NORMAN GAINES *v.* COMMISSIONER
OF CORRECTION
(SC 18760)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Vertefeuille, Js.*

*Argued April 17—officially released September 18, 2012***

Timothy J. Sugrue, assistant state's attorney, with whom were *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and, on the brief, *John C. Smriga*, state's attorney, and *Gerard P. Eisenman*, senior assistant state's attorney, for the appellant (respondent).

James B. Streeto, assistant public defender, for the appellee (petitioner).

Opinion

NORCOTT, J. The respondent, the commissioner of correction, appeals, following our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming the habeas court's granting of the petition for a writ of habeas corpus filed by the petitioner, Norman Gaines, on the basis that his trial attorney, Alexander Schwartz, had rendered ineffective assistance of counsel. *Gaines* v. *Commissioner of Correction*, 125 Conn. App. 97, 111, 7 A.3d 395 (2010). On appeal, the respondent contends that the petitioner failed to establish by a preponderance of the evidence both that Schwartz had rendered ineffective assistance of counsel and that the alleged ineffective assistance was prejudicial to the petitioner. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The record reveals the following relevant facts, which the habeas court reasonably could have found, and procedural history. On October 29, 1996, at approximately 7 p.m., Gary Louis-Jeune and Marsha Larose were shot and killed by two gunmen while sitting in a car parked on the side of Maplewood Avenue in Bridgeport. *State* v. *Gaines*, 257 Conn. 695, 697–98, 778 A.2d 919 (2001). Several months after the shooting, the petitioner was arrested in connection with the murders and charged with capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (8), two counts of murder in violation of General Statutes § 53a-54a, and conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48. Id., 696, 701.

During the petitioner's criminal trial, the state presented eyewitness testimony from Carl Wright, who was driving down Maplewood Avenue just prior to the murders and witnessed two people walk over to the car in which Louis-Jeune and Larose were sitting and open fire—one individual from the driver's side of the vehicle and the other from the passenger side. Id., 697. Wright, however, was unable to identify the race or the gender of either of the shooters because they were wearing hooded sweatshirts with the hoods pulled over their heads. Id. The state also presented testimony from Tyrell Allen, who was walking on a nearby street at the time of the shooting. Id., 697–98. Allen heard about twenty gunshots and, thereafter, witnessed two men run past him from the direction of the shooting. Id. Allen testified that one of the men was approximately five feet, ten inches tall, light-skinned with a flat nose and medium build and wearing an orange or mustard colored hooded sweatshirt, and that the other man was in his twenties and was wearing a black hooded sweatshirt. Id., 698.

The chief medical examiner determined that both victims had died from gunshot wounds. Id. Additionally, the police recovered several spent .22 and .45 caliber

casings from the scene and also recovered several .22 caliber bullets and one .45 caliber bullet from the victims' bodies. Id., 698–99. The forensic science laboratory of the department of public safety determined that all of the .22 caliber casings had been fired from the same gun and that all of the .45 caliber casings had been fired from another gun. Id., 699.

The state also presented testimony from Leo Charles, who stated that, at some time prior to October 31, 1996, he had an encounter with the petitioner and the petitioner's codefendants in the murder trial, Ronald Marcellus and "Nunu" Shipman.[2] Id. Specifically, Charles testified that, during that encounter, he had seen the petitioner with a .22 caliber gun and Shipman with a .45 caliber gun, that Shipman and the petitioner had borrowed his car for forty-five minutes, and that, when they returned the car, Shipman had given him a black sweatshirt. Id. Torrance McClain, with whom the petitioner had been living at the time of the shooting, then testified that he had given Shipman access to a basement area in which a .22 caliber gun and a .45 caliber gun were kept, and that he saw Shipman go into the basement and leave with the guns prior to the shooting. Id. McClain further testified that, shortly after the shooting, the petitioner had told him that he " 'felt good' " because " 'they killed somebody' " with those guns. Id., 700.

The state also presented the testimony of Eleanor Figueroa, McClain's girlfriend at the time of the murders, who stated that the petitioner had told her that Larose had been killed because he could not risk leaving a potential witness to the shooting of Louis-Jeune, and that Larose simply " 'was in the wrong place at the wrong time . . . .' " Id. She also testified that the petitioner had asked her to have Shipman's uncle dispose of the .22 caliber gun because it had been used in the shooting. Id., 701. Figueroa further testified that drugs and guns were kept in the basement of McClain's residence and that she, McClain and the petitioner had sold drugs in that location for Marcellus. Id. The state concluded its case with the testimony of the police officer in charge of the investigation of the murders, who stated that his investigation had led him to believe that the petitioner and Shipman were active participants in the killings and that Marcellus was an accomplice. Id.

