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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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EVELEIGH, J., with whom ESPINOSA and VERTEFEUILLE, Js., join, dissenting. For the reasons articulated in the original majority opinion in this appeal; see *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 467–84, 159 A.3d 109 (2016); I continue to believe that the performance of defense counsel, Michael Sherman, was not deficient and, therefore, that the petitioner, Michael Skakel, was not denied his constitutional right to the effective assistance of counsel. Moreover, even if defense counsel's performance in failing to identify one additional alibi witness, Denis Ossorio, was so deficient as to warrant reconsideration of that decision, I am not persuaded that this alleged shortcoming prejudiced the defense.

As I explain more fully hereinafter, I could not disagree more strongly with the legal analysis of prejudice set forth in the new majority opinion. In particular, I believe that the majority fails to consider the well established rule that, as a matter of law, an alibi defense is no defense at all when it is reasonably possible that the crime was committed outside of the alibi period. That is certainly the case here.

Of perhaps equal concern is the majority's characterization of the factual record in this case. Although it recognizes that we are required to engage in a comprehensive, objective review of the factual record, the majority repeatedly minimizes or overlooks evidence and inferences that fail to comport with its narrative of the case, while exaggerating or overstating the strength of the petitioner's arguments. Barely acknowledging that the state's evidence was sufficiently compelling to persuade twelve jurors beyond a reasonable doubt of the petitioner's guilt, the majority takes it upon itself to make credibility determinations with regard to trial witnesses whose testimony bore no direct relationship to the alleged deficient performance of defense counsel. Perhaps most worrisome, the majority refers throughout its opinion to evidence from outside of the trial record, much of which is not even arguably a proper subject of judicial notice. Accordingly, I must respectfully dissent.

I

Familiarity with the extensive factual and procedural background of the present case and the underlying trial regarding the murder of the victim, Martha Moxley, is presumed. See generally id.; *Skakel* v. *State*, 295 Conn. 447, 991 A.2d 414 (2010); *State* v. *Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). Although the fact intensive nature of the question presently before this court will require a fairly extensive discussion of the evidence

presented at trial, I defer that discussion to the relevant substantive parts of this dissenting opinion.

Because the outcome of the present appeal hinges in no small part on the applicable legal standards, I begin by setting forth in some detail the rules that govern our review of a decision granting postconviction relief, through a writ of habeas corpus, on a claim of ineffective assistance of counsel. I consider, first, the law that a habeas court must apply in evaluating an ineffective assistance of counsel claim and, second, the standards by which an appellate tribunal reviews such a determination.

A

Ineffective Assistance of Counsel

The United States Supreme Court first articulated the two part test governing ineffective assistance of counsel claims in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "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. . . . 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. With respect to the second prong of the test, prejudice, the court in *Strickland* observed that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." Id., 693. For this reason, the Supreme Court explained, "ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Id.[1]

In *Strickland*, the Supreme Court, having initially set forth the relatively nebulous fair trial/reliable result standard governing the prejudice prong, proceeded to try to articulate a more "workable principle" by which courts could assess whether any particular error made by defense counsel was harmless. Id. The court offered the following additional guidance: "Even if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. . . . [A]ny

error, if it is indeed an error, impairs the presentation of the defense . . . . On the other hand . . . a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard . . . is not quite appropriate. . . . [Rather, under] the appropriate test for prejudice . . . [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citations omitted; internal quotation marks omitted.) Id., 693–94.

"In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law. . . . The assessment of prejudice should proceed on the assumption that the [decision maker] is reasonably, conscientiously, and impartially applying the standards that govern the decision. . . .

"In making this determination, a court hearing an ineffectiveness claim 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 defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors*." (Emphasis added.) Id., 694–96.

Since it decided *Strickland*, the United States Supreme Court has emphasized the "highly demanding and heavy burden" that a petitioner must overcome in order to satisfy the prejudice prong. (Internal quotation marks omitted.) *Williams* v. *Taylor*, 529 U.S. 362, 394, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); see also *Powell* v. *Warden*, 272 Va. 217, 234, 634 S.E.2d 289 (2006) (emphasizing that prejudice prong of *Strickland* test imposes "highly demanding standard"), cert. denied, 551 U.S. 1118, 127 S. Ct. 2942, 168 L. Ed. 2d 269 (2007). For this reason, "cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers* v. *Zant*, 13 F.3d 384, 386 (11th Cir.), cert. denied, 513 U.S. 899, 115 S. Ct. 255, 130 L. Ed. 2d 175 (1994); see also J. Cook, Constitutional Rights of the Accused (3d Ed. 2017)

§ 8:19; B. Gershman, Trial Error and Misconduct § 3-3 (a) (2) (1997).

Most recently, in *Harrington* v. *Richter*, 562 U.S. 86, 111–12, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the high court offered more specific and practicable guidance as to how courts are to apply *Strickland*'s reasonable probability standard. "In assessing prejudice under *Strickland*," the court explained, "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; emphasis added; internal quotation marks omitted.) Id.

Both the United States Court of Appeals for the Second Circuit and this court have since applied *Harrington* when evaluating prejudice claims under *Strickland*. See *Santone* v. *Fischer*, 689 F.3d 138, 155 (2d Cir.), cert. denied, 568 U.S. 926, 133 S. Ct. 390, 184 L. Ed. 2d 231 (2012); *Anderson* v. *Commissioner of Correction*, 313 Conn. 360, 376, 98 A.3d 23 (2014), cert. denied sub nom. *Anderson* v. *Semple*, U.S. , 135 S. Ct. 1453, 191 L. Ed. 2d 403 (2015). In *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 52 A.3d 655 (2012), for example, we treated the *Strickland* prejudice standard as essentially equivalent to a preponderance of the evidence test. See id., 102 (prejudice exists when "new evidence undermines the confidence in the result reached such that it can be said that an injustice was *likely* done and that it is *probable* that the new trial would produce a different result" [emphasis added]).

As I explain more fully hereinafter, in my view, in the majority opinion applies *Strickland* in a far looser manner than *Harrington* and *Anderson* permit.[2] Those cases teach that, to demonstrate prejudice, the *petitioner* bears the burden of proving that it is nearly as likely as not that, but for the errors of counsel, a different outcome would have obtained. In the present case, however, the majority simply speculates as to what *could* have been different had Ossorio testified, instead of requiring the petitioner to demonstrate that he had a reasonable probability of obtaining a different result. The jury might have found Ossorio's testimony more credible than that of the state's witnesses who testified against the alibi story. The jury "could have found that the victim was murdered prior to 11:15 p.m." "[T]he jury could have viewed the testimony of [the state's] witnesses differently if [defense counsel] had presented

[a stronger] alibi defense . . . .” The jury, which initially might have been persuaded by the prosecutor's unsubstantiated references to a Skakel family conspiracy, might then have concluded that there was no such conspiracy after all. *Strickland* and its progeny caution against just this sort of speculation as to what conceivably might have gone differently, in a different trial, if different witnesses had testified. That is precisely why prejudice is—and is meant to be—so difficult to establish.

To be clear, *each* of the following propositions would *have* to be true for the outcome of the trial to have been different: (1) the jury concluded that the time of the murder mattered, that is, that the petitioner's various confessions and other evidence of his guilt was not so compelling that the jury could safely conclude that, regardless of when he did it, he must have killed the victim;[3] (2) the jury concluded that the victim was killed during the alibi period, not later, and rejected testimony that the petitioner himself admitted to having seen her alive later that evening; and (3) the jury, although finding all of the petitioner's other family and independent alibi witnesses not to be credible, would have concluded that Ossorio's alibi testimony was more credible than that of the state's witnesses.

The majority repeatedly contends that the petitioner need only demonstrate that the jury *could have* concluded that the crime was committed during the alibi period or *could have* viewed the evidence differently in the light of Ossorio's testimony. But that isn't enough. In order for those three propositions collectively to be as likely as not true, or at least nearly so, which is what the petitioner bears the burden of establishing, *each* proposition individually must at least be highly probable.[4] A simple gut feeling that things might well have gone differently for the petitioner if Ossorio had testified is not enough, as a matter of law. As I explain in parts II and III of this dissenting opinion, the petitioner has not come close to meeting his burden in this regard.

B

Appellate Review

The standards by which we review the granting or denial of habeas relief with respect to an ineffective assistance of counsel claim are well established. “The 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 historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland*, however, is a mixed question of law and fact subject to our plenary review.” (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S.

975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); see also *Strickland* v. *Washington*, supra, 466 U.S. 698 ("[i]neffectiveness is not a question of basic, primary, or historical [fact]" [internal quotation marks omitted]).

Consistent with these principles, and applying plenary review, this state's appellate tribunals have, on multiple recent occasions, reversed a habeas court's determination with respect to the prejudice prong of *Strickland*. See *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 782–83 and n.12, 138 A.3d 908 (2016) (interpreting trial evidence differently than habeas court and emphasizing that "we [are not] required to defer to the trial court's legal determination that there is a reasonable probability that newly discovered evidence would have resulted in a different verdict if credited by the jury, i.e., that it undermines confidence in the verdict"); see also, e.g., *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 102–103; *Crespo* v. *Commissioner of Correction*, 149 Conn. App. 9, 20, 87 A.3d 608, cert. denied, 311 Conn. 953, 97 A.3d 948 (2014); cf. *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 266, 112 A.3d 1 (2015).

Moreover, although we must defer to the habeas court's factual findings with respect to the credibility of witnesses, such as Ossorio, who testified before that court, we are not bound by the habeas court's ultimate determination as to whether the jury would have credited those witnesses over others who testified at trial. As we explained in *Horn*, "there is no requirement that we defer to the habeas court's legal determination that new evidence is so compelling that a reasonable juror could not fail to credit it."[5] *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 783 n.12. A fortiori, we review de novo a habeas court's legal determinations, formed on the basis of its review of the cold trial record, such as whether a proffered alibi defense would have constituted a full alibi or only a partial alibi.

II

I turn now to the question of whether, if we assume for argument's sake that defense counsel's failure to procure and present Ossorio's alibi testimony constituted deficient performance, that deficient performance was prejudicial. In other words, whether there is a reasonable probability that the jury, having heard Ossorio's testimony, would not have convicted the petitioner. The habeas court concluded that defense counsel's errors were prejudicial on the basis of its determinations that (1) there was "weighty evidence that the victim was murdered in the time range of 9:30 p.m. to 10 p.m. on October 30, 1975," and (2) Ossorio's testimony was sufficiently credible that it would have greatly enhanced the persuasiveness of the petitioner's alibi for that time period. In this part of my dissenting opinion, I explain how the fact that the victim reasonably could have been killed outside of the alibi period renders the alibi—and,

therefore, defense counsel's allegedly deficient performance—irrelevant. In part III of this dissenting opinion, I explain why a different result would have been unlikely even if the petitioner had offered a full rather than a partial alibi.

A

Governing Law

It frequently has been remarked, and the majority itself concedes, that "a partial alibi is no alibi at all." (Internal quotation marks omitted.) *Williams* v. *State*, 185 So. 3d 1270, 1271 (Fla. App. 2016), review dismissed, Florida Supreme Court, Docket No 16-605 (April 8, 2016). The reasons behind this maxim are readily apparent.

"The literal significance of the word 'alibi' is 'elsewhere.' . . . [T]o make out a defense of alibi, the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of the defendant's presence at the scene of the offense at the time of the commission of the crime. . . . In other words, by an alibi the accused attempts to prove that the accused has been at a place so distant that the accused's participation in the crime has been *impossible*." (Emphasis added; footnotes omitted.) 21 Am. Jur. 2d 308, Criminal Law § 179 (2016).

"To be successful, a defendant's alibi must cover the entire time when the defendant's presence would have been required for the accomplishment of the crime . . . . [S]ince an alibi defense derives its potency from the physical *impossibility* of the accused's guilt, a purported alibi that leaves it *possible* for the accused to be the guilty person is no alibi at all." (Emphasis added; footnotes omitted.) 21 Am. Jur. 2d, supra, § 181; see also Black's Law Dictionary (10th Ed. 2009) (defining "alibi" as "[a] defense based on the physical *impossibility* of a defendant's guilt" [emphasis added]).

Consistent with these principles, 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. See, e.g., *Johnson* v. *Secretary, Florida Dept. of Corrections*, 680 Fed. Appx. 869, 872 (11th Cir. 2017) (no prejudice when prison records would have shown only that petitioner "was in jail for a substantial portion of the timeframe that the victim testified that the acts occurred" [internal quotation marks omitted]); *Matthews* v. *Mazzuca*, 120 Fed. Appx. 856, 858 (2d Cir. 2005) (no prejudice when alibi would have covered no more than three of five hours during which burglary could have occurred); *Fargo* v. *Phillips*, 58 Fed. Appx. 603, 608–609 (6th Cir.) (when uncalled alibi witnesses

would have left narrow window of time during which crime and various related actions could have been committed, majority rejected habeas court's conclusion that failure to call partial alibi witness was potentially prejudicial), cert. denied, 539 U.S. 932, 123 S. Ct. 2585, 156 L. Ed. 2d 613 (2003); *Fawaz* v. *Wolfenbarger*, United States District Court, Docket No. 09-14965 (DML) (E.D. Mich. April 5, 2013) (failure to present alibi that would have covered all but three hours of night when murder occurred was deficient but not prejudicial); *Rector* v. *Wolfe*, United States District Court, Docket No. 5:07CV1229 (CAB) (N.D. Ohio June 23, 2009) (no prejudice when indictment alleged that rapes occurred on or about Thanksgiving and Christmas holidays and alibi witnesses would have eliminated Thanksgiving Day, Christmas Eve, and Christmas Day), aff'd, 499 Fed. Appx. 532 (6th Cir. 2012); *Halton* v. *Hesson*, 803 F. Supp. 1272, 1277 (M.D. Tenn. 1992) (evidence that petitioner worked as usher during afternoon of crime would not have foreclosed possibility that he committed assault during remainder of afternoon or evening); *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 552, 562–63, 138 A.3d 378 (despite fact that state's case was relatively weak and rested primarily on testimony of one eyewitness of questionable credibility, failure to present alibi witnesses deemed neither deficient nor prejudicial because petitioner could have helped set fire, run home, and pretended to be asleep before arson became apparent), cert. denied, 321 Conn. 923, 138 A.3d 284 (2016); *Ostolaza* v. *Warden*, 26 Conn. App. 758, 767, 603 A.2d 768 (finding no deficient performance because "the petitioner's work schedule constituted only a partial alibi that demonstrated his opportunity to commit the crimes charged on several of the days alleged in the information"), cert. denied, 222 Conn. 906, 608 A.2d 692 (1992); *Beasley* v. *State*, 18 So. 3d 473, 492 (Fla. 2009) (no prejudice when alibi would have left between seventy five and ninety minutes unaccounted for on day of murder); *White* v. *State*, 293 Ga. 825, 827, 750 S.E.2d 165 (2013) (although failure to carefully peruse file and raise alibi defense constituted deficient performance, there was no prejudice because "there was a window of time on the night of the murder for which appellant's whereabouts could not be verified" by alibi); *People* v. *Wynekoop*, 359 Ill. 124, 136, 194 N.E. 276 (1934) ("[a]s the crime is shown to have been committed some time during the five and one-half hour period between 3 and 8:30 [p.m.] the failure of the defendant to offer any alibi proof during the three periods of time aggregating nearly two hours is fatal"), cert. denied, 295 U.S. 758, 55 S. Ct. 915, 79 L. Ed. 1700 (1935); *King* v. *State*, 505 S.W.3d 419, 426 (Mo. App. 2016) (evidence that provides only partial alibi "cannot entitle movant to [postconviction] relief"); *State* v. *Razo*, Ohio Court of Appeals, Docket No. 05CA008639 (July 27, 2005) (failure to interview potential alibi was not prejudicial even though witness would have placed defendant out of state during

large portion of period during which rapes allegedly were committed), appeal denied, 839 N.E.2d 404 (Ohio 2005); *State* v. *Jones*, Ohio Court of Appeals, Docket No. 97-CA-648 (April 14, 1998) (when circumstantial evidence of guilt was strong, no prejudice even though partial alibi would have covered "a large portion of the time" when crime could have occurred); *Carruthers* v. *State*, Tennessee Court of Criminal Appeals, Docket No. W2006-00376-CCA-R3-PD (December 12, 2007) (no prejudice when, even if testimony related to date of crime, it provided partial alibi at best); *Johnson* v. *Virginia*, 210 Va. 16, 20, 168 S.E.2d 97 (1969) (trial court properly declined to give requested alibi instruction when defendant's alibi would have covered all but one hour and forty-five minutes of nine hour period during which crime could have been committed); *Tinsley* v. *Commonwealth*, Virginia Court of Appeals, Docket No. 1026-11-2 (May 1, 2012) (explaining that alibi must cover sufficient time to render defendant's presence impossible or highly improbable, and concluding that evidence that appellant was twenty to thirty minutes away from crime scene fifteen minutes before crime occurred did not justify alibi instruction). In fact, many jurisdictions apply what amounts to a per se rule that a petitioner cannot establish prejudice unless the undiscovered alibi would have covered the entire time period during which the crime might have been committed.[6] See *Johnson* v. *Virginia*, supra, 19–20.

The majority, while generally acknowledging the principle for which these cases stand, argues that none of them is on point and that the present case does not truly present a partial alibi. The distinction to which the majority appeals—a distinction that apparently has never previously been articulated by either court or commentator—is set forth in two hypothetical scenarios. In the first scenario, the crime could have been committed on any one of ten days and the defendant has an alibi for nine of those days. In the second scenario, the evidence suggests a high chance that the crime was committed on days one through nine, and the defendant has an alibi for those days, but not the tenth day. It is the view of the majority that the first scenario presents a partial alibi but that, for reasons that are not entirely clear, the second scenario presents a *complete* alibi, regardless of the fact that the crime reasonably could have been committed outside of the alibi period in both instances. I am not certain that the novel distinction that the majority is trying to draw is a meaningful one. In the absence of any additional information, if a crime could have been committed on any one of ten days, then the likelihood that it was committed on the particular day that the hypothetical defendant lacks an alibi is ten percent. Such a case is no different from one in which the evidence suggests a 90 percent chance that a crime was committed on a day where the defendant had an alibi and a 10 percent

chance that it was committed on a different day. The probabilities are the same.

But we needn't count the angels on the head of a pin. There are at least two other reasons why the argument of the majority fails. First, contrary to the assertions of the majority, the cases that I have cited as authority for the partial alibi rule are not all of the nine in ten day variety. In a number of them, the evidence indicated 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 left open some realistic possibility that the crime had been committed outside of the alibi period, however, the court applied the partial alibi rule.

