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JAMES RAYNOR *v.* COMMISSIONER OF CORRECTION (AC 45675)

Bright, C. J., and Alvord and Clark, Js.

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit assault in the first degree and assault in the first degree as an accessory in connection with the shooting of the victim, sought a writ of habeas corpus, claiming that his trial counsel, C, rendered ineffective assistance. At the time of the shooting, the victim was intending to sell drugs in an area of Hartford controlled by a street gang that trafficked drugs in the area. During the underlying criminal trial, the state presented evidence regarding the petitioner's involvement with the gang, the gang's control of the drug trade in the area, and its methods of enforcing its control over its territory. The state also introduced evidence that, eighteen hours after the victim was shot, another drug dealer, K, was shot in the same area. The state further offered an expert witness, W, who testified to his analysis of certain cell phone records and cell site location information (CSLI), which placed the petitioner and another gang affiliate in the vicinity of the shooting of K when it occurred. In his habeas petition, the petitioner claimed that C rendered ineffective assistance by failing to object to the relevancy of the state's uncharged misconduct evidence and by failing to preclude or limit the scope of the CSLI evidence by requesting a hearing pursuant to *State* v. *Porter* (241 Conn. 57), or by presenting an expert witness to challenge W's CSLI testimony. At the habeas trial, the petitioner's CSLI expert, O, testified that W mapped the cell phone information similarly to how he would have, and O agreed with W's testimony at the criminal trial that the CSLI evidence could not identify the petitioner's specific location but only the general location of the cell phone associated with the petitioner. The habeas court denied the petition, finding that C's decisions regarding the uncharged misconduct evidence were matters of sound trial strategy and not unreasonable, and that the petitioner failing to sustain his burden of proving that, had C requested a *Porter* hearing or presented a CSLI expert, there was a reasonable probability that the outcome of his criminal trial would have been different. On the granting of certification to appeal, the petitioner appealed to this court. *Held*:

1. The habeas court properly determined that C did not render ineffective assistance by failing to object to the uncharged misconduct evidence, as the petitioner did not meet his burden of proving that C's decisions were unreasonable and not a matter of sound trial strategy: with respect to the evidence concerning the petitioner's involvement with drugs and the gang, C testified at the petitioner's habeas trial that he did not object to that evidence because it was interwoven into the fabric of the case, there were witnesses who were going to testify about how they knew the petitioner, and it was clear that the drug evidence would be admitted, and the habeas court determined that C's decision regarding whether to object was guided by his experience that frequently repeated objections can cause harm to the defense, such that it was evident that C made a strategic decision not to object to the drug evidence, and his testimony provided a sufficient rationale for that decision; moreover, with respect to the evidence of the shooting of K, C did not render ineffective assistance by failing to object on relevancy grounds, as he testified that he abandoned a relevancy objection, and instead argued that the evidence was more prejudicial than probative, when he learned that the same gun was used in both shootings, because pursuing the relevancy objection likely would have damaged his own credibility with the trial court, and this testimony unequivocally demonstrated that C made a tactical determination based on his experience with the trial court.
2. The habeas court properly determined that C did not render ineffective assistance by failing to request a *Porter* hearing or to present a CSLI expert to challenge W's testimony because, even assuming that C's

performance was deficient, the petitioner failed to prove prejudice by demonstrating that, but for C's errors, there was a reasonable probability that the outcome of his criminal trial would have been different: there was abundant other evidence connecting the petitioner to the shooting of K, and the petitioner failed to present evidence that the outcome of a request for a *Porter* hearing would have been favorable to the defense and changed the outcome of his criminal trial, as C testified at the habeas trial that his overall strategy regarding the CSLI evidence was to demonstrate that the evidence did not show the specific location or user of each cell phone and that he was more concerned with the witnesses who lived in the area and saw the petitioner; moreover, the petitioner did not claim on appeal that a successful challenge to the CSLI data through a *Porter* hearing would have prevented W from testifying at all about such data, and, to the extent that he claimed that a *Porter* hearing would have led the trial court to exclude testimony from W about the petitioner's specific movements in close proximity to where K was shot, this court agreed with the habeas court that there was no reasonable probability that exclusion of such evidence would have changed the outcome of the petitioner's criminal trial, insofar as evidence unrelated to the CSLI data connected the petitioner to the shooting of K, and the CSLI data that was not challenged placed the petitioner in the vicinity of the shooting when it occurred, such that the confidence in the outcome of the criminal trial would not be undermined by the absence of the more detailed CSLI evidence the petitioner challenged; furthermore, the petitioner was not prejudiced by C's decision not to call a CSLI expert to challenge W's testimony because he failed to show that the testimony of such an expert would have been helpful in establishing his defense, as O and W both concluded that CSLI cannot identify the user or specific location of a cell phone, C testified that he did not believe O's testimony would have helped the petitioner's defense because he reached the same conclusions as W, and the evidence regarding the shooting of K was uncharged misconduct evidence and there was a plethora of other evidence, unrelated to the shooting of K, that directly connected the petitioner to the shooting of the victim.

Argued September 18—officially released December 5, 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, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David Carlucci*, former assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, James Raynor, appeals, following the granting of certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly determined that he failed to establish that he was deprived of the effective assistance of counsel during his criminal trial. Specifically, the petitioner claims that the habeas court erroneously determined that his trial counsel did not render ineffective assistance (1) by failing to object to uncharged misconduct evidence, and (2) by failing to limit the scope of cell site location information (CSLI) evidence by either requesting a *Porter*[1] hearing or presenting a witness to challenge the state's CSLI expert. We affirm the judgment of the habeas court.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. "On the morning of July 24, 2009, Luis Torres (victim) traveled to 10 Liberty Street in Hartford to purchase heroin from an acquaintance, Alex Torres (Torres). At that time, Torres had known the victim for approximately nine months. Torres testified that on several prior occasions he had sold the victim small amounts of heroin, but on this occasion, for the first time, the victim purchased a large quantity of heroin, a total of 100 bags. When the victim was making this purchase, he told Torres that he intended to sell the drugs in front of the 24 Hour Store near the intersection of Albany Avenue and Bedford Street in Hartford. Upon learning this, Torres told the victim 'to be careful because it's . . . a bad neighborhood' and that he should 'stay away from [that] area.' After the victim made his purchase, he parted company with Torres and left Liberty Street.

"Later that evening, the victim drove to New Britain and picked up his girlfriend's father, Miguel Rosado. Thereafter, in the early morning hours of July 25, 2009, the two men went to the 24 Hour Store on Albany Avenue to purchase beer and food. Upon arriving at the 24 Hour Store, Rosado and the victim spoke with two women, Adrienne Morrell and Karline DuBois, whom they believed to be prostitutes. After learning that they were not prostitutes, Rosado and the victim asked the women whether they could help them purchase 'powder,' or powder cocaine. Morrell and DuBois agreed, then got into the victim's car and directed the men to Irving Street in Hartford, where the victim purchased an unspecified quantity of cocaine. The four then returned to the 24 Hour Store in the victim's car.

