****

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.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

ROBERT MADERA *v.* COMMISSIONER OF CORRECTION (AC 45321)

Clark, Seeley and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit burglary in the first degree, burglary in the first degree as an accessory, robbery in the first degree as an accessory and home invasion as an accessory, sought a writ of habeas corpus, claiming that his trial counsel, K, had provided ineffective assistance by failing to seek to preclude or object to certain evidence. During the underlying home invasion, the petitioner waited outside in a vehicle while M and S entered the home, where they sexually assaulted one victim, D, and committed other crimes against two other victims. The petitioner was not charged in connection with the sexual assaults. At the petitioner's criminal trial, there were references to the sexual assaults and the fact that D had been pregnant at the time of the assaults. The petitioner claimed, inter alia, that K should have sought to preclude or objected to any evidence related to the sexual assaults. The habeas court denied the petition for a writ of habeas corpus, concluding that, although K's assistance was deficient for failing to seek to preclude or object to the sexual assault evidence, the petitioner had failed to establish that he was prejudiced by the deficient performance, as the jury had found the petitioner not guilty of two charges, there had been significant evidence from which the jury could conclude that the state had met its burden of proof, and there was no reasonable likelihood that the outcome of the criminal trial would have been different. On the granting of certification, the petitioner appealed to this court. *Held* that the habeas court properly determined that the petitioner failed to meet his burden of demonstrating that he was prejudiced by counsel's alleged deficient performance as required by *Strickland* v. *Washington* (466 U.S. 668): the petitioner could not prevail on his argument that he was prejudiced simply because the evidence introduced was prejudicial, as he did not demonstrate a reasonable probability that, but for K's errors, the result of his criminal trial would have been different; moreover, the admission of the sexual assault evidence did not alter the entire evidentiary picture, as the references to the assaults were not prevalent during the trial and were made in a conclusive and nonprovocative manner, and there was overwhelming evidence in support of the jury's verdict, including an inculpatory written statement by the petitioner, in which he admitted he was with M and S on the night of the home invasion, M and S had talked about robbing the victims, he saw the victims almost every day, M and S drove to the victims' home after asking him where they lived, he saw M and S take two handguns into the victims' home, and he functionally admitted to being the getaway driver for M and S, and the petitioner's assertions in his statement were corroborated by other evidence presented at trial, including photos and a video, and the testimony of all three victims; furthermore, the petitioner's reliance on the fact that he was acquitted of two of the charged offenses and prevailed on an issue on direct appeal to support the argument that this was a "close case" was misguided, as the acquittal demonstrated that the jury was able to consider each charge separately and was not confused or prejudiced against the defendant and the issue that he prevailed on in his direct appeal did not relate to the merits of the state's case but, rather, to the application of a sentence enhancement; additionally, although the prosecutor mentioned the sexual assaults in his closing argument, the trial court did not reference the assaults in its jury instructions.

Argued February 1—officially released September 12, 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 the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Judie Lynn Marshall, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. On the granting of his petition for certification to appeal, the petitioner, Robert Madera, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus, which alleged a claim of ineffective assistance of trial counsel.[1] On appeal, the petitioner claims that the court improperly concluded that he failed to sustain his burden of establishing that he was prejudiced by counsel's alleged deficient performance. We agree with the habeas court's conclusion and, accordingly, affirm its judgment.

The following facts, as set forth by this court in the petitioner's direct criminal appeal, and procedural history are relevant to our resolution of the petitioner's claim. "In early June, 2011, brothers Shawn Kinnel [Shawn] and Marquis Kinnel [Marquis][2] decided to rob two Waterbury drug dealers, D.O. and his roommate, I.T. In order to ascertain where D.O. and I.T. resided at that time, the Kinnels approached the [petitioner], who was D.O.'s first cousin.

"On the night of June 13, 2011, the trio drove to D.O.'s and I.T.'s condominium complex [complex] and parked their [Nissan Altima (Nissan)] on a nearby side street. The Kinnel brothers got out of their car, retrieved two handguns from under the hood of the vehicle, and walked into the complex. The [petitioner] remained inside the vehicle, but moved to the driver's seat and waited for the Kinnels to return.

"Inside the complex, the Kinnels entered D.O.'s and I.T.'s condominium. At that time, D.O. and I.T. were out buying groceries. Once D.O. and I.T. returned, the Kinnels seized them at gunpoint and forced them to lie on the floor with their shirts pulled over their heads to block their vision.

