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SHAWN CROCKER *v.* COMMISSIONER OF CORRECTION (AC 45232)

Prescott, Moll and Cradle, Js.

Syllabus

The petitioner sought habeas relief in a fourth petition for a writ of habeas corpus, claiming that his counsel in two previous habeas actions provided ineffective assistance by failing to raise claims that his criminal trial counsel, A, rendered ineffective assistance by not conducting a proper investigation to identify exculpatory witnesses and/or by failing to call certain allegedly exculpatory witnesses, H, V, T and Y, who testified for the first time at the habeas trial, to testify at his criminal trial. The habeas court rendered judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The habeas court did not improperly deny the petition for a writ of habeas corpus with respect to the petitioner's claims of ineffective assistance of both prior habeas counsel, the petitioner having failed to meet his burden of demonstrating deficient performance by A in failing to conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses: the petitioner failed to meet his burden of rebutting the presumption of competent performance by A, because although A was called as a witness at the habeas trial, the petitioner never asked him any questions about the nature and scope of his investigatory efforts, either generally or with respect to any particular witness or about his reasons for calling or not calling particular witnesses; moreover, the petitioner presented no other evidence that would have supported a finding that A failed to conduct an objectively reasonable investigation; furthermore, the petitioner's own legal expert was not asked and did not opine that A conducted a constitutionally deficient investigation and testified only that A's failure to call Y, assuming A was aware of him, constituted deficient performance, and was asked no questions and offered no opinion regarding the three other potential witnesses.

2. The habeas court did not improperly deny the petition with respect to the petitioner's claims of ineffective assistance of both prior habeas counsel, the petitioner having failing to meet his burden of demonstrating deficient performance by A in failing to call certain allegedly exculpatory witnesses to testify at his criminal trial: it was undisputed that neither V nor H had ever given a statement to the police, the petitioner did not present evidence that either man had spoken to an investigator or was otherwise discoverable by A prior to the criminal trial, and the petitioner did not direct this court's attention to any evidence in the record demonstrating that A or anyone associated with the defense could have identified either of them in the course of a reasonably competent investigation; moreover, with regard to T, there were several objectively reasonable strategic reasons why A might have elected not to call him as a witness, including that he was unable to identify the shooter in the underlying incident either by name or by description, his testimony would have conflicted with the petitioner's own trial testimony in which he admitted to being in the area at the time of the shooting, his testimony would have undermined the testimony of another important exculpatory witness, and T testified that he was smoking marijuana at the time of the shooting, which could have been used on cross-examination to undermine his ability to accurately perceive and recall details; furthermore, with regard to Y, the record revealed a number of objectively reasonable strategic reasons why A may have chosen not to call Y as a witness despite the potential exculpatory nature of his testimony, as Y's testimony and prior statement would have contradicted testimony by other witnesses important to the defense, including the petitioner's own testimony, and the credibility of Y's testimony could have been significantly undermined for a number of reasons, potentially further reducing his desirability to A as a witness.

Argued March 7—officially released July 25, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *John P. Doyle*, *Jr.*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Shawn Crocker, appeals from the judgment of the habeas court granting in part and denying in part his petition for a writ of habeas corpus.[1] The petitioner claims on appeal that the court improperly rejected his claims that counsel in two previous habeas actions provided ineffective assistance of counsel by failing to raise claims that his criminal trial counsel rendered ineffective assistance by not conducting a proper investigation to identify exculpatory witnesses and/or by failing to call exculpatory witnesses to testify at his criminal trial. We disagree. Accordingly, we affirm the judgment of the habeas court.

The following facts underlying the petitioner's criminal conviction, which the jury reasonably could have found on the basis of the evidence admitted at trial, were set forth previously by this court in *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). "Shortly before 7:30 p.m. on October 27, 1997, George David Wright drove a stolen Jeep Cherokee [Jeep] to the Quinnipiac Terrace housing complex in New Haven, also known as the Island. . . . [Daryl Price] was in the [front] passenger seat of the Jeep, and Calvin Taylor was seated in the back. At the housing complex, Wright and Taylor exited the vehicle, and Tacuma Grear [Tacuma] approached the Jeep to talk to [Price]. They talked about the [fatal shooting by Price] of [Tacuma's] brother, Corey Grear [Corey] . . . which had occurred approximately one week earlier, for which [Price] . . . apologized. [Corey] was a friend of the [petitioner], and the [petitioner] had held [Corey] in his arms after [Corey] was fatally shot by [Price]. The [petitioner] had witnessed [Price] shoot [Corey]. [Corey] was . . . a member, as was the [petitioner], of the Island Brothers, a street gang into which [Price] had been introduced and sponsored by the [petitioner]. As his sponsor, the [petitioner] was responsible for disciplining [Price] should [Price] kill a fellow gang member. As [Tacuma] walked away from the Jeep, the [petitioner] had come up to the driver's side of the Jeep carrying a handgun. He then leaned into the Jeep and fired four times into the vehicle. Two .45 caliber bullets hit [Price], killing him . . . ." (Internal quotation marks omitted.) Id., 113–14.

The petitioner subsequently was arrested and charged, inter alia, with murder in violation of General Statutes (Rev. to 1997) § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 1997) § 53a-217.[2] Id., 114. His first trial ended in a mistrial because the jury was unable to reach a unanimous verdict. Following a second jury trial, however, he was found guilty of murder and criminal possession of a firearm. At each trial, the jury heard conflicting

testimony from witnesses regarding the events surrounding the shooting and the culpability of the petitioner.