Consider *Fargo* v. *Phillips*, supra, 58 Fed. Appx. 603. In that case, the overlooked alibi witnesses, whom the trial court found to be truthful, would have testified that they were with the petitioner on the day in question. Some of those witnesses were with the petitioner until just before twilight and others beginning just after dark. See *Fargo* v. *Phillips*, 129 F. Supp. 2d 1075, 1080–84 (E.D. Mich. 2001), rev'd, 58 Fed. Appx. 603 (6th Cir. 2003). As the dissenting judge explained, once the habeas court's erroneous assumptions regarding the time of sunset were corrected, the testimony of the alibi witnesses would have left only a very brief window of time, potentially as narrow as nineteen minutes, for the petitioner to bid goodbye to his friends, leave his house, pick up the complainant from her house, drive her back to his place, watch television with her, engage in foreplay with her, perpetrate a sexual assault, get dressed, drive the complainant to a friend's house, and then drive to the home of another alibi witness. *Fargo* v. *Phillips*, supra, 58 Fed. Appx. 609 (Moore, J., dissenting). Nevertheless, the majority in that case concluded that the failure of defense counsel to interview and call the alibi witnesses was not prejudicial because there was a sufficient window of time in which the crime could have been committed on that evening. Id., 608; see also *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 559–60 (failure to call partial alibi witness in arson case deemed nonprejudicial when alibi would have left just one minute for petitioner to set fire, run home, return to upstairs bedroom, and feign sleepiness); *Tinsley* v. *Commonwealth*, supra, Virginia Court of Appeals, Docket No. 1026-11-2 (alibi that would have placed defendant estimated twenty to thirty minutes away from scene of crime fifteen minutes before it occurred deemed incomplete because it was not impossible that favorable road conditions and aggressive driving could have allowed him to arrive there sooner). Accordingly, in my view, the majority is simply incorrect when it pronounces, without citation to a single authority, that "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.''

The second issue that I have with the majority's characterization of the partial alibi rule is that it is inconsistent with the very concept of an alibi. As the sources that I have cited previously in this dissenting opinion make clear, an alibi defense 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 being committed. The second hypothetical scenario that the majority discusses, thus, presents no more of an alibi than does the first; in both instances, there is a realistic possibility that the crime was committed outside of the alibi period.

The majority dismisses the idea that an alibi could be defeated, as a matter of law, if there were only a small possibility that the crime was committed at a different time. Of course, that is exactly what the word "impossible" means, and other jurisdictions have adopted the stringent version of the partial alibi rule that the majority criticizes as "clearly [defying] reason and common sense." See *State* v. *Tutson*, 278 Conn. 715, 733 n.10, 899 A.2d 598 (2006). For present purposes, however, it is unnecessary to resolve whether, under Connecticut law, a legally cognizable alibi must render the defendant's presence at the crime scene impossible or merely highly improbable. In the present case, as I explain in the remainder of this part of my dissenting opinion, there was a substantial possibility that the victim was killed outside of the alibi period. Indeed, the jury reasonably could have credited testimony indicating that the petitioner himself admitted to having seen the victim alive later that evening. The only evidence that the victim was killed *during* the alibi period, in fact, are inferences from the barking of dogs, ambiguous testimony regarding the victim's curfew, and pure speculation regarding how an independent, precocious teenaged girl might or might not have spent her evening. There is literally nothing more. By whatever standards we define a partial alibi, this was one.

Finally, it bears noting that the majority consistently states that the petitioner is only required to demonstrate that the jury reasonably could have found that the murder took place during the alibi period. The majority cites no authority in support of this proposition. Indeed, as I have previously explained in this dissenting opinion, such a standard is inconsistent with *Strickland* and its progeny. See part I A of this dissenting opinion. The argument of the majority, however, also fails on its own terms. If the evidence suggested that there was a 51 percent chance that the crime was committed between 9:30 and 11 p.m., for example, then a jury certainly could reasonably determine that it was, in fact, committed within that time. But I am not aware of any court that has held that a defendant has a legally cognizable

alibi defense when the alibi fails to account for nearly half of the time during which the crime could have been committed. That cannot be the correct standard.[7]

B

Analysis

The dispositive question on reconsideration of our decision in *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 426, is, therefore, whether the petitioner's alibi story, if believed by the jury, *would have* constituted a full alibi or only a partial one. If, as the state contends, his purported visit to the Terrien home was merely a partial or incomplete alibi, accounting for less than two hours out of the approximately four to eight hour period during which the murder reasonably could have been committed then, as a matter of law, defense counsel's failure to bolster the alibi by presenting Ossorio's testimony could not have been prejudicial, regardless of the overall strength of the state's case. Accordingly, I turn my attention to the evidence that was presented at trial with respect to the timeframe during which the victim could have been killed and the limited portion of that timeframe encompassed by the purported alibi.

1

Scope of the Alibi

The jury heard the following evidence with respect to the time during which the petitioner purportedly visited the Terrien home. It was undisputed that James Terrien, Rushton Skakel Jr. (Rushton), and John Skakel (John) left the Skakel residence in a family car, a Lincoln, just before 9:30 p.m. on October 30, 1975, shortly before Helen Ix (Helen) and Geoffrey Byrne took their leave of the Skakel residence and Julie Skakel (Julie) drove her friend Andrea Shakespeare home. It also was undisputed that, before returning from the Terrien home, Rushton and John watched a Monty Python television program. Although memories varied somewhat as to the precise broadcast time of the show, a published television schedule from that week indicates that the show aired on channel thirteen from 10 to 10:30 p.m. The accuracy of that document is undisputed.

What is in dispute is the time at which Rushton and John—with or without the petitioner—returned to the Skakel residence. A few weeks after the murder, the petitioner himself informed the police that he and his brothers had arrived back from the Terrien home at about 10:30 or 11 p.m. Although Rushton could not be certain of the exact times, he testified that the boys stayed at the Terrien home for approximately fifteen to twenty minutes after the show ended at 10:30 p.m., and that the drive home took between twenty and twenty-five minutes. This would have placed the boys back at the Skakel residence sometime between 11:05 and 11:15 p.m. Terrien testified that the Skakel boys

left his house a little before 11 p.m. Finally, John recalled that they left the Terrien home at about 11 p.m. and made it home around 11:15 p.m. Accordingly, the evidence would have placed the boys back in the Belle Haven neighborhood of Greenwich sometime between 10:30 and 11:15 p.m., with the preponderance of the evidence pointing to the period between 11:00 and 11:15 p.m. I do not understand the majority to disagree with this analysis.

2

Possible Time of Death

The principal question to be resolved, then, is whether it is highly likely that the victim was killed prior to the 10:30 to 11:15 p.m. time period or whether the jury reasonably could have found that she was killed later that night, after the Lincoln and its occupants returned to Belle Haven. 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.

In support of his claim that it is highly likely that the jury concluded that the murder was committed between 9:30 and 10 p.m., the petitioner offers the following five arguments: (1) the state itself believed and indicated at trial that the time of death was before 10 p.m., (2) the forensic evidence supports that timeline, (3) the victim's curfew supports that timeline, (4) the evidence of barking dogs supports that timeline, and (5) the jury's request to have evidence read back relating to the alibi indicates that the jury believed that the alibi was relevant. In addition, the majority offers three additional arguments in support of the petitioner's position: (1) that the state failed to articulate a plausible explanation of where the victim might have been between the time she left the Skakel residence and approximately 11 p.m., when the Lincoln returned from the Terrien home, (2) that the prosecutor argued to the jury that the victim never made it home on the night of the murder, precluding the possibility that she went home and then back out again, and (3) that the victim was killed along the most direct route between the Skakel residence and her home. I consider each of these arguments in turn.

a

The State's Case

The petitioner first argues that the state itself has proceeded on the assumption that the murder had occurred by 10 p.m. and, specifically, that the prosecution's closing argument demonstrated that belief to the jury. I disagree.

In fact, throughout the state's closing argument, the prosecution repeatedly informed the jury that it could convict the petitioner of the murder, even if it credited his alibi story, because the crime reasonably could have been committed after he returned from the Terrien home. The prosecutor began his closing argument by discussing the charges against the petitioner: "What's in the information. First of all, the when and the where. Between 9:30 p.m. and 5:30 a.m., at Walsh Lane, Greenwich, Connecticut—it's no more specific than that . . . ." He then walked the jury through the state's timeline of the night of the murder. With respect to the trip to the Terrien home, the prosecutor explained: "Exactly who went [to the Terrien home] is one of our controversies in this trial. But, as you will see, it is not one that the state necessarily has to resolve in order for you to convict." Later, when the prosecutor first addressed the petitioner's alibi defense, he stated as follows: "[T]he alibi, that is the cornerstone of the defense here. It is a somewhat unbalanced alibi because due to the defendant's ongoing tales in the 1990s, you can accept the alibi at face value and still convict the defendant but you of course will want to take a careful look at that alibi."

The prosecutor continued to follow this belt and suspenders approach in his rebuttal, after defense counsel had laid out the alibi theory. Early in the rebuttal, the prosecutor argued as follows: "Let's talk about time. I spoke about this in my opening. The concept of exact time for a murder is obviously of great concern for the defense, as it should be. Because from 1975 until 1992 or thereabouts, [the petitioner] had a nice, neat 9:30 [or] 10 [p.m.] type alibi. But, as you will see . . . the [petitioner] has dug himself a hole that throws his alibi somewhat to the wind.

"Keep in mind that as regards time, the state has to prove beyond a reasonable doubt only that [the victim] was murdered between 9:30 p.m. and 5:30 a.m. *I am sure you have noted that the defense has presented a partial alibi only*, the trip to [the Terrien home from] 9:30 to 11 [p.m.] or so . . . at night." (Emphasis added.)

Moreover, the prosecutor specifically explained that the jury need not reach a unanimous decision with respect to the alibi and time of death: "As regards time, you must be unanimous that the crime occurred during the time set in the information, 9:30 [p.m.] to 5:30 [a.m.] and that's all. . . . For that matter, if half of you . . . figured the crime happened early and not accept the alibi and the other half of you were to accept the alibi and conclude the [petitioner] . . . came by later on at night and did it . . . you must convict.

"For that matter, all [twelve] of you . . . could each come up with his own personal time. As long as everybody's time came up between 9:30 [p.m.] and 5:30 [a.m.]

and you are convinced beyond a reasonable doubt that [the petitioner] murdered [the victim], you must convict."

Finally, the prosecutor addressed the forensic evidence, arguing against the conclusion of the defense expert that the murder probably happened around 10 p.m. The theory pressed by the state, as I will discuss more fully hereinafter, was that that medical evidence was fully consistent with a time of death as late as 4 a.m. The prosecutor also argued that the only evidence favoring the 10 p.m. time of death—barking dogs and the victim's purported curfew—was "open to any number of alternative constructions." He concluded that portion of his argument with the observation that "all of this falls within 9:30 [p.m.] to 5:30 [a.m.] and that's all that is alleged in the information."[8]

Only at that point in his rebuttal, after having argued at length that the Terrien alibi was incomplete and immaterial because the victim could have died well after 10 p.m., did the prosecutor proceed to argue, *in the alternative*, that the alibi story itself was suspect.[9] Moreover, although it is true that the prosecution implicitly acknowledged that the state initially had assumed that the victim was killed soon after everyone departed from the Skakel residence at 9:30 p.m., the prosecution made clear that the reason that the state had expanded its working theory of the timeframe during which the murder could have been committed in the 1990s was because it became aware at that time that the petitioner himself had admitted to having seen the victim alive later in the evening.[10]

Accordingly, there simply is no reasonable possibility that the jury could have concluded on the basis of the prosecution's closing argument that it continued to be the state's position at the time of trial that the murder must have been committed before 10 p.m. If any doubt remains in this regard, it surely is resolved by the fact that, at trial, defense counsel repeatedly acknowledged in the presence of the jury that the state viewed the trip to the Terrien home as only a partial alibi. Indeed, in his opening remarks, defense counsel recalled that, during jury selection, "[the state] half apologized almost to all of you that they are only going to be able to prove that the crime was committed between 9:30 [p.m.] and 5:30 [a.m.] and that will become very important." Then, in his own closing, defense counsel reflected on the import of a medical examiner's report as follows: "[A]ll we know [is that this] report . . . says . . . that [the murder] occurred at 9:30 [p.m.] to 4:30 or 5:30 [a.m.] the next morning. And [the state] points out, well, that's all we have to tell you."

Later in his closing, defense counsel returned at several points to the time of death, each time remarking on the state's partial alibi theory. Specifically, defense counsel stated the following: "[t]ime of death, the state

would have you believe that this isn't such a big deal, they can go both ways on this"; "you [may] buy the state's alternative theory that [the petitioner] came back after 11 [p.m.] and then went out and did this horrible thing"; and "[t]he trip to the Terrien house . . . I am guessing at least that the state is going to say well, he didn't go but maybe he did, we are not sure. Well, I don't believe in offering up a buffet table of excuses and I don't believe that they should be giving you an alternate choice as well, maybe he did and maybe he didn't."[11]

Indeed, the trial court itself highlighted the state's partial alibi theory, twice instructing the jury as follows: "You should also bear in mind the state's claim that even if you find that the defendant was where his testimony and that of his witnesses indicates, he could still have reached the scene of the crime in time to have committed it . . . ." Defense counsel later took exception to the fact that the court's jury instructions placed too much emphasis on the fact that time of death was unimportant.[12] In light of the repeated statements by the prosecutor, defense counsel, and the trial court that the state was alleging only that the murder had been committed between 9:30 p.m. and 5:30 a.m. and that the petitioner could have committed the crime after returning from the Terrien home, there simply is no reasonable possibility that the jury could have concluded that it was the state's view at the time of trial that the crime had been committed by 10 p.m.

b

The Forensic Evidence

I next address the petitioner's argument that the forensic evidence demonstrated that the time of death was approximately 10 p.m. The following additional facts are relevant to this argument.

At trial, the jury heard evidence, either directly or indirectly, regarding the opinions of three different medical experts who, at some point, had opined as to the probable time of the victim's death. The first opinion was that of Elliot M. Gross, a physician who was the state's chief medical examiner when the murder occurred in 1975 and who had performed the official autopsy on the victim. Gross was not available to testify at the petitioner's trial in 2002, and the report that resulted from his autopsy does not state a conclusion as to the time of the victim's death. Nevertheless, Thomas Keegan, a captain in the detective division of the Greenwich Police Department, testified that, during his investigation of the murder, he sought Gross' opinion as to the time of death. Although Keegan did not testify as to Gross' precise opinion as a result of a hearsay objection,[13] Keegan did indicate that the time window that Gross had given to him on the basis of the forensic evidence was too broad to be helpful in investigating

the crime.[14] The only reasonable conclusion the jury could have drawn from that testimony was that Gross' conclusion was consistent with the state's theory that the crime need not have occurred between 9:30 and 10 p.m.

The jury also heard the testimony of Harold Wayne Carver, the state's chief medical examiner at the time of trial. Carver explained that three forensic factors—lividity, rigor mortis, and digestion—could be used to help identify the time of death.

Carver first discussed lividity, or livor mortis, the tendency of blood to pool in and discolor the lower portions of a body after death. He explained that lividity begins to occur within a couple of hours and that it becomes fixed "somewhere over four, usually six or more hours . . . ." In the present case, Carver explained that lividity could not be used to pinpoint the time of death because the autopsy had not been performed until more than one day after the body was discovered and also because the body was turned over five or six hours after it was found. Moreover, even if lividity had been fixed by the time that the victim's body was discovered at 12:30 p.m. on October 31, on the basis of Carver's testimony the jury best could have concluded that she probably had been killed sometime prior to 6:30 a.m. on that day.[15]

Second, Carver considered the importance of rigor mortis, the stiffening of muscles that occurs after death. Carver testified that the speed at which the process occurs can vary depending on the ambient temperature and the physical condition of the deceased but that, generally, rigor mortis begins to set in after several hours and persists for between twelve and twenty four hours. In the present case, Keegan observed that the victim was in rigor when he examined her around 1:15 p.m. on October 31. In light of the variable and relatively lengthy time that rigor mortis persists, Carver stated that he could not determine the victim's time of death with precision. He could opine only that "[s]he died several, many hours before she was found" and that the time of death was probably "closer to 9:30 [p.m. on October 30] than [noon on October 31]." In other words, the victim likely died at some time prior to 5 a.m. on October 31, and certainly before 9:30 a.m. or so.

Finally, Carver discussed the forensic evidence relating to the victim's digestive process. He noted that the victim last ate between 6 and 6:30 p.m. on October 30, which was consistent with the testimony of the victim's mother, Dorothy Moxley, that the victim began her evening meal around 5:45 p.m. and that she ate "just before she went out" at around 6:30 or 6:45 p.m. Carver further testified that, at the time of the autopsy, the stomach contained only some blackish fluid and the small intestine contained some semi-liquid feces. He further explained that food typically passes from the stomach

into the small intestine between one and two hours after eating, and then takes approximately twenty-four to forty-eight hours to pass through the small intestine. Carver then testified that digestion more or less terminates upon death. On the basis of this information, Carver was unable to draw any useful conclusions regarding the victim's likely time of death. The meal that she ate at 6 or 6:30 p.m. presumably would have exited her stomach by approximately 8:30 p.m. and, in the normal course of digestion, would have remained in her small intestine—where it remained at the time of death—until at least the next morning.

Considering all of these factors in tandem, Carver concluded that the forensic evidence revealed by Gross' autopsy was consistent with the defense's theory that the victim died between 9:30 and 10 p.m. but also was consistent with the state's theory that she could have been killed any time before midnight or 1 a.m. Accordingly, Carver agreed with Gross' opinion that it was impossible to pinpoint or even meaningfully narrow the time of death on the basis of forensic evidence.

Unfortunately, the majority fails to acknowledge any of Carver's extensive forensic analysis, which makes clear that there was absolutely no forensic support for the conclusion that the victim was likely killed before 10 p.m. Moreover, the majority represents that "Carver . . . 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," creating the misleading impression that the expert somehow suggested that a time of death after 10 p.m., while theoretically possible, was extremely unlikely. (Emphasis added.) In fact, Carver said nothing of the sort. He gave absolutely no indication that it was more likely that the victim died between 9:30 and 10 p.m. than at 11:15 p.m. or later that evening.

The third witness to testify with regard to the forensic evidence was the defense expert, Joseph A. Jachimczyk, a well respected retired forensic pathologist and medical examiner from Texas, who consulted with the Greenwich Police Department during the initial investigation of the victim's murder. Although Jachimczyk's testimony differed slightly from that of Carver with respect to the forensic evidence, none of his *medical* opinions could support a determination that the victim likely died between 9:30 and 10 p.m.[16] Moreover, although there is no doubt that Jachimczyk is a highly qualified expert, neither Carver nor Gross' expertise was in any way impugned at trial, and there is no basis for concluding that the jury would have found the testimony of Jachimczyk to be more credible to the extent that it may have differed.

With regard to lividity, Jachimczyk testified that the process usually begins between two and four hours of

death and becomes fixed between eight and twelve hours. Because lividity was first noted—and then only faintly—by Keegan at 1:15 p.m. on October 31 and the victim's body was not moved[17] until later that afternoon, the most that can be said on the basis of Jachimczyk's testimony is that the victim probably died sometime prior to dawn on October 31.

In terms of rigor mortis, Jachimczyk explained that the process usually begins between four and eight hours and persists for about twenty-four hours. Importantly, he also agreed with Carver, and emphasized on several occasions, that rigor mortis is variable and its onset and duration can depend on factors such as ambient temperature. To the extent that rigor mortis was of any use in estimating the time of death, then, Jachimczyk's testimony would support a conclusion only that the victim died sometime after 1:15 p.m. on October 30 and before the morning of October 31.