"The Kinnels then searched D.O., I.T., and the condominium, taking currency, drugs, jewelry, cell phones, and other valuables. During the search of the condominium, Marquis . . . encountered D.O.'s [pregnant] girlfriend, D.M., in her bedroom downstairs. [Marquis] ordered D.M. to take off her clothes at gunpoint and then sexually assaulted her. Thereafter, [Marquis] ordered D.M. to put on a bathrobe, brought her upstairs, and forced her to lie down on the floor next to D.O. and I.T. with her head covered to block her vision. While she was lying on the floor upstairs, D.M. was sexually assaulted again. Having collected all of the valuables, the Kinnels then fled the condominium in a [Jeep] they had stolen from D.O. The [petitioner] followed them, driving the [Nissan] . . . . After the perpetrators had left, D.O. called the police.

"On June 14, 2011, [the] police tracked one of the stolen cell phones to a Waterbury barbershop. When officers converged there, they found the [petitioner] and Marquis . . . inside. Thereafter, the [petitioner]

was arrested on an unrelated outstanding warrant and transported to the Waterbury police station, where he eventually gave a voluntary, signed statement detailing his involvement in the crime. In the statement, the [petitioner] attempted to minimize his involvement, claiming that he did not know about the Kinnels' plan regarding D.O. and I.T." (Footnote added; footnote omitted.) *State* v. *Madera*, 160 Conn. App. 851, 853–55, 125 A.3d 1071 (2015).

After trial, on June 1, 2012, a jury found the petitioner guilty of conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-101 (a) (3), burglary in the first degree as an accessory[3] in violation of General Statutes §§ 53a-8 and 53a-101 (a) (3), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-134 (a) (4), and home invasion as an accessory in violation of General Statutes §§ 53a-8 and 53a-100aa (a) (1). Id., 855. The jury found the petitioner not guilty of conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53-134 (a) (4) and conspiracy to commit home invasion in violation of §§ 53a-48 (a) and 53a-100aa (a) (1). Id. He subsequently was sentenced to twenty-five years of incarceration, execution suspended after twenty years, followed by five years of probation. Id., 856. His sentence later was revised to a total effective sentence of nineteen years of incarceration as a result of this court's decision in his direct criminal appeal.[4]

In February, 2016, the petitioner filed a petition for a writ of habeas corpus. The petitioner, through counsel, filed an amended petition on February 25, 2019, which is the operative petition. He alleged that his criminal trial counsel, Raymond Kotulski, provided ineffective assistance. The petitioner, who had not been charged in connection with the sexual assaults of D.M.,[5] specifically alleged that Kotulski was ineffective because he did not seek to preclude or object to all testimony and evidence relating to the sexual assaults that took place during the home invasion.[6]

The court, *Bhatt*, *J.*, held a trial on the habeas petition on February 4, 2020, and April 28, 2021, at which three witnesses testified: Frank Riccio, Jr., the petitioner's legal expert; Glenn Falk, his appellate counsel on direct appeal; and Kotulski. The petitioner's habeas counsel presented Riccio with a hypothetical situation in which Riccio represented a getaway driver accused of being a coconspirator in a home invasion and one of the coconspirators sexually assaulted someone inside, but the client himself was not charged with sexual assault. Riccio testified that, in his opinion, if an attorney did not object to the evidence in question, that attorney would not meet the standard of care expected of a reasonably competent defense attorney.

Falk testified that, in preparing for the petitioner's

direct criminal appeal, he reviewed the transcripts and noticed that the sexual assaults were referred to numerous times and "became a drumbeat." He further testified that, although he would have liked to have raised a claim on appeal challenging the admission of the sexual assault evidence at trial, he was unable to do so because "there was no objection to any of [it]."

