CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

SHAWN HENNING *v.* COMMISSIONER OF CORRECTION (SC 20137)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The petitioner, who had been convicted of felony murder in connection with the stabbing death of the victim inside the victim's home during what appeared to be a botched burglary, sought a writ of habeas corpus, claiming, inter alia, that the state deprived him of his due process right to a fair trial insofar as it failed to correct the trial testimony of L, a former director of the state police forensic laboratory, that a red substance on a towel found in the victim's home after the murder tested positive for blood when no such test had been conducted and when subsequent testing conducted in connection with the present habeas action revealed that the red substance was not in fact blood. The habeas court rendered judgment denying the habeas petition. With respect to the petitioner's due process claim, the court concluded that, because L mistakenly but honestly believed that the towel tested positive for blood and, thus, did not give perjured testimony, the burden was on the petitioner to demonstrate that there was a reasonable probability of a different verdict if the correct evidence had been disclosed. Applying this standard, the habeas court determined that L's testimony was immaterial because, among other things, the state's criminal case against the petitioner did not rely on forensic evidence. Rather, the state proved its case primarily on the basis of testimony from witnesses who testified as to certain incriminating statements that the petitioner had made to them, testimony from neighbors of the victim that they heard a loud vehicle in the vicinity around the time of the murder, when the petitioner and his alleged accomplice, B, had stolen and were driving a vehicle without a muffler,

and the testimony of the petitioner's girlfriend, who contradicted the petitioner's statements to the police regarding his whereabouts on the night of the murder. On the granting of certification, the petitioner appealed, claiming that the habeas court applied the incorrect standard for determining whether the petitioner was entitled to a new trial and that, upon application of the correct standard, which required the respondent, the Commissioner of Correction, to establish beyond a reasonable doubt that L's incorrect testimony was immaterial, he was entitled to a new trial. *Held* that the state's failure to correct L's incorrect testimony that there was blood on the bathroom towel deprived the petitioner of a fair trial, and the habeas court's judgment was reversed, as it was predicated on a determination that the petitioner was not entitled to a new trial because L's incorrect testimony was immaterial: the habeas court incorrectly concluded that the respondent was not required to establish beyond a reasonable doubt that the state's failure to correct L's incorrect testimony was immaterial, as controlling case law made it clear that such a standard applies whenever the state fails to correct testimony that it knew or, as in the present case, should have known to be false; moreover, L, as the representative of the state police forensic laboratory, should have known that the towel had not been tested for blood, as he had an affirmative obligation to review any relevant test reports before testifying so as to reasonably ensure that his testimony would accurately reflect the findings of those tests, and L's incorrect testimony must be imputed to the prosecutor who, irrespective of whether he elicited that testimony in good faith, is deemed to be aware of any and all material evidence in the possession of any investigating agency, including the state police forensic laboratory; furthermore, the respondent did not meet his burden of establishing beyond a reasonable doubt that L's incorrect testimony was immaterial, as L's testimony concerning the towel was elicited for the purpose of explaining why no evidence of blood connecting the petitioner to the murder was found, the state's case against the petitioner was not so strong as to take it out of the purview of cases in which, as a result of the state's use of testimony that it knew or should have known was false, reversal is virtually automatic, and the state's failure to correct L's testimony was material because it deprived the petitioner of the opportunity to impeach certain other testimony by L regarding how it was possible that the petitioner and B stabbed the victim twenty-seven times in a narrow space and tracked blood all over the victim's home but somehow managed not to leave any trace of blood in their getaway vehicle, which showed no signs of having been cleaned when the police recovered it a few days after the murder.

Argued October 11, 2018—officially released June 14, 2019*

* June 14, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Reversed*; *judgment directed.*

W. James Cousins, with whom was *Craig A. Raabe*, for the appellant (petitioner).

Michael J. Proto, assistant state's attorney, with whom were *Jo Ann Sulik*, supervisory assistant state's attorney, and, on the brief, *David S. Shepack*, state's attorney, for the appellee (respondent).

Opinion

PALMER, J. The petitioner, Shawn Henning, and Ralph Birch were convicted of felony murder in connection with the vicious 1985 slaying of sixty-five year old Everett Carr in Carr's New Milford residence during what the police believed at the time to be a burglary gone wrong.[1] After this court upheld his conviction; see *State* v. *Henning*, 220 Conn. 417, 431, 599 A.2d 1065 (1991); the petitioner filed two habeas petitions, the first of which was dismissed with prejudice by the habeas court, *White*, *J.*, on the basis of the petitioner's purported refusal to appear at his habeas trial. The second habeas petition, which is the subject of this appeal, alleges, among other things, that the state deprived the petitioner of his due process right to a fair trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, which require the state to correct any testimony by a state's witness when the state knew or should have known that that testimony was materially false or misleading. More specifically, the petitioner claims that his right to due process was violated by virtue of the state's failure to correct the trial testimony of the then director

[1] The petitioner and Birch were tried and convicted separately.

of the state police forensic laboratory, Henry C. Lee, that a red substance on a towel found in the victim's home had tested positive for blood when, in fact, no such test had been conducted, and, further, a test of the substance conducted in connection with the present case proved negative for blood. The habeas court, *Sferrazza*, *J.*,[2] rejected all of the petitioner's claims, including his claim concerning Lee's testimony about the towel, and this certified appeal followed. We agree with the petitioner that, contrary to the determination of the habeas court, he is entitled to a new trial due to the state's failure to alert the trial court and the petitioner that Lee's testimony was incorrect,[3] and, therefore, we reverse the judgment of the habeas court.[4]

[2] Unless otherwise noted, all references hereinafter to the habeas court are to *Sferrazza*, *J.*, and all references to the habeas petition are to the petition in the present case.

[3] As we discuss more fully hereinafter, the respondent, the Commissioner of Correction, concedes that the testimony of Lee at issue in this case was false or misleading—terms commonly used in cases, like the present one, involving due process claims stemming from the state's improper use of testimony in a criminal trial—in the sense that it was factually wrong or incorrect. In its memorandum of decision, however, the habeas court found that Lee's testimony was mistaken rather than intentionally false or untruthful—a conclusion that the petitioner has not challenged—and we have no reason to question that determination. Nevertheless, for the reasons set forth hereinafter, we conclude that, in the circumstances presented, the petitioner is entitled to a new trial because, under *Brady* and its progeny, it makes no difference whether Lee's testimony was intentionally false or merely mistaken. In either situation, if, as we conclude, the state knew or should have known that the testimony was incorrect, the petitioner is entitled to a new trial unless the respondent can demonstrate that the incorrect testimony was harmless beyond a reasonable doubt, a burden the respondent cannot meet. Finally, although Lee's testimony was false or misleading insofar as it was contrary to the facts, we characterize his testimony as incorrect rather than false or misleading because the latter terms might be understood as connoting a dishonest or untruthful intent, an implication that would be incompatible with the habeas court's determination.

[4] The petitioner also filed a petition for a new trial; see General Statutes § 52-270 (a); on the basis of newly discovered evidence. Prior to trial, the habeas court consolidated that petition with the present habeas petition and with the closely related habeas and new trial petitions of Birch. The habeas court rejected all of the claims in the four petitions, and the petitioner

The record reveals the following relevant facts and procedural history. On November 29, 1985, the then seventeen year old petitioner, together with his eighteen year old friend, Birch, and eighteen year old girlfriend, Tina Yablonski, stole a 1973 brown Buick Regal from an automobile repair shop in the town of Brookfield. Later that evening, the three teenagers drove the vehicle to New Hampshire to visit Birch's mother. While there, the vehicle's muffler was damaged and subsequently removed, causing the vehicle to make a loud noise when it was operated. When the trio returned to Connecticut on December 1, 1985, they went directly to the Danbury residence of Douglas Stanley, a local drug dealer, where they freebased cocaine. In addition to selling the teenagers drugs, Stanley also acted as a "fence"[5] for property they periodically stole from local businesses and homes. After leaving the Stanley residence, the petitioner and Birch dropped Yablonski off at her parents'

and Birch separately appealed to the Appellate Court from the judgments denying their habeas and new trial petitions. We thereafter transferred all four appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. In a separate opinion also issued today, we have dismissed as moot the petitioner's appeal from the habeas court's denial of his petition for a new trial because of our determination that the petitioner must be afforded a new trial due to the state's failure to correct Lee's incorrect testimony. See *Henning* v. *State*, 334 Conn. 33, 36, A.3d (2019). We also have reversed the judgment of the habeas court denying Birch's habeas petition; see *Birch* v. *Commissioner of Correction*, 334 Conn. 37, 69, A.3d (2019); see also *Birch* v. *State*, 334 Conn. 69, 72, A.3d (2019) (dismissing as moot Birch's appeal from denial of petition for new trial); a decision that, like our decision in the present case, is predicated on the state's use of Lee's incorrect testimony.

We note, finally, that, at various points throughout this opinion, we briefly discuss a number of the other claims raised by the petitioner in his habeas petition and in his petition for a new trial. We do not decide the merits of any of those claims, however, in light of our conclusion that the petitioner is entitled to a new trial as a result of Lee's incorrect testimony. To the extent that we discuss them, we do so only to place the present claim in the broader context of the several significant issues that the petitioner also raises as a basis for his entitlement to a new trial.

[5] A "fence" is a person who receives and sells stolen goods.

home in the town of New Milford, arriving there at approximately 11:55 p.m.

At that time, the victim was living at the home of his daughter, Diana Columbo, in New Milford, approximately two miles from the Yablonski residence. Sometime between 9 and 9:30 p.m. on December 1, 1985, Columbo left the house to visit a friend. When she returned home the next morning, reportedly between 4 and 4:30 a.m., she found the victim's lifeless body in a narrow hallway adjacent to the kitchen, which led to the victim's first floor bedroom. The victim, clad only in an undershirt and underwear, was lying in a pool of blood. Blood spatter and smears covered the walls around him, almost to the ceiling. An autopsy later revealed that the victim had sustained approximately twenty-seven stab wounds, a severed jugular vein, and blunt force trauma to the head. Investigators theorized that the victim had confronted his assailants in the hallway and fought for his life. The associate medical examiner could not determine the exact time of death, only that the victim died within twenty-four hours of his body being examined by the medical examiner and two and one-half to three hours of his last meal.

The assailants left two distinct sets of bloody footprints near the victim's body and in other locations throughout the house. Beneath the victim's body, the police found what they believed to be a piece of the murder weapon—a small metal collar that separates a knife blade from the handle. The police also discovered blood on a dresser drawer in the victim's bedroom. Inside the drawer were a pair of bloody socks and a blood stained cigar box, indicating that the assailants had rummaged through the house after the murder. A videocassette recorder, jewelry, several rolls of quarters, and some clothing were reported missing.

The evidence established that, sometime between 12:10 and 12:30 a.m. on the night of the murder, two

of the victim's neighbors heard a loud vehicle being operated near the victim's residence. One of the neighbors, Alice Kennel, heard the vehicle stop at the lot beside her house for approximately twenty minutes and then drive away. The other neighbor, Brian Church, reported hearing a vehicle with "a very loud muffler sound" at around the same time. According to Church, the vehicle stopped for about thirty minutes and then drove away. Neither Kennel nor Church saw the vehicle or heard its doors open or shut. Nor could either witness place the vehicle or its occupants at the victim's house.[6]

Because the police suspected that the victim had interrupted a burglary, they began their investigation by compiling a list of known burglars in the area. Almost immediately, they became aware of the names of the petitioner, Birch, and Yablonski, as well as Stanley, whom they were told purchased stolen goods from the teenagers. The police interviewed the petitioner on December 4, 1985. By then, he, Birch, and Yablonski had heard about the victim's murder from Stanley, whom the police had already interviewed.

According to Yablonski, who testified for the state, she, the petitioner, and Birch discussed the murder with a group of people at Stanley's residence on December 2, 1985. From this discussion, they learned that a man had been killed after surprising a burglar and that the

[6] A third neighbor, Gary Smith, also reported hearing a vehicle with a loud muffler on the night of the murder. Unlike Kennel and Church, Smith observed the vehicle as it drove past his house. Although Smith did not testify at the petitioner's criminal trial, he did so at Birch's criminal trial, at which he described the vehicle's taillights as being "fairly wide set" and "round in appearance." When Smith was shown a photograph of the stolen Buick, he testified that its taillights were not those of the vehicle he had observed on the night of the murder. In his habeas petition, the petitioner alleged that his trial counsel, Carl D. Eisenmann, rendered ineffective assistance by failing to call Smith as a witness to rebut the state's theory that the loud vehicle that was heard in the vicinity of the victim's home was the stolen Buick.

man's dog also had been killed.[7] Yablonski testified that, prior to speaking to the police, she, the petitioner, and Birch decided they should "get [their] stories straight" to prevent the police from finding out about the stolen Buick and the burglaries that the teens had committed close in time to the murder. To that end, the trio agreed to tell the police that they had hitchhiked to and from New Hampshire, and then hitchhiked home from Stanley's residence on the night of the murder, leaving the city of Danbury at approximately 12:30 or 1 a.m. and arriving in New Milford several hours later. According to Yablonski, however, they did not leave Danbury at 12:30 a.m. but, rather, at around 11:20 p.m. Yablonski further testified that, while discussing the victim's murder, the petitioner had said to her and Birch, "[w]hat if we get caught? What if they suspect us?" At the time, Yablonski had assumed that the petitioner was referring to the burglaries and the stolen Buick.

When interviewed by the police on December 4, 1985, the petitioner informed the officers that he was aware that a man had been stabbed during a burglary. According to the testimony of one of the officers, when the petitioner was shown a photograph of the victim, he indicated that he previously may have seen the man around town and asked whether he was the man with all the tattoos, even though no tattoos were visible in the photograph.[8] The following day, Birch confessed to the theft of the Buick, and the petitioner took the police to where he had hidden it in a wooded area near a reservoir in New Milford. The petitioner and Birch also confessed to using the car in connection with the commission of several burglaries, for which they were placed under arrest.

[7] It is undisputed that no dog was killed or otherwise harmed in the commission of the victim's murder.

[8] The victim did have tattoos. At his criminal trial, however, the petitioner denied indicating to the police that he had ever seen the victim prior to being shown his photograph.

When the police recovered the Buick, it was evident that it had not been cleaned. According to several police reports and photographic exhibits, the vehicle was covered in dirt and filled with sand, sneakers, toiletries, food, blankets, pillows, various items of clothing, and what the police believed to be stolen electronics. Despite a thorough examination of the vehicle and the surrounding area, which involved draining two reservoirs and the use of specially trained dogs, the police found no evidence linking the petitioner or Birch to the murder. A search of the victim's neighborhood, including the surrounding roadways and fields adjacent to those roadways, also produced no incriminating evidence.

On December 6, 1985, the police conducted a second interview of the petitioner. During this interview, which was recorded, the officers falsely claimed that Birch had implicated the petitioner in the murder. Specifically, they told the petitioner that Birch had placed the entire blame for the murder on him and that Birch would "walk out of this thing" a free man while the petitioner would be "left . . . holding the bag." They advised the petitioner that, if he would just "tell . . . the truth about what happened, the whole truth, like . . . Birch did, then it's gonna weigh heavily in [his] favor." The officers also informed the petitioner that the police had recovered a wealth of forensic evidence from the crime scene, that that evidence was being tested, and that it was just a matter of time before it would confirm his presence in the victim's home. Finally, the officers informed the petitioner that, on the night of the murder, the victim's neighbors had heard a loud vehicle that sounded just like the vehicle the petitioner and Birch were driving that evening. The petitioner vehemently denied any involvement in the crime and implored the officers to test the crime scene evidence, his clothing, and everything else that they had seized from him because he was certain it would

prove his innocence. When the petitioner was told that the tests would take two weeks, the petitioner expressed impatience that he would have to wait so long to clear his name.

According to the transcript of the December 6, 1985 interview, the officers asked the petitioner what he knew about the murder. The petitioner responded that he knew only what people had told him and what everyone else knew. Specifically, the petitioner stated that, when he first heard about the murder, he was told "that some old man from New Milford had gotten knocked out in the middle of a burglary; then I heard from someone else right after that . . . [that the victim] came in, saw who it was, and that was the reason for the, the knife or whatever they used on him. . . . [P]eople [told] me he got internal wounds in the gut, and then the story switched around and someone said he got his jugular vein ripped out of his neck or something . . . ." When asked who he had gotten this information from, the petitioner responded, "that's what the Danbury police told [Stanley] when they brought him down for questioning." When the petitioner finished speaking, the officers tried unsuccessfully to elicit a confession from him by informing him that he had revealed details about the murder that only the killer would know. Specifically, one of the officers stated, "you got this information about the old guy being knocked out that ties into some evidence that we've got, that's never been in the paper. . . . [O]nly people who [know] something about [the murder would] say something like that." The petitioner was later asked, "how [do] you know all these things that we don't know? . . . You do too; you know more about that crime scene than [we] know." The petitioner explained, "[t]hat's just what . . . I heard, man, there was fucking six other people there when . . . [Stanley] told me that. Every other [person] . . . heard the same . . . thing. If it wasn't for this stupid

fucking piece of junk [car] that we . . . [stole] to get a ride home that night, none of this shit would [be] happening."

On December 9, 1985, the police conducted a third interview of the petitioner at the Litchfield Correctional Center. According to the testimony of one of the officers who was present there, when the petitioner was told that the police knew from the victim's neighbors where the petitioner and Birch had parked on the night of the murder, and where they had turned their car around, the petitioner's "right leg began to shake violently," and he stated that, although he, Birch, and Yablonski may have turned around in the victim's driveway, he was never in the victim's house and did not kill the victim.

During the course of the investigation, the police discovered that the petitioner had called his grandmother, Mildred Henning (Mildred) and his close childhood friend, Timothy Saathoff, from jail shortly after his arrest in 1985. In 1987 or 1988, Andrew Ocif, a detective with the Connecticut state police, interviewed Mildred and Saathoff about their recollection of those telephone calls. After speaking with Ocif, both Mildred and Saathoff agreed to provide statements indicating that the petitioner had told them that he was involved in various burglaries, that there was a burglary during which a man was killed, and that he did not kill him. Despite Mildred's and Saathoff's statements, the petitioner and Birch were not charged with the victim's murder until November, 1988. At the petitioner's criminal trial, Mildred testified that the petitioner had told her shortly after his arrest, during an emotional telephone call from jail, that he had been involved in a burglary during which a man and a dog were killed but that he was not the killer. Saathoff also testified that the petitioner had told him that he and another individual were involved

in a burglary and that a man had been killed but that he did not commit the murder.[9]

Because there was no forensic evidence connecting the petitioner to the crime, the state's case against him relied primarily on the testimony of Mildred and Saathoff, the testimony of the victim's neighbors, who had heard a loud vehicle on the night of the murder, the fact that the petitioner was driving such a vehicle that evening, and the testimony of Yablonski, whom the state relied on to establish consciousness of guilt predicated on the theory that the petitioner had lied to the police about the time of his return to New Milford to conceal his involvement in the murder. The state also called Lee, the criminalist and forensic scientist, to explain how it was possible for the petitioner and Birch to have stabbed the victim so many times without getting any blood on their clothing and without transferring any blood to the Buick. Lee testified that, although there clearly had been a violent struggle between the victim and his assailants, all of the blood spatter in the hallway was "uninterrupted," meaning that no individual or object was between the victim and the walls or floor to interrupt the blood spatter. According to Lee, this would explain why the assailants might not have been covered in the victim's blood. When asked, however, whether, "based [on his] examination of the [crime] scene and the spatter patterns that appear on the floor and walls, [he] ha[d] an opinion as to whether . . . the perpetrators would have had blood on their persons," Lee answered, "[m]y opinion is maybe."