"Upon returning to the 24 Hour Store, the victim displayed a bag of heroin to DuBois and asked her if she knew 'where he could get rid of it,' from which

DuBois understood him to mean that '[h]e wanted to sell it.' DuBois informed the victim that she did not use heroin, and thus she did not know where the victim could sell his drugs. DuBois then stated that she was going 'back upstairs' to the apartments above the 24 Hour Store, where local people often gathered to use drugs. The victim asked DuBois if he could join her, but DuBois warned him that he should stay downstairs because '[p]eople don't know you . . . .' Ignoring this warning, the victim stated that he was going to go upstairs with DuBois, to which she responded, 'Then you're on your own.'

"Thereafter, the victim, Rosado, Morrell, and DuBois all went upstairs to the apartments above the 24 Hour Store. DuBois recalled that when they reached the apartments, six or seven people were already there, playing cards and getting high. After they entered, Morrell, DuBois and Rosado began to smoke crack cocaine. At the same time, the victim, who was very drunk, began offering heroin to the other occupants of the apartment. As DuBois had predicted, '[n]obody [in the apartment] wanted anything to do with [the victim] because nobody knew him.' Shortly after the victim's arrival, a group of three men entered the apartment. DuBois recognized two of the three men as Altaurus Spivey, whom DuBois knew as 'S,' and Joseph Ward, whom she knew as 'Neutron.' Although DuBois did not identify the third man by name, she described him as a 'bigger black guy.'

"Upon entering the apartment, the three men approached the victim, and S asked, 'What are you doing here?' DuBois agreed with the prosecutor's statement that S spoke to the victim 'in a tough guy type of way,' which she interpreted to mean, 'you don't belong up here. . . . [Y]ou're not going to get rid of nothing. Nobody knows you. Just go.' DuBois recalled feeling a growing tension between the groups and fearing that 'there was going to be a big problem.' Thereafter, according to DuBois, S and his group left the apartment, followed a few minutes later by the victim and an unidentified female, who went downstairs together and outside through the back door of the building to the area behind the 24 Hour Store. As this was occurring, at approximately 2 a.m., DuBois, Rosado, and Morrell remained inside the apartment.

"Several witnesses testified that the 24 Hour Store was often busy at and after 2 a.m. because it was the only store in the area that was open at that time. People would therefore go there to purchase food and drinks after the nearby bars and clubs had closed for the evening. Indeed, Officer Steven Barone of the Hartford Police Department testified that the 24 Hour Store was known by law enforcement as a 'nuisance spot,' where there was always a high volume of foot traffic and criminal activity between 2 and 4 a.m. Consistent with Barone's testimony, several witnesses stated that many

people were both inside and outside of the 24 Hour Store in the early morning hours of July 25, 2009.

"One regular patron, Marc Doster, who lived on Albany Avenue in an apartment adjacent to the 24 Hour Store, was familiar with people who lived in or frequented the area around Bedford Street and Albany Avenue, including the [petitioner], who was known on the streets as 'Ape.' Doster testified that, in the early morning of July 25, 2009, as he was walking from his apartment to the 24 Hour Store, he was approached by the [petitioner] who asked him if he either knew or was affiliated with the man who was selling drugs behind the 24 Hour Store. Doster stated that he did not. The [petitioner] then told Doster, 'don't worry about it,' because he was going 'to pay [the man] a visit . . . talk to him.' Doster then recalled that, just minutes after this conversation, he saw someone with a gun in his hand running toward the back of the 24 Hour Store. Although Doster could not see the face of the man with the gun because the man was wearing black clothing and had covered his face, he observed that the man was short and heavyset, with a body size and shape that resembled the [petitioner].

"As these events were transpiring, another regular patron of the 24 Hour Store, Tyrell Mohown, who had met the victim for the first time that evening, entered the store and purchased a cigar so that he and the victim could smoke marijuana together. After making his purchase, however, when Mohown went behind the 24 Hour Store to meet the victim, he saw the victim surrounded by five men, including Neutron and John Dickerson, nicknamed 'Jerk.' Mohown testified that although he did not see the [petitioner] or S in that group, he recalled that at least two of the five men had covered their faces with bandanas. Shortly after he came upon the scene, Mohown saw Neutron strike the victim with a baseball bat several times in the upper body. The other men then began punching and kicking the victim, who collapsed on the ground. Mohown then saw Jerk take out a gun and fire one round into the victim's back before the group scattered in different directions. The victim, still conscious but unable to walk, stated that he thought he was about to die and asked Mohown to call an ambulance. Mohown returned to the 24 Hour Store and used a pay phone to report the shooting but, not wanting to get involved, did not identify the shooter.

"Another witness, Sonesta Reynolds-Campos (Campos),[2] was standing on Bedford Street near the 24 Hour Store when she heard a gunshot from the area behind the store. Upon hearing the gunshot, Campos directed her attention to that area, where she saw a group of approximately six men. Campos recalled that S, Jerk, Neutron, and the [petitioner] were all in the group, and that the [petitioner] was then wearing a hoodie and holding what

appeared to be a gun.

"At approximately 2:25 a.m., the Hartford police received reports of gunshots fired near the intersection of Bedford Street and Albany Avenue. Within minutes of receiving such reports, several Hartford police officers responded to the scene. Officer Barone, one of the first officers to respond, made efforts to secure the scene while other officers tended to the victim. At that time, officers saw multiple lacerations on the victim's face and discovered a single gunshot wound to his back. The victim was then transported to a hospital, where it was determined that the bullet had struck his spine, paralyzing him. Due to the inherent complications of removing the bullet from the victim's spine, physicians were unable to remove the bullet, and thus officers were unable to conduct forensic testing on the bullet at that time.[3]

"Several days after the shooting, Campos encountered the [petitioner] on Bedford Street. During that encounter, the [petitioner] told Campos, '[I'm] sorry you had to see it,' but '[I] had to make an example of him.' Although Campos did not ask the [petitioner] what he meant by those remarks, she interpreted them to refer to the recent shooting of the victim behind the 24 Hour Store.

"On January 7, 2014, at the conclusion of a lengthy investigation of the July 25, 2009 shooting by a state investigating grand jury,[4] the [petitioner] was arrested in connection with the shooting. Thereafter, by way of a long form information, the state charged the [petitioner] with conspiracy to commit assault in the first degree and with being an accessory to assault in the first degree, on which he was later brought to trial before the court, *Mullarkey, J.*, and a jury of six. The state presented its case-in-chief on November 7, 10, and 12, 2014. On November 12, at the conclusion of the state's case-in-chief, the [petitioner] moved for a judgment of acquittal on both charges. That motion was denied by the court. On November 17, 2014, the jury returned a verdict of guilty on both charges. The following week, on November 21, 2014, the [petitioner] filed a motion to set aside the verdict on the grounds that the verdict was against the weight of the evidence and that the court abused its discretion in admitting evidence of uncharged misconduct. The [petitioner's] motion was subsequently denied by the court. On February 5, 2015, the [petitioner] was sentenced to a total effective term of thirty-seven years of incarceration to be followed by three years of special parole." (Footnotes in original.) *State* v. *Raynor*, 175 Conn. App. 409, 413–19, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

In reviewing the petitioner's sufficiency of the evidence claim on direct appeal, this court also determined that the jury reasonably could have found the following relevant facts. "In July, 2009, the area surrounding Bed-

ford and Brook Streets was under control of Money Green Bedrock (MGB), a neighborhood street gang. MGB was known to traffic in and sell drugs, including heroin and crack cocaine, throughout the area. Members of MGB included, inter alia, S, Neutron, Jerk, and the [petitioner]. Campos testified that she routinely purchased drugs from the [petitioner] for her own use, and was often asked to 'test' the purity of the gang's heroin. As a result of these activities, Campos became acquainted with the [petitioner] and familiar with the [petitioner's] role within MGB, and gained his trust.