Lastly, with respect to digestion, whereas Carver was under the impression that the victim had taken her last meal between 6 and 6:30 p.m., Jachimczyk proceeded under the assumption that she last had eaten at 5:30 p.m. Notably, whereas Carver testified that the stomach empties its contents within one or two hours, Jachimczyk was of the belief that the process takes four hours on average. This means that if the victim last ate around 6, as testimony from her mother suggests, then the *earliest* she could have been killed, given that her stomach was empty at the time of death, was approximately 10 p.m.[18] This insight will become important when I discuss the nonforensic factors.[19]

To summarize the forensic testimony that was presented to the jury, we know for certain that the victim died sometime after 9:30 p.m. on October 30, which is when she was last seen alive at the Skakel residence. The fact that rigor mortis and some degree of lividity were noted when her body was found in the early afternoon on October 31 suggests that she likely died sometime before dawn that day, consistent with the state's charging document. In other words, the forensic evidence itself really tells us almost nothing beyond the undisputed fact that the victim was still alive at 9:30 p.m. on October 30 and that she had died by approximately 5:30 a.m. the following day.

Specifically, nothing in the testimony of any of the medical experts regarding the forensic evidence supports a conclusion that the victim was more likely to have died between 9:30 and 10 p.m. on October 30 than at, say, 11:15 p.m. Although Jachimczyk did make the conclusory statement that he *considered* the forensic evidence when forming his opinion that the victim likely died around 10 p.m., at no time did he specifically tie any of the forensic factors to that time frame in any manner, nor does any of his specific forensic testimony support such a conclusion. Moreover, when pressed,

Jachimczyk acknowledged that forensic factors such as rigor mortis were consistent with a much broader timeframe, including a time of death as late at 4 a.m. on October 31. He also conceded that "this isn't a precision type of thing. It is a range. [There] can be an honest difference of medical opinion." In fact, it became clear from his testimony and from his report that, when he settled on the specific time of 10 p.m. as the probable time of death, he did so largely on the basis of nonmedical factors, such as reports of dogs barking at that time and his belief that the victim had a 10:30 p.m. curfew. Jachimczyk testified that, at best, he could pinpoint the time of death "plus or minus an hour or so." Adding about one hour or so onto his 10 p.m. estimate would, of course, put the time of the victim's death between 11 p.m. and midnight, right when the occupants of the Lincoln were returning from the Terrien home. It is particularly troubling that the majority, which relies so heavily throughout its opinion on the premise that "the substantial weight of the evidence indicated that the murder most likely was committed between 9:30 and 10 p.m.," fails even to acknowledge that Jachimczyk, the only witness who even came close to pinpointing the murder at that time, conceded that his estimate was only accurate to within a few hours. See footnote 8 of this dissenting opinion.

Ultimately, then, the petitioner is unable to point to a single piece of *medical* evidence or testimony indicating that the victim was killed at 10 p.m., or even anywhere close to that time. In fact, the forensic evidence implied that 10 p.m. was likely the *earliest* time that the victim could have been killed, because of the four hours required for her 6 p.m. meal to pass into her small intestine, but far from the latest. Certainly none of the specific expert testimony indicated that an 11:15 p.m. time of death was at all improbable, and neither expert offered any *medical* rationale as to why 10 p.m. would have been more likely than 11:15 p.m. Although Jachimczyk was, of course, free to consider nonmedical evidence such as curfews and barking dogs in forming his opinion as to the likely time of death, there was no suggestion that he had any special expertise in the fields of teenage or canine behavior. One may assume that the jury, which had access to more detailed, accurate, and timely evidence about the barking dogs and the victim's curfew than did Jachimczyk, would have felt free to reach its own conclusions in that regard.

c

The Curfew

I next consider the petitioner's argument that the victim had a 9:30 p.m. curfew on the night of October 30 and that she likely died at approximately 10 p.m., while walking home from the Skakel residence to comply with that curfew. There are many problems with this argument.

First, and most obviously, the petitioner's argument fails on its own terms. The argument is predicated on the assumption that the victim reliably honored her curfew and, therefore, that she would not voluntarily have stayed out past 9:30 p.m. on October 30 participating in the mischief night festivities, fraternizing with boys, or otherwise occupying herself. The problem is that the victim's last known whereabouts were at the Skakel house at approximately 9:30 p.m., the purported curfew time. That was when the other teenagers visiting the Skakel residence that evening left for home, including the victim's friend Helen, who made a point of being home by 9:30 p.m. to comply with her own curfew. The victim lived right across the street, less than one minute's walk from the Skakel residence. If, as Jachimczyk seemed to postulate, the victim was killed en route while walking home to comply with her curfew, then one would expect that the time of death would have been just moments after 9:30 p.m., rather than closer to 10 p.m.

Although the difference between a 9:30 and 10 p.m. time of death may seem insignificant, there are several reasons why, on the petitioner's theory of the case, it is unlikely that the victim died at 9:30 p.m. As I have noted, Jachimczyk's testimony suggested that it was unlikely that she would have fully digested her dinner by that time. Moreover, as I discuss more fully hereinafter, the dog barking on which the petitioner relies did not commence until at least 9:40 or 9:45 p.m.

The second problem with the petitioner's curfew theory is that it is extremely unlikely that the jury concluded that the petitioner had a 9:30 p.m. curfew on the night in question. Although the victim's mother initially may have told the police that she expected the victim home by 9:30 p.m. on school nights, at trial she made clear that any curfew would have been at least one hour later on the night in question, because the victim's school was not in session on Friday, October 31. See footnote 33 of this dissenting opinion. In fact, the victim's mother explained at trial that, within one week of the murder, she clarified to the police that, because Thursday, October 30, had not been a school night, she would have expected the victim home at approximately 10:30 p.m. rather than 9:30 p.m.

More importantly, the victim's mother repeatedly explained at trial that, because the victim was generally responsible and well behaved, she really had no formal curfew at all. Specifically, she testified that there was just a general expectation that the victim would come home at a reasonable hour, which could have been as late as 11 p.m. on the night in question.[20] For example, the victim's mother variously testified as follows:

- "I thought she would probably be home about 10:30 [p.m.]."

- "I thought she would be home [at] about 10:30 [or] 11 [p.m.]."
- "[P]robably 10:30 or 11 [p.m.] would have been all right."
- "You know, we really never had a specific curfew time. I mean, we didn't have a specific time when the kids had to be home because they were always so good, we never had to do that. . . . So, for me to say that it was exactly 9:30 [p.m.] or, you know, it's difficult because we just didn't have those. . . . [I]t wasn't a curfew. I mean, it's school tomorrow, come home at a decent hour."
- "[W]e did not have a set time when the kids had to be home—I mean, it wasn't, you go out and you be home at 9:30 [p.m.]. We didn't do that. We didn't have to. . . . I am sure I put it some time . . . between 9:30 and 10:30 [p.m.] because that's a logical time I would think for kids to be home if they were going to school."
- "[Expecting the victim home at around 9:30 p.m. on school nights and 10:30 p.m. on other nights] wasn't written in stone. . . . I didn't have to . . . . [W]e didn't have these . . . ."
- "[T]he time was not set in stone."

The victim's brother, John Moxley, provided further support for the conclusion that there was no firm curfew at 9:30 p.m. or even 10:30 p.m., and certainly not one that the victim reliably kept. His testimony indicated that he was not concerned when the victim had not come home by 11 p.m., as he assumed that she was out celebrating mischief night, and that his mother was only "a little worried" at that time. If the victim invariably came home each night by 9:30 p.m., as the petitioner's argument posits, then one would expect her mother to be more worried when she had not returned by 11 p.m.

On the basis of the trial evidence, then, it is reasonable to assume that the jury concluded that, to the extent that the victim would have felt compelled to return home by any particular time on the evening of October 30, that time would have been no earlier than 10:30 or 11 p.m. Indeed, that is precisely how this court summarized the trial evidence when we reviewed this case on direct appeal. See *State* v. *Skakel*, supra, 276 Conn. 641 (noting that victim's mother "expected that the victim would be home that evening by 10:30 or 11 p.m.").

Third, despite the testimony of the victim's mother, it is doubtful that the jury concluded that the victim always complied with her parents' informal curfews or expectations. It is true that the victim's mother testified that her children did not require a curfew because they were well behaved and reliably came home at a reasonable hour. Nevertheless, even a quick perusal of the victim's diary—excerpts of which were admitted into evidence—would have left the jury with a rather different impression. A common subject of the victim's diary

entries was her evening social activities. In none of those entries did she make any mention whatsoever of a curfew or indicate that she felt compelled to be home by a certain time. More importantly, several entries logged in the weeks before her death suggest that she did not reliably return home by 9:30 p.m. on school nights or 10:30 p.m. on other nights. For example, on Thursday, September 4, she wrote that her mother was "really ticked" at her after she returned from pool hopping on a school night with the petitioner, David Skakel, and Thomas Skakel (Tommy), as well as her friend Jackie Wettenhall, and that as a result she might not be allowed to attend an upcoming concert. Three days later, on Sunday, September 7, the victim stayed at the Skakel house at least as late as 9:40 p.m. Then, on September 21, she wrote that she had walked home from a block party the day before at 11:30 p.m., after which she went over to Wettenhall's house at 12:45 a.m., went to the Skakel house for one-half hour, and then went home, after which Tommy and others came over to visit her from approximately 2:15 to 4:30 a.m.[21]

Fourth, it is entirely possible that the victim did, in fact, return home prior to 10:30 p.m., only to go back out later in the evening. The victim's mother testified that, between 10 and 11 p.m. on October 30, she was occupied in her bedroom, cleaning up painting supplies and showering and, therefore, that it was possible—albeit unlikely, in her opinion—that the victim had returned home during that time and then gone out again without her knowledge. Although the victim's mother indicated that she was not aware that her daughter had done that before, the jury, presumably having read the victim's diary, knew that she had in fact returned home and then gone back out again late at night to fraternize with the Skakel boys on at least one prior occasion during the fall of 1975.[22]

For similar reasons, the jury may have hesitated to credit the mother's statement that it was unlikely that the victim had gone back out that night without informing her because the victim "was very good at telling [her] everything that was going on." In fact, the victim's mother also testified that, to the best of her knowledge, the victim had never visited the Skakel house, the Skakel boys had never been to her house, and the victim did not even know the Skakel children. In her diary, however, the victim reveals that she spent at least eight evenings with Tommy and or the petitioner between September 4 and October 4 of that year, several of which involved her visiting the Skakel house or their recreational vehicle.

Accordingly, I think it is extremely unlikely that the jury would have concluded on the basis of the evidence presented at trial that the victim would have felt compelled to return home by 9:30 p.m., or even 10:30 p.m., and, therefore, that her death must have occurred by 10 p.m. Rather, the trial testimony of her mother and brother, as well as her own words as memorialized in

her diary, give every indication that she could have remained out—or gone back out—until at least 11 p.m. or so, just around the time that the occupants of the Lincoln were returning from the Terrien home.

d

The Barking Dogs

The petitioner next argues that the "unusual behavior and incessant barking" by certain neighborhood dogs at approximately 10 p.m. supports the conclusion that the victim was killed at that time. This argument echoes the conclusions of Jachimczyk and the habeas court that reports of barking dogs in the vicinity of the Moxley home between 9:30 and 10 p.m. on the night in question indicate that the murder likely occurred at that time. I am not persuaded.

Dogs, of course, are wont to bark, and the jury heard undisputed testimony from multiple witnesses that both of the dogs at issue—the Skakel family's German shepherd, Max, and the Ix family's Australian Shepherd, Zock—as well as other neighborhood dogs, were chronic barkers. Although my search of the case law revealed scant authority on the question of canine cacophony—and that mostly of the dog that didn't bark variety—what little there is confirms that a jury may reasonably disregard evidence of barking as having limited probative value. See, e.g., *Robinson* v. *Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016) (observing that "self-respecting" dogs bark).

As defense counsel readily conceded in his closing argument, there was no expert testimony presented at trial to support the petitioner's theory that the barking or agitation of a few neighborhood dogs provides reliable evidence of the time of a murder. It is true that Jachimczyk, in concluding that the victim likely died around 10 p.m., reasoned that "there were at least two dogs barking and agitated and something was obviously bothering them . . . right around that time . . . ." There is no indication, however, that Jachimczyk possessed any expertise in canine behavior, that he was more qualified than the jury to interpret the meaning of a dog's bark, or that he was aware of, or ever even considered, whether the behavior of those dogs might have been in reaction to the mischief night festivities. Indeed, the fact that both of the medical experts who testified agreed that the crime could have occurred later in the evening indicates that neither was persuaded that the canine disturbance necessarily was related to the crime.

More importantly, it is highly unlikely that the jury would have concluded that the dogs at issue were good barometers of criminal activity or that their behavior could be used to pinpoint the time of the victim's death. With respect to Zock, although it is true that Helen characterized his vocalizations on that evening as angry,

violent, and somewhat atypical, at other times she indicated that his barking was unusual more for its duration than its intensity. Perhaps more importantly, Helen also acknowledged what jurors' own common sense must certainly have told them: that Zock might have barked more protractedly, vociferously, and fearfully on October 30 because teenagers and other children were "out and about around the Belle Haven area" for "mischief night."[23] On that night, as the petitioner himself colorfully described, bands of local teens raced through the yards of Belle Haven egging cars, setting off fireworks, and discharging homemade ballistics such as "funnelators," smoke bombs, and projectiles fabricated from shaving cream cans and butane lighters.[24] Helen specifically acknowledged that that sort of destructive behavior could have caused Zock to bark more violently than usual. The jury was free to credit that testimony.[25]

It is true that Helen testified not only that Zock was barking excessively on the evening of October 30th, but also that he would not come in when she called him. It is difficult to know how much stock the jury may have placed in the fact that Zock, an Australian shepherd, declined to comply when a fifteen-year-old tried to call him into the house. We do know, however, that the jury heard evidence that Zock was a "difficult" dog that was loved only by his family. They also learned that neighborhood teens, including the petitioner, had been known to taunt the poor creature and even shoot him with BB guns. In the face of such treatment, it would be little surprise if Zock were to approach mischief night in a spirit of aggressive trepidation and recalcitrance. Certainly, the jury permissibly could have drawn that inference.

The plausibility of the petitioner's two dog night theory also is seriously undercut by the fact that the pets at issue—Zock and Max[26]—apparently became agitated at completely different times and were barking in different directions. The Skakel's tutor, Kenneth Littleton, in a recorded conversation with his ex-wife that was read to the jury, related that, on the evening of October 30, the Skakel's nanny asked him to go outside to check on barking dogs, including Max, who was barking in the vicinity of the recreational vehicle.[27] Littleton indicated that this disturbance, during which he heard rustling sounds in the trees, happened at approximately 9 p.m. He specifically noted that it occurred before he sat down to watch The French Connection, which aired beginning at 9 p.m.[28]

Zock, by contrast, did not begin barking until at least 9:40 p.m. Helen testified that she clearly recalled that she returned home at precisely 9:30 p.m.—the time of her curfew—and shortly thereafter she commenced a telephone conversation, during which Zock began barking. She specifically testified that the barking started at approximately 9:40 or 9:45 p.m. and lasted until 10:15

p.m.[29] It is clear, therefore, that the testimony that was presented at trial with respect to barking dogs related to two or more distinct events that occurred over the course of mischief night. Accordingly, there was no reasonable basis for the jury, the habeas court, or Jachimczyk to conclude that simultaneous barking somehow indicated that the victim was murdered at 10 p.m.

e

The Jury Requests

The petitioner next points to the fact that, during deliberations, the jury expressed some interest in reviewing testimony related to the petitioner's alibi story and, specifically, whether he was in the Lincoln when it left for the Terrien home at 9:30 p.m. The petitioner's argument appears to be that evidence for or against his alibi story would not have been of interest unless the jury had concluded that the victim was killed during the time when Rushton and John were at the Terrien home.

The following additional facts and procedural history are relevant. The jury began its deliberations on June 4, 2002. On June 5, the jury requested that the testimony of the following six witnesses be read back in full: Julie; Shakespeare; Helen; Andy Pugh, a childhood friend of the petitioner; John Higgins, a former resident with the petitioner at the Elan Therapeutic Boarding School (Elan); and Henry Lee, a professor of forensic science. After having heard a portion of Julie's testimony, the jury sent the court a revised request, indicating that, after completing the read back of all of Julie and Shakespeare's testimony, it was interested in rehearing only that portion of Helen's testimony relating to "who was in the driveway and who [was] left in the car," and only the last two pages of Lee's testimony relating to his statement that there was no direct evidence implicating the defendant in the crime. During the reading of Shakespeare's testimony, the jury also indicated that it did *not* require a replaying of defense exhibits L and N, which were a tape recording and transcript of Shakespeare's 1991 interview with police detectives that defense counsel introduced as a prior inconsistent statement with respect to the alibi question.

The following day, on June 6, the jury again amended its request. It withdrew its request for a play back of Higgins' testimony and it added a request to rehear various jury instructions. The jury also requested a read back of the rebuttal portion of the state's closing argument, a request that the court denied. The jury finished rehearing Pugh's testimony on the afternoon of June 6. The following morning, the jury delivered its verdict.[30]

After reviewing this procedural history, I am not persuaded by the petitioner's argument that the jury's request to rehear the testimony of Julie, Helen, and Shakespeare, each of whom testified, among other

things, as to whether the petitioner went to the Terrien home, indicates that at least some members of the jury must have concluded that the murder was committed during the alibi period. Of course, common sense suggests that a jury's request to rehear particular testimony indicates that the testimony at issue was of some interest to the jury in its deliberations. See *State* v. *Santiago*, 224 Conn. 325, 334, 618 A.2d 32 (1992). This is especially true when, for example, the jury requests the testimony of only one or two witnesses or only testimony relating to a particular issue. See id. In the present case, however, the jury asked for a read back of the testimony of six different witnesses, only three of whom even touched on the alibi story. Each of the other three had provided highly inculpatory testimony regarding the petitioner. Lee testified that there was indirect evidence that the petitioner committed the crime, and it was that portion of his testimony that the jury specifically asked to rehear. Higgins testified that the petitioner had confessed to running through the woods with a golf club on the night of the murder and, ultimately, to having committed the crime. Pugh provided a possible motive for the crime, testifying that the petitioner had a crush on the victim. Pugh also testified that the petitioner was agitated the day after the crime, that he was disliked by Zock, and, most significantly, that he had admitted that, on the night of the murder, he had gone into the victim's yard and had been masturbating in the tree under which the victim's body was later discovered.[31] The fact that the jury reached its verdict soon after it reheard Pugh's testimony—testimony indicating that the petitioner had placed himself at the scene of the murder, under highly suspicious circumstances, *after* the Lincoln had returned from the Terrien home—strongly suggests that the jury ultimately concluded that the question of whether the petitioner's alibi was valid or fabricated was simply irrelevant.[32]

With respect to Julie, Helen, and Shakespeare, it is reasonable to assume that the jury's request to have that testimony read back indicates that, early in its deliberations, the jury gave some consideration to the alibi question. As we explained in *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 120, 193 A.2d 718 (1963), however, such a request may reveal nothing more than a jury's "conscientious effort . . . to cope with perhaps the most important factual question in the case as it had been submitted to them." In the present case, in light of the substantial evidence of the petitioner's guilt; see part III of this dissenting opinion; and what Justice Palmer recognizes to be the obvious flaws in defense counsel's other strategy of painting Littleton as the likely killer; see *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 589–97 (*Palmer*, *J.*, dissenting); it stands to reason that the jury, before convicting the petitioner, would have given due consideration to his principal defense, namely, the Terrien

alibi. Nothing in the jury's various requests, however, provides even the slightest support for the petitioner's bald speculation that the jury was just one witness away from believing his alibi story and acquitting him.