Kotulski testified that he recalled that he wanted to exclude the sexual assault evidence. He explained: "I mean, if someone hears a pregnant woman is raped in her home, they might not see the rest of the facts of the case and might just see that." Kotulski could not recall whether the sexual assault evidence ultimately was introduced at trial, but when asked whether he objected to it, he stated: "I'm pretty positive I did I would think. I know I didn't want it to end up with the jury . . . ." He later testified: "I know I objected to it in some way. What the record says, I don't know, but I know that . . . in some way I objected to it."[7]

The parties subsequently filed their posttrial briefs with the court. The petitioner argued, inter alia, that Kotulski was ineffective for failing to object to the sexual assault evidence at trial because the evidence was irrelevant and unduly prejudicial and, therefore, inadmissible. He further argued that Kotulski's deficiencies caused him prejudice because the sexual assault evidence "turned [the] jury against him" and, consequently, there existed a reasonable probability that, but for the admission of the evidence, there would have been a different outcome at trial.[8] The respondent, the Commissioner of Correction, argued that Kotulski was not ineffective because the evidence was highly probative, there was no sign that the evidence "[distracted] or aroused the jurors' emotions, hostilities, or sympathies," and "the jury proved its impartiality by finding the petitioner not guilty on two of the charged counts."

On January 5, 2022, the court issued a memorandum of decision denying the petitioner's petition for a writ of habeas corpus. The court agreed with the petitioner that Kotulski was deficient for failing to seek to preclude or object to the sexual assault evidence. It reasoned: "The record does not reflect any efforts by Kotulski to preclude evidence of the sexual assault and pregnancy, nor did he make objections when they were mentioned during the entirety of the trial. Although Kotulski testified in the habeas trial that he somehow objected and was overruled, the record does not support that contention. The court concurs with Riccio's assessment that reasonably competent defense counsel would seek to preclude . . . or object to evidence of the sexual assault, which was not a charged offense, and pregnancy. There is no tactical or strategic basis that has been shown [for] why Kotulski, who viewed the sexual assault and pregnancy [evidence] as not relevant to the charges and potentially inflammatory, did

not file a motion in limine or object during the trial. Consequently, the court concludes that [the petitioner] has satisfied the first [prong of] *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . by proving Kotulski rendered deficient performance."

Nevertheless, the court concluded that the petitioner had failed to establish that he was prejudiced by Kotulski's deficient performance. It noted that "[t]he jury had before it significant evidence from which it could conclude that the state had met its burden of proof . . . . This came through the testimony of the victims, D.O., D.M. and I.T., as well as through [the petitioner's] own statement to police and his testimony before the jury. Furthermore, the jury convicted [the petitioner] of four of the six charged offenses and acquitted him of the conspiracy to commit robbery and [the conspiracy to commit] home invasion charges. In light of the above, the court cannot view the references to the sexual assault[s] and pregnancy as being highly inflammatory and prejudicial. The court concludes that [the petitioner] has failed to show that he was prejudiced by Kotulski's deficient performance, i.e., there is no reasonable likelihood that the outcome of the trial would have been different. [The petitioner] has not undermined this court's confidence in the verdicts." Thereafter, the court granted the petition for certification to appeal, and this appeal followed.

Before considering the petitioner's claim that the court improperly concluded that he had not demonstrated prejudice, we first note the well settled principles that govern our analysis. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Soto* v.

Commissioner of Correction, 215 Conn. App. 113, 119, 281 A.3d 1189 (2022).

An evaluation of the prejudice prong involves a consideration of "whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citation omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 38, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). We do "not conduct this inquiry in a vacuum," rather, we "must consider the totality of the evidence before the judge or jury." (Internal quotation marks omitted.) Id. Further, we "are required to undertake an objective review of the nature and strength of the state's case." Id., 39. As our Supreme Court explained in *Skakel*, "[s]ome errors will have had 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." (Internal quotation marks omitted.) Id.

In other words,"[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (Internal quotation marks omitted.) Id., 40. Notably, the petitioner must meet this burden not by use of speculation but by "demonstrable realities." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 834, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

Having set forth those principles, we now turn to the petitioner's claim on appeal. He claims that, although the habeas court properly concluded that Kotulski was deficient for failing to seek to preclude or object to the sexual assault evidence, it improperly concluded that he failed to sustain his burden of establishing that he was prejudiced by Kotulski's error. For the reasons that follow, we are not persuaded.

The following additional facts are relevant to our resolution of the petitioner's claim. At the underlying criminal trial, the state presented substantial evidence in support of its case, including the petitioner's written

statement[9] in which he admitted that he was aware that I.T. and D.O. were drug dealers and that the Kinnels had been talking about robbing I.T. and D.O. for several days prior to June 13, 2011. The petitioner also admitted that, on that night, Marquis called him and stated that he and Shawn would contact the petitioner later "about doing something." Around 8:45 p.m., the petitioner stated that he was with the Kinnels and they were asking him where I.T. and D.O. lived. As soon as they asked where I.T. and D.O. lived, the petitioner stated that he knew that the Kinnels were going to rob I.T. and D.O. He further stated that Shawn drove to a condominium complex, where both Kinnels exited the Nissan and retrieved two handguns from under the hood. The petitioner claimed that he then left the complex driving the Nissan, but he returned after Shawn called him and told him to come back. When he returned, the petitioner stated that the Kinnels were in a Jeep and he followed them to a Naugatuck motel. The petitioner also admitted that Marquis gave him $640 in cash that night "for being with them."

