majority of the judges on the panel hearing the cause concur in the decision. Whenever the Supreme Court is evenly divided as to the result, the court shall reconsider the case, with or without oral argument, with an odd number of judges. . . ." General Statutes § 51-209; see also Practice Book § 71–5 ("[a] motion for reconsideration shall be treated as a motion for reconsideration en banc when any member

of the court which decided the matter will not be available, within a reasonable amount of time, to act on the motion for reconsideration"). For present purposes, however, we need not decide whether § 51-209 also would mandate the addition of a seventh justice because this court, pursuant to its inherent supervisory authority, has the discretion to do so in the interests of justice. The addition of Justice D'Auria to the panel following Justice Zarella's retirement ensures a decision by the court on the merits of the petitioner's motion rather than an outcome predicated on an evenly divided vote that, because of the impasse, would not have resulted in a substantive resolution of the petitioner's claims.

We also observe that the decision to add Justice D'Auria to the panel in the present case is consistent with the practice of *every* other sister state court that has addressed the issue posed by the petitioner's motion, that is, whether to add a judge to a panel when an original panel member was unable to participate in the resolution of a timely filed motion for reconsideration. See, e.g., *Commonwealth* v. *Franklin*, Docket No. 12-P-569, 2015 WL 4663516, *1 n.2 (Mass. App. August 7, 2015) (adding judge to panel after retirement of judge who sat on original panel, and reversing decision of original panel to uphold trial court's denial of defendant's motion for new trial); *University of Michigan Regents* v. *Titan Ins. Co.*, 484 Mich. 852, 852, 769 N.W.2d 646 (2009) (granting reconsideration and vacating prior order denying leave to appeal in case in which justice on original panel had been replaced by another justice who participated in decision on motion for reconsideration); *United States Fidelity Ins. & Guaranty Co.* v. *Michigan Catastrophic Claims Assn.*, 484 Mich. 1, 11 and n.12, 795 N.W.2d 101 (2009) (granting motion for rehearing without further briefing or oral argument after change in composition of court and reversing earlier decision); *Johnson* v. *Administrator, Ohio Bureau of Employment Services*, 48 Ohio St. 3d 67, 69, 549 N.E.2d 153 (1990) (reversing prior judgment in same case after rehearing and change in composition of court); *State* v. *Eriksen*, 172 Wn. 2d 506, 509, 259 P.3d 1079 (2011) (twice granting reconsideration and withdrawing previous decisions, the second time after new justice replaced previous majority author on panel). No contrary authority has been brought to our attention.

In light of the nature of a motion for reconsideration—including, in particular, its corrective purpose and the broad discretion accorded this court in deciding such a motion—it is hardly surprising that our decisions have sometimes been modified or reversed upon reconsideration not only by larger panels, but also by the very same panels that initially issued the decisions. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 511–12 and n.2, 825 A.2d 72 (2003) (superseding prior decision in part upon reconsideration); *Gar-*

trell v. *Dept. of Correction*, 259 Conn. 29, 44–45 and n.14, 787 A.2d 541 (2002) (superseding prior decision upon reconsideration); *Williams* v. *Best Cleaners, Inc.*, 237 Conn. 490, 492, 677 A.2d 1356 (1996) (concluding that prior decision in same case was incorrectly decided); see also W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2017–2018 Ed.) § 71-5, p. 263, authors' comments (identifying, in addition, *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 612 A.2d 1130 [1992], and *Jaconski* v. *AMF, Inc.*, 208 Conn. 230, 543 A.2d 728 [1988]). In other cases, justices who took one position in the original decision have subsequently taken a different position upon reconsideration. See, e.g., *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 35, 734 A.2d 85 (1999) (*Palmer, J.*, concurring) ("Upon reconsideration, I am persuaded that the evidence does not support the jury's verdict and, therefore, I join the new majority opinion. I write separately to explain briefly why, despite my original vote to affirm the judgment of the trial court, I now vote to reverse that judgment."); *State* v. *Chapman*, 229 Conn. 529, 532, 643 A.2d 1213 (1994) (former Chief Justice Peters defected from three to two majority affirming Appellate Court's judgment in *State* v. *Chapman*, 227 Conn. 616, 632 A.2d 827 [1992], to join five to two majority reversing Appellate Court's judgment upon reconsideration en banc).

Finally, on multiple occasions, this court has reversed or substantially altered its original opinion in response to a motion for reconsideration following the retirement of a member of the court. See, e.g., *State* v. *Santiago*, 318 Conn. 1, 12–14, 122 A.3d 1 (2015); *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 36 n.1, 757 A.2d 501 (2000) (*United Steelworkers*); *State* v. *Washington*, 182 Conn. 419, 420, 438 A.2d 1144 (1980) (substitute opinion for *State* v. *Washington*, 42 Conn. L.J., No. 1, p. 10A [July 1, 1980]); *McNamara* v. *Hamden*, 176 Conn. 547, 398 A.2d 1161 (1978) (substitute opinion for *McNamara* v. *Hamden*, 39 Conn. L.J., No. 43, p. 6 [April 25, 1978]). In *United Steelworkers*, a decision was issued by a five member panel on March 17, 2000; see *Groton* v. *United Steelworkers of America*, 252 Conn. 508, 508–509, 747 A.2d 1045 (2000); and, on March 21, 2000, Justice Peters reached her seventieth birthday and retired from this court. *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 36 n.1. On April 28, 2000, the court granted a motion for reconsideration en banc, added three new panel members (two of whom had been on the court and a third who had recently joined the court), and reversed the original judgment. See id. Similarly, the original three to two decision in *McNamara* was overturned upon reconsideration following the retirement of one of the justices in the majority. See *McNamara* v. *Hamden*, supra, 176 Conn. 548, 556; *McNamara* v. *Hamden*, supra, 39 Conn. L.J., No. 43,

pp. 6, 9. In *Washington*, the majority author, Justice Loiselle, was replaced by Justice Parskey for reconsideration. See *State* v. *Washington*, supra, 182 Conn. 429; *State* v. *Washington*, supra, 42 Conn. L.J., No. 1, p. 10A. In *Washington*, the court shifted directions, reaching the same result but deciding on constitutional grounds what had been initially decided on statutory grounds. See *State* v. *Washington*, supra, 182 Conn. 421; id., 429–30 (*Bogdanski*, *J.*, concurring). Most recently, a full panel of seven justices participated in the initial decision in *Santiago*, during consideration of which the legislature passed Public Acts 2012, No. 12-5, prospectively abolishing the death penalty in Connecticut. See *State* v. *Santiago*, 305 Conn. 101, 101, 307 n.167, 49 A.3d 566 (2012), superseded in part by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015). We subsequently granted the defendant's motion for reconsideration and reheard the case with a panel that included three justices who had not participated in the prior decision, eventually superseding the judgment in our original decision.[13] Compare *State* v. *Santiago*, supra, 318 Conn. 1 (listing panel members), with *State* v. *Santiago*, supra, 305 Conn. 101 (same).

As we previously explained, these decisions are well within the broad mandate for reconsideration provided by Practice Book § 71-5. This court's review of a motion for reconsideration is, by design, a case-by-case inquiry intended not only to address unexpected developments in the law and jurisdictional errors, but also to serve as a check on the court's initial conclusions. Thus, when a justice of this court reviews his or her initial decision and finds a mistake, it is incumbent on that justice to change his or her vote accordingly, even if the motion for reconsideration fails to raise a new issue, a new line of reasoning, new facts, or new law. For the same reason, a justice who is added to a panel for purposes of a motion for reconsideration is not obligated to filter his or her consideration of the case through the lens of a predecessor panel member. Indeed, doing so would severely impair the effectiveness of motions for reconsideration as implements for ensuring the consistency and accuracy of our decisions.

Despite this wealth of authority, Justice Espinosa nevertheless contends that, by adding Justice D'Auria to the panel in the present case, we have departed from this court's policy with respect to such motions. More specifically, Justice Espinosa claims that, ordinarily, when a member of this court has resigned from the bench after the issuance of an opinion but before any motion for reconsideration en banc in the case has been decided, we have not added a panel member. This argument is wholly unpersuasive, however, because the cases on which she relies are inapposite. None of them involved an evenly divided panel, as in the present case, and, consequently, no additional judge was needed in those cases to break a deadlock. See, e.g., *Tomick* v.

United Parcel Service, Inc., 324 Conn. 470, 472, 486, 153 A.3d 615 (2016) (original panel vote of four to two); *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 308, 339, 50 A.3d 841 (2012) (original panel vote was unanimous), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013); *State* v. *Drupals*, 306 Conn. 149, 151, 173, 49 A.3d 962 (2012) (same). We therefore reject Justice Espinosa's unfounded contention that it is somehow improper for the court to add a seventh panel member to decide the petitioner's motion.

Insofar as Justice Espinosa accuses the petitioner of judge shopping, we would simply note the obvious—namely, the petitioner had no role in Justice Zarella's decision to leave the court before the time period lapsed for filing a motion for reconsideration en banc, the petitioner timely filed that motion, and he had a legal right to file such a petition. The petitioner having garnered a favorable decision on his request to replace the seventh member of the en banc panel, we turn to the merits of the petitioner's motion.[14]

III

LEGAL PRINCIPLES GOVERNING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Before addressing the merits of the petitioner's claim in the context of the habeas court's decision, we set forth the principles that guide our review of that claim. Under the sixth amendment to the United States constitution, a criminal defendant is guaranteed the right to the effective assistance of counsel. See, e.g., *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *Evitts* v. *Lucey*, 469 U.S. 387, 392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (sixth amendment right to effective assistance of counsel is made applicable to states through due process clause of fourteenth amendment to United States constitution). "The [s]ixth [a]mendment recognizes [this fundamental 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.) *Kimmelman* v. *Morrison*, 477 U.S. 365, 394, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); see id., 377. That role is a vital one 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*, supra, 685; an opportunity that is essential if "the adversarial testing process [is to] work in the particular case." (Internal quotation marks omitted.) *Kimmelman* v. *Morrison*, supra, 384. Thus, because "[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; "[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." *Strickland* v. *Washington*, supra, 686.

To determine whether a defendant is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation, we apply the familiar two part test adopted by the court in *Strickland*. "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. The sixth amendment, therefore, "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).

A

The Performance Prong

With respect to the first component of the *Strickland* test, "the proper standard for attorney performance is that of reasonably effective assistance." *Strickland* v. *Washington*, supra, 466 U.S. 687. Consequently, to establish deficient performance by counsel, a defendant must show that, considering all the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. Id., 687–88.

Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court. "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. Because of the difficulties inherent in making the 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." (Citation omitted; internal quotation marks omitted.) Id., 689. This is so because "[t]here are countless ways to provide effective assistance in any given case"; id.; and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id.

The right to the effective assistance of counsel applies no less to the investigative stage of a criminal case than it does to the trial phase. Indeed, in *Strickland*, the court explained that the foregoing performance "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." Id., 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*, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). 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 . . . ." (Citations omitted.) Id. Thus, "deference to counsel's strategic decisions does not excuse an inadequate investigation . . . ." (Citation omitted.) *Williams* v. *Stephens*, 575 Fed. Appx. 380, 386 (5th Cir.), cert. denied, U.S. , 135 S. Ct. 875, 190 L. Ed. 2d 709 (2014).

Although the reasonableness of any particular investigation necessarily depends on the unique facts of any given case; see *Strickland* v. *Washington*, supra, 466 Conn. 688–89; counsel has certain baseline investigative 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). 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, e.g., id., 381. 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. Because, however, ''[p]retrial investigation and preparation are . . . [key] to [the] effective representation [by] counsel''; (internal quotation marks omitted) *Daniels* v. *Woodford*, 428 F.3d 1181, 1203 (9th Cir. 2005), cert. denied sub nom. *Ayers* v. *Daniels*, 550 U.S. 968, 127 S. Ct. 2876, 167 L. Ed. 2d 1152 (2007); 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); counsel is 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 [in such] circumstances.''); *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).

Similarly, a decision by counsel to forgo an investigation into the possible testimony of a potentially significant witness is constitutionally impermissible 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 to determine the value of any testimony that he may be able to provide. See, e.g., *Ramonez* v. *Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007) ("[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*, 261 F.3d 210, 221 (2d Cir. 2001) (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]). In other words, "counsel's anticipation of what a potential witness would say does not excuse the failure to find out; speculation cannot substitute for certainty." *United States* v. *Moore*, 554 F.2d 1086, 1093 (D.C. Cir. 1976). In the same vein, when counsel's failure 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 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]).

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*, 395 F.3d 251, 259 (6th Cir. 2005) ("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 aban-

doned 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, a thorough investigation of an alibi defense is especially important 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).

Finally, we, like other courts, have identified several nonexclusive factors to be considered in determining whether counsel's failure to investigate and present the testimony of an additional alibi witness or witnesses was reasonable under the circumstances. They include (1) the importance of the alibi to the defense; see *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 674–75, 51 A.3d 948 (2012); (2) the significance of the witness' testimony to the alibi; see id., 688; (3) the ease with which the witness could have been discovered; see id., 685–86; and (4) the gravity of the criminal charges and the magnitude of the sentence that the petitioner faced. See id., 684.[15]

B

The Prejudice Prong

When defense counsel's performance fails the reasonableness test, a new trial is required if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, supra, 466 U.S. 694. The question, therefore, "is whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt." Id., 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 694.

It is also clear, however, that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case"; id., 693; because "[t]he result of a [criminal] proceeding can be rendered unreliable, and [thus] the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id., 694. The defendant must establish, instead, that counsel's constitutionally inadequate representation gives rise to a loss of confidence in the verdict. In evaluating such a claim, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id., 696. Of course, a reviewing court does not conduct this inquiry in a vacuum. Rather, the court "must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. 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 [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id., 695–96. Furthermore, because our role in examining the state's case against the petitioner is to evaluate the strength of that evidence and not its sufficiency, we do not consider the evidence in the light most favorable to the state. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 342 n.88, 112 A.3d 1 (2015); see also *Tice* v. *Johnson*, 647 F.3d 87, 110 (4th Cir. 2011) ("We are not bound . . . to view the facts in the light most favorable to the prosecution. The familiar [evidentiary sufficiency] analysis centering on whether a reasonable jury could have [found] an adequately represented defendant [guilty] is considerably more deferential than the *Strickland* test for prejudice in an [ineffective assistance] case, which seeks only to discover whether the absence of error would have given rise to a reasonable probability of acquittal, such that confidence in the verdict is undermined."). Rather, we are required to undertake an objective review of the nature and strength of the state's case. See *Lapointe* v. *Commissioner of Correction*, supra, 342 n.88;[16] see also *Williams* v. *Taylor*, 529 U.S. 362,

397–98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (concluding that habeas court, in conducting its prejudice analysis, improperly failed to consider evidence favorable to petitioner); *Elmore* v. *Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011) (habeas court "unreasonably broke from *Strickland* by considering less than the totality of the evidence, and [engaged in analysis that] unreasonably discounted evidence favorable to [the petitioner] by unduly minimizing its import and evaluating it piecemeal"). "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . 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." (Citations omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, supra, 562 U.S. 111–12.

C

Standard of Review

It is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 677.

IV

THE HABEAS TRIAL

A

Additional Facts

At the habeas trial, the petitioner sought to establish that Michael Sherman had performed deficiently because he made no effort to learn the identity of the "beau" who Georgeann Dowdle claimed had been with her on the night of October 30, 1975, and to ascertain whether her beau could provide disinterested corroboration of the petitioner's alibi. To that end, he presented the testimony of Denis Ossorio, a seventy-two year old retired psychologist at the time of the petitioner's

habeas proceedings. Ossorio testified that, in 1975, he resided in Greenwich and operated an employment related program for women. Ossorio further testified that he was at the Terrien home on the evening of October 30, 1975, visiting Dowdle, with whom he had a personal relationship. According to Ossorio, the petitioner and two of his brothers were also there that evening, watching television with Terrien, and he joined them in the television room periodically when Dowdle was otherwise occupied with her daughter. Ossorio recalled leaving the Terrien residence at about midnight and was not sure whether the Skakels had left before him. Ossorio further stated that he was living in Greenwich at the time of the petitioner's criminal trial and would have been available to testify, but no one from Sherman's office or the office of the state's attorney ever contacted him. Ossorio also explained that, although he was aware that the petitioner had been charged with the victim's murder, he did not pay close attention to the trial itself and was unaware that his recollection of the events of the evening of October 30, 1975, had any particular significance to the case.