As recognized by the habeas court in the present action, Tacuma was an important witness for the state because he was present when Price was shot and killed, and his testimony directly implicated the petitioner as the shooter. Tacuma testified at two probable cause hearings and at both criminal trials. At the second criminal trial, Tacuma "testified for the state that he talked to the police two days after the shooting and again on June 18, 1998, when he gave the police a tape-recorded statement, which was introduced into evidence. . . . [Tacuma admitted to telling the police] that when four to five gunshots were fired, he saw someone who looked like the [petitioner] leaning toward the driver's side window of the vehicle in which the victim was a passenger and saw flashes." *State* v. *Crocker*, 83 Conn. App. 615, 623, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004). Tacuma, however, was unwilling to testify directly that he in fact saw the petitioner shoot Price despite having previously told the police otherwise.

Wright also was an important witness for the state. Although he refused to testify at both trials despite offers of immunity and threats of contempt, his prior testimony from the first probable cause hearing was admitted at the second trial over the objection of the petitioner. Id., 645–46. Specifically, "Wright had testified at the probable cause hearing that he saw someone fire gunshots from a .45 caliber semiautomatic pistol into the Jeep in which [Price] was sitting. As that person walked away, Wright recognized the [petitioner's] limp. Wright had known the [petitioner] for eight years. Wright also saw that that person was dressed in the same clothes Wright had seen the [petitioner] wearing approximately twenty minutes before the shooting. Wright testified that he told the police two days after the shooting that he was sure that it was the [petitioner] who had shot [Price]." Id., 646.

Travis Jenkins, who had testified during the first criminal trial, was unavailable to testify at the second criminal trial. As a result, the court presiding over the second criminal trial permitted the state to read into the record (1) Jenkins' testimony from the first trial and (2) the substance of a prior inconsistent statement that Jenkins had made to the police and that had been admitted for substantive purposes under *Whelan*[3] at the first criminal trial. See id., 651–53. In his prior trial testimony, Jenkins acknowledged having told the police that he had witnessed the events leading up to the shooting and that the petitioner was the shooter. Jenkins also asserted, however, that his prior statement to the police was not true and that he had made the statement only because the police had threatened to charge him with conspiracy

to murder Price. Id., 652–53.

The defense called various witnesses at the second criminal trial to rebut the testimony by Tacuma, Wright, and Jenkins, each of whom directly or indirectly identified the petitioner as the shooter. Darrel Belton was the first defense witness to testify at the second trial. He testified that he was with Tacuma the entire day of the shooting. Belton asserted that he observed the scene from a distance while Tacuma spoke with Price, who was inside the Jeep. Belton testified that, after they spoke for a few minutes, he saw Tacuma back away from the Jeep and raise his hands in the air. Belton then heard shots fired, ducked for cover, and ran up a nearby hill. He did not see the shooter. Belton testified, however, that when he got to the top of the hill, the petitioner, whom Belton knew from childhood, was already there, the implication being that he could not have been the shooter. According to Belton, he had seen the petitioner earlier that day when the petitioner had approached the Jeep and spoke with Wright before the shooting. Belton explained that the petitioner appeared to ask Wright a question and, in response, Wright pointed toward the top of the nearby hill, and the petitioner walked away in that direction. Belton also stated that he did not see the petitioner carrying a gun.[4]

Linwood Stevenson, who lived at the housing complex where the shooting occurred and was outside fixing his car at the time of the shooting, also testified at the second criminal trial that the petitioner was not the shooter. Unlike many of the other witnesses who testified during the criminal trial, Stevenson had no personal connection to the petitioner or any of the other persons present at the shooting. The habeas court summarized Stevenson's testimony as follows: "[H]e saw the [Jeep] with two people inside, several individuals near the vehicle, and one person [coming] down the hill to approach the Jeep. That individual walked toward the Jeep's rear, walked around the Jeep, and fired shots. Stevenson . . . described the shooter as being short, about five feet tall, medium build, dark skin, with a clean-cut head. After firing the shots, the short individual turned and walked back up the hill where he had come from.

"Stevenson saw people around the Jeep immediately after the shooting. Stevenson saw someone standing not too far from him, someone he said had been standing there, toward the front of the Jeep, even before the shots occurred. According to Stevenson, that individual turned around and walked to the Jeep, looked inside, and then walked back to where he had been standing. Stevenson identified [the petitioner] as being that individual. Stevenson testified that [the petitioner] was not the person who fired shots into the vehicle and then walked up the hill. The police interviewed Stevenson

[on] the evening of the shooting, and Stevenson conveyed his observations and the shooter's description to the police. According to Stevenson, the police never asked him to identify the shooter or look at a photographic board/lineup. Stevenson testified that at the time of the shooting, his cousin was the chief of the New Haven homicide unit. Stevenson spoke with his cousin and told him the same information he provided in his court testimony."

The defense also called James Benson as a witness. Benson asserted that he was not a witness to the shooting and provided no testimony regarding the identity of the shooter. The purpose of Benson's testimony was to establish that Jenkins had been with Benson at the time of the shooting and thus could not have seen the petitioner shoot Price.[5]

During his closing argument, the petitioner's trial counsel, Leo Ahern, pointed out the disparities between the various witnesses' accounts of the shooting to demonstrate that there was reasonable doubt about the identity of the shooter. He highlighted, in particular, the fact that, although Tacuma had identified the petitioner as the shooter in his statement to the police, he was unwilling to do so during his trial testimony.

