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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

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D'AURIA, J., concurring in part. I agree with and join in the majority opinion, with the exception of part II of that opinion, about which I express no view.

I

On the last business day of 2016, a majority of an en banc panel of this court officially released its decision in this case, reversing the habeas court's judgment and thereby reinstating the petitioner's conviction of murder. The vote was four to three. The next day, the author of the majority opinion retired, leaving judicial service before his term of office expired.

Six days later, the petitioner, Michael Skakel, filed a motion for reconsideration en banc, as our rules of practice permit. See Practice Book § 71-5. In that motion, he argues that, because of the authoring justice's retirement, Practice Book § 71-5 and General Statutes §§ 51-207 and 51-209 require that the court provide a "replacement" seventh panel member so that on reconsideration he will "enjoy a panel of the same size as that which heard the case." The respondent, the Commissioner of Correction, has objected to the petitioner's request for an en banc court to decide his motion for reconsideration.

The dispute about the proper composition of the panel deciding this motion to reconsider was foreseeable. In the past several years, other members of this court have retired and left judicial service just after the expedited official release of decisions in which they had participated, but before the deadline for postjudgment filings had passed (including cases heard en banc and split decisions). The uncertainty the petitioner's motion has created for the parties, the attorneys, the families and the public, who all seek finality in this matter, was therefore matched only by the certainty that such a motion would be filed days after the release of this court's decision. Although I am entirely comfortable with my own vote on the petitioner's motion for reconsideration, having been summoned by the remaining members of the original panel to rule on the motion, the dilemma created by the petitioner's motion and the subsequent delay in resolving this matter have been unfortunate.[1]

II

The parties in this case have already received a considered decision of an en banc panel of this court. That decision is due respect, and a motion for reconsideration ordinarily should not be used merely as an "opportunity to have a second bite of the apple . . . ." (Emphasis omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94 n.28, 952 A.2d 1 (2008); see also *C. R. Klewin Northeast*,

LLC v. *Bridgeport*, 282 Conn. 54, 101 n.39, 919 A.2d 1002 (2007).

Even so, "a motion for reconsideration is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment . . . ." 56 Am. Jur. 2d 58, Motions § 40 (2010). As this court has noted, and as "the United States Supreme Court has said: 'It is a power inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' . . . *United States* v. *Morgan*, 307 U.S. 183, 197, 59 S. Ct. 795, 83 L. Ed. 1211 (1939) . . . ." (Citation omitted.) *Steele* v. *Stonington*, 225 Conn. 217, 219 n.4, 622 A.2d 551 (1993). The usual grounds courts consider when deciding such a motion include whether "there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts." (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 94 n.28. Ultimately, however, in exercising this inherent authority, "[t]he granting of a motion for reconsideration . . . is within the sound discretion of the court." (Internal quotation marks omitted.) *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 575, 910 A.2d 235 (2006).

Today's majority notes that it is not unprecedented for a state's highest court to reconsider—and then alter—the outcome of a case when a change in the court's membership has occurred between the announcement of the original decision and the court's ruling on a motion for reconsideration. See, e.g., *United States Fidelity & Guaranty Co.* v. *Michigan Catastrophic Claims Assn.*, 484 Mich. 1, 5–6, 795 N.W.2d 101 (2009); *Johnson* v. *Administrator, Ohio Bureau of Employment Services*, 48 Ohio St. 3d 67, 68–69, 549 N.E.2d 153 (1990). Predictably and understandably, in those cases, reconsideration was met with protest by those who considered it inappropriate for the court to alter the outcome of a case simply because, through intervening circumstances, membership on the court had changed. *United States Fidelity & Guaranty Co.* v. *Michigan Catastrophic Claims Assn.*, supra, 27–30 (Young, J., dissenting); *Johnson* v. *Administrator, Ohio Bureau of Employment Services*, supra, 71 (Holmes, J., dissenting).

However, the potential for a change in court membership during the pendency of any case—whether through death, resignation or the expiration of a judge's term—is a fact of life in our constitutional system. And in this case, the circumstances leading to this conundrum were not of the parties' creation but were created by this court. Moreover, as in any case, when this court exercises its discretionary authority to reconsider a decision, the outcome must turn ultimately not on the

court's membership but on the strength of the parties' legal positions. Therefore, regardless of the route by which this matter came before me, as a current member of this court called to rule upon this case, I have undertaken to assess the strength of those positions.