In his defense, the petitioner testified that he had begun selling drugs with McClain and Figueroa to earn money to pay them rent. Id., 702. He also testified that, in early October, 1996, he and McClain had had a dispute over the difference of $100 worth of drug sale proceeds. Id. He further testified that Figueroa had visited him while he was incarcerated on unrelated charges and repeatedly tried to get him to admit that he was involved in the murders. Id. He stated that he believed that she was joking about his involvement until he learned that Marcellus had been arrested and had signed a statement

implicating him. Id. Finally, the petitioner testified that he did not kill the victims, that no one ever asked him to kill the victims and that he had no reason to kill the victims. Id., 703.

On the basis of the foregoing evidence, the jury convicted the petitioner on all four counts, and he was sentenced to an effective term of life imprisonment without the possibility of release.[3] This court upheld all four convictions on appeal. See id., 697. Thereafter, on June 30, 2008, the petitioner filed an amended petition for a writ of habeas corpus, alleging that his confinement was illegal because he had been denied the effective assistance of counsel. The petitioner based his claim on, inter alia,[4] Schwartz' failure to complete an adequate pretrial investigation. Specifically, the petitioner contended that, had Schwartz conducted an adequate investigation, he would have discovered two witnesses who could have provided an alibi for the petitioner at the time of the murders.

At the habeas hearing, the habeas court heard the following testimony relevant to the present appeal. First, the petitioner testified that he had spoken with an investigator, whom Schwartz had hired, concerning his criminal case. The petitioner admitted that the "investigator had investigated things that the petitioner had discussed with him." The petitioner did not, however, specify which "things" had been discussed and investigated. He further testified that he had given the names "Madeline Rivera"[5] and "Calvin Shipman"[6] to Schwartz but did not discuss the context in which he had provided those names. Finally, he testified that, because he could not remember where he was or what he was doing on the night of the murders, had Schwartz conducted an adequate investigation of the names that the petitioner had provided, he would have discovered that Rivera, who is Figueroa's sister, and her mother, Luz Davila, would have been able to explain his whereabouts at the time in question.

Rivera then testified that, on the night of the murders, she was moving from her apartment, which was adjacent to McClain's apartment, into a new apartment. At approximately 4 p.m. that evening, she left her children in the care of the petitioner in order to go with Davila and Shipman to rent a U-Haul truck for the move. When she returned to her apartment with the truck, the petitioner and Shipman spent several hours, making several trips with the truck, moving Rivera's belongings out of the old apartment and into the new one. The group completed the move shortly after midnight, Rivera returned the truck, and, when she arrived back at her new apartment, she saw that the petitioner, who had again stayed behind to watch the children, was asleep. Rivera also testified that the petitioner did not leave for any reason at any time on the evening of the move. Furthermore, she testified that, although she had no

corroborating evidence to establish the date of her move, such as a lease for the apartment into which she was moving or the rental agreement for the truck, she was sure that the petitioner and Shipman were helping her move on that night because she remembers seeing the television news report regarding the murders while she was in the process of moving.

When asked why she did not come forward sooner with the alibi information for the petitioner—which also would have provided an alibi for Shipman, who was her boyfriend at the time and the father of one of her children—Rivera testified that she had been incarcerated on an unrelated charge approximately one month after the petitioner was arrested for the murders, and she was unaware that the petitioner and Shipman were charged with the murders until after she had been released from prison.[7] She further testified that she went to the courthouse after she learned of the petitioner's ongoing trial and told an attorney, who she presumed was representing the petitioner, that the petitioner and Shipman were helping her move at the time that they were accused of committing the crime and discussed a letter addressed to her written by the petitioner.[8] She, however, could not recall with whom she had spoken.[9] Rivera also testified that she had not given the information concerning the petitioner's whereabouts on October 29, 1996, to the police because "[n]obody ever came to see [her]." Finally, when asked why she did not otherwise volunteer the information, she asked, "who's going to listen to a parolee," and stated that she believed that the state's attorney was "not on [her] side; he was on [her] sister's side."

The petitioner then presented testimony from Davila that was consistent with Rivera's account of the events of October 29, 1996. Davila testified that, on that night, she went with Rivera and Shipman around 4:30 to 5 p.m. to rent a U-Haul truck. They arrived at Rivera's apartment between 6:30 and 7:30 p.m. with the truck, at which time she saw the petitioner on the porch. Davila further testified that she had returned home after dropping off the U-Haul truck at Rivera's apartment, but went back to Rivera's apartment around 9 p.m., when she saw the petitioner still at work helping Rivera move. She stayed at Rivera's apartment for approximately one hour and last saw the petitioner there at approximately 10 p.m. Finally, Davila explained that she had not come forward with this information because no one, including the police and the petitioner's attorney, had asked her to discuss what she had seen that night. She also testified that she was not aware that the petitioner had been charged with the murders because she worked long hours, had limited contact with Rivera, and had no contact at all with Shipman after the night of the move. Finally, Davila testified that, because her daughter had been in jail, she did not think the police would believe her if she came forward once she learned

of the charges against the petitioner.