Following his conviction, the petitioner filed a direct appeal,[6] and this court affirmed the judgment of conviction. *State* v. *Crocker*, supra, 83 Conn. App. 618. Attorney Adele V. Patterson, an assistant public defender, represented the petitioner during his direct appeal. The petitioner claimed that the trial court improperly disqualified his initial defense counsel, Attorney Michael Dolan, on the basis of a conflict of interest; permitted expert testimony regarding street gangs; and permitted the state to introduce inflammatory and prejudicial testimony concerning gang activities. He also claimed that the court violated his right to confrontation by admitting Wright's and Jenkins' prior testimony and that the state had engaged in prosecutorial impropriety during closing arguments. Id.

Following his unsuccessful direct appeal, the petitioner commenced his first habeas action, "alleging, inter alia, ineffective assistance of his [criminal] trial counsel, [Attorney] Leo Ahern, who had represented the petitioner throughout his first criminal trial . . . and then again in his second trial. . . . In the first habeas [action], the petitioner claimed that Ahern rendered ineffective assistance by failing to object to the admission of the transcript testimony of [Jenkins] . . . and [failing] to investigate or to obtain evidence prior to the start of the second criminal trial. . . . The petitioner argued that Jenkins' testimony was inadmissible because he was unavailable for cross-examination at the second criminal trial. . . .

"At the conclusion of his first habeas trial, the court

rejected the petitioner's claims of ineffective assistance of counsel, and this court affirmed that judgment . . . [concluding] that the petitioner had failed to demonstrate that there [was] a reasonable probability that, but for the admission of the Jenkins transcript, the result of the trial would have been different. . . .

"[While the appeal in his first habeas action was pending, the petitioner commenced a second habeas action], claiming . . . that his first habeas counsel, [A]ttorney Genevieve Salvatore, rendered ineffective assistance. . . . [H]e claimed, inter alia, that Salvatore rendered ineffective assistance by failing: (1) to raise various claims of ineffective assistance of the petitioner's trial and appellate counsel, (2) to investigate potentially exculpatory information, (3) to raise a claim that the prosecution did not disclose exculpatory evidence and (4) to raise a claim that the petitioner's second criminal trial violated double jeopardy. . . . [Following a trial, the habeas court, *A. Santos, J.*] denied the petitioner's claims of ineffective assistance of counsel." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, supra, 126 Conn. App. 114–16. This court thereafter affirmed the judgment of the habeas court. Id., 113.

On June 17, 2013, the petitioner initiated his second "habeas on a habeas" action,[7] which is the action that underlies the present appeal.[8] The operative second amended petition was filed on August 31, 2018. The petitioner alleged in part that his two prior habeas counsel, Salvatore and Attorney Joseph Visone, provided ineffective assistance by failing to raise claims that Ahern was ineffective by failing (1) to file a motion in limine to preclude introduction of evidence of gang activity or prior shootings, (2) to object to the admission of out-of-court statements made by Wright and Jenkins, (3) to challenge the state's argument that Jenkins was unavailable and thus that his statement was admissible under *Whelan*, (4) to cross-examine witnesses regarding motive, interests, and credibility, (5) to prepare the petitioner to testify, (6) to object to the cross-examination of the petitioner regarding his gang affiliation, prior experience with firearms, and other issues, (7) to object to the state's closing arguments, (8) to investigate and locate exculpatory witnesses, (9) to present mitigation evidence at sentencing, (10) to advise the petitioner regarding his sentence review rights, and (11) to present expert testimony regarding the identification process.[9] The petitioner further alleged that his right to due process was violated by the state's failure to disclose agreements that it entered into with certain witnesses, particularly Tacuma and Jenkins. In addition to asking the court to vacate his conviction and sentence, the petitioner asked the court to reinstate his right to sentence review and his right to appellate review of the judgment rendered by the first habeas court.

The respondent, the Commissioner of Correction, filed a return denying the allegations in the operative petition or leaving the petitioner to his proof. The respondent also raised defenses of procedural default, res judicata, and abuse of the writ. The habeas court, *Bhatt, J.*, conducted a trial over five days from October 4, 2018, to January 14, 2020.

During the habeas trial, the court heard testimony from the petitioner; Ahern; Salvatore; Attorney Joseph Jaumann; Jenkins; Tacuma; the petitioner's legal expert, Attorney Gary Mastronardi; and Attorney David Strollo, who had prosecuted the underlying criminal case on behalf of the state. Most germane to the present appeal, the court also heard testimony from four witnesses—Ernest Henry, Shawn Harris, Eric Vidro, and Taylor—none of whom had testified previously, either at the petitioner's criminal trials or in his prior habeas actions. The petitioner offered their testimony in support of his claim that Ahern had failed to conduct a proper investigation to identify and secure the testimony of exculpatory witnesses and, accordingly, that his prior habeas counsel had provided ineffective assistance by failing to raise the claim that Ahern's failure to investigate constituted ineffective assistance of counsel.[10]

Henry testified that he was familiar with the petitioner because they both lived at the Quinnipiac Terrace housing complex but could not recall seeing him in the area on the date of the shooting. Henry also testified that he witnessed the shooting from the porch of his apartment near the parking lot where the shooting occurred and saw the actual shooter, whom he asserted was not the petitioner. Because the shooting occurred in the evening, he could not see features, only silhouettes. According to Henry, the shooter was among a group of four or five persons standing in front of the Jeep, and the shooter began firing at the front of the Jeep. He described the shooter as being short and stocky, which description did not match the petitioner, whom he described as tall and slim and someone who walked with a limp. Henry indicated that he never called 911 or spoke with police about what he had seen.

