

Case No. 3:20-cv-534 (JBA)

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Tre Mcpherson Et. Al.

Vs.

Ned Lamont Et. Al.

"INTERVENTION F.R.C.P. 24(a)(1),(2) OF "RIGHT" IS

"MY" DERIVATIVE ACTION UNDER "F.R.C.P. 23.1"

"RIGHT TO REDRESS"

Exhibit # 6

In Re

UNITED STATES "SUPREME" COURT

MICHAEL A. YOUNG

CASE NO.

V.

19-8436

NED LAMONT ET. AL.

APRIL 29, 2020

"RULE 23" application "SEE" Certification page 4 to
MOTION FOR "EMERGENCY" RULE 36 "DECLARATION TO ENLARGEMENT ON
PERSONAL RECOGNIZANCE PENDING "FINALITY"

"NOW"... Comes petitioner already with "GOOD" forgoing "CAUSE" explicitly "SHOWN" an "MOVES" this
 "HONORABLE" Court "SUPREME CHIEF" Justice "JOHN ROBERTS" under "RULE 36.3(a), (b) for 36.4
 "EMERGENCY" declaration to immediate "ENLARGEMENT" on "PERSONAL RECOGNIZANCE" pending "MY"
 "FINALITY" in above "ENTITLED" matter... In further support thereof as follows... "AN" Although
"NOT" provisional "REQUIRED" this "MARA SILVER" dictated appended "ORDERS" from Courts "BELOW"
are "TWO FOLD" here No. 18-7321/19-8436 for U.S. Court of Appeals at [APPENDIX A, B, C, E, F, G, R]
U.S. District Court [APPENDIX J, K]... The States "HIGH" Courts [APPENDIX M, N]!!!
 I. "CORRUPT" STATE COURT "REVIEW"

ERROR OF "FACTUAL LAW"

1. "YES"... As I "DENY" the "RIGHT" to remain "SILENT" the "PROPER" standard of "LEGAL" review here
 exceeds way "BEYOND" the constitutional "LIMITATIONS" of "OBSTRUCTIONIST" Oliver "MISCONDUCTED"
 Planko "MISAPPLICATION"... "SEE" trial court 11-13-14 transcript 3:16-cv-1720 (AWT) [Doc. 20] "FOUND"
 at #1, 2... "YES"... In egregious "NON" compliance "THIS CASE" is much "MORE" consistent with state court
 "SUPREME AUTHORITY" confirmation set forth by State v. LaFleur 307 Conn. 115... In that it "FAILS"
 to conform to "REQUIREMENTS" of "FEDERAL" constitutional "LAW" in light of "CHIEF" Justice "CHASE T.
 ROGERS" supervisory alignment "HOLDING" with "THIS" courts "CHIEF" Justice "ROBERT A. KATZMANN" panel
 "LAW OF CASE" in U.S.v. Dhinsa 243 F.3d 635... Consistent with "OTHER" circuit decisions "FOUND" in
 U.S.v. Vasques-Chan 978 F.2d 546; U.S.v. Spinney 65 F.3d 231; and U.S.v. Dinkane 17 F.3d 1192...
 "YES"... Making "PROPER" subject of the "VACATURE" approach that "MUST" provide immediate relief
 "RIGHTS NOW" with "NO" further "ACTUAL INJURY"!!!

ERROR OF "FACT" RENDERING JUDGMENT "VOID"II. "CORRUPT" STATE COURT JURY SELECTION

2. As "YOU" know I have been "DENIED" access to "ALL" meaningful jury selection transcripts, audio
 recordings, and "MY RIGHTS" to "ANY" disclosure as "NECESSARY" for "PROPER" preparation and
 presentation of "MY" motion challenging this "ILLEGAL" selection procedure "ALL" in "VIOLATION" of
 28 USC § 1867(f)... "SO"... Just recently mid-January 2017 over 3 years latter I "FINALLY" obtained
 "ONLY" "LIMITED" transcribed access to [T: 8-14-13/8-15-13] "SEE" 3:16-cv-1720 (AWT) [Doc. 20] "AGAIN"
 at #1, 2... Also worth "NOTING"... Simultaneous with "MY" 2-23-17 state court "ILLEGAL" jury selection
 challenge an "OBSTRUCTIONIST" Oliver "DISCARDED" filing 3:16-cv-1720 (AWT) [Doc. 21] at #1 "SEE"
 [EXHIBIT 7]... Here "ALL" (AWT) pleading "DENIALS" with "PREMATURE" case "DISMISSALS" were "ALL" entered
 upon the docket in a 2-23-17 after hours "PARTY"... 3:16-cv-1720 (AWT) [Doc. 14], ... 3:16-cv-1744 (AWT)
 and 3:16-cv-1798 (AWT) [Doc. 13]!!!

3. Anyway, where upon "MY" intelligently "LAZER FOCUSED" review I've "NOTICED" in addition to "ALL" other countless mistated alterations documented throughout the "ENTIRE" transcribed process, "DECEITFULLY" here are "TWO" days "MANIPULATED" into "ONE" day with the existance of intentional "TAMPERING": [8-15-13]... Clearly convincingly resulting in "SEVERE" prejudicial "DEFECTS" during the appeal and throughout "ALL" post-conviction procedures... "AN". YUP!... Along with "OLIVERS" "UN" "FAIR"ness of available settlement procedure have and "STHIL" are in "FACT" in "THIS" unethical "VIOLATION" of the due process clause of the 14th amendment see Layne v. Gunter 559 F.2d 850: Morales v. Roque v. P.R. 558 F.2d 606: Burrell v. Swartz 558 F.supp. 91: U.S. v. Pratt 645 F.2d 89: Rheuark v. Shaw 628 F.2d 297: and Parker v. Texas 464 F.2d 572 !!!

4. "NOW"! "YOU" see upon "MORE" of "MY" COMPETENTLY "consistant" "LAZER FOCUSED" intelligence that "THIS" Rockville G.A. 19 jury selection process "VIOLATED" MY statutory and constitutional "RIGHTS"! "AN"... That "DECEITFULLY" executed "CORRUPT" plan here specifically "MANIPULATED" the "PROPER" requirements of Jury Selection and Service 28 U.S.C. §1861-1869 "ACT"! "YES"!.. Also resulting in disproportionate "IMPROPER" underrepresentation of "PROPER" county sections in "VIOLATION" of "MY RIGHTS" under "EQUAL" Protection Clause of the 5th amendment see U.S. v. Jackson 46 F.3d 322... "SHOWN" here in such egregious "NON" compliance with federal "MANDATE" of "RANDOM" "SELECTIONS" in this "MISCONDUCTED" venire drawn in "MISUSE" and "ABUSE" of "PROPER" delegated clerk "DUTIES" as set forth by 28 U.S.C. §1866(f)... see U.S. v. Kennedy 548 F.2d 604: Berry v. Cooper at 577 F.2d 322... Through of course "DELIBERATE" systematic "EXCLUSION" in this "PROVEN" Rockville G.A. 19 "ILLEGAL" jury selection process... "YUP"! "SO"!.. Also see Duren v. Missouri 439 U.S. 357: U.S. v. Rioux 97 F.3d 648: U.S. v. Gometz 730 F.2d 475: and Davis v. Warden 867 F.2d 1003... "YET"!.. In contrast with U.S. v. "YOUNG" 618 F.2d 281... "SO"!.. Consistantly "RIPE" for "ALL" sustained "RELIEF" as implicated in "YOUNG" at 1288 8, 9 "RIGHTS NOW" with "NO" further "ACTUAL INJURY"!!!

5. "BUT"!.. Even "MORE" so... Excluded panel members from sevice for invidious reasons with use of "TACTICAL" unethical "FORCED" judicial (Mullarkey J) "MANUVERS" [T:8-15-13pg23]... "YET" another "VIOLATION" of 28 U.S.C. §1862, with a "FACT" verified unconstitutional demonstration also in "VIOLATION" of 28 U.S.C. §1863... Obviously, "ALL" systematic "EXCLUSIONS" clearly "ENABLES" meeting the "BURDEN" of already "SHOWN" substantial "FAILURE" to "COMPLY" with "REQUIREMENTS" of the "ACT", of course "MY" requirement set forth by 28 U.S.C. §1867(a)... "AN"... I also contend while "IMPROPERLY" being "DENIED" further "ENTITLED" transcribing with "REFUSED" audio recordings and "RIGHT" to access discovery "ONLY" hampers "ANY" further "ABILITY", another "IMPROPER" curtailment of "MY RIGHTS"... "YA"... "NOW"!.. Demonstrated by "MY" jury selection "EXCERPT" obtained 6-6-17, "INCOMPLETE" of course "ONLY" just recently 3-3-17 "IMPROPERLY" transcribed with "MORE" telling (Mullarkey) "CIRCUS COURT ACTION" [T:8-9-13pg1-29]... "AN"... Revealing "MORE" pre-arraigned "CORRUPT" verified "STAGE SETTING" for "YES"... another "TRUE" intentional "SERIOUS" structural "ERROR" in "DECEIT" [T:8-9-13pg29-36]... "YUP"!.. Obviously meeting the extraordinary "CRITERIA" in "THIS HABEAS APPEAL" that is "NEEDED" for being "GRANTED" "MY" immediate relief "RIGHTS NOW" with "NO" further "SUFFERING" of "ACTUAL INJURY"!!!

III. "CORRUPT"STATE COURT"SECRET WATER SIGNAL"/"SECRET CODES"

6. "MORE"IMPORTANTLY"..Consistant with new"LAW OF CASE"uncovered in State v."RANDOLPH"at 2011 Conn.Super"LEXIS"125:2011WL 522092 here"CRIMINAL"KWAK"(KKs)"CORRUPT"judicial"SECRET""WATER"undisputable"SIGNAL"is"SET UP"in"THIS CASE"at[T:8-26-13pg162]"SEE"3:16-cv-1720(AWT) [Doc.12]"FOUND"at#1.."YA"..Through the states"KNOWN"by"ALL"[Line 9-10] use of"UNCORRECTED" solicited"PERJURY"followed by"PRE-STAGED"Professor"MALPRACTICE"with"NO FURTHER"direct nor "ANY"redirect examination.[T:8-26-13pg163-180]...Also Professor confirmed"HAND"signals at [Line 25-27].."AN"..That"CORROBORATION"is depicted by"SMART"aleck"SECRET CODE"in"MISSING" witness"FORUM"!!! [T:8-28-13pg141]"SEE"3:16-cv-1720(AWT)[Doc.12]"FOUND"at#2#3!!!
7. Then"WE HAVE"the"NON"disclosed"HAND/HEAD"nod prosecutorial"SECRET CODE"(KWAK)judicially "MISCONDUCTED"through"SECRET WATER SIGNAL"for"SECOND"(2)"TIME"at[8-28-13pg141]"SEE""SAME" 3:16-cv-1720(AWT)[Doc.12]"FOUND"at#2#3...With of course the Professors overruled"HEAD"nod "SECRET CODE"objection [pg.92], together with"HIS"[pg.1]"RESPONSE"to(KWAK)"SECRET"inuendo in "LIE"of"DECEIT"are"CORRUPT"intentional"ACTS"manipulating the"ACCURATE"record,an"STAGE SETTING" for"END OF DAY"set up"CARPENTER SCAM"!!![T:8-28-13pg198-201]!!!
8. "SO"..After"MORE"uncorrected"KNOWN"Detective Carpenter"PERJURY"regarding:Why she don't want to be here today"[T:8-29-13pg9-10]"SEE"3:16-cv-1720(AWT)[Doc.12]"FOUND"at#4#5...another "MISCONDUCTED"(KWAK)invoked"SECRET CODE"jesture"ENDED"Professor"MALPRACTICE"cross examination, "CORROBORATED"by"HIS"apology to everyone"FOUND"here on [pg.39]..Then undergoing anxiety"PANIC" of"CARPENTER"organized"KNOWN"solicited"PERJURY"her"SECRET SIGNAL"of"RETREAT"is immediately "MET"with"THIRD"(3)(KWAK)"MISCONDUCTED"judicial"SECRET WATER SIGNAL"ending prosecutorial questioning again invoking"NO"Professor Pattis"REDIRECT"[T:8-29-13pg42].."NOW"..This direct prosecutorial"KNOWN"Trooper"BARROWS"solicited"PERJURY"organized"TIMELY"ending is"BEYOND" "absolute certainty""STAGED SETTING"corroborating"CRIMINAL"KWAK"(KKs)"FOURTH"(4)"SECRET WATER" "SIGNAL"for"BARROWS"relayed confirmation"BACK"in affirmative"SECRET CODE"[T:8-29-13pg88-91].."AN".."YA"..Undisputably"MUST"provide"MY"immediate relief"RIGHTS NOW"with"NO"further" "SUFFERING"of"ACTUAL INJURY"!!!
9. "HERE"...Corroboration of"MORE"Rockville GA 19"SECRET SIGNAL"use in Tolland County "CODE"of ongoing Corporate"CORRUPTION"is"PROVEN"by"SFERRAZZA"Court with constitutional verification.[EXHIBIT 1].."YES"..With"MOORE"a"BLATANT"inapplicable"SUA SPONTE"judicial "CORRUPT"doctrine in"SFERRAZZA"deliberate"BY PASS"procedural"RULE OF EVIL",yes,"HIS"spoken "CODE"is an indisputable"CREATION"to"CLEARLY"thwart"JUSTICE"for"ALL"..see Barlow v.Comm. of Corr.166 Conn.App.408(quoted)150 Conn.App.781 at[EXHIBIT 2,3]!!!