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, on the basis of his expertise and experience in criminal law, it was his opinion that any reasonably competent criminal defense attorney, after receiving and reviewing Dowdle's grand jury testimony, "absolutely" would have ascertained Ossorio's identity and 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 he were in fact present, to ascertain whether his recollection of 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" who would have significantly enhanced the credibility of the petitioner's defense. On cross-examination, the respondent challenged Fitzpatrick's opinion that Sherman had rendered ineffective assistance by failing to present Ossorio's testimony, but adduced no expert testimony of its own on that issue.

Jason Throne, who served as Sherman's cocounsel

at trial, also was a witness at the habeas trial. Throne testified that the petitioner's alibi was "extremely important" to the defense. When Thorne was asked if he and Sherman were "eager to find anyone who could corroborate [the alibi]," he responded, "[a]bsolutely, without question." Throne further stated that, "even more importantly," he and Sherman were "especially eager to find a nonfamily member who could corroborate it" because of the "obvious concern" that, because all of the alibi witnesses were family members, "the jury would perceive all of [them] 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 [who] 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."

Sherman testified at the habeas trial, as well. When Sherman was asked whether the alibi was the petitioner's "principal defense" at trial, he responded, "[a]bsolutely . . . ." 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 "[w]ithout a doubt." Sherman also acknowledged reading Dowdle's grand jury testimony prior to trial, including her statement that her beau was with her at her home the evening of October 30, 1975. When Sherman was asked why he had never inquired into the identity of Dowdle's beau, he responded: "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." In response to questioning from the respondent's counsel, Sherman indicated that, because Dowdle had testified before the grand jury that she "really didn't venture out" of the room on the evening of October 30, 1975, Ossorio, her guest, might well have stayed in the library, as well. Sherman also acknowledged that, because Dowdle recalled hearing but not seeing her Skakel cousins that evening, Ossorio also may not have seen the four boys.

B

Findings and Conclusions of the Habeas Court

On the basis of the foregoing evidence, the habeas court concluded that Sherman's performance was constitutionally deficient in that Sherman failed to identify Ossorio and to present his testimony to the jury. According to the habeas court, "Ossorio's testimony supported the petitioner's claim that, during the likely time of the murder, he was away from Belle Haven, as he indicated. To the [habeas] court, 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." The habeas court further concluded that Sherman "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 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."[17] (Internal quotation marks omitted.)

The habeas court further concluded that the petitioner's defense was prejudiced by Sherman's failure to call Ossorio because, if the jury had heard his testimony, there was a reasonable probability that the outcome of the trial would have been different. The habeas court based that determination, in part, on the fact that the state had "vigorously contested the petitioner's claimed absence from the area [of the murder] between the hours of 9:15 . . . and 11:15 p.m. Indeed, a fair reading of [the state's attorney's] closing argument suggests that he, too, acknowledged the strength of evidence that the victim likely had died at approximately 10 p.m. For example, while [the state's attorney] argued to the jury that the time of death was not integral to the charging document and that the [jurors] could find the petitioner guilty even if they believed his alibi, [the state's attorney] strenuously argued that the petitioner had not, in fact, gone to the Terrien residence as [he] claimed, and that it was the [petitioner's] presence at the crime scene at approximately 10 p.m. that likely caused . . . [Helen Ix'] dog to bark in such an unusually disturbed manner. Additionally, even though the [state's attorney] adduced evidence that the time of death could have been any time between 9:30 p.m. [on October 30] and 1 a.m. . . . the next day, there was weighty evidence that the murder took place while the petitioner claimed to have been absent from the Belle Haven area."

Finally, with respect to the issue of prejudice, the habeas court noted "that the jury deliberated for four days, beginning on June 4, 2002, and reaching a verdict on June 7, 2002. During the jury's deliberations, on June 5, 2002, the jury asked to have read back the testimony of Julie Skakel, Andrea Shakespeare and . . . Ix. With this request, the jury also provided a note, which stated in [relevant] part: 'We would like to limit . . . Ix' testimony to the discussion of who was in the driveway and who left in the car.' Significantly, the focus of the testimony of each of these witnesses was whether the petitioner had left the Belle Haven area at approximately 9:15 p.m. in the Lincoln [Continental] to go to the Terrien residence. Thus, even though the [trial] court charged the jury that [it] need not fix the time of death in order to find the petitioner guilty, the jury showed

particular interest in the petitioner's whereabouts between 9:15 . . . and 11:15 p.m.

"Given the weighty evidence that the victim was murdered in the time range of 9:30 . . . to 10 p.m. on October 30, 1975, the importance of the petitioner's alibi defense to the fact finders cannot fairly be discounted. And, given the importance of the petitioner's alibi defense, its persuasiveness would have been greatly enhanced by the testimony of Ossorio, an independent and credible witness to the petitioner's presence at the Terrien household during the relevant evening hours of October 30, 1975." On the basis of these and other related findings, the habeas court concluded that Sherman's failure to call Ossorio as a witness entitled the petitioner to a new trial.

V

ANALYSIS

A

Sherman's Deficient Performance

As we previously explained, the reasonableness of Sherman's decision not to investigate whether Dowdle's beau could provide testimony favorable to the petitioner's alibi defense turns on the facts of the case and, more particularly, the circumstances pertaining to that defense and the potential witness. In light of the various relevant factors—the importance of the petitioner's alibi defense, the significance of Ossorio's testimony to that defense, the ease with which Ossorio could have been located, and the gravity of the charges and potential punishment that the petitioner faced—it is abundantly clear 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 have been fruitless, was unreasonable.

First, as Sherman testified, and the state conceded at trial, the petitioner's alibi was his primary defense to the state's case against him. This is because, 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 good likelihood that the petitioner would have been acquitted.

The importance of the petitioner's alibi defense is underscored by how vigorously the state sought to discredit it. The state's attorney claimed that it had been concocted by the Skakel family and founded on the perjurious testimony of the petitioner's alibi witnesses. The state's attorney 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 the state's attorney 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). Conversely, the state made no effort to establish any narrative to explain how the victim could have been murdered after 11 p.m. In particular, the state never presented any evidence as to why the victim would have remained out past her curfew in cold weather, where she could have been between 9:30 and 11 p.m., with whom she could have been during that period of time, or why the extensive police investigation into her whereabouts never yielded a single credible piece of information relating to those matters. Because the state's attorney adduced no such evidence, his closing argument contained no mention of any scenario pursuant to which the murder could have occurred as late as 11 p.m.

Second, it could hardly have been easier for Sherman to 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 (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—one of the petitioner's own alibi witnesses—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 [trial counsel] would not have pursued speaking to [the potential alibi witness]. The [trial] court correctly concluded that [trial 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.

Third, the significance of Ossorio's testimony to the petitioner's alibi cannot be overstated: unquestionably, it was essential to the 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. The state's attorney 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 credi-

bility of the petitioner's witnesses more specifically. Indeed, if believed, Ossorio's testimony would have disproved the state's attorney'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 we 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 refuted the testimony of those state witnesses, testimony that undoubtedly appeared far more significant in light of the state's contention that the petitioner's alibi witnesses all were lying. In fact, it seems likely 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.[18]

Along the same lines, Ossorio's testimony also would have refuted the state's claim that the alibi was an integral part of a broader Skakel family scheme to cover up for the petitioner. According to the state's attorney, 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 Elan, 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 the state's attorney's claim of a grand family scheme, Ossorio's credible testimony demonstrating the validity of the alibi also would have debunked the state's attorney's broader conspiracy theory.

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.

In light of the foregoing, we agree with the habeas court that Sherman failed by a considerable margin to satisfy *Strickland*'s requirement that a decision to forgo or truncate a particular pretrial investigation must flow from an informed, professional judgment. That standard cannot possibly be met when counsel fails to undertake any steps to investigate evidence relating to the very matter that he has identified as the critical flaw in his primary defense. 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 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 alibi immeasurably.

The respondent nonetheless makes several arguments as to why it was reasonable for Sherman not to investigate the identity of Dowdle's beau. The respondent contends that none of the petitioner's alibi witnesses ever mentioned seeing him at the Terrien house on the night of the murder, either in their statements to the police, in their grand jury testimony, or to Sherman directly. The respondent further asserts that, "even when Sherman asked if there was anyone else who could verify the alibi, [the] petitioner, his cousins, and his brothers essentially told Sherman there was no need to look into the beau." (Internal quotation marks omitted.) An examination of these arguments readily demonstrates that they depend on facts that were not found by the habeas court, are immaterial to Sherman's professional obligations even if factually based, or are otherwise groundless.

Contrary to the respondent's assertions, the habeas court made no finding as to whether the petitioner, Rushton Skakel, Jr., John Skakel or Terrien told Sherman about the presence of another person at the Terrien

home on the night of the murder, or whether Sherman even asked those witnesses about the presence of another person at the Terrien home that evening. The petitioner testified at the habeas trial that he had informed Sherman about Dowdle's boyfriend being present, whereas Sherman testified that the petitioner did not tell him about Ossorio's presence there. The habeas court made no finding either way, explaining, instead, that it made no difference whether the petitioner had informed Sherman about Ossorio because Sherman was on notice three years before trial, by virtue of Dowdle's grand jury testimony, that her beau was, in fact, at the Terrien residence. See footnote 17 of this opinion. Courts have consistently recognized that counsel reasonably cannot limit the pretrial investigation of a case to only those leads offered by the client himself. See, e.g., *Rompilla* v. *Beard*, supra, 545 U.S. 381–83 (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*, supra, 428 F.3d 1202–1203 ("[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]). Rather, counsel has an independent duty to investigate potentially important witnesses not suggested by the client, including, of course, potentially important alibi witnesses. See, e.g., *Bigelow* v. *Haviland*, supra, 576 F.3d 288–89 (defense counsel could not reasonably assume that merely because petitioner had provided counsel with identity of alibi witness that there were no other such witnesses).

As to the other witnesses, Sherman's testimony at the habeas trial was equivocal: when questioned whether he had asked Rushton Skakel, Jr., and John Skakel about the presence of anyone else at the Terrien home that evening, Sherman responded, "[p]robably," and when asked the same question about James Terrien, he responded, "I would assume I did." Thus, Sherman himself could not testify with any certainty that he had questioned those witnesses about the presence of another person at the Terrien home. In fact, the habeas court's findings are crystal clear that Sherman did *not* ask Dowdle this most basic of questions. When queried at the habeas trial whether he had asked Dowdle whether another person was present, Sherman responded, "I would assume I did," the same response he gave to the same question posed to him about James Terrien. The habeas court expressly found, however, that, if Sherman had made such an inquiry of Dowdle, she would have told him about Ossorio. This finding by the habeas court necessarily means that the habeas court found that Sherman did *not* ask Dowdle about

the presence of another person, even though Sherman testified that he "would assume" he did so. In other words, contrary to the respondent's assertions, the habeas court specifically found that, although Dowdle testified under oath, both during the grand jury proceedings and again at the petitioner's criminal trial, that her boyfriend was at the Terrien home with her on the evening in question, Sherman never bothered to ask her about that person's identity.

Furthermore, even it is assumed that the petitioner's alibi witnesses did not tell Sherman about Ossorio's presence at the Terrien home on the night in question on their own initiative, their failure to do so is both readily explainable and irrelevant to the question at hand. By the time these witnesses were asked, twenty-seven years later, to recall the details of the events of October 30, 1975, they simply may have forgotten about Ossorio's presence at the Terrien home that evening. Indeed, Ossorio testified that he was in the television room only intermittently, while Dowdle was putting her child to bed. Cf. *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). And, even if one or more of the petitioner's witnesses did recall Ossorio being there that evening, there is no reason to believe that those witnesses appreciated the potential import of that information. In fact, it is obvious that even Dowdle, who knew that Ossorio was with her on the night in question, didn't appreciate the potential significance of his presence at the Terrien home: she referred to her beau in her grand jury testimony and again at trial by happenstance, without any apparent awareness of his possible importance as a witness. Evidently, as far as Dowdle and the other alibi witnesses were concerned, their testimony placing the petitioner at the Terrien home that evening was sufficient to establish that he was present there, and, as nonlawyers, they had no reason to know that Ossorio potentially was a critically important witness because of the credibility issues inherent in an alibi predicated solely on the testimony of family members. In sum, the onus was not on the petitioner's alibi witnesses to divine what would have been important for Sherman to know; rather, it was Sherman's responsibility to elicit such information from them—or at the very least to recognize the significance of such information when witnesses like Dowdle divulged it of their own accord.

The respondent next contends that, because the petitioner's "siblings . . . and his cousins supplied the police with the [petitioner's] alibi shortly after the murder, without ever mentioning Ossorio, and testified at the grand jury [proceedings] without mentioning Ossorio," Sherman "had no reason to go looking for other alibi witnesses when those who claimed to be there never gave any indication anyone else could verify [the

petitioner's] presence at Terrien's [home] that evening." First, as we have explained, it is simply incorrect to assert that none of the petitioner's alibi witnesses mentioned Ossorio in their grand jury testimony. When asked about her recollection of the night in question, Dowdle mentioned Ossorio immediately, although not by name. Later, at the petitioner's criminal trial, the state's attorney himself asked Dowdle whether she previously had testified before the grand jury that she was at home with her "husband" on the night of the murder. Dowdle corrected the state's attorney, noting that the person she was with was merely a "friend." For reasons we cannot fathom, neither the state's attorney nor Sherman ever saw fit to question Dowdle as to the identity of the person whom she was with that evening.

Moreover, we do not agree with the respondent that Sherman had no reason to investigate Ossorio's identity simply because his name is not mentioned in any of the police reports prepared or witness statements taken in 1975. As we previously indicated, it is undisputed that the petitioner never was considered a suspect in the victim's murder before the mid-1990s but, rather, was only a potential witness. Indeed, the state's attorney acknowledged this fact at trial, pointing out that, until the 1990s, no witness ever had been asked about the petitioner's whereabouts or movements on the night of the murder because the police never suspected his involvement in the crime. Nor is there any evidence to suggest that anyone else who was at the Terrien home on the night of the murder was ever considered a suspect. Consequently, there was never any reason for the police to seek a complete accounting of all individuals who were present at the Terrien home on the evening of October 30, 1975. In fact, the respondent does not identify a single police report suggesting that such a question had been asked.[19] In such circumstances, therefore, the fact that Ossorio's name did not surface until decades after the victim's murder, more or less unexpectedly, is entirely understandable.

In sum, the fact that Ossorio's identity came to light for the first time during and exclusively from Dowdle's grand jury testimony reasonably could have given Sherman a reason to question whether Dowdle's testimony was accurate in this regard. Nevertheless, his obligation was to undertake some effort to answer that question rather than to dismiss it out of hand, given its potential significance.

In addition to the late timing of Ossorio's identity coming to light, the respondent argues that, even after it did, it was reasonable for Sherman to infer that Ossorio either saw nothing or would remember nothing about events that had occurred decades earlier. Specifically, the respondent argues that, because Dowdle indicated in her grand jury testimony that she mostly stayed in the library that evening and did not recall seeing the

Skakel brothers herself, Ossorio, too, did not have occasion to see who was watching television in an adjacent room. This argument is unavailing for two reasons. First, it is based on sheer speculation that Ossorio stayed in the library all evening, even when Dowdle was out of the library putting her daughter to bed. The fact is that Sherman had no idea whether Ossorio stayed in the library, wandered around the house, spent time in the television room or otherwise ran into the petitioner or his brothers during the hour and one half or so that they were all together at the Terrien residence. Of course, the only way for Sherman to have found out is to have asked Dowdle or Ossorio, but, inexplicably, he made no effort to do so.