Furthermore, the fact that the jury requested a read back of only those portions of Helen's testimony relating to whether the petitioner accompanied his brothers to the Terrien home, but asked to rehear all of Julie and Shakespeare's testimony, suggests that the alibi issue was not the jury's primary concern with respect to those latter two witnesses. In Julie's testimony, for instance, the jury may have been interested in her efforts to provide an innocent explanation for the petitioner's attempted suicide in 1977 and his inculpatory statement to the family chauffeur, Lawrence Zicarelli, that "he had done something very bad and he either had to kill himself or get out of the country." See part III B 1 c of this dissenting opinion. The jury also may have been interested in Julie's testimony that the petitioner had been dismissed from several high schools after the murder, that he was drinking alcohol daily by the age of fifteen, and that he was consuming various other controlled substances at that age. All of that testimony reinforced the testimony of other witnesses that the petitioner was in a drug and alcohol induced blackout on the night of the murder and was uncertain whether he had committed the crime.

Turning to Shakespeare, it is even clearer that the jury may have been less interested in her testimony related to the alibi than in what light that she could shed on the petitioner's culpability. Shakespeare testified twice, once for the prosecution and once for the defense. In both instances, she testified that she was certain that the petitioner remained at the Skakel residence after the Lincoln departed. Curiously, however, the jury informed the court that it was not interested in reexamining defense exhibits L and N, which pertained to Shakespeare's prior statements to the police suggesting that (1) she had no firsthand knowledge of whether the petitioner had gone to the Terrien home, and (2) her recollection that he had stayed home was based largely on "tales" and hearsay. It was Shakespeare who provided the strongest support for the state's theory that the petitioner had not gone to the Terrien home. If the jury had been interested in assessing her testimony and credibility on that question, then one would expect that jurors would have asked to reexamine her prior inconsistent statements as well.

Why, then, would the jury have requested a play back of Shakespeare's testimony, if not to explore the alibi question? Although we do not know for certain, one clue may be found in the state's closing argument, during which the prosecutor listed nearly one dozen of the petitioner's admissions, confessions, and other inculpatory statements regarding the murder. Notably, the

prosecutor began this portion of his argument by reminding the jury: "On October 31, to [Shakespeare], [the petitioner] said 'Martha is dead, Tommy and I were the last to see her.' " In fact, Shakespeare's precise testimony was that officials at the school that she and Julie attended had instructed the two girls to go home to the Skakel house "immediately," before the end of the school day, on that Friday. See footnote 33 of this dissenting opinion. She further testified that, as they pulled up to the Skakel residence, the petitioner came up to their car and informed them "that Martha had been killed and he and Tommy were the last to see her that night."

Although Shakespeare testified as to this conversation on two separate occasions, her brief references to the petitioner's odd statement did not generate significant attention at trial, and it is possible that the jury did not perceive the true importance of the statement until the prosecutor highlighted it during his closing argument. The petitioner's story was that he had departed for the Terrien home in the Lincoln, while the victim remained standing outside the Skakel residence. When he spoke to the police after the murder, he indicated that she had been standing alone with Tommy. To Richard Hoffman, the petitioner's would-be biographer, he indicated that Helen, Byrne, Wettenhall, Marjorie Walker, and, possibly, Robert Ix also remained at the back door of his house with the victim after he departed. He further informed the police that, upon returning home, he went straight to sleep. In Hoffman's tapes, by contrast, the petitioner recounted that he was unable to sleep and, therefore, that he had gone back out to peep at a female neighbor and, later, to try to "get a kiss" from the victim. Still, he never indicated to Hoffman that he ever saw the victim again that night. The question thus becomes on what basis could the petitioner have concluded that he and his brother were the last people to see the victim alive? Clearly Tommy was with her after the Lincoln departed and might have been among the last to see her. But Helen, Byrne, and perhaps a number of other neighborhood children were with the victim at least as long as was the petitioner, if not longer. In addition, Julie and Shakespeare themselves had remained at the Skakel residence after the Lincoln departed, and so the petitioner would have had no way of knowing whether they saw or spoke with the victim after he departed.

More fundamentally, if the petitioner's account of the evening's events were true, then he could not possibly have known what the victim did, or whom she met, after she left the Skakel residence. This was decades before the age of cell phones and social media. When the petitioner made the incriminating statement to Julie and Shakespeare, the school day had not yet ended[33] and friends and family were just beginning to learn and discuss the tragic news. The petitioner would not yet

have had any opportunity to canvass other members of the victim's circle of friends to determine whether she had met up with any of them to celebrate mischief night after leaving the Skakel residence.

In short, if he were innocent, and if his alibi story were true, then the petitioner would not have been one of the last two people to see the victim alive. Nor could he possibly have known who, if anyone, had spent time with the victim after he purportedly left for the Terrien home. Rather than informing Julie and Shakespeare that he was the last to see her alive, it would have made far more sense for him to have asked *them* whether, and under what circumstances, *they* had seen the victim after *he* left. Moreover, Julie and Shakespeare, having remained at the house after the petitioner purportedly left, would have known that the petitioner could not have seen the victim any later than they did—unless of course he was involved in her murder. Accordingly, the petitioner's statement, as recounted by Shakespeare, provided compelling evidence of his consciousness of guilt, and it is unsurprising that the jury asked to rehear her testimony after the prosecutor had highlighted its significance.[34]

Three final points bear emphasizing in this regard. First, in addition to requesting a read back of the testimony of these witnesses, the jury also asked the court to repeat its instruction regarding "the requirements for a conviction or acquittal." When the court invited the jury to elaborate, the jury asked to rehear the court's instructions regarding "reasonable doubt, inferences, weighing testimony and then the intentional murder charge, elements, *time of offense*, proximate cause, intent, motive, alibi, and . . . concluding instructions . . . ." (Emphasis added.) Thus, although it would appear that the credibility of the alibi witnesses was on the minds of the jurors as they deliberated, it is equally apparent that (1) that was only one issue among many that concerned them, and (2) they also were focused on the court's time of offense instructions, which made clear that the state was required to prove only that the crime occurred sometime prior to 5:30 a.m. on October 31. Taken together, then, the jury's requests provide at least as strong support for the proposition that the jury accepted the state's partial alibi theory and concluded that the petitioner had committed the crime after returning from the Terrien home.

Second, to the extent that the jury was focused on the alibi issue when it asked to rehear the testimony of Julie, Helen, and Shakespeare, that tends to diminish the likelihood that the outcome would have been different if Ossorio had testified at trial. While instructing the jury on the alibi, the court specifically directed the jury's attention to the testimony of those three witnesses. On the one hand, the court identified Helen as a disinterested alibi witness, one who was not a member

of the petitioner's family. Although the majority largely ignores both Helen's testimony and the court's instruction, the trial court properly recognized that Helen was an independent witness whose testimony corroborated the petitioner's alibi. Specifically, Helen testified on multiple occasions that, although she could not be 100 percent certain, her best recollection was that she had seen the petitioner leave for the Terrien home with his brothers.[35]

On the other hand, the court reminded the jury of Shakespeare's testimony that the petitioner had remained at the Skakel residence after the Lincoln departed, and also alluded to Julie's initial statements to the police that she thought she saw the petitioner run by at that time. Accordingly, even if the petitioner's interpretation of the jury requests was accurate, the only reasonable conclusion would be that the jury ultimately credited Shakespeare's testimony and Julie's statements to the police, despite knowing that at least one disinterested witness—as well as several family members—had confirmed the petitioner's alibi. To demonstrate that there is a reasonable probability that the outcome would have been different but for defense counsel's deficient performance, then, the petitioner must establish not only that the jury would have credited Ossorio, but also that it would have found him so credible that his testimony would have overshadowed not only the abundant evidence of the petitioner's guilt; see part III of this dissenting opinion; but also both Shakespeare and Julie's statements that the petitioner had not been in the Lincoln when it left for the Terrien home.[36]

Third, it is noteworthy that the jury did not ask to rehear the testimony of Jachimczyk. He was the only witness who opined that the murder probably occurred around 10 p.m. Nevertheless, he failed to provide any medical support for that conclusion, and he acknowledged that his estimate was only accurate within "an hour or so." If the jury had been focused on the 10 p.m. timeframe, as the petitioner suggests, then one would have thought that jurors would have reexamined Jachimczyk's testimony as well. The fact that they did not strongly suggests that they ultimately were persuaded that the petitioner had committed the crime regardless of when it occurred.

f

The Ninety Missing Minutes

Although the petitioner himself does not make the argument, the majority argues that the jury could not reasonably have concluded that the victim might have been killed after the alibi period because we cannot account for her whereabouts between 9:30 p.m., when she allegedly left the Skakel residence, and approximately 11 p.m., when the Lincoln and its occupants

returned to Belle Haven. The argument appears to be that the victim was a young woman who rarely spent time alone outside her home and that, (1) if she had been out socializing, someone else would have reported having seen her between 9:30 and 11 p.m., and (2) if she had been at home during that period her mother would have been aware of her presence.

i

Needless to say, this argument is highly speculative, and there simply is no way to know whether the jury even would have considered it, let alone found it persuasive. In any event, there are countless plausible explanations for where the victim could have been during the alibi period. In an age before cellphone communications, a teenage girl could have been walking around the neighborhood looking for her friends. She could have been engaging in mischief night festivities with her friend Byrne, who died a few years after the murder, or hanging out at the Skakel residence with Tommy, neither of whom testified at trial. She could have been out with some other young man who, presumably, would not have been especially eager to come forward after the murder and inform law enforcement that he had been the last person to see her alive.[37] She might have dozed off in the Skakel's recreational vehicle after drinking too heavily.[38] Or she could have come home while her mother was busy painting,[39] been reading a book in her room, become bored, changed clothes, and gone back out again, consistent with the petitioner's own confession to Michael Meredith[40] that he had peeped at the victim while she was undressing later that evening. As anyone who has parented a precocious teenager will know, the possibilities are endless.

Ultimately, the burden falls on the habeas petitioner to establish that the victim could not reasonably have been alive after 9:30 or 10 p.m., and not, as the majority repeatedly implies, on the state to prove her precise whereabouts throughout the evening. See *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 460; *Hampton* v. *Commissioner of Correction*, 174 Conn. App. 867, 886, 167 A.3d 418 (2017); cf. *State* v. *Evans*, 205 Conn. 528, 536, 534 A.2d 1159 (1987) (state not obliged to pinpoint exact time of offense even though failure to do so may make it difficult for defendant to establish complete alibi), cert. denied, 485 U.S. 988, 108 S. Ct. 1292, 99 L. Ed. 2d 502 (1988). Indeed, the majority fails to cite even a single case in support of its novel and bizarre theory that the state was obliged to account for the victim's whereabouts during the entire time that the state charged and the experts said she could have been killed and that its failure to do so means that we must assume that *the jury* concluded that the victim was killed at the earliest possible time, between 9:30 and 10 p.m. Neither law nor logic supports such a theory.

ii

Indeed, the only analysis that the majority does offer with respect to the whereabouts of the victim after 9:30 p.m. relies on facts outside the scope of the trial record. The majority contends that "the evidence in the state's possession at the time of trial . . . 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." This is just one example of a troubling pattern of the majority relying on or citing to facts and evidence that were not part of the trial record and could not have been considered by the jury in its deliberations.

In a number of instances, for example, the majority discusses evidence unrelated to Ossorio's testimony that was presented only at the habeas trial or that is completely outside the record. See, e.g., footnote 3 of the majority opinion (discussing statement from Tommy indicating sexual liaison with victim beginning at 9:30 p.m.); footnote 4 of the majority opinion (discussing behavior of third dog around 9:45 p.m.); footnote 5 of the majority opinion (discussing conclusion by police that victim must have died between 9:30 and 10 p.m. because 400 people were interviewed and none reported seeing her after that time); footnote 22 of the majority opinion (discussing assertions made in Mark Fuhrman's book and passages in victim's diary that were never entered into evidence); footnote 26 of the majority opinion (discussing habeas testimony of former Elan resident John Simpson that contradicted testimony of state's key witness); part I of the majority opinion (discussing publicity that led law enforcement to reopen case and focus attention on the petitioner); part V B 1 of the majority opinion (discussing what state's theory of murder had been prior to trial); part VI A of the majority opinion (discussing what police had believed about case "for the better part of twenty-five years").

Respectfully, such evidence, which relates to key questions such as the time of the victim's death, the believability of the petitioner's confessions, and other possible suspects in the victim's murder, is not properly the subject of this court's consideration in a *Strickland* analysis. That evidence is, therefore, inappropriate for the majority to consider in reaching the determination that the jury would not have convicted the petitioner had Ossorio's testimony been presented. In some instances, the majority cites such materials without offering any justification whatsoever for considering facts and evidence that the jury itself never saw. In other instances, the majority purports not to have considered those materials but repeatedly draws attention to them.

I have confined my own analysis in the present appeal to the record that was before the jury and the inferences

that the jury reasonably could have drawn therefrom, as properly supplemented by the habeas testimony of Ossorio. I merely note, however, that if I were to follow the lead of the majority and freely discuss materials from outside of the trial court record, there is plenty of information in the public domain and the habeas record that, if it had been before the jury, would have inculpated the petitioner. To name just a few: that he tried to kill a police officer, that he bludgeoned a cat to death with a golf club, and that experts concluded that the victim was likely murdered by a serial peeping tom like the petitioner. There also is evidence from the habeas trial, demonstrating that the victim did not immediately go home after leaving the Skakel residence. Specifically, she spent time with Tommy, who subsequently lied to the police about having been with her after 9:30 p.m. In addition, entries from the victim's diary suggest that her social circle was far wider at that time than her parents were likely aware of and her evening social life far more private than they knew, and also that she had misgivings about her relationship with the boy whom the majority characterizes as her "steady" boyfriend. If we are going to take evidence from outside of the trial record into account when speculating about these matters, then we should consider it all.

iii

The majority also dismisses out of hand the quite realistic possibility that the victim could have returned home for a while after leaving the Skakel residence and then gone out again later that evening, without her mother's knowledge. The majority dismisses this possibility as incompatible with the state's "theory of the case . . . ." As I will discuss more fully hereinafter, the majority relies on similar reasoning to dismiss other key trial evidence, such as the testimony of Meredith, who testified without contradiction that the petitioner admitted to having seen the victim alive, later that evening, after purportedly returning home from the Terrien home. The view of the majority appears to be that any consideration of the testimony of the victim's mother that the victim could have returned home and then gone back out again on the evening of October 30 is somehow off limits because that evidence contradicts the state's arguments at trial. There are a number of problems with this position.

First, to the extent that the majority implies that we may consider only that evidence and those inferences from the evidence that defense counsel expressly set forth during closing argument,[41] this court has flatly rejected such a rule. In *State* v. *Robert H.*, 273 Conn. 56, 866 A.2d 1255 (2005), for example "we emphasize[d] . . . the well established principles . . . that when evaluating the evidence in support of a conviction, we generally do not confine our review to only that evi-

dence relied on or referred to by counsel during the trial. . . . We also assume that the fact finder is free to consider all of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so, regardless of whether the evidence is relied on by the attorneys." (Citations omitted.) Id., 81–82; see also *State* v. *King*, 321 Conn. 135, 153, 136 A.3d 1210 (2016) ("a jury may consider all evidence properly before it").

Indeed, to adopt a contrary rule would directly contradict the time limitations on counsel's closing arguments. This was a trial that played out over the course of an entire month. More than fifty witnesses took the stand. Their testimony fills literally thousands of pages of transcripts. More than 100 exhibits, some of them quite lengthy, were entered into evidence. To suggest that the state may rely on—and that a reviewing court may consider—only the evidence and analysis that the prosecution had time to specifically highlight during its limited closing argument would place an impossible burden on the state and would, in all likelihood, transform closing argument into a pointless exercise in speed reading rather than an opportunity to provide the jury with a useful, thoughtful framework by which to evaluate *all* of the evidence of record.

The majority has not articulated any rationale or authority as to why these principles should apply differently in the *Strickland* context. Indeed, *Strickland* expressly requires that "a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the . . . jury." (Emphasis added.) *Strickland* v. *Washington*, supra, 466 U.S. 694. The cases cited by the majority are not to the contrary. For example, in *Weeden* v. *Johnson*, 854 F.3d 1063 (9th Cir. 2017), the United States Court of Appeals for the Ninth Circuit merely declined to engage in pure counterfactual speculation as to what rebuttal evidence the state might have presented had defense counsel properly sought a psychological evaluation of petitioner. Similar reasoning underlay that court's decision in *Hardy* v. *Chappell*, 849 F.3d 803, 823 (9th Cir. 2016). In the present case, by contrast, the question is simply whether we can, and should, assume that the jury rationally considered all of the evidence that the state *did*, in fact, present at trial.[42]

Moreover, I am not aware of a single case that holds that we must assume that the jury agreed with all of the state's comments and arguments during closing argument, and the majority has not cited any. Indeed, the trial court expressly instructed the jury that the arguments and statements of counsel "are not evidence *and you may not consider them* in deciding what the facts are." (Emphasis added.) The jury was, instead, properly instructed that its own recollection and understanding of the facts must control.

Nor does the majority cite any authority for its con-

tention that we are somehow constrained by three brief rhetorical comments that the prosecutor made during argument. First, during his opening statement, the prosecutor argued that the victim "went out that evening and with the next day being a holiday for Greenwich High School was due in about 10:30 [p.m.]. *She never made it home* . . . ." (Emphasis added.) Second, during closing argument, the prosecutor stated that the victim "didn't have school the next day so wasn't supposed to be in until about 10:30 [p.m.] or so that night. *Of course*, *she never got there*." (Emphasis added.) Subsequently, he argued as follows: "[The victim's mother] didn't become concerned until after 11:00 [p.m.] or so. *Needless to say*, [*the victim*] *never did make it home*." (Emphasis added.) The majority suggests that these statements preclude us from considering the possibility that the victim stopped home, unbeknownst to her mother, sometime after 9:30 p.m. and then went back out and was killed later that evening.

Respectfully, I disagree, for at least three reasons. First, as I have explained, the jury was well aware that arguments of counsel are not evidence and that the jurors alone were empowered to determine what happened on the evening in question. There is no reason, then, to think that the jury would have felt itself constrained by the statements of counsel. I also am aware of no authority for the proposition that a reviewing court should confine its *Strickland* analysis to only those facts and possibilities that comport with the inferences that the state urged the jury to draw.

Second, the state did, in fact, seek to elicit testimony that the victim could have returned home and then gone back out again. The prosecutor specifically asked the victim's mother the following question: "[T]he previous night before you had fallen asleep, before you came down to watch the news, when you were painting and taking a shower and stuff, is it possible that [the victim] could have come home at some point when you were working or in the shower or dozing and left again and you would not have necessarily known that she had been home?" There would have been no reason to elicit that testimony if the state's view was that the victim could not have returned home and then gone back out.

Third, it is clear from the context that the prosecutor was not intending to literally foreclose the possibility that the victim stopped home and then went back out. Rather, his brief, offhand comments are clearly rhetorical statements meant to highlight for the jury the tragedy that was the victim's death. The fact that he prefaces the remarks with phrases such as "of course" and "needless to say" indicates that he is not intending to eliminate any realistic possibilities, but merely to emphasize the indisputable fact that, ultimately, the victim did not end up safe in her home that night.