"According to Campos, only members of MGB were permitted to sell drugs in the area around Bedford Street, and drug dealers who did not live in the area were not allowed to do business in the area. In order to enforce their control over this territory, the members of MGB shared certain duties, including conducting drug sales, acting as lookouts, and monitoring the area to make sure no one from outside the group was 'hustling on the block . . . .' Several witnesses testified that the [petitioner] had a position of authority within MGB, and was considered an 'enforcer' for the gang. According to one witness, Ladean Daniels, the [petitioner] 'gave orders, and the people who [are] in that area abide by them.' Similarly, Doster testified that the [petitioner] would 'handle problems . . . [p]atrol the area . . . [and] [e]nforce the rules . . . .'

"As a result of the gang's assertion of control over drug selling activity in the Bedford Street area, several witnesses, who were also admitted drug dealers, testified that they either did not sell drugs in that neighborhood, because they were not from there, or that they were permitted to sell drugs on MGB's turf because they lived in the neighborhood. Drug dealers in the latter group, including Daniels,[5] operated in the area with the understanding that they would either pay MGB a portion of their profits or purchase the drugs they sold directly from the gang. According to DuBois, it was known throughout the neighborhood that drug dealers who did not abide by these rules would be 'dealt with' by MGB.

"The state introduced testimony from several witnesses to the shooting of the victim behind the 24 Hour Store on July 25, 2009. In the state's case-in-chief, Rosado testified that, when he and the victim returned to the 24 Hour Store from Irving Street, he saw the victim speak with a man known as S, whom the victim claimed to have known from the area. Although Rosado could not remember the exact words that the victim used, he recalled the victim saying that he intended either to purchase marijuana from S or to sell some marijuana to S that night. The jury also heard testimony from Mohown, who stated that he had met the victim for the first time on the evening prior to the shooting and that, prior to the shooting, he had agreed to smoke

marijuana with the victim behind the 24 Hour Store.

"Doster testified, as previously noted, that 'a couple minutes before . . . the incident happened,' the [petitioner] approached him and asked him if he knew or was associated with the man who was selling drugs behind the 24 Hour Store. When Doster said that he did not know the man, the [petitioner] informed him that he was 'going to talk to [that man] and handle it.' Doster further testified that, shortly after he and the [petitioner] had that conversation, he saw someone who resembled the [petitioner] running toward the back of the 24 Hour Store holding a gun. Furthermore, Campos testified that, upon hearing gunshots, she observed the [petitioner] standing near the victim, wearing a hoodie and holding a gun. This testimony was corroborated by Daniels, who also claimed to have been near the 24 Hour Store in the early morning hours of July 25, 2009. Daniels stated that, although he did not see who shot the victim, he walked behind the store after hearing gunshots in the area and, at that time, saw the [petitioner] and another man nicknamed 'Hollywood' holding guns and standing near the victim, who was lying on the ground. Additionally, several witnesses testified that the group of men who had surrounded the victim during the incident scattered and ran away in different directions after the victim was shot.

"Daniels further testified that, when he reencountered the [petitioner] near the 24 Hour Store minutes after the shooting and asked him what had happened, the [petitioner] stated, '[d]ude kept coming in the area trying to hustle.' Daniels also testified that, after he had returned to the 24 Hour Store and purchased a sandwich, he walked to an apartment building on Brook Street, which runs parallel to Bedford Street. As he arrived at the apartment building, Daniels came upon the group of men he had seen surrounding the victim behind the 24 Hour Store. According to Daniels, the [petitioner], Jerk, S, and another man were gathered in the yard behind the apartment building. At that time, Daniels overheard the [petitioner] tell the men 'to stay off the block and keep their eyes open because that was their work,' then warning them to be careful because 'the block was hot.' Finally, Campos testified that when she spoke with the [petitioner] several days after the shooting, he apologized to her for her having to witness the shooting, but explained to her that he 'had to make an example of him.'

"In addition to this evidence, the state introduced, as part of its case-in-chief, evidence of the [petitioner's] involvement, later on that same day, in arranging the shooting of another drug dealer who was selling drugs without permission on MGB's turf. This evidence was offered, over the [petitioner's] objection, to prove his motive and intent to participate in the earlier shooting of the victim behind the 24 Hour Store. On the basis

of that evidence, the jury reasonably could have found that, on the night of July 25, 2009, approximately eighteen hours after the victim in this case was shot, another drug dealer, Kenneth Carter, was shot multiple times in the chest on Liberty Street in Hartford, approximately one block away from Bedford Street.[6] After the police had secured the scene of the later shooting, officers recovered, from the interior of Carter's vehicle, a large clear bag filled with small, individually wrapped packages of a green, leafy substance suspected of being marijuana. The officers also found and lifted several latent fingerprints from the outside of the driver's side door of Carter's vehicle. When those fingerprints were entered into the AFIS[7] database, they were found to match known fingerprints on file for Kendel Jules, nicknamed 'Jock,' who was a known affiliate of MGB.

"Thereafter, Sergeant Andrew Weaver of the Hartford Police Department testified to his analysis of the cell phone records associated with the cell phones of Carter, the [petitioner], and Jock.[8] Weaver testified that the cell phone records revealed that the [petitioner] had initiated contact with Carter at 10:10 p.m. that evening and had called him several times over the next thirty minutes, including one call at 10:39 p.m., approximately ten minutes before Carter was shot. Weaver also testified that a call had been placed from the [petitioner's] cell phone to Jock's cell phone approximately seven minutes before Carter was shot. On the basis of his analysis of such call records and the associated cell phone tower, Weaver testified that, at the time of the [petitioner's] final call to Jock before the Carter shooting, Jock's cell phone was in the area of Liberty Street, moving in the general direction of the location of Carter's vehicle.

"Thereafter, the state presented additional testimony from Daniels, who claimed that he had been present for a conversation between the [petitioner], Jerk, and Jock in the days following the Carter shooting. Daniels testified that on that occasion, he had gone to the [petitioner's] apartment on Bedford Street to purchase drugs. He further testified that, within three or four minutes of his arrival, the [petitioner] and Jerk began 'mocking [Jock about] how he was nervous and afraid when he was supposed to shoot the dude.' Although Daniels did not know who the group was referring to, the [petitioner] indicated that the person who was shot '[kept] coming down [here] hustling and he was meeting people in that back street.' Daniels also testified that the three men described how they had split up and deployed themselves before the Carter shooting. According to Daniels, the [petitioner] patrolled the area of Garden Street to make sure the coast was clear, while Jock walked to Liberty Street and Jerk positioned himself on Brook Street. The [petitioner] also said that the shooting was '[Jock's] initiation into the block' and that 'if Jock [couldn't] get the job done, Jerk was [there]

to help . . . .' " (Footnotes in original; footnote omitted.) Id., 419–24.