More fundamentally, however, the respondent's argument is unavailing because it is factually inaccurate. See, e.g., *Wiggins* v. *Smith*, supra, 539 U.S. 526–27 (noting that rationale utilized by state "to justify counsel's [failure to pursue] mitigating evidence resembles more a post hoc rationalization of counsel's conduct than an accurate description of [counsel's] deliberations prior to [trial]"). At the petitioner's criminal trial, Sherman vigorously disputed the state's contention that Dowdle had only heard her Skakel cousins on the night in question, and had not seen them. When Dowdle could not recall whether she had seen them, Sherman presented Dowdle with a copy of a 1975 police report indicating that, when she was interviewed by the police shortly after the murder, she told the officers that she had "observed" three of her Skakel cousins, including the petitioner, at her home that evening. Although the police report did not refresh her memory with respect to this issue, Dowdle testified that whatever she had told the police in 1975 would have been the truth. Accordingly, Sherman's position at trial—that Dowdle did, in fact, see the petitioner on the night in question—belies the respondent's assertion that Sherman's failure to investigate Ossorio's identity was based on his reasoned belief at the time of trial that, like Dowdle, Ossorio did not see the Skakel brothers on the night in question.

Thus, although Sherman reasonably could have questioned whether Ossorio would remember whether the petitioner was at the Terrien home on October 30, 1975, Sherman could not reasonably rule out that possibility without making some inquiries. Indeed, from its inception, this case concerned events long in the past, forcing both the state and the defense to do their best to develop facts based largely on distant memory and recall. It is not an exaggeration to say that this case could not 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 task in defending the petitioner necessarily required him to undertake the same investigation. His failure to do so with respect to Ossorio, merely because he did not think that Ossorio would be able to provide any useful

information, was plainly deficient by any reasonable measure.[20]

B

Prejudice

We fully agree with the habeas court that, if Sherman had located Ossorio and called him as a witness at the petitioner's criminal trial, there is a reasonable probability of a different outcome, that is, a probability sufficient to undermine confidence in the result. As we discussed, throughout the criminal trial, the state's attorney forcefully and persistently argued that the family alibi witnesses were all lying to protect the petitioner. As the petitioner himself aptly explained on direct appeal from his criminal conviction, "[t]his devastating 'cover-up' theme not only conveyed a familial verdict of guilt, it also gutted the credibility of all alibi witnesses in one argumentative thrust, and appealed to the jury's sense of outrage that a wealthy family thought it was able to trick the police by concocting a false alibi." Ossorio's testimony, however, necessarily would have bolstered the credibility of those family alibi witnesses substantially because, if the jury credited him—an independent alibi witness with no apparent reason to lie—it would have had no reason not to credit the other alibi witnesses, as well. See, e.g., *Montgomery* v. *Petersen*, supra, 846 F.2d 415 ("the jury might well have viewed the otherwise impeachable testimony of the [family alibi] witnesses who were presented at the . . . trial in a different light had the jury also heard the testimony of this disinterested witness").

Indeed, as we also have discussed, the state seized on the purportedly contrived alibi defense not only to discredit the alibi itself, but also to support its broader theme of a long-standing Skakel family conspiracy designed to conceal the petitioner's involvement in the victim's murder. This theory of a family conspiracy, which was repeatedly articulated by the state's attorney during his closing argument, related the involvement of numerous members of the petitioner's family who, according to the state's attorney, conspired over a period of decades to thwart the state's investigation into the victim's murder.[21] Independent and objective testimony by Ossorio, however, would have enabled the petitioner to refute this central thesis of the state's case against him. See, e.g., *Kyles* v. *Whitley*, 514 U.S. 419, 441–45, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (concluding that evidence withheld from petitioner would have undermined state's central thesis concerning commission of crime and, therefore, petitioner was prejudiced by state's failure to disclose that evidence); see also *Thomas* v. *Chappell*, 678 F.3d 1086, 1105–1106 (9th Cir. 2012) (when prosecutor criticized and mocked defense witness as unworthy of belief, petitioner was prejudiced by defense counsel's failure to present witnesses who would have corroborated that witness' testi-

mony), cert. denied, 568 U.S. 1186, 133 S. Ct. 1239, 185 L. Ed. 2d 231 (2013); *Raygoza* v. *Hulick*, 474 F.3d 958, 961, 965 (7th Cir.) (when prosecutor "hammered on the skimpiness" of alibi supported solely by petitioner's girlfriend, petitioner was prejudiced by counsel's failure to present independent alibi witness who would have corroborated girlfriend's testimony), cert. denied sub nom. *Randolph* v. *Raygoza*, 552 U.S. 1033, 128 S. Ct. 613, 169 L. Ed. 2d 413 (2007).

Furthermore, 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 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). Indeed, it reasonably may be argued that "[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.) Id.

Finally, contrary to the contention of the respondent, which we address more fully hereinafter, this is not a case in which the evidence of guilt was so overwhelming that Sherman's serious errors can be discounted as trivial. To the contrary, 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 . . . [and of] consciousness of guilt evidence . . . [indicating] that the petitioner changed his initial account to the police of his movements on the evening of the murder."

Not only was there no forensic evidence or eyewitness testimony linking the petitioner to the crime, the state's primary witnesses came forward with incriminating evidence more than twenty years after the crime and did so only after either learning of the sizeable reward being offered in the case, reading Mark Fuhrman's 1998 book, Murder in Greenwich: Who Killed Martha Moxley, inculpating the petitioner,[22] or both.

Indeed, one key witness for the state, Andrea Shakespeare, the only person to testify that the petitioner did not go to his cousin's home on the night of the murder, completely changed her account of that evening after reading Fuhrman's book.[23] Thus, as the habeas court concluded, all of the state's witnesses were eminently impeachable. In sum, although the state's evidence was sufficient to convict the petitioner, that evidence was far from strong—and most certainly not strong enough such that it confidently can be said that Ossorio's critical alibi testimony simply would not have mattered to the jury.

The respondent nevertheless makes two primary arguments as to why, in his view, there is no reasonable probability of a different result, even if Ossorio had testified. Specifically, the respondent claims that the petitioner's alibi was only a partial one, and the state's case was so strong that Ossorio's testimony would have made no difference in terms of the outcome. We address each of these contentions in turn.

1

Partial Alibi

The respondent claims that, because the petitioner's alibi was only a partial one, even if the jury had credited that alibi, it nonetheless would have found the petitioner guilty. In support of this contention, the respondent observes that, at trial, the state's attorney argued, and the jury was instructed, that the jury could accept the petitioner's alibi and still find the petitioner guilty. Although perhaps superficially appealing, this argument does not hold up upon closer examination.

We agree that, as a general rule, partial alibis are unconvincing. Indeed, it has been argued that a partial or incomplete alibi is not really an alibi in the truest sense; see, e.g., *Williams* v. *State*, 185 So. 3d 1270, 1271 (Fla. App. 2016) ("a partial alibi is no alibi at all" [internal quotation marks omitted]); because it fails to account for a defendant's whereabouts for at least some period of time during which the crime reasonably could have been committed by the defendant. Thus, when a true partial alibi is at issue, it is invariably the case that the defendant just as likely could have committed the crime during a period of time not covered by the alibi. Notably, each and every one of the cases on which the respondent relies fall squarely into this category.

As the habeas court explained, however, in the present case, the petitioner's alibi, if believed, establishes that he was not at the crime scene when the substantial weight of the evidence indicates that the victim was murdered. The respondent has identified no case in which a partial alibi was found to exist and in which the state's primary theory of the case, and the only one toward which its evidence was geared, was that the crime most likely occurred during the period of time

covered by the defendant's alibi. Accordingly, this case simply does not involve the kind of alibi that courts treat as partial or incomplete.

The thin evidentiary reed on which the respondent's partial alibi theory rests is the trial testimony of Harold Wayne Carver II, then the state's chief medical examiner, who reviewed the 1975 autopsy report and opined that it was within the realm of scientific possibility that the victim died any time between 9:30 p.m. on October 30, 1975, and "many hours before she was found" the next afternoon. Carver's testimony establishing this broad time frame, however, does nothing to establish when *within that time period* the murder actually occurred. Indeed, the state's attorney discounted part of that window of time by conceding that the crime must have been committed no later than 1 a.m. the next morning because, by that time, the victim's family was out looking for her. Insofar as Carver offered any opinion as to when the murder actually occurred within the scientifically possible time frame, he opined that the victim probably was murdered "closer to 9:30 p.m." than when she was found the next day.

To be sure, the state's attorney observed during closing argument that the state did not have to disprove the petitioner's alibi for the jury to find him guilty, insofar as the autopsy report did not rule out the possibility that the victim was alive as late as 5:30 a.m. on October 31, 1975. However, the state's attorney made no effort to explain to the jury the victim's whereabouts in the one hour and forty-five minutes or so between the time her friends left her to return to their homes and the time the petitioner's alibi established his return home. It is reasonable to conclude that no such effort was made because, as we previously discussed, the substantial weight of the evidence indicated that the victim was murdered between 9:30 and 10 p.m. Indeed, for more than twenty years, that was the state's own theory of when the crime was committed, and no evidence has ever surfaced to undermine that theory. In light of the convincing evidence supporting the theory that the victim was murdered between 9:30 and 10 p.m. and the complete absence of evidence that she was alive but otherwise unseen after that time frame, there is little wonder that neither the state nor the respondent has ever articulated a plausible theory to support the possibility that she was murdered after 11 p.m. Accordingly, the respondent's attempt to negate the significance of the alibi under a partial alibi theory is unavailing.

2

Strength of the State's Case

We therefore turn to the question of whether, in light of the theory the state advanced at trial, there is a reasonable probability of a different result if Ossorio's

credible testimony regarding the alibi had been presented to the jury. As we previously indicated, this is not a case in which there was any forensic evidence or eyewitness testimony connecting the petitioner to the crime. Nonetheless, the respondent argues that there is no reasonable probability of a different result because the evidence presented at trial, considered as a whole, was overwhelming. Specifically, the respondent contends that the present case, "unlike most murder cases, contained evidence of three explicit confessions of guilt" and a "multitude of other incriminatory statements" that the petitioner purportedly made over the years, including the petitioner's statement to Hoffman "placing himself at the crime scene on the night of the murder . . . ."

Before addressing the nature and strength of the evidence adduced by the state at the petitioner's criminal trial, it bears emphasis that our research has not revealed a single case, and the respondent has cited none, in which the failure to present the testimony of a credible, noncumulative, independent alibi witness was determined not to have prejudiced a petitioner under *Strickland*'s second prong. There are many cases, however, in which counsel's failure to present the testimony of even a questionable or cumulative alibi witness was deemed prejudicial in view of the critical importance of an alibi defense. See, e.g., *Caldwell* v. *Lewis*, 414 Fed. Appx. 809, 818 (6th Cir. 2011) ("[The] [c]ourt has recognized that when trial counsel fails to present an alibi witness, [t]he difference between the case that was and the case that should have been is undeniable. . . . [The] [c]ourt has held that the failure to produce an alibi witness at trial was prejudicial under *Strickland*, even [when] the . . . [habeas] court said [that] the alibi witnesses would have been unconvincing, and there were other alibi witnesses presented at trial." [Citation omitted; internal quotation marks omitted.]); *Brown* v. *Myers*, 137 F.3d 1154, 1155–56, 1157–58 (9th Cir. 1998) (petitioner suffered prejudice from counsel's failure to present alibi witnesses even though their testimony "was vague with regard to time," and three eyewitnesses identified petitioner as shooter); see also *Davis* v. *Lafler*, 658 F.3d 525, 541 (6th Cir. 2011) ("[the] court has repeatedly found prejudice resulting from trial counsel failing to investigate or present favorable witnesses"), cert. denied, 566 U.S. 947, 132 S. Ct. 1927, 182 L. Ed. 2d 788 (2012); *Bigelow* v. *Haviland*, supra, 576 F.3d 291 (when case turned on credibility of state's witnesses, failure to produce alibi witness was prejudicial); *Avery* v. *Prelesnik*, supra, 548 F.3d 439 ("[The] potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to undermine confidence in the outcome of the jury verdict. . . . [T]he jury was deprived of the right to hear testimony that could have supplied . . . reasonable doubt." [Internal quotation marks

omitted.]); *Harrison* v. *Quarterman*, 496 F.3d 419, 427 (5th Cir. 2007) ("[o]ur sister circuits have held that counsel prejudices his client's defense when [he] fails to call a witness who is central to establishing the defense's [theory of the case]"); *Raygoza* v. *Hulick*, supra, 474 F.3d 960, 964–65 (petitioner was prejudiced by counsel's failure to present independent alibi witness who would have corroborated testimony of petitioner's girlfriend that petitioner was thirty-five miles from crime scene at time of murder); *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 359–61 (6th Cir. 2006) (petitioner prejudiced by counsel's failure to call independent alibi witness to corroborate another alibi witness whose testimony was subject to impeachment); *Alcala* v. *Woodford*, 334 F.3d 862, 872–73 (9th Cir. 2003) (petitioner was prejudiced by counsel's failure to investigate and corroborate petitioner's alibi, insofar as prosecution's evidence was "far from compelling" and eyewitness made "confident" but "not unimpeachable" identification of petitioner); *Lindstadt* v. *Keane*, 239 F.3d 191, 204–205 (2d Cir. 2001) (petitioner was prejudiced when trial counsel failed to present evidence that could have corroborated petitioner's alibi claims); *Montgomery* v. *Petersen*, supra, 846 F.2d 415 (petitioner was prejudiced by counsel's failure to call additional, disinterested alibi witnesses not subject to same impeachment as petitioner's other alibi witnesses, all of whom were family members); *Syed* v. *State*, Docket Nos. 1396, 2519, 2018 WL 1530300, *3, *45–49 (Md. App. March 29, 2018) (when state's case rested in part on testimony of witness who claimed to have helped petitioner dispose of victim's body, petitioner was prejudiced by counsel's failure to present testimony of independent alibi witness, inasmuch as "potential alibi witnesses coupled with an otherwise weak case render[ed] the failure to investigate the [alibi] testimony sufficient to undermine confidence in the outcome of the jury verdict" [internal quotation marks omitted]). The only cases to the contrary are ones in which the exculpatory evidence was found not to be credible, or, in addition to such a finding, there was conclusive physical evidence linking the petitioner to the crime. See, e.g., *Moore* v. *New York*, 357 Fed. Appx. 398, 401 (2d Cir. 2009) (undercover police officers observed petitioner committing crime); *Hemstreet* v. *Greiner*, 491 F.3d 84, 92 (2d Cir. 2007) (petitioner was not prejudiced by counsel's failure to present additional alibi witness "of questionable veracity" when state's case was based on "[o]verwhelming items of forensic evidence connect[ing] [the petitioner and his accomplice] to the murder . . . including [the victim's] blood in [the petitioner's] car"), cert. denied sub nom. *Hemstreet* v. *Ercole*, 552 U.S. 1119, 128 S. Ct. 962, 169 L. Ed. 2d 763 (2008).

In the present case, there was no unassailable evidence establishing the petitioner's guilt to the exclusion of others, and the habeas court found Ossario's account

credible. Accordingly, the foregoing authority, and the logic underlying it, compels us to conclude that Sherman's deficient performance in failing to investigate the independent alibi testimony of Ossorio was inherently or necessarily prejudicial. Nonetheless, we explain why the evidence on which the respondent relies—comprised almost exclusively of incriminating statements purportedly made by the petitioner—would not, in any event, compel a different conclusion. Specifically, we conclude that, although it certainly was within the province of the jury to credit some or all of those incriminating statements in reaching its guilty verdict, there is a reasonable likelihood that the already substantial impeachment evidence pertaining to those statements would have been afforded considerably more weight by the jury if the petitioner had presented credible, independent alibi testimony persuasively demonstrating that he was at the Terrien home when the murder likely occurred.