[9] Saathoff recanted his testimony several years later, stating that the petitioner had never confessed to any involvement in the burglary and the victim's murder. Saathoff stated that the only reason he testified that the petitioner did so confess was because Ocif had told him that it would help the petitioner. At the petitioner's habeas trial, Ocif did not deny telling both Mildred and Saathoff that the police had strong evidence placing the petitioner at the crime scene and that it would actually help the petitioner if they would say that he had told them that he was there but that he did not kill the victim.

During his testimony, Lee relied on certain crime scene photographs. One of the photographs showed two towels hanging beside a sink in the upstairs bathroom. Although the state now concedes that the towels had not been tested for the presence of blood, Lee testified at trial that they had been so tested. Lee testified specifically that "there are some reddish color stain[s] [on one of the towels]. Those stains tested [positive] for the presence of blood . . . ." Later, in reference to the same photograph, Lee reiterated that one of the two towels had a "reddish color smear. That smear, I did a few tests, [which] show that it [tested] positive consistent with blood." At no time did the assistant state's attorney (prosecutor) correct Lee's incorrect testimony, apparently because he was unaware that it was untrue. Nor did the petitioner's trial counsel, Carl D. Eisenmann, attempt to correct it, presumably because he, too, did not know that it was incorrect.

At the close of the state's case, the petitioner moved for a judgment of acquittal, which the trial court denied. Thereafter, the petitioner's trial counsel presented a defense comprised of just two witnesses, Columbo, the victim's daughter, and the petitioner. In an effort to establish time of death, the petitioner's counsel asked Columbo whether she knew when her father had last eaten prior to being murdered. Columbo testified that she did not know. He also asked her whether she had ever told anyone that the victim was holding an object in his hand when she discovered his body. Columbo denied having said any such thing, and counsel asked no further questions.[10]

[10] As we explain more fully hereinafter; see footnote 11 of this opinion; the petitioner alleged in his habeas petition that his trial counsel was ineffective by failing to raise a third-party culpability defense against Columbo on the basis of numerous lies that she had told the police in the early hours of the investigation, and in light of other suspicious behavior that she exhibited at that time, including, on the night of the murder, screaming to the emergency services dispatcher, "[o]h God, he's got a knife in his hand."

In his trial testimony, the petitioner denied killing the victim or ever being in the victim's home. The petitioner stated that, after he, Birch, and Yablonski left the Stanley residence on December 1, 1985, they "smoked" cocaine before dropping Yablonski off at her parents' home in New Milford, and then he and Birch drove around siphoning gas for the Buick, after which they went to his father's house. According to the petitioner's father, the petitioner and Birch arrived at his house sometime between 2:15 and 4:20 a.m. The petitioner further testified that, although he had called Mildred and Saathoff after his arrest in 1985, at no time did he tell them that he was at the victim's home on the night of the murder; according to the petitioner, he told them only that the police were accusing him of being there and that he feared they were trying to frame him. The petitioner testified that he told both Mildred and Saathoff "that the police . . . believed . . . [that he had] been at the [victim's] residence because of things that [he] had said to the police when [he] was asked about [the] case, about the murder. When I was asked about the murder, I had known things that other people had not known, that the newspapers had not known yet, and . . . [that is what] I . . . told [them], that [the] man had been beaten to death, stabbed to death, and his dog was killed. . . . That's what I [had] heard."

In his closing argument, the prosecutor, relying on Lee's reconstruction of the crime, argued "that the evidence shows that . . . there may have been two individuals involved in that fight, with [the victim] holding one while the other stabbed him about the back and arms." The prosecutor also argued to the jury that the bloody footwear impressions, blood stained bathroom towel, and "bloodied items . . . found in the dresser . . . in the northwest bedroom" indicated that "the burglary continued after the bloodletting."

The prosecutor also explained to the jury that, although there was no forensic evidence connecting the petitioner and Birch to the crime, that was only because, as Lee had explained, all of the blood spatter was uninterrupted, meaning that the assailants would not have been covered in it. Another reason why there was no forensic evidence, the prosecutor asserted, was because the perpetrators had cleaned up before leaving the scene. "Remember also the bloody towel in the upstairs bathroom," the prosecutor stated. "It gave them an opportunity to wash or have some access to that sink." Finally, the prosecutor reminded the jury about the petitioner's admissions to his grandmother and Saathoff, the noisy vehicle that was heard near the victim's home on the night of the murder, the fact that the petitioner and Birch were driving a noisy vehicle that evening, and the petitioner's consciousness of guilt as evidenced by the fact that he lied to the police about the time he left Danbury on the night of the murder. The prosecutor also reminded the jury that, according to the officers who first interviewed him, the petitioner had asked whether the victim was the man with many tattoos even though there were no tattoos visible in the photograph. Finally, the prosecutor maintained that the explanation that the petitioner purportedly gave to the officers as to why he knew about the tattoos—namely, because he previously had seen the victim around town— should not be believed.

During closing argument, the petitioner's trial counsel emphasized the lack of forensic evidence, arguing that it simply made no sense that the petitioner and Birch could have committed such a violent and bloody crime without getting a drop of blood on their shoes or clothing, or without transferring any trace evidence to the Buick. With respect to the testimony of Mildred and Saathoff, the petitioner's counsel maintained that those witnesses were simply mistaken about what the

petitioner had told them so many years ago. The petitioner's counsel argued that, if the petitioner actually had been present when the victim was murdered, he would not have told his grandmother that a dog was killed during the commission of the crime because he would have known that no such thing had occurred. The fact that he did, counsel stated, supported the petitioner's contention that he had told his grandmother and Saathoff that he had been arrested on burglary charges and that, as a result, the police suspected him of committing another burglary during which a man had been killed, but that he had nothing to do with that crime.

The jury thereafter found the petitioner guilty of felony murder, and the trial court rendered judgment sentencing the petitioner to a term of imprisonment of fifty years. This court later affirmed the trial court's judgment in *State* v. *Henning*, supra, 220 Conn. 431. In 2001, while serving his Connecticut sentence in a Virginia prison, the petitioner filed a petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel. As we previously indicated, the habeas court dismissed that petition with prejudice on the basis of the petitioner's purported refusal to appear at the habeas trial. In 2012, the petitioner filed a second habeas petition in which he alleged, inter alia, that his trial counsel had rendered ineffective assistance in myriad ways, including but not limited to his failure to consult and present the testimony of a forensic footwear impression expert, failure to consult and present the testimony of a crime scene reconstructionist, failure to consult and present the testimony of a forensic pathologist, failure to investigate and present a third-party culpability defense implicating the victim's daughter,[11] and failure to investigate, cross-examine, impeach,

[11] More specifically, at the habeas trial, the petitioner sought to demonstrate that the crime scene had been staged to resemble a burglary and that his trial counsel had rendered ineffective assistance in failing to raise a third-party culpability defense against Columbo and Richard Burkhart, Columbo's

or otherwise challenge the testimony of the state's witnesses, including Mildred, Saathoff and Ocif.[12] The petitioner further claimed that his first habeas counsel,

lover and employer at the time of the murder, and for whom the victim also had worked and who allegedly owed the victim money. In support of this contention, the petitioner adduced evidence that, when Columbo was initially interviewed by the police on the night of the murder, she claimed to have been home all evening and to have heard the victim coughing, although she did not check on him. She then told the police that she actually had gone out that evening and returned home between 2:30 and 3 a.m. Later, she told the police that she had lied in her earlier statements to prevent Burkhart from finding out that she had been with another man that evening. Columbo also told the police that she had left the house at around 9:30 p.m. and returned sometime between 4 and 4:30 a.m. Police records indicate, however, that Columbo did not call for help until 4:50 a.m. and that, when she did, according to the emergency dispatcher, she screamed, "[o]h God, he's got a knife in his hand." There was also evidence that Columbo exhibited highly unusual behavior immediately after the murder. For example, one of the first responders, Anita Bagot, testified that Columbo barricaded herself in the dining room shortly after the police arrived and, later, asked Bagot, "[w]hy would he do it . . . [w]hy would he do it," clearly suggesting that she knew the identity of the assailant. The petitioner also presented evidence at the habeas trial that there was animus between Burkhart and the victim, despite Burkhart's statement to the police that he and the victim "had an excellent relationship" and that he "loved" the victim. One witness who had worked for Burkhart, Cynthia M. Russo-Donaghy, testified that Burkhart had a scratch on his face on the morning after the murder and that the victim had told her that Burkhart was a "son of a bitch" and that he "hate[d]" him. The petitioner also established that the state police received an anonymous telephone call on May 22, 1986, from an unknown male who said that Burkhart had murdered the victim.

We note, finally, that the petitioner, in support of his petition for a new trial, presented the deposition testimony of John Andrews, who stated that, after the murder, he and Columbo became romantically involved and, for a time, lived together. Andrews stated that, during an argument one night, Columbo charged at him with a knife and told him that "she would kill [him] like she killed her father." According to Andrews, late at night sometime thereafter, while he was in the kitchen and Columbo was upstairs, he was attacked and severely injured by an unknown assailant who beat him over the head and repeatedly stabbed him. Andrews further explained that, during the assault, he heard a male voice telling him to "leave and don't come back." Following this incident, Andrews decided to move out and, while packing his belongings, found a six to seven inch knife blade without a handle protruding from a basement wall. Andrews never told anyone about Columbo's threat or his discovery of the knife blade until years later, when he was contacted by the Connecticut Innocence Project. In its memorandum of decision, the habeas court observed that "Andrews [had] no obvious reason to fabricate [his] recollections."

[12] In particular, the petitioner alleged that his trial counsel had rendered ineffective assistance by failing to interview Mildred, Saathoff and Ocif prior

Michael Merati, rendered ineffective assistance of counsel by failing to adequately investigate and present his ineffective assistance of trial counsel claims and by allowing the petitioner's first habeas petition to be dismissed with prejudice on the basis of his purported failure to appear at the first habeas trial. The petitioner also claimed actual innocence on the basis of, among other things, numerous DNA tests conducted over the last decade by the Connecticut Forensic Science Laboratory, which had excluded the petitioner, Birch, and Yablonski as the source of DNA recovered from the crime scene, and had revealed the DNA of an unknown female on four key pieces of evidence with which the assailants were known or thought to have come into contact.[13] Finally, the petitioner alleged that the state had violated his right to a fair trial by adducing Lee's

to trial, and by failing to impeach their testimony at trial. The petitioner argued that, if trial counsel had interviewed Mildred and Saathoff, he would have learned that Ocif had goaded them into providing false testimony in the misguided belief that they were helping the petitioner. The petitioner further claimed that, if trial counsel had interviewed Ocif, he would have discovered that Ocif had failed to adequately investigate any other suspects or their possible motives for the crime or even to familiarize himself with the investigative file because Ocif was convinced of the petitioner's guilt founded on the theory that the victim was killed during the course of a burglary. In support of this contention, the petitioner elicited testimony from Ocif that he did not assist in the crime scene investigation and had seen only a single photograph of the crime scene. Ocif also did not know at the time of his investigation that Columbo had lied to the police about her whereabouts on the night of the murder, that she had barricaded herself in the dining room after the police arrived, and that, when she called for emergency assistance, indicated to the dispatcher that there was a man in her home holding a knife. Ocif also was unaware of the animus between the victim and Burkhart, and the fact that the police had received an anonymous call identifying Burkhart as the killer.

[13] In this regard, Christine Mary Roy, a forensic science examiner with the state's Division of Scientific Services, testified at the petitioner's habeas trial that, in addition to the victim's DNA, the DNA profile of an unknown female was found on the bloody cigar box, the inside of the front waistband of the victim's underwear, the metal ring that was found under the victim that was thought to be part of the murder weapon, and a floor board that the police had removed, which contained two sets of bloody footprints. Lucinda Lopes-Phelan, another forensic science examiner with the Division of Scientific Services, testified that she had tested the victim's underwear on the theory that one of the assailants may have grabbed him there during the struggle that led to the victim's murder.

incorrect testimony that there was blood on the bathroom towel, testimony that had permitted the prosecutor to argue that the reason investigators failed to find forensic evidence on the petitioner's clothing or in the Buick was because the petitioner had cleaned himself up before leaving the victim's home.

A consolidated trial on the petitioner's second habeas petition, his petition for a new trial, and the closely related habeas and new trial petitions of Birch; see footnote 4 of this opinion; was conducted over a period of several weeks in November and December, 2015, during which the petitioner and Birch called a number of expert and lay witnesses whose testimony cast serious doubt on the state's theory of the case.[14] In support of the petitioner's claim that the prosecutor's failure to correct Lee's incorrect testimony entitled the petitioner to a new trial, he argued that, under a line of cases following the United States Supreme Court's seminal opinion in *Brady* v. *Maryland*, supra, 373 U.S. 83, including *United States* v. *Bagley*, 473 U.S. 667, 679 and n.9, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (opinion

[14] For example, in support of his claim that trial counsel was ineffective insofar as counsel failed to consult a forensic footwear impression expert, the petitioner presented the testimony of William Bodziak, a former agent with the Federal Bureau of Investigation (FBI) and a prominent footwear impression expert. Bodziak testified that, using techniques available at the time of the petitioner's criminal trial, he was able to determine that one of the two sets of bloody footprints from the crime scene could not possibly have been left by either the petitioner or Birch because it was made by a size 9 or smaller shoe, perhaps even as small as a size 7 and 1/2, and the petitioner and Birch wore shoes sized 11 and 1/2 and 10 and 1/2 to 11, respectively. According to Bodziak, the size difference between the bloody footprints and the petitioner's and Birch's shoes at the time of the murder was "enormous . . . ." With respect to Bodziak's expertise, the habeas court made the following findings: "Obviously, expert footwear analysts were available at the time of the petitioner's [criminal] trial in 1989. From 1973 to 1997 . . . Bodziak was a special agent for the FBI who specialized [in], among other [things] . . . footwear imprint analysis. He testified at the [petitioner's] habeas trial, and he is a well trained, extensively experienced, and highly qualified expert in this field of criminology. He has testified in nearly every state and federal trial court in the United States, including at the trials of [Orenthal James] Simpson and [Timothy McVeigh] the Oklahoma City bomber."

announcing judgment) (conviction obtained with state's knowing use of perjured testimony must be set aside unless state can establish testimony was harmless beyond reasonable doubt), *State* v. *Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010) (prosecutor who knows that testimony of witness is false or substantially misleading must correct that testimony regardless of lack of intent to lie on part of witness), and *State* v. *Cohane*, 193 Conn. 474, 498, 479 A.2d 763 (prosecutor has responsibility to correct false testimony when prosecutor knew or should have known that testimony was false), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), the state was required to establish that Lee's concededly incorrect testimony was immaterial beyond a reasonable doubt, a standard that, the petitioner further claimed, the respondent could not meet.

Following the trial, the habeas court issued a memorandum of decision in which it denied or dismissed all of the petitioner's claims.[15] With respect to the petitioner's

[15] We note that one of the claims that the habeas court rejected was the claim that the petitioner's first habeas counsel had rendered ineffective assistance by allowing the petitioner's first habeas petition to be dismissed with prejudice. In light of that conclusion, the habeas court declined to consider the merits of several of the petitioner's claims because they had been raised in the first petition, and, by virtue of the dismissal of that petition with prejudice, they could not be litigated in any subsequent habeas petition. In rejecting this claim of ineffective assistance by first habeas counsel, the habeas court discredited the petitioner's testimony that his first habeas counsel had told him that he need not appear for the scheduled habeas trial because he was withdrawing the petition without prejudice, which would have allowed the petitioner to refile it at a later date if and when additional evidence became available. In doing so, the habeas court observed that when the first habeas court asked first habeas counsel whether "it is true that your client refused to come here," he replied, "[y]es." The court then stated that it could discern "no possible motivation for [first habeas counsel] to mischaracterize the petitioner's position about refusing to appear and participate in his own case with respect to [his] allegation of ineffective assistance [against his trial counsel]. . . . The petitioner neither appealed [from] the dismissal nor asserted any misrepresentation or misunderstanding as to the dismissal with prejudice for the eight years between the dismissal and the filing of the present habeas action." It is undisputed, however, that the petitioner, acting pro se, filed a timely petition for certification to appeal

claim that the state had deprived him of a fair trial by failing to correct Lee's concededly incorrect testimony,[16] the court concluded, contrary to the contention of the petitioner, that the respondent, the Commissioner of Correction, was not required to demonstrate the immateriality, that is, the harmlessness, of that testimony beyond a reasonable doubt. The habeas court concluded, rather, that that heavy burden applies only when the state fails to correct *perjured* testimony, and it appeared clear to the habeas court that, in the absence of any contrary evidence, "Lee mistakenly, but honestly,

from the judgment dismissing his first habeas petition and a motion for the appointment of new habeas counsel, which the first habeas court denied. After the dismissal of his first habeas petition, the petitioner also sent the court a letter he had received from first habeas counsel advising him that he need not appear. On appeal to this court, the petitioner contends that the habeas court incorrectly determined that first habeas counsel did not render ineffective assistance by allowing his first habeas petition to be dismissed with prejudice or by representing to the first habeas court that his claims against trial counsel lacked merit. As we explained, because we conclude that the petitioner is entitled to a new trial due to the prosecutor's failure to correct Lee's incorrect testimony that there was blood on the bathroom towel, we do not reach the merits of this or any of the petitioner's other claims. We take this opportunity to reiterate, however, that a habeas petition may not be dismissed with prejudice in the absence of a knowing, voluntary, and intelligent waiver by the petitioner of the claims contained therein. See, e.g., *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 785–86, 167 A.3d 952 (2017) ("a habeas court may accept the withdrawal of a habeas petition 'with prejudice,' allowing the petitioner to waive any future habeas rights, as long as the withdrawal is knowing, voluntary, and intelligent"); *Fine* v. *Commissioner of Correction*, 147 Conn. App. 136, 145, 81 A.3d 1209 (2013) ("in light of the magnitude of the right at issue . . . we will not merely presume a waiver of [the petitioner's habeas petition with prejudice] on the basis of a silent record . . . but will give effect to a waiver only after ensuring that it has been clearly expressed on the record, and that it is knowing, intelligent, and voluntary").

[16] In regard to that testimony, the habeas court found in relevant part: "As to . . . Lee's testimony, he erroneously testified that he tested a reddish substance on a towel seized from an upstairs bathroom, which test indicated a positive result for blood. That stain was never tested by . . . Lee or anyone at the crime laboratory before the petitioner's criminal trial. In conjunction with the present habeas action, the towel was tested, and the reddish smear proved negative for blood." The respondent, the Commissioner of Correction, has never contested the results of that test.

believed he tested [the bathroom towel] rather than contrived a false story about having done so." In other words, as the habeas court explained, although Lee had testified incorrectly, he was "not lying under oath." The habeas court then concluded that the applicable standard was "the classic test" for determining whether the petitioner was entitled to a new trial as a consequence of the state's *Brady* violation, a standard that, as the habeas court further explained, is satisfied "only if [the petitioner can demonstrate that] there would be a reasonable probability of a different result if the [correct] evidence had been disclosed. . . . A reasonable probability . . . is one [that] undermines confidence in the outcome of the trial . . . ." (Citations omitted; internal quotation marks omitted.)

Applying this standard, which is considerably less favorable to the petitioner than the standard that the petitioner himself had advanced, the habeas court concluded that Lee's incorrect testimony was immaterial because the state's case against the petitioner did not in any way rely on forensic evidence. Specifically, the court explained: "Because no forensic nexus was produced, the state's case against [the petitioner] hinged on the credibility of . . . [numerous] lay witnesses rather than on . . . Lee's [testimony]. The impact of the victim's neighbors' testimony about being disturbed by a very loud vehicle and the false time line fabricated by Birch and [the petitioner] was far more incriminating and [was] in no way diminished by . . . Lee's error as to whether a reddish smear on a towel . . . was or was not tested for blood." The court further reasoned that Lee's incorrect testimony also was immaterial because the prosecutor could have explained the absence of any forensic evidence simply by arguing that the petitioner and Birch had disposed of their bloody clothing and shoes sometime after leaving the victim's home and prior to their arrest.