The habeas hearing concluded with testimony from Schwartz, who testified that both he and the investigator he had hired had spoken with the petitioner concerning the case. He further testified that, although the petitioner could not remember where he was on the night in question, he had told Schwartz that he was not present at the time and location of the shooting. Nevertheless, the petitioner did not provide Schwartz with the name of any alibi witness, and although the petitioner named Rivera as someone he knew,[10] he did not tell Schwartz that she or Davila had any information that would have exonerated the petitioner or would even have been helpful to the case. In addition, Schwartz testified that, not only was he unaware of the substance of both Rivera's and Davila's testimony until he had heard them testify at the habeas hearing, but also that he had not even heard of Davila before receiving the habeas petition. Schwartz testified, however, that if he had known of a potential alibi or if he had any kind of information that even remotely appeared to be helpful to the case, he would have investigated it.

Finally, although he could not explain how the pretrial investigation did not include speaking with Rivera, Schwartz testified that, had he known of her testimony and that of her mother, he would have called both of them to testify during the petitioner's criminal trial. He stated that testimony regarding an alibi for the petitioner is something the jury should have heard because the theory of his defense was that McClain and Figueroa had "thrown [the petitioner] under the bus" because they were either the perpetrators of the murders themselves or were simply lying to receive benefits from the state with respect to the disposition of their own unrelated criminal cases, and the petitioner was an easy target because he had limited connections in Bridgeport.[11] Alibi testimony would have undermined the testimony from McClain and Figueroa at trial, and Schwartz testified that, had he called Rivera and Davila to testify during the trial, he believed that their testimony might have made a difference in the jury's verdict.

From this testimony, the habeas court found that the petitioner's inability to recall his whereabouts on a night approximately five months prior to his arrest was credible. Furthermore, the court found that, under the circumstances of this case, wherein Schwartz' client was unable to recall his whereabouts on the night in question or to name a witness who could attest to his whereabouts, Schwartz should have investigated Rivera—one of two names that the petitioner had provided as his limited acquaintances in Bridgeport—to determine if she had any useful information. This was particularly so given that Schwartz was aware that Rivera was the sister and next door neighbor of one of the state's key witnesses at the criminal trial. The court further found

that, had Schwartz conducted an adequate investigation, he would have contacted Rivera and, through her, would also have reached Davila, both of whose testimony the habeas court found to be credible and compelling, despite the circumstances under which their testimony had failed to come to light prior to the petitioner's trial. Furthermore, the habeas court found that their testimony would have served as "a substantial counterweight to the evidence of guilt" presented at trial. The habeas court, therefore, concluded that, despite the fact that the petitioner did not expressly inform Schwartz that Rivera would be able to provide him with an alibi, she was one of the few people he had identified by name as a potential witness, and "[f]ailing to at least attempt to contact her to ascertain whether she had any information as to the petitioner's whereabouts on the night in question, or at least provide more background information on the situation in general, constitute[d] deficient performance." Finally, the habeas court found that Schwartz' failure to investigate and to call Rivera and Davila at trial prejudiced the petitioner because their credible, compelling testimony likely would have affected the verdict, especially in light of the general weakness of the state's case. The habeas court, therefore, granted the petition for a writ of habeas corpus and ordered a new criminal trial.

Thereafter, the respondent appealed from the judgment of the habeas court to the Appellate Court, claiming that the habeas court incorrectly determined that the petitioner had established ineffective assistance of trial counsel and that he had been prejudiced by counsel's purported ineffectiveness. *Gaines* v. *Commissioner of Correction*, supra, 125 Conn. App. 99. The Appellate Court was not persuaded and concluded that, "given the petitioner's stated lack of recall, which the habeas court found to be credible, it is not imposing an unreasonable burden on Schwartz to have expected him to contact Rivera, who was identified by the petitioner as a potential witness, to see if she had any information related to the petitioner's whereabouts on the night in question . . . ." Id., 111. The Appellate Court also agreed with the habeas court that, had the jury "heard the testimony of Rivera and Davila purporting to account for the petitioner's whereabouts on the night the murders took place, particularly when considered with the theory that the murders were committed by Figueroa and McClain, there is a reasonable probability that the outcome of the petitioner's criminal trial would have been different." Id., 112. Accordingly, the Appellate Court affirmed the judgment of the habeas court. Id., 113. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the respondent contends that the Appellate Court improperly affirmed the judgment of the habeas court because the petitioner failed to establish that Schwartz rendered ineffective assistance of coun-

sel. Specifically, the respondent claims that the petitioner failed to prove that Schwartz' investigation of Rivera was so inadequate that it caused Davila not to be discovered and thus prevented the presentation of Rivera's and Davila's testimony at trial. Furthermore, the respondent contends that, even if the failure to investigate amounted to ineffective assistance of counsel, the petitioner did not adequately establish that the jury verdict would have been different had he discovered and called Rivera and Davila as witnesses. We disagree with the respondent's claims.