We begin with the observation that the statements deemed most incriminating by the respondent, which we discuss more fully hereinafter, were made during the petitioner's stay at Elan, where, according to all reports, he was sadistically interrogated about the victim's murder over a period of months and brutally beaten if he ever proclaimed his innocence. Indeed, in his closing argument, the state's attorney described Elan as having a "concentration camp-type atmosphere" that was "equivalent to the lower circles of hell." This court also acknowledged in the petitioner's direct criminal appeal the "extremely harsh and oppressive" atmosphere at Elan, under which residents were subjected to a program "predicated on ridicule and fear." *State* v. *Skakel*, supra, 276 Conn. 717. Accordingly, some additional detail about the conditions at Elan and the petitioner's treatment there is useful to understand the context underlying the petitioner's statements, both at Elan and thereafter.[24]

Trial testimony about Elan and the petitioner's cruel and inhumane treatment there has previously been briefly summarized by this court. "[Certain Elan] 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 [victim's] 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." *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 438.

More specifically, every witness who attended Elan—with the notable exception of Gregory Coleman and John Higgins, the only Elan witnesses who claimed to have heard the petitioner confess and whose testimony constitutes two of the three confessions on which the respondent relies—testified that Joseph Ricci, the executive director of Elan, liked to taunt the petitioner about the victim's murder, constantly accusing him either of having committed the crime or of knowing who did. At one point, after the petitioner had run away from Elan, Ricci convened a general meeting, which typically was attended by 100 or more Elan residents and staff and called for the purpose of focusing on one or two residents who had violated Elan rules. At this meeting, the petitioner was singled out for his attempt to run away.

All of the witnesses gave similar accounts of the general meeting and certain other related events. Alice Dunn, a former student at Elan, testified that, for three days before the general meeting, the petitioner had been forced to stand in the corner of the school's dining room without any sleep. On the third day, at the general meeting itself, the petitioner was placed against the wall, and at least 150 residents confronted him by yelling and spitting in his face. After a while, the petitioner was placed in a boxing ring and questioned by Ricci about the victim's murder. According to Dunn, this was the first time that anyone at Elan ever had heard about the victim's murder. Ricci tried to get the petitioner to confess, but the petitioner insisted numerous times that he didn't do it. Each time the petitioner denied involvement in the crime, Ricci put him in the boxing ring, and students would "pummel" him until he was "physically . . . wiped out . . . ."

According to Sarah Petersen, another former Elan student, the petitioner cried "uncontrollably" during the beatings. She stated that Ricci often "liked to pull [the petitioner] out [of the crowd at general meetings and] emotionally pound on him," saying things like, "we know you did this . . . ." When Ricci did not get the response that he was looking for, he would place the petitioner in the boxing ring or spank him with a paddle. Petersen testified that the petitioner always denied any involvement in the murder, but, after "long hours of torture," he would say that he did not remember just to "get them to lay off him for a little while."

Another former Elan student, Michael Wiggins, remembered the general meetings as pure "mayhem," with students hitting the petitioner as hard as they could while others screamed "hit him, hit him hard, hit him harder . . . ." Wiggins recalled that the petitioner always denied any involvement in the victim's murder until he was beaten down and extremely fatigued, at which point he would say, "I don't remember . . . ." The beatings would stop as soon as the petitioner expressed some doubt. According to Wiggins, the beat-

ings would stop for everyone as soon as they told Ricci what Ricci wanted to hear, even if it was not true.

According to Elizabeth Arnold, two days after the petitioner's first boxing ring incident, Ricci tried to reassure the petitioner at a group therapy session that he did not really think that the petitioner had murdered the victim, only that the petitioner knew who did and that he probably was covering up for his brother. The petitioner responded that "[h]e didn't know" and "had no recollection" about the night of the victim's murder. When the petitioner was asked about the murder, the petitioner sometimes would respond that he was drunk that evening and that he must have blacked out. Other times, he would say that he did not know if he or his brother was involved in the murder because "he had no memory of the incident whatsoever."

It is with this backdrop that the petitioner made his allegedly incriminating statements to Elan students Coleman and Higgins. The fact that all of those statements were either made at Elan or in the aftermath of his experience there places them in a light that a jury would be far less likely to disregard in the face of a credible alibi. More specifically, the treatment that the petitioner received at Elan as an adolescent was so brutal and coercive, and so directly related to his alleged involvement in the victim's murder, that the jury reasonably would question how that treatment affected the way the petitioner thought about the murder and how he responded to questions about it.[25] Indeed, because the petitioner's alleged involvement in the victim's murder was a constant topic of conversation at Elan, the jury also reasonably could have questioned whether witnesses like Coleman and Higgins, either because they were young and impressionable at the time or due to the passage of so much time, had simply conflated in their minds an accusation with a confession. As one Elan witness stated, it was "common knowledge" that the petitioner "was there because he had murdered somebody." "It was not a secret. . . . As far as in my fouteen year old head, that was [the petitioner's] punishment, going to Elan."

As the habeas court observed, however, of all the former Elan students who testified at the petitioner's criminal trial, only Coleman claimed that the petitioner had provided him with anything resembling a detailed account of the victim's murder. A twenty-five bag a day heroin addict, Coleman contacted a television station to tell his story in 1998 after seeing a tabloid news show based on Fuhrman's book and learning of the sizeable reward being offered in the case. It is conceded that, during the grand jury proceedings, Coleman testified under the influence of heroin. Thereafter, Coleman testified at the petitioner's probable cause hearing and explained that he met the petitioner for the first time when he was assigned to guard him at Elan, following

the petitioner's attempt to escape. According to Coleman, the first thing that the petitioner ever said to him was, "I am going to get away with murder because I am a Kennedy . . . ." Coleman also testified that the petitioner told him that he had beaten a girl's head in with a golf club and, two days later, had gone back to the body and masturbated on it. Coleman died of a drug overdose before the petitioner's criminal trial, but his probable cause hearing testimony was admitted into evidence and read to the jury at that trial.

Coleman's account of what the petitioner allegedly told him, however, flew in the face of established facts, forcing the state's attorney to acknowledge in closing argument that, "[c]learly [Coleman] has some facts kind of backwards . . . ." Although the state's attorney urged the jury to attribute Coleman's "backwards" facts to "the fog of time," a fact finder also reasonably could have questioned whether Coleman's confusion had resulted from his inability to accurately recall the information he had gleaned about the murder from the television shows and magazine articles that had prompted him to come forward in the first place. A fact finder also could have believed that Coleman's testimony was merely the product of his obvious interest, fueled by his heroin addiction, in the reward. To be sure, Coleman conveyed nothing about the murder that was not already in the public domain when he first told the authorities about the petitioner's alleged confession.[26]

The respondent argues that Coleman's testimony was nevertheless reliable because it was corroborated by Coleman's wife, Elizabeth Coleman, who testified that Coleman told her about the petitioner's confession in 1986, and by Jennifer Pease, who testified that Coleman told her, while they were students at Elan, that the petitioner had told him "that he bashed [the victim's] head in with a golf club." As with Coleman himself, however, the jury reasonably could have questioned whether his wife had a similar motive to fabricate, namely, to collect the reward money. The jury also reasonably could have questioned Pease's testimony in view of the fact that she waited until the final days of the trial to come forward, and then did so, it appears, for reasons unrelated to any information she claimed to have had concerning Coleman and the petitioner.[27] Finally, as we previously indicated, the jury also reasonably could have questioned whether Coleman actually believed that the petitioner had confessed to him, insofar as his youth or impairments may have caused his perception in that regard to be wrong.

The state also introduced evidence that the petitioner had confessed to a second Elan student, Higgins, who testified that, on one occasion, when he and the petitioner were on guard duty at the school, the petitioner told him "about a murder that he was somehow involved in" and that "he remembered that there was a party

going on . . . at his house." The petitioner also remembered "going through some golf clubs" and "running through some woods." According to Higgins, the petitioner "was sobbing and crying," just "releasing emotion[s]" and "bleeding out." Higgins testified that the petitioner, through a progression of statements, said that "he didn't know whether he did it, that he may have done it, [that] he didn't know what happened, [and that], eventually, he came to the point that he [thought he] did do it, [that] he must have done it . . . ."

Like Coleman, however, Higgins was far from unimpeachable. For example, on cross-examination, he acknowledged that, when he was initially contacted by the police, he told them repeatedly that the petitioner had never confessed in his presence. Higgins also acknowledged that he changed his initial story after the state's lead investigator in the case informed him that the reward had been increased to $100,000, and after the victim's mother, after receiving a phone call from Higgins, asked him to testify against the petitioner. Higgins also claimed that approximately twenty-five to thirty people were with him and the petitioner when the petitioner made his admissions but provided few names of these alleged witnesses, and no witness came forward to corroborate Higgins' testimony. Finally, Higgins claimed that his conversation with the petitioner was the first and only time that he had ever heard about the victim's murder, until he read about it in People Magazine in the 1990s. As we previously indicated, however, every other Elan witness—Petersen, Wiggins, Charles Seigen, Dorothy Rogers, Arnold and Dunn—testified unequivocally that the murder was a regular topic of conversation at the school, so much so that, for weeks on end, the petitioner was forced to wear an enormous sign around his neck inviting students to question him about his involvement in the victim's murder.

The third "confession" introduced by the state at trial came from a 2002 telephone conversation between two people unknown to the petitioner, Geranne Ridge and her friend, Matthew Attanian, in which Ridge claimed to have heard such a confession. During that conversation, which Attanian secretly recorded for Frank Garr, an inspector with the state's attorney's office, Ridge claimed to have met the petitioner at a party in 1997, and to have heard the petitioner confess, in front of everyone there, to murdering the victim, apparently because the victim had had sex with his brother and because the petitioner was "doing LSD and acid and really big-time drugs, mind, you know, altering drugs."

When under oath at the petitioner's criminal trial, however, Ridge testified, consistent with her previous statements to investigators, that nothing she had said to Attanian was true. Ridge explained that, although she had seen the petitioner at a party once, they were

never introduced and never spoke. Ridge testified that she told Attanian that the petitioner had confessed to her because Attanian "was always bragging about who he knew, and [Ridge] had done some modeling, and [Attanian] is a part-time photographer, and he was talking about famous models he knew and so forth." Ridge just wanted to seem "more knowledgeable than [she] was" about the petitioner's case. Ridge testified that everything that she told Attanian had been gleaned from "magazines, newspapers and from [the tabloids]," like the "Star, Globe, [National] Enquirer, those kinds of things . . . ." In light of her testimony under oath and her credible explanation for her earlier statement, there is strong reason to question whether, even without a solid alibi for the petitioner, the jury would have found the statement credible.

In addition, the respondent relies on a number of other statements that the jury heard, which the petitioner made or purportedly made throughout the years, that fell well short of an actual confession but, depending on one's view, could be suggestive of a consciousness of guilt. One such statement was made to Lawrence Zicarelli, who worked as the Skakel's chauffeur from 1976 through 1977. According to Zicarelli, the petitioner, following a fight with his father earlier in the day, stated that, if Zicarelli "knew what he had done, [Zicarelli] would never talk to him again," and that "he either had to kill himself or get out of the country." According to Zicarelli, later that same day, the petitioner jumped out of the family's car on the Triboro Bridge in New York while the car was stuck in traffic. Zicarelli further testified, however, that these incidents occurred approximately two years after the murder and that he had no idea what the petitioner was referring to at the time or what the petitioner had been fighting about with his father. Zicarelli also noted that he never mentioned the petitioner's statement to the police, even though detectives from the Greenwich police department regularly visited him in the late 1970s in an effort to obtain incriminating information about the Skakel family.

According to Matthew Tucharoni, a Greenwich barber, three people who he believes were the petitioner, the petitioner's sister, one of the petitioner's brothers, came into his barber shop in the late 1970s, and the petitioner purportedly told his sister, while getting his hair trimmed, "I am going to get a gun and I am going to kill him." The petitioner's sister purportedly replied: "[Y]ou can't do that." The petitioner purportedly responded: "Why not? I did it before, I killed before." His sister then responded: "Shut up, Michael." Despite the passage of more than twenty-five years, Tucharoni also recalled that, when he finished cutting the hair of the person he believed to be the petitioner, "the total was $8 because I didn't wash it and blow dry it, so they [gave] me $10, and I figured $2 was my tip for the

haircut." Tucharoni further testified that he never spoke about the petitioner's purported admissions to anyone until reading about the petitioner's trial in 2002, at which point he went to the state's attorney's office and was shown a picture of the petitioner taken in the mid to late 1970s. From that picture, Tucharoni identified the petitioner as the teen who, twenty-five years earlier, in the middle of a barber shop, purportedly claimed to have killed before.[28]

Finally, in the 1990s, the petitioner informed writer Richard Hoffman and childhood friend Andrew Pugh that, after he returned home from the Terrien residence on the night of the murder, he went back out to peep in neighbors' windows and masturbated in a tree on the Moxley's property. Although he told Hoffman that the tree was adjacent to the front of the victim's house, Pugh testified that he had always assumed that the tree that the petitioner was referring to was the one under which the victim's body was found. In 1987, the petitioner purportedly told Michael Meredith, another former Elan student, a similar story. According to Meredith, the petitioner told him that he could see the victim undressing and showering from the tree. Notably, when the victim's mother asked whether there were any climbable trees next to her house, she replied that there were none because the branches had been trimmed "off very high . . . ." When asked specifically whether a person could climb any of the trees behind the house, next to the victim's third floor bedroom windows, she replied, only if the person "were like a monkey" because "[t]here were no branches, no branches. I mean . . . they [were] all trimmed away." Similarly, when John Moxley, the victim's brother, was asked whether the trees adjacent to the front of the house, which the petitioner told Hoffman he had climbed on the night of the murder, were climbable, he replied that he thought they "were hemlocks, and the branches were like pencils."[29]

Despite the admittedly suspicious nature of some of this evidence, some of which reasonably could be construed as demonstrating a consciousness of guilt, the state's case clearly cannot be described as strong or overwhelming. As the habeas court noted, the victim's murder remained unsolved for more than two decades, and, initially, the Greenwich police sought to arrest Thomas Skakel in connection with the victim's murder, without success, and then focused their attention on a second suspect, Skakel tutor Littleton, before turning, finally, to the petitioner. There were no eyewitnesses and no physical evidence connecting the petitioner to the crime, except for the murder weapon, to which many people had access prior to the crime. There also was no motive except for a highly dubious one devised by Mark Fuhrman, seemingly out of whole cloth. See footnote 22 of this opinion. Suffice it to say that courts routinely have held that defense counsel's failure to

present exculpatory evidence was prejudicial in cases involving far stronger evidence. Cf. *Thomas* v. *Chappell*, supra, 678 F.3d 1102–1103 ("The prosecution's evidence certainly goes a long way toward implicating [the] [p]etitioner. [The] [p]etitioner was present; was the last person seen with the victims by those who testified at trial, at a location near the murder site; had access to what could have been the murder weapon; told a bizarre, mostly uncorroborated tale of where he had been; identified [the victim's] body in a potentially suspicious manner; gave the police and acquaintances somewhat conflicting descriptions of his activities on the night of the murders; acted oddly after the murders; and owned a distinctive pipe that was found [in the vicinity of the] murder site . . . . Nevertheless, in [the court's] view, the case against [the] [p]etitioner was not overwhelmingly strong. The prosecution presented circumstantial evidence only: no motive, no murder weapon, no witness to the crime, no fingerprint evidence, and no blood or other bodily fluid evidence." [Emphasis omitted.]); *Raygoza* v. *Hulick*, supra, 474 F.3d 964–65 (even though state's evidence included several eyewitness identifications and petitioner's self-incriminating statement to friend on night of murder, petitioner was prejudiced by counsel's failure to present alibi witness who would have corroborated testimony of petitioner's girlfriend that petitioner was thirty-five miles away from crime scene at time of murder); *Anderson* v. *Johnson*, 338 F.3d 382, 393–94 (5th Cir. 2003) (describing as "weak" for purposes of *Strickland* case relying primarily on eyewitness testimony); *Wright* v. *Gramley*, 125 F.3d 1038, 1043 (7th Cir. 1997) (same); *United States ex rel. Freeman* v. *Lane*, Docket No. 89 C 4642, 1990 WL 70558, *6 (N.D. Ill. May 16, 1990) (evidence of guilt was "not overwhelming" when conviction was based on testimony of eyewitness and no physical evidence corroborated witness' testimony), aff'd sub nom. *Freeman* v. *Lane*, 962 F.2d 1252 (7th Cir. 1992); *Syed* v. *State*, supra, 2018 WL 1530300, *49 (describing as weak, for purposes of *Strickland*, case predicated entirely on circumstantial evidence, which included testimony of witness who claimed to have helped petitioner dispose of victim's body).