In addition to having the petitioner's written inculpatory statement read to the jury in its entirety, D.M., I.T. and D.O. all testified as witnesses for the state. All three testified that they were living together at that complex on the night of the incident. D.M. described the break-in that night and the series of events leading up to the sexual assaults. The prosecutor asked D.M. a few questions about the sexual assaults directly. He asked, "And at that point did that person sexually [assault] you?" She responded, "Yes." D.M. testified that, next, the man brought her upstairs. The prosecutor asked, "And at that point he sexually assaulted you again?" and D.M. responded, "Yes." The prosecutor's final question on direct examination was, "And I apologize, but when you were sexually assaulted upstairs when you were lying at the top of the stairs, by sexually assaulted, do you mean he put his penis in your vagina?" D.M. again responded, "Yes."

D.O. and I.T. also testified about the night of the incident. They explained that, when they arrived home from grocery shopping, there were masked and armed men inside who forced them to lie on the kitchen floor with their shirts over their heads while the men searched for valuables. They testified that the men stole between two and three thousand dollars from them, as well as the Jeep and other valuables. The prosecutor showed D.O. a black mask—later confirmed to have been found in the Nissan that the Kinnels and the petitioner were driving that night—which D.O. testified was the same as the ones he saw the men wearing that evening. The state also presented considerable evidence, including, but not limited to, pictures of the crime scene that corroborated the petitioner's assertion in his written statement that the Kinnels broke into the bedroom window of the apartment, and a video of the

Nissan, which the petitioner admitted he was driving, leaving the complex with its lights off, following behind the stolen Jeep.

The petitioner then testified in his defense. He explained that he was close with his cousin, D.O., and would "hang out" with him "like every day" and that he would see I.T. "[l]ike every day." He stated that he would never help someone rob D.O., and he maintained that he did not know that D.O. and I.T. lived at that complex and that he did not give the Kinnels their address. He further testified that, on the night in question, when he, Marquis and Shawn pulled up to the complex, he did not know why they were there and that when Marquis and Shawn went inside, he left and drove around and later returned to the complex when called back by Shawn. When he arrived back at the complex, he saw the Kinnels in the Jeep, and they told him to follow them, which he did, to a hotel in Naugatuck. When asked whether he questioned the Kinnels concerning where they got the new car, he said: "No, it's none of my business. . . . [It] never crossed my mind to ask." When asked why he drove the Nissan with its lights off when he followed the Jeep out of the complex, he testified that it was his "habit" to wait to turn the lights on until right before he pulled out onto the street. He testified that, after they left the hotel, the Kinnels told him that they had robbed D.O. and I.T., which made him feel "strange" because "that's [his] family." Nonetheless, he testified that he subsequently spent the night at Marquis' house. Contrary to his written statement, he testified that the Kinnels did not give him any money for his participation, that the money he had on him when he was arrested—$832—was from selling drugs, that they did not tell him that they had sexually assaulted D.M., and that he did not see them grab two handguns from under the hood but, rather, saw that only Shawn had a gun with him.

The attorneys then presented their closing arguments, during which the prosecutor mentioned the sexual assaults on multiple occasions. He stated, inter alia: "[Marquis] sexually [assaulted] her"; "There was a sexual assault committed against her downstairs"; and "There [are] sexual assault felonies." After closing arguments, the court instructed the jury and did not, at any point of its instruction, reference the sexual assaults.

At the outset of our analysis of the petitioner's claim, we note that the majority of his principal appellate brief is devoted to his argument that Kotulski rendered deficient performance, with only a small portion of his brief being dedicated to the prejudice analysis. We further note that, within that short analysis, the petitioner conflates the *Strickland* prongs. Specifically, he argues that, "[i]n many ways, the evidence relating to deficient performance and to the irrelevant and prejudicial nature of the sexual assault evidence demonstrates prejudice

on their own." He contends that "[i]t is almost paradoxical that it would be deficient for counsel not to exclude the evidence unless the evidence itself would harm the petitioner," and that, "[e]ven more perplexing is how evidence can be unduly prejudicial under an admissibility analysis, without necessarily being prejudicial to the outcome of the petitioner's case."