Today, a majority of the court has decided to grant the petitioner's motion for reconsideration and to affirm the habeas court's judgment granting his petition. I concur in the determination that this court's earlier decision warrants reconsideration, and I join in all but part II of the majority's opinion.

III

I share in the concern that this case has received so much judicial attention. But what ultimately distinguishes this petition for a writ of habeas corpus from so many others that come through our court system is that, after hearing testimony, taking evidence and finding facts, a habeas judge *granted* the petition.

It was the habeas judge—a veteran of both the habeas court and the Appellate Court—who listened to the explanation of the petitioner's counsel, Michael Sherman, for why he did not investigate the identity of Georgeann Dowdle's "beau." As today's majority notes well, the habeas judge did not credit this post hoc rationalization. See footnotes 17 and 20 of the majority opinion. The habeas judge's credibility determinations and findings of historical fact are entitled to deference from this court and cannot be disregarded unless clearly erroneous. *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); see also *Carr* v. *Schofield*, 364 F.3d 1246, 1264–65 (11th Cir. 2004) ("[t]he determination of credibility, including an attorney's testimony regarding decisions of tactic and strategy, is within the province of the [habeas] court, which has the opportunity to observe and study the witness"), citing *Cave* v. *Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992) ("[c]onclusions regarding credibility are within the province of the [habeas] court judge, who has the opportunity to observe and analyze witnesses that we, as an appellate tribunal, lack").

The habeas judge also observed the testimony of Dowdle's "beau," Denis Ossorio, and, on the basis of his conduct, demeanor, and attitude, found him to be a "powerful witness in support of the petitioner's alibi claim."[2] This finding is also entitled to deference from this court. *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014).

And it was the habeas judge who, after finding Ossorio credible, weighed Ossorio's testimony against the record of the petitioner's criminal trial. Independent of other claims made in the case, the habeas judge determined that, on the basis of the strength of Ossorio's

credibility, had Sherman presented the testimony of this "disinterested and credible witness" to the jury "there is a reasonable likelihood that the jury would have been persuaded by his testimony" and that "there is a reasonable probability [the] outcome [of the trial] would have been different." See *Shabazz* v. *State*, 259 Conn. 811, 827–28, 792 A.2d 797 (2002) (trial court should grant petition for new trial if, among other things, "the evidence is *sufficiently credible* so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result" [emphasis added]).

That is the record confronting me. I have undertaken my task mindful that "[a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 575, 31 A.3d 1 (2011). My review of the record and the governing law persuades me that the motion for reconsideration and the relief requested therein should be granted.

IV

I fully agree with today's majority that any " 'strategic' " decision by Sherman to disregard Dowdle's grand jury testimony about her "beau" was unreasonable under the circumstances and prejudicial to the petitioner's defense. See *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 674–76, 51 A.3d 948 (2012). An additional point made by the majority also bears emphasizing: although Sherman offered a justification for his disregard, it was not credited by the habeas court, and, in fact, when Sherman's actions are considered "as of the time of counsel's conduct"; (internal quotation marks omitted) id., 688; it is apparent that any decision not to pursue the "beau" would have been contrary to the strategy Sherman *actually* employed at trial. Thus, any reliance on Sherman's stated reasons for not pursuing this lead to justify his conduct would resemble more of a post hoc rationalization than an actual strategic basis for his actions.

A

At the habeas trial, Sherman defended his failure to investigate as the product of a reasoned decision. He testified that he did not pursue the "beau" reference because Dowdle had told the grand jury that she had not seen her cousins, the Skakels, on the night in question and so he inferred that the "beau" likely had not either.[3] Essentially, Sherman testified, tracking down the "beau" would be fruitless. This justification, if true, was unreasonable for all the reasons given by today's

majority. See part V A of the majority opinion.