Henry also testified that he remembered giving a statement to an investigator who spoke with him at his apartment one or two months after the shooting. He could not recall for whom the investigator had worked but remembered that his statement contained essentially the same information to which he testified at the habeas trial.[11] He was never contacted again. When asked why, despite knowing of the murder trial, he did not come forward to alert authorities that the petitioner was being wrongly accused, he stated that "because nobody never asked me and, then again, in my opinion, I know—I believe I was on parole and probably was wanted at the time." Henry testified that, if someone had approached him or subpoenaed him to appear at

the criminal trial, he would have testified. Henry also testified that he was never subpoenaed to testify at the petitioner's prior habeas trials.[12]

Harris testified that he knew both the petitioner and Price from "hanging out" at the Quinnipiac Terrace housing complex. He did not witness the shooting, having left the area one hour before the incident happened. He stated that he could not remember seeing the petitioner at the housing complex that day but that, given its size, "[y]ou could be in the projects and not see each other . . . ." Harris nevertheless testified that a cousin of Jenkins, Albert Jenkins, known as Tre, later admitted to Harris that he, Tre, was responsible for the killing of Price. Harris described Tre as short and stocky. Harris explained that he did not disclose this information previously to the petitioner or the police because of his close relationship with Tre and his not wanting to implicate him in a murder. He claimed that he only agreed to testify at the latest habeas trial because Tre was now deceased and because he had been subpoenaed.

Vidro testified that he knew the petitioner, having met him through Corey. He was at the Quinnipiac Terrace housing complex at the time of the shooting and heard gunshots, but he did not witness the shooting. Vidro testified that, after Price was shot, he saw Tre in the vicinity of the shooting.

Taylor testified that he and Price were passengers in the Jeep driven by Wright on the day of the shooting. He exited the Jeep just prior to the shooting, but remained close by, noting that a lot of people were outside that night. Taylor knew the petitioner from living in the neighborhood, whom he described as tall, slim and someone who walked with a limp. Taylor testified that the petitioner was not among the people at the scene. Taylor observed Tacuma speaking with Price. Shortly thereafter, he heard gunshots and ran toward his home. Taylor testified that he did not see the person who fired the shots. Taylor also testified that he was contacted once by the New Haven police and provided a statement but was never contacted by an attorney or investigator prior to the present habeas action.

Ahern testified at the habeas trial about his background as an experienced criminal defense attorney and about his limited recollections of the petitioner's case. He recalled that the primary theory of defense during the criminal trial was that the petitioner was not the shooter and that the state could not prove its case beyond a reasonable doubt. The petitioner elicited from Ahern that he had engaged the services of an investigator, Leon O'Connor, and that O'Connor had located one witness who later testified at trial. Ahern could not recall whether O'Connor met with the petitioner. The petitioner never asked Ahern to describe what efforts, if any, he or his investigator had undertaken to discover and locate other exculpatory witnesses for trial.

Although Henry had given a written statement to an investigator working for Ahern's predecessor a short time after the shooting and Taylor had given a statement to the police investigating the shooting, the petitioner never asked Ahern about his knowledge of the contents of Henry's or Taylor's statements, how he had chosen which witnesses to call at trial, or whether he had a strategic reason for not calling Henry or Taylor to testify during the criminal trial.

Following the habeas trial, the petitioner and the respondent each filed posttrial briefs. The petitioner argued in relevant part that "trial counsel did not effectively prepare his defense and investigate his case because crucial witnesses who were available and known to trial counsel were not presented on behalf of the petitioner's defense." The habeas court issued a memorandum of decision on November 2, 2021, denying the petition except with respect to the petitioner's claim regarding his right to apply for sentence review, which the court ordered restored.

In addressing whether the petitioner's criminal trial counsel provided ineffective assistance by failing to discover and/or call the four witnesses who had not testified previously in this matter, the habeas court concluded that the petitioner had failed to demonstrate that Ahern rendered deficient performance, which ultimately was dispositive of the petitioner's claims against former habeas counsel. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992) (emphasizing that petitioner asserting "habeas on a habeas" faces herculean task of proving, in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both that habeas counsel was ineffective and that trial counsel was ineffective). The habeas court indicated that neither Harris nor Vidro had given a statement to the police at the time of the murder, and, therefore, it was unclear from the record how Ahern reasonably would have discovered them in order to conduct interviews and obtain statements.[13] With respect to Henry, the habeas court stated that Ahern's failure to call him to testify presented the closest call regarding the issue of deficient performance because, unlike Harris and Vidro, Henry's name and statement to the investigator were contained in the case file he obtained from the petitioner's prior defense counsel. Nevertheless, with respect to both Henry and Taylor, the court concluded that the petitioner had failed to overcome the strong presumption that trial counsel had provided competent representation because the petitioner had not elicited any evidence from Ahern regarding what reasons, if any, he may have had for not further investigating Taylor or Henry or calling them as witnesses.