10. "NOW"...Even "MOORE" outlined "SFERRAZZA" Habeas "RULE OF EVIL" deliberate "BY PASS", contrary to "ALL" articulated "FACTS" that "IS" incompatible with constitutional "RULE OF LAW", yes, recently "PROMOTED" by Connecticut "SUPREME" Court opinion. 2019 Conn. LEXIS 158; 2019 WL 2494788. "FOUND" here at [EXHIBIT 4]!!!

11. "SPECIAL NOTE"...This "PATTERN" is "SAME" verified "REITERATION" in "MIMIC" with "MY" already demonstrated constitutional "PROOF", corroborating "MERITS" of "CRIMINAL" judicial "MISCONDUCT" by "DISHONOR" of "SAMUAL SFERRAZZA". "AN"...Consistent with "DISHONORABLE" recent (2019) "BEDROCK" GA 19 "ACTIONS" of "JOHN M. NEWSOM" along "SEVERAL" others as "FOUND" in "BOTH MY" civil "R.I.C.O" 18 U.S.C. § 1961-67 "CAUSE OF ACTIONS". "YES" Pending in this U.S. "SUPREME" Court at NO. 19-8284!

Wherefore with "RESPONDENTS" stated position in "EXERSIZE" of "FIFTH" amendment "SILENCE"... "YA"... Under "MY COMPETENTLY" articulated compliant "SHOWING" petitioner explicitly request the constitutional "AUTHORITY" of "SUPREME" Court "CHIEF" Justice "JOHN ROBERTS" under "GREAT HONORABLE" 28 U.S.C. § 2601 to "TAKE" expeditious "CORRECTIVE ACTION" and "GRANT" this "EMERGENCY" declaration, then "ORDER MY" immediate "ENLARGEMENT" on "PERSONAL RECOGNIZANCE" pending "MY FINALITY" in above "ENTITLED" forgoing "REALM" of jurisdictional "SUBJECT MATTER"!!!

EXPLICITLY SUBMITTED

BY: MA "Factual Innocence"!!!
MICHAEL A. YOUNG

The "SOLE FORCES" of "TOP SECRET SPECIAL" intelligence eliminating "ALL" forum of malicious "LAW"!!!

DECLARATION UNDER 18 U.S.C. § 1621/28 U.S.C. § 1746

I, Michael A. Young declare in "TRUTH" affidavit process, certified under penalty of "PERJURY" that the information in this application is "TRUE" and "ACCURATE" to the "BEST" of "MY" knowledge an intelligence which "CAN ONLY" be "REBUTED" by "SAME" in "RESPONSE" thereto. Filed under "SUPREME" Court "RULE 29.2" procedure for the benefit of "TIMELY" filing... The undersigned further declares that "HE" is the petitioner in this "ACTION" and "HIS" forgoing application was mailed first-class postage prepaid on April 30th, 2020 placed in the institutions "LEGAL" mail system. "AN"

Executed at Cheshire CI. Cheshire CT. on April 30th, 2020. "AN"

"AGAIN" May 20, 2020!!!

BY: MA "Factual Innocence"!!!
MICHAEL A. YOUNG

FURTHER DECLARATION UNDER 18 U.S.C. § 1621/28 U.S.C. § 1746

I, Michael A. Young further "DECLARE" this "SUPREME" Court "RULE 21" motion is further certified as "COMPETENT" compliant application under "RULE 22" for "ENTITLEMENT" as set forth by "OUR" U.S. "SUPREME" Court "RULE 36.3(a), (b), and 36.4" applicable "RELIEF"!!!

BY: MA "Factual Innocence"!!!
MICHAEL A. YOUNG

Exhibit # 1



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Memorandum

www.ct.gov

TO: Michael Gailor
Executive Assistant State's Attorney

FROM: Michael Sullivan
Chief Inspector

DATE: 02/02/2017

SUBJECT: Allegations Made by Court Reporter Lori Guegel

At your direction I initiated an investigation into the allegations made by Court Reporter Lori Guegel.

On 01/06/2017 (1300 hours) I met with Guegel at the Tolland County Courthouse. I had previously spoken to Guegel by telephone and explained my inquiry to her. She indicated she had spoken to her supervisor and would meet with me. Guegel presented as very reluctant to speak with me. It was clear that she felt her job was in jeopardy. We spoke for at least ten minutes before she agreed to speak with me about the allegations she initiated.

Guegel stated she was the court reporter on the matter of Daniel Diaz v. Warden (12/07/2016.) She believed the trial last four days. Guegel reported the first three days were uneventful.

Guegel stated that on the fourth day SASA Mary Rose Palmese was testifying. Guegel explained that her position in the courtroom faces the gallery. The witness and the judge are behind her. Guegel stated she can see the gallery but cannot see the witness or the judge. Guegel stated there was one male in the gallery, believed to be sitting in the second row, behind Daniel Diaz. Guegel stated she later learned from Defense Attorney Stephanie Evans that this male was Jerry Chrostowski.

Guegel stated that Palmese was testifying for approximately one hour. Guegel stated that approximately six (6) times she observed hand signals being made by Chrostowski to Palmese. Guegel stated that on each of these occasions the defense attorney would ask Palmese a question. Palmese would start to answer and receive a hand signal from Chrostowski. Each time the judge would interrupt or let her finish and then state the answer



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Memorandum

that Palmese meant to answer. Guegel stated that on each of these occasions Chrostowski and SASA Jo Anne Sulik would cover their faces and laugh.

Guegel was asked to explain the hand signals. Guegel described one as a motion of the hand near the neck and the other as a motion of the hand by the side of the head.

Guegel stated that the next witness to testify was a "cop" (Attorney Frank Canace.) Guegel stated the defense attorney starting to ask questions about hand signals being used in a prior trial. Guegel stated, "that's when it fully hit me." Guegel stated she then realized that Chrostowski had been signaling Palmese.

Guegel stated that it appeared to her that the Judge, Palmese, and Chrostowski were working in a coordinated fashion. She believes that the Judge was interrupting Palmese and then answering the questions for her.

Guegel stated that during a break she ran into the defense attorney on the elevator. Guegel advised the defense attorney what she had observed.

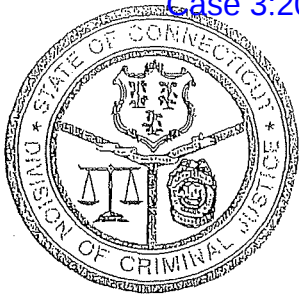
Guegel stated if she looked at the transcript she would be able to point out the parts of the testimony where the signaling took place. Guegel stated she was not allowed to type the transcript and directed me to her supervisor, Sharon Rosato. Guegel agreed to meet at a later time to review the transcript when it was obtained by me.

I met with Sharon Rosato immediately after Guegel and ordered the transcript.

Temporary Assistant Clerk (TAC) Mary Clark was interviewed on 01/06/2017. Clark stated she was the Clerk in the courtroom on 12/07/2016 in the case of Daniel Diaz v. Warden.

Clark stated that she sits to the right of the Judge and in front of the Petitioner. The witness sits to the left of the Judge. Clark stated she cannot see the witness from her position. Clark stated she did see one male in the gallery (Chrostowski) sitting behind the Petitioner. Clark stated she did not see Chrostowski making hand signals to the witness. Clark stated she did not see the Judge cut off the witness or suggest answers to the witness.

Clark stated she was aware of the general allegations in this case as a result of hearing from others in the courthouse.



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On 01/06/2017 I interviewed Judicial Marshal Rick Barile. Barile was one the marshal's assigned to the case of Daniel Diaz v. Warden on 12/07/2016. Barile stated he did see one male in the gallery behind the Petitioner. Barile did not see any hand signals being made by this male. Barile stated the Judge did nothing out of the ordinary during the trial.

Barile stated that Palmese was an authoritative figure and didn't need any directions during her testimony. It was clear to Barile that Palmese didn't like being questioned and was used to being the one asking the questions.

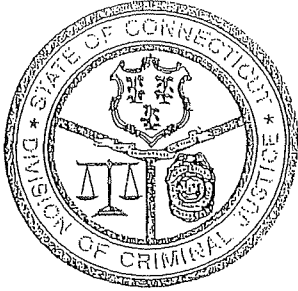
Michael Pio (Lead Marshal) identified Pat Coomey as the second marshal assigned to the Daniel Diaz v. Warden courtroom on 12/07/2016. I interviewed Coomey on 01/06/2017. Coomey stated he had no recollection of being in the courtroom. Coomey stated that if nothing out of the ordinary happened then each day blends together and he couldn't differentiate 12/07/2016 from any other day.

On 02/01/2017 I met with Guegel at the Tolland County Courthouse a second time. Guegel was given a copy of the transcript from 12/07/2016 and asked to point out the areas of the transcript where she alleges signals were involved. Guegel agreed to do so and asked if she could read and absorb the transcript first and meet with me another date. I asked Guegel to read the transcript and makes notations where certain things happened. She agreed to do so.

Guegel was asked to explain her statement to Judge Bright that Diaz had been wrongfully convicted. Guegel stated that she formed this "opinion" during Canace's testimony. Canace testified that he was also a police officer and did not advise Diaz of this fact. This formed the basis of Guegel's "opinion."

I also advised Guegel that in reviewing the transcript it was apparent that Evan's reference to hand signals in a prior trial was a trial not related to Diaz. Guegel stated she did not know what trial Evan's was referring to. The testimony just made her realize what was happening in Diaz's trial.

On 02/02/2017 I received a telephone call from Guegel. Guegel stated she was "not comfortable with speaking to [me] again." Guegel stated that her supervisor advised her today that she (supervisor) would be docking Guegel's pay for the time she spent speaking to me on 02/01/2017. Guegel stated she knows that her allegations have put her on people's



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"radar." As a result of her pay being docked Guegel feels that her job is in jeopardy. Guegel stated she would not meet with me again and will be returning the transcript to me.

End.

Exhibit # 2

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JUNE, 2016

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Barlow v. Commissioner of Correction

ALISON BARLOW *v.* COMMISSIONER
OF CORRECTION
(AC 37417)

Beach, Keller and West, Js.

Syllabus

The petitioner, who had been convicted of various crimes, claimed that his trial counsel, M, and his appellate counsel, N, rendered ineffective assistance. The habeas court rendered judgment dismissing the claim against M and denying the claim against N. The petitioner thereafter appealed to this court, which reversed the habeas court's judgment in part and remanded the case to the habeas court for further proceedings.

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This court concluded as a matter of law that M rendered ineffective assistance in having failed to advise the petitioner adequately concerning the trial court's plea offer. This court also determined that because M had rendered ineffective assistance, it did not need to consider whether N had rendered deficient performance in failing to pursue a claim of ineffective assistance against M. This court's remand order, *inter alia*, directed the habeas court to conduct further proceedings on the issue of whether the petitioner had been prejudiced by M's deficient performance. Thereafter, on remand, the proceedings were presided over by the same judge who presided over the initial habeas proceedings and issued the judgment that was reversed in part. The habeas court first conducted a hearing concerning this court's remand order. The petitioner argued that the remand order required a new evidentiary hearing and that the matter should be decided by a different judge. The respondent Commissioner of Correction argued that the remand order was in the nature of an articulation request and did not require a new evidentiary hearing, but only a decision as to the issue of prejudice on the basis of the evidence already in the record. The court ruled that the respondent's interpretation was more logical and that the remand order did not require a new evidentiary hearing, but merely necessitated further proceedings. Thereafter, the court denied the petitioner's motion for recusal in which he argued that the court was precluded by statute (§ 51-183c) and rule of practice (§ 1-22 [a]) from retrying the case on remand. The court thereafter denied the petition for a writ of habeas corpus. The court then granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed, *inter alia*, that the habeas court improperly denied his motion for recusal and his request for an evidentiary hearing. *Held:*

1. The habeas court improperly denied the petitioner's motion for recusal because § 51-183c necessitated that a different judge preside over the proceedings on remand, as that statute applied to the habeas judge here who tried the case without a jury and whose judgment later was reversed by this court; accordingly, because the respondent could not demonstrate that the habeas judge's failure to recuse himself was harmless error, the habeas court's judgment was reversed and the case was remanded so that a different habeas judge could try the issue of whether the petitioner was prejudiced by M's deficient performance.
2. This court determined that its previous remand order did not preclude an evidentiary hearing or limit the habeas court to a consideration of only the evidence that had been admitted in the prior habeas proceeding, as it was not appropriate for the habeas court to construe the remand order as being in the nature of an articulation request, and there were no findings as to the issue of prejudice for the court to explain because it did not make findings as to prejudice in its prior opinion; moreover, if this court had determined that it was appropriate for the habeas court to make a finding with respect to prejudice on the basis of the evidence

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in the record, it would not have ordered further proceedings for that purpose, but would have instructed the habeas court to articulate with respect to that limited factual issue that had been litigated by the parties at the first habeas trial.