The following procedural history is also relevant to our resolution of this appeal. On August 26, 2020, the petitioner filed his third amended petition for a writ of habeas corpus, claiming in relevant part that his criminal trial counsel, Attorney Glen Conway, had provided ineffective assistance during the petitioner's criminal trial. The petitioner claimed, inter alia, that Conway was ineffective because he failed to object to the relevancy of the state's uncharged misconduct evidence regarding both the petitioner's involvement in the MGB neighborhood street gang and the Carter shooting, failed to request a *Porter* hearing to preclude Weaver's CSLI testimony and failed to present an expert witness to challenge Weaver's testimony.

The habeas court, *M. Murphy, J.*, conducted a trial on October 19 and 20, 2021, at which the petitioner presented the testimony of several witnesses, including CSLI expert James Oulundsen and Conway. Moreover, the petitioner proffered and the court admitted several exhibits, including transcripts from the underlying criminal proceeding and maps pertaining to CSLI data. On June 8, 2022, the court issued a memorandum of decision denying the petition. As to the petitioner's claim that Conway was deficient in failing to object to the uncharged misconduct evidence, the habeas court determined that Conway's decisions regarding the uncharged misconduct evidence were matters of sound trial strategy and that the petitioner failed to prove that Conway acted unreasonably. The habeas court also rejected the petitioner's claims that Conway was ineffective by failing to request a *Porter* hearing or to present a CSLI expert to challenge Weaver's testimony because the petitioner had not sustained his burden of proving that, had Conway requested a *Porter* hearing or presented a CSLI expert, there was a reasonable probability that the outcome of his criminal trial would have been different. On June 14, 2022, the petitioner filed a petition for certification to appeal the habeas court's denial of his writ of habeas corpus, which the habeas court granted. This appeal followed.

While this appeal was pending, the petitioner filed a motion for articulation, requesting that the habeas court address whether Conway was deficient in failing to move to preclude the CSLI evidence and in failing to present an expert to counter the state's CSLI evidence. In its order granting the motion for articulation, the habeas court stated: "(1) The petitioner . . . did not substantiate by a preponderance of the evidence that the CSLI evidence was unreliable and/or irrelevant. Oulundsen validated and replicated Weaver's analysis; thus, their analyses were the same. Oulundsen viewed Weaver's maps as only potentially misleading because Oulundsen considered some representations on the

maps to be general instead of specific. The general representations included where individuals could have been without pinpoint precision, which both Weaver and Oulundsen acknowledged was not possible. The CSLI evidence was relevant and [the petitioner] did not demonstrate such evidence would have been excluded had Conway sought to exclude it. Had Conway utilized an expert such as Oulundsen, he would not have undermined the relevance and probity of the CSLI evidence. Therefore, Conway did not perform deficiently by failing to move to preclude the CSLI evidence as unreliable and/or irrelevant, and by failing to present a defense expert to counter Weaver's testimony as to the relevance and probity of the CSLI evidence. (2) Even if [the petitioner] had shown deficient performance, which he has not, he has not demonstrated that he was prejudiced. Oulundsen's testimony in the habeas trial did not undermine this court's confidence in the outcome of the jury trial."

The standard of review and law governing ineffective assistance of counsel claims is well settled. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied. . . . Consequently, [i]t is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Hazel*

v. *Commissioner of Correction*, 179 Conn. App. 534, 542–43, 179 A.3d 813, cert. denied, 328 Conn. 918, 180 A.3d 963 (2018).

I

We begin with the petitioner's claim that Conway provided ineffective assistance by failing to object to the uncharged misconduct evidence, which consists of the drug evidence[9] and the Carter shooting evidence, as irrelevant. The respondent, the Commissioner of Correction, maintains that the habeas court properly determined that Conway's decision to forgo objecting to the uncharged misconduct evidence on relevancy grounds was a matter of sound trial strategy. We agree with the respondent.

The following additional procedural history, as set forth by this court in the petitioner's direct appeal, is relevant. "On November 5, 2014, two days before trial, the court held a hearing on the state's motion to admit other crimes evidence. At the hearing, the state indicated that it intended to offer evidence as to 'the [petitioner's] drug trafficking in the area in question . . . his control of the area . . . his association with a gang known as [MGB] . . . and the enforcement of that area from individuals who would encroach on that drug trafficking turf.' The state further indicated at that time that it intended to offer the Carter evidence during its case-in-chief.

"In support of its motion, the state made the following offer of proof: as a matter of logistics, the state intended to devote the first two days of trial to presenting evidence of the shooting of the victim in this case. Thereafter, on the third day of evidence, it would present the Carter evidence. Such evidence would include testimony from Officer Michael Creter, the first Hartford police officer to respond to the scene of the Carter shooting, and Detective Claudette Kosinski, who, while processing the vehicle in which Carter was shot, recovered latent fingerprints that ultimately were linked to MGB member Jock. The state also stated that it intended to present testimony from Vachon Young, who had spoken to Carter minutes before the shooting. The state claimed that Young would testify that Carter had told him that he 'was going to the area of Liberty Street to sell the [petitioner] some drugs.' The state then indicated that it would call Daniels to testify about the conversation he overheard while inside the [petitioner's] apartment several days after the Carter shooting in which the [petitioner] acknowledged his planning of the Carter shooting, which he described as Jock's initiation into the gang. In addition, the state indicated that it would call Rosado to testify that just before the victim was shot, 'an identified associate or coconspirator, [S], asked [the victim] to go to the back of the 24 Hour Store so that he could buy [drugs] from [the victim].' The state thus argued that the setup of the victim's

shooting, inducing the victim, through S, to go behind the 24 Hour Store either to sell or buy drugs, was 'strikingly similar' to the [petitioner's] conduct before the Carter shooting, whereby the [petitioner] '[summoned Carter] to the Liberty Street area so that he could buy drugs from him.'

"The state next indicated that it would call James Stephenson, a former supervisor in the state forensics laboratory, who would testify that he compared the bullets used in the Carter shooting with the bullet recovered from the victim, and concluded by forensic analysis that the same firearm had been used in both shootings. Last, the state indicated that it would present the testimony of Weaver, who would discuss the cell phone records of the participants in the Carter shooting and the associated cell tower logs.

"In response to this offer of proof, [Conway] informed the court that, although he had received the police reports submitted by the state months before the trial, the state's written notice of intent to admit such evidence was vague because it failed to specify what subsection of the Connecticut Code of Evidence the state was relying upon to establish its admissibility. Without a more definite statement from the prosecutor as to the applicable subsection of the Connecticut Code of Evidence, [Conway] claimed that 'it [was] a little hard to fashion an objection.' [Conway] then commented that 'notwithstanding the fact that bullets were fired from the same gun . . . eighteen or nineteen hours apart, I don't see the relevance . . . [t]he description of the person . . . doesn't fit my client . . . [and] there was a claim that what happened to . . . Carter was a result [of] a dispute over a woman. So, I, you know . . . relevance, common scheme, whatever the claim . . . I don't think it crosses the relevance threshold, number one. Number two . . . if it is able to crawl over the relevance threshold, barely, I see a tremendous prejudicial effect that far outweighs whatever minute probative value . . . is there. And that's a concern of mine. But I need specificity, and that's the whole point of me filing the motion for . . . notice of the uncharged misconduct . . . .'