We begin with the applicable standard of review and the law governing ineffective assistance of counsel claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 509, 964 A.2d 1186, cert. denied sub nom. *Bryant* v. *Murphy*, U.S. , 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). "Historical facts constitute a recital of external events and the credibility of their narrators." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). 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." (Internal quotation marks omitted.) Id., 717. "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." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, supra, 510.

Furthermore, it is well established that "[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. . . . As enunciated in *Strickland* v. *Washington*, supra, 687, this court has stated: It is axiomatic that the right to counsel is the right to the 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, 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. . . . The claim will succeed

only if both prongs are satisfied." (Citation omitted; internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 510.

I

We first address the respondent's claim that the Appellate Court improperly affirmed the habeas court's grant of the petition for a writ of habeas corpus because the petitioner failed to establish by a preponderance of the evidence that Schwartz' failure to investigate Rivera amounted to ineffective assistance of counsel. Specifically, the respondent argues that the petitioner did not present any evidence regarding the manner in which Schwartz had received Rivera's name, or what information the petitioner had provided to Schwartz regarding Rivera, beyond the fact that Rivera was a person whom the petitioner knew. Importantly, the respondent contends that the petitioner did not indicate that Rivera might provide exculpatory evidence or any evidence that might even remotely be helpful to his defense. In response, the petitioner argues that, given the seriousness of the charges that he was facing, and given that Rivera was one of only two individuals that he had identified to Schwartz as local acquaintances, the Appellate Court properly determined that the habeas court correctly found that Schwartz had rendered ineffective assistance of counsel by failing even to attempt to contact Rivera. We agree with the petitioner.

"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 . . . are guides to determining what is reasonable . . . ." (Citation omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 688. Nevertheless, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's chal-

lenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citations omitted; internal quotation marks omitted.) Id., 689–90.

This court has stated that, "[t]o satisfy the performance prong [of the *Strickland* test], a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713. Inasmuch as "[c]onstitutionally adequate assistance of counsel includes competent pretrial investigation"; *Siemon* v. *Stoughton*, 184 Conn. 547, 554, 440 A.2d 210 (1981); "[e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 100 Conn. App. 94, 102, 917 A.2d 555, cert. denied, 282 Conn. 914, 924 A.2d 140 (2007).

Nevertheless, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland* v. *Washington*, supra, 466 U.S. 690–91.

"Defense counsel will be deemed ineffective only

when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it." *State* v. *Talton*, 197 Conn. 280, 297–98, 497 A.2d 35 (1985). Furthermore, "[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." Id., 297.

Finally, our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when: (1) counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case;[12] (2) the defendant provides some information, but omits any reference to a specific individual who is later determined to have exculpatory evidence such that counsel could not reasonably have been expected to have discovered that witness without having received further information from his client;[13] or (3) the petitioner fails to present, at the habeas hearing, evidence or the testimony of witnesses that he argues counsel reasonably should have discovered during the pretrial investigation.[14]

Turning now to the facts of the present case, we acknowledge that "counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, supra, 100 Conn. App. 103. Nevertheless, it is clear that the habeas court properly determined that Schwartz' failure to investigate Rivera and, therefore, his corresponding failure to locate and to interview Davila, did not fulfill Schwartz' duty to undertake a reasonable investigation under the circumstances of this particular case.

First, Schwartz did not claim that he made an informed decision not to investigate or to call Rivera in conjunction with a reasonable trial strategy. At the habeas hearing, Schwartz admitted that he was aware that the petitioner knew a woman named "Maddie Rivera," but he could not explain why neither he nor his investigator had attempted to contact her. Because of his complete lack of investigation of Rivera, Schwartz did not know the substance of Rivera's or Davila's testimony. Therefore, his failure to investigate and to call Rivera and Davila was not based on a reasonable professional judgment that their testimony would be either irrelevant or harmful to his case. Indeed, Schwartz

acknowledged that, had he known the substance of their testimony, he would have called them to testify at trial because providing an alibi for the petitioner was not only consistent with the theory of the defense he presented to the jury, but also was something he believed would have changed the verdict that the jury returned. Thus, under the circumstances of the present case, customary deference to trial strategy does not save Schwartz' actions because that decision was not one that was strategically based and, therefore, ordinarily left to the discretion of trial counsel. See *State* v. *Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008). In light of an objective standard, Schwartz' failure to investigate Rivera was unreasonable.