Argued February 9—officially released June 28, 2016

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza, J.*; judgment dismissing the first count of the petition and denying the second count of the petition, from which the petitioner, on the granting of certification, appealed to this court; thereafter, this court reversed in part the judgment of the habeas court and remanded the case for further proceedings; subsequently, the court, *Sferrazza, J.*, denied the petitioner's motion for recusal; thereafter, the court, *Sferrazza, J.*, denied the petition and rendered judgment thereon, and the petitioner, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Naomi T. Fetterman, with whom was *Aaron J. Romano*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. Following a grant of certification to appeal, the petitioner, Alison Barlow, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court improperly (1) denied his motion for recusal, (2) denied his request for a new evidentiary hearing, and (3) concluded that he failed to demonstrate prejudice as a result of his trial counsel's deficient per-

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formance.¹ We agree with the first and second claims raised by the petitioner, reverse the judgment of the habeas court, and remand the case for further proceedings consistent with this opinion.

The following facts and procedural history are relevant to this appeal. In 1998, following a jury trial, the petitioner was convicted of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a, two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and alteration of a firearm identification number in violation of General Statutes § 29-36. The petitioner was sentenced to a total effective term of thirty-five years imprisonment. Following a direct appeal brought by the petitioner, this court affirmed the judgment of conviction. *State v. Barlow*, 70 Conn. App. 232, 797 A.2d 605, cert. denied, 261 Conn. 929, 806 A.2d 1067 (2002).

Following his conviction, the petitioner brought several petitions for a writ of habeas corpus. At issue in the present appeal is an amended petition that the petitioner filed on January 17, 2002—his third petition for a writ of habeas corpus—in which he alleged in count one that his trial counsel, Attorney Sheridan L. Moore, rendered ineffective assistance in connection with a plea bargain offer² and in connection with the represen-

¹ Because our resolution of the petitioner's first claim is dispositive of the appeal, we need not address his third claim. We will address his second claim because the issue involved therein is likely to arise during the proceedings on remand.

² Specifically, the petitioner alleged: "Trial counsel's representation with regard to the plea bargain offer was ineffective in the following ways:

"a. counsel failed to advise the petitioner that the offer was a one-time offer and if not accepted immediately it would be withdrawn;

"b. counsel failed to explain the court's position regarding the offer;

"c. counsel failed to explain that the court would not accept a counteroffer from the petitioner;

"d. counsel failed to return to the lockup and advise the petitioner that the court rejected his counteroffer so that the petitioner would have an opportunity to accept the court's offer;

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tation that she afforded the petitioner during the trial generally.³ In count two, the petitioner alleged that his prior habeas counsel, Attorney Christopher Neary, rendered ineffective assistance by failing to pursue a claim that Moore had rendered ineffective representation during his criminal trial.

Following a hearing, the habeas court, *Sferrazza, J.*, dismissed the amended petition with respect to the claim of ineffective representation by Moore set forth in count one. With respect to this count, the court, *sua sponte*, invoked the doctrine of deliberate bypass and stated, in relevant part: "This, the petitioner's third

"e. counsel failed to provide a meaningful explanation of the plea offer extended by the court;

"f. counsel failed to advise the petitioner as [to] the benefits of accepting the court's offer;

"g. counsel failed to recommend the petitioner accept a beneficial offer;

"h. counsel failed to request [that] the court continue the case to give the petitioner an opportunity to consider the offer and/or discuss the offer with family before the court withdrew the offer;

"i. counsel failed to discuss the strength of the state's case and evidence before the plea offer was withdrawn;

"j. counsel failed to advise the petitioner of the mandatory minimums, maximum sentences of each separate offense and the effect of consecutive sentences;

"k. counsel failed to ensure [that] the petitioner had an opportunity to accept the court's offer after he was fully advised of all implications, legal and otherwise."

³ The petitioner alleged: "Trial counsel's representation with regard to trial was ineffective in the following ways:

"a. counsel failed to visit the petitioner in jail to discuss the state's evidence, the strength of the state's case, the defenses which could be presented and evidence which could be presented in defense of the case;

"b. counsel failed to keep [the] petitioner informed as to the status of the case;

"c. counsel failed to communicate with [the] petitioner either in writing or by telephone;

"d. counsel failed to advise the petitioner of the specific elements of each crime charged and the maximum and minimum penalties which could be imposed if convicted;

"e. counsel failed to meet with potential witnesses prior to trial;

"f. counsel failed to request [that] the physical evidence be examined by the state forensics laboratory;

"g. counsel failed to develop any theory of defense for trial;

"h. counsel failed to file a motion in limine to prevent testimony about statements allegedly made by the petitioner to police officers;

"i. counsel failed to do any investigation prior to trial."

habeas action in which he has asserted claims of ineffectiveness against Moore, is a blatant example of the procedural evils that the deliberate bypass rule was created to thwart." The court denied the petition with respect to the claim of ineffective representation by Neary set forth in count two. In rejecting the claim that Neary rendered ineffective representation for, in relevant part, failing to pursue a claim of ineffective representation against Moore, the court made several findings with respect to the nature of Moore's representation of the petitioner with respect to the plea offer. In relevant part, the court stated: "The court has found that Moore fully apprised the petitioner as to the terms of the plea offer, including its temporary nature, the strengths and weaknesses of the prosecution and defense cases, and the possible outcomes after trial.

"Moore, at the time of the petitioner's criminal case, had seventeen years of experience handling serious criminal matters as a special public defender and five and one-half years as a public defender for the Waterbury judicial district. This experience entailed defending clients charged with murder and trying such cases to verdict. No expert witness testified critically of Moore's representation of the petitioner. To the contrary, Attorney Neary averred that he examined Moore's performance for the petitioner's defense and found no basis for such an ineffective assistance claim against her.

"The court determines that the petitioner has failed to prove that Moore was deficient in any of the ways alleged surrounding the petitioner's rejection of the nine year plea offer. As a result, the petitioner has also failed to meet his burden of establishing that [prior habeas counsel had] rendered ineffective assistance by withdrawing the claims against Moore through amended petitions." (Citations omitted.)

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The petitioner appealed to this court from the judgment of the habeas court. With respect to the petitioner's claim that the habeas court improperly dismissed his claim that Moore had rendered ineffective assistance with respect to the trial court's plea offer, this court ruled that, in the absence of any claim by the respondent, the Commissioner of Correction, that the doctrine of deliberate bypass applied in the present case, the habeas court erroneously had relied on that doctrine in dismissing that aspect of the petition. *Barlow v. Commissioner of Correction*, 150 Conn. App. 781, 785-88, 93 A.3d 165 (2014). After reviewing the findings of the habeas court and the evidence in the record, which included Moore's testimony during the habeas trial, this court disagreed with the habeas court's assessment of Moore's representation. This court, referring to Moore's undisputed testimony at the habeas trial, concluded as a matter of law that Moore's performance with respect to the plea offer was deficient "because she did not give the petitioner her professional advice and assistance concerning, and her evaluation of, the court's plea offer." *Id.*, 802.

Although we resolved the issue of deficient performance in the petitioner's favor, this court rejected the petitioner's argument that, on the basis of the record, we could presume that he was prejudiced, under the applicable standard of prejudice, as a result of Moore's deficient performance concerning the plea offer. *Id.* This court agreed with the respondent that the habeas court was in the best position to determine an unresolved issue integral to whether the petitioner was prejudiced by Moore's deficient performance, specifically, "whether it is reasonably likely that the petitioner would have accepted the offer had he received adequate advice from Moore." *Id.*, 804. In light of our resolution of the claim concerning Moore, this court concluded that it did not need to consider, on its merits, "the issue of

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whether Neary's performance was deficient for failing to pursue the issue of Moore's performance." *Id.*, 783 n.1.

In the rescript of our opinion, this court set forth the following order: "The judgment is reversed in part and the case is remanded for further proceedings on the issue of whether the petitioner was prejudiced by counsel's deficient performance. In the event that the habeas court finds that the petitioner has established prejudice, and no timely appeal is taken from that decision, the judgment is reversed and the case is remanded with direction to grant the petition for a writ of habeas corpus. In the event that the habeas court finds that the petitioner has failed to demonstrate prejudice, and no timely appeal is taken from that decision, the judgment is reversed only as to form and the court is ordered to render judgment denying rather than dismissing the petition as it relates to the claim that Moore provided ineffective assistance of counsel." *Id.*, 804-805.

Judge Sferrazza, who had presided over the habeas proceedings and, as discussed previously in this opinion, had issued the prior judgment that was the subject of this court's prior decision in the habeas matter, presided over the proceedings on remand. The record reflects that on August 5, 2014, at a hearing following the issuance of this court's remand order, Judge Sferrazza asked the parties to express their positions with respect to several issues, including whether this court's remand order required the court to hold an evidentiary hearing or whether the order required the court to make the required finding with respect to prejudice on the basis of the evidence in the record. Additionally, Judge Sferrazza raised the issue of whether, following this court's reversal of his prior judgment, he was presumptively disqualified from continuing with the case.

The petitioner argued that this court's remand order required a new evidentiary hearing and argued that the

matter should be heard and decided by a different judge. The petitioner's attorney stated that the petitioner would not waive his right to have the matter heard by a different judge. The respondent argued that this court's remand order did not require a new evidentiary hearing, but merely a decision to be made on the basis of the evidence already in the record. Further, the respondent argued that, because Judge Sferrazza had not yet decided the specific factual issue set forth in this court's remand order, it was proper for him to hear and decide the matter. Thereafter, on August 11, 2014, Judge Sferrazza issued a memorandum of decision in which he concluded that this court's remand order did not require a new evidentiary hearing. In relevant part, the court stated: "The court and the parties have found this remand order somewhat perplexing. The respondent asserts that the Appellate Court's order is in the nature of an articulation order concerning the prejudice determination. Under this view, this court would simply review the evidence adduced at the habeas hearing and render a decision resolving the prejudice question."

"The petitioner, on the other hand, argues that the Appellate Court intended that a new evidentiary hearing take place at which the parties could introduce evidence not previously presented. He also contends that General Statutes § 51-183c would necessitate that a different habeas judge preside over the new evidentiary hearing." The court went on to conclude that the respondent's interpretation of the order was more logical. Among the reasons it set forth for its interpretation of this court's remand order, the court observed that the order did not explicitly mandate a new hearing, but merely necessitated further proceedings. Accordingly, with respect to the prejudice issue before the court, it directed the parties to submit supplemental briefs "based on the evidence previously admitted"

On August 15, 2014, the petitioner filed a motion for review of Judge Sferrazza's decision with this court. The respondent opposed the motion. This court dismissed the motion on the ground that the issues raised therein were not subject to interlocutory review.⁴

On September 24, 2014, the petitioner filed a motion for recusal in which he brought into focus some of the arguments he had raised at the previous hearing concerning this court's remand order.⁵ Relying on § 51-183c⁶ and Practice Book § 1-22 (a),⁷ the petitioner argued that, following this court's reversal of the prior judgment, Judge Sferrazza was prohibited from retrying the case on remand. Additionally, relying on rule 2.11 (a)⁸ of the Code of Judicial Conduct, the petitioner argued that recusal was warranted because Judge Sferrazza's impartiality during the proceedings on remand might reasonably be questioned. The petitioner, first noting that, in his prior decision, Judge Sferrazza, sua sponte, had applied the doctrine of deliberate bypass in the respondent's favor and, in the context of rejecting

⁴ As a result, this court's ruling on the motion for review did not assist in resolving the issues raised by Judge Sferrazza concerning the remand order.

⁵ Attached to the motion was an affidavit from the petitioner's counsel, Aaron J. Romano, in which he averred in relevant part that the motion was made in good faith and in furtherance of the petitioner's constitutional rights.

⁶ General Statutes § 51-183c, entitled, "Same judge not to preside at new trial," provides: "No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case."

⁷ Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct or because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal"

⁸ Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"

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the petitioner's claim against habeas counsel, had rejected the petitioner's argument that Moore had performed deficiently in connection with the plea agreement, argued: "It is difficult to conceive that the trial court will be able to render a finding that [the petitioner] was prejudiced by conduct that, on the same record, the trial court did not find to be deficient, and afford [the petitioner] the requested relief. In order to preserve the appearance of impartiality and [the petitioner's] constitutional rights to a fair trial, this court should recuse itself."