"Thereafter, by agreement of the parties, the court withheld its ruling on the admissibility of the proffered misconduct evidence to afford the state two more days to identify which exception to the Connecticut Code of Evidence on which it would rely in offering the evidence detailed in its offer of proof. Noting his agreement with the court's suggestion, [Conway] stated, '[my] preference . . . would be to wait . . . and the rationale is just because of the additional names that were disclosed, the cases that [the state] is relying on, it would afford me an opportunity to see what I can do about it . . . .'

"Two days later, in accordance with the court's

instructions, the state filed an amended notice of intent to offer other crimes evidence. In that filing, the state expressly stated that the Carter evidence would be offered as evidence of the [petitioner's] intent and motive to conspire to participate and to aid the principal in shooting the victim in this case. The [petitioner] did not file a motion in limine seeking the exclusion of such evidence.

"On the second day of its case-in-chief . . . the state, outside the presence of the jury, reasserted its intention to introduce the drug evidence and the Carter evidence. Specifically, the state asserted that this evidence was relevant to the [petitioner's] motive for being involved in shooting the victim, as well as to his control of the Bedford Street area. In addition, the state indicated its intention to offer evidence of a third instance of uncharged misconduct, which involved the [petitioner's] separate alleged assault of a man named Nigel, because he had been selling drugs in the area controlled by MGB without the gang's permission.

"In response to the state's amended notice of intent, [Conway] remarked: 'I did have a chance to read [case law] over the weekend and I appreciate the opportunity to better get a handle on . . . the law surrounding the misconduct. I do understand the claim of relevancy by the state's attorney. However, I . . . do not believe, in particular, with regard to the alleged bad act involving . . . Nigel, as well as the . . . involvement by my client in the [Carter] shooting, that . . . whatever probative value is achieved through the introduction of that evidence, it's far outweighed by the prejudicial impact. It's . . . overwhelming, in my opinion. . . . And although I do maintain my objection, and I'd ask the court to rule in my favor, I would ask the court, if the court intends to allow this testimony and this evidence in, to give the appropriate . . . limiting instructions throughout the introduction of this evidence as to what it's offered for and to the extent possible, obviously, to minimize the prejudicial aspects of . . . the evidence, in particular, the . . . [Carter] . . . evidence because it is . . . shocking and . . . my concern is . . . that the jury will take that evidence, disregard the actual evidence from this case and convict my client for his conduct or alleged conduct in that case.'

"The court subsequently ruled that it would allow limited uncharged misconduct evidence regarding the [petitioner's] membership in MGB and its control of the drug trade in the Bedford Street area. The court further stated: '[A]s far as the shooting on Liberty Street is concerned, I have been weighing those factors for quite some time since I got this case, I guess, because there's so much material here provided through the grand jury investigation. And the fact that each of the charges in this information against [the petitioner] are specific intent crimes, as opposed to general intent, makes the

evidence, particularly the ballistics evidence, very relevant, highly probative. And, properly sanitized, I'm going to allow in evidence on the Liberty Street shooting that occurred eighteen hours after the incident that we're trying. As far as exactly what we need to sanitize, I want to go through that with you gentlemen in some detail. Of course, the fact that someone was killed at that scene is out.' Last, the court excluded evidence of the alleged assault on Nigel on grounds of its prejudicial effect on the [petitioner] and lack of notice.

"Shortly thereafter, in the presence of the jury, the prosecutor asked Campos whether there was 'a certain . . . group' that hung out on Bedford Street and if it was known by a particular name. [Conway] objected and asked to be heard outside the presence of the jury. [Conway] then requested clarification as to whether the court's decision to admit the drug evidence included a ruling that the name of the gang was also admissible. The court clarified that, on the basis of its earlier ruling, the name of the gang was admissible. The [petitioner] raised no further objections to the admission of such evidence.

"That afternoon, after the testimony of Campos and Doster, both of whom testified without further objection as to the drug evidence . . . the court, sua sponte, instructed the jury that '[w]hen the state offers evidence of . . . misconduct, it's not being admitted to prove the bad character, propensity or criminal tendencies of the [petitioner]. It's being admitted solely to show intent and motive. You may not consider such evidence as establishing a predisposition on the part of the [petitioner] to commit any of the crimes charged or demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues of motive and intent, and each of those legal concepts you will get an instruction on.

" 'On the other hand, if you don't believe the evidence or even if you do, you find [it does] not logically, rationally and conclusively support . . . the issues of motive and intent, you may not consider that testimony for any other purpose. You may not consider evidence of other misconduct of the [petitioner] for any purpose, other than the ones I just told you about because it could predispose you to critically believe the [petitioner] may be guilty of the offenses charged here merely because of the other alleged misconduct. So, you may consider that evidence, if you credit it, only on the issues of intent and motive.'

"On the third day of trial . . . the state concluded its presentation of the evidence regarding the shooting of the victim. Thereafter, the court informed the jurors that the state was 'going to shift gears in this case' and asked the jury to take a short recess. Outside the

presence of the jury, the court inquired as to the order of the state's witnesses and stressed that the state should take great care not to reveal that Carter had died on the night of the shooting. By agreement of the parties, the state informed the court that it would ask leading questions to its witnesses and instruct them that they were not to reveal that Carter had been killed, but only that he had been shot.

"The court then summoned the jury back to the courtroom, after which it stated that '[t]he reason I said we're switching gears, ladies and gentlemen, is, most of the evidence that's remaining in the state's case-in-chief, as far as I know, concerns a different incident, and I didn't want you to be confused. And the state will be offering this evidence, and I will be giving you a specific instruction about it. . . . [T]here will be some evidence in this case of other acts of misconduct. It's not being admitted to prove bad character, propensity of criminal tendencies of the [petitioner]. It's being entered simply to show intent and motive related to the crimes that are being tried in this case, and you may not consider such evidence as establishing a predisposition on the part of the [petitioner] to commit any of the crimes charged in our information, nor to demonstrate a criminal propensity.

" 'You may consider such evidence if you believe it and further find it logically, rationally and conclusively supports the issues for which it is being offered by the state. But it bears only on the issues of intent and motive concerning the charges that arise from the Bedford Street incident. And you may not consider evidence of other misconduct of the [petitioner] for any purpose other than the ones I just told you because if you do, it may predispose your mind to . . . uncritically believe the [petitioner] may be guilty of the offense here charged, merely because of other misconduct. For this reason, you consider it only on the issues of intent and motive.'

"Thereafter, in accordance with its offer of proof, the state presented, inter alia, the testimony of Creter, Kosinski, Weaver, Stephenson, and Daniels . . . . Only Young, of the witnesses mentioned in the state's offer of proof, did not testify. At the conclusion of the state's case-in-chief that afternoon, the court reinstructed the jury that evidence regarding uncharged misconduct of the [petitioner] was 'admitted . . . only to establish . . . his intent, motive in the matter involving [the victim]. You may not consider such other evidence as establishing a predisposition on the part of the [petitioner] to commit any crimes charged or to demonstrate a criminal propensity. . . . If you don't believe the evidence or even if you do, and you find that it does not logically, rationally, and conclusively support on the issues of motive, intent in the [present] matter . . . then you may not consider it for any pur-

pose.' " (Citation omitted; footnotes omitted.) *State* v. *Raynor*, supra, 175 Conn. App. 440–47.