Indeed, in *State* v. *King*, supra, 321 Conn. 135, we

specifically rejected the argument that, when evaluating the scope and nature of the state's theory of a case, our review should be constrained by the sort of offhand prosecutorial comments at issue here. We explained that "closing arguments are often ambiguous and imprecisely phrased given that most attorneys do not appear before the jury like an actor on the stage with every word, phrase, and inflection memorized and exhaustively rehearsed in advance. . . . [Because] closing arguments of counsel . . . are seldom carefully constructed in toto before the event . . . improvisation frequently results in syntax left imperfect and meaning less than crystal clear . . . ." (Citations omitted; internal quotation marks omitted.) Id., 155; cf., *State* v. *Albino*, 312 Conn. 763, 796, 97 A.3d 478 (2014) (*Palmer*, *J.*, concurring) (arguments of prosecutor must be afforded "generous latitude" with respect to "occasional use of rhetorical devices" [internal quotation marks omitted]).

g

The Most Direct Route Home

The majority also contends that the murder probably took place during the alibi period because "the victim was attacked . . . along what would have been the most direct route between where she was last seen and her parents' home." This theory not only is highly speculative but was never articulated by the defendant or, indeed, by any of the more than fifty witnesses who testified at trial.[43]

The facts are simply that the victim initially was assaulted on or near the westerly leg of the horseshoe shaped driveway in front of her house. Because there apparently was no sidewalk, walkway, or other path leading to the Moxley house from Walsh Lane, the victim's choice when coming home, from anywhere really, would have been between walking up the easterly or the westerly leg of the driveway to the house. Although there is no evidence in the record one way or the other, one would assume that if she was walking home along Walsh Lane from the east she would opt for the easterly route, and the westerly route if coming from the west. Because the Skakel house lies to the northwest of the Moxley house, it is fair to think that she would have walked along that westerly leg of the driveway if returning directly from the Skakel's. But half of Belle Haven also lay to the west of the Moxley residence, and so it is equally fair to assume that the victim would have taken that same route when coming home from any number of friends' houses. Nothing in the record points uniquely to the Skakel residence, as the majority opinion seems to imply.

More importantly, even if the victim was assaulted on her way home from the Skakel house, that in no way implies that the attack must have occurred soon

after the Lincoln departed at 9:30 p.m. The victim's diary indicates that, in the weeks before the murder, she frequently spent time hanging out in the Skakel's recreational vehicle. It is certainly possible, then, that she spent some time in the recreational vehicle before returning home on the night of the murder. Indeed, her mother testified that, when the victim had not returned home by Friday morning, she believed that the most likely explanation was that the victim had been drinking beer in the recreational vehicle and had fallen asleep. The jury certainly could have come to the same conclusion.

h

Deference to the Habeas Court's Legal Conclusions

Lastly, I note in this regard that the majority repeatedly relies on what the majority characterizes as the conclusion of the habeas court that "the substantial weight of the evidence indicated that the murder most likely was committed between 9:30 and 10 p.m. on October 30." This is problematic because the questions at issue here—whether the alibi was a complete or partial one, whether the jury reasonably could have concluded that the crime was committed after the alibi period—are either pure questions of law or mixed questions of law and fact, over which our review is plenary. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 717. The habeas court did not hear any testimony, take any new evidence, or make any factual findings regarding the evidence as to the likely time of death. Any conclusions in that regard were formed on the basis of the same cold trial record that now sits before us. The majority was, therefore, obliged to conduct its own comprehensive, objective review of the trial evidence to determine whether the substantial weight of the evidence did, in fact, point to a time of death between 9:30 and 10 p.m. And yet, one searches the majority opinion in vain for even a reference to, let alone an analysis of, most of the relevant facts that I have discussed herein. As I believe I have shown, an objective and comprehensive review of the trial record reveals that the evidence pointing to a time of death during the alibi period was anything but substantial.

3

Evidence Suggesting a Later Death

Against the virtually nonexistent evidence pointing specifically to a 10 p.m. time of death—little more than the notable recalcitrance of a notably recalcitrant dog, as seen through the eyes of a fifteen year old girl—the jury weighed the testimony that a *human*, the petitioner himself no less, actually saw the victim alive later that evening. The likelihood that the jury disregarded that testimony, and yet still concluded that the petitioner was the killer, is extremely low. That possibility, although certainly conceivable, is not sufficiently prob-

able to surmount *Strickland*'s high bar.

Near the end of the state's case in chief, the jury heard the testimony from Meredith, a former Elan resident who stayed in the petitioner's home during the summer of 1987. According to Meredith, the petitioner admitted to him during the visit that, on the night of the victim's murder, he had climbed a tree on the Moxley property and masturbated while watching the victim through her window, undressing. The petitioner also told Meredith that, while he was in the tree, he had seen his brother Tommy walk across the Moxley property toward the victim's home.[44] Meredith further testified that the petitioner told him that the spying incident was "the last time he saw [the victim] alive." The following day, Meredith left the Skakel residence and terminated his relationship with the petitioner, having developed a fear of the petitioner and a feeling that the petitioner "had a violence kind of boiling under the skin . . . ."

Meredith's testimony not only established a motive for the murder, reinforcing the state's theory that the petitioner murdered the victim out of jealousy over her relationship with his older brother, but also established that the petitioner had been at the crime scene on the night of the murder *while the victim was still alive*. Importantly, the events that Meredith described could not have taken place prior to 9:30 p.m.[45] Accordingly, his testimony, if believed by the jury, conclusively demonstrated that, if the petitioner did go to the Terrien home, then the victim must have been murdered after the Lincoln returned to Belle Haven.

The majority makes three arguments in an attempt to downplay the importance of Meredith's devastating testimony, which simultaneously sidelined the petitioner's alibi defense and established his motive and opportunity to commit the crime. First, the majority argues that we cannot consider Meredith's testimony because it somehow contradicts the state's "theory of the case . . . ." I already have pointed out the problems with that argument. See part II B 2 f iii of this dissenting opinion.

Second, the majority suggests that Meredith's testimony was undermined by the testimony of the victim's mother and brother. As majority notes, the victim's mother testified that there were no climbable trees next to the house and that one would have to be "like a monkey" or wearing cleats to climb the trees directly adjacent to the victim's bedroom. The victim's brother also implied that the trees directly in front of the house, which the petitioner told Hoffman he had climbed on the night of the murder, were not climbable.

This is all true, as far as it goes. The majority neglects, however, to discuss virtually all of the evidence regarding the trees that was actually relevant to Meredith's account of the petitioner's confession.[46] First, the victim's mother elaborated that, although the trees that

were right next to the house would have been difficult to climb because the branches were kept trimmed, "[t]here were all kinds of trees all over the place."[47] Indeed, she specifically testified that "[w]e had Norwegian spruce trees where the branches came down to the ground and I could see my grandchildren having a good time scurrying up and down those."

The jury would have had little difficulty confirming that the victim's mother spoke truly in that regard. The trial exhibits included numerous photographs of the Moxley yard that depicted trees of all sorts, trees that had a direct line of sight to the Moxley home. Among those were divers trees with large, low branches that almost certainly would have been climbable by a teenager in reasonably good physical condition, and certainly by a star high school athlete such as the petitioner.

Notably, at no point did Meredith testify that the petitioner had told him that the tree in question was directly adjacent to the Moxley home. *That* was the Hoffman story. Meredith's testimony was that "[the petitioner] told me on the evening of the murder that . . . he had climbed a tree *outside of his house and Martha's house* where he could see through her window." (Emphasis added.) Beyond that, Meredith simply assented when the prosecutor asked the following: "So, he told you that the night that [the victim] was killed, he climbed a tree outside of her bedroom window?"

Moreover, Meredith testified that the petitioner claimed, while in the tree, to have "seen his brother, Tommy, crossing the yard [toward the Moxley] house. And [the petitioner], of course, didn't want to be seen. So after [Tommy] was out of sight, [the petitioner] climbed down the tree . . . ." That testimony strongly suggests that the tree in question was *not* immediately adjacent to the Moxley home. If it were, then Tommy could not have passed the tree and passed out of the petitioner's line of sight on his way to the Moxley home, other than by entering the house itself. Accordingly, although the jury reasonably could have concluded that the petitioner's statement to Hoffman that he climbed a tree directly in front of the Moxley house was untrue—just as the state contended that it was—nothing in the testimony of the victim's family would have undermined Meredith's more incriminating account of the petitioner's confession.

Third, the majority argues that the prosecutor disavowed Meredith's story when he argued that the petitioner had not in fact masturbated in a tree on the night of the murder. It is true that the prosecutor argued at trial that the petitioner had fabricated the *masturbation component* of the story in the event that his DNA was later identified on the victim's body. The state never argued, however, that the central import of Meredith's testimony—that the petitioner spied on the victim and watched her undressing after he returned home from

the Terrien home on the night of the murder—was untrue. Indeed, the state emphasized that this new evidence was the very reason that the petitioner's alibi was no longer a valid defense.

Fourth, the majority suggests that Meredith's testimony was "flatly contradicted" by the testimony of the victim's mother and brother. This argument appears to be that if the victim had returned home and showered or changed clothes before going back out, then her family would have seen her. In reality, however, the victim's mother testified that the Moxley's had "a very large house" and she twice acknowledged that it was possible, albeit unlikely, that the victim could have come back and left again while she was painting in her room, showering, or napping. It is simply incorrect, then, to say that the testimony of the victim's mother "flatly contradicted" that of Meredith. The statement of the majority makes even less sense with respect to the victim's brother, who might have returned to the Moxley house as late as 11:30 p.m. and, therefore, could not possibly have known whether the victim had stopped home before then.

4

Conclusion

To summarize the evidence with respect to the time of death, two of the three medical experts who reviewed the case were of the opinion that the victim could have been killed well outside the 9:30 to 10 p.m. timeframe. The third expert, Jachimczyk, concluded that she had been killed around 10 p.m., but he conceded that his estimate was only accurate to within "an hour or so." Moreover, his review of the forensic evidence suggested that 10 p.m. was quite possibly the *earliest* time that the victim could have been killed, and certainly not the latest.

Nor did the other evidence presented at trial bear out Jachimczyk's assumption that the victim was most likely killed around 10 p.m. because that is when neighborhood dogs began barking and when the victim was expected home. The evidence suggested that neighborhood dogs—all chronic barkers—became agitated at different times throughout mischief night, in some instances long before the victim was last seen alive. Moreover, the testimony of the victim's family regarding her alleged "curfew" was consistent with a time of death well after the Lincoln returned from the Terrien home. Specifically, the victim's family did not expect her home until approximately 10:30 or 11 p.m. on October 30, because it was not a school night, and 11 p.m., or soon thereafter, was just around the time that the Skakel brothers returned from the Terrien home.

Finally, and most devastatingly, the jury heard unrefuted evidence that the petitioner himself had admitted to having watched the victim undressing, in her room,

later that same evening. If the jury credited that testimony, and there is no reason to believe that it did not, then the petitioner's alibi story was simply immaterial.

In light of this record, the petitioner's contention that the jury could only reasonably have concluded that the victim died at approximately 10 p.m. amounts to pure speculation. Accordingly, I conclude that the Terrien alibi was an incomplete one and, therefore, that defense counsel's failure to buttress it with Ossorio's testimony could not have been prejudicial.[48]

III

In part II of this dissenting opinion, I explained how defense counsel's failure to procure and present the testimony of one additional alibi witness could not have been prejudicial, as a matter of law, because the petitioner's alibi was at best a partial one. This is necessarily so because: the state was required to prove only that the petitioner killed the victim sometime between 9:30 p.m. and 5:30 a.m.; the limited evidence suggesting that the murder was committed around 10 p.m., rather than later that night, was contested and highly speculative; and the jury could have credited testimony indicating that the petitioner himself admitted to having sought the victim out and seen her alive, near the crime scene, after he purportedly returned from the Terrien home around 11 p.m. None of this would have been altered in the least by calling Ossorio as a witness, however credible his testimony might have been.

Even if we were to assume for the sake of argument, however, that the jury did conclude that the crime took place at approximately 10 p.m., the petitioner still would face a Herculean task in establishing prejudice. Specifically, the petitioner bears the burden of demonstrating that, even though the jury found the evidence in favor of the petitioner's guilt so much more compelling than the evidence in favor of his alibi that it found him guilty beyond a reasonable doubt, there is a reasonable probability that adding the testimony of just one additional alibi witness, on top of the numerous witnesses who already had testified to his alibi, would have altered the outcome. This he has failed to do.

A

Governing Law

In evaluating whether defense counsel's failure to procure Ossorio's testimony was prejudicial, the habeas court was of the opinion that "the state did not possess overwhelming evidence of the petitioner's guilt." This was so, the habeas court reasoned, because the state's case was largely circumstantial, consisting primarily of (1) consciousness of guilt evidence and, (2) in the words of the habeas court, "testimony from witnesses of assailable credibility who asserted that, at one time or another and in one form or another, the petitioner made inculpatory statements." The opinion of the habeas

court differed in this respect from that of the trial court, *Karazin*, *J*. In rejecting the petitioner's motion for a new trial, that court characterized the evidence of guilt presented at trial as "strong . . . ."[49]

We owe no deference, however, to either court's assessment of the strength of the state's case. Although "[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 . . . [t]he application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* . . . is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 717. Moreover, as this court recently explained in *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 783 n.12, "there is no requirement that we defer to the habeas court's legal determination that new evidence is so compelling that a reasonable juror could not fail to credit it. . . . Nor are we required to defer to the [habeas] court's legal determination that there is a reasonable probability that newly discovered evidence would have resulted in a different verdict if credited by the jury . . . ." (Citation omitted.)

1

Types of Inculpatory Evidence

Before I review the evidence presented at trial, the strength of the state's case against the petitioner, and the likely impact that Ossorio's testimony would have had on the jury, it will be instructive to set forth the well established legal principles that guide that analysis. Although highly reliable modern forms of scientific identification such as DNA analysis; see General Statutes § 54-86k (a); were not yet available to law enforcement at the time of the victim's death in 1975, this court has frequently recognized that more traditional types of evidence, including confessions, consciousness of guilt, and other forms of circumstantial evidence, may provide equally persuasive proof of a defendant's guilt.

As this court explained in *State* v. *Miguel C.*, 305 Conn. 562, 581, 46 A.3d 126 (2012), "confessions have a particularly profound impact on the jury, so much so that we may justifiably doubt [the jury's] ability to put them out of mind even if told to do so." (Internal quotation marks omitted.) "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [*The*] *admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct*. . . . While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to

other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (Citations omitted; internal quotation marks omitted.) *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Indeed, as Justice Katz' dissent explained in *State* v. *Lawrence*, 282 Conn. 141, 202–204, 920 A.2d 236 (2007), "[m]ock jury studies have shown that confession evidence has greater impact than eyewitness testimony, character testimony and other forms of evidence. . . . [T]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous . . . ." (Citations omitted; internal quotation marks omitted.)

We also have recognized the persuasive force of evidence tending to show that a criminal defendant was possessed of a guilty conscience. "As we have stated, [t]he state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Weinberg*, 215 Conn. 231, 255, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990); see also *State* v. *Felix R.*, 319 Conn. 1, 22, 124 A.3d 871 (2015) (*McDonald*, *J.*, concurring) (defendant's consciousness of guilt was most significant factor in determination that state's case was strong for purposes of assessing whether prosecutorial impropriety deprived defendant of fair trial); *State* v. *Coccomo*, 302 Conn. 664, 721, 31 A.3d 1012 (2011) (*Eveleigh*, *J.*, dissenting) ("[C]onsciousness of guilt evidence is second only to a confession in terms of probative value. . . . Indeed, nothing but an hallucination or a most extraordinary mistake will otherwise explain why a person would harbor a guilty conscience without actually being guilty." [Citation omitted; internal quotation marks omitted.]); IA Wigmore on Evidence (Tillers Rev. 1983) § 173 ("The inference from consciousness of guilt to 'guilty' is always available in evidence. It is a most powerful one . . . ."); 2 Wigmore on Evidence (Chadbourn Rev. 1979) § 273 ("[n]o one doubts that the state of mind that we call 'guilty consciousness' is perhaps the strongest evidence . . . that the person is indeed the guilty doer . . . ." [Citation omitted.]).

Courts and commentators have identified a wide range of conduct that may be inconsistent with a claim of innocence and indicative of a guilty conscience. This includes attempted flight, attempts to fabricate an alibi or inculpate an innocent party, and any other statements made subsequent to a criminal act that tend to identify the speaker as the perpetrator. See *State* v. *Reid*, 193 Conn. 646, 656, 480 A.2d 463 (1984); *State* v. *Coccomo*, supra, 302 Conn. 709 (*Eveleigh*, *J.*, dissenting); 2 Wigmore on Evidence (Chadbourn Rev.

1979) §§ 273 and 276.

Furthermore, it does not follow from the fact that the state's case rested primarily on circumstantial evidence[50] that it was not a strong one. *State* v. *Smith*, 156 Conn. 378, 382, 242 A.2d 763 (1968). "The law recognizes no distinction between circumstantial evidence and direct evidence so far as probative force is concerned." (Internal quotation marks omitted.) Id.; see also *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 545 (noting that circumstantial evidence can be used to disprove alibi defense). Accordingly, the habeas court went astray, as a matter of law, insofar as that court concluded that the state's case against the petitioner was weak simply because it rested primarily on confessions, admissions, consciousness of guilt, and other circumstantial evidence.

2

Importance of Objective Prejudice Analysis

Also 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.[51] When the state's case is predicated primarily on witness testimony, "[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." *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); see also *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 102; *Ayala* v. *Commissioner of Correction*, 159 Conn. App. 608, 616–18, 123 A.3d 447, cert. denied, 319 Conn. 933, 125 A.3d 207 (2015); *Hunnicutt* v. *State*, Docket No. 05-00-01867-CR, 2001 WL 995972, *6 (Tex. App. 2001); *In re Towne*, 195 Vt. 42, 52, 86 A.3d 429 (2013). The argument that the state's case was weak because the reviewing court believes that the state's witnesses lacked credibility is, therefore, generally without merit because the jury necessarily resolved those questions in favor of the state. See *Hope* v. *Cartledge*, supra, 525; see also *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 737, 66 A.3d 848 (2013) ("Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . [A reviewing] court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." [Internal quotation marks omitted.]); *State* v. *Hart*, 198 Conn. 424, 427, 503 A.2d 588 (1986) ("[t]he credibility of witnesses is a matter to be resolved solely by the jury" [internal quotation marks omitted]).

That is not to say that, in assessing *Strickland* preju-

dice, it is inappropriate for a reviewing court to draw its own independent conclusions regarding the strength of the state's evidence with respect to the issues *directly* impacted by the errors of counsel. That it may do so is well established. As the United States Supreme Court explained in *Strickland*, however, in assessing whether counsel's deficient performance prejudiced the petitioner, the reviewing court must take as given any findings unaffected by the error. *Strickland* v. *Washington*, supra, 466 U.S. 696. For example, in *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 530, the Appellate Court properly held that defense counsel's failure to call potentially credible and noncumulative alibi witnesses was not prejudicial because, among other things, (1) the credibility of the primary eyewitness to the petitioner's culpability already had been placed at issue before and assessed by the jury and (2) the alibi testimony would not have *directly* contradicted her testimony, much less other evidence of the petitioner's consciousness of guilt that was "wholly unaffected by the proposed alibi testimony." Id., 571–73; see also *Cox* v. *Horn*, 174 Fed. Appx. 84, 87 (3d Cir. 2006) (credibility of petitioner's confession not affected by errors of counsel); *United States* v. *Andrews*, 953 F.2d 1312, 1327 (11th Cir.) (no prejudice when partial alibi would not directly have refuted testimony of defendant's involvement in crime), cert. denied, 505 U.S. 1210, 112 S. Ct. 3007, 120 L. Ed. 2d 882 (1992); *In re Towne*, supra, 195 Vt. 51–52 (circumstantial evidence not affected).