As today's majority notes, however, the habeas court did not credit this testimony and instead found that "Sherman's failure to investigate in this regard cannot be attributed to any strategic decision under these circumstances." "The question of whether a decision was a tactical one is a question of fact." *Porter* v. *Singletary*, 14 F.3d 554, 558 (11th Cir.), cert. denied, 513 U.S. 1009, 115 S. Ct. 532, 130 L. Ed. 2d 435 (1994). Although courts often apply "a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect' "; *Harrington* v. *Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); accord *Yarborough* v. *Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003); the habeas court in the present case ruled out trial tactics as a justification for Sherman's failure to investigate in this respect.[4] In the light of this factual record, Sherman's testimony, which the original majority opinion accepted at face value, "resembles more a post hoc rationalization of counsel's conduct than an accurate description of [his] deliberations . . . ." *Wiggins* v. *Smith*, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). A fair reading of the record therefore suggests that Sherman simply overlooked the significance of the "beau" referred to in Dowdle's grand jury testimony. See *Wiggins* v. *Smith*, supra, 526. (counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment").[5]

B

In considering the reasonableness of counsel's actions, *Strickland* v. *Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and its progeny admonish courts to review the challenged actions "as of the time of counsel's conduct." Neither the petitioner nor the respondent may benefit by later reconstructing the petitioner's criminal trial. This means at least two things.

First, "[i]t 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." Id., 689. Therefore, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . ." Id.

Second, but equally vital, the United States Supreme Court has instructed that courts are not to "indulge 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions . . . ." *Harrington* v. *Richter*, supra, 562 U.S. 109, quoting *Wiggins* v. *Smith*, supra, 539 U.S. 526–27. The original majority did not mention this important

Strickland principle. See *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 443–44, 159 A.3d 109 (2016).

C

It was reasonable for the habeas court not to credit Sherman's testimony about why he decided not to follow up on the "beau" reference because that testimony was contrary to Sherman's *actual* strategy at trial. As mentioned, Sherman testified that he did not investigate Dowdle's "beau" because he assumed that the "beau" had most likely not seen the Skakel brothers at the Terrien home given that, during her grand jury testimony, Dowdle could not remember seeing them. See footnote 3 of this concurring opinion. Recalling, however, that *Strickland* directs courts to review an attorney's challenged actions "as of the time of counsel's conduct"; *Strickland* v. *Washington*, supra, 466 U.S. 690; I agree with the majority's conclusion that Sherman's after-the-fact explanation for his failure to investigate is undermined by the fact that, at the time of the petitioner's criminal trial, Sherman himself did not accept Dowdle's grand jury testimony that she "[didn't] know who was there" at the Terrien's that night and that she could not identify the voices she heard that night with specificity. See part V A of the majority opinion. Although, in 1998, Dowdle had testified before the grand jury that she heard the voices of "cousins" or "Skakels" that night but "[didn't] know who was there at the time," Sherman came to the criminal trial equipped with a 1975 police report reflecting that, merely nine days after the murder, she had indicated that she had indeed "observed her brother and the Skakel brothers, Rushton-John-Michael, return to her house sometime around 10 [p.m.]" Sherman partially succeeded in getting Dowdle to recount to the jury what the report said she had told police in 1975 and that her memory of the night of the murder would have been better in 1975 than in 1998. Although Dowdle's own memory might have faltered years later, it would have been important for Sherman to determine if anyone else at her house that night also might have "observed" the petitioner. Sherman's conduct thus cannot be defended on the ground that he had presumed from Dowdle's grand jury testimony that neither Dowdle nor her "beau" had seen the petitioner that night.

Even if Sherman had decided to disregard Dowdle's 1998 grand jury testimony concerning her "beau," the identity of this other person (who turned out to be Ossorio) came up again—more conspicuously—at the criminal trial in 2002, thereby bolstering the finding that Sherman had acted unreasonably by failing to pursue this lead. On the heels of Sherman's attempt to get Dowdle to recollect what she had said to the police in 1975, the prosecutor, Jonathan Benedict, asked whether the "beau" referred to in the grand jury transcripts as being with her that night was her "husband." Dowdle

corrected Benedict, testifying that the person was a "friend" of hers.[6] Thus, Sherman was not confronted with just a single reference to the "beau" in the grand jury transcripts; his identity was probed *at trial*, including shortly after Sherman had attempted to refresh Dowdle's recollection so that she could recall seeing the petitioner at the Terrien home on the night in question.[7]

It is no wonder then that the habeas court did not credit Sherman's after-the-fact justification for his failure to investigate. For many of the same reasons that lead today's majority to conclude that Sherman's failure to investigate the "beau" was not reasonable under the circumstances, the factual record, and logical inferences drawn from it, amply support the habeas court's finding that Sherman's failure to investigate the "beau" was not attributable to strategy.