The following legal principles guide our resolution of the petitioner's claims that trial counsel rendered deficient performance under *Strickland*. "In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standard for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is*, *the* [*petitioner*] *must overcome the presumption that*, *under the circumstances*, *the challenged action might be considered sound trial strategy*. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Emphasis in original; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 305–306, 298 A.3d 636, cert. denied, 348 Conn. 915, A.3d (2023).

We first address the petitioner's argument that Conway provided ineffective assistance by not objecting to the admission of the drug evidence. The petitioner claims that, although Conway knew the prejudicial effect of the drug evidence, he did not object to its admission because it was "so interwoven into the fabric of the case . . . ."[10] We are not persuaded.

We agree with the habeas court's conclusion that Conway did not render deficient performance in deciding not to object to the admission of the drug evidence. At the petitioner's habeas trial, Conway testified that he did not object to the drug evidence because "it was so interwoven into the fabric of the case, there were witnesses that were going to testify about how they knew [the petitioner] and these other individuals associated with [him]. . . . [A]fter looking at the grand jury testimony, it was so crystal clear that [it] was coming in . . . ." In its memorandum of decision, the habeas court determined that "Conway anticipated that the state would show that the petitioner was a member of the MGB organization, that the [victim's shooting was] connected to the area MGB controlled, and that the organization used enforcement methods against individuals who infringed on their territory. . . . [Conway's] decision whether to object or not [was] guided by his experience that frequently repeated objections can cause harm to the defense." As this court repeatedly has noted, "[t]he decision of a trial lawyer not to make an objection is a matter of trial tactics, not evidence of incompetency . . . . [T]here is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment. . . . It is well established that [a] reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance and that a tactic that appears ineffective in hindsight may have been sound trial strategy at the time." (Citation omitted; internal quotation marks omitted.) *Boyd* v. *Commissioner of Correction*, 130 Conn. App. 291, 298, 21 A.3d 969, cert. denied, 302 Conn. 926, 28 A.3d 337 (2011). It is evident, based on his testimony at the habeas trial, that Conway made a strategic decision not to object to the drug evidence. Furthermore, his testimony provided a sufficient rationale for that decision. Thus, we agree with the habeas court that the petitioner has not overcome the strong presumption that Conway's decision not to object to the drug evidence was anything other than a reasonable exercise of his professional judgment.

In connection with his argument that Conway was ineffective by failing to object to the drug evidence, the petitioner further claims that Conway rendered ineffective assistance by failing to object to the Carter shooting evidence on the basis of relevancy. We are not per-

suaded.

At the habeas trial, Conway testified that he initially objected to the Carter shooting evidence on relevancy grounds. Conway explained, however, that when he learned that the same gun was used in both the shooting of the victim and the Carter shooting, "the relevance [objection] was not going to fly, and so it had to be because of the overwhelming amount of uncharged misconduct. It was . . . in my view really more prejudicial than probative." Conway further testified that his relevancy objection was a "loser," and pursuing it likely would have damaged his own credibility with the trial court and "haunt[ed]" the petitioner.

In its memorandum of decision, the habeas court found that Conway rendered effective assistance and that the petitioner failed to overcome the presumption that Conway's decision to forgo objecting to the Carter shooting evidence on relevancy grounds was reasonable. The habeas court stated that "Conway assesses each case based on its unique circumstances, and his decision whether to object or not is guided by his experience that frequently repeated objections can cause harm to the defense. . . . Conway's strategy in this case was determined by the dynamics of the case itself and the trial judge, who had overruled his initial relevance objection. Conway, who knows the exceptions by which uncharged misconduct can be used to prove intent, abandoned the relevance objection and subsequently argued that such evidence was more prejudicial than probative.

"Although the petitioner argues that the Carter shooting misconduct evidence was irrelevant, does not prove that the [victim's] shooting was intentional, and is merely 'bad act' evidence, the record and the Appellate Court's summary starkly contradict the petitioner's contentions. The court concludes that Conway's performance was reasonably competent and that the petitioner has not rebutted the presumption that the trial strategy was reasonable. Additionally, the petitioner has not shown that he was prejudiced by undermining this court's confidence in the outcome of the criminal trial on this ground." (Citation omitted.)

We conclude that Conway did not render deficient performance by objecting to the Carter shooting evidence on grounds of its prejudicial effect, instead of its relevancy. "In reaching our conclusion, we emphasize that a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 313. Conway's testimony at the petitioner's habeas trial, specifically regarding his desire to maintain his own credibility with the trial court, unequivocally demonstrates that he made a tactical determina-

tion to pursue an objection that the Carter shooting evidence was prejudicial in lieu of a potentially damaging and less viable relevancy objection. See *Reynolds* v. *Commissioner of Correction*, 321 Conn. 750, 762–63, 140 A.3d 894 (2016) ("[i]t is hardly unreasonable for counsel to choose to preserve credibility with the finder of fact by declining to pursue an argument that is supported by nothing more than conjecture"), cert. denied sub nom. *Reynolds* v. *Semple*, 581 U.S. 997, 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017). Thus, we agree with the habeas court that Conway's decision to refrain from making a relevancy objection that he knew, based on his experience with the trial court, could harm his credibility and defense, was one of reasonable trial strategy.

We agree with the habeas court's determination that the petitioner did not meet his burden of proving that Conway's decisions regarding the drug evidence and the Carter shooting evidence were unreasonable. Conway's decisions were tactical determinations that "fall into the category of trial strategy or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 314. Thus, we conclude that Conway's performance was not deficient.[11]

II

We now turn to the remaining aspect of the petitioner's claim, which is that Conway provided ineffective assistance by failing to object to, or otherwise challenge, the introduction of the CSLI evidence. Specifically, the petitioner asserts that Conway was ineffective by failing to request a *Porter* hearing with respect to the CSLI evidence and by failing to present the testimony of an expert witness to counter Weaver's testimony. The respondent maintains that the habeas court correctly determined that the petitioner failed to prove that he was prejudiced by Conway's failure to request a *Porter* hearing or to present a CSLI expert to challenge Weaver's testimony because the petitioner failed to prove that, but for Conway's errors, there was a reasonable probability that the outcome of his criminal trial would have been different. We agree with the respondent.

The following additional procedural history is relevant to our resolution of this claim. At the petitioner's criminal trial, "[o]n direct examination, Weaver testified that between 2004 and 2014, he had received extensive forensics training in '[analyzing] cellular phones, cellular mapping . . . [and] computer forensics.' The [petitioner] did not object either to Weaver's credentials or the substance of his testimony." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.14. Moreover, "Weaver testified that the cell phone records revealed that the [petitioner] had initiated contact with Carter at 10:10 p.m. that evening and had called him several times over the next thirty minutes, including one call at 10:39 p.m., approxi-

mately ten minutes before Carter was shot. Weaver also testified that a call had been placed from the [petitioner's] cell phone to Jock's cell phone approximately seven minutes before Carter was shot. On the basis of his analysis of such call records and the associated cell phone tower, Weaver testified that, at the time of the [petitioner's] final call to Jock before the Carter shooting, Jock's cell phone was in the area of Liberty Street, moving in the general direction of the location of Carter's vehicle." Id., 423–24.