Furthermore, although we acknowledge that the precise context in which Schwartz learned of Rivera's name is unclear, the fact that the petitioner did not expressly inform Schwartz that Rivera would be able to provide him with an alibi for the evening of the murders is not fatal to the petitioner's claim that Schwartz, nevertheless, had a duty to investigate her. Given the seriousness of the charges that his client faced, the petitioner's consistent statement that he was not at the scene of the murders, the very limited number of local individuals the petitioner mentioned by name, and Rivera's proximity and relationship to the petitioner and the state's key witnesses, it was unreasonable for Schwartz not to recognize the potential that Rivera might possess information helpful to the petitioner's case.

The respondent contends, however, that the cases in which we have stated that counsel will be deemed ineffective for failing to investigate a witness specifically identified by his client; see, e.g., *State* v. *Talton*, supra, 197 Conn. 297–98; require that the criminal defendant must identify individuals as *potential witnesses* to his counsel in order to trigger counsel's duty to investigate. We disagree, given the circumstances of the present case. The petitioner's failure to indicate explicitly that Rivera possessed information that would be helpful to his case did not relieve Schwartz of his duty to interview her. Criminal defendants are guaranteed effective assistance of counsel, including adequate pretrial investigation, because they require the skill and knowledge of an individual trained in the adversarial process to identify the most important witnesses and evidence in order to present the most effective defense. See *Williams* v. *Commissioner of Correction*, supra, 100 Conn. App. 103 ("[b]ecause a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction" [internal quotation marks omitted]). Although we acknowledge that merely mentioning an individual is not necessarily sufficient to trigger counsel's duty to investigate in all cases; see

Chace v. *Bronson*, 19 Conn. App. 674, 679, 564 A.2d 303 ("[d]efense counsel is not required to investigate everyone whose name happens to be mentioned by the petitioner"), cert. denied, 213 Conn. 801, 567 A.2d 832 (1989); given the circumstances of the present case, it was unreasonable for Schwartz not to investigate Rivera after the petitioner identified her to Schwartz.

First, Schwartz was aware that Rivera was one of only two individuals the petitioner had discussed with him as people whom he knew in Bridgeport. Schwartz was also aware that the then sixteen year old petitioner had been residing in Bridgeport for only a few months at the time of the murders, and, therefore, that he had limited contacts there. Additionally, Schwartz testified that the petitioner had indicated that he could not account for his whereabouts on the specific night in question, but consistently and emphatically denied being present at the murders. Moreover, unlike *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 817, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004), wherein the Appellate Court disapproved of contriving a detailed, hypothetical scenario in which counsel might have uncovered the potentially helpful witness, despite his client's failure to even mention that witness' name, in the present case, no such extensive investigation, based wholly on conjecture, was necessary to discover or to contact Rivera. To be sure, the petitioner mentioned Rivera by name during their discussions before trial, and Schwartz was aware not only that she was one of the very few individuals whom the petitioner knew in Bridgeport, but also that she was his next door neighbor and the sister of one of the state's key witnesses against the petitioner. Given the information Schwartz had gathered in the course of preparing for trial, as well as the seriousness of the charges that the petitioner was facing, we cannot imagine any scenario in which it would be reasonable for Schwartz not to have at least attempted to contact Rivera—at a minimum to see if she had any background information about the petitioner or the case, or if she might, as indeed she did, have any information concerning the petitioner's whereabouts on the night in question.

Finally, unlike the cases in which petitioners had failed to present evidence to the habeas court that their counsel should have uncovered and presented at trial; see, e.g., *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 858–59, 33 A.3d 819, cert. denied, 303 Conn. 936, 36 A.3d 695 (2012); *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 697, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); *Romero* v. *Commissioner of Correction*, 112 Conn. App. 305, 312, 962 A.2d 894, cert. denied, 290 Conn. 921, 966 A.2d 236 (2009); the petitioner in the present case called both Rivera and Davila at the habeas hearing, and they

testified not only that they were willing witnesses, but also that they could provide an alibi for the petitioner on the night of the murders. From their testimony, the habeas court was able to find that, had Schwartz interviewed Rivera, he would have discovered two credible and compelling alibi witnesses for his client on the night in question, and, on the record before us, we cannot conclude that the habeas court's finding was clearly erroneous. Had Schwartz interviewed Rivera, she would have told him that the petitioner was helping her move throughout the evening on which the murders had occurred, and would have indicated that her mother, Davila, could verify her claim.