At any rate, I agree with today's majority that, even if Sherman had made a strategic judgment about whether to investigate the "beau," that judgment was not reasonable under the circumstances, and the failure to follow this lead prejudiced the petitioner's defense at trial.

For the foregoing reasons, I concur in part with the majority's opinion.

[1] As other opinions released today note, a majority of the remaining six members of the original panel voted to add a seventh judge to the panel deciding the motion for reconsideration.

[2] The habeas court found specifically with respect to Ossorio's testimony: "To the court, Ossorio was a *disinterested* and *credible* witness with a *clear recollection* of seeing the petitioner at the Terrien home on the evening in question. He testified *credibly* that not only was he present in the home with Dowdle and that he saw the petitioner there, but that he lived in the area throughout the time of the trial and would have readily been available to testify if asked." (Emphasis added.) The habeas court found Ossorio to be a "powerful" and "credible" witness, notwithstanding how long it took to locate him to tell his story. The record in this case is rife with witnesses called by both parties who never came forward until many years after the murder, or whose recollections changed—sometimes markedly—over time.

[3] At the habeas trial, after being reminded of Dowdle's grand jury testimony, in which she first mentioned the "beau," Sherman testified as follows in response questions from the petitioner's counsel:

"Q. Did you ever try to find out who the beau was?

"A. No, because [*Dowdle*] *clearly testified* [*before the grand jury*] *that she didn't know who was there*. . . .

"Q. Did you ever try to find out who the beau was?

"A. He—he—*I had no reason to suspect that he, in fact, would be helpful in that he saw* [*the petitioner*] *and the rest of the boys*." (Emphasis added.)

Days later in the habeas trial, the respondent's counsel gave Sherman another opportunity to explain his rationale for not even asking Dowdle who had been with her that night, and the following exchange occurred:

"Q. From that passage [in the grand jury testimony], did that give you any indication to think that [Dowdle's] beau would have heard or seen anything that night?

"A. Well, she said that she didn't venture out and that her beau was in [her] mother's library.

"Q. Okay. And would that give you any indication that, even if he heard voices, he'd be able to identify them.

"A. Well, it's her beau. I don't know how close they were, but *she couldn't identify her own cousins' voices or her brother's voice necessarily, so how would the beau be able to do anything—be able to do anything—be any more accurate, especially, if* [*it was*] *only occasionally that he went out there*." (Emphasis added.)

[4] As Justice Robinson expressed in his original concurring and dissenting

opinion, "I cannot think of a single reasonable, strategic reason why Sherman would not at least attempt to track down Ossorio . . . ." *Skakel* v. *Commissioner of Correction*, 325 Conn. 426, 533, 159 A.3d 109 (2016) (*Robinson*, *J.*, concurring in part and dissenting in part).

[5] This reading of the record is consistent with the testimony of Jason Throne, Sherman's cocounsel, called to testify by the respondent at the habeas trial. Throne did not suggest that the defense team made a decision that the "beau" would not be helpful, or even that the "beau" was the topic of discussion. Rather, when asked by the petitioner's counsel, "[w]as there any discussion among the defense team to try and find out who this beau was?" Throne replied: "I don't recall any specific discussions about her beau; I just don't recall, I don't remember."

[6] The following colloquy between Benedict and Dowdle took place during the criminal trial:

"Q. Isn't it true that you and [your brother] James were never in the same room [on the night of the murder]?

"A. I don't remember.

"Q. Do you remember, you have indicated that you were with your husband?

"A. No, I didn't.

"Q. You were with somebody?

"A. A friend of mine.

"Q. I wouldn't suggest you misspoke, I misheard. You were with someone?

"A. A friend of mine.

"Q. A friend. And where were you—where in the house were you when [James and the Skakels] entered?

"A. I was in the library."

[7] In fact, at this time during the criminal trial, the court also allowed a transcript of the relevant portion of Dowdle's grand jury testimony into evidence as a full exhibit. While Sherman was present, Benedict read that portion of the transcript into the record, beginning with Dowdle's testimony that she "was in [the library] with [her] beau at the time . . . ."