Although *Spearman*, like all cases, may be distinguished on its facts from the present case, that case does stand for an important proposition. Namely, that, in assessing *Strickland* prejudice, we must focus our analysis primarily on the impact to the state's evidence that would have been most directly undermined or contradicted had the omitted evidence been presented to the jury. Contrary to the majority's characterization of my position, I recognize that *Strickland* permits a reviewing court to consider the overall strength of the state's case when assessing prejudice and, therefore, that there is a sense in which all of the state's evidence is subject to appellate scrutiny. Nevertheless, the primary focus of the prejudice analysis must be on the most directly affected evidence, rather than on a speculative relitigation of every aspect of the trial. See *Cox* v. *Horn*, supra, 174 Fed. Appx. 87; *People* v. *Foster*, 6 Cal. App. 4th 1, 12–13, 7 Cal. Rptr. 2d 748 (1992).

What this means is that, in most habeas cases in which it is alleged or determined that defense counsel failed to identify and present potentially credible alibi witnesses, the focus of the prejudice analysis is on whether the omitted alibi would have called into question other evidence that placed the petitioner at the scene of the crime at the time that it was being committed. Because eyewitness testimony is perhaps the most common means of establishing that presence, and

because other means, such as forensic evidence, is not as readily refutable by alibi testimony, the focus of analysis in such cases frequently is on a weighing of the omitted alibi evidence relative to the strength of eyewitness testimony. See, e.g., *Griffin* v. *Warden*, 970 F.2d 1355, 1359 (4th Cir. 1992) ("[e]yewitness identification evidence . . . is precisely the sort of evidence that an alibi defense refutes best"); *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 545 ("alibi testimony is frequently the best way to counter eyewitness testimony of a defendant's involvement in a crime").

By contrast, in the present case, not only was the petitioner not convicted on the basis of eyewitness evidence, but, as I shall explain more fully hereinafter, *none* of the confession, consciousness of guilt, or other inculpatory evidence offered by the state was linked to any particular time of death or required that the petitioner be present at the crime scene during the purported alibi period. Accordingly, the relevance of Ossorio's testimony with respect to the prejudice prong of *Strickland* is substantially less than is typically the case with credible alibi evidence. In short, the jury could well have convicted the petitioner without coming to any particular conclusion about when the crime was committed.

Of course, if a petitioner has been convicted on the basis of types of evidence other than eyewitness testimony, then it is appropriate for the reviewing court to consider, as a general matter, the overall strength of that evidence. Still, I am not aware of any other case in which a reviewing court has gone to such lengths to criticize and deconstruct the state's case. 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 cites evidence from outside of the trial court record and relies on 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.

Several facets of the majority's analysis are especially troubling in this respect. First, the majority focuses less on specific defects in the testimony of the state's witnesses and more on what it perceives to be the hurdles that *any* witness for the state must overcome in this unique, high profile case. Specifically, the majority implies that the testimony by *any* witness that the petitioner had confessed to killing the victim would be highly suspect because (1) they might have been exposed to Fuhrman's book and other publicity regarding the crime, (2) their memory could have faded in the intervening years, (3) they might have been moti-

vated by rewards offered by the victim's family, and (4) the petitioner himself might have been tricked by the staff of Elan into believing that he had committed the crime.

Second, it is true that other courts have, in weighing the strength of the state's case, considered whether the defendant successfully impeached the state's key witnesses at trial. It would not necessarily be inappropriate, for instance, for the majority to note in the present case that the testimony of Gregory Coleman; see part III B 1 a of this dissenting opinion; was readily impeached. Coleman admitted to being a career criminal who was on heroin at the time that he testified and had altered his story in various respects. No reasonable observer could dispute that his credibility was suspect. The majority, however, then continues to find that the credibility of Coleman's former wife also was suspect, simply on the basis of unfounded, speculative theories that were never raised at trial, such as that she might have lied to obtain a reward. In my view, such scrutiny by a reviewing court is improper. If anything, where a jury has convicted a defendant on the basis of witness testimony, courts will presume the credibility of such evidence. See, e.g., *Bridges* v. *Thaler*, 419 Fed. Appx. 511, 516 (5th Cir. 2011).

Third, the majority fails to take any account, in assessing the evidence against the petitioner, as to how directly that evidence would have been impacted by Ossorio's testimony. When courts have considered the credibility of the state's witnesses for purposes of a *Strickland* prejudice analysis, it usually involves a situation where the improperly omitted evidence or testimony would have *directly* contradicted the state's key witnesses. The cases on which the majority relies are of that ilk. See, e.g., *Kyles* v. *Whitley*, 514 U.S. 419, 441–45, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 690–92, 551 A.3d 948 (2012).[52] By contrast, the more attenuated the relationship between the omitted evidence and the evidence of guilt, the less appropriate it is to relitigate the case with respect to the latter. See, e.g., *People* v. *Foster*, supra, 6 Cal. App. 4th 12 ("If this case involved a single, crucial credibility conflict we would be inclined to find prejudice. . . . With each ever-more-complicated and farfetched episode appellant described . . . the credibility significance of 'who dropped the cocaine' shrank."). In the present case, as I explain more fully hereinafter, there is no direct relationship between the evidence of the petitioner's guilt—his various confessions, his consciousness of guilt, his motive and opportunity to commit the crime—and Ossorio's testimony that the petitioner was at the Terrien home at a particular time.

Finally, in my view, the majority persistently overstates the likely effects of Ossorio's testimony. In the

first paragraph of its prejudice analysis, for example, the majority cites a case for the proposition that if counsel had presented an additional, independent alibi witness, then the jury might also have given greater credence to those family alibi witnesses who did testify at trial. Notably, the case on which the majority relies, *Montgomery* v. *Petersen*, 846 F.2d 407, 415 (7th Cir. 1988), states this proposition in an appropriately measured way, positing that "the jury *might well* have viewed the otherwise impeachable testimony of the [family alibi] witnesses . . . in a different light . . . ." (Emphasis added.) The majority, by contrast, declares that "Ossorio's testimony . . . *necessarily* would have bolstered the credibility of those family alibi witnesses *substantially* . . . ." (Emphasis added.) A decision of the United States Court of Appeals for the First Circuit, *Gonzalez-Soberal* v. *United States*, 244 F.3d 273, 278 (1st Cir. 2001), offers an instructive contrast to the approach followed by the majority. In that case, the alleged deficient performance was counsel's failure to use two pieces of documentary evidence that would have directly impeached the testimony of the state's two key witnesses. Id., 274. It was, therefore, necessary for the court to consider the strength of their testimony in assessing prejudice. Id. Notably, even then the First Circuit concluded that the prejudice analysis was a "close call." Id., 279. Rather than independently evaluate the credibility of the state's trial witnesses on the basis of a cold record, the court remanded the case to the District Court that had presided over the habeas trial to make the necessary credibility assessments firsthand. Id.

B

Analysis

Having set forth the governing legal principles, I next consider whether there is a reasonable probability that, if the jury had heard Ossorio's testimony, the result of the petitioner's trial would have been different. In this part of the opinion, I summarize the state's case against the petitioner and the evidence of his guilt. That evidence consisted of: various confessions, admissions, and other inculpatory statements; evidence that the petitioner had both the motive and opportunity to commit the crime; and diverse consciousness of guilt evidence. Finally, and powerfully, the petitioner wove together all of these threads in his incriminating statements to Hoffman, his would-be biographer. In light of this compelling evidence of the petitioner's guilt, none of which identified the murder as having occurred at any particular time, I conclude that there is no reasonable probability that the jury, having heard Ossorio's alibi testimony covering the period from approximately 9:30 to 11 p.m., would have reached a different result.

Confessions & Admissions

As I have explained previously in this dissenting opinion, a defendant's confession that he committed a crime is, to the typical juror, among the most powerful and compelling proofs of guilt. This is especially true when the confession illuminates the defendant's motives or the means by which the criminal act was accomplished. More than one dozen witnesses testified at the underlying trial regarding the petitioner's numerous confessions, admissions, and other statements that tended to implicate him in the victim's murder. The petitioner made these statements over the course of more than two decades, in three different states, to family members, friends, acquaintances,[53] employees of the Skakel family, and Elan classmates and staff. Some of the witnesses to these admissions revealed them to law enforcement soon thereafter, others shared them with family or friends long before the petitioner had become a suspect in the case or a source of public interest. Still others kept the information to themselves and testified only reluctantly, after having been approached by law enforcement or encouraged to testify by the victim's family. Individually, as is frequently the case in criminal trials, certain of the state's witnesses were subject to reasonable impeachment.[54] Others, however, were beyond reproach. Taken together, these witnesses presented the jury with an overwhelming picture of the petitioner's guilt.

a

Confessions

The state presented six witnesses who testified that, on three separate occasions, the petitioner directly confessed to having murdered the victim. Those confessions are noteworthy in that they not only explain the petitioner's motive for committing the murder—he had unrequited romantic feelings for the victim, who rebuffed his advances and chose instead to become involved with his arch rival, his older brother Tommy—but also relate specific details of the crime that are largely consistent with the facts of the case.

The state's most important confession witness was Coleman. "Coleman, a resident at Elan from 1978 to 1980, testified about an exchange that he had had with the [petitioner] while Coleman stood 'guard' over [him] following the [petitioner's] failed escape attempt from Elan. During this conversation, the [petitioner] confided in Coleman about murdering a girl who had rejected his advances. According to Coleman, the [petitioner] had admitted killing the girl with a golf club in a wooded area, that the force with which he had hit her had caused the golf club to break in half, and that he had returned to the body two days later and masturbated on it." *State* v. *Skakel*, supra, 276 Conn. 648.

It is true that Coleman was less than a model witness

for the state. Defense counsel was able to impeach his credibility on several grounds, including his reputation for truthfulness, his history of providing inconsistent testimony, and his ongoing struggles with substance abuse, which included having testified while under the influence of controlled substances. Even if we were to assume that the jury found Coleman's personal credibility to be suspect, however, two independent witnesses validated his account of events.

First, Coleman's former wife testified at trial that Coleman had related the petitioner's confession to her when they first met in 1986, more than one decade before the petitioner became a suspect in the case. She further testified regarding an incident that transpired in the mid-1990s, when Coleman became visibly outraged while watching a television show that suggested that Tommy, rather than the petitioner, was the killer. At that time, Coleman again referenced the petitioner's confession and indicated that he was going to call the television network in an attempt to set the record straight.

Coleman was deceased at the time of trial, and I perceive nothing in the record that would have given the jury cause to question the veracity of his former wife. Although she did not claim to have personally witnessed the petitioner's confession, her testimony suggested that, at the very least, Coleman had sincerely believed that the petitioner murdered the victim and that Coleman had articulated the confession to her years before he might have had anything to gain by fabricating it. There was absolutely no evidence in the record to support the majority's baseless speculation that Coleman's former wife might have stood to gain financially from the petitioner's conviction, and the petitioner himself has never made such an argument.

A second corroborating witness, Jennifer Pease, also verified that Coleman had recounted the petitioner's confession long before the petitioner became a suspect in the victim's murder. Pease, who was a housemate of Coleman's at Elan, testified that, in 1979, Coleman, whom she trusted, told her that the petitioner had admitted "that he had beat some girl's head in and killed her with a golf club." Although the majority tries to undermine Pease's credibility by suggesting that she decided to testify out of an "intense dislike of another former Elan witness, [Alice] Dunn"; footnote 27 of the majority opinion; the majority fails to articulate any reason why Pease's dislike for *Dunn* would plausibly have led her to fabricate a corroborating account of *Coleman's* testimony regarding the *petitioner's* confession. Perhaps because Coleman's testimony was corroborated by two independent witnesses, whose own credibility was largely unassailed, the habeas court itself ultimately characterized him as a "powerful witness" in support of the state's case whose testimony

proved "particularly troublesome" for the defense.[55]

The state also presented the testimony of Higgins, another former resident of Elan. Higgins "recounted certain emotional admissions that the [petitioner] had made to him while the two were on guard duty one night on the porch of the men's dormitory at Elan. In particular, Higgins testified that the [petitioner] had told him that, on the night of the murder, there was a 'party of some kind or another' at the defendant's home. The defendant also told Higgins that he remembered rummaging through his garage looking for a golf club, running through the woods with the club and seeing pine trees. Higgins further stated that, as the conversation continued, the [petitioner's] acknowledgment of his culpability in the victim's murder progressed from 'he didn't know whether he did it' to 'he may have done it' to 'he must have done it,' and finally to 'I did it.' " *State* v. *Skakel*, supra, 276 Conn. 648. Higgins testified that he disclosed this confession to another Elan resident the following day, to former Elan resident Charles Seigan sometime in the late 1980s or early 1990s, and, reluctantly, to law enforcement prior to the trial after having been persuaded to testify by the victim's mother.

In his own testimony, Seigan verified that, in 1996, Higgins confided in him that the petitioner was involved in a Connecticut murder. Seigan subsequently shared that information with law enforcement. As with Coleman, then, independent testimony corroborated that Higgins had related the petitioner's confession to other individuals prior to 1998, when the publication of Fuhrman's book led the state to begin focusing on the petitioner as a possible suspect.[56] See *Skakel* v. *Commissioner of Correction*, supra, 325 Conn. 571 (*Palmer*, *J.*, dissenting).

Evidence of a third confession was introduced through the testimony of Geranne Ridge. Ridge testified that, during a party at her Boston apartment in 1997, she overheard the petitioner say, seemingly in jest, "ask me why I killed my neighbor."[57] Pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), the jury also heard a conversation that was taped in 2002 in which Ridge revealed to her friend, Matt Attanian, that the petitioner, while attending a party at her apartment, had confessed that, on the night of her death, he had watched the victim changing in her bathroom while he masturbated in a tree. He further confessed that he had killed her with a golf club, while high on mind-altering drugs, upon learning that she had had sex with his brother Tommy.

At trial, Ridge repudiated her taped statements, testifying that she was not personally acquainted with the petitioner and that she had invented the confession story in order to impress Attanian and put an end to his persistent inquiries about her knowledge of the case.

Ridge's attempts to repudiate her taped statements were undermined, however, by the following facts: (1) it was Ridge who had initiated and perpetuated the conversations with Attanian in which she described the petitioner's confessions; (2) it was implausible to think that inventing a salacious confession story would do more to "get [Attanian] off [her] back" and terminate his interest than would a simple statement that she had only met the petitioner briefly at a party and that she had no knowledge of the murder; (3) Ridge appeared to be unreasonably agitated for someone who claimed to have no useful information about the case; and (4) certain tabloid newspapers from which Ridge claimed to have gleaned the details about the murder that she had attributed to the petitioner's confession did not, in fact, contain all of those details. In light of these various deficiencies in her trial testimony, the jury certainly was within its province to determine that her original, taped statement was more credible.[58] See *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 608 n.15, 103 A.3d 954 (2014) (declining to disregard *Whelan* testimony that witnesses recanted at trial when assessing strength of state's case because "we allow the fact finder to determine whether the [*Whelan*] statement is credible upon consideration of all the relevant circumstances" [internal quotation marks omitted]).

b

Other Admissions

In addition to the three witnesses who testified that the petitioner directly confessed to the victim's murder and the three additional witnesses who corroborated their testimony, the state proffered additional testimony indicating that, on numerous occasions, the petitioner made various statements that were consistent with his having committed the crime. Specifically, witnesses testified that the petitioner acknowledged that, on the night of the murder, he had been high on illicit drugs as well as "blackout," "blind," "stumbling" drunk and, therefore, that he was unable to rule out the possibility that he was the killer. Witnesses who testified to admissions of this sort included Seigan; Dorothy Rogers, a childhood acquaintance of the petitioner and also a former Elan resident;[59] Elizabeth Arnold, another former Elan resident; and Alice Dunn, a former Elan resident who, like the petitioner, returned to Elan as a staff member after having graduated from the program.

In addition to testifying that the petitioner conceded that he could have committed the crime, several of these witnesses also stated that the petitioner had revealed additional incriminating information. Rogers, for example, testified that the petitioner had admitted to her that his family placed him at Elan because they were scared that he might have committed the murder and they wanted to hide him from law enforcement.[60] For her part, Arnold told the jury that the petitioner recalled

running around outside on the night of the murder and that "he didn't know if he had done it or his brother had done it." She also testified as to the petitioner's motive for the crime, relating that "[h]e said that his brother [had sex with] his girlfriend. . . . [H]e elaborated and said well, they didn't really have sex but they were fooling around. And [his brother had] stole his girlfriend."[61]

It is true that many of these admissions were made when the petitioner was a resident at Elan, and the jury heard extensive testimony that the therapeutic techniques employed by that school were so draconian that a captive resident might have acknowledged the possibility that he had committed a crime simply to spare himself from unending verbal and physical abuse. The jury also heard testimony, however, that the petitioner continued to make such admissions to trusted friends and relatives even after he had left Elan and was no longer subject to its harsh discipline and unique behavior modification techniques. Dunn, for example, testified about a subsequent dinner date that she had with the petitioner at a restaurant fifteen miles away from Elan, at a time when both of them were employed as staff members at the school and the petitioner was living off-campus in Auburn, Maine. She related that the petitioner continued to indicate that he could not recall the evening in question other than that he had not been in his normal state and that either he or his brother could have killed the victim.[62]

Perhaps most damning was the grand jury testimony of a family friend that the petitioner had confided to his own father that he believed that he could have murdered the victim. Mildred Ix (Mildred), a longtime neighbor and confidant of the petitioner's parents, testified before the grand jury in this case that, during a conversation on some undisclosed date, the petitioner's father 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 . . . 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, Mildred claimed to have misremembered this conversation when testifying before the grand jury, and her grand jury testimony was admitted into evidence pursuant to *State* v. *Whelan*, supra, 200 Conn. 743. Notably, at trial, Mildred only repudiated that portion of her grand jury testimony relating to the petitioner's alleged admission that he could have killed the victim. She remained firm in the belief that the petitioner had indicated to his father that he desired to take a sodium pentothal test. The only reasonable conclusion that the jury could have drawn from that testimony is that, at the very least, the petitioner was troubled by his lack of recall of the night in question and believed that he could have either murdered or witnessed the murder

of the victim. Of course, that would not have been the case if the petitioner had been miles away, at the Terrien home, at the time the crime was being committed.

The majority dismisses, out of hand, not only the petitioner's Elan confessions, but also all of his subsequent confessions and admissions, which he made while no longer under the control or influence of the Elan staff. The majority's rationale bears close scrutiny: "The fact that all of those statements were . . . made . . . in the aftermath of his experience [at Elan] 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." The majority continues this remarkable analysis in a footnote: "We note in this regard that [defense counsel] 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."[63] Footnote 25 of the majority opinion.