This appeal followed. Additional facts and procedural history will be set forth as necessary.

The petitioner claims on appeal that the habeas court improperly denied his petition for a writ of habeas corpus with respect to his claims of ineffective assistance of both prior habeas counsel. According to the petitioner, his prior habeas counsel engaged in deficient performance by failing to raise claims that his criminal trial counsel, Ahern, had provided ineffective assistance by failing to call Harris, Vidro, Taylor, and Henry to testify at his criminal trial, each of whom the petitioner maintains were "critical witnesses" who "were available and able to provide exculpatory evidence . . . ." The respondent counters that the habeas court properly determined that the petitioner failed to meet his burden of showing that Ahern's performance fell below the minimum standard of professional competency, which necessarily was also fatal to his claims against prior habeas counsel. See *Lozada* v. *Warden*, supra, 223 Conn. 842–43. For the reasons that follow, we agree with the respondent.

We begin with well settled legal principles, including our standard of review. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).[14]

With respect to the performance prong, the court in *Strickland* further elaborated as follows: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citation omitted; internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689. Our Supreme Court has stated that "to establish deficient performance by counsel, a [petitioner] must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"[T]he strong presumption of *Strickland* that counsel exercised reasonable professional judgment requires the habeas court to affirmatively entertain the range of possible reasons trial counsel might have had for the challenged action." (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 290, 267 A.3d 120 (2021). Nevertheless, this court has recognized that, because "[t]he law presumes that counsel is competent until evidence has been introduced to the contrary"; (internal quotation marks omitted) *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 776, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021); a petitioner who fails to call the attorney in question to testify at the habeas trial may face considerable "difficulty in overcoming the presumption of competence . . . ." Id., 775. In short, although not automatically fatal to a petitioner's claim, failure to elicit testimony from counsel about trial strategy renders it less likely that the petitioner can prevail with respect to his burden to demonstrate deficient performance.

"Our Supreme Court, in *Lozada* v. *Warden*, [supra, 223 Conn. 843], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018). Our Supreme Court subsequently expanded *Lozada*'s holding to encompass third habeas petitions challenging the performance of second habeas counsel. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550–51, 153 A.3d 1233 (2017). "Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that

his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . .

"Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 178 Conn. App. 319–20.

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are entitled to great weight. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 346–47, 221 A.3d 81 (2019). Whether a petitioner received constitutionally inadequate representation is a mixed question of law and fact that requires plenary review. *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 212, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

The petitioner in the present case maintained throughout the underlying criminal proceedings and subsequent collateral actions that he was not the person who shot and killed Price. Thus, an essential part of establishing reasonable doubt included introducing evidence at trial that would tend to raise questions about the petitioner's identity as the shooter and/or implicate someone other than the petitioner as the shooter. The petitioner argues that each of the four witnesses whom Ahern did not call to testify at the petitioner's criminal trial—Henry, Taylor, Vidro, and Harris—could have provided such evidence and would have supported the petitioner's strategy. Although the petitioner admits in his appellate brief that the decision to call any particular witness "is up to trial counsel as a part of trial strategy," the petitioner also argues that not every such decision necessarily is a sound one. The habeas court nonetheless rejected the petitioner's claims of ineffective assistance on the ground that, as to each of these potential witnesses, the petitioner failed to demonstrate that Ahern's failure to call them as a witness constituted deficient performance.

In his appellate brief, the petitioner frames his habeas claim as follows: "In regard to each of the four critical missing witnesses—Henry, Taylor, Vidro, and Harris—Ahern was ineffective for failing to investigate each man and introduce their testimony to the second criminal jury that convicted [the petitioner]." Thus, construed broadly, there appears to be two aspects to the petitioner's claim of ineffective assistance: a general failure to investigate and a failure to call exculpatory witnesses.

First, to the extent that the petitioner is claiming that Ahern's performance was deficient because he failed to conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses, he has failed to meet his burden of rebutting the presumption of competent performance. It is undeniable that in all instances, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012). Certainly, "[b]ecause a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case . . . . [Nonetheless], counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Citations omitted; internal quotation marks omitted.) *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 721, 789 A.2d 1046 (2002).

Here, the evidence before the habeas court demonstrated that Ahern took over the case from prior defense counsel. Ahern relied in part on the investigation conducted by prior counsel and on the information found in prior counsel's file. He also spoke with prior defense counsel about the case. In addition, Ahern testified that he had engaged his own investigator in this case. It is undisputed that Ahern produced several witnesses at trial whose testimony, if believed by the jury, raised doubts about the identity of the shooter. In fact, the petitioner's first trial ended in a hung jury, strongly suggesting that Ahern's investigatory efforts and trial strategy were not ineffective.

Significantly, although Ahern was called as a witness at the latest habeas trial, the petitioner never asked Ahern any questions about the nature and scope of his investigatory efforts, either generally or with respect to any particular witness or about his reasons for calling or not calling particular witnesses. The petitioner presented no other evidence that would support a finding

that Ahern failed to conduct an objectively reasonable investigation. Although not dispositive, the petitioner's own legal expert, Mastronardi, was not asked and did not opine that Ahern conducted a constitutionally deficient investigation. Rather, he testified only that Ahern's failure to call Henry as a witness, assuming he was aware of him, constituted deficient performance. Mastronardi was asked no questions and offered no opinion regarding the other three "new" witnesses. The petitioner simply failed to demonstrate that Ahern did not conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses.