Thus, despite the respondent's efforts to depict the state's evidence as strong for purposes of applying *Strickland*'s prejudice prong, it demonstrably was not—a point further illustrated, as the habeas court noted, by the jury's four days of deliberations and request to have read back the only testimony that supported the state's theory that the petitioner did not go to the Terrien residence on the night of the murder, as he claimed. Cf. *Thomas* v. *Chappell*, supra, 678 F.3d 1102–1103 (in evaluating strength of case under *Strickland*, "almost five full days" of deliberations and jury's request for read back of testimony supporting petitioner's defense were indicative of close case, and "the

jury struggled with precisely the theory that adequate representation would have bolstered"); *Daniels* v. *Woodford*, supra, 428 F.3d 1209–10 ("[that] [t]he jury deliberated for two days before returning a verdict . . . suggests that [it] may have been influenced by [additional] mitigation evidence had it been offered," and "[t]his alone [was] sufficient for a finding of prejudice"); *Dallago* v. *United States*, 427 F.2d 546, 559 (D.C. Cir. 1969) ("[t]he jury deliberated for five days, and one would expect that if the evidence of guilt was overwhelming the jury would have succumbed much sooner").

In light of the foregoing, it is apparent that Sherman's deficient performance in failing to adduce the testimony of Ossorio resulted in prejudice to the petitioner. As we have explained, without Ossorio's testimony, the state was able to attack the petitioner's alibi—a complete alibi for the time period during which it is highly likely that the victim was murdered—as part of a Skakel family conspiracy to cover up the petitioner's involvement in the victim's murder. According to the state, this scheme began with the removal and destruction of incriminating evidence immediately after the victim's murder and continued in the months and years thereafter, culminating some twenty-five years later in the false alibi advanced by the petitioner's close family members both during the grand jury proceedings and at trial. Ossorio's disinterested testimony, if credited by the jury, would have defeated the state's theory of a fraudulent family conspiracy, with the false alibi as its centerpiece, thereby requiring the state to prove that the murder occurred sometime after 11 p.m. on October 30, 1975, when the petitioner returned home from the Terrien residence—a nearly impossible burden in view of the fact that the state has never proffered any explanation as to where the victim may have been or what she may have been doing from 9:30 p.m., when she was last seen alive, until at least 11 p.m. Moreover, as we have explained, an objective review of the state's evidence reveals that it was highly impeachable and far from strong. Under any reasonable view of the state's case, therefore, and considering the gravity of the prejudice flowing from Sherman's failure to call Ossorio as a witness, that failure seriously undermines confidence in the verdict. In such circumstances, the sixth amendment requires that the petitioner be afforded a new trial at which he will have the benefit of Ossorio's important exculpatory testimony.

VI

JUSTICE EVELEIGH'S DISSENT

In his dissent, Justice Eveleigh repeatedly charges the majority with minimizing the import of or overlooking the evidence and case law that do not "comport with its narrative of the case . . . ." As we explain hereinafter, these accusations are baseless.

A

The Facts

Throughout his dissent, Justice Eveleigh claims that the majority "consistently downplays or ignores evidence and arguments that contradict or fail to support its own theory of the case . . . ." Footnote 8 of Justice Eveliegh's dissenting opinion. To the contrary, we have 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 at trial. Upon review of that record, we strongly disagree with Justice Eveleigh as to the strength and import of much of the evidence. In large part, that disagreement stems from the fact that Justice Eveleigh consistently construes the evidence in the light most favorable to the state, scarcely acknowledging any weakness in the state's case, rather than viewing the evidence objectively as *Strickland* requires.[30] Justice Eveleigh's flawed methodology is compounded by his reliance on arguments that are either inconsistent with the state's theory of the case at trial—and thus were never made by the state—or are so speculative or tenuous that they have not been made by the respondent on appeal.

Rather than attempt to identify and explicate the numerous occasions on which Justice Eveleigh resorts to this methodology, we turn to one such instance that exemplifies it, namely, his treatment of the testimony of Michael Meredith. Justice Eveleigh roundly criticizes the majority for undervaluing Meredith's testimony. As Justice Eveleigh notes, Meredith testified that the petitioner had told him that he climbed a tree next to the Moxley's house on the night of the murder and masturbated. Meredith further testified that, throughout his conversation with the petitioner, "[he] got the feeling like it was something that [the petitioner] had done before because he said . . . [he] could see her when she was getting dressed or undressed or coming out of the shower . . . ." Justice Eveleigh argues that Meredith's testimony "conclusively demonstrated that, if the petitioner did go to the Terrien home, then the victim must have been murdered after [11 p.m.] . . . ." According to Justice Eveleigh, "[because] the jury reasonably could have credited [Meredith's] testimony indicating that the petitioner . . . [saw] the victim alive [after 11 p.m.]," then the petitioner's alibi story was immaterial, and Sherman's failure to present a stronger alibi could not have been prejudicial.

Justice Eveleigh's arguments with respect to Meredith, however, cannot be squared with the state's express theory of the case at trial, which, as the state's attorney explained to the jury, is that the victim *never returned home on the night in question*.[31] Indeed, as we previously indicated, the state argued that the petitioner

concocted the story about masturbating in a tree out of concern that his DNA might one day be discovered on or near the victim's body.[32] See footnote 29 of this opinion. In considering the prejudicial impact of Sherman's deficient performance, this court must consider the case as it was actually presented to the jury. See, e.g., *Weeden* v. *Johnson*, 854 F.3d 1063, 1072 (9th Cir. 2017) ("[i]n determining how omitted evidence would have altered the trial, [courts] may not invent arguments the prosecution could have made" [internal quotation marks omitted]); *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016) ("*Strickland* does not permit the court to reimagine the entire trial. [The court] must leave undisturbed the prosecution's case. [The court] only envision[s] what [counsel] should have presented in [the petitioner's] defense and determine[s] how that would have altered the trial. In doing so, [the court] may not invent arguments the prosecution could have made if it had known its theory of the case would be disproved."); *Syed* v. *State*, supra, 2018 WL 1530300, *49–50 (rejecting state's attempt to alter its theory of when murder occurred in light of credible alibi testimony adduced at petitioner's habeas trial).

That the state's attorney did not argue, on the basis of Meredith's testimony, that the victim went home after leaving the Skakel driveway, proceeded to her room, where she remained until after the petitioner returned home from the Terrien house sometime after 11 p.m., all the while avoiding the notice of her worried mother, is undoubtedly because such an argument would be flatly contradicted by the testimony of two key witnesses for the state, the victim's mother and John Moxley, the victim's brother, both of whom testified that the victim was *not* at home at 11 p.m. They, of course, were two of only a handful of witnesses in the entire case with firsthand knowledge of the events in question. Justice Eveleigh has not cited a single case—because there is none—in which this or any other reviewing court has deemed itself free to adopt a theory of the case that was expressly rejected by the state at trial, and then assume that the jury could have found the defendant guilty based on that theory.[33]

Recognizing that the respondent's failure to point to *any* evidence that supports a finding that the victim was alive when the petitioner returned home from the Terrien house is fatal to the respondent's partial alibi claim, Justice Eveleigh purports to identify such evidence. For example, Justice Eveleigh contends that the jury reasonably could have concluded, on the basis of the testimony of the victim's mother, either that the victim was with friends from 9:30 to 11 p.m., because the victim's mother testified that the victim "really had no formal curfew," or that the victim was at home from 9:30 to 11 p.m., unbeknownst to her family, because her mother also testified "that it was possible . . . that the victim had returned home during that time and then

[had] gone out again without her knowledge." Justice Eveleigh maintains, in fact, that "there are countless, plausible explanations for where the victim could have been during the alibi period. In an age before cellphone communications, [she] could have been walking around the neighborhood looking for her friends. She could have been engaging in mischief night festivities with her [eleven year old] friend [Geoffrey] Byrne, who died a few years after the [victim's] murder, or [could have been] hanging out at the Skakel residence with [Thomas Skakel], [who did not testify] at [the petitioner's criminal] trial. She could have been out some other young man who, presumably, would not have been especially eager to come forward after the murder and [to] inform law enforcement that he had been the last person to see her alive." Text accompanying footnote 37 of Justice Eveleigh's dissenting opinion. As we previously noted, these possibilities are so remote and conjectural that neither the state nor the respondent has ever seen fit to mention them.

Even putting aside the highly speculative nature of Justice Eveleigh's hypothetical scenarios, they are simply irrelevant because the issue before this court is not whether an argument can be made—however tenuous—that the victim was killed after 11 p.m. The issue, rather, is whether the jury reasonably could have concluded that she was murdered prior to 11 p.m. For the reasons previously set forth in this opinion, it is readily apparent that the jury very well could have found—in fact, it is highly probable that it did find, on the basis of the evidence and arguments presented at trial—that she was killed before 11 p.m.

Not only do they miss the point, Justice Eveleigh's speculative scenarios are also contrary to the arguments that the state made at trial. As we have discussed, the state's attorney did not argue that the victim, unbeknownst to her mother and brother, returned home at 9:30 p.m. and remained there, unnoticed, until sneaking out sometime after 11 p.m. On the contrary, in his closing argument to the jury, the state's attorney asserted repeatedly and unequivocally that the victim was not home during that time period and that, in fact, *the victim never made it home on the night in question*.[34] Nor did the state's attorney argue that the victim was "hanging out at the Skakel residence with" Thomas Skakel or engaging in activities with Byrne, or "out with some other young man who, presumably, would not have been especially eager to come forward after the murder and [to] inform law enforcement that he had been the last person to see her alive." Text accompanying footnote 37 of Justice Eveleigh's dissenting opinion. Undoubtedly, the state did not make the arguments that Justice Eveleigh now asserts on its behalf because there was no evidence in the record to support them. E.g. *State* v. *Lopez*, 280 Conn. 779, 803, 911 A.2d 1099 (2007) ("Counsel may comment [on] facts properly in

evidence and [on] reasonable inferences to be drawn from them. . . . Counsel may not, however, comment on or suggest an inference from facts not in evidence." [Internal quotation marks omitted.]). Indeed, the evidence in the state's possession at the time of trial, which is part of the record in this appeal, indicates that the police interviewed hundreds of people at the time of the murder, including Byrne and the victim's other friends and neighbors, subjecting many of them to multiple lie detector tests; and yet not one of them professed any knowledge of the victim's whereabouts after 9:30 p.m. Justice Eveleigh also overlooks the fact that the state's attorney argued that Thomas Skakel had an alibi for the entire evening after the victim reportedly left him, at approximately 9:30 p.m., by his back door.

Justice Eveleigh makes several additional factual arguments, purportedly to demonstrate why the jury reasonably could have found that the murder did not occur until after 11 p.m. and, therefore, why Ossorio's testimony was immaterial. For example, Justice Eveleigh argues that the jury may not have attached any significance to the violent barking by Helen Ix' dog, Zock, near the crime scene because (1) "[d]ogs, of course, are wont to bark, and the jury heard undisputed testimony from multiple witnesses that . . . the Skakel family's German Shepherd and . . . Zock . . . as well as other neighborhood dogs, were chronic barkers," and (2) Ix testified "that [Zock's] barking was unusual more for its duration than its intensity" and that Zock's behavior could have been explained by the fact that many teens were out celebrating mischief night. We agree wholeheartedly that the jury was not required to attach significance to Zock's behavior, even though the Greenwich police and Joseph Jachimczyk, the medical examiner from Texas, did so for the better part of twenty-five years, both believing that it was a reliable indicator of the victim's time of death. As we have explained, however, the issue we must decide, and the issue that Justice Eveleigh does not address, is whether the jury reasonably could have found that the victim was murdered between 9:30 and 11 p.m.

Nevertheless, we take issue with Justice Eveleigh's assertion that Ix testified that Zock's behavior that evening "was unusual more for its duration than its intensity," and that Zock could have been reacting to teenagers out on mischief night rather than the assault on the victim. In fact, as we previously indicated, Ix testified that she had never seen her dog behave as he did on the night in question, that "[h]e always barked but not like that," and that "[t]here was really a difference . . . ." Indeed, Ix explained that Zock was so "disturbed by something that was going on," that he refused to come for the very first time in his life. She also stated that she never saw the dog behave in the same manner again after that evening. Nor is it accurate to say that Ix testified that Zock's behavior could just

as easily have been explained by the fact that many teens were out celebrating mischief night. In fact, when asked that question, Ix replied, only if the teens had been "doing something destructive . . . ." Justice Eveleigh does not identify any evidence, and we are aware of none, that anyone other than the victim's killer was engaged in destructive behavior in the vicinity where Zock was observed in an extremely distressed state, barking in the direction of the victim's body.

B

The Law

Justice Eveleigh asserts that we have ignored or misapplied the relevant law in a number of respects, but he appears to treat two such assertions as most consequential. He contends, first, that we have improperly failed to acknowledge that the petitioner's alibi was a partial one and, therefore, of no consequence for purposes of either of *Strickland*'s two prongs, and, second, that we have substituted our judgment for that of the jury's in evaluating the strength of the state's case. In fact, it is Justice Eveleigh, not the majority, who has misapplied governing legal principles.

With respect to Justice Eveleigh's first contention, he states that, for purposes of evaluating prejudice, "[the] cases almost universally hold that defense counsel's failure to investigate, identify, or present an alibi witness either does not constitute deficient performance or is not prejudicial when that alibi would cover only a portion—even a substantial portion—of the time period during which the crime could have been, or was alleged to have been, committed." We do not disagree with this assertion as a general proposition. According to Justice Eveleigh, however, this general rule applies without exception in all circumstances in which, as in the present case, an alibi does not cover the entire time frame within which the crime could have occurred. As the following two hypothetical scenarios reveal, Justice Eveleigh is demonstrably wrong in applying broadly applicable partial alibi principles to the particular circumstances of the present case.

Under hypothetical number one, which mirrors the factual scenario of the vast majority of cases in which an alibi does not span the full time period within which the crime could have been committed, the defendant is alleged to have committed that crime on any of days one through ten, and the defendant has an alibi for days one through nine only. In such circumstances, there is no less reason for a jury to find that the crime was committed on day ten than on days one through nine, and the alibi is considered a partial one, which courts frequently do not consider material for purposes of the performance or prejudice prongs of *Strickland*.

Under the second hypothetical, the facts are the same as those of the first hypothetical except that, in addition,

both the defendant and the state have presented evidence that establishes or purports to establish that it is highly likely that the crime was committed on days one through nine, and, thus, it is highly unlikely that the crime was committed on day ten. In those circumstances, the potential significance of the alibi is manifest because, if the jury is persuaded by the parties' evidence that the crime likely was committed on one of the first nine days, the defendant's alibi for those days, if credited, would exonerate him. Of course, this second hypothetical mirrors the facts of the present case.[35]

Justice Eveleigh's failure to acknowledge the critical distinction between these two scenarios leads him to the erroneous conclusion that the alibi advanced by the petitioner in the present case is no different from the ordinary case in which it is no more or less likely that the defendant committed the crime at any particular point in time within the period alleged by the state. Indeed, under Justice Eveleigh's flawed analysis, as long as there is even the remotest possibility that the defendant could have committed the crime at a time not covered by the alibi, that alibi would be deemed partial and therefore immaterial for *Strickland* purposes. In fact, this apparently would be the result under the analysis employed by Justice Eveleigh even if, for example, the evidence established to a near certainty that the crime was committed during the period covered by the defendant's alibi. We reject this conclusion because it so clearly defies reason and common sense.