In his memorandum of decision denying the petitioner's motion for recusal, Judge Sferrazza stated in relevant part: "The court discerns no cogent reason for recusal. . . . [T]his court has construed the remand order to compel the court to issue findings and rulings pertinent to the prejudice component of [*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] without the taking of additional evidence. It would be impossible for a different judge to fulfill that mandate. This would fly in the teeth of the Appellate Court's remand order."

"More importantly, the mere fact that a trial court has ruled against a party on one aspect of a case and that ruling was reversed on appeal fails to implicate General Statutes § 51-183c. The Appellate Court did not order a new trial, nor did it reverse this court as to the *prejudice* prong of *Strickland*." (Emphasis in original.) The court, relying on *Taft v. Wheelabrator Putnam, Inc.*, 255 Conn. 916, 763 A.2d 1044 (2000), and *State v. Santiago*, 245 Conn. 301, 715 A.2d 1 (1998), concluded that recusal was not required by the Code of Judicial Conduct. The court stated in relevant part: "The present case, on remand, involves no new evidence. Although it is not an articulation order, which compels a trial court to explain the conclusion it reached previously, the remand order is in the nature of an articulation of

a previously undecided matter. . . . [R]eversal of a judge's decision on one, limited issue in a case does not disqualify the judge from further participation with respect to other aspects of the case despite having the salutary experience of being overturned by a higher tribunal."

After the court ruled on the motion for recusal, both the petitioner and the respondent filed briefs with respect to the issue set forth in this court's remand order. The respondent objected to any attempt by the petitioner to rely on matters that were outside of the evidence that had been admitted at the petitioner's habeas trial.

In his written memorandum of decision of November 17, 2014, which is the subject of this appeal, Judge Sferrazza stated: "Because the remand order [of the Appellate Court] lacks clarity in some respects, a controversy had arisen as to whether the Appellate Court intended to require an entirely new habeas trial, before a different habeas judge, limited to adjudicating the prejudice issue, or simply was returning the matter to this court to make findings and draw conclusions as to prejudice utilizing the prejudice test . . . based on the evidence previously admitted. This court resolved that conundrum . . . holding that the Appellate Court meant for this court to supplement its original decision by determining those factual issues as to prejudice, which were previously unaddressed [in its prior decision]."

In its memorandum of decision, the court set forth several findings concerning Moore that it had set forth in its prior memorandum of decision addressing the merits of the petition for a writ of habeas corpus. Although it is unnecessary for us to set forth these findings in detail, we observe that the court once again set forth a generally positive assessment of Moore's

performance with respect to the plea offer. The habeas court found that Moore advised the petitioner of the status of the plea offer made by the trial court, "thoroughly reviewed" the evidence and possible witnesses, discussed matters related to the plea negotiations, and cautioned the petitioner that "a jury might find the prosecution's case persuasive despite his denials of participation in the drive-by shooting" at issue in the case. The petitioner, who received a sentence of thirty-five years of incarceration, attempted to demonstrate that, with proper counsel from Moore, it is reasonably likely that he would have accepted a plea offer that would have required him to serve fourteen years, execution suspended after nine years. The court found: "At no time did the petitioner express any interest in accepting a plea disposition which entailed more than six years incarceration. At the habeas trial, the petitioner averred that, had Moore recommended that he agree to the plea offer as being in his best interest, he would have readily changed his plea and accepted the sentence indicated, namely, fourteen years, execution suspended after the service of nine years." After observing that this court had determined that Moore had performed deficiently for failing to provide the petitioner with professional advice and assistance, including her evaluation of the plea offer, the habeas court observed that the petitioner had not presented any expert evidence to support that determination. The court also observed that Neary had testified that Moore had "handled the petitioner's criminal matter properly"

The court went on to conclude that the petitioner failed to establish by a preponderance of the evidence that there was a reasonable likelihood that he would have accepted the proposed disposition and given up his right to a jury trial had Moore advised him that accepting the offer was in his best interest. Among the findings made by the court with respect to this

determination, the court found that the petitioner had believed that his codefendants planned on retracting their statements implicating him in the crimes, the petitioner had consented to Neary omitting allegations of ineffective assistance of counsel claims against Moore in the context of prior habeas matters, and that the petitioner had "acknowledged that he never inquired of Moore as to what he should do, nor about her lack of recommendation [with respect to the plea offer]." After observing that the petitioner had a lengthy criminal history and a familiarity with the criminal court system, the court stated: "If the petitioner was irresolute in his desire to go to trial, unless the plea offer was reduced to six years imprisonment, one would have expected him to request Moore's opinion as to his best course of action or know the reason why she declined to afford him the benefit of that opinion." On the basis of its findings, the court denied the amended petition for a writ of habeas corpus. This appeal followed.

I

First, we address the petitioner's claim that the court improperly denied his motion for recusal. We agree with the petitioner's claim.

Before this court, the petitioner reiterates the arguments that he raised before Judge Sferrazza, as set forth previously in this opinion. Thus, the petitioner relies on the undisputed procedural history of this case as well as § 51-183c, Practice Book § 1-22 (a), and rule 2.11 (a) of the Code of Judicial Conduct.

The issue of whether § 51-183c required Judge Sferrazza's recusal in the present case is an issue of statutory interpretation over which we exercise plenary review. See, e.g., *State v. Smith*, 317 Conn. 338, 346, 118 A.3d 49 (2015). "The process of statutory interpretation

involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . In seeking to determine [the] meaning [of a statute], General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Efstathiadis v. Holder*, 317 Conn. 482, 486–87, 119 A.3d 522 (2015).

The mandate of § 51-183c, a subject of prior judicial interpretation, is plain and unambiguous. It provides in relevant part: "No judge of any court who tried a case without a jury . . . in which the judgment is reversed by the Supreme Court, may again try the case. . . ." General Statutes § 51-183c. Our rules of practice give effect to this statutory right by providing in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein . . . because the judicial authority previously tried the same matter and . . . the judgment was reversed on appeal. . . ." Practice Book § 1-22 (a).

"[Section] 51-183c, by its plain terms, applies . . . to judges." *State v. AFSCME, Council 4, Local 1565*, 249 Conn. 474, 480, 732 A.2d 762 (1999). "The statute explicitly prohibits a judge who tries a case that is thereafter reversed to try the case on remand. There is no reasonable manner in which the language of the statute can be interpreted to yield a different result." *Gagne v. Vaccaro*, 133 Conn. App. 431, 437, 35 A.3d 380 (2012), rev'd on other grounds, 311 Conn. 649, 90 A.3d 196 (2014). "Furthermore, we have narrowly construed § 51-183c to apply solely to trials and not to all types of adversarial proceedings. . . . Section 51-183c does not apply to pretrial or short calendar proceedings." (Citation omitted; internal quotation marks omitted.) *Board of Education v. East Haven Education Assn.*, 66 Conn. App. 202, 216, 784 A.2d 958 (2001) (declining to extend § 51-183c to arbitration process); see also *Lafayette Bank & Trust Co. v. Szentkuti*, 27 Conn. App. 15, 19, 603 A.2d 1215 (1991) ("[s]ection 51-183c unambiguously applies exclusively to 'trials,' as distinguished from pretrial or short calendar matters"), cert. denied, 222 Conn. 901, 606 A.2d 1327 (1992).

Consistent with the arguments advanced by the respondent, Judge Sferrazza reasoned that recusal was not warranted because, in his prior decision, he had not made any findings concerning prejudice and, thus, this court had not reversed his prior judgment on the basis of such findings. Judge Sferrazza also reasoned that recusal was not warranted because he viewed this court's reversal as relating to only one aspect of his decision. Likewise, the respondent urges us to conclude that § 51-183c does not apply because this court's rescript expressly stated that the habeas court's judgment was "reversed in part" *Barlow v. Commissioner of Correction*, supra, 150 Conn. App. 804.

Neither the court nor the respondent has advanced any authority in support of their narrow interpretation

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of § 51-183c, and we are unaware of any such authority. The statute broadly applies to judges who have tried cases without a jury in which their judgment later is "reversed." The statute does not restrict its application to cases in which issues to be considered on remand are identical to those that already had been decided by the trial judge. The reversal in the present case followed a trial, and pertained to the same general claim that was before the court during the proceedings on remand, namely, whether, under the proper standard, his trial counsel's deficient performance prejudiced the petitioner, thereby depriving him of his right to a fair trial. The habeas court's prior judgment dismissed the petitioner's petition with respect to the claim that Moore had rendered ineffective assistance and denied his claim that prior habeas counsel had rendered ineffective assistance. It appears that this court reversed the judgment *in part*, rather than in its entirety, because it was able to dispose of the appeal without reaching the merits of all of the claims set forth therein, including the claim challenging that portion of the habeas court's judgment in which it denied the petition. Specifically, this court explained that, in light of its resolution of the petitioner's claim that the habeas court improperly had dismissed the petition with respect to his claim concerning Moore's representation as to the plea offer, it did not need to consider the claim that the habeas court improperly had denied the petition with respect to his claim that prior habeas counsel had rendered ineffective assistance. *Barlow v. Commissioner of Correction*, supra, 150 Conn. App. 783 n.1.

Judge Sferrazza tried the petitioner's habeas case and rendered a judgment that, in part, was reversed by this court. Although this court did not specify in its remand order that a different judge should hear the case on remand, the requirement imposed by § 51-183c nonetheless applied to the proceedings on remand. This court,

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in either its prior decision or remand order, did not include any language that suggested that Judge Sferrazza should hear the case on remand, the purpose of which was not to determine whether error occurred, but to correct error. Cf. *State v. Douglas*, 10 Conn. App. 103, 119, 522 A.2d 302 (1987); see also *State v. Gonzalez*, 186 Conn. 426, 436 n.7, 441 A.2d 852 (1982). It is of no consequence to the proper application of the statute that the remand order required consideration of an issue in the case that Judge Sferrazza had yet to resolve on its merits or that the prior judgment had not been reversed with respect to Judge Sferrazza's resolution of that unresolved issue of fact. In order for the petitioner to prevail on the issue of prejudice, the habeas court, on remand, would have to substitute the decision of the Appellate Court in place of its own prior decision, and to change not only the reasoning or basis of its prior decision, but the decision itself, which held that trial counsel's conduct was *not* deficient. See *State v. Lafferty*, 191 Conn. 73, 76, 463 A.2d 238 (1983) (on remand trial court must proceed in conformity with views expressed in reviewing court's opinion).

Because we conclude that recusal was warranted under § 51-183c and Practice Book § 1-22 (a), we need not address the petitioner's alternative argument that recusal was warranted under rule 2.11 (a) of the Code of Judicial Conduct. Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"

Although we need not resolve the petitioner's alternative argument that the court did not properly consider the application of rule 2.11 (a) in the present case, we observe that, from an early stage in the remand proceedings, Judge Sferrazza expressed his uncertainty with respect to this court's remand order, including the

issue of whether it was proper for him to hear the case on remand. He afforded the parties an ample opportunity to address the issue of his presumptive disqualification under § 51-183c. Judge Sferrazza's decision reflects that because he concluded, albeit erroneously, that his participation in the proceedings on remand was required by this court's remand order,⁹ he logically rejected the petitioner's argument that his participation in the proceedings on remand gave rise to a reasonable question concerning his impartiality.¹⁰

⁹ The record reflects that Judge Sferrazza also based his decision, in part, on his belief that this court's remand order precluded him from considering additional evidence. As we discuss in part II of this opinion, we disagree with this construction of the order.

¹⁰ In resolving the recusal issue, Judge Sferrazza relied on *Taft v. Wheelabrator Putnam, Inc.*, supra, 265 Conn. 916, and *State v. Santiago*, supra, 245 Conn. 340–41 n.25. Having reviewed these authorities, we conclude that neither of them governs the outcome of the recusal issue before us. In *Taft*, our Supreme Court did not set forth any analysis, let alone a holding, related to the issue of a trial court's involvement in a case on remand following a reversal of its judgment by a reviewing court. It does not appear that such issue was raised or considered in *Taft*. In *Santiago*, our Supreme Court reversed the judgment of a trial court with respect to its decision not to conduct a more extensive inquiry into a postverdict allegation of juror misconduct, and remanded the case for further proceedings. *State v. Santiago*, supra, 340. On the basis of certain findings by the trial court, the defendant raised a concern with respect to the court's impartiality on remand and claimed that a different trial judge should handle the case on remand. *Id.*, 340–41 n.25. Our Supreme Court stated that the findings at issue "[did] not render the court biased and [were not a] bar to conducting the necessary further inquiry on remand." *Id.*, 341 n.25. In its brief discussion of this issue, the court did not refer to § 51-183c or Practice Book § 1-22 (a). We observe that the court did not remand the case for a new trial on the merits of the case, but for further proceedings related to an allegation of juror misconduct. As opposed to a new trial, such a proceeding is more like a sentencing hearing, a hearing related to pretrial matters, or a short calendar hearing—proceedings to which § 51-183c does not apply. See, e.g., *State v. Miranda*, 260 Conn. 93, 131, 794 A.2d 506 (§ 51-183c does not apply to sentencing hearings), cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); *Board of Education v. East Haven Education Assn.*, supra, 66 Conn. App. 216 (§ 51-183c does not apply to pretrial hearings or short calendar hearings). In light of the particular circumstances of that case and the issues that would come before the court on remand, it determined prospectively that the trial judge's participation in the case on remand would not give rise to

The respondent is unable to demonstrate that Judge Sferrazza's failure to recuse himself from the case on remand was harmless error. We conclude that the proper remedy is to reverse the judgment denying the petition for a writ of habeas corpus and to remand the case to the habeas court, so that the issue set forth in this court's prior remand order may be tried by another judge.