On appeal, the petitioner claims that the legal standard for materiality that the habeas court applied, that is, that the petitioner was required to demonstrate that the incorrect testimony at issue undermines confidence in the verdict, was incorrect, and that the proper standard required the respondent to establish beyond a reasonable doubt that the testimony was immaterial. The petitioner further contends that, upon application of the proper standard, it is apparent that Lee's incorrect testimony was material and, therefore, that the prosecutor's failure to correct that testimony dictated that the petitioner be awarded a new trial because the state's case was weak and Lee's testimony offered jurors an explanation as to why no incriminating blood evidence was found despite the victim's massive blood loss and the fact that the victim was killed at such close range. The respondent, for his part, maintains that (1) the habeas court properly applied the less stringent materiality standard of *Brady*, (2) Lee's incorrect testimony was not adduced for the purpose of providing an explanation for why no blood evidence was found linking the petitioner to the victim's murder, and the prosecutor did not rely on that testimony to that end, (3) the state's case was so strong that there is no reasonable probability that the jury verdict would have been any different without it, and (4) even if we were to apply the demanding materiality standard pursuant to which the respondent must establish beyond a reasonable doubt that Lee's incorrect testimony had no bearing on the verdict, the state's evidence was so strong that that more exacting standard has been met. We disagree with each of the respondent's contentions.

We commence our consideration of the petitioner's claim with a brief review of the principles that guide our analysis. "The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the

United States Supreme Court in *Brady* v. *Maryland*, [supra, 373 U.S. 86–87] . . . [in which] the court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . The United States Supreme Court also has recognized that [t]he jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Accordingly, the *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . *United States* v. *Rivas*, 377 F.3d 195, 199 (2d Cir. 2004). . . .

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. . . . In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. . . . A reasonable probability of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Kyles* v. *Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

"When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more

favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair . . . and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) . . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–72, 71 A.3d 512 (2013).

Furthermore, it is well established that this stringent materiality test applies when a prosecutor elicits testimony that he or she knows or should know to be false, "[*r*]*egardless of the lack of intent to lie on the part of the witness* . . . ." (Emphasis added; internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 15, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019); accord *State* v. *Satchwell*, 244 Conn. 547, 561, 710 A.2d 1348 (1998); see also *State* v. *Cohane*, supra, 193 Conn. 498 ("[t]he responsibility of the state's attorney to conduct the prosecution in accordance with constitutional fair trial standards . . . cannot be defined or limited by the precise contours of the perjury statute"). "This strict standard of materiality is appropriate in such cases not just because they involve prosecutorial [impropriety], but more importantly because they involve a corruption of the [truth seeking] function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice

sufficient to satisfy the materiality standard is readily shown . . . such that reversal is *virtually automatic* . . . *unless the state's case is so overwhelming* that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; emphasis added; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372–73. "In accordance with these principles, our determination of whether . . . false testimony was material under *Brady* and its progeny requires a careful review of that testimony and its probable effect on the jury, weighed against the strength of the state's case and the extent to which the petitioner . . . [was] otherwise able to impeach [the witness]." Id., 373. Finally, "because our role in examining the state's case against the petitioner is to evaluate the strength of that evidence and not its sufficiency, we do not consider the evidence in the light most favorable to the state. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 342 n.88, 112 A.3d 1 (2015) . . . . Rather, we are required to undertake an objective review of the nature and strength of the state's case." (Citation omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 39, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

In light of the foregoing principles, it is readily apparent that the habeas court incorrectly concluded that the respondent was not required to establish beyond a reasonable doubt that the prosecutor's failure to correct Lee's incorrect testimony was immaterial. Contrary to the respondent's assertion, controlling case law makes it abundantly clear that that strict materiality standard applies whenever the state fails to correct testimony that it knew or, as in the present case, should have known to be false. As we explained in *State* v. *Cohane*, supra, 193 Conn. 474, a case directly on point, "[t]he references in *Agurs* to perjured testimony must be

taken to include testimony [that the prosecutor knew or should have known] to be false or misleading *even if the witness may not have such an awareness*. . . . [T]he [prosecutor's] actions in failing to disclose [false or misleading testimony] corrupt[s] the trial process and denie[s] the defendant his constitutional right to a fair trial just as surely as if the state's case included perjured testimony."[17] (Emphasis added; footnotes omitted.) Id., 498–99; see also *Mesarosh* v. *United States*, 352 U.S. 1, 9, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956) ("The question of whether [the witness'] untruthfulness . . . constituted perjury or was caused by a psychiatric condition can make no material difference . . . . Whichever explanation might be found to be correct in this regard, [the witness'] credibility has been wholly discredited . . . . The dignity of the . . . [g]overnment will not permit the conviction of any person on tainted testimony.").

Furthermore, it is inarguable that Lee, as the representative of the state police forensic laboratory, should have known that the bathroom towel had not been tested for blood. He, like any such witness, had an affirmative obligation to review any relevant test reports before testifying so as to reasonably ensure that his testimony would accurately reflect the findings of those tests. To conclude otherwise would permit the state to gain a conviction on the basis of false or misleading testimony even though the error readily could have been avoided if the witness merely had exercised due diligence; such a result is clearly incompatible with the principles enunciated in *Brady* and its progeny. Lee's incorrect testimony also must be imputed to the prosecutor who, irrespective of whether he elicited that testimony in good faith, is deemed to be aware of any

[17] For reasons unknown to us, the respondent, in his brief, does not even cite to *Cohane*, let alone seek to distinguish that case or to have this court overrule it. The habeas court similarly failed to cite to *Cohane*.

and all material evidence in the possession of any investigating agency, including, of course, the state police forensic laboratory. See, e.g., *Kyles* v. *Whitley*, supra, 514 U.S. 437–38 ("[T]he . . . prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation [whether, that is, a failure to disclose is in good faith or bad faith] . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." [Citation omitted.]). Notably, the respondent does not claim otherwise. Thus, the only question remaining is whether the respondent has met his burden of establishing that the prosecutor's failure to correct Lee's testimony concerning the bathroom towel was harmless beyond a reasonable doubt. We agree with the petitioner that he has not.

As we previously indicated, the respondent maintains that Lee's incorrect testimony was immaterial because the prosecutor did not offer that testimony to persuade the jury "that the towel smear explained the absence of physical evidence," only to establish "that a burglary occurred, and that it occurred . . . 'after the bloodletting.' " The respondent also argues that the state's case against the petitioner was so overwhelming that the petitioner would have been convicted regardless of Lee's incorrect testimony.

First, we disagree that that incorrect testimony was offered solely for the purpose of establishing the existence and timeline of the burglary. As we explained, during his closing argument, the prosecutor expressly urged the jury to "[r]emember . . . the bloody towel in the upstairs bathroom. *It gave them an opportunity to wash* . . . ." (Emphasis added.) This argument by the prosecutor leaves no doubt that the testimony concerning the bathroom towel was elicited for the purpose

of explaining why no evidence of blood connecting the petitioner to the murder was found. Although the prosecutor also argued to the jury that it reasonably could find, in accordance with other testimony from Lee, that the petitioner never came in contact with any of the victim's blood despite the extremely bloody crime scene, the prosecutor further stated to the jury that the blood on the bathroom towel supported the conclusion that the petitioner had washed off any of the victim's blood with which he had come in contact. The importance of this latter argument cannot fairly be minimized in light of how profusely the victim bled as a result of the twenty-seven stabs wounds he suffered at the hands of his assailants. That argument, moreover, was intended to address Lee's testimony, offered in response to the question of whether "the perpetrators would have had blood on their persons" as a result of their attack on the victim, acknowledging that "maybe" they did. In fact, it is apparent that the perpetrators did get at least some of the victim's blood on them because they left several sets of bloody footprints in the house, and blood was discovered on a dresser drawer in the victim's bedroom and on socks and a cigar box that were found in that drawer, all of which indicate that the perpetrators, with blood on their shoes and hands, made their way through the victim's house following the deadly assault on the victim.

Nor do we agree with the respondent that the state's case against the petitioner was so strong as to take this case out of the purview of cases in which, as a result of the state's use of testimony that it knew or should have known was false, reversal is "virtually automatic . . . ." (Internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372. Although sufficient to sustain a conviction, the state's evidence was hardly overwhelming. The strongest evidence by far was the testimony of Mildred, the petitioner's grandmother, and Saathoff, both of whom provided

nearly identical statements to the police two or three years after the victim's murder. As we discussed previously, both Mildred and Saathoff testified that the petitioner had called them from jail after his arrest in 1985 and told them that he had been involved in a burglary during which a man had been killed but that he was not the killer. The strength of this evidence was considerably diluted, however, by virtue of Mildred's repeated statement that the petitioner also told her that a dog had been killed during the commission of the victim's murder. Surely, jurors must have wondered why, if the petitioner actually was present when the victim was murdered, he informed his grandmother, Mildred, that a man *and* a dog were killed. We note, moreover, that, beyond the petitioner's purported bare-bones admission that the murder occurred and that he was present when it occurred, neither Mildred nor Saathoff claimed to have learned from the petitioner any more specific information about the crime or the petitioner's role in it.

In addition to the testimony of Mildred and Saathoff, the only other evidence that the state presented was the testimony of the victim's two neighbors who had heard a car with a loud engine shortly after midnight on the night of the murder, Yablonski's testimony that the petitioner and Birch had lied to the police that they were in Danbury at that time, and the fact that the petitioner had asked whether the victim was the man with all the tattoos when the police showed him a photograph of the victim. This additional evidence may have cast suspicion on the petitioner and was sufficient to support the jury's guilty verdict when considered together with the testimony of Mildred and Saathoff, but the state's case against the petitioner was certainly not so overwhelming that we can be satisfied beyond a reasonable doubt that Lee's incorrect testimony was harmless. As this court previously has recognized in the *Brady* context, a murder prosecution predicated

primarily on a defendant's alleged or actual admissions, and in which there are no eyewitnesses and no forensic or other physical evidence connecting the defendant to the crime, is not a strong case; see *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 85–86; *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 323–25; and is therefore one in which "prejudice sufficient to satisfy the materiality standard is readily shown . . . ." (Citations omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372.

The respondent asserts, nonetheless, that there is no reasonable possibility that the petitioner was prejudiced by Lee's incorrect testimony because there is little chance that the jury credited the state's theory that the assailants washed up before leaving. Specifically, the respondent argues that, "if the prosecution [had] sought to portray the towel smear as a portal through which blood drenched killers passed only to emerge on the other side completely clean, it would have failed miserably. In the absence of any other evidence that the killers cleaned up at the scene . . . it is simply not reasonable to believe that all of that blood reduced to a single towel smear. The more obvious conclusion is that the jury found that, consistent with . . . Lee's spatter testimony, the perpetrators were not drenched in blood . . . ." That conclusion is far from obvious and by no means compelled from the facts. Indeed, we cannot say with any confidence that the jury found either theory more plausible than the other as a basis for explaining the total absence of forensic evidence. The more probable scenario, rather, is that the jury, like the state, relied on *both* theories. That is, the jury very reasonably could have found, on the basis of the blood spatter testimony, that the killers may have had less blood on them than the evidence otherwise would seem to indicate, and, on the basis of the towel testimony, whatever blood they did have on them, they simply washed off.

Finally, because Lee's testimony provided the sole evidentiary basis for both of the state's theories regarding the dearth of forensic evidence, the prosecutor's failure to correct Lee's testimony about the bathroom towel was material for the additional reason that it deprived the petitioner of the opportunity to impeach Lee's blood spatter testimony. See, e.g., *Merrill* v. *Warden*, 177 Conn. 427, 431, 418 A.2d 74 (1979) ("The fact that [the witness] was a key witness made his credibility crucial to the state's case. In assessing his credibility the jury [was] entitled to know that he was testifying under false colors. Such knowledge could have affected the result."); *State* v. *Grasso*, 172 Conn. 298, 302, 374 A.2d 239 (1977) ("[w]hen a conviction depends entirely [on] the testimony of certain witnesses . . . information affecting their credibility is material in the constitutional sense since if they are not believed a reasonable doubt of guilt would be created"). To be sure, the prosecutor's greatest challenge at trial was to explain how it was possible for two teenagers to have stabbed the victim twenty-seven times in the confines of a narrow hallway, severed his jugular vein, struck him over the head several times, tracked blood all over the house, and yet somehow managed not to leave any trace evidence in their getaway vehicle—which, as we previously discussed, did not show any signs of having been cleaned when the police recovered it a few days later—or elsewhere. To answer this question, the state proffered two theories, one of which the respondent now concedes was predicated on Lee's incorrect testimony. If the jury had known that Lee's testimony about finding blood on the bathroom towel was incorrect, that knowledge might well have caused it to question the reliability of his other testimony. If that had occurred, the state's entire case against the petitioner could very well have collapsed.[18]

[18] We note that the habeas court, in reaching a different conclusion, reasoned that the incorrect testimony was immaterial because the prosecutor could have explained the absence of forensic evidence by arguing that the

In light of the foregoing, we conclude that the state's failure to correct Lee's testimony that there was blood on the bathroom towel deprived the petitioner of a fair trial. Accordingly, the judgment of the habeas court must be reversed insofar as it was predicated on that court's determination that the petitioner is not entitled to a new trial because Lee's incorrect testimony was immaterial.

The judgment is reversed and the case is remanded with direction to render judgment granting the habeas petition and ordering a new trial.

In this opinion the other justices concurred.

SHAWN HENNING *v.* STATE OF CONNECTICUT (SC 20139)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The petitioner, who had been convicted of felony murder in connection with the stabbing death of the victim, filed a petition for a new trial based on a claim of newly discovered DNA and other evidence. Thereafter, the petitioner's case was consolidated with the petitioner's closely related habeas action. The habeas court denied the petition for a new trial, and the petitioner appealed, claiming, inter alia, that the habeas court

petitioner had disposed of the evidence before his December 6, 1985 arrest on burglary charges. As the petitioner observes, however, the prosecutor did not make this argument at trial, and the respondent does not make it on appeal. This is undoubtedly so because the trace evidence likely to have been left by the perpetrators in the present case is not the kind of evidence that could be readily identified, collected and disposed of by the perpetrators. Moreover, testimony adduced by the state indicated that the petitioner made no attempt to clean the Buick allegedly used in connection with the crime, and no evidence was found in or near that vehicle, which was subjected to a thorough examination by the investigating authorities.

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

incorrectly determined that the newly discovered DNA evidence did not warrant a new trial. *Held* that this court having determined in *Henning* v. *Commissioner of Correction* (334 Conn. 1), which addressed the petitioner's appeal from the denial of his habeas petition, that the petitioner is entitled to a writ of habeas corpus granting him a new trial insofar as the state deprived him of a fair trial by failing to correct certain incorrect trial testimony, the petitioner's appeal from the denial of his petition for a new trial was rendered moot, and, accordingly, the appeal was dismissed.

Argued October 12, 2018—officially released June 14, 2019**

Procedural History

Petition for a new trial after the petitioner's conviction of felony murder, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the case was transferred to the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Appeal dismissed.*

W. James Cousins, with whom, on the brief, was *Craig A. Raabe*, for the appellant (petitioner).

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, was *David S. Shepack*, state's attorney, for the appellee (state).

Opinion

PALMER, J. In 1989, the petitioner, Shawn Henning, was convicted of felony murder for the 1985 slaying of Everett Carr during the course of an apparent burglary of Carr's New Milford home. The petitioner was sentenced to a term of imprisonment of fifty years, and, following his appeal, this court upheld his conviction. See *State* v. *Henning*, 220 Conn. 417, 431, 599 A.2d 1065 (1991). Thereafter, in 2015, the petitioner filed a petition

** June 14, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

for a new trial; see General Statutes § 52-270 (a);[1] on the basis of newly discovered DNA and other evidence.[2] Subsequently, the trial court, *Pickard*, *J.*, granted the petitioner's motion to transfer the case to the judicial district of Tolland, where it was consolidated with his previously filed petition for a writ of habeas corpus and the closely related new trial and habeas petitions of Ralph Birch, who, at a separate trial, was also convicted of felony murder in connection with Carr's death. The habeas court, *Sferrazza*, *J.*, rejected all of the claims advanced in the four petitions, and the petitioner and Birch filed separate appeals with the Appellate Court. We thereafter transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

On appeal from the denial of his petition for a new trial, the petitioner claims that the habeas court incorrectly determined that the newly discovered DNA evidence does not warrant a new trial. The petitioner further claims that, in determining whether he should be awarded a new trial under § 52-270 (a), he is entitled to consideration of the original trial evidence together with *all* exculpatory evidence, including evidence that would not otherwise provide a basis for a petition for a new trial because it was not discovered by the petitioner until after the three year limitation period for filing such

[1] General Statutes § 52-270 (a) provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . ."

[2] In addition to the newly discovered DNA evidence, the petitioner relied on the following evidence in support of a new trial: (1) his discovery that the police recovered $1000 in cash at the crime scene, thereby refuting the state's theory at the petitioner's criminal trial that Carr was murdered during the commission of a botched burglary; (2) Timothy Saathoff's recantation of his criminal trial testimony that the petitioner confessed to being present at the victim's home on the night of the murder; and (3) the testimony of John Andrews, the former boyfriend of the victim's daughter, Diana Columbo, that Columbo had confessed to him that she was the person responsible for the victim's murder.

a petition had expired. See General Statutes § 52-582 (a) ("[n]o petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition for a new trial in a criminal proceeding based on DNA . . . evidence or other newly discovered [forensic] evidence . . . that was not discoverable or available at the time of the original trial or at the time of any previous petition under this section, may be brought at any time after the discovery or availability of such new evidence"). In support of this contention, the petitioner claims that the three year limitation period of § 52-582 (a) simply does not apply to a petition, like the present one, in which there is newly discovered DNA evidence because, the petitioner argues, the three year limitation period having been deemed inapplicable to newly discovered DNA evidence, that limitation period is also inapplicable to all other evidence that was not available at the time of trial.

In a separate opinion issued today, we have concluded, contrary to the determination of the habeas court, that the petitioner is entitled to a writ of habeas corpus granting him a new trial because the state deprived him of a fair trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny by failing to correct certain incorrect trial testimony of the then director of the state police forensic laboratory, Henry C. Lee. See *Henning* v. *Commissioner of Correction*, 334 Conn. 1, 33, A.3d (2019). Because our decision in that case awarding the petitioner a new trial renders moot the petitioner's appeal from the denial of his petition for a new trial, we must dismiss the present appeal. See, e.g., *State* v. *Boyle*, 287 Conn. 478, 486–87, 949 A.2d 460 (2008) (appeal is moot, and therefore must be dismissed, when, because of events occurring during pen-

dency of appeal, appellate court cannot afford any practical relief to appellant).

The appeal is dismissed.

In this opinion the other justices concurred.