Ignoring this distinction, Justice Eveleigh argues that the majority is of the view that an alibi that covers only part of the time period during which a crime could have been committed is partial only if the probability that the crime was committed during the time period covered by the alibi is equal to the probability that it was committed during the alibi period. Justice Eveleigh then asserts that, in many partial alibi cases, "the evidence indicate[s] that it would have been extremely difficult for the petitioner to have committed the crime outside of the period during which he had a potential alibi. Because the evidence [leaves] open some realistic possibility that the crime [was] committed outside of the alibi period, however, the court applie[s] the partial alibi rule." Justice Eveleigh incorrectly equates those cases in which the alibi covers a majority of the time during which the crime could have been committed with a case, like the present one, in which the evidence demonstrates that it is more likely that the crime was committed during that alibi period.[36] As we have explained, however, for present purposes, the two scenarios are vastly different. It is Justice Eveleigh's reliance on the false equivalence between the two scenarios that leads him to the wrong result.[37]

Second, Justice Eveleigh argues that the majority mis-

applies *Strickland*'s prejudice prong by considering the potential impact of Ossorio's testimony on the testimony of those witnesses who claimed that the petitioner had either confessed to, or otherwise implicated himself in, the victim's murder, because the latter testimony was not "linked to any particular time of death [and did not require] that the petitioner be present at the crime scene during the purported alibi period," and, therefore, the testimony is not directly affected by Ossorio's testimony. According to Justice Eveleigh, the only evidence that would be directly affected by the testimony of an alibi witness is evidence placing the petitioner at the crime scene at the exact moment when the crime was committed, such as the testimony of an eyewitness. Justice Eveleigh argues that, because there are no such witnesses in this case, and because the petitioner's purported admissions are vague as to time, the petitioner cannot possibly have been prejudiced by the absence of Ossorio's testimony. Justice Eveleigh is unable to cite a single case—because there is no such case—in which a court, in deciding a *Strickland* claim, has concluded that a credible alibi does not call into question the credibility of an alleged confession merely because the alleged confession is devoid of specifics. There is no such case because it is self-evident that the persuasive force of a disputed confession—particularly one lacking in crucial details, such as when the crime was committed—may well be undermined if that confession is placed in the context of an alibi that itself is persuasive.

Thus, in *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 664, a case very much on point, this court concluded that counsel's failure to present the testimony of two credible alibi witnesses "cast appreciable doubt on the state's case against the petitioner and . . . undermined this court's confidence in the outcome of his criminal trial." (Internal quotation marks omitted.) Id., 691. In *Gaines*, "the only evidence implicating the petitioner in the murders was the testimony of [two witnesses who claimed that the petitioner had confessed to or otherwise implicated himself in the murder] and, to a lesser extent, the testimony of [a third witness, who claimed to have seen the petitioner with the same type of gun used to commit the crime]." Id. Nevertheless, this court concluded that "[the] *testimony* [of the state's witnesses] *was*, *itself*, *subject to substantial impeachment evidence that they had only implicated the petitioner to serve their own needs . . . . The alibi defense*, [*however*] *. . . likely would have permeated*, *to some degree*, *every aspect of the petitioner's criminal trial and raised a reasonable doubt in the minds of the jurors as to the petitioner's guilt*." (Emphasis added.) Id. In *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 225, this court similarly concluded that counsel's failure to present exculpatory forensic evidence, which established a nar-

rower window in which a fire could have been started, prejudiced the petitioner because there was a reasonable probability that, if the jury had credited that evidence, it would have been less inclined to credit the petitioner's multiple confessions, which the petitioner claimed were false, and more likely to credit his alibi. See id., 348–49.

Indeed, Justice Eveleigh's assertions notwithstanding, courts uniformly have held that a reviewing court cannot determine whether the omission of exculpatory evidence prejudiced a defendant without considering the impact of that evidence on every aspect of the state's case. See, e.g., *Strickland* v. *Washington*, supra, 466 U.S. 695–96 ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture"); see also, e.g., *Kyles* v. *Whitley*, supra, 514 U.S. 445 (considering impact, on every aspect of state's case, of state's failure to disclose evidence that could have been used to impeach several eyewitnesses and concluding that "[the] [d]amage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for [the undisclosed evidence] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well"); *United States* v. *Agurs*, 427 U.S. 97, 112, 113, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (in assessing prejudice under *Strickland* and *Brady*, omitted exculpatory evidence "must be evaluated in the context of the entire record," and exculpatory evidence of even "minor importance" may well be "sufficient to create a reasonable doubt" when original case was not particularly strong); *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 294 (examining entirety of state's case and concluding that "the state's less than compelling case against the petitioner was such that any new evidence tending to cast doubt on the petitioner's responsibility for the charged crimes could well have led to an acquittal").

Accordingly, Justice Eveleigh is also manifestly incorrect in asserting that the habeas court and the majority, merely by pointing out the weaknesses in the state's evidence, have engaged in improper appellate fact finding or have made improper credibility determinations.[38] See, e.g., *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 691 (concluding that petitioner was prejudiced by counsel's failure to present alibi defense because "[the] testimony [of the state's witnesses] was . . . subject to substantial impeachment evidence that they had only implicated the petitioner to serve their own needs"). Contrary to Justice Eveleigh's contentions, the habeas court did not find—nor do we conclude—that the state's witnesses "lacked credibility" in the eyes of the jurors. Rather, the habeas court determined, and we fully agree, that, based on an objective

evaluation of the testimony, the state's case was not strong, in that, as in *Gaines*, the credibility of all of the state's witnesses was subject to question. Contrary to Justice Eveleigh's claim, the fact that the jury may have resolved issues of witness credibility in favor of the state at trial is not at issue in this appeal; the question, rather, is whether the jury could have viewed the testimony of those witnesses differently if Sherman had presented the petitioner's alibi defense in a manner consistent with his obligations under the sixth amendment. To support his mistaken view of the law, Justice Eveleigh employs language from cases that simply are inapposite to the issue presented. For example, he quotes from *Hope* v. *Cartledge*, 857 F.3d 518, 525 (4th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 646, 199 L. Ed. 2d 530 (2018), for the proposition that, " '[t]he guilty verdict necessarily establishes that the jury found the [s]tate's witnesses to be credible and believed the [s]tate's version of events.' " Relying on this language, Justice Eveleigh then asserts that "[t]he argument that the state's case was weak because . . . witnesses lacked credibility is, therefore, generally without merit because the jury necessarily resolved those questions in favor of the state." Even a cursory review of *Hope* reveals that it does not support the proposition for which it is cited because it does not involve counsel's failure to present exculpatory evidence. In *Hope*, the claimed ineffectiveness was counsel's failure to request a jury instruction indicating that the state was required to disprove the petitioner's alibi beyond a reasonable doubt. See *Hope* v. *Cartledge*, supra, 523. The court ultimately determined that the petitioner was not prejudiced by counsel's deficient performance because the jury had been instructed fifteen times that the state was required to prove the petitioner's guilt beyond a reasonable doubt. Id., 524–25. In reaching its conclusion, the court also observed that, at trial, the petitioner and the state had presented two mutually exclusive versions of the facts and that it was clear that the jury had credited the state's witnesses, who identified the petitioner as the perpetrator, over the petitioner's alibi witnesses, who claimed that the petitioner was with them at a party during the robbery. Id., 525. The court concluded, therefore, that there was no reasonable probability of a different result at a new trial because the jury had already found the state's witnesses to be more credible than the petitioner's alibi witnesses, and no additional jury instruction regarding the state's burden of proof would have affected that finding. See id. Thus, *Hope* does not support the principle, espoused by Justice Eveleigh, that, because a jury may have credited the testimony of some or all of the state's witnesses, a petitioner is somehow foreclosed from demonstrating that the state's case nevertheless was not strong for purposes of the prejudice prong of *Strickland*.

CONCLUSION

Upon reconsideration of our original decision in this case, we agree with the petitioner that the habeas court correctly concluded that Sherman's failure to identify and call Ossorio as an alibi witness constituted deficient performance under the first prong of *Strickland*, and that, under *Strickland*'s second prong, that inadequate performance resulted in prejudice to the petitioner sufficient to undermine confidence in the outcome of his criminal trial. Consequently, the habeas court also correctly determined that the petitioner, having been deprived of a fair trial, is entitled to a new trial at which he will have the benefit of Ossorio's alibi testimony.

The judgment is affirmed.

In this opinion McDONALD and ROBINSON, Js., concurred, and D'AURIA, J., concurred in all but part II.

* This appeal was originally 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 the oral argument prior to participating in this decision. After publication of our initial decision, in which we reversed the habeas court's judgment; see *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 531, 159 A.3d 109 (2016); Justice Zarella retired from the Judicial Branch. Thereafter, the petitioner filed a timely motion for reconsideration en banc by a seven member panel of this court. Following a vote of the six remaining panel members, we granted the petitioner's request for a panel comprised of seven members. Justice D'Auria, who became a member of this court after the petitioner's motion for reconsideration en banc was filed, was then added to the panel, and he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. On reconsideration en banc, Justices McDonald and Robinson join Justice Palmer's majority opinion, Justice D'Auria joins all but part II of Justice Palmer's majority opinion, and Justices Espinosa and Vertefeuille join Justice Eveleigh's dissenting opinion. Because of these changes in the panel and vote, this opinion supersedes in all respects our prior decision; see *Skakel* v. *Commissioner of Correction*, supra, 426; on the issue for which reconsideration en banc was granted. See, e.g., *Honulik* v. *Greenwich*, 293 Conn. 698, 702 n.1, 980 A.2d 880 (2009).

The listing of justices reflects their seniority status on this court as of date of oral argument.

** May 4, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes. This opinion is being released as a slip opinion to allow Senior Justice Espinosa, who has indicated by letter to the Judicial Branch that she is retiring from the Judicial Branch effective May 28, 2018, to participate in any rulings on any motions filed in response to this decision.

[1] Justice Zarella authored the majority opinion; *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 430; which Justices Eveleigh, Espinosa and Vertefeuille joined. Id., 531. Justice Palmer authored a dissenting opinion; id., 534 (*Palmer*, *J.*, dissenting); which Justice McDonald joined; id.; and with which Justice Robinson agreed in part; id., 531 (*Robinson*, *J.*, concurring in part and dissenting in part).

[2] We note, in addition, that, because this opinion addresses the very same claim and reaches the very same conclusion in regard to that claim as the dissent in *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 426, some of the discussion of the defendant's claim is taken verbatim from that dissent. See id., 534–623 (*Palmer*, *J.*, dissenting).

[3] We note that, when the police interviewed Thomas Skakel the next day, just hours after the victim's body was discovered, he stated that he went into his house for the evening immediately after Ix and Byrne departed, and that the victim also left at that time. Nearly twenty years later, however, Thomas Skakel disclosed that he had lied to the police and that, in fact, he and the victim had remained in his backyard for about twenty minutes, at which time they engaged in consensual sexual contact. In addition, on the

eve of the petitioner's criminal trial, Thomas Skakel, in the presence of his attorney, repeated this version of the events to Sherman. The jury, however, never heard anything about Thomas Skakel's claimed sexual involvement with the victim that evening because Sherman was informed by counsel for Thomas Skakel that he would invoke his constitutional privilege against self-incrimination, and, accordingly, he was not called to testify at the petitioner's criminal trial. Sherman did not otherwise seek to introduce any evidence concerning that purported involvement. Consequently, for purposes of resolving the petitioner's motion for reconsideration en banc, we do not consider Thomas Skakel's statements either to the police or to Sherman.

[4] The habeas court noted the following additional information concerning the unusual behavior of a dog between 9:30 and 10 p.m. on October 30, 1975. "This court is aware, from a review of the Greenwich police file, that . . . [Robert] Bjork . . . reported that he observed his dog, a springer spaniel, walk to the edge of his property, which bordered on the Moxley property, and 'then [walk] to the area of the pine tree where the body of the victim was subsequently found. . . . Bjork related that the dog would first walk to the area of the willow tree on the southwest corner of the Moxley property, where two large spots of blood were found, and then walk from this spot to the pine tree. At the time, [Bjork] related that he placed no significance in the action. He related that this was approximately 9:50 p.m.' This report was filed on April 8, 1976. Since the jury did not hear this evidence, and there is no claim by the petitioner that trial counsel was ineffective for not presenting this evidence, the court draws no conclusions from it regarding ineffectiveness. The court simply notes that such evidence, if presented, would have further buttressed the petitioner's claim regarding the approximate time of death and, by extension, the importance of his alibi defense." We, likewise, do not rely on this evidence in connection with our determination of the petitioner's motion for reconsideration en banc.

[5] Thus, as Keegan wrote in a letter to Jachimczyk shortly after the murder: "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." Because this letter was never introduced into evidence at the petitioner's criminal trial, it plays no role in our analysis of the issues raised in this appeal.

[6] Immediately after the murder, Thomas Skakel told the police that he had not spent any time with the victim after his brothers and cousin left the Skakel residence in the family's Lincoln because he had to complete a homework assignment that was due the next day. He also informed the police that he was in his bedroom working on that assignment at 10 p.m. Subsequently, however, the police learned from Thomas Skakel's teachers that there had been no homework assignment for the next day. They also learned from Littleton that Thomas Skakel was not in his bedroom at 10 p.m., as Thomas Skakel had claimed. Although this evidence was pertinent to claims raised in the respondent's appeal from the judgment of the habeas court, it does not bear on the outcome of the issues raised in petitioner's motion for reconsideration en banc because the evidence was not introduced at the petitioner's criminal trial, and it is not otherwise the subject of any claim raised in the petitioner's motion for reconsideration en banc.

[7] As we explain in greater detail hereinafter, neither the state nor Sherman ever asked Dowdle about the identity of her "beau," who was subsequently identified as Ossorio, until years after the petitioner's criminal trial.

[8] In fact, the state's attorney argued that the barking was additional proof that the petitioner did not go to the Terrien's house as claimed because there was testimony suggesting that the petitioner was the only person in the neighborhood who could make Ix' dog behave in such a frenzied manner.

[9] More specifically, the habeas court found that Sherman had performed deficiently in failing: (1) to competently present his third party culpability claim regarding Littleton, (2) to investigate a third-party culpability claim concerning Adolph Hasbrouck and Burton Tinsley, two high school students from New York who, according to Gitano Bryant, a former Greenwich resident, were with him in Belle Haven on the night of the victim's murder and subsequently acknowledged to Bryant that they had murdered the victim, (3) to raise a third-party culpability claim implicating Thomas Skakel as the perpetrator, (4) to diligently pursue the petitioner's alibi defense by

neglecting to locate and adduce testimony from an independent alibi witness, Ossorio, (5) to investigate and counter the testimony of Coleman regarding the petitioner's alleged confession while the petitioner was a resident at Elan, (6) to adequately rebut arguments made by the state's attorney to the jury, including but not limited to his claim that placing the petitioner in Elan was part of a family cover-up, (7) to employ and utilize expert testimony regarding the cruel and coercive treatment the petitioner experienced at Elan; (8) to undertake appropriate efforts to select an impartial jury, (9) to suppress audio recordings of the petitioner that were unlawfully seized from Hoffman by the state, and (10) to adequately prepare for and present a minimally effective closing argument. The three deficiencies that the habeas court found had so seriously prejudiced the petitioner as to require a new trial were (1) Sherman's failure to raise a third-party culpability claim implicating Thomas Skakel as the murderer, (2) his failure to identify, locate and call Ossorio as an alibi witness, and (3) his failure to adequately challenge the veracity of Coleman's testimony concerning the petitioner's alleged confession.