Accordingly, we conclude that Schwartz' failure to investigate Rivera could in no way be considered sound trial strategy based on reasonable professional judgment. Schwartz failed to interview one of the two individuals whom the sixteen year old petitioner had named as one of the few people in Bridgeport that he knew. This individual also happened to be the sister and neighbor of one of the state's key witnesses against the petitioner. Nonetheless, Schwartz failed to explain how that individual was not part of the pretrial investigation and, subsequently, failed to identify substantial evidence in the petitioner's favor, which was wholly consistent with the theory of defense that he presented at trial. This does not fall within the range of trial strategy that courts may not second-guess upon collateral attack. Schwartz had no reasonable countervailing reason not to investigate Rivera. Indeed, he could not even explain how or why Rivera had not been interviewed prior to the petitioner's trial; he simply failed to conduct an adequate investigation into the circumstances of the alleged crime and his client's background. We therefore conclude that Schwartz' performance fell below an objective standard of reasonableness and deprived the petitioner of his right to the effective assistance of counsel.

II

We next address the respondent's claim that, even if the habeas court correctly determined that Schwartz had performed a deficient investigation and, thus, rendered ineffective assistance of counsel to the petitioner, the petitioner nevertheless failed to establish that Schwartz' deficient performance was prejudicial. Specifically, the respondent contends that, although the habeas court found the testimony of the alibi witnesses compelling and credible, it failed to take into account other impeachment evidence, which would have weakened the alibi testimony, thus making any impact on the jury's determination of guilt merely conceivable, rather than likely. In response, the petitioner argues that the habeas court specifically found the alibi testimony to be both credible and compelling, and that the respondent has done nothing to establish that the

court's finding in that regard is clearly erroneous. Furthermore, he argues that, given the weakness of the state's case against him at trial—namely, that the case lacked independent eyewitnesses and forensic evidence tying him to the crimes—and that he consistently asserted that he was not present at the shootings, the alibi testimony would have refuted the state's case, leading the jury to return a different verdict. Finally, the petitioner notes that even Schwartz testified that he believed that the jury would have returned a different verdict had it heard the alibi testimony. We agree with the petitioner that the habeas court properly found that the alibi testimony likely would have created reasonable doubt as to his guilt and led the jury to return a different verdict in his criminal trial.

In order to prevail on a claim of ineffectiveness of counsel, the 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." *Strickland* v. *Washington*, supra, 466 U.S. 694. "[T]he question is whether there is a reasonable probability that, absent the [alleged] errors, the [fact finder] would have had a reasonable doubt respecting guilt." Id., 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id., 695–96. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id., 696. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 686.

In the present case, the respondent "does not challenge the habeas court's finding that the alibi witnesses were credible" despite their failure to disclose the alibi to the police, the petitioner or Schwartz prior to the petitioner's trial. Nevertheless, the respondent argues that the habeas court's finding of credibility did not address additional impeachment evidence that would have fatally weakened the alibi testimony had it been presented to the jury at trial. Specifically, the respondent points to Rivera's failure to disclose the alibi to Shipman, one of the petitioner's codefendants in the criminal trial, Rivera's boyfriend at the time of the murders and the father of one of her children. The respon-

dent also points to the lack of documentation to corroborate the date of Rivera's move, the fact that Rivera had a felony conviction, and the fact that Davila failed to disclose the alibi, despite her testimony that she had often spoken of it with her children, Rivera and Figueroa. According to the respondent, the "cumulative strength of all of the . . . impeachment evidence would in all likelihood have doomed the alibi defense and prevented it from succeeding had it been asserted at the criminal trial."

This argument fails to acknowledge, however, that all of this impeachment evidence was also considered by the habeas court. The habeas court heard testimony regarding all of the reasons that both Rivera and Davila failed to volunteer the alibi information earlier, despite their relationships with the petitioner and his codefendant, Rivera's criminal history, and the lack of documentation to corroborate the date of the move. Although the respondent claims not to be challenging the habeas court's factual findings, the respondent essentially questions whether the habeas court properly weighed the impeachment evidence before it when it found Rivera and Davila to be credible. Nevertheless, "[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"; (emphasis added; internal quotation marks omitted) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 717; and the habeas court's factual findings regarding the credibility of witnesses "will not be disturbed unless they are clearly erroneous." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 509. In addition, we note that "[a]n appellate court is entitled to presume that the trial court acted properly and considered all the evidence." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 142, 943 A.2d 406 (2008). The respondent has pointed to no evidence that the habeas court improperly disregarded any of the testimony during the habeas hearing. Indeed, in its memorandum of decision, the habeas court specifically acknowledged that the delay in the alibi testimony coming to light was "somewhat troubling" and tended to "cast some doubt on its credibility," which indicates that the habeas court was not only aware of, but also considered, the evidence that undermined the potential effect the alibi testimony would have had on the jury. That the habeas court only specifically elaborated on why the delay was not sufficient to undermine Rivera's and Davila's testimony does not indicate that the habeas court ignored the other evidence before it, especially given the presumption that habeas courts act properly and consider all evidence. *TES Franchising, LLC* v. *Feldman*, supra, 142. Accordingly, on the record before us, we cannot say that the habeas court's finding that the alibi testimony was credible and compelling was clearly erroneous.