II

Although we have concluded in part I of this opinion that the judgment must be reversed and we remand the case to the habeas court, we shall address the petitioner's claim that the habeas court improperly denied his request for a new evidentiary hearing because that issue is likely to arise during the proceeding on remand. See *State v. Tabone*, 292 Conn. 417, 431, 973 A.2d 74 (2009) (addressing issue likely to arise on remand). We agree with the petitioner.

As we have explained previously in this opinion, this court's remand order stated in relevant part: "The judgment is reversed in part and the case is remanded for further proceedings on the issue of whether the petitioner was prejudiced by counsel's deficient performance." (Emphasis added.) *Barlow v. Commissioner of Correction*, supra, 150 Conn. App. 804. Judge Sferrazza invited the parties to address the issue of whether he should hold a hearing on remand. When the parties first appeared before the court to discuss the nature of the proceedings on remand, the petitioner represented that he wished to present additional evidence to the court, even specifying the nature of some of the additional

an appearance of impartiality or bias. Its determination in this regard was dispositive of the issue of the propriety of the trial court's participation in the case on remand. This court, however, did not make a similar determination in its decision in the petitioner's prior habeas appeal.

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evidence he intended to present.¹¹ In declining this request, the court appears to have been persuaded by the fact that the remand order did not explicitly mandate a new hearing. Agreeing with the respondent's interpretation of the remand order, the court viewed its role as being in the nature of providing an articulation. Thus, the court ordered the parties to brief the prejudice issue solely on the basis of the evidence previously submitted to the court.

¹¹ The petitioner argued that he had been assigned new counsel who determined there was additional, available evidence bearing on the prejudice inquiry that had not been presented at the first habeas trial. Both at the hearing and in later submissions to the court, the petitioner explained that he intended to present new evidence that included, but was not limited to, transcripts from his criminal trial, expert testimony pertaining to trial counsel's plea advice, the arrest warrant for the petitioner, the mittimus reflecting the sentences received by the petitioner's two codefendants, testimony from the petitioner's two codefendants, and the witness list from the petitioner's criminal trial. The petitioner attached some of this additional evidence to his posttrial brief but, following an objection by the respondent, the court declined to consider such materials.

Among the arguments advanced in his posttrial brief, the petitioner argued that such evidence was relevant to proving that, if Moore had counseled the petitioner adequately, he would have had accurate and relevant information that would have affected his decision with respect to the plea. This information, the petitioner argued, should have included an accurate assessment of the strength of the state's case. Additionally, the petitioner argued that Moore failed to explain the error of the petitioner's belief that the state's case would be significantly weakened if his two coconspirators decided not to stand behind their written statements to the police, which implicated themselves and the petitioner in the shootings, or if they decided not to testify against him at his trial. The petitioner argued that competent advice would have conveyed that, even if the coconspirators did not testify, it was possible for the state to introduce their statements implicating the petitioner under § 8-6 (4) of the Connecticut Code of Evidence as dual inculpatory statements, made against the penal interests of the two codefendants and the petitioner. In the event that the two codefendants testified contrary to their incriminatory statements made to the police, the petitioner argued, it was possible for the state to introduce the statements of the coconspirators under the doctrine of *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), which is codified in § 8-5 (1) of the Connecticut Code of Evidence, or § 6-10 of the Connecticut Code of Evidence. The petitioner also argued that, insofar as there was evidence that his plea decision was based on his belief that he had an alibi

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"Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject-matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion*. . . . This is the guiding principle that the trial court must observe. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . These principles apply to criminal as well as to civil proceedings. . . . The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. . . .

"We have also cautioned, however, that our remand orders should not be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the

defense, Moore did not file a notice of alibi and, in any event, was unable to present the testimony of witness that could have provided such a defense. Moreover, the petitioner intended to demonstrate that Moore failed to assess the "severe punishment" that he could expect following a conviction.

remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Brundage*, 320 Conn. 740, 747-48, A.3d (2016); accord *Higgins v. Karp*, 243 Conn. 495, 502-503, 706 A.2d 1 (1998); *Halpern v. Board of Education*, 231 Conn. 308, 313, 649 A.2d 534 (1994).

The narrow issue presented in the present claim is whether the habeas court properly construed the remand order such that it was akin to a request for articulation, and therefore did not permit the presentation of additional admissible evidence relevant to the issue submitted to the habeas court for its resolution. The remand order required "further proceedings," thus using a broad phrase that does not preclude an evidentiary hearing. Nothing in the remainder of the remand order, as interpreted in light of the opinion, limited the habeas court to consider only the evidence that had been admitted in the context of the prior proceeding.

Moreover, it was not appropriate for the court to construe the order as being in the nature of an articulation request. As the court did not make findings with respect to prejudice in its prior opinion, there were no relevant findings for the court to explain. If this court had determined that it was appropriate for the habeas court merely to make a finding with respect to the issue of prejudice on the basis of the evidence in the record, it would not have ordered "further proceedings," for that purpose, but merely would have instructed the court to articulate with respect to that limited factual issue that had been litigated by the parties at the first habeas trial. Further, it is not reasonable to construe the remand order as a request for articulation because, in the context of an articulation, the court is unable to alter any of its original findings. An articulation request is appropriate if "the trial court has failed to state the

basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial [court] to rule on an overlooked matter." (Internal quotation marks omitted.) *Dickinson v. Mullaney*, 284 Conn. 673, 680, 937 A.2d 667 (2007). None of these circumstances existed in the present case, in which, because of this court's resolution of the petitioner's appeal, it became necessary for the court to resolve the factual issue related to prejudice. "It is well established that a trial court may not alter its initial findings by way of a further articulation [A]n articulation is not an opportunity for a trial court to substitute a new decision [or] to change the reasoning or basis of a prior decision" (Citations omitted; internal quotation marks omitted.) *Sosin v. Sosin*, 300 Conn. 205, 240, 14 A.3d 307 (2011).

Typically, the next step in our analysis would be to consider whether the court's failure to afford the parties an opportunity to present evidence was harmful; *Higgins v. Karp*, supra, 243 Conn. 506; we need not reach that issue, as it relates to a proper remedy in light of our resolution of the issue in part I of this opinion, which leads us to remand the case for further proceedings. We have addressed the present claim to clarify, for purposes of those further proceedings, that this court's prior remand order did not preclude an evidentiary hearing. Because the present case will be remanded to a different habeas court judge for further proceedings related to the issue of prejudice under *Strickland*, we anticipate that a hearing will be conducted during which the petitioner will be afforded an opportunity to present evidence with respect to the issue of prejudice.

The judgment is reversed and the case is remanded to the habeas court for a hearing before a different judge for the purpose of determining the issue of prejudice in accordance with this opinion.

In this opinion the other judges concurred.

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Exhibit # 3

Branford, 58 Conn. App. 702, 710, 755 A.2d 317 (2000). The application of the exception to an identifiable class of victims has been exclusively reserved for school-children attending public schools during school hours. See *Grady v. Somers*, 294 Conn. 324, 352–53, 934 A.2d 684 (2009). Outside of the public school context, the only Connecticut case we have identified wherein a specific plaintiff has been held potentially to be an identifiable person for purposes of the exception involved a discrete group of men involved in a brawl in a bar parking lot. See *Sestito v. Grotton*, 178 Conn. 520, 522–23, 423 A.2d 165 (1979);⁸ see also *Grady v. Somers*, *supra*, 353 (discussing restrictive application of exception).

In the present case, any number of potential victims could have come into contact with the dog following Petras' issuance of the restraint order. The exception cannot be construed so broadly as to apply to any person stepping foot onto Witham's property while the dog was present. See *Cotto v. Board of Education*, *supra*, 294 Conn. 279 ("[i]f the plaintiff was identifiable as a potential victim of a specific imminent harm, then so was every participant and supervisor in the Latino Youth program who used the bathroom").

We are likewise persuaded that the injuries suffered by the plaintiff do not qualify as imminent harm under the exception. "For [a] harm to be deemed imminent, the potential for harm must be sufficiently immediate." *Id.*, 276. Here, Petras issued the restraint order on June 21, 2007, and the dog bite incident occurred nearly three years later, on June 15, 2010. The type of attack that

⁸ The plaintiff argues that *Sestito v. Grotton*, *supra*, 178 Conn. 520, is analogous to the present case. Our Supreme Court recently has explained that *Sestito* was decided before the current three-pronged identifiable person-imminent harm exception was adopted and its holding is limited to its facts, which are readily distinguishable from those alleged by the plaintiff. See *Edgerton v. Clinton*, *supra*, 311 Conn. 240.

caused the injuries suffered by the plaintiff "could have occurred at any future time or not at all." *Evon v. Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989) (rejecting application of exception to claims of negligent fire inspection by city officials). Accordingly, we conclude that the plaintiff in this case cannot avail herself of the identifiable person-imminent harm exception to discretionary act immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

ALISON BARLOW v. COMMISSIONER
OF CORRECTION
(AC 34925)

Beach, Bear and Sheldon, Js.*

Syllabus

The petitioner filed a third petition for a writ of habeas corpus, claiming, inter alia, that his trial counsel, M, had provided ineffective assistance. The habeas court rendered judgment dismissing in part and denying in part the habeas petition, and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. He claimed, inter alia, that the habeas court improperly applied the doctrine of deliberate bypass to his claim that M's assistance was ineffective with respect to a plea offer of the trial court, which was not accepted by the petitioner. *Held:*

1. The habeas court improperly raised the doctrine of deliberate bypass sua sponte, and, therefore, erred in dismissing the petitioner's claim concerning M on that basis, the respondent Commissioner of Correction not having claimed that the petitioner had procedurally defaulted or that the doctrine of deliberate bypass was applicable.
2. This court concluded that M rendered deficient performance to the petitioner by failing to advise him adequately concerning the trial court's plea offer, as M had an obligation to provide advice and assistance to the petitioner regarding the plea offer, which she failed to do; M testified that it was her practice never to recommend to a criminal defense client to accept or to reject a plea offer so as to avoid later claims of a coerced

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

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- plea, that she presented the court's plea offer to the petitioner without giving him any advice on that offer, and that she did not give the petitioner a professional assessment of the court's offer of nine years to serve in the context of the facts underlying the charges against him and his potential total sentence exposure of eighty-five years incarceration.
3. The petitioner could not prevail on his claim that although the habeas court made no findings concerning prejudice, this court should presume prejudice on the basis of the record and order that the petition for a writ of habeas corpus be granted and that the court be ordered to give the petitioner the opportunity to plead guilty under the plea agreement he previously was offered by the trial court; because the habeas court was in the best position to determine whether it was reasonably likely that the petitioner would have accepted the court's offer had he received adequate advice from M, the case was remanded for further findings on the issue of whether the petitioner was prejudiced by M's deficient performance.

Argued February 6—officially released June 10, 2014

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza, J.*; judgment dismissing the first count of the petition and denying the second count of the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part; further proceedings.*

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *Aaron J. Romano*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Alison Barlow, appeals from the judgment of the habeas court dismissing in part and denying in part his third petition for a writ of habeas corpus. On appeal, the petitioner claims: (1) the court erred in denying his claim that counsel for his second

habeas appeal, Christopher M. Neary, provided ineffective assistance by withdrawing the petitioner's claims of ineffective assistance of counsel concerning the petitioner's criminal trial attorney, Sheridan L. Moore; (2) the court erred in dismissing his claim that Moore had provided ineffective assistance by improperly concluding that the doctrine of deliberate bypass applied to bar that claim; (3) Moore rendered deficient performance during the petitioner's criminal proceedings by failing to advise the petitioner adequately regarding the court's plea offer; and (4) although the habeas court made no findings concerning prejudice, we should presume prejudice on the basis of the record and order that the petition for a writ of habeas corpus be granted and that the court be ordered to give the petitioner the opportunity to plead guilty under the plea agreement he previously was offered by the trial court. We agree with the petitioner's second and third claims, and, on this basis, conclude that it is unnecessary to consider his first claim. We do not agree with his fourth claim, however, and thus conclude that the case must be remanded to the habeas court for further findings on the issue of prejudice.¹ Accordingly, the judgment is reversed in part, and the case is remanded to the habeas court.