We also note that the petitioner raised several additional claims in support of his contention that he is entitled to a new trial due to Sherman's inadequate or otherwise flawed representation. The habeas court, however, rejected these claims.

[10] The petitioner cross appealed, claiming, as alternative grounds for affirmance of the habeas court's judgment, that that court had improperly rejected several of his claims. See *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 440. Some of the petitioner's claims on appeal pertained to challenges that the habeas court had rejected on the ground that the petitioner had failed to establish deficient performance by Sherman, and others pertained to challenges that the habeas court rejected, despite its finding of inadequate performance, due to lack of proof of prejudice. This court rejected all of these claims, none of which is the subject of this opinion.

[11] All three of the justices who either dissented or dissented in part from this court's majority opinion in *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, would have affirmed the habeas court's judgment with respect to that issue. See *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 533 (*Robinson*, *J.*, concurring in part and dissenting in part); id., 534 (*Palmer*, *J.*, with whom *McDonald*, *J.*, joined, dissenting).

[12] Because the petitioner's motion seeks reconsideration en banc only as to the petitioner's claim that Sherman rendered ineffective assistance in connection with the investigation and presentation of the petitioner's alibi defense, this opinion addresses that issue only.

[13] Relatedly, the proper role of precedent following a recent shift in the composition of the court was addressed at some length by several members of this court in *State* v. *Peeler*, 321 Conn. 375, 140 A.3d 811 (2016), in which we rejected the state's claim that our holding in *State* v. *Santiago*, supra, 318 Conn. 1, declaring the death penalty statute unconstitutional, was ill-advised and should be overruled. In separate concurring opinions in *Peeler*, former Chief Justice Rogers and Justice Robinson both emphasized that a panel of this court should exercise particular caution when it is asked to overrule a case, of very recent vintage, that previously had been decided by a different panel of the court. See *State* v. *Peeler*, supra, 377–83 (*Rogers*, *C. J.*, concurring); id., 413–16 (*Robinson*, *J.*, concurring). In a dissenting opinion, Justice Zarella maintained that the court in *Peeler* was *obliged* to overrule *Santiago*, explaining that, "[i]f this court now were to overturn *Santiago*, it would not be because Justice Robinson replaced Justice Norcott. Certainly, the change in court membership may be a circumstance under which the overruling occurs, but it is nothing more than pure happenstance. Instead, the actual reasons for overruling *Santiago* . . . would be, one, a majority of the justices believes that decision is not supported by the law and, two, after weighing the benefit and costs of stare decisis, a majority of the justices concludes that *Santiago* is not deserving of stare decisis effect." Id., 489–90 (*Zarella*, *J.*, dissenting). Justice Espinosa, who also dissented in *Peeler* on the ground that *Santiago* should be overruled, took the same position on this issue as Justice Zarella, stating that, "[a]s this court frequently has noted, [i]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." (Internal quotation marks omitted.) Id., 501–502 (*Espinosa*, *J.*, dissenting). "[T]he mere fact that a decision overruling *Santiago* would have occurred after the panel changed does not necessitate the conclusion that the panel change would have caused the court to overrule *Santiago*, and is nothing more than a logical fallacy, an example of post

hoc, ergo propter hoc reasoning." (Emphasis omitted; internal quotation marks omitted.) Id., 503 (*Espinosa*, *J.*, dissenting). We cannot understand how Justice Espinosa reasonably can conclude, on the one hand, that it would have been perfectly appropriate for an en banc panel of this court in *Peeler* to overrule an earlier en banc panel in *Santiago*—indeed, in Justice Espinosa's view, it was *imperative* that the court in *Peeler* overrule *Santiago*—and also conclude, in her dissenting opinion in this case, that it is improper for a reconstituted en banc panel in the present case, upon reconsideration, to overrule the original panel's decision.

It bears noting that Justice Espinosa's observations have even more force in the present case because, in *Peeler*, we were required to decide whether to follow the holding of recent prior precedent, namely, *Santiago*. Thus, whereas *Peeler* squarely implicated the doctrine of stare decisis, the present case does not because, as the Ohio Supreme Court has observed, the prudential concerns that animate the doctrine of stare decisis have no applicability in the context of a motion for reconsideration. See *Rocky River* v. *State Employment Relations Board*, 43 Ohio St. 3d 1, 5, 539 N.E.2d 103 (1989) ("*Rocky IV* is not a *different* case than *Rocky I*. It is the *same* case! Therefore, the doctrine [of stare decisis] cannot apply [to] *Rocky IV*."). A motion for reconsideration, unlike a challenge to an earlier, separate decision of the court, is designed "generally to point out errors or omissions in the original decision so that they may be corrected"; E. Prescott, Connecticut Appellate Practice and Procedure (5th Ed. 2016) § 8–5:9.2, p. 496; and such motions, "if meritorious . . . may generate a revised opinion." Id., p. 497. The purpose of such motions, in other words, is to ensure the correctness, accuracy and consistency of our decisions when, as in the present case, no party seeks the overruling of prior precedent that otherwise would dictate the result of the case.

[14] Justice Espinosa also contends that we should have resolved the petitioner's motion before Justice D'Auria became a member of this court. We disagree. As the preceding discussion reflects, substantial research and deliberation were necessary to reach a considered decision on this threshold issue of first impression for our court. Justice D'Auria was nominated and confirmed well before that process was completed. In other words, the remaining six panel members reasonably could not have considered and decided the issue prior to Justice D'Auria's confirmation as a member of this court.

We note, as well, that Justice Espinosa makes a number of other baseless claims and accusations. None of them warrants a response.

[15] See *Blackmon* v. *Williams*, supra, 823 F.3d 1104–1105 (noting "significant potential benefits of obtaining alibi testimony from witnesses unimpaired by family ties" to petitioner); *Bemore* v. *Chappell*, 788 F.3d 1151, 1164 (9th Cir. 2015) ("[c]ounsel's duty to investigate and to prepare his client's [alibi] defense becomes especially pressing [when] . . . the [alibi] witnesses and their credibility . . . are crucial" [internal quotation marks omitted]), cert. denied sub nom. *Davis* v. *Bemore*, U.S. , 136 S. Ct. 1173, 194 L. Ed. 2d 241 (2016); *Mosley* v. *Atchison*, 689 F.3d 838, 848–49 (7th Cir. 2012) (counsel's failure to investigate additional alibi witnesses was unreasonable when petitioner's whereabouts at time of crime was central issue at criminal trial); *Greiner* v. *Wells*, 417 F.3d 305, 322 (2d Cir. 2005) ("[i]n nearly every case that concludes that counsel conducted a constitutionally deficient investigation, the courts point to readily available evidence neglected by counsel"), cert. denied sub nom. *Wells* v. *Ercole*, 546 U.S. 1184, 126 S. Ct. 1363, 164 L. Ed. 2d 72 (2006); *Huffington* v. *Nuth*, 140 F.3d 572, 580–81 (4th Cir.) (courts are especially unsympathetic to counsel's failure to interview important, prospective witnesses when those witnesses were readily available), cert. denied, 525 U.S. 981, 119 S. Ct. 444, 142 L. Ed. 2d 399 (1998); 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 (noting importance of seriousness of offense and gravity of punishment in determining reasonableness); *Coleman* v. *Brown*, 802 F.2d 1227, 1234 (10th Cir. 1986) (noting gravity of punishment in determining reasonableness), cert. denied, 482 U.S. 909, 107 S. Ct. 2491, 96 L. Ed. 2d 383 (1987).

[16] Although we most recently made this observation in *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 342 n.88, a case involving our analysis of a claim that habeas counsel rendered ineffective assistance in failing to demonstrate that the state had improperly withheld exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); see *Lapointe* v. *Commissioner of Correction*, supra, 229; it is undisputed that the test for prejudice under *Strickland* is identical to the test for materiality under *Brady*. See, e.g., *Lapointe* v. *Commissioner of Correction*, supra, 266–67; see also id., 366 (*Zarella*, *J.*, dissenting) (same). Consequently, the nature of our review is precisely the same for both categories of cases.

[17] We fully agree with all aspects of Justice D'Auria's concurring opinion, in which he underscores, among other things, that the habeas court did not credit Sherman's habeas trial testimony that, in light of Dowdle's grand jury testimony that she could not recall actually observing the petitioner at her home on the night of the murder, Sherman had made a conscious decision not to investigate Dowdle's beau because he believed it also was unlikely that her beau would have observed the petitioner. In concluding, rather, that "Sherman's failure to investigate in this regard cannot be attributed to any strategic decision" and, therefore, was entitled to no deference, the habeas court undoubtedly attributed that failure to oversight or inattention. Indeed, as Justice D'Auria aptly notes, the habeas court declined to credit Sherman's explanation for failing to investigate Ossorio because that explanation is belied by the trial strategy Sherman actually employed at the petitioner's criminal trial, as reflected in the record of that trial. As Justice D'Auria notes, "Sherman came to the criminal trial equipped with a 1975 police report reflecting that merely nine days after the murder, [Dowdle] had indicated that she had indeed 'observed her brother [James Terrien] and the Skakel brothers, [Rushton Skakel, Jr., John Skakel and the petitioner], return to her house sometime around [10 p.m. on the night of the murder].' Sherman partially succeeded in getting Dowdle to recount to the jury what the report said she had told [the] police in 1975 and that her memory of the night of the murder would have been better in 1975 than in 1998." Thus, it was Sherman's position at trial that Dowdle *did* observe the petitioner at her home that night, thereby defeating the respondent's belated claim in the habeas court that Sherman's failure to investigate Ossorio was founded on his understanding that Dowdle did not observe the petitioner there.

It is likely for the same reason that the habeas court never made an express finding crediting Sherman's testimony that he actually had read Dowdle's grand jury testimony. With respect to that issue, the habeas court stated only that "[Sherman] 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 [petitioner's criminal] trial, he would have learned of the presence of an unrelated person in the Terrien household." (Internal quotation marks omitted.) It is apparent from this statement that, in the habeas court's view, regardless of whether Sherman read Dowdle's grand jury testimony, he was on notice of that testimony, and, consequently, he was required to make reasonable efforts to follow up on it. We fully agree with the habeas court's analysis in this regard. We note, further, that, if Sherman had not read Dowdle's grand jury testimony, or read it but failed to note the potential significance of that testimony with respect to her beau due to inattention or otherwise, Sherman's failure to take any further action with respect to that testimony cannot possibly be considered reasonable. In any event, for present purposes, we assume that Sherman did read Dowdle's testimony and, as he testified, elected not to pursue it. We make that assumption, however, only because it is the position that the respondent and the majority in *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 426, has taken. As we explain hereinafter, that view of the habeas court's decision, even if credited, does not support that position.

[18] As we previously noted, each of these witnesses' recollection of the petitioner's presence was equivocal in some respect.

[19] If such a question had been asked, it would seem likely that, at the very least, one of the members of the staff serving at the large Terrien home would have been mentioned.

[20] In his dissent, which we address in part V of this opinion, Justice Eveleigh does not address *Strickland*'s performance prong except to note that he agrees with the majority's analysis of that issue in *Skakel* v. *Commissioner*

of Correction, supra, 325 Conn. 426. In that opinion, the majority concluded that Sherman's decision not to ascertain Ossorio's identity and potential testimony was not constitutionally deficient because Sherman reasonably, albeit wrongly, presumed, on the basis of Dowdle's grand jury testimony, that Dowdle did not see the petitioner on the night of the murder, and, therefore, it was unlikely that Ossorio had seen him either. See id., 478. As we previously explained, however; see footnote 17 of this opinion; the habeas court did not credit Sherman's testimony as to why he failed to investigate Ossorio's identity, undoubtedly because, as Justice D'Auria explains in his concurring opinion, it so clearly smacked of the sort of post hoc rationalization that *Strickland* forbids.

As the dissent explained at length in *Skakel* v. *Commissioner of Correction*,325 Conn. 558–87 (*Palmer*, *J.*, dissenting), the majority's conclusion in that decision with respect *Strickland*'s performance prong was also fundamentally flawed for two additional reasons: first, because it applied an unprecedented and manifestly incorrect legal standard; see id., 559–62 (*Palmer*, *J.*, dissenting) (majority's analysis and conclusion were improperly predicated on its determination that Sherman reasonably believed that Ossorio likely would not be able to provide testimony material to petitioner's alibi defense, and correct legal standard is whether, under all relevant circumstances, competent attorney would have taken reasonable efforts to determine whether Ossorio had information that was useful to establish petitioner's alibi defense); and, second, because it failed to take into account *any* of the considerations relevant to determining whether Sherman's failure to present Ossorio's testimony was reasonable. See id., 563–64 (*Palmer*, *J.*, dissenting) (majority improperly failed to consider factors most relevant to ascertaining reasonableness of Sherman's failure to locate Ossorio and to call him as witness, including, inter alia, importance of petitioner's alibi defense, significance of Ossorio's testimony to that defense, import of Ossorio's testimony to rebut state's claim of long-standing family cover-up, ease with which Sherman could have discovered that Ossorio could provide critically important alibi testimony, and gravity of criminal charges and magnitude of sentence that petitioner faced).

[21] For example, the state's attorney argued that, "[i]f this case had come to trial when perhaps it should have some twenty years ago, if the Skakels hadn't managed to keep things under wraps for so long, the jury's task would have been a simple one of just determining the credibility of this interesting alibi . . . ." He also argued that, "[w]here you are really going to find the truth in this case is in determining what the [petitioner] and his greater family support group have done in this case sometimes with words, sometimes without." According to the state's attorney, the cover-up commenced just hours after the murder "with the disappearance of the golf club, the shaft, and any other evidence . . . [of] the crime," and continued in the days and weeks immediately following the crime with a trip to the Skakel family's hunting lodge in Windham, New York. The state's attorney argued: "[W]hat did the Skakel family do to put this together? Someone seeing the police all over the place . . . had the sense to get the players out of the area. The oldest brother [Rushton Skakel, Jr.] had already gone off to [Washington] D.C., so the first thing the next morning, [Kenneth] Littleton was ordered to take the four players, [the petitioner], John [Skakel], Thomas [Skakel] and . . . Terrien, out of the way for awhile, for a short trip upstate. Now, clearly, that wasn't decided for the sake of protection of these kids . . . . The importance of that sudden, brief, one night trip is that the alibi didn't begin to take shape until sometime after the return from Windham." The state's attorney also argued: "Not until after their return from Windham did the alibi begin to come up." "And then you have the additional fact of two weeks after the murder . . . father Rushton Skakel [Sr.], escorting the entire family together plus . . . Terrien, almost like leading the von Trapp family over the [Swiss] Alps to the police station to give their recorded but unsworn statements." Two years later, the state's attorney maintained, the petitioner was sent to Elan as part of the family cover-up. The state's attorney argued: "One thing that I submit helps tie all this together, particularly on the subject of Elan, and really see the truth, is the [petitioner's] very presence at that place. The defense scoffs at the idea despite I think such clear evidence of a cover-up. Why was the [petitioner] at Elan? This is really not a matter of seeing the forest [for] the trees. It is genuinely transparent." The state's attorney further maintained that the conspiracy lasted through the grand jury investigation with false and misleading testimony before the grand jury: "What the evidence says the Skakels and Terriens have done under oath before you and some even previously

before a grand jury is intentionally suppress their memories and claim a lack of recall. Why? Because in their actual recall lies the truth." And, finally, of course, the state's attorney claimed that various members of the Skakel family—including Rushton Skakel, Jr., John Skakel, David Skakel, Julie Skakel, Terrien and Dowdle all had lied at the petitioner's criminal trial, both in connection with the allegedly concocted alibi and otherwise. The state's attorney argued: "Let's stay with the alibi. Why is it so suspect? How was it produced? . . . [W]hat did the Skakel family do to put this together? . . . Consider who the alibi witnesses are, all siblings or first cousins, not one single independent alibi witness."