Turning now to the impact that the credible, compelling alibi testimony likely would have had on the jury's verdict in the petitioner's criminal case, we agree with the habeas court that, "[w]hen viewed as a whole, the [alibi] evidence . . . tends to cast appreciable doubt on the state's case against the petitioner and has undermined this court's confidence in the outcome of his criminal trial." At trial, the only evidence implicating the petitioner in the murders was the testimony of McClain and Figueroa and, to a lesser extent, the testimony of Charles. Nevertheless, McClain's and Figueroa's testimony was, itself, subject to substantial impeachment evidence that they had only implicated the petitioner to serve their own needs—either by directing suspicion away from their own involvement in the murders or by procuring more favorable outcomes in their other, unrelated criminal matters. The alibi defense, as supported by the testimony of Rivera and Davila, likely would have permeated, to some degree, every aspect of the petitioner's criminal trial and raised a reasonable doubt in the minds of the jury as to the petitioner's guilt. See *Strickland* v. *Washington*, supra, 466 U.S. 695–96 ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture").

The failure to investigate and to call Rivera and Davila left McClain and Figueroa's testimony largely uncontested and deprived the jury of a plausible alternative to their descriptions of the events on the night in question. This case is similar to the circumstances in *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 517–18, wherein we concluded that the testimony of neutral, third party witnesses, whom the habeas court had found to be credible and highly persuasive, created a plausible, well supported third party culpability defense, which would have called into question the most basic elements of the state's case in a trial that was largely a credibility contest. Thus, had the jury in the present case been presented with credible, compelling alibi testimony, we conclude that there is a reasonable probability that the outcome of the petitioner's criminal trial would have been different. We therefore conclude that the petitioner sufficiently established that he was prejudiced by Schwartz' failure to investigate adequately and to present the alibi defense.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER, McLACHLAN, EVELEIGH and VERTEFEUILLE, Js., concurred.

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

** September 18, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We granted the respondent's petition for certification limited to the following issue: "Did the Appellate Court properly affirm the judgment of the habeas court determining that the petitioner's trial counsel had rendered

ineffective assistance of counsel and was entitled to a new trial because said ineffective assistance was prejudicial to the petitioner?" *Gaines* v. *Commissioner of Correction*, 300 Conn. 920, 14 A.3d 1005 (2011).

We note that the petitioner argues that, based on our wording of the certified question, this court did not intend to review whether counsel had rendered the petitioner ineffective assistance of counsel but, rather, intended only to review the separate question of whether the petitioner was prejudiced by such ineffective assistance. This argument is meritless given that the petition for certification addressed both the performance and the prejudice prongs of the *Strickland* test; see *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); and the petitioner did not file a motion to strike those portions of the respondent's brief that addressed the performance prong. The certified question clearly encompasses both prongs of the *Strickland* test, and we proceed with a review of both whether counsel rendered ineffective assistance and, if so, whether the petitioner was thereby prejudiced.

[2] "Nunu" Shipman is also referred to as either Somen Shipman or Manu Shipman by the witnesses who testified before the habeas court. For consistency, we will refer to him as Shipman herein.

[3] The two murder convictions merged with the capital felony conviction, which carries a mandatory sentence of life without the possibility of release pursuant to General Statutes §§ 53a-35a and 53a-46a (g) if a sentence of death is not imposed. The court also sentenced the petitioner to twenty years incarceration on the conviction of conspiracy to commit murder, to run concurrently with the life sentence.

[4] The petitioner's ineffective assistance claims were based on allegations that: (1) counsel who represented the petitioner during his probable cause hearing had a conflict of interest; (2) Schwartz failed to cross-examine state witnesses adequately at trial, to introduce exculpatory evidence at trial, and to investigate adequately possible alibis or defenses to the case; and (3) the petitioner's trial cocounsel failed to investigate the case, to put on a defense, and to introduce exculpatory evidence at trial. With the exception of the petitioner's claim that Schwartz had failed to investigate adequately possible alibis or defenses, the habeas court determined that the petitioner had failed to establish inadequate performance, prejudice, or both inadequate performance and prejudice regarding all of his alleged failures of counsel. Accordingly, the habeas court granted the petition based solely on its determination that Schwartz had rendered ineffective assistance of counsel in failing to conduct an adequate pretrial investigation. The habeas court's rulings regarding the remaining alleged failures of counsel have not been challenged in the present appeal.

[5] Madeline Rivera is Figueroa's sister. At the time of the murders, she was living next door to McClain and was dating the petitioner's codefendant, Shipman.