The record reveals the following relevant facts and procedural history. The petitioner had been charged with several serious crimes, including attempt to commit murder and conspiracy to commit murder. He was offered a "one time" plea deal by the court that included a sentence of nine years to serve. The petitioner instead wanted a deal that would require him to serve only six

¹ Because we conclude that the court improperly, sua sponte, raised the issue of deliberate bypass and that the petitioner proved in the habeas court that Moore's performance was deficient concerning the plea offer, we also conclude that we need not consider the issue of whether Neary's performance was deficient for failing to pursue the issue of Moore's performance.

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years incarceration. The court informed him that the deal it offered was good for one day only, after which his case would be placed on the trial list. The petitioner did not accept the court's offer at that time. The offer, however, ultimately remained in effect for approximately one year before it was withdrawn. The petitioner was tried by a jury and found guilty of the charges. He was given a total effective sentence of thirty-five years incarceration.² His conviction was upheld on appeal. See *State v. Barlow*, 70 Conn. App. 232, 797 A.2d 605, cert. denied, 261 Conn. 929, 806 A.2d 1067 (2002).

In his first habeas petition, the petitioner, initially acting in a self-represented capacity, alleged that his trial counsel, Moore, was ineffective, inter alia, in failing to counsel him fully regarding the time limitation on the availability of the trial court's plea offer. His appointed counsel, Peter Tsimbidaros, then amended the first habeas petition and withdrew the ineffective assistance claim concerning Moore. The first habeas petition was not successful.

The petitioner, again initially acting in a self-represented capacity, filed a second habeas petition alleging that Moore had been ineffective, and that Tsimbidaros had been ineffective by withdrawing the claim concerning Moore from the first habeas petition. Appointed counsel, Neary, then filed an amended petition, withdrawing those claims. This second habeas petition was denied, and the habeas court, thereafter, denied the petition for certification to appeal. We dismissed the petitioner's appeal from that judgment after concluding that the court did not abuse its discretion in denying

² The petitioner was convicted of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a, two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and alteration of a firearm identification number in violation of General Statutes § 29-36.

the petition for certification to appeal. See *Barlow v. Commissioner of Correction*, 131 Conn. App. 90, 26 A.3d 123, cert. denied, 302 Conn. 937, 28 A.3d 989 (2011).

The present appeal concerns the petitioner's third habeas petition. In it, he alleges that Moore was ineffective, and that Neary was ineffective in amending the second habeas petition to withdraw his ineffective assistance claims concerning Tsimbidaros and Moore. The habeas court determined that the petitioner's first claim, which was based on the alleged ineffective assistance of Moore, had been deliberately bypassed, and, therefore, the court dismissed the first count of the petition. As to the second count, the court determined that the petitioner failed to prove that Neary had been ineffective by withdrawing the claims concerning Tsimbidaros and Moore. In considering the claim concerning Neary, however, the court necessarily examined whether there was merit to the petitioner's claim that Moore had been ineffective. The court specifically found that "Moore fully apprised the petitioner as to the terms of the plea offer, including its temporary nature, the strengths and weaknesses of the prosecution and defense cases, and the possible outcomes after trial." It also found that "Neary averred that he examined Moore's performance for the petitioner's defense and found no basis for such an ineffective assistance claim [concerning] her." The court concluded that the petitioner had failed to prove that "Moore was deficient in any of the ways alleged . . . [or] that Attorney Neary or Attorney Tsimbidaros rendered ineffective assistance by withdrawing the claims [concerning] Moore" Accordingly, the court denied the petition as to the second count. The court granted certification to appeal, and this appeal followed.

I

We first consider the petitioner's claim that the court improperly applied the doctrine of deliberate bypass to

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his claim that Moore's assistance was ineffective with respect to the court's plea offer. He argues that the doctrine of deliberate bypass does not apply to ineffective assistance of counsel claims in habeas proceedings, but that it applies only to claims that should have been raised on direct appeal but were deliberately bypassed. He further argues that the respondent, the Commissioner of Correction, never raised this claim before the habeas court and that our case law has established that the deliberate bypass doctrine automatically becomes inapplicable when a claim of ineffective assistance of counsel is raised. The respondent argues that the doctrine applies in this instance because the petitioner knowingly and voluntarily declined to pursue his claim concerning Moore by permitting Neary to withdraw that claim.³ The respondent also argued during appellate oral argument that, although it neither raised nor argued the doctrine of deliberate bypass before the habeas court, the court was within its authority to raise the doctrine *sua sponte*. We need not decide whether the doctrine *could apply* in this instance because we conclude that the court improperly raised the doctrine *sua sponte*.⁴

Practice Book § 23-30 (b) provides, in relevant part, that the respondent's return "*shall allege* any facts in support of any claim of procedural default, abuse of the writ, or any other claim that the petitioner is not entitled to relief." (Emphasis added.) In *Fine v. Commissioner of Correction*, 147 Conn. App. 136, 141, 81

³ We note that the petitioner argues in his reply brief that he did not knowingly and voluntarily decline to pursue this claim and that this is demonstrated by Neary's testimony that he specifically told the petitioner that such claims could be raised in a later habeas proceeding.

⁴ We offer no opinion on the status of the doctrine of deliberate bypass in habeas proceedings alleging ineffective assistance of counsel, but we note that our Supreme Court has most recently discussed that issue in *Crawford v. Commissioner of Correction*, 294 Conn. 165, 180–90, 982 A.2d 620 (2009).

A.3d 1209 (2013), we recently explained that the doctrine of deliberate bypass "historically has arisen in the context of habeas petitions involving claims procedurally defaulted at trial and on appeal. See *Crawford v. Commissioner of Correction*, 294 Conn. 165, 186, 982 A.2d 620 (2009) (observing that since *Jackson v. Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 [1993], our Supreme Court 'consistently and broadly has applied the cause and prejudice standard to trial level and appellate level procedural defaults in habeas corpus petitions')."

"If the respondent claims that the petitioner should have raised the issue [previously] . . . the claim [of procedural default] *must be raised in the return or it will not be considered at the [habeas] hearing.*" (Emphasis added.) W. Horton & K. Knox, 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2013–2014 Ed.) Rule 23-30, official comments, p. 1031. "[T]he plain language of Practice Book § 23-30 (b) requires the [respondent] to plead procedural default in [the] return or [the respondent] will relinquish the right to assert the defense thereafter. . . . [I]n Connecticut, although the petitioner has the burden of proving cause and prejudice . . . that burden does not arise until after the respondent raises the claim of procedural default in [the] return. . . . Because the respondent did not plead procedural default as an affirmative defense . . . the court could not find that the petitioner was procedurally defaulted" (Citation omitted; internal quotation marks omitted.) *Ankerman v. Commissioner of Correction*, 104 Conn. App. 649, 654–55, 935 A.2d 208 (2007), cert. denied, 285 Conn. 916, 943 A.2d 474 (2008); see *Milner v. Commissioner of Correction*, 63 Conn. App. 726, 733, 779 A.2d 156 (2001) (supporting and applying position of federal habeas commentators that "petitioners generally need not raise waiver and procedural default matter in their

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initial pleading and briefs, because the burden to raise and prove those defenses is on the [respondent]" [internal quotation marks omitted]).⁵

In the present case, the respondent did not claim in the return that the petitioner had procedurally defaulted (or that the doctrine of deliberate bypass was applicable). Accordingly, we conclude that the court improperly raised the doctrine of deliberate bypass sua sponte and, therefore, that it erred in dismissing the petitioner's claim concerning Moore on this basis.⁶

II

We next consider the petitioner's claim that Moore rendered ineffective assistance of counsel during the petitioner's criminal proceedings. The petitioner argues in relevant part that Moore's "decision not to advise [the petitioner], or any of her clients, with respect to plea offers was motivated by her desire to avoid habeas and grievance actions in which clients could claim that they were coerced into pleading guilty. . . . This blanket strategy was in no way formulated to benefit [the petitioner], and, to the contrary, her self-imposed protective mechanism put [her] interests in conflict with those of [the petitioner], who, as a defendant exercising his right to counsel under the sixth amendment to the United States constitution . . . expects to be counseled" (Citation omitted.) The respondent contends that Moore adequately advised the petitioner and

⁵ Reasonable prior written notice of and the opportunity to be heard concerning a claim or defense are fundamental aspects of procedural due process. See, e.g., *Connolly v. Connolly*, 191 Conn. 468, 475, 464 A.2d 837 (1983) ("[t]he purpose of requiring written motions is not only the orderly administration of justice; see *Malone v. Steinberg*, 138 Conn. 718, 721, 89 A.2d 213 [1952]; but the fundamental requirement of due process of law. *Winick v. Winick*, [153 Conn. 294, 299, 216 A.2d 185 (1965)]").

⁶ Although the court dismissed the petition as it related to the ineffective assistance claim concerning Moore, it nonetheless examined whether Moore was ineffective when it reviewed the petitioner's claims concerning former habeas counsel, which alleged that they were ineffective for failing to pursue ineffective assistance claims concerning Moore.

that she was not required to tell him whether to take the plea. The respondent further argues that, although *Vazquez v. Commissioner of Correction*, 123 Conn. App. 424, 437–38, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011), holds that specific recommendations may be required in certain situations, in the current case, where Moore represented the petitioner in 1997–98—long before *Vazquez* was decided—her competency should be measured against the benchmark of competence at that time and not "under current standards."⁷ We agree with the petitioner that Moore

⁷ The respondent's contention that in *Vazquez* we announced a new standard for counsel during plea negotiations has no merit. A similar argument was made before the United States Court of Appeals for the Second Circuit in *Roccisano v. Meniffee*, 293 F.3d 51, 59 (2d Cir. 2002), when the petitioner in that case argued that he could not have raised his claim that counsel did not adequately advise him previously because the court had not yet decided *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997). Specifically, the court explained: "Roccisano's contention that he could not assert his present claim until he learned of our decision in *Boria* is meritless, however, for the principle applied in *Boria*, i.e., that the right to effective assistance of counsel encompasses the accused's right to be informed by his attorney as to the relative merits of pleading guilty and proceeding to trial, was hardly novel, having been articulated clearly by the Supreme Court nearly a half-century earlier, see *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 309 (1948) ([p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered).

"In *Boria*, we applied this principle in holding that an attorney had rendered constitutionally deficient assistance to the defendant by failing to discuss with him the advisability of accepting or rejecting a proffered plea bargain that would have resulted in a prison term of one-to-three years, where the attorney felt it would be suicidal to go to trial and the defendant, after going to trial, received a sentence of [twenty] years to life. See [*Boria v. Keane*, supra, 99 F.3d 494–95]. We noted that although our own Court had not previously been called upon to articulate the rule that an accused is entitled to receive such advice, our holding was based principally on the standards for claims of ineffective assistance of counsel set out more than a decade earlier in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and on well established principles set forth in American Bar Association (ABA) guidelines: While the Second Circuit may not have spoken, the *Strickland* Court has indicated how the question should

rendered deficient performance to the petitioner concerning the plea offer.

We begin with the applicable standard of appellate review and the law governing ineffective assistance of counsel claims. “The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court’s factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject

be resolved. Just before starting its discussion of the merits, it observed that it had granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. [Id.] 684 Later it pointed to [p]revailing norms of practice as reflected in American Bar Association standards as guides to determining what is reasonable. Id. [688]

“The American Bar Association’s standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992): A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable*. . . . *Boria* [v. *Keane*, supra, 99 F.3d] 496

“Further, as recognized in *Boria*, the principle articulated by the Supreme Court in *Von Moltke* in 1948 had been reiterated decades prior to *Boria* by other circuit courts of appeals in *Walker v. Caldwell*, 476 F.2d 213, 224 (5th Cir. 1973), and *Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir.), cert. denied, 375 U.S. 832, 84 S. Ct. 42, 11 L. Ed. 2d 63 (1963), and by the district court in which Roccisano was convicted and filed his 1991 and 1995 Motions, see *Boria* [v. *Keane*, supra, 99 F.3d] 497 ([i]n *United States v. Villar*, 416 F. Supp. 887, 889 [S.D.N.Y. 1976], Judge Motley . . . made the following observation about effective assistance of counsel: Effective assistance of counsel includes counsel’s informed opinion as to what pleas should be entered).

“In sum, the principle that defense counsel in a criminal case must advise his client of the merits of the government’s case, of what plea counsel recommends, and of the likely results of a trial, was established long before Roccisano was even prosecuted. Roccisano plainly was aware of the factual basis for his present claim, knowing what counsel’s advice to him had been. The fact that *Boria* had not yet been decided gave him no excuse for not raising his present claim at least as early as his first [motion pursuant to 28 U.S.C. § 2255].” (Citations omitted; emphasis altered; internal quotation marks omitted.) *Roccisano v. Menifee*, supra, 293 F.3d 59–60.

to plenary review. . . . *Sastrom v. Mullaney*, 286 Conn. 655, 661, 945 A.2d 442 (2008).