RALPH BIRCH *v.* COMMISSIONER OF CORRECTION (SC 20136)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The petitioner, who had been convicted of felony murder in connection with the stabbing death of the victim inside the victim's home during what appeared to be a botched burglary, sought a writ of habeas corpus, claiming, inter alia, that the state deprived him of his due process right to a fair trial insofar as it failed to correct the trial testimony of L, a former director of the state police forensic laboratory, that a red substance on a towel found in the victim's home after the murder tested positive for blood when no such test had been conducted and when subsequent testing conducted in connection with the present habeas action revealed that the red substance was not in fact blood. The habeas court rendered judgment denying the habeas petition. With respect to the petitioner's due process claim, the court concluded that, because L mistakenly but honestly believed that the towel tested positive for blood and, thus, did not give perjured testimony, the burden was on the petitioner to demonstrate that there was a reasonable probability of a different verdict if the correct evidence had been disclosed. Applying this standard, the habeas court determined that L's testimony was immaterial because, among other things, the state's criminal case against the petitioner did not rely on forensic evidence but, rather, on the testimony of numerous lay witnesses. On the granting of certification, the petitioner appealed, claiming that the habeas court applied the incorrect standard for determining whether the petitioner was entitled to a new trial and that, upon application of the correct standard, which required the respondent, the Commissioner of Correction, to establish beyond a reasonable doubt that L's incorrect testimony was immaterial, he was entitled to a new trial. *Held* that, on the basis of this court's analysis in the companion case of *State* v. *Henning* (334 Conn. 1), this court concluded that the state's failure to correct L's incorrect testimony that there was blood on the bathroom towel deprived the petitioner of a fair trial, and the habeas court's judgment was reversed, as it was predicated on a determination that the petitioner was not entitled to a new trial because L's

incorrect testimony was immaterial: the habeas court incorrectly concluded that the respondent was not required to establish beyond a reasonable doubt that the state's failure to correct L's incorrect testimony was immaterial, as controlling case law made it clear that such a standard applies whenever the state fails to correct testimony that it knew or, as in the present case, should have known to be false; moreover, L, as the representative of the state police forensic laboratory, should have known that the towel had not been tested for blood, as he had an affirmative obligation to review any relevant test reports before testifying so as to reasonably ensure that his testimony would accurately reflect the findings of those tests, and L's incorrect testimony must be imputed to the prosecutor who, irrespective of whether he elicited that testimony in good faith, is deemed to be aware of any and all material evidence in the possession of any investigating agency, including the state police forensic laboratory; furthermore, the respondent did not meet his burden of establishing beyond a reasonable doubt that L's incorrect testimony was immaterial, as the state apparently offered L's testimony concerning the towel to demonstrate the petitioner's efforts to conceal evidence of the murder before he left the victim's home, the jury reasonably could have relied on the state's theory regarding the petitioner's use of the towel to conceal evidence, the state's case against the petitioner was not so strong as to take it out of the purview of cases in which, as a result of the state's use of testimony that it knew or should have known was false, reversal is virtually automatic, and the state's failure to correct L's testimony was material because it deprived the petitioner of the opportunity to impeach certain other testimony by L regarding how it was possible that the petitioner and his alleged accomplice, H, stabbed the victim twenty-seven times in a narrow space and tracked blood all over the victim's home but somehow managed not to leave any trace of blood in their getaway vehicle, which showed no signs of having been cleaned when the police recovered it a few days after the murder.

Argued October 11, 2018—officially released June 14, 2019*

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Reversed*; *judgment directed.*

Andrew P. O'Shea, for the appellant (petitioner).

* June 14, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Michael J. Proto, assistant state's attorney, with whom were *Jo Ann Sulik*, supervisory assistant state's attorney, and, on the brief, *David S. Shepack*, state's attorney, for the appellee (respondent).

Opinion

PALMER, J. In the early morning hours of December 2, 1985, sixty-five year old Everett Carr was brutally murdered in his New Milford residence. Subsequently, the petitioner, Ralph Birch, and a second man, Shawn Henning, were arrested and charged with Carr's murder, which the police theorized was committed during the course of a burglary of Carr's home by the two men. After a jury trial, the petitioner was convicted of felony murder, and, following his appeal, this court upheld the petitioner's conviction.[1] See *State* v. *Birch*, 219 Conn. 743, 751, 594 A.2d 972 (1991). Thereafter, the petitioner filed two habeas petitions, the first of which was denied by the habeas court, *Zarella*, *J. Birch* v. *Warden*, Docket No. TSR-CV-92-1567-S, 1998 WL 376345, *11 (Conn. Super. June 25, 1998). The second petition, which is the subject of this appeal, alleged, among other things, that the state deprived the petitioner of a fair trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, which require the state to correct any testimony that it knows or should know is materially false or misleading. More specifically, the petitioner claims that his right to due process was violated because the assistant state's attorney (prosecutor) failed to correct certain testimony of the then director of the state police forensic laboratory, Henry C. Lee, concerning a red substance on a towel found in the victim's home that, according to Lee, had tested positive for blood. In fact, no such test had been

[1] Henning was tried separately and convicted of felony murder, as well. This court also rejected Henning's appeal. See *State* v. *Henning*, 220 Conn. 417, 431, 599 A.2d 1065 (1991).

conducted, and, moreover, a test of the substance that was performed for purposes of the present case proved negative for blood. The habeas court, *Sferrazza*, *J.*,[2] rejected all of the petitioner's claims, including his claim with respect to Lee's testimony about the towel, and this appeal followed.[3] Because we agree with the petitioner that, contrary to the conclusion of the habeas court, he is entitled to a new trial due to the state's failure to alert the trial court and the petitioner that Lee's testimony was incorrect,[4] we reverse the judgment of the habeas court.[5]

[2] Unless otherwise noted, all references hereinafter to the habeas court are to *Sferrazza*, *J.*, and all references to the habeas petition are to the petition in the present case.

[3] As we explain hereinafter in greater detail, Henning also sought posttrial relief that, in many respects, mirrors the relief that the petitioner sought.

[4] As we discuss more fully hereinafter, the respondent, the Commissioner of Correction, concedes that the testimony of Lee at issue in this case was false or misleading—terms commonly used in cases, like the present one, that involve due process claims predicated on the state's improper use of testimony in a criminal trial—in the sense that it was factually wrong or incorrect. In its memorandum of decision, however, the habeas court found that Lee's testimony was mistaken and not intentionally false—a conclusion that the petitioner has not challenged—and we have no reason to second-guess that determination. Nevertheless, for the reasons set forth hereinafter, we conclude that, in the circumstances presented, the petitioner is entitled to a new trial because, under *Brady* and its progeny, it makes no difference whether Lee's testimony was intentionally false or merely mistaken. In either case, if, as we conclude, the state knew or should have known that Lee's testimony was incorrect, the petitioner is entitled to a new trial unless the respondent can demonstrate that the incorrect testimony was harmless beyond a reasonable doubt, a burden that the respondent cannot meet. Finally, although Lee's testimony was false or misleading insofar as it was contrary to the facts, we characterize it as incorrect rather than false or misleading because the latter terms might be understood as connoting a dishonest or untruthful intent, an implication that would be incompatible with the habeas court's determination.

[5] The petitioner also filed a petition for a new trial pursuant to General Statutes § 52-270 (a) on the basis of newly discovered evidence. Prior to trial, the habeas court consolidated that petition with the present habeas petition and with the closely related habeas and new trial petitions of Henning. The habeas court rejected all of the claims in the four petitions, and the petitioner and Henning separately appealed to the Appellate Court from the judgments denying their habeas and new trial petitions. We thereafter

The following facts and procedural history are set forth in the companion case of *Henning* v. *Commissioner of Correction*, 334 Conn. 1, A.3d (2019). "On November 29, 1985, the then [eighteen] year old petitioner, together with his [seventeen] year old friend, [Henning], and [Henning's] eighteen year old girlfriend, Tina Yablonski, stole a 1973 brown Buick Regal from an automobile repair shop in the town of Brookfield. Later that evening, the three teenagers drove the vehicle to New Hampshire to visit [the petitioner's] mother. While there, the vehicle's muffler was damaged and subsequently removed, causing the vehicle to make a loud noise when it was operated. When the trio returned to Connecticut on December 1, 1985, they went directly to the Danbury residence of Douglas Stanley, a local

transferred all four appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. In a separate opinion also issued today, we have dismissed as moot the petitioner's appeal from the habeas court's denial of his petition for a new trial in view of our determination that the petitioner must be afforded a new trial on the basis of the state's failure to correct Lee's incorrect testimony. See *Birch* v. *State*, 334 Conn. 69, 72, A.3d (2019). We also have reversed the judgment of the habeas court in Henning's habeas case, as well; see *Henning* v. *Commissioner of Correction*, 334 Conn. 1, 33, A.3d (2019); see also *Henning* v. *State*, 334 Conn. 33, 36, A.3d (2019) (dismissing as moot Henning's appeal from denial of petition for new trial), a decision that, like our decision in the present case, is predicated on the state's use of Lee's incorrect testimony.

We note, moreover, that, at various points throughout this opinion, we briefly discuss a number of the other claims raised by the petitioner in his habeas petition and in his petition for a new trial. We do not decide the merits of any of those claims, however, because of our conclusion that the petitioner is entitled to a new trial due to Lee's incorrect testimony. Insofar as we do discuss them, we do so only to place the present claim in the broader context of the several significant issues that the petitioner also raises as a basis for his entitlement to a new trial. Finally, many of the facts and much of the substantive analysis in this case is taken directly from our decision in *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 1, because that opinion addresses the identical claim concerning the state's failure to correct Lee's incorrect testimony. To the extent that the evidence adduced at the petitioner's underlying criminal trial or in connection with the present habeas case differs in any relevant respect from that presented at Henning's criminal or habeas trial, all such differences are duly noted.

drug dealer, where they freebased cocaine. In addition to selling the teenagers drugs, Stanley also acted as a 'fence'[6] for property they periodically stole from local businesses and homes. After leaving the Stanley residence, the petitioner and [Henning] dropped Yablonski off at her parents' home in the town of New Milford, arriving there at approximately 11:55 p.m.

"At that time, the victim was living at the home of his daughter, Diana Columbo, in New Milford, approximately two miles from the Yablonski residence. Sometime between 9 and 9:30 p.m. on December 1, 1985, Columbo left the house to visit a friend. When she returned home the next morning, reportedly between 4 and 4:30 a.m., she found the victim's lifeless body in a narrow hallway adjacent to the kitchen, which led to the victim's first floor bedroom. The victim, clad only in an undershirt and underwear, was lying in a pool of blood. Blood spatter and smears covered the walls around him, almost to the ceiling. An autopsy later revealed that the victim had sustained approximately twenty-seven stab wounds, a severed jugular vein, and blunt force trauma to the head. Investigators theorized that the victim had confronted his assailants in the hallway and fought for his life. The associate medical examiner could not determine the exact time of death, only that the victim died within twenty-four hours of his body being examined by the medical examiner and two and one-half to three hours of his last meal.

"The assailants left two distinct sets of bloody footprints near the victim's body and in other locations throughout the house. Beneath the victim's body, the police found what they believed to be a piece of the murder weapon—a small metal collar that separates a knife blade from the handle. The police also discovered

[6] "A 'fence' is a person who receives and sells stolen goods." *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 5 n.5.

blood on a dresser drawer in the victim's bedroom. Inside the drawer were a pair of bloody socks and a blood stained cigar box, indicating that the assailants had rummaged through the house after the murder. A videocassette recorder, jewelry, several rolls of quarters, and some clothing were reported missing." (Footnote in original.) Id., 5–6.

On the night of the murder, three of the victim's neighbors heard what they believed to be a vehicle with a defective muffler in the vicinity of the victim's residence. One of the neighbors, Gary Smith, heard it sometime between 10 p.m. and midnight, although he thought it was "[p]robably closer to midnight." Smith, who reported that the noise was unusual enough that he stopped what he was doing to look out the window, observed the vehicle just as it was passing his house and noticed that its taillights "were fairly wide set" and "round in appearance." Smith was shown a photograph of the stolen Buick at the petitioner's criminal trial and testified that he was positive that its taillights were not the taillights he observed on the night of the murder. Smith further testified that he informed the police in the days following the murder that he had seen the taillights of the vehicle but that the officers never returned to show him a photograph of the stolen Buick's taillights for comparison. Upon cross-examination by the prosecutor, Smith acknowledged that the vehicle he saw was "not the noisiest" he had ever heard and that it was "probably fair to say it was not terribly noisy . . . ."

The evidence also established that, sometime between 12:10 and 12:30 a.m., two other neighbors, Alice Kennel and Brian Church, also heard a loud vehicle near the victim's residence. Kennel heard the vehicle, which she described as "very noisy," stop at the lot beside her house for approximately twenty minutes and then drive away. Church similarly reported hearing

the vehicle stop for twenty to thirty minutes and then drive away. Neither Kennel nor Church actually observed the vehicle or heard its doors open or shut. Nor could either witness place the vehicle or its occupants at the victim's residence.

Because the police suspected that the victim had interrupted a burglary, they began their investigation by identifying known burglars in the area. One of the individuals they interviewed, Peter Barrett, gave them the names of the petitioner, Henning, Yablonski, and Stanley. On December 5, 1985, the petitioner went voluntarily to the police station to be interviewed about the murder. By then, the petitioner had heard about the murder from Stanley, among others, whom the police had already interviewed. According to Yablonski, who testified for the state at the petitioner's criminal trial, she, the petitioner, and Henning discussed the murder with several other people at Stanley's house on the afternoon of December 2, 1985. Yablonski further testified that, before speaking to the police, she, the petitioner, and Henning agreed to "get [their] stories straight" to prevent the police from learning about the stolen Buick and a number of recent burglaries that the teens had committed in the area. In furtherance of that plan, the three agreed to tell the police that they had hitchhiked to and from New Hampshire on the evening of November 29, 1985, and that they had hitchhiked home from the city of Danbury on the night of the murder, leaving there at approximately 2 a.m. and arriving in New Milford several hours later. In fact, however, they actually left Danbury at around 11:20 p.m.[7]

When the petitioner arrived at the police station on December 5, 1985, the officers did not question him

[7] We note that, at Henning's criminal trial, Yablonski testified that she, Henning and the petitioner agreed to tell the police that they had left Danbury at 12:30 or 1 a.m., not at 2 a.m., as she testified at the petitioner's trial. *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 8.

about the victim's murder but, instead, asked him if he knew anything about a stolen Buick Regal. After initially denying that he did, the petitioner confessed to having stolen the Buick, explaining that he did so because he needed somewhere to live. That afternoon, he and Henning took the officers to a wooded area near a reservoir in New Milford where the vehicle had been hidden. The petitioner and Henning also confessed to having used the vehicle in the commission of several burglaries, for which the two men were placed under arrest.

As we explained in *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 1, "[w]hen the police recovered the Buick, it was evident that it had not been cleaned. According to several police reports and photographic exhibits, the vehicle was covered in dirt and filled with sand, sneakers, toiletries, food, blankets, pillows, various items of clothing, and what the police believed to be stolen electronics. Despite a thorough examination of the vehicle and the surrounding area, which involved draining two reservoirs and the use of specially trained dogs, the police found no evidence linking the petitioner or [Henning] to the murder. A search of the victim's neighborhood, including the surrounding roadways and fields adjacent to those roadways, also produced no incriminating evidence." Id., 9.

On December 9, 1985, Sergeant John Mucherino and Detective Scott O'Mara, both of the Connecticut state police, interviewed the petitioner at the Litchfield Correctional Center. During that interview, the petitioner again denied any involvement in the victim's murder. At the petitioner's criminal trial, Mucherino testified that, when he showed the petitioner a photograph of the victim's deceased body in a pool of blood, the peti-

tioner's "whole body spasmed, and he literally almost fell out of [his] chair." Afterward, according to both Mucherino and O'Mara, the petitioner stared at the photograph for a short time and then, pointing to an area not shown in the photograph, but in the direction where the bathroom would have been, said either, "is that the bathroom there," or "[t]hat is the bathroom there,"[8] even though the location of the bathroom, though correctly identified by the petitioner, was not apparent from the photograph. According to Mucherino, when the officers attempted to question the petitioner regarding his apparent knowledge about the interior of the victim's home, the petitioner threatened to punch Mucherino, and the interview was terminated. Mucherino also testified that, at the time of the interview, he considered the petitioner's statement about the bathroom not only "highly incriminating" but "devastating" evidence of the petitioner's guilt.

Immediately following the interview, O'Mara wrote, reviewed, and signed a police report about the interview, relying in part on contemporaneous notes that he had taken at the time. Mucherino also reviewed and signed the report. The report does not state that the petitioner said either, "is that the bathroom there" or "[t]hat is the bathroom there," or otherwise indicate any familiarity with the victim's home. Nor does it state that the petitioner pointed at the photograph in the direction of the bathroom. Instead, the original report reflects that the petitioner *asked* the officers if the victim was lying in a bathroom.

On September 10, 1986, Detective Andrew Ocif, who by then had replaced Mucherino as the Connecticut

[8] O'Mara and Mucherino provided somewhat conflicting testimony about what the petitioner said when he was shown the crime scene photograph of the victim's body. O'Mara testified that, pointing in the direction of where the bathroom would be, the petitioner asked, "is that the bathroom there?" Mucherino testified that the petitioner stated, "[t]hat is the bathroom there."

state police officer assigned to the investigation, arrested the petitioner on an unrelated larceny charge and transported him to state police barracks for processing. While at the barracks, Ocif spoke with Mucherino about his December 9, 1985 interview of the petitioner. At the petitioner's criminal trial, Ocif testified that, while speaking to Mucherino at the barracks, Mucherino informed Ocif that, during that December 9, 1985 interview, the petitioner had pointed to the crime scene photograph of the victim and said, "there was a bathroom there." After advising Mucherino that O'Mara's written report did not contain this information, Ocif requested that Mucherino ask O'Mara to file a new report that did include that statement by the petitioner. According to O'Mara, Ocif "badgered [him] for a better part of a year to get the [new] report in." On May 5, 1987, O'Mara finally provided the requested addendum to the original report.

In the fall of 1987, the petitioner was incarcerated at the John R. Manson Youth Institution (Manson Youth Institution) in the town of Cheshire. There, while working in the laundry room, he met an eighteen year old fellow inmate, Robert Perugini. On December 7, 1987, Ocif visited Perugini and informed him that he was investigating a murder that he knew the petitioner had committed. Perugini, who was then serving a seventeen year sentence for conspiracy to commit murder, kidnapping in the first degree and robbery in the first degree, agreed to provide incriminating information about the petitioner, but only if "there was something in it for [him] . . . ." Thereafter, the state entered into an agreement with Perugini pursuant to which it agreed to notify the Board of Pardons about Perugini's cooperation. Perugini then told Ocif that, in the summer of 1987, the petitioner had told him that he was worried that his release from the Manson Youth Institution would get "held up because of a murder investigation."

According to Perugini, the petitioner also told him that he and Henning had killed an old man with a knife while robbing a house in New Milford.[9]

While incarcerated at the Manson Youth Institution, the petitioner also befriended fellow inmate Todd Cocchia. After their release from custody in 1988, the petitioner and Cocchia lived together in Danbury for approximately two months before moving together to Norfolk, Virginia. On June 22, 1988, Cocchia was arrested and subsequently detained in a Norfolk jail. On July 12, 1988, Ocif visited Cocchia in Virginia where Cocchia was being held, and Cocchia agreed to provide incriminating information about the petitioner. In exchange, the state of Connecticut entered into an agreement with Cocchia pursuant to which it agreed, first, not to seek any prison time for Cocchia's probation violation and, second, to notify the Office of the State's Attorney for the judicial district of Danbury, where Cocchia had a pending criminal matter, of his cooperation in the petitioner's case. Additionally, because of his cooperation with Connecticut authorities, prosecutors

[9] We note that, in his habeas petition, the petitioner alleged that trial counsel in his criminal case, Alfred B. Mencuccini, had rendered ineffective assistance by failing to adequately impeach Perugini at trial. In support of this contention, the petitioner claimed that competent counsel would have interviewed Perugini's known associates, including Stephen Alan McDonald and Daniel Edwards, and learned that Perugini had provided false testimony against the petitioner in exchange for the state's promise that he not be transferred to a prison for adult offenders. In support of this contention, McDonald testified at the petitioner's habeas trial that, when he was incarcerated with Perugini at the Manson Youth Institution, he asked Perugini why he had lied to the police about the petitioner's having confessed to him. Perugini, who was about to be transferred from that institution because he was turning nineteen, responded, "he did what he had to do because he didn't want to go to [the] Somers [prison]." Similarly, Edwards, who was Perugini's best friend at the time, testified that, in early 1989, he received a letter from Perugini in which Perugini stated that he had arranged a deal with the state whereby he would testify against the petitioner, albeit falsely, in exchange for a reduced sentence. According to Edwards, Perugini "feared Somers" because of its reputation for sexual violence against inmates.

in Virginia agreed that Cocchia would receive a sentence of time served on the charges that were pending against him there.