The petitioner's reasoning, however, is flawed. Even if we assumed that the sexual assault evidence was unduly prejudicial and that Kotulski's performance was deficient because he failed to object to it, that would not absolve the petitioner of his burden of also establishing the prejudice prong of *Strickland*. The standard for whether evidence is unduly prejudicial in an admissibility context is not synonymous with the standard for prejudice in the context of an ineffective assistance of counsel claim. Compare *State* v. *James A.*, 345 Conn. 599, 619, 286 A.3d 855 (2022) ("[t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the jur[ors]" (internal quotation marks omitted)), cert. denied, U.S. , 143 S. Ct. 2473, 216 L. Ed. 2d 439 (2023), with *Carter* v. *Commissioner of Correction*, 219 Conn. App. 389, 402, 295 A.3d 460 ("[t]o satisfy the prejudice prong [of *Strickland*], 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" (internal quotation marks omitted)), cert. denied, 347 Conn. 906, 297 A.3d 198 (2023). In other words, proving that Kotulski was deficient because he failed to object to unduly prejudicial evidence does not, on its own, demonstrate a reasonable probability that, but for his error, the petitioner would not have been convicted. Thus, the petitioner's argument that he was prejudiced simply because the evidence was unduly prejudicial is not the proper standard for analyzing the prejudice prong under *Strickland*.

The petitioner next argues that he was prejudiced because the sexual assault evidence "became a significant issue in the case" and "altered the evidentiary picture" such that "[i]t created a reasonable probability sufficient to undermine the reliability of the verdict." We are not persuaded. We conclude, on the basis of our objective review of the totality of the evidence presented at the underlying criminal trial, that the admission of the sexual assault evidence did not alter the entire evidentiary picture. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39.

We agree with the habeas court that the sexual assault evidence was "not a focus of the trial and [was] referred to tangentially, often in a conclusory fashion." As already discussed in this opinion, the petitioner was not charged in connection with the sexual assaults, and,

although the prosecutor suggested to the jury that it could consider the sexual assaults as one of numerous predicate felonies with respect to the home invasion charges, the court instructed the jury that it could consider only the charged offenses, burglary and robbery, and larceny as the crimes committed therein. See *State* v. *Carrillo*, 209 Conn. App. 213, 246, 267 A.3d 322 (2021) (noting well settled principle that "[w]e presume that the jury followed the court's instructions in the absence of any indication to the contrary" (internal quotation marks omitted)), cert. denied, 342 Conn. 909, 271 A.3d 663 (2022). In fact, the court did not at any point refer to the sexual assaults during its jury instructions.

Additionally, although the prosecutor did ask D.M. questions about the sexual assaults, the few questions he asked were all conclusory and elicited only "yes or no" answers. D.M. did not at any point describe the sexual assaults or discuss them in detail, nor did any other witness. Moreover, all of the references that D.M. and other witnesses made to the assaults, with the exception of the petitioner's written statement, were sanitized of graphic language and descriptive details. For instance, one of the references to the sexual assaults that the petitioner relies on was the testimony of a forensic technician who merely referred to the existence of a sexual assault kit in passing when he described his conduct on the day of the incident.[10] Thus, on the basis of our thorough review of the record, we disagree with the petitioner that the sexual assault evidence played a significant role at trial so as to alter the evidentiary picture. Although the sexual assaults were undoubtedly referred to throughout the proceeding, the references were not as prevalent as the petitioner suggests, and they were made in a conclusory and nonprovocative manner. We conclude, therefore, that the petitioner has not met his burden of showing that the decision reached would reasonably have been different in the absence of the admission of the sexual assault evidence.

The petitioner further argues that he was prejudiced because this was a "close case." In essence, he argues that the jury's verdict was only weakly supported by the record, and, therefore, it was more likely to have been affected by the error. We also are not persuaded by this argument.

First, although "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"; (internal quotation marks omitted) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39; merely stating in a conclusory fashion that the evidence was not overwhelming cannot, by itself, establish prejudice. As we stated previously in this opinion, the petitioner must prove by "demonstrable realities," not just mere speculation, that he was prejudiced. (Internal quo-

tation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 834.