The remaining aspect of the petitioner's claim is that Ahern engaged in deficient performance by failing to call each of the four witnesses who testified for the first time in the present habeas action. He asserts that each such failure constituted a separate and distinct instance of ineffective assistance of counsel. Accordingly, we look to the facts and circumstances surrounding each witness to evaluate whether Ahern's performance was deficient.

With respect to Harris and Vidro, a lengthy analysis is not warranted. We agree with the habeas court's assessment that the petitioner clearly failed to demonstrate deficient performance by Ahern with respect to both. It is undisputed that neither Vidro nor Harris ever gave a statement to the police nor did the petitioner present evidence that either man had spoken to an investigator or was otherwise discoverable by Ahern prior to trial. In other words, the petitioner has not directed our attention to any evidence in the record demonstrating that Ahern or anyone associated with the defense could have identified either of them in the course of a reasonably competent investigation. If it was not deficient performance to have failed to identify these witnesses, it cannot, as a matter of logic, have been deficient performance not to call them as witnesses at trial.

With respect to Vidro specifically, the petitioner argues in his appellate brief only that Vidro testified that he spoke with the petitioner in jail, "and his importance to the defense case *excuses any possible failure by* [*the petitioner*] *to give Vidro's name specifically to Ahern* . . . ." (Emphasis added.) The petitioner does not explain, however, what Ahern could have done, in the absence of the petitioner's disclosure, to discover Vidro's name. Instead, the remainder of the petitioner's appellate argument focuses on the import of Vidro's testimony that the petitioner was not the shooter, which does not implicate the performance prong of *Strickland* but rather the prejudice prong. Failure to prove either prong, however, is fatal to the petitioner's claim.

Similarly, the petitioner offers nothing to support his contention that the habeas court made a clearly erroneous finding that Harris was undiscoverable by Ahern.

Furthermore, the habeas court found that, even if Ahern knew of Harris, Harris had made clear that he would not have revealed Tre's alleged confession to the shooting while Tre was alive. Although Harris testified that he would have disclosed Tre's alleged confession if trial counsel had subpoenaed him to testify at the criminal trial, the habeas court found that assertion not credible. It is axiomatic that we defer to the habeas court's assessment of the credibility of a witness made on the basis of its firsthand observation of the witness' conduct, demeanor, and attitude. See *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014). The petitioner simply has failed to meet his burden of demonstrating that Ahern's performance was deficient with respect to either Vidro or Harris.

Unlike Vidro and Harris, however, Ahern presumably would have been aware from his review of the state's file and former defense counsel's file that Henry and Taylor were potential witnesses to the shooting and surrounding events. Henry gave a written sworn statement to a defense investigator and Taylor was interviewed by the police and provided a statement. Taylor also was described by other witnesses as having been a passenger in the vehicle with Price and Wright just prior to the shooting.

"[A]n attorney's failure to present available exculpatory evidence is ordinarily deficient, *unless some cogent tactical or other consideration justified it*." (Emphasis added; internal quotation marks omitted.) *Pavel* v. *Hollins*, 261 F.3d 210, 220 (2d Cir. 2001). It is certainly not the burden of the respondent, however, to demonstrate that a particular reasonable trial tactic existed for not calling a particular witness. Rather, as the petitioner acknowledges in his appellate brief, to overcome the presumption that defense counsel exercised reasonable professional judgment, the petitioner had the burden to present "adequate proof of sufficient facts indicating less than competent performance by counsel." *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004); see also *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 81, 174 A.3d 206 (2017) ("petitioner in a habeas proceeding cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead *offer demonstrable evidence in support of his claim*" (emphasis added; internal quotation marks omitted)). Therefore, the real inquiry with respect to deficient performance regarding Ahern's decision not to call Taylor or Henry to testify at the second criminal trial is whether Ahern had some reasonable strategic reason for choosing not to call them. As to that inquiry, the petitioner simply failed to meet his burden of persuasion.

"Although [counsel's] testimony is not necessary to [a] determination that a particular decision might be

considered sound trial strategy . . . [a] habeas petitioner's failure to present [counsel's] testimony as to the strategy employed . . . hampers both the court at the habeas trial and the reviewing court in their assessments of [strategy]." (Internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, supra, 203 Conn. App. 776–77. Logically, the same conclusion is true if a petitioner, having called counsel to testify, fails to make any inquiry into the reasoning behind counsel's actions or inactions that the petitioner claims were objectively unreasonable and, thus, constitutionally deficient.