In 1989, the petitioner was arrested for the victim's murder, and a jury trial subsequently ensued. At that trial, Cocchia testified that the petitioner had told him while they were en route to Virginia that he needed to leave Connecticut because he had killed a man during a burglary.[10] On cross-examination, however, Cocchia acknowledged that, when he was first interviewed by Ocif, Cocchia answered incorrectly, or could not answer at all, as to whether the petitioner had committed the murder alone or with an accomplice, whether the crime occurred at night or in the daytime, and as to the name of the town where the crime was committed. In accordance with his agreement with the state, Perugini also testified that the petitioner had confessed to him.

Because there was no forensic evidence connecting the petitioner to the crime, the state's case against him was based almost entirely on Cocchia's and Perugini's testimony, the testimony of Kennel and Church, both of whom heard a noisy vehicle on the night of the murder, the fact that the petitioner was driving such a vehicle that evening, and Yablonski's testimony, which the state relied on to demonstrate consciousness of guilt predicated on the theory that the petitioner had lied to the police about the time he returned to New Milford in an effort to conceal his involvement in the murder.

The state also adduced testimony from Lee, then the director of the state forensic laboratory, to explain how

[10] Cocchia recanted his testimony at the petitioner's habeas trial, stating that, in fact, the petitioner had never told him that he was in any way involved in the victim's murder. Cocchia further testified that, when Ocif came to visit him in Virginia in 1988, he left "the [police] file right there in front [of him], opened," and that everything he subsequently told the police about the murder he learned from "[r]eading [the open police file] . . . [and] listening to what they [the police] were saying [about it]."

it was possible that the petitioner and Henning could have stabbed the victim so many times without getting any blood on their clothing and without transferring any blood to the Buick. Lee explained that, although the victim fought with his assailants, all of the blood spatter in the hallway was uninterrupted, meaning that no individual or object was between the victim and the walls or floor to interrupt the blood spatter. According to Lee, this could explain why the assailants were not covered in the victim's blood.

During his testimony, Lee relied on certain photographs of the crime scene. One such photograph was of two towels hanging next to the sink in an upstairs bathroom. Although the towels had not been tested for the presence of blood—a fact that the state now concedes—Lee testified that they had, in fact, been so tested, stating that a "[s]mear of blood was found on [one of] the towel[s]" and that this smear was "[a]nalyzed and shows" blood. When Lee stated that he could not "recall if it was human blood or animal [blood]," the petitioner's trial counsel, Alfred B. Mencuccini, objected to the admission of the photograph, arguing that the state had not established that the substance on the towel was, in fact, blood. In response, the prosecutor argued that "[Lee could] testify as to what he did with respect to that towel, what he observed, and what he had done." Thereafter, outside the presence of the jury, the following exchange occurred between the court and the prosecutor:

"The Court: There is no evidence of this towel before this time.

"[The Prosecutor]: Somebody has to find it. I mean, [Lee] is the person that noted it.

"The Court: Are you prepared to admit it?

"[The Prosecutor]: I am prepared to—I do not intend to use the towel, but just have [Lee] testify that he found the towel and what he observed on it and its location."

Following this exchange, the court overruled the objection of the petitioner's counsel. Thereafter, in reference to the same photograph, Lee reiterated that it "depicts the portion of the [upstairs] bathroom—bathroom, two towels. This towel had a reddish smear, very light smear. Subsequently, that smear was identified to be blood." At no time did the prosecutor correct Lee's testimony in this regard.

At the close of the state's case, the petitioner moved for a judgment of acquittal, which the trial court denied. The petitioner then presented the testimony of Smith, the victim's neighbor who, in contrast to Church and Kennel, saw the loud vehicle that he heard on the night of the murder. When Smith was shown a photograph of the rear taillights of the stolen Buick, he testified unequivocally that they were not the taillights he had observed on the night of the murder. Donna Dacey, a New Milford emergency services dispatcher who was on duty on December 2, 1985, also testified for the petitioner. Dacey explained that she had received a call at 4:49 or 4:50 a.m. from the victim's daughter, Columbo, who stated in a "[h]ighly excited" voice, "[o]h my God, he has a knife." Dacey testified that she had no idea who Columbo was referring to at the time of the call.

In his closing argument, the prosecutor, relying on Lee's reconstruction of the crime, stated that the evidence demonstrated that "there were two perpetrators, separate and distinct footwear, a struggle ensued, the struggle started in the [downstairs] bathroom area, progressed down the hall, [the victim's] head on at least three occasions was struck against the molding, the various doorjambs, blood was spilled, the man was stabbed.'' The prosecutor further asserted that the bloody footwear impressions, blood stained bathroom

towel, and blood in the victim's bedroom indicated that "the burglary continued after the bloodletting." He maintained, moreover, that there was no forensic evidence connecting the petitioner to the crime only because, as Lee had explained, all of the blood spatter was uninterrupted, indicating that the assailants would not have been covered in it. Another reason why there was no forensic evidence connecting the petitioner to the crime, he argued, was because the petitioner had cleaned up before leaving the scene. "There was testimony that there was blood by the bathroom sink upstairs. There was testimony that . . . the [petitioner] had access to clothing and footwear in that [dresser] drawer." The prosecutor further maintained that the petitioner and Henning, "one, weren't covered with blood and, two, had the opportunity between [12] and [2:30 a.m.] to change their clothes or dispose of their clothes."

Finally, the prosecutor reminded the jury about the petitioner's admissions to Cocchia and Perugini, his apparent familiarity with the interior of the victim's home, the loud vehicle that the victim's neighbors heard on the night of the murder, the fact that the petitioner and Henning were driving such a vehicle that evening, and Yablonski's testimony that the petitioner and Henning had lied to the police about what time they left Danbury that evening so as to place their arrival in New Milford sometime after the murder was committed. With respect to Smith, the neighbor who testified that the loud vehicle he saw was not the stolen Buick Regal, the prosecutor argued that the vehicle Smith saw could not have been the one that Kennel and Church heard because, whereas Kennel and Church described the vehicle as being extremely noisy, Smith described it as "not being particularly loud" and making a sound like "thump, thump, as opposed to the sound [a car makes] . . . with no muffler."

In his closing argument to the jury, the petitioner's trial counsel argued that the petitioner was the victim not only of shoddy police work but of police officers who had predetermined his guilt. Specifically, counsel asserted that, "once the police focused on [the petitioner], they developed [a] case of tunnel vision" so extreme that they failed to take the most obvious investigative steps and "ignored every piece of evidence that cast doubt [on the petitioner's guilt] . . . ." That evidence, counsel argued, included the information provided by Smith, the only neighbor who had actually seen the vehicle that the other neighbors had only heard. It also included the bizarre behavior of Columbo, the victim's daughter, who had told the dispatcher when she called to report her father's murder that there was a man in her home holding a knife. "That knife had to be held by the person who [murdered the victim]," the petitioner's counsel argued, "[b]ut the police did nothing to clear up that question. Nothing at all."

The petitioner's counsel also maintained that, because there was no evidence linking the petitioner to the crime, and because the evidence that did exist pointed elsewhere, the police were compelled to create evidence. They did this, he argued, first, by having O'Mara amend the report of his December 9, 1985 interview with the petitioner to falsely reflect that the petitioner was familiar with the interior of the victim's home and, second, by offering leniency to two jailhouse informants wholly lacking in credibility. Counsel argued that O'Mara's explanation for why he had not included the petitioner's allegedly suspicious statement about the bathroom in the original report—namely, because he was "busy" and "had a number of distractions" on the day of the interview—was "completely unworthy of belief." Counsel maintained that, if the petitioner really had incriminated himself in the presence of two such experienced investigators, "you know darn well

it would have been in that [original] report." Finally, counsel reminded the jury of the complete lack of forensic evidence connecting the petitioner to the crime, arguing that it was inconceivable that the petitioner and Henning could have committed such a crime without getting any blood on their clothing or transferring any trace evidence to the Buick.

The jury deliberated for three days before reaching a verdict. During those deliberations, the jury asked to have the testimony of several witnesses read back[11] and to be reinstructed on the meaning of reasonable doubt. The jury ultimately found the petitioner guilty of felony murder, and the trial court rendered judgment in accordance with the verdict, sentencing the petitioner to a term of imprisonment of fifty-five years. This court subsequently affirmed the petitioner's conviction on appeal in *State* v. *Birch*, supra, 219 Conn. 751.

In 1997, the petitioner filed an amended petition for a writ of habeas corpus, alleging that his trial counsel had rendered ineffective assistance in numerous respects. The habeas court rejected the petitioner's claims, and he appealed to the Appellate Court, which affirmed the habeas court's judgment. *Birch* v. *Commissioner of Correction*, 57 Conn. App. 383, 385, 749 A.2d 648, cert. denied, 253 Conn. 920, 755 A.2d 213 (2000).

In 2000 and 2001, respectively, the petitioner filed two additional habeas petitions in which he alleged that his first habeas counsel, Avery Chapman, had rendered ineffective assistance by failing to adequately investigate and present his claims against his trial counsel, including his claim that trial counsel had rendered ineffective assistance by failing (1) to consult and present the testimony of a forensic footwear impression expert,

[11] The jury asked to have the testimony of O'Mara, Mucherino, Yablonski, Cocchia and Perugini read back.

(2) to consult and present the testimony of a crime scene reconstructionist, (3) to consult and present the testimony of a forensic pathologist, (4) to investigate and present a third-party culpability defense against Columbo,[12] and (5) to investigate, cross-examine,

[12] As we explained in *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 1, in which we have addressed an identical claim involving the same relevant facts, "at the habeas trial, the petitioner sought to demonstrate that the crime scene had been staged to resemble a burglary and that his trial counsel had rendered ineffective assistance in failing to raise a third-party culpability defense against Columbo and Richard Burkhart, Columbo's lover and employer at the time of the murder, and for whom the victim also had worked and who allegedly owed the victim money. In support of this contention, the petitioner adduced evidence that, when Columbo was initially interviewed by the police on the night of the murder, she claimed to have been home all evening and to have heard the victim coughing, although she did not check on him. She then told the police that she actually had gone out that evening and returned home between 2:30 and 3 a.m. Later, she told the police that she had lied in her earlier statements to prevent Burkhart from finding out that she had been with another man that evening. Columbo also told the police that she had left the house at around 9:30 p.m. and returned sometime between 4 and 4:30 a.m. Police records indicate, however, that Columbo did not call for help until 4:50 a.m. and that, when she did, according to the emergency dispatcher, she screamed, '[o]h God, he's got a knife in his hand.' There was also evidence that Columbo exhibited highly unusual behavior immediately after the murder. For example, one of the first responders, Anita Bagot, testified that Columbo barricaded herself in the dining room shortly after the police arrived and, later, asked Bagot, '[w]hy would he do it . . . [w]hy would he do it,' clearly suggesting that she knew the identity of the assailant. The petitioner also presented evidence at the habeas trial that there was animus between Burkhart and the victim, despite Burkhart's statement to the police that he and the victim 'had an excellent relationship' and that he 'loved' the victim. One witness who had worked for Burkhart, Cynthia M. Russo-Donaghy, testified that Burkhart had a scratch on his face on the morning after the murder and that the victim had told her that Burkhart was a 'son of a bitch' and that he 'hate[d]' him. The petitioner also established that the state police received an anonymous call on May 22, 1986, from an unknown male who said that Burkhart had murdered the victim.

"We note, finally, that the petitioner, in support of his petition for a new trial, presented the deposition testimony of John Andrews, who stated that, after the murder, he and Columbo became romantically involved and, for a time, lived together. Andrews stated that, during an argument one night, Columbo charged at him with a knife and told him that 'she would kill [him] like she killed her father.' According to Andrews, late at night sometime

impeach or otherwise challenge the testimony of Cocchia, Perugini, and Ocif. As we observed in the companion case of *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 1, "[t]he petitioner also claimed actual innocence on the basis of, among other things, numerous DNA tests conducted over the last decade by the Connecticut Forensic Science Laboratory, which had excluded the petitioner, [Henning], and Yablonski as the source of DNA recovered from the crime scene, and had revealed the DNA of an unknown female on four key pieces of evidence with which the assailants were known or thought to have come in contact.[13] Finally, the petitioner alleged that the state had violated his right to a fair trial by adducing Lee's false testimony that there was blood on the bathroom towel, testimony that had permitted the prosecutor to argue that the reason investigators failed to find forensic evidence on the petitioner's clothing or in the Buick was because

thereafter, while he was in the kitchen and Columbo was upstairs, he was attacked and severely injured by an unknown assailant who beat him over the head and repeatedly stabbed him. Andrews further explained that, during the assault, he heard a male voice telling him to 'leave and don't come back.' Following this incident, Andrews decided to move out and, while packing his belongings, found a six to seven inch knife blade without a handle protruding from a basement wall. Andrews never told anyone about Columbo's threat or his discovery of the knife blade until years later, when he was contacted by the Connecticut Innocence Project. In its memorandum of decision, the habeas court observed that 'Andrews [had] no obvious reason to fabricate [his] recollections.' " Id., 16–17 n.11.

[13] "In this regard, Christine Mary Roy, a forensic science examiner with the state's Division of Scientific Services, testified at the petitioner's habeas trial that, in addition to the victim's DNA, the DNA profile of an unknown female was found on the bloody cigar box, the inside of the front waistband of the victim's underwear, the metal ring that was found under the victim that was thought to be part of the murder weapon, and a floor board that the police had removed, which contained two sets of bloody footprints. Lucinda Lopes-Phelan, another forensic science examiner with the Division of Scientific Services, testified that she had tested the victim's underwear on the theory that one of the assailants may have grabbed him there during the struggle that led to the victim's murder." *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 18 n.13.

the petitioner had cleaned himself up before leaving the victim's home.

"A consolidated trial on the petitioner's . . . habeas petition[s], his petition for a new trial, and the closely related habeas and new trial petitions of [Henning]; see footnote [5] of this opinion; was conducted over a period of several weeks in November and December, 2015, during which the petitioner and [Henning] called a number of expert and lay witnesses whose testimony cast serious doubt on the state's theory of the case.[14]

[14] "For example, in support of his claim that trial counsel was ineffective insofar as counsel failed to consult a forensic footwear impression expert, the petitioner presented the testimony of William Bodziak, a former agent with the Federal Bureau of Investigation (FBI) and a prominent footwear impression expert. Bodziak testified that, using techniques available at the time of the petitioner's criminal trial, he was able to determine that one of the two sets of bloody footprints from the crime scene could not possibly have been left by either the petitioner or [Henning] because it was made by a size 9 or smaller shoe, perhaps even as small as a size 7 and 1/2, and the petitioner and [Henning] wore shoes sized . . . 10 and 1/2 to 11 [and 11 and 1/2], respectively. According to Bodziak, the size difference between the bloody footprints and the petitioner's and [Henning's] shoes at the time of the murder was 'enormous . . . .' With respect to Bodziak's expertise, the habeas court made the following findings: 'Obviously, expert footwear analysts were available at the time of the petitioner's [criminal] trial in 1989. From 1973 to 1997 . . . Bodziak was a special agent for the FBI who specialized [in], among other [things] . . . footwear imprint analysis. He testified at the [petitioner's] habeas trial, and he is a well trained, extensively experienced, and highly qualified expert in this field of criminology. He has testified in nearly every state and federal trial court in the United States, including at the trials of [Orenthal James] Simpson and [Timothy McVeigh] the Oklahoma City bomber.' " *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 19 n.14.

We note that, despite Bodziak's highly exculpatory testimony that neither the petitioner nor Henning was the source of one of the two footwear impressions that the state argued was left by one of the assailants, the habeas court rejected the petitioner's claim that his trial counsel was constitutionally ineffective for failing to consult a footwear expert. In doing so, the habeas court credited the state's contention that the petitioner's trial counsel reasonably "feared that, if he hired [a footwear impression expert], he had little to gain and everything to lose if that independent examination revealed that the bloody imprints came from a boot [that] fell within the size range that encompassed the petitioner's size" because, the habeas court explained, the relevant rule of practice at that time, Practice Book (1978–97) § 769 (2),

In support of the petitioner's claim that the prosecutor's failure to correct Lee's incorrect testimony entitled the petitioner to a new trial, he argued that, under a line of cases following the United States Supreme Court's seminal opinion in *Brady* v. *Maryland*, supra, 373 U.S. 83, including *United States* v. *Bagley*, 473 U.S. 667, 679 and n.9, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (opinion announcing judgment) (conviction obtained with state's knowing use of perjured testimony must be set aside unless state can establish testimony was harmless beyond reasonable doubt), *State* v. *Ouellette*, 295 Conn. 173, 186, 989 A.2d 1048 (2010) (prosecutor who knows that testimony of witness is false or substantially misleading must correct that testimony regardless of lack of intent to lie on part of witness), and *State* v. *Cohane*, 193 Conn. 474, 498, 479 A.2d 763 (prosecutor has responsibility to correct false testimony when prosecutor knew or should have known that testimony was false), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), the respondent, the Commissioner of Correction, was required to establish that Lee's concededly incorrect testimony was immaterial beyond a reasonable doubt, a standard that, the petitioner further claimed, the respondent could not meet.

"allowed the prosecutor to require a criminal defendant to disclose the existence of and permit inspection of any document within the control of the defense [that] is a report or statement as to a physical . . . [examination] or scientific test or experiment made in connection with the particular case prepared by, and relating to the anticipated testimony of, a person whom the defendant intends to call as a witness." (Internal quotation marks omitted.) Clearly, however, any concern that the petitioner's trial counsel might have had about consulting an expert was unfounded because § 769 (2), by its plain and unambiguous terms, required a defendant to turn over any such report or statement *only if that defendant intended to call the expert as a witness*. Thus, if counsel had retained an expert whose opinion would not have been helpful to the petitioner, counsel would have had no reason to call that expert as a witness or even to have had the expert produce a statement or report documenting his or her opinion. The habeas court was incorrect, therefore, in concluding that the petitioner's trial counsel reasonably decided not to consult a footwear impression expert because of the then applicable reciprocal discovery provisions of the rules of practice.

"Following the trial, the habeas court issued a memorandum of decision in which it denied or dismissed all of the petitioner's claims. With respect to the petitioner's claim that the state had deprived him of a fair trial by failing to correct Lee's concededly incorrect testimony,[15] the court concluded, contrary to the contention of the petitioner, that the respondent was not required to demonstrate the immateriality, that is, the harmlessness, of that testimony beyond a reasonable doubt. The habeas court concluded, rather, that that heavy burden applies only when the state fails to correct *perjured* testimony, and it appeared clear to the habeas court that, in the absence of any contrary evidence, 'Lee mistakenly, but honestly, believed he tested [the bathroom towel] rather than contrived a false story about having done so.' In other words, as the habeas court explained, although Lee had testified incorrectly, he was 'not lying under oath.' The habeas court then concluded that the applicable standard was 'the classic test' for determining whether the petitioner was entitled to a new trial as a consequence of the state's *Brady* violation, a standard that, as the habeas court further explained, is satisfied 'only if [the petitioner can demonstrate that] there would be a reasonable probability of a different result if the [correct] evidence had been disclosed. . . . A reasonable probability . . . is one [that] undermines confidence in the outcome of the trial . . . .' " (Footnote added; footnotes in original; footnote omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 18–22.