Second, we disagree with the petitioner that this was a "close case." We conclude, on the basis of our thorough and objective review of the record, that there was overwhelming evidence in support of the jury's decision to convict the petitioner of the offenses of conspiracy to commit burglary and accessory to burglary, robbery, and home invasion. Included in this overwhelming evidence was the petitioner's inculpatory statement. The petitioner admitted that he was with the Kinnels on the night in question and that they had been talking about robbing two drug dealers, D.O. and I.T., "for a couple days." He further admitted that, on the night of the incident, Marquis told him that he and Shawn would contact him later "about doing something" and when they did get together, the Kinnels asked the petitioner where D.O. and I.T. lived. He admitted that, "[r]ight away when they asked where [D.O. and I.T.] lived, [the petitioner] knew that these guys were going to rob D.O. and I.T." Although he maintained in his statement and in his testimony that he did not know that D.O. and I.T. lived at that complex, he also admitted to seeing D.O. and I.T. nearly every day. Furthermore, he admitted that, after the Kinnels asked him where D.O. and I.T. lived, he and the Kinnels drove to the very condominium complex where D.O. and I.T. happened to live. Thus, the jury reasonably could have inferred that he did in fact know that D.O. and I.T. lived there and, moreover, that he aided the Kinnels by providing them with D.O. and I.T.'s address. Likewise, although the petitioner maintained that when the Kinnels got out of the Nissan and walked toward the condominium complex, he did not know what they were doing, he also admitted that the Kinnels had first retrieved two handguns that were stored under the hood of the Nissan. Thus, the jury reasonably could have concluded that the petitioner was well aware that the Kinnels were planning to break into D.O. and I.T.'s residence and to steal their money and drugs and, furthermore, that he aided them and entered into an agreement with them to do so.

Additionally, the petitioner consistently admitted to functionally being the Kinnels' getaway driver that night. He confessed that when the Kinnels called him and told him to return to the complex, he did, and that he then followed them in the stolen Jeep out of the complex with the lights to the Nissan turned off. He continued to follow them to a hotel in Naugatuck where he waited for them while they tried to find D.O. and I.T.'s drug "stash," before driving them away from the Naugatuck hotel. Finally, the petitioner admitted in his written statement that the Kinnels paid him for his assistance that night, which money logically came from the stolen proceeds, and he admitted to spending the remainder of that night at Marquis' house despite the wrongdoings committed against his cousin that day,

which supports his awareness of, and participation in, the crimes committed. Thus, in light of the foregoing, we conclude that there was overwhelming record support for the jury's verdict.

In support of his argument that this was a "close case," the petitioner specifically relies on the fact that he was acquitted of two of the charged offenses and "prevailed on an issue on direct appeal." His reliance, however, is misguided. The fact that the petitioner was acquitted of two of the offenses does not support his claim of prejudice; in fact, it does the opposite. See, e.g., *State* v. *Edwards*, 325 Conn. 97, 134, 156 A.3d 506 (2017) ("[t]he fact that the jury was able to acquit the defendant on some charges is strong evidence that the improperly admitted evidence did not substantially affect the verdict"); *State* v. *Rodriguez*, 91 Conn. App. 112, 120–21, 881 A.2d 371 ("Although the jury found the defendant guilty of all the counts of burglary, attempt to commit burglary, larceny and criminal trespass that it considered, it found the defendant not guilty of one count of breach of the peace in the second degree. That acquittal demonstrated that the jury was able to consider each count separately and, therefore, was not confused or prejudiced against the defendant."), cert. denied, 276 Conn. 909, 886 A.2d 423 (2005). Likewise, the fact that the petitioner prevailed on his direct appeal also does not support his claim. The issue that the petitioner prevailed on in his direct appeal did not relate to the merits of the state's case, but, rather, to the application of a sentence enhancement under General Statutes § 53-202k. See *State* v. *Madera*, supra, 160 Conn. App. 862. More specifically, on appeal, we concluded that, because of our decision in a companion case, *State* v. *VanDeusen*, 160 Conn. App. 815, 842, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015), in which we held that § 53-202k does not apply to unarmed coconspirators, the petitioner's sentence should not have been enhanced with respect to his conspiracy conviction. Hence, his success in his criminal appeal was unrelated to the strength of the state's case and, therefore, has no bearing on the issue presented in this appeal.