"In a typical habeas trial for a claim of ineffective assistance, the petitioner's criminal trial counsel would testify about whether the challenged action was part of a strategic decision or litigation tactic, rather than a result of inadvertence or sheer neglect. . . . Assuming the habeas court finds testimony regarding trial counsel's strategy credible, the petitioner would then attempt to overcome the strong presumption that the asserted strategy was objectively reasonable." (Citations omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 289. In the absence of evidence of counsel's actual strategic reasoning for the choices challenged by the petitioner, the petitioner is left to demonstrate, essentially, that no possible objectively reasonable strategy or tactic existed that would justify counsel's choices. See id., 291–92. Our review of the underlying record reveals that objectively reasonable strategic reasons existed that would justify Ahern's decision not to call Henry or Taylor as witnesses at the second criminal trial and these reasons are fatal to the petitioner's claim of deficient performance.[15]

With regard to Taylor, there are several objectively reasonable strategic reasons why Ahern might have elected not to call him as a witness. First, Taylor did not see the shooting. Therefore, he was unable to identify the shooter either by name or by description. Ahern called two other witnesses who testified that another individual was the shooter and directly contradicted the state's witnesses who identified the petitioner as the shooter. Second, although Taylor could have testified, as he did during the habeas trial, that he did not see the petitioner in the area at the time of the shooting, that testimony would have conflicted with the petitioner's own trial testimony in which he admitted to being in the area at the time of the shooting.

Taylor's testimony also would have undermined the testimony of Stevenson, who the petitioner had called as an important exculpatory witness at his criminal trial. As previously stated, Stevenson testified that the petitioner was present at the scene but was not the person whom Stevenson saw approach the Jeep and shoot Price. Because it was crucial to Ahern's defense

strategy that the jury find both the petitioner and Stevenson credible, it was objectively reasonable for Ahern not to call a witness who would have contradicted their testimony and undermined their credibility. See *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82 ("our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to . . . call certain witnesses . . . such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is . . . potentially harmful to the case"). Lastly, Taylor testified that he was smoking marijuana at the time of the shooting, a fact that could have been used on cross-examination to undermine his ability to accurately perceive and recall details. In sum, the habeas court correctly concluded that the petitioner failed to demonstrate that Ahern provided deficient performance by not calling Taylor as a witness.

With regard to Henry, the record reveals a number of objectively reasonable strategic reasons why Ahern may have chosen not to call Henry as a witness despite the potential exculpatory nature of his testimony.[16] First, as Judge Santos found in the petitioner's prior habeas action; see footnote 12 of this opinion; Henry's testimony and prior statement, like Taylor's, would have contradicted testimony by other witnesses important to the defense, including the petitioner's own testimony. Henry stated that the petitioner was not in the area at the time of the shooting but, as we have already indicated, the petitioner admitted to the jury that he was there. Henry also claimed the shooting occurred around 9 or 9:30 p.m., while other witnesses almost unanimously maintained that it occurred sometime between 7:30 and 8 p.m.

Second, the credibility of Henry's testimony could have been significantly undermined for a number of reasons, potentially further reducing his desirability to Ahern as a witness. Unlike Stevenson, whose testimony Ahern chose to present to the jury, Henry was not a disinterested or neutral witness. He knew the petitioner and considered him a friend. He was also associated with the Island Brothers. Moreover, he admitted to having been drinking alcohol at the time he allegedly witnessed the shooting from some distance away on his porch and to being a drug dealer and on parole at the time of the shooting. Finally, there were no other witnesses who corroborated that Henry was anywhere near the scene at the time of the shooting.

In light of these facts, and in light of the petitioner's failure to present any evidence or adduce any testimony from Ahern that he lacked an objectively reasonable strategic reason for not calling Henry as a witness, we conclude that the petitioner has failed to meet his burden of demonstrating deficient performance. Accordingly, for all the reasons set forth previously, we

affirm the judgment of the habeas court denying in part the petitioner's latest petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The habeas court granted certification to appeal.

[2] The petitioner also was charged with manslaughter in the first degree with a firearm in violation of General Statutes (Rev. to 1997) § 53a-55a.

[3] See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

[4] Several days after the shooting, Belton spoke with police detectives, who indicated that they wanted to talk to any individuals who were in the area at the time of the shooting. At that time, Belton, contrary to his subsequent trial testimony, told the police that he was not present during the shooting. Belton nevertheless identified by name a number of other individuals from photographs shown to him by the police whom the police wanted to question about the shooting, including the petitioner and Tacuma.

[5] In recounting Benson's testimony in its memorandum of decision, the habeas court seems to confuse factual elements of Benson's testimony with testimony given by the somewhat similarly named Belton. The petitioner has not raised the court's recounting of Benson's testimony as a claim of error, nor does it appear that the court materially relied upon its understanding of Benson's testimony in its analysis of the petitioner's claims.

[6] Pursuant to Practice Book § 65-1, our Supreme Court transferred the matter to this court.

[7] A "habeas on a habeas" action refers to a habeas proceeding in which a petitioner claims that habeas counsel in a prior proceeding provided ineffective assistance of counsel. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992); see also *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550–51, 153 A.3d 1233 (2017) (expanding *Lozada*'s holding to permit third petition for writ of habeas corpus to vindicate claim of ineffective assistance of habeas counsel arising out of prior "habeas on a habeas").

[8] The present habeas action appears to be the fourth in which the petitioner seeks postconviction review of his criminal conviction. In addition to the two prior actions already mentioned, the petitioner commenced a third habeas action in 2009, which was withdrawn in 2013 prior to a trial on the merits.

[9] The petitioner withdrew a number of additional specifications of ineffective assistance in his posttrial brief. He also withdrew count two of the petition, in which he alleged claims of ineffective assistance by his appellate counsel in his first habeas appeal, Attorney Joseph Jaumann. Prior to trial, the court granted the motion filed by the respondent, the Commissioner of Correction, to dismiss count four of the petition, which alleged due process and equal protection violations.