[22] In his book, Fuhrman asserted that the petitioner and the victim were boyfriend and girlfriend and that the petitioner flew into a jealous rage upon seeing the victim having a sexual encounter with Thomas Skakel. See M. Fuhrman, Murder In Greenwich (HarperCollins 1998) p. 215. Fuhrman claimed that he had learned about the relationship between the victim and the petitioner from unnamed sources and, further, that the victim's diary "clearly stated" that the petitioner was interested in her romantically. Id. At the petitioner's criminal trial, however, Fuhrman's claims both with respect to the victim's diary and the victim's purported relationship with the petitioner were debunked. Indeed, according to the victim's diary, the victim did not even become acquainted with the petitioner until two months before her death, and, during the entire time that they were acquainted, she was in a steady relationship with a boy from her high school. Fuhrman's false claims nevertheless appear to have formed the basis for the state's theory that the petitioner murdered the victim in a jealous rage; indeed, the only two witnesses that the state's attorney has identified as providing testimony in support of that theory—Elizabeth Arnold and Geranne Ridge—both admitted that Fuhrman's book, or tabloid accounts about the book, were instrumental to the substance of their testimony concerning the petitioner's purported motive. At trial, Arnold testified that, while she and the petitioner were students at Elan, the petitioner told her "that his brother [fucked] his girlfriend . . . well, they didn't really have sex, but they were fooling around." On cross-examination, Arnold was asked why, when testifying before the grand jury or talking to the police, she never mentioned that the petitioner had told her that his brother 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. Ridge testified that much of which she knew about the murder came from the tabloids.

[23] Indeed, there is perhaps no better example of the seemingly corruptive effect of Fuhrman's book than the testimony of Shakespeare. At trial, Shakespeare testified that she was absolutely certain that the petitioner did not go to the Terrien home on the night of the murder and that, in fact, she had observed the boys who did go as they were leaving the driveway. Because Shakespeare was the only witness whose testimony placed the petitioner at home at the likely time of the murder, her testimony was extremely important, and, indeed, the jury asked to have it read back during its deliberations.

But Shakespeare's story at trial bore little resemblance to statements that she gave to the police in 1991. At that time, she told investigators that she had no independent recollection of any of the events in question because she was in the kitchen at the Skakel house with Julie Skakel the entire time. What little she knew, she explained, she had learned secondhand. Specifically, Shakespeare stated that she always had assumed that the petitioner did not go to the Terrien home because, after the murder, she had been told that there were four people in the driveway after the Lincoln departed, and she always had assumed that one of them was the petitioner. Shakespeare stated: "I thought that I heard . . . that there were four of them back in the backyard, saying goodbye to each other. . . . It was my assumption, and it's a total assumption, that . . . it was [Thomas Skakel], [the petitioner], [Ix], and [the victim]. . . . I don't know where the information came from." Shakespeare's continued: "None of [it] I . . . saw with my own two eyes. It's the tales I've heard over the years . . . . Did I see it? No. Do I know it for a fact? No." Shakespeare also acknowledged that she "thought, because I've heard, because of what's been, you know, told over the years . . . that [the petitioner] and [Thomas Skakel] and [the victim] and [Ix] were out back . . . hanging out, chitchatting. And then the girls went to go home, and the boys came in the house. That's what I'd always assumed." When informed by investigators that there were four children in the backyard after the Lincoln Continental left but that it was

undisputed that the fourth child was not the petitioner but an eleven year old boy name Geoffrey Byrne, Shakespeare responded that she had never even heard the name Byrne before and that, of course, the petitioner could have gone to the Terrien residence because "I didn't see them leave, so I can't tell you who was in that car." Shakespeare also stated: "I didn't see anybody after a certain point [because] I was sitting in the kitchen . . . ."

At the petitioner's criminal trial eleven years later, however, Shakespeare testified that, in the twenty-seven years since the murder, she had never once doubted that the petitioner "was home after [the] car left . . . ." Indeed, Shakespeare insisted that she "was there . . . when the boys left in the car to take [Terrien] home" and that she was "sure" she "saw them leave." Shakespeare was asked how it was possible that, in 1991, she had no such recollection, and whether she had read any books about the case in the intervening years. Shakespeare responded that she had "read Mark Fuhrman's book."

[24] Apart from two confessions that the petitioner purportedly made while attending Elan, the respondent relies on a third "confession" that the petitioner is alleged to have made to a total stranger, Geranne Ridge, at a cocktail party in the 1990s, and a number of other statements, which run the gamut from odd to suspicious, that he reportedly made in the presence of a barber, and to the family chauffeur, to a ghostwriter whom he hired in the late 1990s to write his autobiography, and to Michael Meredith, another former Elan student. As we explain hereinafter in this opinion, an examination of this evidence reveals that it, too, was either readily impeachable, subject to differing interpretations, or, in some cases, both.

[25] We note in this regard that Sherman never sought to explain to the jury that an innocent person—particularly an emotionally troubled adolescent who had been subjected to appalling physical and psychological coercion—could convince himself that he may have killed someone in a drunken stupor but have no recollection of doing so. Thus, Sherman offered no rebuttal to the state's assertion that only someone who had committed murder would express uncertainty when asked about his involvement in the crime. Because defense counsel had not raised certain challenges to the admission of these purported statements, the record on the petitioner's direct appeal lacked sufficient factual findings for us to "assume that the atmosphere at Elan was so coercive that any incriminating statement by the [petitioner] necessarily was the product of that coercive environment." *State* v. *Skakel*, supra, 276 Conn. 723. Although this court was precluded under the circumstances from making any such assumption, the jury was free to draw such an inference. This court never questioned the brutality of the petitioner's treatment at Elan.

[26] Although we consider the issue of prejudice only in the context of the evidence actually presented at the criminal trial, the habeas court observed that additional evidence existed to impeach Coleman's account. Specifically, John Simpson, a former Elan resident who was present when the petitioner allegedly confessed to Coleman, testified unequivocally at the hearing on the petitioner's new trial petition that he remembered the conversation between Coleman and the petitioner in which Coleman claims the petitioner confessed, and that, contrary to Coleman's testimony, the petitioner made no such incriminating statements.

[27] More specifically, it appears that Pease's belated decision to come forward was motivated by her intense dislike of another former Elan witness, Dunn. For example, on cross-examination, Pease admitted that, days before her testimony, using the screen name "Betty," she had posted a fairly lengthy screed on the "Crime News 2000" website in which she stated, "what the prosecution needs [are] some people who can testify to what . . . Dunn really is, a monster."

[28] In his closing argument, the state's attorney also cited the testimony of Shakespeare that, when she and Julie Skakel arrived at the Skakel home on the afternoon of October 31, 1975, following the discovery of the victim's body, the petitioner approached their car and informed them that "[the victim] had been killed and that he and [Thomas Skakel] were the last to see [the victim] that night." This is hardly inculpatory evidence, however, given that it was common knowledge, from the earliest moments of the investigation, that the victim was last seen alive in the Skakel's driveway, in the company of the petitioner, Thomas Skakel, Helen Ix and Byrne. Additionally, at trial, the state presented the grand jury testimony of Mildred Ix, Helen Ix' mother, who testified that, sometime in the early 1980s, the petitioner's father [Rushton Skakel, Sr.] had told her that the petitioner "had come up to him and . . . said, you know, I had a lot . . . to drink that

night, and I would like to see—I would like to see if—if I could have had so much to drink that I would have forgotten something, and I could have murdered [the victim] . . . . So he asked to go under Sodium Pentothal or whatever it was." At trial, however, Mildred Ix testified that her recollection of her conversation with the petitioner's father was incorrect and that the petitioner had not told his father that he wanted to find out if he could have murdered the victim.

[29] At the petitioner's criminal trial, but outside the presence of the jury, the state's attorney argued that, with the advent of DNA testing in the early 1990s, the petitioner invented the masturbation story out of fear that his DNA might one day be found at the crime scene. As we previously indicated, however, Meredith testified that the petitioner had told him the masturbation story in 1987, many years before DNA was used as an investigative tool in Connecticut. Accordingly, although the petitioner's masturbation story was sufficiently bizarre that the jury reasonably could have viewed it as consciousness of guilt evidence, the state's only theory with respect to that evidence was not supported by the evidence.

[30] A good example of Justice Eveleigh's one-sided approach to reviewing the evidence is reflected in his extensive parsing of every inculpatory inference that the jury possibly could have drawn from Andrea Shakespeare's testimony that, when she and Julie Skakel arrived at the Skakel home on the afternoon of October 31, 1975, to what one state witness described as a "chaotic" scene of police, press, neighbors and children running in and out of the house, the petitioner approached their car and excitedly informed them that the victim had been murdered and that he and Thomas Skakel were the last ones to have seen her alive. Even though what the petitioner told his sister and Shakespeare was true; see footnote 28 of this opinion; Justice Eveleigh nonetheless construes the petitioner's statement to his sister and Shakespeare as tantamount to a confession, a conclusion that we believe is completely unsupported.

[31] In his opening statement to the jury, the state's attorney argued, "Martha Moxley, then and forever fifteen years of age, went out that evening and . . . never made it home, resulting in an all-night effort by her mother, Dorothy [Moxley], to learn [of] her daughter's whereabouts, which weren't . . . discovered until around noon the next day . . . ."During his closing argument, the state's attorney similarly argued: "[W]e realize that Martha [Moxley] didn't get home as expected by 10 or 10:30 [p.m.], and we could pretty much conclude that, by 1 [a.m.] . . . she was never coming home." He further argued: "Martha [Moxley] . . . wasn't supposed to be in until about 10:30 or so that night. Of course, she never got there." Finally, he stated: "Dorothy [Moxley] didn't become concerned until after 11 [p.m.] or so. Needless to say, Martha [Moxley] never did make it home."

[32] Specifically, the state's attorney argued: "You didn't have to be a fly on the wall when . . . Sutton Associates came into the picture in 1992 to understand why the [petitioner] soon was serving up his bizarre tale of masturbation in a tree . . . . He had masturbated, *not in that cedar tree by John Moxley's room and not in that monkey tree that's on the side of the house*, *but*, *rather*, *in the vicinity of* [*the victim's*] *body*."

[33] We also reject Justice Eveleigh's repeated assertion that "the majority rel[ies] on . . . facts and evidence that were not part of the trial record and could not have been considered by the jury in its deliberations." As we have explained, we have relegated to footnotes certain evidence or information made known in court proceedings that occurred subsequent to the petitioner's criminal trial solely for the purpose of providing context for certain claims raised in this appeal. As we have made crystal clear on each such occasion, however, we have not relied on that evidence or information in resolving any of the issues presently before this court.

[34] We note that, in arguing that the jury reasonably could have found that the victim went home after leaving the Skakel driveway, where she was observed by the petitioner after his return from the Terrien residence sometime after 11 p.m., Justice Eveleigh omits several facts that are inconsistent with this argument. For example, in support of his contention that the victim could have been at home from 9:30 until 11 p.m., Justice Eveleigh cites the testimony of the victim's mother "that it was possible . . . that the victim had returned home during that time and then [had] gone out again without her knowledge." This was hardly the import of that testimony. Rather, when the victim's mother was asked whether such a scenario was possible, she responded: "Yes, I suppose it is possible but, you know, I didn't know that it had ever . . . happened before. [The victim] was very good at telling me everything that was going on. I mean, she talked to me all the time, and,

you know, I don't think she did [that], but, you know, there is always a chance she could have." In any event, in stating unequivocally to the jury in closing argument that the victim never returned home that evening, the state's attorney expressly disavowed the theory that Justice Eveleigh posits—for the first time in the long history of this case—in his dissenting opinion.

[35] Justice Eveleigh argues that the distinction the majority draws between a case in which there is evidence that the crime was committed during the alibi period and a case in which there is no such evidence "is inconsistent with the very concept of an alibi," [which] "has long been understood to mean that it is impossible for a person to have committed a crime because he or she was at another location when the crime was . . . committed." (Emphasis omitted.) According to Justice Eveleigh, as long as "there is a realistic possibility that the crime was committed outside of the alibi period," then the petitioner cannot possibly have been prejudiced by counsel's failure to present an alibi witness. Contrary to Justice Eveleigh's contention, our determination in the present case is not remotely inconsistent with the concept of an "alibi," namely, "[a] defense based on the physical impossibility of a defendant's guilt . . . ." Black's Law Dictionary (10th Ed. 2014) p. 87. As we have explained, if the jury were to credit the petitioner's alibi and to conclude that the murder occurred at approximately 10 p.m.—as the evidence clearly suggested—then the jury necessarily would also have to conclude that it was impossible for the petitioner to have committed the crime.

[36] Justice Eveleigh cites just three cases, namely, *Fargo* v. *Phillips*, 58 Fed. Appx. 603 (6th Cir.), cert. denied, 539 U.S. 932, 123 S. Ct. 2585, 156 L. Ed. 2d 613 (2003), *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016), and *Tinsley* v. *Commonwealth*, Docket No. 1026-11-2, 2012 WL 1499352 (Va. App. May 1, 2012); for the proposition that courts have applied the so-called partial alibi rule in cases involving facts resembling those of the present case. Suffice it to say that those cases bear no legal or factual resemblance to the present case for numerous reasons, but most significantly because they simply do not involve a factual scenario, like the present one, in which the jury reasonably could find, on the basis of the evidence, that it is more likely that the crime was committed during a particular portion of the alibi period than during the remainder of that period.

[37] Justice Eveleigh's reliance on this false equivalence also leads him repeatedly to misstate "[t]he principal question to be resolved" as one that requires a determination of "whether it is highly likely that the victim was [murdered] prior to . . . 11:15 p.m. . . . or whether the jury reasonably could have found that she was [murdered] later that night . . . . If the former, then Ossorio's testimony would have supported a full alibi, and we must determine whether presenting that testimony to the jury would have been reasonably likely to result in a different outcome. If the latter, however, then the trip to the Terrien home represented merely a partial or incomplete alibi, and, as a matter of law, defense counsel's failure to present one additional witness in support of that partial alibi was, at worst, a harmless error." (Emphasis omitted.) This statement of the "principal question" reflects Justice Eveleigh's fundamental misapprehension of the issue actually presented by this appeal. As we have explained, because Sherman performed deficiently in failing to present the alibi testimony of Ossorio, the question is not "whether it is highly likely that the victim was [murdered] prior to . . . 11:15 p.m. . . . or whether the jury reasonably could have found that she was [murdered] later [than] that . . . ." The question is whether there is a reasonable probability of a different result because the jury reasonably could have found that the victim was murdered prior to 11:15 p.m. Under Justice Eveleigh's incorrect statement of the issue presented, the petitioner is required to prove that the victim necessarily was murdered prior to 11:15 p.m. in order to demonstrate prejudice, which is clearly not the applicable standard. See, e.g., *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 263 ("[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence" [internal quotation marks omitted]); see also *Avery* v. *Prelesnik*, supra, 548 F.3d 439 ("[w]e do not ask whether [the petitioner] was ultimately innocent, but, rather, whether he was deprived [of] a reasonable shot of acquittal").

[38] See, e.g., part III A 2 of Justice Eveleigh's dissenting opinion ("[a]lso of concern is the apparent willingness of both the habeas court and the

majority to substitute their own credibility determinations for those of the jury"); footnote 51 of Justice Eveleigh's dissenting opinion ("the habeas court appears to have determined that the state's trial witnesses lacked credibility solely on the basis of its review of the cold trial record, notwithstanding the fact that the jury, which had the opportunity to observe [their demeanor] firsthand, clearly credited at least some of their testimony" [emphasis omitted]); see also part III A 2 of Justice Eveleigh's dissenting opinion ("The majority examines each of the state's witnesses, explaining—from a cold trial record—why it does not find their testimony to be believable and, therefore, why a jury also conceivably might not credit them. In so doing, the majority resorts to speculative arguments, which the petitioner himself has never made, requiring credibility determinations best left to the trier of fact; such a review is, in my view, simply inappropriate in the context of a *Strickland* analysis.").