Accordingly, we are not persuaded by the petitioner's argument that he was prejudiced because this "was a close case." On the basis of our objective review of the record, we determine that the jury's verdict was not one "weakly supported by the record," but, rather, was a verdict "with overwhelming record support." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39.[11] As such, the admission of the sexual assault evidence did not alter "the entire evidentiary picture" and, therefore, we conclude the petitioner has not met his burden of showing that the jury's verdict "would reasonably likely have been different absent the errors." (Internal quotation marks omitted.) Id.

In sum, we conclude that the habeas court properly determined that the petitioner failed to meet his burden of demonstrating prejudice under *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] The petitioner also alleged a due process claim, which was duplicative of his ineffective assistance of counsel claim. The habeas court concluded that the petitioner had failed to establish a violation of his due process rights, and the petitioner has not challenged the habeas court's ruling concerning his due process claim in his appellate briefs. Accordingly, we deem the claim abandoned. See, e.g., *Ross* v. *Commissioner of Correction*, 217 Conn. App. 286, 289–90 n.1, 283 A.3d 1055 ("because the petitioner mentioned but did not otherwise address in his brief the habeas court's dismissal of the jury selection claim, we deem any claim related to that ruling abandoned"), cert. denied, 346 Conn. 915, 290 A.3d 374 (2023).

[2] Throughout this opinion, we will refer to Shawn and Marquis individually by name and collectively as the Kinnels as necessary.

[3] "It is well established that there is no legal distinction between principal and accessorial liability. . . . [A]ccessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *White*, 215 Conn. App. 273, 290, 283 A.3d 542 (2022), cert. denied, 346 Conn. 918, 291 A.3d 108 (2023).

[4] The jury also found that the state had proved beyond a reasonable doubt that a firearm had been used in the commission of each of the four charges. The court, therefore, enhanced each of the petitioner's sentences pursuant to General Statutes § 53-202k. The petitioner appealed from the judgment of conviction to this court, specifically challenging the § 53-202k sentence enhancements. This court, relying on our decision in *State* v. *VanDeusen*, 160 Conn. App. 815, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015), agreed in part and reversed the judgment "only as to the sentence enhancement under § 53-202k of the sentence on the conviction of conspiracy to commit burglary in the first degree . . . ." *State* v. *Madera*, supra, 160 Conn. App. 862. We, therefore, remanded the case with direction to vacate that enhancement and to resentence the petitioner but otherwise affirmed the judgment of conviction. Id. On January 21, 2016, the petitioner was resentenced to a total effective sentence of nineteen years of incarceration.

[5] Although the petitioner was not charged in connection with the sexual assaults, it appears from the record, particularly from the prosecutor's closing statement, that the prosecutor had intended to use the sexual assaults as possible predicate offenses for the home invasion charges. Ultimately, however, the court did not instruct the jury that it could consider the sexual assaults as predicate offenses.

[6] The petitioner specifically asserted as three separate claims that Kotulski was deficient because he did not seek to preclude or object to evidence relating to (1) the sexual assaults, (2) the fact that D.M. was pregnant at the time of the assaults and (3) her subsequent medical treatment, namely, a sexual assault kit that was performed on D.M. On appeal, he continues to assert these as three specific grounds for concluding that Kotulski rendered deficient performance. Upon our thorough review of the record, however, we conclude that these claims are indistinguishable and, as a result, we consider them as one. For purposes of ease of discussion, we refer to the sexual assault, pregnancy and medical treatment evidence collectively as the sexual assault evidence.

[7] We note that we thoroughly have reviewed the record and it does not reflect that Kotulski objected in any way to this evidence.

[8] The petitioner also maintained that (1) Kotulski was deficient because he "failed to request more specific facts as to the predicate felony underlying the petitioner's two home invasion charges" and (2) he was prejudiced because the sexual assault evidence confused the jury about what to consider as the predicate felony for the home invasion charges and there was "a reasonable probability that the jury improperly concluded that D.M.'s sexual assault was the predicate felony in convicting the petitioner [of the accessory to home invasion charge]." We conclude that we need not address these contentions. The petitioner has not asserted the first argument on appeal to this court, and we determine that, to the extent the petitioner has asserted

the second argument, it is inadequately briefed. Although the petitioner mentions in his principal appellate brief that it is his position that the sexual assaults could not have served as the predicate felony, he has not otherwise addressed this argument in any meaningful way. See, e.g., *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 80–81, 256 A.3d 684 ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 339 Conn. 909, 261 A.2d 744 (2021).