[15] "In regard to that testimony, the habeas court found in relevant part: 'As to . . . Lee's testimony, he erroneously testified that he tested a reddish substance on a towel seized from an upstairs bathroom, which test indicated a positive result for blood. That stain was never tested by . . . Lee or anyone at the crime laboratory before the petitioner's criminal trial. In conjunction with the present habeas action, the towel was tested, and the reddish smear proved negative for blood.' The respondent, the Commissioner of Correction, has never contested the results of that test." *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 21 n.16.

"Applying this standard, which is considerably less favorable to the petitioner than the standard that the petitioner himself had advanced, the habeas court concluded that Lee's incorrect testimony was immaterial because the state's case against the petitioner did not in any way rely on forensic evidence. Specifically, the court explained: 'Because no forensic nexus was produced, the state's case against [the petitioner] hinged on the credibility of . . . [numerous] lay witnesses rather than on . . . Lee's [testimony]. The impact of the victim's neighbors' testimony about being disturbed by a very loud vehicle and the false time line fabricated by [the petitioner] and [Henning] was far more incriminating and [was] in no way diminished by . . . Lee's error as to whether a reddish smear on a towel . . . was or was not tested for blood.' The court further reasoned that Lee's incorrect testimony also was immaterial because the prosecutor could have explained the absence of any forensic evidence simply by arguing that the petitioner and [Henning] had disposed of their bloody clothing and shoes sometime after leaving the victim's home and prior to their arrest.

"On appeal, the petitioner claims that the legal standard for materiality that the habeas court applied, that is, that the petitioner was required to demonstrate that the false testimony at issue undermines confidence in the verdict, was incorrect, and that the proper standard required the respondent to establish beyond a reasonable doubt that the testimony was immaterial. The petitioner further contends that, upon application of the proper standard, it is apparent that Lee's incorrect testimony was material and, therefore, that the prosecutor's failure to correct that testimony dictated that the petitioner be awarded a new trial because the state's case was weak and Lee's testimony offered jurors an explanation as to why no incriminating blood evidence was found despite the victim's massive blood loss and the

fact that the victim was killed at such close range. The respondent, for his part, maintains that (1) the habeas court properly applied the less stringent materiality standard of *Brady*, (2) Lee's incorrect testimony was not adduced for the purpose of providing an explanation for why no blood evidence was found linking the petitioner to the victim's murder, and the prosecutor did not rely on that testimony to that end, (3) the state's case was so strong that there is no reasonable probability that the jury verdict would have been any different without it, and (4) even if we were to apply the demanding materiality standard pursuant to which the respondent must establish beyond a reasonable doubt that Lee's incorrect testimony had no bearing on the verdict, the state's evidence was so strong that that more exacting standard has been met." Id., 22–23.

In *Henning*, we rejected the respondent's contention that the habeas court properly applied *Brady*'s less stringent materiality standard in determining whether Henning was prejudiced by the state's failure to correct Lee's testimony. See id., 23. Our analysis in *Henning* is fully applicable to the present case: "When . . . a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair . . . and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States* v. *Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) . . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless

beyond a reasonable doubt." (Internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 24–25.

Accordingly, "it is readily apparent that the habeas court incorrectly concluded that the respondent was not required to establish beyond a reasonable doubt that the prosecutor's failure to correct Lee's incorrect testimony was immaterial. Contrary to the respondent's assertion, controlling case law makes it abundantly clear that that strict materiality standard applies whenever the state fails to correct testimony that it knew or, as in the present case, should have known to be false. As we explained in *State* v. *Cohane*, supra, 193 Conn. 474, a case directly on point, [t]he references in *Agurs* to perjured testimony must be taken to include testimony [that the prosecutor knew or should have known] to be false or misleading *even if the witness may not have such an awareness*. . . . [T]he [prosecutor's] actions in failing to disclose [false or misleading testimony] corrupt[s] the trial process and denie[s] the defendant his constitutional right to a fair trial just as surely as if the state's case included perjured testimony."[16] (Emphasis in original; internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 26–27; see also *Mesarosh* v. *United States*, 352 U.S. 1, 9, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956) ("The question of whether [the witness'] untruthfulness . . . constituted perjury or was caused by a psychiatric condition can make no material difference . . . . Whichever explanation might be found to be correct in this regard, [the witness'] credibility has been wholly discredited . . . . The dignity of the . . . [g]overnment will not permit the conviction of any person on tainted testimony.").

[16] "For reasons unknown to us, the respondent, in his brief, does not even cite to *Cohane*, let alone seek to distinguish that case or to have this court overrule it. The habeas court similarly failed to cite to *Cohane*." *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 27 n.17.

"Furthermore, it is inarguable that Lee, as the representative of the state police forensic laboratory, should have known that the bathroom towel had not been tested for blood. He, like any such witness, had an affirmative obligation to review any relevant test reports before testifying so as to reasonably ensure that his testimony would accurately reflect the findings of those tests. To conclude otherwise would permit the state to gain a conviction on the basis of false or misleading testimony even though the error readily could have been avoided if the witness merely had exercised due diligence; such a result is clearly incompatible with the principles enunciated in *Brady* and its progeny. Lee's incorrect testimony also must be imputed to the prosecutor who, irrespective of whether he elicited that testimony in good faith, is deemed to be aware of any and all material evidence in the possession of any investigating agency, including, of course, the state police forensic laboratory. See, e.g., *Kyles* v. *Whitley*, [514 U.S. 419, 437–38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)] ([T]he . . . prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation [whether, that is, a failure to disclose is in good faith or bad faith] . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. . . .). Notably, the respondent does not claim otherwise. Thus, the only question remaining is whether the respondent has met his burden of establishing that the prosecutor's failure to correct Lee's testimony concerning the bathroom towel was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 27–28.

As we previously indicated, the respondent argues that the state's failure to correct Lee's incorrect testi-

mony was immaterial, or harmless, because the prosecutor did not offer that testimony to persuade the jury "that the towel was bloodied by the petitioner's efforts to wash off his crime," only "to establish the duration of the predicate burglary and the fact that it continued after the bloodletting." (Internal quotation marks omitted.) We disagree that Lee's testimony about the towel was offered solely for the purpose of establishing the existence and timeline of the burglary. In closing argument, the prosecutor expressly stated, "I suspect . . . that the [petitioner] will argue that there [are] no forensics putting [the petitioner] in the [victim's] house." To rebut this anticipated argument by the defense, the prosecutor reminded the jury of Lee's testimony that "the spatter patterns were uninterrupted" and "*that there was blood by the bathroom sink upstairs*." (Emphasis added.) He also argued that "[t]here was testimony that . . . the [petitioner] had access to clothing and footwear in [the victim's dresser] drawer." Contrary to the respondent's assertions, the only possible inference that the prosecutor could have intended the jury to draw by virtue of his reference to the "blood by the bathroom sink upstairs" was that the petitioner used the second floor bathroom to clean up before leaving the victim's home. As we previously indicated, Lee testified that he had found blood on a towel hanging beside the second floor bathroom sink. Because that blood was the only blood Lee claimed to have found in the second floor bathroom, the prosecutor's reference to "blood by the bathroom sink upstairs"—a reference made by the prosecutor in the context of explaining the absence of forensic evidence "putting [the petitioner] in the [victim's] house"—was quite clearly a reference to Lee's testimony about the blood on the towel. There simply is no other evidentiary basis for this portion of the prosecutor's argument to the jury.

Nor are we persuaded by the respondent's contention that the state's case against the petitioner was suffi-

ciently powerful as to take this case out of the purview of cases in which, in light of the state's use of testimony that it knew or should have known was false, reversal is "virtually automatic . . . ." *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 359, 372, 71 A.3d 512 (2013). In *Henning*, we concluded that, although the evidence was sufficient to sustain a conviction, it was far from strong. See *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 29. In many ways, the state's case against the petitioner was weaker than it was in *Henning*, largely because the state's case against the petitioner turned primarily on the credibility of two jailhouse informants, both of whom were awarded valuable consideration in exchange for their testimony. Not surprisingly, the dubious trustworthiness of such jailhouse informant testimony has widely been acknowledged. See, e.g., *Kansas* v. *Ventris*, 556 U.S. 586, 597 n.2, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009) ("[t]he likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored"); *State* v. *Arroyo*, 292 Conn. 558, 567, 973 A.2d 1254 (2009) ("[i]n recent years, there have been a number of high profile cases involving wrongful convictions based on the false testimony of jailhouse informants''), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010); see also *State* v. *Patterson*, 276 Conn. 452, 469, 886 A.2d 777 (2005) ("an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused").

Indeed, this court previously has recognized that, for purposes of applying *Brady*'s materiality prong, a murder case predicated on a defendant's alleged or actual admissions, in which there are no eyewitnesses and no forensic or other physical evidence connecting the defendant to the crime, is not a particularly strong one, even when the admissions were made to persons

whose credibility is not so inherently suspect as that of a jailhouse informant. See *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 85–86, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019); *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 323–25, 112 A.3d 1 (2015). It is precisely because of the intrinsic unreliability of jailhouse informant testimony that we have required our trial courts "[to] give a special credibility instruction to the jury whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit. As we indicated in [*State* v.] *Patterson*, [supra, 276 Conn. 465, 470], the trial court should instruct the jury that the informant's must be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness." (Internal quotation marks omitted.) *State* v. *Arroyo*, supra, 292 Conn. 569–70.

Apart from the petitioner's alleged admissions to Cocchia and Perugini, the only other evidence connecting him to the victim's murder was the testimony of O'Mara and Mucherino that the petitioner, when shown a crime scene photograph of the victim's body, pointed in the direction of the bathroom and said either, "is that the bathroom there" or "[t]hat is the bathroom there," even though no bathroom was visible in the photograph. The state also relied on the testimony of Church and Kennel regarding the noisy vehicle that they heard on the night of the murder and Yablonski's testimony that the petitioner and Henning had lied about what time they returned to New Milford that evening. As we indicated, however, the state's theory regarding the noisy vehicle was substantially undercut by the testimony of Smith, who stated unequivocally that the noisy vehicle he saw on the night of the murder was not the stolen Buick. As for O'Mara's and Mucherino's testimony, even if the jury were inclined to believe their testimony, it was not

particularly incriminating as to the petitioner. The fact is, however, that the jury had good reason to question the reliability of their testimony because it strains credulity to think that two highly experienced detectives, when memorializing an interview they had just conducted with the prime suspect in a murder investigation, would fail to include in that report that the suspect had disclosed what one of the detectives considered to be ''devastating'' evidence of his involvement in the murder.

The respondent next argues that the prosecutor's failure to correct Lee's incorrect testimony was harmless beyond a reasonable doubt because there is little or no chance that the jury credited the state's theory that the assailants used the bathroom to wash up before leaving. Specifically, the respondent argues that, "[i]f the jury [had been] in search of an explanation as to how such a bloody crime scene could have been wiped clean from the men and their belongings before they could transfer any of it to the Buick, it is difficult to imagine that the jury would have been satisfied by the suggestion that the bloody scene distilled to a single towel smear . . . . The more obvious conclusion is that the jury found . . . that the perpetrators *were not* doused in blood because, as . . . Lee testified, the blood spatter patterns were not interrupted, and, therefore, [the blood] did not spatter . . . on those standing nearby . . . ." (Emphasis in original.) As we stated in *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 1, in rejecting this very argument, "[t]hat conclusion is far from obvious and by no means compelled from the facts. Indeed, we cannot say with any confidence that the jury found either theory more plausible than the other as a basis for explaining the total absence of forensic evidence. The more probable scenario, rather, is that the jury, like the state, relied on *both* theories. That is, the jury very reasonably could have

found, on the basis of the blood spatter testimony, that the killers may have had less blood on them than the evidence otherwise would seem to indicate, and, on the basis of the towel testimony, whatever blood they did have on them, they simply washed off." (Emphasis in original.) Id., 31.

"Finally, because Lee's testimony provided the sole evidentiary basis for both of the state's theories regarding the dearth of forensic evidence, the prosecutor's failure to correct Lee's testimony about the bathroom towel was material for the additional reason that it deprived the petitioner of the opportunity to impeach Lee's blood spatter testimony. See, e.g., *Merrill* v. *Warden*, 177 Conn. 427, 431, 418 A.2d 74 (1979) (The fact that [the witness] was a key witness made his credibility crucial to the state's case. In assessing his credibility the jury [was] entitled to know that he was testifying under false colors. Such knowledge could have affected the result.); *State* v. *Grasso*, 172 Conn. 298, 302, 374 A.2d 239 (1977) ([w]hen a conviction depends entirely [on] the testimony of certain witnesses . . . information affecting their credibility is material in the constitutional sense since if they are not believed a reasonable doubt of guilt would be created). To be sure, the prosecutor's greatest challenge at trial was to explain how it was possible for two teenagers to have stabbed the victim twenty-seven times in the confines of a narrow hallway, severed his jugular vein, struck him over the head several times, tracked blood all over the house, and yet somehow managed not to leave any trace evidence in their getaway vehicle—which, as we previously discussed, did not show any signs of having been cleaned when the police recovered it a few days later—or elsewhere. To answer this question, the state proffered two theories, one of which the respondent now concedes was predicated on Lee's incorrect testimony. If the jury had known that Lee's testimony

about finding blood on the bathroom towel was incorrect, that knowledge might well have caused it to question the reliability of his other testimony. If that had occurred, the state's entire case against the petitioner could very well have collapsed." (Internal quotation marks omitted.) *Henning* v. *Commissioner of Correction*, supra, 334 Conn. 32.

In light of the foregoing, we conclude that the state's failure to correct Lee's testimony that there was blood on the bathroom towel deprived the petitioner of a fair trial. Because the habeas court incorrectly reached a contrary conclusion, that court's judgment must be reversed, and the petitioner must be afforded a new trial.

The judgment is reversed and the case is remanded with direction to render judgment granting the habeas petition and ordering a new trial.

In this opinion the other justices concurred.

RALPH BIRCH *v.* STATE OF CONNECTICUT
(SC 20138)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The petitioner, who had been convicted of felony murder in connection with the stabbing death of the victim, filed a petition for a new trial based on a claim of newly discovered DNA and other evidence. Thereafter, the petitioner's case was consolidated with the petitioner's closely related habeas action. The habeas court denied the petition for a new trial, and the petitioner appealed, claiming, inter alia, that the habeas court

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

incorrectly determined that the newly discovered DNA evidence did not warrant a new trial. *Held* that this court having determined in *Birch* v. *Commissioner of Correction* (334 Conn. 37), which addressed the petitioner's appeal from the denial of his habeas petition, that the petitioner is entitled to a writ of habeas corpus granting him a new trial insofar as the state deprived him of a fair trial by failing to correct certain incorrect trial testimony, the petitioner's appeal from the denial of his petition for a new trial was rendered moot, and, accordingly, the appeal was dismissed.

Argued October 12, 2018—officially released June 14, 2019**

Procedural History

Petition for a new trial after the petitioner's conviction of felony murder, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the case was transferred to the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Appeal dismissed.*

Andrew P. O'Shea, for the appellant (petitioner).

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, was *David S. Shepack*, state's attorney, for the appellee (state).

Opinion

PALMER, J. On December 2, 1985, sixty-five year old Everett Carr was found dead in his New Milford home, the victim of multiple stab wounds and blunt force trauma to the head. The petitioner, Ralph Birch, and Shawn Henning were arrested and charged in connection with Carr's murder, and, following separate trials, both were convicted of felony murder. The petitioner received a sentence of fifty five years imprisonment, and, on appeal, this court upheld his conviction.[1] *State*

** June 14, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We also affirmed the conviction of Henning, who was sentenced to a prison term of fifty years. See *State* v. *Henning*, 220 Conn. 417, 418, 431, 599 A.2d 1065 (1991).

v. *Birch*, 219 Conn. 743, 751, 594 A.2d 972 (1991). In 2015, the petitioner filed a petition for a new trial; see General Statutes § 52-270 (a);[2] on the basis of newly discovered DNA and other evidence.[3] Subsequently, the trial court, *Pickard*, *J.*, granted the petitioner's motion to transfer the case to the judicial district of Tolland, where it was consolidated with his previously filed petition for a writ of habeas corpus and the closely related new trial and habeas petitions of Henning. The habeas court, *Sferrazza*, *J.*, rejected all of the claims advanced in the four petitions, and the petitioner and Henning filed separate appeals with the Appellate Court. We thereafter transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

On appeal from the denial of his petition for a new trial, the petitioner claims that the habeas court incorrectly determined that the newly discovered DNA evidence does not warrant a new trial. The petitioner further claims that this court, in determining whether a new trial is likely to result in a different outcome, should consider the original trial evidence together with *all* exculpatory evidence, even evidence that would not

[2] General Statutes § 52-270 (a) provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for the discovery of new evidence . . . ."

[3] In addition to the newly discovered DNA evidence, the petitioner relied on the following evidence in support of a new trial: (1) his discovery that the police had recovered $1000 in cash and jewelry worth approximately $10,000 from the crime scene, thereby refuting the state's theory at the petitioner's criminal trial that the victim was murdered as part of a botched burglary; (2) Todd Cocchia's recantation of his criminal trial testimony that the petitioner had confessed to murdering the victim and the testimony of Cocchia's mother corroborating Cocchia's recantation; (3) the testimony of four close associates of Robert Perugini that Perugini told them, contrary to his criminal trial testimony, that the petitioner never confessed to murdering the victim; and (4) the testimony of John Andrews, the former boyfriend of the victim's daughter, Diana Columbo, that Columbo had confessed to him that she was the person responsible for the victim's murder.

otherwise support a petition for a new trial because it was discovered by the petitioner after the three year limitation period for filing such a petition had expired. See General Statutes § 52-582 (a) ("[n]o petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition for a new trial in a criminal proceeding based on DNA . . . evidence or other newly discovered [forensic] evidence . . . that was not discoverable or available at the time of the original trial or at the time of any previous petition under this section, may be brought at any time after the discovery or availability of such new evidence"). In support of this contention, the petitioner asserts that the three year limitation period of § 52-582 (a) does not apply to a case, like the present one, in which there is newly discovered DNA evidence because, according to the petitioner, that limitation period, having been deemed inapplicable to newly discovered DNA evidence, also is inapplicable to any other evidence that was unavailable at the time of trial.

In a separate opinion issued today, we have concluded, contrary to the determination of the habeas court, that the petitioner is entitled to a writ of habeas corpus granting him a new trial because the state deprived him of a fair trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny by failing to correct certain incorrect trial testimony of the then director of the state police forensic laboratory, Henry C. Lee. See *Birch* v. *Commissioner of Correction*, 334 Conn. 37, 69, A.3d (2019). Because our decision in that case awarding the petitioner a new trial renders moot the petitioner's appeal from the denial of his petition for a new trial, we must dismiss the present appeal. See, e.g., *State* v. *Boyle*, 287 Conn. 478, 486–87, 949 A.2d 460 (2008)

(appeal is moot, and therefore must be dismissed, when, because of intervening events during pendency of appeal, appellate court cannot afford appellant any practical relief).

The appeal is dismissed.

In this opinion the other justices concurred.

BETH LAZAR ET AL. *v.* JOSEPH P. GANIM ET AL. (SC 20381)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 9-329a [a]), "[a]ny (1) elector . . . aggrieved by a ruling of an election official in connection with any primary . . . [or] (2) elector . . . who alleges that there has been a mistake in the count of the votes cast at such primary . . . may bring [a] complaint to . . . the Superior Court for appropriate action."