The majority has concluded that the state's case was weak, and that the petitioner was, thus, prejudiced by defense counsel's alleged errors, because none of his confessions or admissions actually count. They don't count because the majority believes that, after leaving Elan, the petitioner could have persuaded himself that he murdered the victim. They don't count even though the petitioner already was an adult when the relevant events at Elan transpired, and even though his confession to Coleman was made *before* he had been made the subject of any of the psychologically abusive general meetings. They don't count because, although no expert psychological testimony was presented at trial, the majority's own analysis persuades it that Elan could have tricked the petitioner into spending the rest of his life admitting—and even thinking—that he might be the killer. They don't count even though, as the majority itself readily concedes, the jury itself never was presented with the majority's own theories about the defendant's warped subconscious mind. Yet still, the majority asks us to conclude that the petitioner suffered prejudice because, having weighed Ossorio's testimony in light of the state's case, *the jury* probably would not have convicted the petitioner. In my view, this is unpersuasive absent any expert testimony in the record.

c

Other Inculpatory Statements

In addition to these various confessions and admissions regarding the petitioner's involvement in the victim's death, the jury heard testimony that the petitioner on several occasions made statements that, although not expressly related to the victim's murder, strongly suggested that he had committed a serious crime. This included the testimony of Zicarelli, a Skakel family employee, and Matthew Tucharoni, a local Greenwich barber.

Zicarelli began working for the petitioner's family as a driver, handyman, and gardener in 1976, the year following the victim's murder. Part of his job was to chauffeur the Skakel children, and he testified that the petitioner trusted and confided in him. Zicarelli further testified that, on one occasion in the spring of 1977, while driving the petitioner to a doctor's appointment in New York City, "[the petitioner] said to me that he was very sorry, that he had a lot of respect for me and [that] I was the only person that he could talk to but he had done something very bad and he either had to kill himself or get out of the country." On the return trip, while they were stopped in traffic on the Triboro bridge, the petitioner exited the vehicle and twice ran toward the side of the bridge as if to jump. After Zicarelli forcibly returned him to the car, the petitioner lamented that "if [Zicarelli] knew what he had done, [Zicarelli] would never talk to him again." Immediately following this incident, Zicarelli terminated his employment with the Skakel family.

In his closing argument, defense counsel attempted to persuade the jury that the petitioner's admissions to Zicarelli related not to the victim's murder but, rather, to the fact that the petitioner had been experiencing feelings of embarrassment over having taken his deceased mother's dress to bed with him. As I have discussed with respect to Meredith's testimony, the jury heard testimony that the petitioner admitted even to casual acquaintances that he had snuck into neighboring women's yards, climbed into nearby trees to peep at them, and masturbated. Apparently the petitioner, who revealed this conduct to Hoffman, was perfectly comfortable including it in his memoirs.

The notion that a man who so shamelessly admits to, and even publicizes, such behavior would at the same time feel so ashamed of having slept with his deceased mother's dress that he would feel compelled to go to such extreme measures as to flee the country or commit suicide defies all logic. Even assuming—and it is an enormous assumption—that the petitioner truly felt that he could no longer show his face in Greenwich after having slept with a dress, why leave the *country* rather than moving to, say, Oklahoma or Alaska? Leaving the country is something one does to escape the jurisdiction of the criminal justice system. The chance that the jury was persuaded by defense counsel's expla-

nation is, therefore, extraordinarily slim.

The state also introduced testimony from Tucharoni, who recounted an occasion in the spring of 1976 when the petitioner, Rushton, and Julie had come into his barbershop. He testified that, as he was preparing to cut the petitioner's hair, the petitioner declared, "I am going to get a gun and I am going to kill him." When Julie responded, "you can't do that," the petitioner replied, "[w]hy not? I did it before, I killed before."

2

Motive & Opportunity

The state also introduced testimony from several witnesses indicating that the petitioner had both the motive and the opportunity to kill the victim. With respect to motive, as discussed previously in this dissenting opinion, Pugh, the petitioner's childhood best friend, testified that, in 1975, the petitioner had "liked [the victim] quite a bit and had a crush on her," but that the victim "didn't seem as interested . . . ." Pugh also characterized the petitioner's brother Tommy as his rival and adversary. Arnold testified that the petitioner had variously complained that his brother had "fool[ed] around" with and "stole," his girlfriend. Ridge connected the dots, relating how the petitioner admitted to having killed the victim upon learning that she had sex with Tommy. Hoffman corroborated these accounts. He testified that, on the basis of his conversations with the petitioner, he formed the impression that, as of October, 1975, the petitioner had a crush on the victim and wanted her to be his girlfriend. Hoffman also came to believe that Tommy had been the petitioner's "nemesis."

The majority contends that the only two witnesses who support the state's theory that the petitioner killed the victim in a jealous rage or because she spurned his advances were Ridge and Arnold, and that both witnesses were, in the eyes of the majority, tainted by having Fuhrman's book. See footnote 22 of the majority opinion. The majority appears to have overlooked both Pugh and Hoffman. See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

Turning to opportunity, it was undisputed that the petitioner had ready access to the murder weapon, a Tony Penna golf club, that had belonged to the petitioner's deceased mother and ordinarily was kept at the Skakel residence. As I have discussed previously; see part II B 3 of this dissenting opinion; the jury also heard the testimony of Meredith that the petitioner admitted both to having peeped at the victim, through her bedroom window, on the night of the murder and to having seen Tommy approaching her house. Meredith's testimony, thus, placed the petitioner at the scene of the

crime while also bolstering the state's theory of motive.

3

Consciousness of Guilt

As I have discussed previously in this dissenting opinion, consciousness of guilt evidence, if credited by the jury, tends to be highly persuasive. See, e.g., *State* v. *Quail*, 168 Conn. App. 743, 765–66, 148 A.3d 1092, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016). A wide range of conduct and statements can provide evidence of a defendant's consciousness of guilt. These include the following: (1) fleeing from law enforcement or attempting suicide, (2) acting unnaturally or demonstrating agitation soon after the discovery of a crime, (3) making false statements or giving inconsistent accounts of one's whereabouts and activities, and (4) attempting to concoct an alibi, pin blame for the crime on other individuals, or intimidate witnesses. See 2 Wigmore on Evidence (Chadbourn Rev. 1979) §§ 273 through 276. The present case may be unprecedented in the scope and range of evidence that was proffered by the state to suggest that the petitioner had a guilty conscience.

First, the petitioner repeatedly and substantially changed his accounts of both his activities and his whereabouts on the night of the murder.[64] Soon after the murder, the petitioner told the police that he had returned from the Terrien home between 10:30 and 11 p.m. and gone to sleep for the night shortly thereafter. He specifically denied having left the house again after returning home. For years after that, his story, both at Elan and to his father, was that he had been so drunk and high that he was unable to recall any of the evening's events. Subsequently, however, the petitioner somehow regained the ability to recall in elaborate detail his activities and conversations on the night in question. Hoffman's records of his conversations with the petitioner, for instance, contain many pages of notes detailing the petitioner's specific recollections about that evening. But these accounts differed dramatically from, and were far less innocuous than, his initial statements to the police. Most notably, he admitted to having gone back out and masturbated while attempting to spy on the victim and another female neighbor. On the basis of the petitioner's ever changing—and increasingly inculpatory—stories, the jury reasonably could have concluded not only that *all* of his accounts and denials lacked credibility but also that he had reason to mislead the police as to his true whereabouts and activities on the night the victim was killed.

Second, there was evidence that the petitioner not only attempted suicide but also considered fleeing the United States in the years following the murder. In a classic demonstration of a guilty conscience, the petitioner, having twice attempted to jump off the Triboro Bridge, confided to Zicarelli that he saw no choice but

to kill himself or get out of the country. As I have explained previously in this dissenting opinion, the most reasonable interpretation of that statement is that the petitioner felt the need to escape the jurisdiction of the criminal justice system. That would be consistent with his confession to Rogers that the petitioner's family sent him to Elan "to hide him from the police so the police couldn't put him in jail."

Third, there was evidence that the petitioner tried to fabricate an innocuous account of his activities on the night of the murder, an account that would explain the presence of his DNA should it later be identified on the victim or the murder weapon. Pugh, for example, testified that, when he and the petitioner became reacquainted in 1991, the petitioner, having had no contact with Pugh for fourteen years, volunteered that, on the night of the murder, he had been masturbating in the tree where the victim's body was found. Soon thereafter, Pugh began receiving calls from an investigative agency, which had been hired to clear the petitioner of the crime. Ultimately, the petitioner himself called to urge Pugh to meet with that agency.[65]

Fourth, as I have discussed previously in this dissenting opinion, soon after the victim's body was discovered, the petitioner made the highly incriminating statement that he, along with Tommy, had been the last person to see the victim alive. If he had gone to the Terrien home while the victim remained at the Skakel residence with one-half dozen other neighborhood children, and not seen her again that night, then he would have known that he was not among the last two people to see her. He also could not possibly have known with whom, if anyone, the victim might have spent time later that evening, as many neighborhood children were still in school at the time that statement was made. See footnote 33 of this dissenting opinion. This statement to Shakespeare and Julie was completely consistent, however, with Meredith's testimony that the petitioner had spied on Tommy and the victim from a tree later that evening.

It also bears noting in this regard that (1) the petitioner decided to cut school the day the victim's body was discovered, (2) he was especially agitated after the murder, and (3) the record indicates that he may have attempted to intimidate the state's witnesses during the trial, which conduct the jury may well have witnessed.[66] All of this consciousness of guilt evidence, taken together, would have strongly suggested to the jury that the petitioner was involved in the murder.

4

Hoffman Tapes

Finally, I come to the Hoffman tapes, perhaps the single most important piece of evidence in the state's case against the petitioner. Although the petitioner

exercised his right not to testify at trial, the jury was nevertheless able to hear the petitioner, in his own voice, providing his account of the evening's events. This gave the jury a unique opportunity to assess his truthfulness and the credibility of his story.

As I have explained, the statements that the petitioner made to Hoffman inculpated him in various ways. He laid out a motive for the crime: he was attracted to the victim, and even went to "get a kiss" from her when he was feeling "horny" on the night of the murder, but she had rebuffed his advances and declined to go to the Terrien home with him, stating that she had to comply with an early curfew. He confessed to having engaged in criminal misconduct on mischief night: shooting apples out of homemade "funnelators" at other children and moving vehicles and then running away; and peeping in a neighbor's window "hoping to see her naked." He admitted to having consumed numerous alcoholic drinks and smoked marijuana throughout that evening, at the age of fifteen. He expressed a ready willingness to deceive adults, explaining that he had planned to cut school the next day and lie about his whereabouts. He undercut his own alibi, stating that, upon returning from the Terrien home, "he remember[ed] that [Shakespeare] had gone home . . . ."[67]

Perhaps most importantly, however, the Hoffman tapes are simply replete with evidence of the petitioner's guilty conscience. First, he tried to cast suspicion on various Skakel employees. He insinuated that Franz Wittine, the Skakel's handyman, had mysteriously disappeared and suggested that Littleton was possessed of a weird quietness and "wouldn't hesitate to pummel you." In a revelation worthy of Sigmund Freud, the petitioner went so far as to suggest that he had tried to get Littleton romantically interested in the fifteen year old victim, claiming to have told Littleton the following: " 'Oh, you should meet Martha, Martha's hot, she's a "shmoke," . . . . "Yeah, she's really cute." ' " He also conveniently mentioned that he had planned to tell Pugh that he had seen someone lurking near the victim's house that night.

Second, contrary to previous statements indicating that he had gone straight to bed upon returning from the Terrien home or could not recall the night's events, the Hoffman tapes demonstrate that the petitioner was able to recount his activities, thoughts, and conversations in great detail. He remembered the various types of cocktails that he had been drinking that night. He recalled the victim's exact words when she rejected his invitation to join him at the Terrien home. He knew who was sitting in which seat of the Lincoln, and where the car pulled over to change drivers. He was able to retrace his path through his house, up Walsh Lane, to the window of a neighboring "lady's house," and, finally, to the victim's house and through the murder scene.

Third, the petitioner admitted to feelings of guilt, shame, and panic regarding the evening's events. He recalled that he had gone to sleep hoping that no one had seen his behavior at the victim's house and woken up feeling the same way. He spoke of waking with a feeling of panic, and alluded to his "worry of what I went to bed with . . . ."[68] He specifically expressed the fear that people would think that he had committed the crime.

Fourth, upon waking the next morning and being confronted by the victim's mother, the petitioner immediately left Belle Haven on his bicycle. His statement to Hoffman was to the effect that he headed "uptown" to see if he could locate the victim, but concluded that " '[t]his is crazy' " and "turned around and came back." The clear implication is that he was gone only briefly from his house and never actually conducted a search for the victim. The problem, however, is that the petitioner also told Hoffman that, upon his return, police cars were "everywhere" at the scene and the victim had been found dead. This means that the petitioner, who left Belle Haven at approximately 8:30 a.m., did not return until at least 12:30 p.m. The jury may well have determined that the petitioner's unexplained four-hour disappearance from the neighborhood after having been confronted by the victim's mother represented an initial attempt at flight.

Finally, and most significantly, the Hoffman tapes revealed the petitioner's bizarre account of his conduct at the Moxley house after returning from the Terrien home, an account that seems precisely calculated to fabricate a legitimate explanation in the event that anyone saw him assault the victim or his DNA was later tied to the murder. He narrated how he went to the Moxley property that night to get a kiss from the victim, how he climbed a tree to spy on her, how he threw rocks and sticks at the window to get her attention, how he pulled his pants down and masturbated for thirty seconds in the tree, how he started to walk through the oval where the victim had been killed until "something in [him] said, '[d]on't go in the dark over there,' " and how he ran home while picking up sticks, throwing rocks, and yelling obscenities.

In perhaps the most extraordinary portion of its opinion, the majority turns a blind eye to almost all of the petitioner's statements in the Hoffman tapes, summarizing and dismissing them in a single sentence. This was some of the most compelling evidence of the petitioner's guilty conscience. The state considered these recorded statements to be such powerful evidence of the petitioner's guilt that the prosecutor made them the centerpiece of his summation. The habeas court itself recognized that the tapes were "an emotionally powerful tool . . . ." Most importantly, in his brief to this court, the petitioner characterizes his own taped state-

ments as "creepy" and "highly prejudicial," and admits that the state's use of those statements in its summation was "*extremely damning* . . . ." (Emphasis added.) The petitioner concedes that these statements not only corroborated the testimony of the state's witnesses and documented his feelings of guilt and panic surrounding the night of the murder, but also unequivocally placed him at the scene of the crime, drunk and high, masturbating and wanting a "kiss" from the victim, right around the time that she was killed. Yet still, the majority, while purporting to conduct an objective assessment of the state's evidence, dismisses the petitioner's own statements out of hand, writing them off as merely "odd" or "suspicious . . . ." Footnote 24 of the majority opinion.

Rather than directly address these statements, the majority simply argues that, in any event, the state's case must have been weak because the murder remained unsolved for more than two decades and the police initially pursued various other suspects before finally turning to the petitioner. What the majority fails to acknowledge was that this was not some game of musical chairs in which law enforcement's attention happened to turn to the petitioner only after other, more likely suspects had been cleared. Rather, it was the petitioner's own statements admitting that, while sexually aroused, he had sought out the victim for a kiss, attempted to spy on her, and then ran away from her house while holding "sticks" and yelling obscenities, that he drew the spotlight of suspicion onto himself.

5

Family Conspiracy Theory

Perhaps more remarkably, although the evidence that I have outlined—hundreds of exhibits and many days of trial testimony from dozens of state's witnesses—clearly was sufficient to convince the jury of the petitioner's guilt beyond a reasonable doubt, the majority, having brushed much of it away as merely "odd"; footnote 24 of the majority opinion; instead posits that the jury must have rendered its verdict on the basis of a theory that had virtually *no* evidentiary support. Specifically, the majority posits that the jury was persuaded by the prosecutor's suggestion during closing argument that the Skakel family could have engaged in a decades long conspiracy to cover up the petitioner's crime, a conspiracy that purportedly included the fabrication of the Terrien alibi, and that the family would not have engaged in such a conspiracy unless the petitioner was guilty. Having set up this straw man, the majority asserts that a stronger alibi defense not only would have made it impossible for the petitioner to have committed the murder around 10 p.m. but also would have refuted the conspiracy theory on which the conviction was purportedly based. In fact, the only evidence that supported this "conspiracy" theory consisted of the peti-

tioner's own admissions that his family had sent him to Elan because they were afraid that he was a killer. That *is* evidence of the petitioner's consciousness of guilt, and the jury properly could have taken it into account as such. But that has nothing to do with a fabricated alibi defense, and Ossorio's testimony would have done nothing to neutralize it.

The other evidence that allegedly supported the family conspiracy theory, such as the fact that the petitioner's father drove his minor children to the police station to give statements about their whereabouts on the night of the crime, was so innocuous that no reasonable jury could have found it to be incriminating. See *Skakel* v. *State*, supra, 295 Conn. 687–95 (*Palmer*, *J.*, dissenting). There certainly is nothing unusual about a father driving his teenaged children to the police station if their statements have been requested. Moreover, the family conspiracy theory failed, transparently, on its own terms. Soon after the murder, for example, Julie told the police that she thought that she had seen the petitioner running in the bushes outside the Skakel residence after the Lincoln had departed. It defies logic to think that the family would have fabricated a grand conspiracy theory but forgotten to include Julie in the plan, or that it would have proceeded with the conspiracy if Julie refused to go along with it.

In light of the almost complete lack of evidence in support of the family conspiracy theory, the insistence by the majority that that theory—rather than the abundant, actual evidence of the petitioner's guilt—was the basis for his conviction, offends several well established legal rules. First, as I already have noted, the trial court properly instructed the jury that the arguments and statements of counsel "are not evidence *and you may not consider them* in deciding what the facts are." (Emphasis added.) We are required to assume that the jury complied with that instruction and convicted the petitioner on the basis of evidence, not argument.[69] *PSE Consulting*, *Inc.* v. *Frank Mercede & Sons*, *Inc.*, 267 Conn. 279, 335, 838 A.2d 135 (2004).

Second, to assume that the jury convicted the petitioner on the basis of the prosecutor's groundless references to a family conspiracy, rather than on the basis of the abundant confession and consciousness of guilt evidence that the state had presented at trial, would run afoul of *Strickland*'s admonition that "[i]n making the determination whether the specified errors [of counsel] resulted in the required prejudice, a court should presume . . . that the . . . jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice . . . and the like. . . . The assessment of prejudice should proceed on the assumption that the [decision maker] is reasonably, conscientiously, and impartially applying the standards

that govern the decision." *Strickland* v. *Washington*, supra, 466 U.S. 694–95; see also *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 690 (we must assume that trier of fact acted properly and considered all relevant evidence at trial); *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991) (noting, with respect to conspiracy charge, that jury may not "resort to speculation and conjecture [or draw] unwarranted inferences from the facts presented").

Conclusion

The truth is that the petitioner's guilt was for the jury to decide. Having heard the petitioner's own words on the Hoffman tapes, the jury had to conclude either (1) that he had the bizarre misfortune of walking right through the crime scene, just after the murder, without noticing the body, murder weapons, or fresh blood, and while acting extremely oddly, sexually, and aggressively, or (2) that he committed the crime in a manner more or less consistent with the evidence presented by the state and later attempted to fabricate an explanation, through Hoffman, to hedge against the discovery of inculpatory DNA evidence or the possibility that anyone had witnessed him committing the crime. Nothing that Ossorio would have said at trial possibly could have transformed the former conclusion into a rational one.