The following legal principles pertaining to the prejudice component of the *Strickland* test are relevant to our resolution of this claim. At the outset, "[a] court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 562–63, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018). Thus, when a habeas court "determine[s] that the petitioner ha[s] not proven that he was prejudiced by the performance of his trial counsel, our focus on review is whether the [habeas] court correctly determined the absence of prejudice. . . . With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.) Id., 565.

We begin with the petitioner's first claim that Conway provided ineffective assistance by failing to request a hearing to either exclude or limit the scope of the CSLI evidence pursuant to *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).[12] Our Supreme Court, in *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), first determined that CSLI is of a scientific nature; id., 132; and held in that case that the trial court erred by not conducting a *Porter* hearing to ensure that the evidence was based on reliable scientific methodology. Id.,133. In *State* v. *Turner*, 334 Conn. 660, 224 A.3d 129 (2020), however, our Supreme Court clarified that, "[e]ven though . . . the rule in *Edwards* applies retroactively, we did not hold in *Edwards* that trial courts were bound to have, sua sponte, held *Porter* hearings

in every case involving expert testimony on cell phone data in the absence of an objection or request to do so. Rather, a court is obligated to conduct a *Porter* hearing only when a party requests one." (Footnote omitted.) Id., 677–78. In the present case, Conway did not request a *Porter* hearing. In order to succeed on his claim, the petitioner must prove *both* that Conway's decision to forgo a *Porter* hearing constituted deficient performance *and* that he was prejudiced by that performance.

On the basis of our review of the record, we conclude that, even assuming arguendo that Conway's performance was deficient, the petitioner cannot demonstrate prejudice because he has not shown that there is a reasonable probability that the outcome of his criminal trial would have been different had Conway requested a *Porter* hearing. See *Martin* v. *Commissioner of Correction*, 179 Conn. App. 647, 664, 180 A.3d 1003 ("reasonable probability is a probability sufficient to undermine the confidence in the outcome" (internal quotation marks omitted)), cert. denied, 328 Conn. 926, 182 A.3d 84 (2018). First, the petitioner has not demonstrated that there is a reasonable probability that the outcome of his criminal trial would have been different because there was abundant other evidence connecting the petitioner to the Carter shooting. At the petitioner's criminal trial, Weaver testified that he had reviewed the cell phone records of the petitioner, Jules, and Carter, and found that the cell phone associated with the petitioner made several phone calls to cell phones associated with both Jules and Carter in the thirty minutes before the Carter shooting.[13] Moreover, the state presented testimony from Daniels indicating that the petitioner discussed how he patrolled Garden Street before the Carter shooting, and how, according to the petitioner, the person shot "[kept] coming down [here] hustling." *State* v. *Raynor*, supra, 175 Conn. App. 424.

Second, we agree with the habeas court that the petitioner has failed to present evidence that the outcome of a request for a *Porter* hearing would have been favorable to the defense and changed the outcome of his criminal trial. At the petitioner's habeas trial, Conway testified that his overall strategy regarding the CSLI evidence was to demonstrate that the evidence neither showed the specific location of the cell phones nor established the user of each cell phone. When asked whether excluding the CSLI evidence would have helped his defense, Conway testified: "I can't say it would have been helpful or harmful quite frankly because there was a benefit, in my view, based on . . . sort of how this stuff was presented by the state and how flat it fell. Sometimes . . . that's okay to have [an expert] come up there and put this big show on, and [the] ultimate conclusion is zero. It shows how thin [the state's] case is. So, I can't tell you for me to say it would be helpful or harmful . . . you are asking me to speculate . . . ."

In its memorandum of decision, the habeas court set forth a detailed analysis regarding Conway's failure to request a *Porter* hearing. The habeas court stated that "[a] *Porter* hearing is warranted prior to testimony such as Weaver's about cell site location information. It is incumbent on counsel to request a *Porter* hearing. Conway did not request a *Porter* hearing. Conway testified that he was not overly concerned about the cell phone evidence because it could not pinpoint anyone, it was unknown precisely where on the map a caller was located, and it was unknown who was using any of the cell phones. Conway described his strategy as highlighting that it was unknowable with any certainty where a caller was located and who was using the cell phone. Thus, Conway did not think the maps mattered much and was more concerned with the witnesses who lived in the area and saw the petitioner. Conway acknowledged that he could have requested a *Porter* hearing, but it never occurred to him in this case because he considered cell site information to be generally accepted."

The habeas court found "that the petitioner has not proven that Conway was ineffective for failing to request a *Porter* hearing. The petitioner has not demonstrated that, had Conway requested a *Porter* hearing, the trial court would have conducted such a hearing and that the outcome would have been favorable to the defense or changed the outcome of the criminal trial. . . . Even if this court were to assume that Conway performed deficiently, the petitioner has failed to prove the necessary prejudice." (Citation omitted.) We agree.

The petitioner does not claim on appeal that a successful challenge to the CSLI data through a *Porter* hearing would have prevented Weaver from testifying at all about such data. In fact, the petitioner concedes in his principal brief: "If the extent of Weaver's testimony had been that the CSLI data showed that cell phones associated with [the petitioner] and Jules were in the vicinity of the Carter shooting at the time it occurred, that would have been generally accepted usage of CSLI, and Conway might have correctly assumed a request for a *Porter* hearing would be denied." This statement was confirmed by the testimony at the habeas trial of the petitioner's CSLI expert, Oulundsen. As more fully set forth in this opinion, Oulundsen agreed generally with Weaver's mapping of the cell site information and his placement of the petitioner in the general vicinity of the Carter shooting at the times the petitioner's phone was sending and receiving calls to and from Jules.

The petitioner's challenge to Weaver's testimony is limited to arguing that a *Porter* hearing would have led the court to exclude testimony from Weaver about the specific movements of Jules and the petitioner in "close proximity" to where Carter was shot. Assuming the

petitioner is correct, we agree with the habeas court that there is no reasonable probability that exclusion of such evidence would have changed the outcome of the petitioner's criminal trial. As noted previously, evidence unrelated to the CSLI data connected the petitioner to the Carter shooting, and the CSLI data that is not challenged placed the petitioner and Jules in the vicinity of the shooting when it occurred. Furthermore, Weaver testified at the petitioner's criminal trial that the CSLI data could not pinpoint the location of a cell phone and could only provide a general idea of its location. Given this evidence, our confidence in the outcome of the trial would not be undermined by the absence of the more detailed CSLI evidence the petitioner challenges.