Pursuant further to statute (§ 9-329 [b]), a court may order a new primary if it finds that, "but for the error in the ruling of the election official, [or] any mistake in the count of the votes . . . the result of [the primary election] might have been different and [the court] is unable to determine the result of such primary."

The plaintiffs, three electors in the 2019 Democratic primary election for municipal office in the city of Bridgeport, brought an action pursuant to § 9-329a (a), challenging the results of that election and seeking an order directing a new primary election on the basis of, inter alia, various alleged improprieties in the handling of absentee ballots. The plaintiffs claimed that certain individuals associated with the defendants, who are certain Bridgeport election officials and certain candidates for elected office in the primary, had engaged in improper primary election activity and violated certain state election laws by virtue of, inter alia, the alleged misrepresentation of absentee voting eligibility and the improper handling of absentee ballots. As a result of the alleged improprieties, the plaintiffs claimed that they were aggrieved by the ruling of an election official within the meaning of § 9-329a (a) (1) and that there had been a mistake in the count of the votes within the meaning of § 9-329a (a) (2). The defendants moved to dismiss the plaintiffs' complaint, claiming, inter alia, that the plaintiffs lacked standing because they were not personally aggrieved by the ruling of any election official. The trial court granted the motion as to the claims brought under § 9-329a (a) (1),

concluding that the plaintiffs were not aggrieved by any of the claimed election violations because they had not suffered a personal or individual injury that was different from that suffered by any other elector eligible to vote in the primary. The court, however, denied the motion to dismiss as to the claims brought under § 9-329a (a) (2). Following an expedited trial to the court, the court concluded that, although there were certain irregularities in the handling of absentee ballots, the plaintiffs had not established that a mistake in the count of the votes cast in the primary election entitled them to an order directing a new primary pursuant to § 9-329 (b) because it was unable to determine the extent to which the improper conduct had affected the primary as a whole. Accordingly, the trial court rendered judgment for the defendants. Thereafter, the plaintiffs requested that the trial court certify two questions of law to this court for review pursuant to statute (§ 9-325), and, upon the trial court's granting of the plaintiffs' request, the plaintiffs appealed to this court. *Held*:

1. The plaintiffs' appeal challenging the result of the primary election, which involved the selection of Democratic candidates for the general election, was not moot, even though the general election had already occurred, because this court could afford the plaintiffs practical relief by ordering a new general election: if this court were to reverse the trial court's judgment, invalidate the results of the primary election, and deem its decision effective as of the time this appeal was heard, which was before the general election occurred, then the results of the general election necessarily would be invalid because the candidates selected in the invalidated primary election would not have been validly elected candidates for the general election; accordingly, this court concluded that § 9-329a (b), which does not place any time restrictions on when a court may issue an order directing a new primary election, implicitly authorizes a court to order a new general election if the earlier general election was invalidated by operation of a court order invalidating the underlying primary election.
2. The trial court correctly determined that the plaintiffs lacked standing to bring their claims pursuant to § 9-329a (a) (1) and, accordingly, properly dismissed those claims: in order to have standing to bring a claim pursuant to § 9-329a (a) (1), a party must establish that he or she has a specific, personal and legal interest in the subject matter of the controversy, as opposed to a general interest that members of the community share; moreover, the plaintiffs failed to demonstrate that they had a specific, personal interest that was affected by the improprieties in the handling of absentee ballots, as the only harm they claimed to have suffered was that the primary election was unfair as a result of those improprieties, and an unfair election affects every voter and constitutes an injury to the general interest shared by all members of the community, which was insufficient to establish standing.

3. The plaintiffs could not prevail on their claim that the trial court applied an improper legal standard in determining that they had failed to establish that a mistake in the count of the votes cast in the primary election entitled them to an order directing a new primary election under § 9-329a (b): to be entitled to an order directing a new primary election under § 9-329a (b), a plaintiff must demonstrate that there were substantial violations of § 9-329a (a) and that, as a result of those violations, the reliability of the result of the election is seriously in doubt, and, when the trial court's memorandum of decision was read in its entirety, it was clear that the trial court properly understood and applied the correct standard; moreover, under that standard, the trial court correctly concluded that the plaintiffs had failed to establish that the reliability of the result of the primary election was seriously in doubt, the plaintiffs having failed to challenge any of the trial court's factual findings or legal conclusions as to which absentee ballots should have been counted, and having failed to present any evidence that there was a serious risk that any of the losing candidates in the primary election would have won in the absence of the alleged improprieties.

Argued November 4—officially released November 29, 2019*

Procedural History

Action seeking, inter alia, an order setting aside the results of the Democratic primary election held by the city of Bridgeport and directing a new special primary, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Stevens*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the case was tried to the court; judgment for the defendants and certifying the results of the primary election, from which the plaintiffs appealed to this court. *Affirmed.*

Prerna Rao, for the appellants (plaintiffs).

James J. Healy, with whom were *John P. Bohannon*, *Jr.*, deputy city attorney, and *John F. Droney*, *Jr.*, for the appellees (defendants).

Opinion

ROBINSON, C. J. This appeal, which comes before this court pursuant to the expedited review procedure provided by General Statutes § 9-325, involves a claim

* November 29, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

that certain improprieties in the handling of absentee ballots for the 2019 Democratic primary election for municipal office (primary election) in the city of Bridgeport (city) rendered the result so unreliable that it must be set aside. The plaintiffs, Beth Lazar, Annette Goodridge and Vanessa Liles, who are registered Democrats residing in the city, brought this action against the defendants[1] pursuant to subdivisions (1) and (2) of General Statutes § 9-329a (a).[2] The plaintiffs alleged that extensive absentee ballot abuse and other improprieties leading up to the primary election rendered its result unreliable. Accordingly, they asked the trial court to set aside the results and to order a new, special primary election for all candidates pursuant to § 9-329a (b). The defendants moved to dismiss the action for lack of aggrievement. The trial court granted the motion to dismiss with respect to the plaintiff's claims brought pursuant to subdivision (1) of § 9-329a (a) but denied the motion with respect to the claims brought pursuant to subdivision (2). After a trial to the court, the court concluded that the plaintiff had failed to establish that the result of the primary election might have been differ-

[1] The defendants are Joseph P. Ganim, who, at the time that this action was brought, was the mayor of the city and a candidate for reelection; Charles D. Clemons, Jr., the city's town clerk and a candidate for reelection; Santa I. Ayala, the Democratic registrar of voters for the city; Patricia A. Howard, the deputy Democratic registrar of voters for the city; James Mullen, the head moderator for the primary election; Thomas Errichetti, the head moderator of absentee ballots for the primary election; Lydia Martinez, who, at the time that this action was brought, was the city clerk and a candidate for reelection; and Jorge Cruz, the candidate for city council in the 131st district of the city.

[2] General Statutes § 9-329a (a) provides in relevant part: "Any (1) elector or candidate aggrieved by a ruling of an election official in connection with any primary held pursuant to (A) section 9-423, 9-425 or 9-464, or (B) a special act, (2) elector or candidate who alleges that there has been a mistake in the count of the votes cast at such primary, or (3) candidate in such a primary who alleges that he is aggrieved by a violation of any provision of sections 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of absentee ballots at such primary, may bring his complaint to any judge of the Superior Court for appropriate action. . . ."

ent but for the alleged improprieties and rendered judgment for the defendants. The plaintiffs then requested that the trial court certify the following two questions to this court pursuant to § 9-325: (1) "Did the trial court err in finding that no plaintiff . . . has standing to challenge the [primary] election results under § 9-329a (a) (1) . . . ?" And (2) "Did the trial court apply the wrong legal standard when declining to order a new primary?" Upon the trial court's grant of their request, the plaintiffs filed this appeal. In their brief to this court, the plaintiffs raised the additional issue of whether this court is able to grant any relief to the plaintiffs or, instead, the appeal is moot in light of its timing, which implicates this court's subject matter jurisdiction. We conclude that the appeal is not moot. We further conclude that the trial court correctly determined that the plaintiffs lacked standing to invoke § 9-329a (a) (1) because they were not aggrieved and that the plaintiffs failed to establish that they were entitled to an order directing a new primary election under § 9-329a (a) (2). Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which were found by the trial court or are undisputed, and procedural history. The primary election took place on September 10, 2019. The mayoral candidates were Joseph P. Ganim and Marilyn Moore. There were 4337 walk-in ballots cast for Ganim and 4721 for Moore. In addition, 967 absentee ballots were cast for Ganim and 313 for Moore. Thus, Ganim won the election with 5304 votes, as against 5034 votes for Moore, by a margin of 270 votes.

Thereafter, the plaintiffs, who voted in the primary election, brought this action pursuant to § 9-329a, alleging that certain individuals associated with the defendants or the city's Democratic Town Committee engaged in improper primary election activity, including the misrepresentation of absentee voting eligibility in

violation of General Statutes § 9-135, the improper handling of absentee ballots in violation of General Statutes § 9-140b, attempts to influence the speech of any person in a primary in violation of General Statutes § 9-364a, and improprieties in the application and distribution process for absentee ballots in violation of General Statutes § 9-140. The plaintiffs claimed that, as the result of these allegedly improper activities, they were aggrieved by the ruling of an election official within the meaning of § 9-329a (a) (1) and that there had been a mistake in the count of the votes within the meaning of § 9-329a (a) (2). They sought a court order setting aside the result of the primary election, directing a new Democratic primary election for all candidates and requiring supervised voting in locations where a disproportionately large percentage of voters use absentee ballots.

The defendants moved to dismiss the complaint on the ground that the plaintiffs were not personally aggrieved by the ruling of any election official for purposes of § 9-329a (a) (1). In their opposition to the motion to dismiss, the plaintiffs contended that they did not have to establish that they were classically aggrieved, that is, that they had (1) "demonstrate[d] a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole," and (2) "establish[ed] that the specific personal and legal interest has been specially and injuriously affected by the decision." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 539, 833 A.2d 883 (2003). Rather, they claimed that they were required to establish only that they had statutory standing, which "concerns the question [of] whether the interest sought to be protected by the complainant[s] is arguably within the zone of interests to be protected or regulated by

the statute . . . .'' (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 393, 941 A.2d 868 (2008). The plaintiffs also argued that § 9-329a (a) (2) required them to allege only that there had been a mistake in the count of the vote.

The trial court concluded that the plaintiffs were not aggrieved for purposes of § 9-329a (a) (1) because they had not ''suffered a personal or individual injury that was different from any other elector eligible to vote in the primary.'' Accordingly, the court granted the motion to dismiss the plaintiffs' claims pursuant to subdivision (1) of § 9-329a (a). The trial court also concluded, however, that the plaintiffs were not required to establish that they were personally aggrieved under § 9-329a (a) (2) but only that there had been a mistake in the count of the vote. In addition, the court concluded that subdivision (2) was broad enough to encompass not only a mechanical miscount but a mistake arising from the counting of votes that legally should not be counted, such as absentee ballots cast by voters who were not eligible to cast them. Accordingly, the court denied the motion to dismiss the claims pursuant to subdivision (2).

The trial court conducted a trial over the course of two weeks, during which the plaintiff presented the following evidence: testimony by five witnesses that they had been solicited to submit absentee ballots, even though they did not satisfy the criteria for doing so under § 9-135; testimony by six witnesses that their completed absentee ballots were taken from them by canvassers associated with political campaigns, rather than mailed, in violation of § 9-140b (a); evidence that electors had filed multiple absentee ballot applications, some of which were missing signatures or were otherwise questionable; evidence that the absentee ballot moderator had violated procedures intended to protect

ballot secrecy; evidence that the town clerk had modified the addresses on multiple absentee ballot applications in violation of § 9-140 (g); evidence that certain campaign workers had been paid exclusively to distribute absentee ballot applications in violation of § 9-140 (j); and evidence that numerous individuals had received applications for absentee ballots for distribution and failed to return a list to the town clerk's office identifying the electors to whom they gave the applications in violation of § 9-140 (k) (2). The trial court acknowledged that the conduct of the individuals who were paid exclusively to distribute absentee ballots and those who failed to return a list to the town clerk's office identifying the electors to whom they had distributed applications was "illegal and disturbing," an observation that, in our view, was warranted in light of the history of improper handling of absentee ballots in the city. See, e.g., *Keeley* v. *Ayala*, 328 Conn. 393, 427–28, 179 A.3d 1249 (2018) (trial court correctly determined that new special primary was required as result of improper handling of absentee ballots). The court was unable to determine, however, "the extent to which such conduct may have affected the primary as a whole." Accordingly, the trial court found that the plaintiffs had failed to establish that, "but for the . . . mistake in the count of the votes . . . the result of [the primary election] might have been different . . . ." General Statutes § 9-329a (b). The court therefore rendered judgment in favor of the defendants.

This expedited appeal pursuant to § 9-325 followed. The appeal was filed on Friday, November 1, 2019, and we ordered an expedited hearing of the appeal, which took place on Monday, November 4, 2019, the day before the general election was held. The plaintiffs claim on appeal that the trial court incorrectly determined that they lacked standing to bring a claim pursuant to § 9-329a (a) (1) and that it applied an improper

legal standard in determining that the plaintiffs had failed to establish that they were entitled to an order directing a new primary election. The plaintiffs also contend that the appeal was justiciable at the time that it was filed because this court could order relief, namely, a new primary before the general election occurred. They further contend that, even if the general election were to occur before this court could decide the appeal, and even if that event rendered moot their claim that the trial court applied an incorrect legal standard when it denied their request for an order directing a new election because no relief could be granted, we still could address their standing claim under the capable of repetition, yet evading review exception to the mootness doctrine. In response, the defendants dispute the plaintiffs' claims challenging the rulings of the trial court, and they do not address the justiciability issue.

We conclude that the appeal is not moot because a new general election could be held if this court concludes that the trial court improperly denied the plaintiffs' request for an order directing a new primary election. We further conclude that the trial court correctly determined that the plaintiffs did not have standing to assert a claim pursuant to § 9-329a (a) (1) and that the plaintiffs had not established that they were entitled to a new primary election.

I

Because it implicates this court's subject matter jurisdiction, we first address the plaintiff's claim that this appeal is justiciable. As we indicated, the plaintiffs contended in their brief to this court that this appeal was not moot *at the time that it was filed* because this court could order a new primary election *before* the general election occurred. Neither party has addressed the issue of whether this court can void a general election that has already occurred and order a new one

after invalidating the primary election at which the candidates for the general election were chosen. Nevertheless, because the issue implicates this court's jurisdiction, we address it.

This court has never directly addressed the issue of whether a primary election contest becomes moot after the general election has taken place. Cf. *Caruso* v. *Bridgeport*, 285 Conn. 618, 624–25 n.5, 941 A.2d 266 (2008) (*Caruso II*) (declining to address issue of whether this court has authority "to overturn a general election and order a new one based on the voiding of a primary election" at which candidates were chosen). We held in *Caruso* v. *Bridgeport*, 284 Conn. 793, 804, 937 A.2d 1 (2007) (*Caruso I*), however, that the courts have no authority to order a *postponement* of a general election in an action brought pursuant to § 9-329a. In *Caruso I*, the plaintiff brought a certified appeal to this court pursuant to § 9-325, challenging the trial court's ruling in an action brought pursuant to § 9-329a denying his motion to postpone the general election pending the resolution of a separate appeal from other rulings by the trial court. Id., 795–97. We held that "§ 9-329a does not authorize the courts under any circumstances to order the postponement of a general election in an action brought pursuant to that statute" because "the judge may go no further in extending relief than that outlined in the statute"; id., 804; and, in a proceeding pursuant to § 9-329a (a), the statute authorizes the judge only to "[1] determine the result of such primary; [2] order a change in the existing primary schedule; or [3] order a new primary." (Internal quotation marks omitted.) Id.

It does not follow, however, from the fact that a general election must go forward while a challenge to the primary election at which the candidates were selected is pending—thereby preserving the special

"snapshot" character[3] of the election in the event that the challenge is unsuccessful—that the courts cannot order a new general election if the plaintiff prevails in his challenge to the validity of the primary election after the general election has taken place. If the invalidation of the primary results were given nunc pro tunc effect—that is, if this court reversed the trial court and that decision was deemed to be effective as of the time that the appeal was heard before the general election—that necessarily would mean that the candidates for office who ran in the primary were not validly elected candidates for the general election.[4] Thus, with respect to those candidates, the general election also would have been treated as invalid as a matter of pure logic. A valid general election could not be held without first holding a valid primary election to select the candidates. We

[3] See *Bortner* v. *Woodbridge*, 250 Conn. 241, 255, 736 A.2d 104 (1999) (discussing importance of preserving "snapshot" character of election that "is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date").

[4] "Nunc pro tunc, [literally] now for then, refers to a court's inherent power to enter an order having retroactive effect. . . . When a matter is adjudicated nunc pro tunc, it is as if it were done as of the time that it should have been done." (Internal quotation marks omitted.) *State* v. *Connor*, 152 Conn. App. 780, 799, 100 A.3d 877 (2014), rev'd on other grounds, 321 Conn. 350, 138 A.3d 265 (2016).

"The underlying principle on which judgments nunc pro tunc are sustained is that such action is necessary in furtherance of justice and in order to save a party from unjust prejudice . . . caused by the acts of the court or the course of judicial procedure. In other words, the practice is intended merely to make sure that one shall not suffer for an event which he could not avoid." (Internal quotation marks omitted.) *Gary Excavating Co.* v. *North Haven*, 163 Conn. 428, 430, 311 A.2d 90 (1972); see also *Feehan* v. *Marcone*, 331 Conn. 436, 488, 204 A.3d 666 ("it is a [well established] prerogative of the [c]ourt to treat as done that which should have been done" [internal quotation marks omitted]), cert. denied, U.S. , 140 S. Ct. 144, L. Ed. 2d (2019). As the circumstances of the present case show, because of the time constraints on elections and the complexity of election contests, there is a significant risk that a plaintiff in a primary election contest may, through no fault of his or her own, be unable to obtain a final judgment, including the resolution of any appeal, before the general election takes place.

conclude, therefore, that the provision of § 9-329a (b) authorizing the court to order a new primary election if it finds that the result of the primary might have been different but for the improprieties complained of, without any limits on the timing of such an order, implicitly authorizes the judge to order a new general election if the first general election is invalidated by operation of the judge's order invalidating the primary election. Because this court could provide this form of relief, we conclude that this appeal is not moot.

II

We next address the plaintiffs' claim that the trial court incorrectly determined that they lacked standing to bring a claim pursuant to § 9-329a (a) (1). "As a preliminary matter, we address the appropriate standard of review. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 802, 925 A.2d 292 (2007).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered

or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . .

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) Id., 802–803.

"The fundamental aspect of [statutory] standing . . . [is that] it focuses on the party seeking to get his complaint before [the] court and not on the issues he wishes to have adjudicated. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded. . . . The concepts of standing and legal interest are to be distinguished. The legal interest test goes to the merits, whereas standing concerns the

question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Citations omitted; internal quotation marks omitted.) *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 491–92, 400 A.2d 726 (1978).

In the present case, the plaintiffs contend that the trial court incorrectly determined that, to have standing to bring a claim pursuant to § 9-329a (a) (1), which authorizes "[a]ny . . . elector . . . aggrieved by a ruling of an election official" to bring an action pursuant to the statute, they had to show that they had "a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 282 Conn. 803. Rather, the plaintiffs contend, they were required to show only that "the interest sought to be protected by [them] is arguably within the zone of interests to be protected or regulated by the statute . . . in question." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 393–94.