“A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record As we have noted previously, however, when a question of fact is essential to the outcome of a particular legal determination that implicates a defendant’s constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court’s factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court’s factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision *State v. Mullins*, 288 Conn. 345, 362–63, 952 A.2d 784 (2008).” (Internal quotation marks omitted.) *State v. DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014); id., 520 (if credible witness’ “own testimony as to what occurred is internally consistent and uncontested by the defendant but, in fact, undercuts the trial court’s ruling in favor of the state, a reviewing court would be remiss in failing to consider it”).⁸

⁸ We find the language of *State v. DeMarco*, supra, 311 Conn. 520, to be instructive: “[I]f, upon examination of the testimonial record, the reviewing court discovers but one version of the relevant events upon which both the state and the defendant agree, and such agreement exists both at trial and on appeal, the reviewing court may rely on that version of events in evaluating the propriety of the trial court’s determinations and determining whether the trial court’s factual findings are supported by substantial evidence. In a case where the trial court has concluded that the police action at issue was justified and the undisputed version of events reflected in the transcript was adduced by the state through testimony of the police officers, a reviewing court’s reliance on that version of events is particularly appropriate. If the officers’ own testimony as to what occurred is internally consistent and uncontested by the defendant but, in fact, undercuts the trial court’s ruling in favor of the state, a reviewing court would be remiss in failing to consider it.”

Our Supreme Court in *DeMarco* was careful to insert a footnote stressing that the finder of fact is free to credit parts of a witness’ testimony and to

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Citations omitted; internal quotation marks omitted.) *Mozell v. Commissioner of Correction*, 291 Conn. 62, 77, 967 A.2d 41 (2009). The United States Supreme Court, long before its recent decisions in *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), recognized that the two part test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to ineffective assistance of counsel claims arising out of the plea negotiation stage. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); see also *Missouri v. Frye*, supra, 140 ("Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*").

"Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have

reject other parts. See id., 520 n.4. That specific limitation leads us to believe that the broad review approved in *DeMarco* is to be used sparingly and only where the overall thrust of a witness' testimony, relied upon by both parties, is clear and unequivocal.

We believe that Moore's testimony in the present case falls into that narrow category. Her testimony, which we have carefully reviewed, was clear and unequivocal. It was relied on by both sides, and credited by all parties and by the habeas court. We conclude, then, that the circumstances of the present case fit within the narrow exception recognized in *DeMarco*, and that we may rely on facts apparent from Moore's testimony, even though not expressly found by the habeas court.

responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system. . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

"To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." (Citations omitted; internal quotation marks omitted.) *Missouri v. Frye*, supra, 132 S. Ct. 1407-1408; see also *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 478-79, 68 A.3d 624, cert. denied sub nom. *Dzurenda v. Gonzalez*, U.S. , 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

Under the two part *Strickland* test, a petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice. *Ledbetter v. Commissioner of Correction*, 275 Conn. 451, 460, 880 A.2d 160 (2005), cert. denied sub

nom. *Ledbetter v. Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). The petitioner will meet his burden by establishing that counsel's performance "fell below an objective standard of reasonableness"; *Strickland v. Washington*, supra, 466 U.S. 688; and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 694. Where, as here, a petitioner rejects a plea offer, he must establish that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, supra, 566 U.S. 164; see also *Missouri v. Frye*, supra, 566 U.S. 147.

When considering whether Moore's performance was deficient for failing to advise and assist the petitioner concerning the court's plea offer, the habeas court explained: "Moore acknowledged that it was her practice never to recommend to a criminal defense client to accept or reject a plea offer. She abstained from doing so to avoid later claims of a coerced plea. In particular, she made no recommendation to the petitioner as to whether to accept or reject the nine year offer. The question arises as to whether a practice eschewing such a recommendation comports with effective representation.

"There is no per se requirement obligating defense counsel to make such a recommendation. *Edwards v. Commissioner of Correction*, 87 Conn. App. 517, 524-25, [865 A.2d 1231] (2005); *Vazquez v. Commissioner of Correction*, [supra, 123 Conn. App. 437-40]; *Purdy v.*

United States, 208 F.3d 41, 48 (2d Cir. 2000). 'Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness' *Vazquez v. Commissioner of Correction*, supra, 438. The need for recommendation depends on 'countless' factors, such as 'the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea . . . whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform [the] plea decision.' *Id.*

"The court has found that Moore fully apprised the petitioner as to the terms of the plea offer, including its temporary nature, the strengths and weaknesses of the prosecution and defense cases, and the possible outcomes after trial. . . . [The court] also explained to the petitioner this information. The proof of the petitioner's guilt hinged on the believability of a coconspirator and circumstantial proof linking a weapon to the petitioner, that is, conviction was not a foregone conclusion.

"The cases which have found defense counsel wanting for failure to recommend acceptance of a plea offer have typically involved hopeless cases where going to trial was 'suicidal' and where the disparity between the plea offer and the potential sentence after trial was enormous. See., e.g., *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996) [cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997)]. The circumstances of the present case differ markedly from such a scenario."

The petitioner argues that the habeas court erred in rendering its decision because Moore testified during the habeas trial that she presented the court's plea offer to him without giving him *any advice* on that offer,

which, he argues, is constitutionally deficient performance that reduces counsel's role "to that of a mere messenger" He further explains that the role of an attorney is to give advice and counsel to a client, especially in a criminal matter, and, in the present case, Moore specifically testified that she refrained from giving any such advice, which the habeas court acknowledged in its memorandum of decision. He further argues that Moore's testimony that she refrained from giving him any advice about the plea offer in order to protect herself demonstrated a clear conflict of interest in violation of rule 1.7 of the Rules of Professional Conduct⁹ and rendered her *assistance* deficient and ineffective.¹⁰ Although we agree with the habeas court that Moore had no obligation in this case specifically to tell the petitioner whether to take the court's plea offer, we conclude that she had an obligation to provide advice

⁹ Rule 1.7 (a) of the Rules of Professional Conduct provides in relevant part: "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

¹⁰ The Rules of Professional Conduct, however, are not to be used as a basis to determine that a legal duty has been breached: "Indeed, one of the introductory provisions of the Rules of Professional Conduct expressly provides that a '[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.'" *Biller Associates v. Peterken*, 269 Conn. 716, 722–23, 849 A.2d 847 (2004).

and assistance to the petitioner regarding that plea offer, which, she admittedly failed to do. Accordingly, after our own scrupulous search of the record—Moore's credibility not being an issue in this case—we agree with the petitioner that Moore's performance concerning the plea offer was deficient. See *State v. DeMarco*, supra, 311 Conn. 519–20.

"The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. . . . [C]ounsel may and must give the client the benefit of counsel's professional advice on this crucial decision. . . . It is well-settled that defense counsel have a constitutional duty to convey any plea offers from the government and to *advise their clients on the crucial decision* whether to accept a plea offer. . . . A significant disparity between the sentence the defendant might have received had he [pleaded] guilty, and the sentence he received after trial, provides objective evidence that a defendant was prejudiced by his attorney's failure to adequately inform him of his plea options." (Citations omitted; emphasis added; internal quotation marks omitted.) *Cardoza v. Rock*, 731 F.3d 169, 178–79 (2d Cir. 2013).

In *Peterson v. Commissioner of Correction*, 142 Conn. App. 267, 272–73, 67 A.3d 293 (2013), we recently explained: "Although affirming a defendant's constitutional right to the effective assistance of counsel at the plea negotiations stage of criminal proceedings, our courts have nevertheless been reluctant to elaborate on attorney behaviors that may or may not constitute ineffectiveness. In *Ebron v. Commissioner of Correction*, 120 Conn. App. 560, 572, 992 A.2d 1200 (2010), rev'd in part on other grounds, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnove v. Ebron*, U.S. , 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013), this court observed: '[P]lea bargaining is an integral component of the criminal justice system and essential

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to the expeditious and fair administration of our courts. . . . Commentators have estimated that between 80 and 90 percent of criminal cases in Connecticut result in guilty pleas, the majority of which are the product of plea bargains. . . . Thus, almost every criminal defendant is faced with the crucial decision of whether to plead guilty or proceed to trial. Although this decision is ultimately made by the defendant, the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial. . . . Indeed, the United States Court of Appeals for the Second Circuit has described the decision to plead guilty as ordinarily the most important single decision in any criminal case. . . . *Boria v. Keane*, [supra, 99 F.3d 496–97]. It further stated that [e]ffective assistance of counsel includes counsel's informed opinion as to what pleas should enter." (Emphasis omitted; internal quotation marks omitted.)

In *Vazquez v. Commissioner of Correction*, supra, 123 Conn. App. 437, we explained: "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer [an] *informed opinion as to what plea should be entered*. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. . . . A defense lawyer in a criminal case *has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable*." (Citation omitted; emphasis added; internal quotation marks omitted.)

We further explained: "On the one hand, defense counsel must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty. . . . On the other hand, the ultimate decision whether to plead guilty must be made by the defendant. . . . And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. . . . Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because [r]epresentation is an art . . . and [t]here are countless ways to provide effective assistance in any given case Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea (whether or not accompanied by an agreement with the government), whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." (Emphasis altered; internal quotation marks omitted.) *Id.*, 438.

After examining relevant case law, we conclude that a crucial component of counsel's effective representation during plea negotiations is *giving professional advice* to a defendant. See *Cardoza v. Rock*, supra, 731 F.3d 178–79; *Boria v. Keane*, supra, 99 F.3d 496; *Peterson v. Commissioner of Correction*, supra, 142 Conn. App. 273; *Vazquez v. Commissioner of Correction*, supra, 123 Conn. App. 437; see also Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992);¹¹ Rules

¹¹ Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992), provides: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept

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of Professional Conduct 2.1.¹² Although the defendant ultimately must decide whether to accept a plea offer or proceed to trial, this critical decision, which in many instances will affect a defendant's liberty, should be made by a represented defendant with the *adequate professional assistance, advice, and input of his or her counsel*. Counsel should not make the decision for the defendant or in any way pressure the defendant to accept or reject the offer, but counsel should give the defendant his or her *professional advice* on the best course of action given the facts of the particular case and the potential total sentence exposure. See *Cardoza v. Rock*, supra, 178 ("defense counsel have a constitutional duty to . . . advise their clients on the crucial decision whether to accept a plea offer" [internal quotation marks omitted]); *Peterson v. Commissioner of Correction*, supra, 273 ("[A]most every criminal defendant is faced with the crucial decision of whether to plead guilty or proceed to trial. Although this decision is ultimately made by the defendant, *the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation*" [Emphasis added; internal quotation marks omitted.]); *Vazquez v. Commissioner of Correction*, supra, 437 ("[a] defense lawyer in a criminal case *has the duty to advise his client fully on whether a particular plea to*

a settlement offer or whether he will waive his right to plead an affirmative defense. *A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable* and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken." (Emphasis added.)

¹² Rule 2.1 of the Rules of Professional Conduct provides: "In representing a client, a lawyer shall exercise independent professional judgment and *render candid advice*. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." (Emphasis added.)

a charge appears to be desirable" [emphasis added; internal quotation marks omitted]).

In the present case, there is no question that the habeas court credited Moore's testimony. During the habeas trial, Moore testified that the state initially had offered the petitioner a plea deal that required him to serve fourteen years of an eighteen year sentence, but that the court offered the petitioner a sentence of fifteen years, suspended after nine years of incarceration. The petitioner, however, wanted to serve only six years, and he wanted to know what sentences his codefendants would be getting before he decided on his course of action. Moore also testified that, although the court stated that the offer would be good only for that day, the court actually kept the offer open until the start of trial. Moore additionally testified during the habeas trial that she refrained from giving the petitioner *any advice* on the plea offer proposed by the court; she merely gave him the facts of the offer, providing no assistance or advice as he weighed his options.¹³ Additionally, the

¹³ Specifically, Moore testified as follows:

"[The Petitioner's Counsel]: Did you recommend to [the petitioner] that he accept [the court's] offer?

"[Moore]: I don't recommend that people take offers.

"[The Petitioner's Counsel]: You just convey the offer?

"[Moore]: That's correct.

* * *

"[The Petitioner's Counsel]: And just going back to April 21, 1997, you had testified that the prosecutor wanted eighteen, suspended after fourteen. The [court] offered fifteen, suspended after nine, and [the petitioner] said he would take six.

"[Moore]: Again, that's what appears to have happened.

"[The Petitioner's Counsel]: So, you are only three years apart, correct?

"[Moore]: . . . yes.

"[The Petitioner's Counsel]: And did you make any attempt to convince [the petitioner] to go with the nine years that [the court] was offering?

"[Moore]: As I indicated, I don't convince my clients. I indicate what the offer is. They tell me what they want or don't want, and I relay that to the judge.

"[The Petitioner's Counsel]: Okay. But based on the seventeen years [of] experience you had at that time, do you tell them, here is what I think is likely to happen, you should seriously consider taking this offer?

"[Moore]: No, I don't do that."