For the same reason, we reject the petitioner's claim that Conway provided ineffective assistance by failing to present a CSLI expert to challenge Weaver's testimony. Oulundsen testified at the habeas trial that, after reviewing Weaver's work, he determined that Weaver mapped the cell phone information similarly to how he would have. Oulundsen stated, however, that Weaver chose to omit icons representing the petitioner's residence and towers that provided overlapping coverage, both of which were in the vicinity of the cell towers on which Weaver relied. Additionally, Oulundsen testified that he found Weaver's maps "suggestive" because he placed icons representing the cell phones associated with the petitioner and Jules next to each other. When asked whether he disagreed with the steps Weaver took to reach his conclusions, however, Oulundsen responded, "Not so much of the steps, *because I would have kind of plotted these things the same way* . . . ." (Emphasis added.) Finally, Oulundsen agreed with Weaver's testimony at the criminal trial that CSLI evidence could not identify the petitioner's specific location but, rather, CSLI evidence could identify the general location of the cell phone associated with the petitioner.

Next, the petitioner's counsel questioned Conway regarding his decision not to present a CSLI expert to challenge Weaver's testimony. Conway testified that he did not believe Oulundsen's testimony would have helped the petitioner's defense, nor persuaded a jury, because he and Weaver ultimately reached the same conclusions. Further, Conway testified that his strategy regarding the CSLI evidence was to show that Weaver could neither say who was using the cell phones, nor identify the specific locations of the cell phones. In its memorandum of decision, the habeas court determined that "Oulundsen agreed with Weaver's trial testimony that he did not know exactly where the petitioner and Jules were, and that only a general area of their locations could be determined."

We agree with the habeas court that the petitioner was not prejudiced by Conway's decision not to call a

CSLI expert to challenge Weaver's testimony. "[T]here is no per se rule that requires a trial attorney to seek out an expert witness." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600, cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). In fact, "[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Servello* v. *Commissioner of Correction*, 95 Conn. App. 753, 763–64, 899 A.2d 636, cert. denied, 280 Conn. 904, 907 A.2d 91 (2006). Here, Oulundsen and Weaver both concluded that CSLI cannot identify the user of the cell phones or the specific locations of the cell phones. Thus, the petitioner has not shown that the presentation of a CSLI expert to challenge Weaver's testimony would have assisted his defense. Finally, it bears remembering that the evidence regarding the Carter shooting was uncharged misconduct evidence. As discussed previously in this opinion, there was a plethora of other evidence, unrelated to the Carter shooting, that directly connected the petitioner to the shooting of the victim, the crime of which the petitioner was convicted and which he has challenged in his habeas petition.

Therefore, we agree with the habeas court's conclusion that the petitioner has not satisfied the prejudice prong of *Strickland* because he has not demonstrated a reasonable probability that, had Conway requested a *Porter* hearing to challenge or limit the scope of the CSLI evidence or presented a CSLI expert to challenge Weaver's testimony, the outcome of his criminal trial would have been different. Consequently, the habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

[2] "Throughout the course of the trial, the witness was referred to as Sonesta Reynolds, Sonesta Campos, and Sonesta Reynolds-Campos. Because the witness indicated no preference to as to how she was addressed, we refer to her simply as Campos." *State* v. *Raynor*, 175 Conn. App. 409, 417 n.5, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

[3] "Prior to trial, the victim died due to an unrelated drug overdose. Following the victim's death, police were able to remove and analyze the bullet that had struck the victim's spinal cord. . . . As part of its evidentiary rulings, the court excluded any reference to the victim's death." (Citation omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 418 n.6, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

[4] "The jury did not, at any time during the [petitioner's] criminal trial, receive evidence concerning or related to the state investigating grand jury." *State* v. *Raynor*, 175 Conn. App. 409, 418 n.7, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

[5] "Daniels testified that he was allowed to sell drugs in the neighborhood because he had lived in the area of Bedford Street for approximately eleven years, he 'was cool with some of the friends of the [petitioner],' and there was an understanding that '[i]f [he] was the hustler on that block, [he] had to be buying [MGB's] drugs.' " *State* v. *Raynor*, supra, 175 Conn. App.

420 n.10.

[6] "Although Carter died as a result of his wounds, the court excluded from the trial any reference to Carter's death, and the state was prohibited from referring to the shooting as a murder or homicide." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.12.

[7] "AFIS stands for automated fingerprint identification system." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.13.

[8] "On direct examination, Weaver testified that between 2004 and 2014, he had received extensive forensics training in '[analyzing] cellular phones, cellular mapping . . . [and] computer forensics.' The [petitioner] did not object either to Weaver's credentials or the substance of his testimony." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.14.

[9] The petitioner refers to this evidence as "general gang evidence." Because the respondent, habeas court, and this court in the petitioner's direct appeal, all refer to it as "drug evidence," we similarly use that term.

[10] The petitioner further claims that Conway was ineffective by not objecting to the drug evidence because the evidence the state proffered to suggest its relevancy never materialized. The petitioner argues that "neither Campos nor Doster or Daniels testified that the petitioner occupied such a position of authority in the gang that the assault of [the victim] could not have happened without his knowledge or approval" and that "the promised testimony establishing [the victim] was lured to the rear of the 24 Hour Store as part of an orchestrated gang retaliation never materialized." As set forth previously in this opinion, however, all three witnesses identified the petitioner as having a position of authority in, and being an enforcer of, MGB. Moreover, all three witnesses testified about their separate conversations with the petitioner, wherein the petitioner stated that he was going to "make an example of" and "handle" the person selling drugs behind the 24 Hour Store. Accordingly, we are not persuaded by the petitioner's claim that the evidence the state proffered to prove the relevancy of the drug evidence never materialized.

[11] Accordingly, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Conway's decision not to object to the relevancy of the drug evidence and the Carter shooting evidence. See, e.g., *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637–38, 212 A.3d 678 (2019) (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently).

[12] "In *Porter*, [our Supreme Court] . . . held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. A nonexhaustive list of factors for the court to consider include: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] substantive judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Citation omitted; internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124, 156 A.3d 506 (2017).

[13] At the petitioner's criminal trial, Weaver generally testified that, when reviewing cell phone records, he does not say for certain who the person was that was making or receiving the phone call. Instead, he "specifically state[s] that a phone number that is related to [Person A] . . . made a call to another phone number." Weaver then testified that the following phone calls were made the evening of July 25, 2009: (1) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 9:09 p.m.; (2) a phone call from a cell phone related to the petitioner to a cell phone related to Carter at 10:10 p.m.; (3) a two second call from a cell phone

related to Jules to a cell phone related to the petitioner at 10:10 p.m.; (4) two phone calls from a cell phone related to Young to a cell phone related to the petitioner at approximately 10:12 p.m.; (5) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 10:15 p.m.; (6) a phone call from a cell phone related to Young to a cell phone related to the petitioner at 10:24 p.m.; (7) a phone call from a cell phone related to Young to a cell phone related to Carter at approximately 10:32 p.m.; (8) a phone call from a cell phone related to the petitioner to a cell phone related to Carter at 10:39 p.m.; (9) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 10:42 p.m.; and (10) a phone call from a cell phone related to Carter to a cell phone related to the petitioner at 10:42 p.m. Finally, Weaver testified that, on July 26, 2009, beginning at 6:58 a.m., a cell phone related to the petitioner exchanged "[q]uite a few phone calls" with a cell phone related to Jules.