The plaintiffs have cited no authority, however, for the proposition that, *whenever* the legislature enacts a statute protecting a specific zone of interests, *any person* who is a member of the class of persons who are statutorily authorized to invoke the statute may bring an action to protect that zone of interests. Although the legislature has, on occasion, dispensed with the requirement that a plaintiff establish the elements of classical aggrievement in order to have standing to invoke a statute by conferring presumptive or automatic standing on a particular class of persons; see, e.g., *Jolly, Inc.* v. *Zoning Board of Appeals*, 237 Conn. 184, 201,

676 A.2d 831 (1996) (under General Statutes § 8-8 [a], landowners living within 100 foot radius of land involved in zoning decision have presumptive standing to appeal from decision); id. (taxpayers have automatic standing to appeal from zoning decisions involving sale of liquor under § 8-8 [a]); proof of a specific, personal and legal interest that has been injured by the defendant's conduct ordinarily is required to establish statutory standing. See id., 203 (taxpayers do not have automatic standing under § 8-8 [a] to appeal from zoning decisions involving "dangerous businesses, such as adult video and bookstores, adult entertainment clubs, X-rated movie theaters, massage parlors, pool halls, gun dealers, pawn shops, and all-night convenience stores," but must establish aggrievement); see also *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 711, 217 A.3d 953 (2019) ("to have standing to bring an antitrust action [pursuant to General Statutes § 35-24 et seq.], a plaintiff must adequately allege not only that it is a member of the class of persons that is statutorily authorized to bring such an action, but also that [1] it suffered an antitrust injury and [2] it is an acceptable plaintiff to pursue the alleged antitrust violations" [internal quotation marks omitted]); *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 527, 119 A.3d 541 (2015) (to have standing to appeal from zoning decision pursuant to § 8-8, "a party must have and must maintain a specific, personal and legal interest in the subject matter of the appeal throughout the course of the appeal" [internal quotation marks omitted]); *Schwartz* v. *Town Plan & Zoning Commission*, 168 Conn. 20, 25, 357 A.2d 495 (1975) (under § 8-8, "[e]xcept in cases involving the sale of alcoholic beverages, aggrievement requires a showing that the plaintiffs have a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest such as is the

concern of the community as a whole, and that the plaintiffs were specially and injuriously affected in their property or other legal rights"); *McDermott* v. *Zoning Board of Appeals*, 150 Conn. 510, 513, 191 A.2d 551 (1963) ("[a] person is aggrieved within the meaning of [General Statutes] § 14-324 [which allows aggrieved persons to appeal from decisions involving licensing for the sale of gasoline] if he has a personal or property interest which will be substantially and adversely affected by a finding of the board that the location is suitable and that its use for a gasoline station will not imperil the safety of the public").

Nevertheless, the plaintiffs contend that the legislature must have intended that all electors, or at least the class of electors that is entitled to vote in a particular election, would have standing to bring a claim pursuant to § 9-329a (a) (1), even if the elector did not have a specific personal interest that was substantially affected by the improper ruling because, otherwise, an elector could bring an action pursuant to the statute only "if the margin of victory was one or on a tie vote." This is so, according to the plaintiffs, because the improper ruling "would not make a difference in the outcome" if the margin were larger. See General Statutes § 9-329a (b) ("judge may . . . order a new primary if he finds that but for the error in the ruling of the election official, [or] any mistake in the count of the votes . . . the result of such primary might have been different"). We note, however, that § 9-329a (b) also authorizes the judge to "determine the result of such primary . . . ." Accordingly, if an elector were improperly denied his right to vote, the elector would have standing to bring an action pursuant to § 9-329a (a) (1) and could ask the court to correct the results to include his vote. Moreover, we find it unlikely that the legislature intended to create the situation in which, after every primary election, thousands of potential plaintiffs

would have standing to seek a new primary based on the rulings of an election official that did not personally affect them. It is more likely that the legislature intended that the proper party to seek that particular form of relief would be a losing *candidate* who could establish that the improper ruling of an election official had rendered the results unreliable.

The plaintiffs also contend that this court previously has held that § 9-329a (a) (1) should be interpreted broadly. In *Caruso II*, this court reviewed the legislative history and genealogy of § 9-329a (a) (1) and concluded that, "although statutes governing election contests generally are construed strictly, nothing in the language, genealogy or legislative history of § 9-329a (a) suggests that the legislature intended for the phrase 'ruling of an election official' to have a narrow, technical meaning. Cf. *Bortner* v. *Woodbridge*, [250 Conn. 241, 267, 736 A.2d 104 (1999)] (nothing in legislative history of [General Statutes] § 9-328 gives 'any indication that it was intended to have some specialized meaning'). Indeed, it appears that the legislature considered an improper action to be a type of ruling." *Caruso II*, supra, 285 Conn. 646.

We disagree with the plaintiffs' reliance on *Caruso II*. In that case, there was no claim that the plaintiff, who was the losing mayoral candidate, did not have a specific personal interest in the outcome of the election that had been affected by the conduct at issue. Rather, the only issue that was before this court was whether the conduct complained of constituted a ruling of an election official. See id., 644 (defendants claimed that "the trial court improperly had determined that the alleged conduct constituted rulings by an election official"). Thus, it does not follow from our conclusion in *Caruso II* that the legislature intended that *that particular phrase* should be interpreted broadly such that the legislature intended to eliminate the requirement

that plaintiffs establish that they have a specific personal interest that was affected by the conduct at issue. In other words, lack of standing under § 9-329a (a) (1) can be found *either* when the plaintiff was not "aggrieved" because he did not have a specific personal interest that was affected by the conduct at issue *or* when the plaintiff may have had a specific personal interest that was affected by the conduct complained of but the claim is not within the zone of interests that the statute was intended to protect because the conduct did not constitute a ruling of an election official. Only the latter issue was before this court in *Caruso II*.

The plaintiffs also rely on this court's decision in *Bauer* v. *Souto*, 277 Conn. 829, 896 A.2d 90 (2006), to support their contention that a plaintiff bringing a claim pursuant to § 9-329a (a) (1) is not required to establish a specific personal interest that was substantially affected by the ruling of an election official. In *Bauer*, the plaintiff, David P. Bauer, who was a losing candidate for the common council of the city of Middletown, brought an action pursuant to § 9-328, challenging the results of the election. Id., 830–33. All of the candidates for the common council, which consisted of twelve members, ran at large. Id., 834. Bauer received the thirteenth highest number of votes. Id. After finding that one of the voting machines used in the election had malfunctioned, resulting in an undercount of the votes for Bauer, the trial court ordered a new election in the district where the malfunctioning machine had been located, with all of the candidates participating. Id., 836–37. On appeal, this court agreed that a new election was required but concluded that the relief should be a new citywide election with all candidates participating. Id., 843. The plaintiff in the present case contends that *Bauer* shows that a plaintiff in an election contest can raise claims that are outside the scope of his or her specific personal interest.

We disagree. This court's conclusion in *Bauer* that a new citywide election with all candidates participating was required was not driven by the determination that the plaintiff could raise claims on behalf of the other candidates or electors but by the determination that the best way to remedy the undercount of the votes cast for Bauer, a common council candidate, was to conduct an election that would approximate as closely as possible the at-large conditions of the invalidated election. See id., 843–44. In any event, it appears that Bauer claimed that there had been a mistake in the count of the vote, not that he was aggrieved by the ruling of an election official. See id., 836–37 (trial court found that, as result of malfunctioning machine, "all those who voted for [the plaintiff] in district eleven did not have their vote[s] counted" [internal quotation marks omitted]). Under § 9-328, as under § 9-329a (a) (2), there is no requirement that a plaintiff establish aggrievement before the court may entertain a claim that there has been a mistake in the count of the votes. See General Statutes § 9-328 ("any elector or candidate claiming that there has been a mistake in the count of votes cast" may bring complaint pursuant to statute). Thus, *Bauer* does not support the plaintiffs' position here. Accordingly, we conclude that, to have standing to bring a claim pursuant to § 9-329a (a) (1), the plaintiff must establish that he or she has "a specific, personal and legal interest in the subject matter of the [controversy] . . . ." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 282 Conn. 803.

The plaintiffs have made no claim that, if they are required to establish that they had a specific personal interest that was affected by the improprieties in the handling of the absentee ballots, they are able to do so. The only harm that the plaintiffs have claimed is that the election was unfair as a result of the improprieties, and an unfair election affects every voter. Although

we are not unsympathetic to the desire to ensure the fairness of the city's election, particularly given that this is not the first time that there have been challenges to the handling of absentee ballots in the city, it is well established that a claim of injury to "a general interest that all members of the community share" is not sufficient to establish standing. (Internal quotation marks omitted.) Id.; see also *Crist* v. *Commission on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) ("a voter fails to present an [injury in fact] when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate"); *Kauffman* v. *Osser*, 441 Pa. 150, 156, 271 A.2d 236 (1970) (electors did not have standing to challenge validity of statutes governing absentee ballots on ground that statutes operated to dilute their votes because "a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing to attack the validity of a legislative enactment"). But see *Committee for an Effective Judiciary* v. *State*, 209 Mont. 105, 112, 679 P.2d 1223 (1984) (voters had standing to challenge constitutionality of statutes requiring district court judge or Supreme Court justice to resign from office before running for another elective judicial office because electorate was intended to be beneficiary of state constitutional provision allowing judge to run for another judicial office without first resigning). Accordingly, we conclude that the trial court correctly determined that the plaintiffs lacked standing to bring a claim pursuant to § 9-329a (a) (1) because they had no specific personal interest that was affected by the improprieties complained of.[5]

[5] In light of this conclusion, we need not address the plaintiffs' contention that the evidence that the trial court excluded on the ground that it was relevant only to the plaintiffs' claim pursuant to § 9-329a (a) (1) supports the conclusion that the primary election result was unreliable. We note that the plaintiffs do not claim on appeal that this evidence was relevant to their claim pursuant to § 9-329a (a) (2), and they have not challenged the trial court's evidentiary rulings on any other grounds.

III

Finally, we address the plaintiffs' contention that the trial court applied an improper legal standard when it determined that the plaintiffs had not established that a mistake in the count of the votes cast in the primary election entitled them to an order directing a new primary election. We disagree.

We begin with a review of the general principles governing our review of election contests. "We previously have recognized that, under our democratic form of government, an election is the paradigm of the democratic process designed to ascertain and implement the will of the people. . . . [E]lection laws . . . generally vest the primary responsibility for ascertaining [the] intent and will [of the voters] on the election officials . . . ." (Citation omitted; internal quotation marks omitted.) *Caruso II*, supra, 285 Conn. 637.

When considering whether to order a new election, the court must engage in a "sensitive balance among three powerful interests, all of which are integral to our notion of democracy, but which in a challenged election may pull in different directions. One such interest is that each elector who properly cast his or her vote in the election is entitled to have that vote counted. Correspondingly, the candidate for whom that vote properly was cast has a legitimate and powerful interest in having that vote properly recorded in his or her favor. When an election is challenged on the basis that particular electors' votes for a particular candidate were not properly credited to him, these two interests pull in the direction of ordering a new election. The third such interest, however, is that of the rest of the electorate who voted at a challenged election, and arises from the nature of an election in our democratic society, as we explain in the discussion that follows. That interest

ordinarily will pull in the direction of letting the election results stand.

"An election is essentially—and necessarily—a snapshot. It is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date, namely, the officially designated election day. In that campaign, the various parties and candidates presumably concentrate their resources—financial, political and personal—on producing a victory on that date. When that date comes, the election records the votes of those electors, and only those electors, who were available to and took the opportunity to vote—whether by machine lever, write-in or absentee ballot—on that particular day. Those electors, moreover, ordinarily are motivated by a complex combination of personal and political factors that may result in particular combinations of votes for the various candidates who are running for the various offices.

"The snapshot captures, therefore, only the results of the election conducted on the officially designated election day. It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that day. Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms. That is what we mean when we say that one candidate has been elected and another defeated. No losing candidate is entitled to the electoral equivalent of a mulligan.

"Moreover, that snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around. Thus, when a court orders a *new* election, it is really ordering

a *different* election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *Bortner* v. *Woodbridge*, supra, 250 Conn. 255–56.

With these general principles in mind, we turn to the plaintiffs' contention that the trial court applied the wrong legal standard when it determined that the plaintiffs had not established that they were entitled to an order directing a new primary election pursuant to the portion of § 9-329a (b) providing that, in a proceeding pursuant to that statute, the trial court judge may "order a new primary if he finds that but for [the] . . . mistake in the count of the votes . . . the result of such primary might have been different and he is unable to determine the result of such primary." Specifically, the plaintiffs contend that they were not required to establish that a different candidate *would have* prevailed but for the improprieties in the absentee ballot process, but only that "(1) there were substantial violations of the requirements of [§ 9-329a (a)], such as errors in the rulings of an election official or officials or mistakes in the counts of the votes]; and (2) as a result of those [errors or mistakes], the reliability of the result of the election is seriously in doubt." (Footnote omitted; internal quotation marks omitted.) *Bauer* v. *Souto*, supra, 277 Conn. 840.

This court previously has had occasion to construe the phrase "the result of such primary might have been different" as used in § 9-329a (b). In *Penn* v. *Irizarry*, 220 Conn. 682, 688, 600 A.2d 1024 (1991), this court observed that the word "might," as used in this provision, was ambiguous because of "the various gradations of meaning that lexicographers attribute to the word, which include 'probability' as well as 'possibility.' " We then stated that "[t]he ambiguity inherent in the use of 'might' in the first condition cannot be allowed to

obfuscate the relative clarity of the second condition, inability to determine the outcome of a primary election." Id. Because the trial court in *Penn* had "concluded that [it] was able to determine the result of the contested primary, because [it] found that the various irregularities relied upon had not affected the outcome," and because "[t]he plaintiff [had] not challenged that factual finding except by pointing to the possibility of a different result," this court concluded that the trial court correctly determined that the plaintiff was not entitled to a new primary. Id.

In *Caruso II*, supra, 285 Conn. 649, the plaintiff contended that this court in *Penn* had "too literally construed the language in . . . § 9-329a, so that basically [the plaintiff's] burden became showing that but for the irregularities there *would have been* a different result . . . ."[6] (Emphasis in original; internal quotation marks

[6] We stated in *Caruso II* that this court "did not conclude in *Penn* that a plaintiff cannot prevail in an action under § 9-329a if the trial court is able to determine the result of an election, *regardless* of how unreliable that determination is. We concluded only that the plaintiff in *Penn* could not prevail because the trial court had found that the official misconduct *had not affected the outcome* and the plaintiff had not challenged that finding." (Emphasis in original.) *Caruso II*, supra, 285 Conn. 649. We acknowledge that the plaintiff in *Penn* contended on appeal that he was entitled to an order directing a new primary because there was a *possibility* of a different result. *Penn* v. *Irizarry*, supra, 220 Conn. 687–88. Thus, it is difficult to reconcile our conclusion in that case that the trial court "was able to determine the result of the contested primary, because [it] found that the various irregularities relied upon had not affected the outcome"; id., 688; with our acknowledgement that the "might have been different" language in § 9-329a (b) could mean the mere possibility of a different result. In other words, if "might have been different" means that a new election should be ordered if there is a mere possibility of a different result, it is difficult to see how a court could, at the same time, *both* (1) be able to determine the result of the contested primary so as to obviate the need for a new primary *and* (2) conclude that there was a possibility of a different result. In any event, it is clear from our analysis in *Caruso* that proof of a mere possibility of a different result is not sufficient to entitle the plaintiff to an order directing a new primary. Rather, the plaintiff must establish that "the reliability of the result of the election is *seriously in doubt*." (Emphasis in original; internal quotation marks omitted.) *Caruso II*, supra, 649.

omitted.) The plaintiff contended that this court should adopt the standard that the court had applied in *Bortner* v. *Woodbridge*, supra, 250 Conn. 241, when construing a similar provision of § 9-328. In *Bortner*, this court held that, to be entitled to an order for a new election, the plaintiff was not required to show that he *would have* prevailed in the election but for the alleged irregularities. Id., 258. Rather, the plaintiff must show that "(1) there were *substantial* violations of the requirements of the statute . . . and (2) as a result of those violations, the reliability of the result of the election is *seriously in doubt.*" (Emphasis added.) Id.

We agreed with the plaintiff in *Caruso II* that our interpretation of § 9-328 in *Bortner* should guide our interpretation of § 9-329a (b). See *Caruso II*, supra, 285 Conn. 649–50 n.25. We then observed that the trial court in that case repeatedly had stated "that the plaintiff could not prevail unless he established that, but for [the conduct complained of], the result of the primary election 'might have been different.' " Id., 650. In addition, the trial court had indicated that the plaintiff must establish that "the result of the election [was] seriously in doubt." (Internal quotation marks omitted.) Id. We concluded, therefore, that the trial court had applied the proper standard. Id. Thus, we clearly held in *Caruso II* that the phrase "the result of [the] primary might have been different," as used in § 9-329a (b), means that the reliability of the election result is seriously in doubt due to substantial violations of § 9-329a (a) (1) or (2).

In the present case, the trial court stated three times in its memorandum of decision that it would be authorized to order a new primary if it found that the result of the first primary "might have been different." The court, quoting *Bortner* v. *Woodbridge*, supra, 250 Conn. 263, also observed that the plaintiffs were required to prove by a fair preponderance of the evidence that " '(1)

there were . . . substantial mistakes in the count of the votes; and (2) as a result of those errors or mistakes, the reliability of the result of the election . . . is seriously in doubt.' " Thus, although the trial court stated at one point in its memorandum of decision that the plaintiffs had failed to establish that the "the result of the primary would have been different" but for the mistake in the count of the votes, when the memorandum is read in its entirety, it is clear that the trial court properly understood and applied the "might have been different" standard. See *Caruso II*, supra, 285 Conn. 650 n.26 (rejecting plaintiff's claim that single reference to "would have been different" standard showed that trial court applied that standard when it repeatedly cited correct "might have been different" standard [emphasis omitted; internal quotation marks omitted]).

To the extent that the plaintiffs contend that the requirement under *Bortner* v. *Woodbridge*, supra, 250 Conn. 263, that they establish that "the reliability of the result of the election . . . is seriously in doubt" does not require them to establish that there is a significant risk that the *result* would have been different but for the conduct complained of, but only that there were significant improprieties in the election *process*, we expressly held to the contrary in *Caruso II*, supra, 285 Conn. 618. We stated in that case that, "[a]lthough we are mindful of the difficulties that plaintiffs face in meeting [the heavy burden of *proving* by a preponderance of the evidence that any irregularities in the election process actually, and seriously, undermined the reliability of the election *results*] in light of the statutory time constraints on election contests and the magnitude and complexity of the election process, our limited statutory role in that process and our need to exercise great caution when carrying out that role compel the conclusion that *proof of irregularities in the process is not sufficient to overturn an election in the absence*

of proof that any of the irregularities actually affected the result." (Emphasis altered.) Id., 653. It is also clear that the phrase "reliability of the result" means the reliability of the voters' choice of candidate and not the reliability of the precise vote count. For example, if an election result were 1000 votes for candidate A and 1200 votes for candidate B, the fact that the plaintiff established that candidate A actually received 1010 votes and candidate B actually received 1190 votes would not entitle the plaintiff to a new election on the ground that the initial count was unreliable because it would still be clear that candidate B was the winning candidate. We conclude, therefore, that the trial court applied the proper legal standard.

We further conclude that the trial court properly found that, under this standard, the plaintiffs had failed to establish that the reliability of the result of the primary election is seriously in doubt. Indeed, they have not expressly challenged any of the court's factual findings or legal conclusions as to which absentee ballots should have been counted, and they have not pointed to any evidence that would compel a finding that there is a serious risk that Moore or any of the other candidates who lost in the primary election would have won in the absence of the improprieties in the handling of the absentee ballots. Accordingly, we conclude that the trial court correctly determined that the plaintiffs failed to establish that they were entitled to an order directing a new special primary election.

The judgment is affirmed.

In this opinion the other justices concurred.