[10] The operative petition stated that "trial counsel failed to investigate and locate exculpatory witnesses; such as: Yvonne Tyson and other witnesses . . . ." As noted by the habeas court, none of the new witnesses who testified at the habeas trial were named in the operative petition, and Yvonne Tyson, who was named, was not among the witnesses that the petitioner called to testify at the habeas trial. The habeas court denied "[a]ny claim as to [Yvonne Tyson]," and the petitioner does not challenge that aspect of the court's decision on appeal.

[11] A copy of the sworn statement signed by Henry and dated January 16, 1998, was admitted as a full exhibit at the habeas trial. The statement indicates that the investigator who took the statement was hired by the petitioner's first defense counsel, Attorney Michael Dolan.

[12] In the petitioner's second habeas action, the habeas court, *A. Santos*, *J.*, specifically rejected the petitioner's claim that prior habeas counsel, Salvatore, rendered deficient performance by not investigating witnesses with potentially exculpatory information, including Henry. See *Crocker* v. *Warden*, Docket No. CV-05-4000431-S, 2009 WL 455529, *10 (Conn. Super. January 26, 2009), aff'd sub nom. *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Salvatore testified that she was aware of Henry's statement to the investigator but that she made a "tactical determination that it was not helpful for the habeas petition." Id., *9. In holding that Salvatore's decision fell "within the wide range of professionally competent assistance," the

court made the following findings: "Henry's [written] statement not only contradicted several of the other trial witnesses but also contradicted the petitioner's own testimony, both in the particulars of the shooting and the fact that [the petitioner] admitted to being in the area. Henry also claimed the shooting occurred around [9] or [9:30 p.m.] while other witnesses almost unanimously maintained that it occurred sometime between [7:30] and [8 p.m.] No other witnesses placed Henry on the scene at the time of the shooting. Thus, a claim that Attorney Ahern was ineffective for failing to investigate or call Henry was not likely to succeed at the first habeas trial, and Attorney Salvatore was not deficient in failing to investigate this possible avenue of inquiry." (Internal quotation marks omitted.) Id., *10.

The respondent asserted res judicata as a special defense in the present habeas action, but the habeas court rejected it, concluding that the claims raised in the present action were not precluded because they were not identical to those raised in the prior habeas actions. The respondent has not briefed the court's denial of its res judicata defense as an alternative ground for affirmance and thus is deemed to have abandoned it. See *State* v. *Rowe*, 279 Conn. 139, 143 n.1, 900 A.2d 1276 (2006).

[13] The habeas court indicated that, even if Ahern had learned about Harris and Vidro, the petitioner could not demonstrate how he was prejudiced by Ahern's failure to call them as witnesses. Vidro had not been present at the scene at the time of the shooting, and Harris testified at the present habeas trial that he would not have revealed Tre's purported confession prior to Tre's death. Despite this testimony, he subsequently testified that he would have revealed the alleged confession under subpoena. The habeas court specifically found the latter testimony to be not credible.

[14] In evaluating the prejudice prong, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland* v. *Washington*, supra, 466 U.S. 695–96. Because, in the present case, we affirm the habeas court's ruling on the basis that the petitioner's claim fails under the performance prong of *Strickland*, we need not engage in further discussion of the prejudice prong.

[15] The petitioner relies on *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 664, to argue that it was not necessary for him to adduce from Ahern what strategic reason, if any, he had for not calling Henry. The petitioner argues that any reason would be immaterial because the failure to call him was essentially per se deficient performance. We conclude that *Gaines* is distinguishable from the present case. In *Gaines*, the petitioner had provided his criminal defense counsel with the name of a witness who, it later was determined, would have been a credible alibi witness for the petitioner and could have led to the discovery of a second credible alibi witness. Id., 683. At the habeas trial, defense counsel, *when asked*, was unable to provide any explanation for why he failed to investigate the name the petitioner had provided to him. Id. Our Supreme Court determined that counsel's failure to investigate and to call the witnesses "was not based on a reasonable professional judgment that their testimony would be either irrelevant or harmful to [the petitioner's] case" and that the "customary deference to trial strategy does not save [defense counsel's] actions because that decision was not one that was strategically based and, therefore, ordinarily left to the discretion of trial counsel." Id., 683–84. Thus, unlike in the present case, in which Ahern was never even asked about what strategic basis he had, if any, for not calling witnesses, counsel in *Gaines* was asked and was unable to proffer any strategic basis for his actions. As the respondent aptly points out in his brief, the court in *Gaines* never stated that trial counsel's explanation would not have mattered for purposes of a *Strickland* analysis because our court's review of trial strategy decisions is highly deferential and "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 628, 212 A.3d 678 (2019). We agree with the respondent that "[t]he petitioner skirted around the issues of Ahern's trial strategy at his own peril, because he carried the heavy burden of proving that counsel's action or inaction was unreasonable under the circumstances."

[16] The habeas court, in its memorandum of decision, resolved the claim as to Henry by stating that there was "simply no evidence before this court from which it can conclude that Ahern's decision [not to call Henry to testify]—whatever that may have been based on—was below the standard of reasonableness." Although the court seemed to imply that it was not required to "speculate" about the reason for Ahern's decision, it nevertheless did credit and adopt the reasoning of the prior habeas court, which had concluded that it was not deficient performance not to call Henry as a witness at the petitioner's prior habeas trial.