[9] The petitioner's statement provided in relevant part: "Last night around 8 p.m. [Marquis] called me and told me Shawn was going to call me later about doing something. At that time I was at my girlfriend's house . . . . At about 8:45 Shawn called me and told me he was coming by to pick me up. He showed up ten minutes later and I told him to call [Marquis] and he did. [Marquis] said that he was on North Main Street, so we went there and met him. . . . [Marquis] and Shawn were asking me where this kid [I.T.] and my cousin [D.O.] lived. . . . I've known these guys for a long time. Right away when they asked where they lived I knew that these guys were going to rob these guys. Both [D.O.] and [I.T.] sell drugs to make money. I told these guys last I knew [I.T.] lived in the Brooklyn area and [D.O.] lived with his mother . . . . [D.O.] lived with my aunt so I wasn't going to tell them to go up there. These guys have been talking about robbing [I.T.] and [D.O.] for a couple days. . . . Shawn drove up to [the] . . . condo complex and pulled in a lot. . . . Shawn and [Marquis] got out of the car, grabbed a bookbag. They then went under the hood of the car and grabbed two handguns. I asked them what was up and they said they were going to go take care of . . . something. They then walked into the complex. I then jumped in the driver's seat and waited for them to come out. The car we were in is a dark colored Nissan Altima that belongs to Shawn's girlfriend. I waited about ten or fifteen minutes and drove off. About an hour from then Shawn called my phone and told me that they were leaving the apartment and for me to meet them in front of the condo complex. I met them and saw that they were driving in a silver Jeep. They told me that they had just robbed [I.T.] and [D.O.'s] apartment there and they were heading to Naugatuck because they found a motel card in the car and thought that maybe [I.T.'s] and [D.O.'s] stash was there. By stash I mean drugs. I followed them to Naugatuck . . . . Shawn was driving the silver truck, which was a rental that [I.T.] and [D.O.] were using. After I waited for a few minutes [at the motel] I saw [Marquis and Shawn] come running towards me from behind the motel building. They got in the car and we drove off. . . . I asked them what had happened. These guys told me that they robbed—they robbed those guys of their money and cash. [Marquis] told me that he fucked [D.O.'s] girlfriend while they were inside the apartment. . . . They said that they had climbed through a window to get in and found a girl in the bedroom. [Marquis] said that they made her strip and that Shawn fingered her. He stated that he fucked her right after that. . . . I stayed at [Marquis'] place for the night. While we were in the car [Marquis] gave me $640 in cash for being with them. . . ."

[10] The technician specifically testified that, on the day of the incident, "[a]fter processing of the primary scene [he] was dispatched to Waterbury Hospital to . . . collect clothing and a sexual assault kit."

[11] The petitioner also argued that he was prejudiced because, at his sentencing hearing, "[d]espite the fact that he was not charged with sexual assault, the sentencing court nevertheless mentioned the sexual assault at sentencing, and it was clear that it became a part of its analysis in imposing the sentence." At the initial sentencing hearing, the petitioner provided the court with a letter from Marquis, which Kotulski claimed "essentially exonerate[d]" the petitioner. In response to the letter specifically, the court stated: "I think, a reasonable assumption is that the reference [in the letter] is to the sexual assaults that occurred inside of the house, and the [petitioner] was not charged with being an accessory to those sexual assaults." The court went on to state: "And as I indicate, I accept that in terms of the sexual assaults that occurred while in the residence appear to have been a crime of opportunity. . . . And so those are things that the court has taken into consideration."

The petitioner did not raise this particular argument about his sentencing hearing in his amended petition or in his posttrial brief to the habeas court, and the court did not address it in its memorandum of decision. Moreover, the petitioner has not sought review of his unpreserved claim under the

plain error doctrine or *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and the claim, which relates to the petitioner's criminal trial, does not challenge the actions of the habeas court. See *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 346–47, 297 A.3d 541 (2023). Accordingly, we decline to address this argument. See *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 787–88, 114 A.3d 925 (2015).

However, we note that, even if the petitioner had raised this argument to the habeas court, we nonetheless are not persuaded by it because the only reasonable interpretation of the trial court's statement at the sentencing hearing is that the court was clarifying that it was *not* taking into consideration the sexual assaults in imposing its sentence because they were crimes of opportunity.