[6] Calvin Shipman (Calvin) is the uncle of both McClain and Shipman. Calvin testified at the habeas hearing, and the habeas court found that, although his testimony, had it been presented at trial, would have tended to undermine Figueroa's credibility, Schwartz did "an excellent job" of undermining her testimony on other grounds, and one additional instance of possible contradiction was not likely to have swayed the jury to reach a different verdict. Therefore, the habeas court concluded that the petitioner had not demonstrated ineffective assistance of counsel for failing to investigate Calvin or to call him as a witness at trial. That determination has not been challenged on appeal.

[7] Furthermore, although Rivera testified that she and Shipman had never officially ended their relationship, when asked what her current relationship with Shipman was, she stated: "Right now? Nothing." She also testified that, at the time of Shipman's trial, she was not accepting his calls from prison, was not allowed to visit him in prison and had only learned that he was on trial for murder when another woman who had a child with Shipman telephoned Rivera to tell her that she had seen Shipman in court.

[8] Both parties to this appeal discussed, at great length in their briefs and at oral argument before this court, the import of this letter, as it relates to what Schwartz knew about Rivera and the potential that she had exculpatory evidence at the time of the petitioner's criminal trial. We note that a letter purportedly addressed to Rivera was marked for identification purposes only during the petitioner's criminal trial, but that letter was not ultimately admitted into evidence. Furthermore, no letter from the petitioner to Rivera was introduced or admitted into evidence during the petitioner's habeas hearing. Finally, both the habeas court and the Appellate Court were silent

with respect to the import of this letter in their decisions. Because this letter is not a part of the record in the present case, we will not consider it. See, e.g., *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 126, 977 A.2d 772 (reviewing court is "not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding" [internal quotation marks omitted]), cert. denied, 294 Conn. 904, 982 A.2d 647 (2009).

[9] During his testimony, Schwartz stated that, although Rivera looked familiar, he did not recall ever having a conversation with her. The habeas court found that Schwartz was not the person with whom Rivera had spoken at the courthouse on that occasion.

[10] Although Schwartz did not specifically testify during the habeas hearing that he knew that Rivera was Figueroa's sister, the transcript from the petitioner's criminal trial, which was an exhibit admitted into evidence by the habeas court, indicates that Schwartz was not only aware that Rivera was someone whom the petitioner knew, but also that Rivera was Figueroa's sister.

[11] The trial transcript indicates that, as part of the theory of the defense that the petitioner was being framed for the murders by McClain and Figueroa, Schwartz emphasized the fact that the petitioner had been in Bridgeport for only four months prior to the murders, that he had been incarcerated for one of those months and that he did not know anyone when he moved to Bridgeport. Schwartz also reiterated the fact that the petitioner had "no connection to Bridgeport" numerous times during his closing argument.

[12] See, e.g., *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 79, 967 A.2d 41 (2009) (decision not to call witness consistent with theory of defense); *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 694–97, 27 A.3d 86 (decision not to interview and present two witnesses did not render pretrial investigation inadequate because counsel determined that testimony would contradict theory of defense), cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); *Stepney* v. *Commissioner of Correction*, 129 Conn. App. 364, 367–68, 19 A.3d 1262 (2011) (failure to investigate and to introduce DNA report was matter of trial strategy that Appellate Court would not second-guess in context of " 'overwhelming evidence of guilt' "); *State* v. *Gay*, 108 Conn. App. 211, 218–19, 947 A.2d 428 (refusal to call victim to testify at trial not ineffective assistance when counsel believed that victim would be uncooperative and potentially harmful to defense case), cert. denied, 288 Conn. 913, 954 A.2d 186 (2008); *Davis* v. *Warden*, 32 Conn. App. 296, 304–305, 629 A.2d 440 (refusal to investigate implausible alternative defense after proper investigation of murders and surrounding circumstances deemed reasonable professional judgment and effective assistance of counsel), cert. denied, 227 Conn. 924, 632 A.2d 701 (1993).

[13] See, e.g., *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 817, 837 A.2d 849 (counsel did not perform deficient investigation for failing to find witness whom petitioner did not remember or mention to counsel), cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

[14] See, e.g., *Norton* v. *Commissioner of Correction*, 132 Conn. App. 850, 858–59, 33 A.3d 819 (2012) (failure to undertake further investigation was not ineffective assistance when petitioner failed to present relevant evidence counsel should have uncovered with further investigation), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012); *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 697, 27 A.3d 86 (decision not to call expert not deficient because petitioner failed to present helpful evidence attorney failed to uncover or present to jury), cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); *Romero* v. *Commissioner of Correction*, 112 Conn. App. 305, 312, 962 A.2d 894 (petitioner failed to present evidence that would allow habeas court to determine whether counsel's pretrial investigation was inadequate), cert. denied, 290 Conn. 921, 966 A.2d 236 (2009).