For all of these reasons, I respectfully dissent.

[1] It is undisputed that the deficient performance alleged to have occurred in the present case was not among the limited class of errors for which prejudice may be presumed. See *Strickland* v. *Washington*, supra, 466 U.S. 692.

[2] Of course, the Connecticut constitution may, in theory, afford broader protections with respect to the right to counsel than does the sixth amendment to the United States constitution. Neither the petitioner nor the majority argues, however, that the state constitution confers broader protection under the circumstances presented in this appeal.

[3] The jury was fully aware that the time of the offense was not an essential element of the charged crime and that the state was under no obligation to narrow the time of the commission of the offense more than the available evidence warranted. Indeed, the trial court charged the jury to that effect on two separate occasions.

[4] The basic principle here is that several different things would have to happen for the petitioner to prevail, and he has the burden of proving that it is reasonably likely that *all* of them, collectively, would happen. For there to be nearly even odds that three different things will happen, it must be overwhelmingly likely that each will. For example, one would not place a wager that Boston teams will win the Super Bowl, the World Series, *and* the National Basketball Association Championship in a given year unless the New England Patriots, the Boston Red Sox, and the Boston Celtics were each prohibitive favorites. If each team was just a slight favorite, wagering on all three winning would be a sucker's bet.

[5] In the present case, the habeas court found prejudice largely on the basis of what the court described as its "fair reading" of the cold trial record, including the state's closing argument, the trial testimony of two medical experts, and several jury requests.

[6] I find it difficult, therefore, to understand the majority's sweeping statement that it is not aware of "a single case . . . 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" and, therefore, that defense counsel's "deficient performance in failing to investigate the independent alibi testimony of Ossorio was inherently or necessarily prejudicial." Many of the cases I have cited hold pre-

cisely that.

Indeed, even if we were to limit the discussion to cases in which the alibi at issue was undisputedly a complete one, the failure to identify or present a noncumulative alibi witness is not per se prejudicial. See, e.g., *United States* v. *Turuseta*, 853 F. Supp. 416, 422 (S.D. Fla. 1994), aff'd, 59 F.3d 1246 (11th Cir. 1995) (no prejudice because alibi testimony would not have directly contradicted confession); *Torres-Arboleda* v. *Dugger*, 636 So. 2d 1321, 1324 (Fla. 1994) (no prejudice in light of eyewitness testimony placing petitioner at murder scene); see also *United States ex rel. Kleba* v. *McGinnis*, 796 F.2d 947, 959 (7th Cir. 1986) (Cudahy, J., concurring and dissenting) (although "complete alibi should ordinarily meet the prejudice requirement of *Strickland* . . . if the evidence against a defendant is 'overwhelming,' a deficient performance of counsel that would otherwise be deemed prejudicial might fail to produce a reasonable probability of prejudice"); cf. *Ford* v. *State*, 314 S.C. 245, 248, 442 S.E.2d 604 (1994) (failure to seek alibi charge not prejudicial in light of overwhelming evidence of guilt).

[7] It appears that the majority may have confused the legal standard governing partial alibis with the *Strickland* prejudice standard. Although it is true that the petitioner need only show a reasonable probability of a different result to prevail under *Strickland*, he nevertheless cannot prevail, as a matter of law, unless his alibi argument is legally sound. See *King* v. *State*, supra, 505 S.W.3d 426.

In any event, the argument of the majority founders on another shoal. If his alibi was not a complete one, then the petitioner also cannot demonstrate that defense counsel performed deficiently. It is not deficient performance to fail to identify a witness who, at best, could have testified to a partial alibi. See *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 546; *Beasley* v. *State*, supra, 18 So. 3d 492. It is undisputed that, under the first prong of *Strickland*, the petitioner has the burden of establishing something more than the fact that the crime *might* have been committed during the alibi period.

[8] Throughout its opinion, the majority consistently downplays or ignores evidence and arguments that contradict or fail to support its own theory of the case, notwithstanding the fact that the jury, which was in the best position to assess the evidence and arguments presented at trial, concluded that the petitioner murdered the victim. In this context, for example, the majority ignores all of these statements in which the prosecutor repeatedly made clear that the state was aggressively arguing a partial alibi theory. The majority acknowledges only that State's Attorney Jonathan C. Benedict "observed during closing argument that the state did not have to disprove the petitioner's alibi for the jury to find him guilty," which hardly does justice to the force of the state's partial alibi theory.

[9] Accordingly, the majority's statement that "[t]he 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," while quite possibly true, is simply irrelevant. That was not the state's argument in the present case.

[10] It is, therefore, disingenuous of the petitioner to insinuate in his brief that the state changed its theory as to the time of death in order to pin the crime on him. The petitioner neglects to mention that it was his own subsequent admissions that he initially misled law enforcement about his activities and whereabouts after returning from the Terrien home, and that he had seen the victim alive later that evening, that led the state to reexamine the time of death and the importance of the Terrien alibi.

[11] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[12] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[13] As previously noted in this dissenting opinion, during closing arguments, defense counsel stated that "all we know from . . . Gross is [that his] report . . . says well, my conclusion is that it occurred at 9:30 [p.m.] to 4:30 or 5:30 [a.m.] of the next morning." We must assume that, pursuant to the court's instructions, the jury disregarded counsel's recitation of facts that were not in evidence. *State* v. *McIntyre*, 250 Conn. 526, 534, 737 A.2d 392 (1999).

Unfortunately, the majority fails to honor this same, well established principle within its own reasoning. Indeed, the majority's prejudice analysis hinges to a large extent on the dubious assumption that the jury was persuaded not by the abundant, actual evidence of the petitioner's guilt; see

part III of this dissenting opinion; but, rather, by the prosecutor's speculative suggestion during closing argument that the Skakel family had engaged in a protracted conspiracy to cover up the petitioner's crime, a conspiracy theory that defense counsel easily rebutted and that found virtually no support in the evidence presented at trial. See *Skakel* v. *State*, supra, 295 Conn. 687–95 (*Palmer*, *J.*, dissenting). The majority fails to explain why we should attribute such irrational decision making to the jury, which it accuses, without any support or evidence, of having decided the case on the basis of a feeling of outrage that a wealthy family was able to " 'trick' " the police.

[14] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[15] Keegan's investigation report indicates that he observed slight lividity when he examined the body during the afternoon of October 31, but there is no indication whether lividity was fixed at that time. Gross did note lividity during the autopsy on November 1.

[16] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[17] The extent to which lividity has been fixed is ascertained by turning a body over and noting the degree to which the color shifts downward. Even if the detectives had noted fixed lividity when they first examined the body at 1:15 p.m., at best that would indicate that the victim had died sometime prior to the early morning hours of October 31.

[18] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[19] Jachimczyk acknowledged that the only determination that could be made on the basis of an examination of the victim's digestive tract was that she died sometime after 9:30 or 10 p.m. on October 30. He agreed that it was very difficult to say how long she had lived past 10 p.m.

[20] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[21] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

It is not entirely clear from the diary entry whether the activities that ensued took place at the Moxley home or at Wettenhall's home. Curiously, the entry indicates that both girls' mothers were awakened at 4:30 a.m. when the boys left.

[22] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[23] It is, therefore, quite misleading for the majority to argue that State's Attorney Jonathan C. Benedict made no attempt to proffer "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." Although it is technically true that Benedict himself only alluded to this point, it is also true that another state's attorney specifically questioned Helen as to whether teenagers and other children were out that night and induced testimony indicating that Helen had initially assumed that this activity was what Zock had been barking at.

[24] There is no evidence in the record as to whether the Ix' had owned Zock for more than one year or whether Zock had ever before experienced mischief night and, if so, how he had reacted to that sort of mayhem.

[25] The majority dismisses this testimony, noting that there was no specific evidence at trial that anyone was engaged in mischief night activities at that particular time and place. However, there was abundant evidence, including statements from the petitioner himself, that mischief night typically involved the setting off of loud and destructive percussive devices. Anyone who has owned a dog or spent time around dogs will know that the explosion of a firecracker or similar pyrotechnic *anywhere in the vicinity* typically will be enough to send neighborhood dogs racing to their doors or to the edge of their properties, where they will stand barking at the outside world. That is precisely how Zock behaved.

It is important to note in this respect that this is a habeas case. The *petitioner* bears the burden of establishing that the crime occurred during the alibi period and, therefore, that the alibi was legally relevant. See *Wong* v. *Belmontes*, 558 U.S. 15, 27, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009); *Lawrence* v. *Armontrout*, 31 F.3d 662, 668 (8th Cir. 1994). The state is not obligated to prove the specific details of every scenario that is incompatible with the petitioner's claim. In any event, there was more than enough evidence regarding mischief night for the jury to have dismissed Zock's behavior as unimportant.

[26] Although Jachimczyk may have relied on police reports relating to a third

dog that allegedly acted peculiarly on the night in question, that evidence was not presented to the jury and, therefore, the habeas court properly determined that it was not relevant to the prejudice analysis.

[27] Littleton explained that the recreational vehicle was parked in front of the Skakel house. It was, therefore, on the opposite side of the house from the Moxley residence, and far removed from where Zock was barking across from the front of that property.

[28] The habeas court proceeded on the assumption that these events transpired "at around 10 p.m.," rather than at 9 p.m. Insofar as I am unable to identify any evidence in the trial record to support that alternative timeline, I conclude that the opinion of the habeas court was clearly erroneous in this respect.

[29] This was consistent with testimony from the victim's mother indicating that she heard voices outside and the barking of dogs between around 9:30 and 10 p.m.

[30] The majority's argument that the fact that the jury took several days to reach a verdict indicates that the jury thought that this was a close case is belied by the fact that very little of that time was spent in actual deliberations. The jury spent only two full days and part of two others deciding the case, and much of that time was spent rehearing the requested testimony. The present case is thus readily distinguishable from those on which the majority relies.

[31] Pugh's testimony also reasonably can be understood to evidence the petitioner's consciousness of guilt. See part III B 3 of this dissenting opinion. Pugh testified that the petitioner tried to provide him with an exculpatory account of his activities on the night in question and then urged Pugh to speak with an investigative agency that had been hired to clear the petitioner's name.

[32] The majority opinion barely mentions Pugh's testimony. See footnote 8 of this dissenting opinion.

[33] Although that Friday was a teacher conference day for the local public school that the victim attended, those who attended various private schools in the area of Belle Haven, such as the Skakel children, did have school that day.

[34] As I have discussed previously in this dissenting opinion, during closing argument the petitioner's statement to Shakespeare and Julie headlined the list of confessions and other inculpatory statements that the prosecutor highlighted for the jury. Nevertheless, the majority, in dismissing the importance of that statement, contends that I have parsed it overmuch. Indeed, the majority goes so far as to allege that, by merely discussing the evidence that the state set before the jury, I have demonstrated my "one-sided approach" to the petitioner's motion for reconsideration.

Apparently eager to avoid my missteps, the majority parses this key element of the state's case not at all. In any event, one need not analyze Shakespeare's testimony too deeply to recognize that it dovetailed perfectly with unrefuted testimony in the record indicating that the petitioner and Tommy really were the last ones to see the victim alive, later that evening, when the petitioner stole onto the victim's property to watch her undressing. See part II B 3 of this dissenting opinion.

[35] In light of this testimony and the trial court's clear instruction thereon, it is difficult to understand how the majority can represent that the "alibi defense [was] comprised solely of the testimony of family members." See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder). Also concerning is the majority's persistent exaggeration of the weakness of the petitioner's alibi, suggesting that an alibi defense that included the testimony of multiple family members as well as Helen's independent testimony was so "far weaker" and so " 'poorly investigated' " that proffering the defense actually constituted a " 'disservice' " to the petitioner.

[36] Had Ossorio testified at trial that he had seen the petitioner at the Terrien home on the night of the murder, the state undoubtedly would have impeached that testimony on the grounds that (1) the Skakel boys themselves had not recalled watching television with Ossorio on that night, and (2) it seems highly unlikely that, decades after the fact, Ossorio could have recalled with any precision whether it was that particular evening and not some other Thursday in 1975 in which he watched television with the petitioner.

[37] See footnote 3 of the majority opinion (discussing testimony from habeas trial that victim had sexual encounter with Tommy on Skakel property beginning around 9:30 p.m., after other teenagers departed, which encounter Tommy neglected to report to law enforcement).

[38] At trial, the victim's mother testified that, when the victim had not come home by the morning of October 31, she believed that the most likely explanation was that the victim, who had developed a fondness for beer, had been drinking in the recreational vehicle with Tommy and had fallen asleep. There is no doubt, then, that the jury would have been cognizant of this possibility.

[39] See part II B 2 c of this dissenting opinion (explaining that state specifically asked victim's mother whether victim could have returned home for a while without her mother's knowledge and victim's mother conceded that it was possible, which was fully consistent with victim's description of her late night activities in her diary).

[40] See part II B 3 of this dissenting opinion.

[41] The majority argues, for example, that we should not consider the possibility that the victim stopped home to shower and change clothes on the evening of the murder, because the prosecutor did not expressly discuss that scenario during his closing argument.

[42] I recognize that it might be inappropriate for a reviewing court to rely on inferences from the trial evidence that are so esoteric or obscure that it is unreasonable to assume that a lay jury would have imagined them on its own. We ought not to assume, for example, that a jury would have performed its own statistical analysis of evidence presented in a trial involving intensive amounts of data. In the present case, by contrast, the evidence and inferences at issue, such as the testimony of the victim's mother that it was possible that the victim came home and went back out without being seen, all were transparently before the jury.

[43] Relatedly, in the very first paragraph of its summary of the facts of the case, the majority states, as if it were an established truth, that the victim "was likely murdered as she made her way home from the Skakel driveway." In fact, the only support for this unproven statement is the fact that the Skakel house was located catty corner from the victim's house and she was killed near the driveway in front of that side of her home.

[44] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[45] Testimony of various witnesses placed the petitioner, the victim, and Tommy at the Skakel residence from the time the Skakel family returned from dinner around 9 p.m. until the Lincoln departed for the Terrien home just before 9:30 p.m.

[46] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[47] The victim's corner bedroom had unobstructed windows that faced both to the south and to the west. Her room would, therefore, have been in view of the trees in both directions on the Moxley property.

[48] The majority, begging the question, contends that if the jury *had* concluded that the crime was committed at 10 p.m., then Ossorio's alibi would have been a complete one. That is undoubtedly true. I have dedicated no fewer than fifty pages of this dissenting opinion, however, to reviewing in detail the evidence that was before the jury and explaining why we cannot assume that the jury concluded that the murder was committed at that time. The majority's counter analysis amounts to little more than a few paragraphs of sheer speculation: why would a dog have barked and become agitated if not because of a murder, and how could a teenaged girl have passed an hour or so unnoticed? Respectfully, I do not believe that that is the sort of objective review of the entire trial record that *Strickland* demands.

[49] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[50] It bears noting, however, that the state's case was not based entirely on circumstantial and confession evidence. Most notably, it is undisputed that the victim was killed with a golf club that had belonged to the petitioner's mother and that was typically stored in the petitioner's home. Although the use of the club as the murder weapon does not directly implicate the petitioner, he is one of only a few potential suspects in the crime who had regular access to the weapon.

[51] It was, of course, proper for the habeas court to assess the credibility of Ossorio and other witnesses at the habeas trial. My concern here is that 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 the demeanor of those witnesses firsthand, clearly credited at least some of their testimony.

[52] In *Kyles*, for example, the suppressed evidence directly undermined

eyewitness testimony that constituted the essence of the state's case. *Kyles* v. *Whitley*, supra, 514 U.S. 441. Similarly, in *Gaines*, we emphasized that (1) the omitted alibi evidence would have called into question the most essential elements of the state's case, and (2) the habeas court was the sole arbiter of witness credibility. *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 677, 690–92.

None of the other cases on which the majority relies authorizes the level of independent scrutiny in which the majority engages here. For example, in *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 293, the majority took pains to explain that, "[n]eedless to say, it is not the role of this court to make credibility determinations . . . ." Moreover, Chief Justice Rogers, whose vote was necessary to the result, emphasized in her concurring opinion that "[t]he majority is *not* holding, and I would strongly reject any suggestion, that this court may ever second-guess the factual findings of the ultimate finder of fact . . . ." (Emphasis in original.) Id., 352. Whereas, in that case, we simply considered how evidence the jury never had an opportunity to hear might have been received by the fact finder, the majority in the present case appears to relitigate portions of the underlying trial a priori.

[53] It adds to the probative value of these highly incriminating statements that many were made by the petitioner, while he was visibly emotional, to close friends and family members. See *State* v. *Quail*, 168 Conn. App. 743, 765, 148 A.3d 1092, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016).

[54] It often has been noted that the prosecution is not free to pick and choose its witnesses and that, ultimately, it is the offender himself who determines who will bear witness to his crimes. See *State* v. *Fronning*, 186 Neb. 463, 465, 183 N.W.2d 920 (1971); *State* v. *Niblack*, 74 Wn. 2d 200, 207, 443 P.2d 809 (1968). This maxim assumes particular significance in the context of confession and admission evidence, as a wrongdoer may not choose to place his confidence in "nuns, teachers [and] engineers . . . ." (Internal quotation marks omitted.) *Virakitti* v. *Mills*, United States District Court, Docket No. CV-07-306-BR (AJB) (D. Or. February 4, 2010).

[55] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[56] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[57] At trial, several witnesses testified that, while at Elan, the petitioner had been required to wear a large sign inviting other residents to confront him about the murder of the victim.

[58] It is not clear to me why, when a witness such as Ridge has changed their account of events over time in a manner that favors the petitioner, the majority concludes that the latter statements reflect the truth, but that when other witnesses whose testimony evolved in a manner that inculpates the petitioner—such as Shakespeare and the victim's mother—the majority credits, and thereby concludes that the jury must have credited, the witness' original statements.

[59] Rogers indicated that she reported the petitioner's admissions to law enforcement soon after she left Elan in 1980, almost two decades before the publication of Fuhrman's book. Richard Haug, a police detective employed by the town of Greenwich, confirmed that he and Rogers discussed the matter while she was under arrest for arson in 1980.

[60] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[61] Because Arnold's testimony does not go to the alibi issue, the time of death, or the petitioner's presence at the crime scene, the majority's efforts to undermine her credibility on the basis of its own reading of the cold trial record are both improper and largely irrelevant to the legal question presently before this court.

[62] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[63] In the majority's discussion of the petitioner's experience at Elan, the majority repeatedly implies that the petitioner was beaten and tortured many times over the course of his stay at the school. In fact, however, there was testimony at trial that he received such treatment only on a single occasion, after he had broken a cardinal rule of the school and attempted to escape.

[64] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[65] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[66] See footnote 8 of this dissenting opinion (noting majority's consistent failure to acknowledge facts undermining its theory of the murder).

[67] Because Shakespeare went home after the petitioner had allegedly left for the Terrien home, he should not have had any memory of her leaving.

[68] The state argued at trial that this was a reference to the missing shaft of the golf club that had been used to kill the victim.

[69] It is notable in this respect that the trial court, in its lengthy instructions to the jury and recitation of the potentially relevant facts, never so much as mentioned the state's family conspiracy theory.