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trial court directly explained to the petitioner that he was facing at least eighty-five years incarceration, and it offered him a plea deal of fifteen years, execution suspended after serving nine years. The petitioner indicated that he was willing to accept a plea deal, but he wanted only six years to serve, and he asked Moore to try to negotiate that for him. Moore gave the petitioner no professional assessment of the court's offer of nine years to serve in the context of the facts underlying the charges against him and his potential total sentence exposure.¹⁴ Ultimately, after not accepting the court's offer of nine years to serve, the petitioner went to trial, was convicted, and received a sentence of thirty-five years incarceration. We conclude that on the facts of this case, Moore's performance was deficient because she did not give the petitioner her professional advice and assistance concerning, and her evaluation of, the court's plea offer.

III

The petitioner next argues that, although the habeas court made no findings concerning prejudice, we can presume prejudice on appeal on the basis of the record. He argues that the record clearly demonstrates that he was willing to plead guilty because he made a counteroffer to the court, and it is reasonably probable that he would have taken the court's offer had counsel properly

¹⁴ We note, in particular, the following colloquy:

"[The Respondent's Counsel]: Did you feel that his desire for [a] six year sentence was realistic in light of the circumstances and his history?

"[Moore]: I don't think I had a feeling one way or the other. I felt that I would relay the court's offer to [the petitioner], [the petitioner] would tell me what he wanted me to relay to the court, and I did that; I didn't feel one way or the other.

"[The Respondent's Counsel]: If a client says to you, you know, what is the range that I can expect, how does what I desire fit into this? Do you go over that with them?

"[Moore]: Well, I don't think I ever had a conversation like that with my client."

advised him. He asks that we order that the petition for a writ of habeas corpus be granted and that the court be ordered to give the petitioner the opportunity to plead guilty under the plea agreement he previously was offered by the trial court. The respondent contends that the record is inadequate to review the prejudice prong of the *Strickland* analysis because the habeas court made no findings as to prejudice. He argues, therefore, that we should affirm the judgment on the basis of an inadequate record. In the alternative, the respondent requests that we remand the case to the habeas court for consideration of the *Strickland* prejudice prong.

The respondent argues that we cannot make the credibility determinations that are necessary in determining whether the petitioner was prejudiced. He argues: "In applying the three-pronged test for determining whether Moore's failure to make a specific recommendation regarding [the trial court's] plea offer prejudiced the petitioner for Sixth Amendment purposes, the [respondent] does not dispute that the record is sufficient for this court to consider the prong that concerns whether [the trial court] would have continued to extend the offer after it was initially rejected by the petitioner; *Ebron* [v. *Commissioner of Correction*, 307 Conn. 342, 352, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone v. Ebron*, U.S. , 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013)]; given [Moore's] uncontested testimony that the judge held the offer open until the start of trial. . . . The [respondent] also does not dispute that the record is adequate for this court to find, pursuant to another prong of the test, that the offer[ed] sentence of nine years to serve would have been less severe than the thirty-five year total effective sentence that the petitioner received as a result of his convictions at trial. However, the record is lacking regarding the final prong of the test, which is whether the petitioner

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would have accepted the offer had [Moore] recommended that he do so. The petitioner asserts that he would have accepted the offer . . . [b]ut only the habeas court, as the trier of fact, is in a position to assess the petitioner's believability on this matter and make the necessary credibility determination" (Citations omitted.)

The petitioner contends that we can presume prejudice on the basis of the record because it is uncontested that he was willing to take a plea deal because he asked Moore to try to negotiate a deal that required him to serve a term of six years, and he was not insisting on going to trial. Citing *Missouri v. Frye*, supra, 566 U.S. 148, he argues that in this case there is no need for a credibility determination because he need not prove that he would have accepted the court's offer because the standard set forth in *Frye* requires only that he demonstrate a *reasonable probability* that he would have accepted such offer. We agree with the respondent that the habeas court is in the best position to determine whether it is reasonably likely that the petitioner would have accepted the offer had he received adequate advice from Moore.

The judgment is reversed in part and the case is remanded for further proceedings on the issue of whether the petitioner was prejudiced by counsel's deficient performance. In the event that the habeas court finds that the petitioner has established prejudice, and no timely appeal is taken from that decision, the judgment is reversed and the case is remanded with direction to grant the petition for a writ of habeas corpus. In the event that the habeas court finds that the petitioner has failed to demonstrate prejudice, and no timely appeal is taken from that decision, the judgment is reversed only as to form and the court is ordered to render judgment denying rather than dismissing the

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petition as it relates to the claim that Moore provided ineffective assistance of counsel.

In this opinion the other judges concurred.

TEANNA ESCOURSE ET AL. v. 100 TAYLOR
AVENUE, LLC, ET AL.
(AC 35054)

DiPentima, C. J., and Gruendel and Beach, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant city of Norwalk for personal injuries sustained by the minor plaintiff T when she was struck by a hit and run driver while she was walking along the shoulder of a roadway in the city. The plaintiffs claimed that T was forced to enter the southbound lane of traffic because the sidewalk area and the shoulder of the roadway were obstructed with snow. The fourth count of their complaint alleged a claim of public nuisance against the city, pursuant to statute (§ 52-557n [a] [1]), stemming from the city's conduct in plowing the snow onto the sidewalk, rendering it impassible to pedestrians. The city filed a motion to strike the public nuisance count on the ground that the plaintiffs' exclusive remedy as to the city was an action pursuant to the municipal highway defect statute (§ 13a-149). The trial court granted the city's motion to strike and rendered judgment in favor of the city on the stricken claim, and the plaintiffs appealed to this court. *Held* that the trial court properly granted the city's motion to strike the public nuisance count of the complaint and determined that the plaintiffs' exclusive remedy against the city was an action pursuant to § 13a-149: because it was clear from the facts alleged in count four of the complaint that the plaintiffs' claim was one for damages against a municipality resulting from an injury to a person by means of a defective road, § 52-557n (a) (1) required the plaintiffs to seek relief, if at all, pursuant to § 13a-149 for their claim against the city; furthermore, the plaintiffs' claim that because, pursuant to statute (§ 7-163a), a municipality may shift liability and responsibility for removing snow and ice to abutting landowners, the city was not the party bound to maintain the sidewalk and, thus, an action arising from a defect in that sidewalk did not fall within the ambit of § 13a-149 was unavailing, as § 52-557n (a) categorically establishes that no claim alleging personal or property damage by means of a defective sidewalk may be brought against a municipality except pursuant to § 13a-149, which was dispositive, and § 7-163a also provides that regardless of generally shifting liability, the municipality shall be liable for its affirmative acts with respect to such

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Supreme Court of Connecticut

October 11, 2018, Argued; June 14, 2019*, Decided

SC 20136

Exhibit #4

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

Reporter

2019 Conn. LEXIS 158 *; 2019 WL 2494788

RALPH BIRCH v. COMMISSIONER OF CORRECTION

Prior History: [*1] 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.

State v. Birch, 219 Conn. 743, 594 A.2d 972, 1991 Conn. LEXIS 372 (July 30, 1991)

Disposition: Reversed; judgment directed.

Counsel: Andrew P. O'Shea, 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).

Judges: Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js. PALMER, J. In this opinion the other justices concurred.

Opinion by: PALMER

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 affirmed the petitioner's conviction.¹ See State v. Birch, 219 Conn. 743, 751, 594 A.2d 972 (1991). Thereafter, the petitioner [*2] filed two habeas petitions, the first of which was denied by the habeas court, Zarella, J. Birch

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).

v. Warden, Docket No. TSR-CV-92-1567-S, 1998 Conn. Super. LEXIS 1824, 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 conducted, and, moreover, a test of the substance that was done 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 [*3] 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

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 sought by the petitioner.

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

the habeas court.⁵

The following facts and procedural history are set forth in the companion case of *Henning v. Commissioner of Correction*, 331 Conn. __, __ 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 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] [*4] 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.

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*, 331 Conn. __, __ A.3d __, 2019 Conn. LEXIS 158 (2019). We also have reversed the judgment of the habeas court in Henning's habeas case, as well; see *Henning v. Commissioner of Correction*, 331 Conn. __, __ A.3d __, 2019 Conn. LEXIS 161 (2019); see also *Henning v. State*, 331 Conn. __, __ A.3d __, 2019 Conn. LEXIS 160 (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.

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 transferred

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 opinion in *Henning v. Commissioner of Correction*, supra, 331 Conn. __, 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.

⁶ "A fence is a person who receives and sells stolen goods." *Henning v. Commissioner of Correction*, supra, 331 Conn. __ n.5.

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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 [*5] 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." *Id.*, __.

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 [*6] "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 [*7] 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 crime 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 [*8] 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 11:25 p.m.⁷

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

⁷We 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*, 331 Conn. __.

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having used the vehicle in the commission of several burglaries, for which the two men were placed under arrest.

As we explain in *Henning v. Commissioner of Correction*, supra, 331 Conn. __, "[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, [*9] 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, no evidence was found 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.*, __.

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 petitioner'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 [*10] 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 [*11] if the victim was lying in a bathroom.

On September 10, 1986, Detective Andrew Ocif, who by then had replaced Mucherino as the Connecticut 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 the 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 in the town of Cheshire. [*12] 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

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."

John R. 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 John R. Manson Youth Institution, the petitioner also befriended fellow inmate Todd Cocchia. After their release from custody in 1988, the petitioner [*13] 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 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

⁹We 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 John R. Manson Youth Institution, he asked Perugini why he had lied to the police about the petitioner 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.

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. [*14]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 it was possible that the [*15] 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.

¹⁰Cocchia 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]."

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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, [*16] 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 [*17] 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, "Oh 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 doorjamb, blood was spilled, the man was stabbed." The prosecutor further asserted that the bloody footwear [*18] 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 [*19] 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

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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 [*20] 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 [*21] 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 back¹¹ 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 [*22] 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, (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

¹² As we explained in *Henning v. Commissioner of Correction*, *supra*, 331 Conn. __, 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, 'Oh God, he's got a knife in his hand.' There was also evidence

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

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investigate, cross-examine, 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, 331 Conn. __, "[t]he petitioner also claimed actual innocence on the basis of, [*23] 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 revealed the DNA of an unknown female on four key pieces of evidence with which the assailants were known or believed 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 the petitioner had cleaned himself up before leaving the victim's home.

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 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 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 [*24] 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*,

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.'" *Henning v. Commissioner of Correction*, supra, 331 Conn. __ 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, 331 Conn. __ n.13.

¹⁴"For example, in support of his claim that trial counsel was ineffective for failing 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 footprint 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

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supra, 373 U.S. 83, including *United States v. Bagley*, 473 U.S. 667, 679, 105 S. Ct. 3375, 87 L. Ed. 2d 481 and n.9, 473 U.S. 667, 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 state could not meet.

"Following the trial, the habeas court issued a memorandum of decision in which it denied or dismissed all [*25] 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 [*26] 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" (Footnotes

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*, 331 Conn. __ 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), "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 intends 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.

¹⁵In 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*, 331 Conn. __ n.16.

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added, in original and omitted.) *Henning v. Commissioner of Correction*, supra, 331 Conn. __.

"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 [*27] 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*, [*28] (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.*, __.

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.*, __. 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 [*29] 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, 331 Conn. __.

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 [*30] [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

¹⁶For reasons unknown to us, the respondent, in his brief, does not even cite to *Cohane*, let alone did he seek to

marks omitted.) *Henning v. Commissioner of Correction*, supra, 331 Conn. ; 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 [*31] 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 [*32] 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." *Henning v. Commissioner of Correction*, supra, 331 Conn. __.

distinguish that case or have this court overrule it. The habeas court similarly ignored *Cohane*." *Henning v. Commissioner of Correction*, supra, 331 Conn. __ n.17.

As we previously indicated, the respondent argues that the state's failure to correct Lee's incorrect testimony 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.) [*33] 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 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 sufficiently powerful as to take this case out of [*34] 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, 331 Conn. . 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 [*35] 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 included the testimony of O'Mara and Mucherino that [*36] 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 it, 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 [*37] 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*, 331 Conn. ___, in rejecting this very argument, "[t]hat conclusion is far from obvious and by [*38] 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

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the towel testimony, whatever blood they did have on them, they simply washed off." (Emphasis in original.) Id., __.

In this opinion the other justices concurred.

End of Document

"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. [*39] 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 prosecution'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 [*40] the petitioner could very well have collapsed." Henning v. Commissioner of Correction, supra, 331 Conn. __.

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.

James Mortimer

No. 19-8436

IN THE
SUPREME COURT OF THE UNITED STATES

In Re
Michael A. Young — PETITIONER
(Your Name)

VS.
Ned Lamont Et. Al. — RESPONDENT(S)

PROOF OF SERVICE

I, Michael A. Young do swear or declare on April 30th, 2020 as required by this U.S. "SUPREME" Court "RULE 29" that I have "SERVED" the enclosed: MOTION APPLICATION FOR "EMERGENCY" RULE 36 "DECLARATION TO ENLARGEMENT ON PERSONAL RECOGNIZANCE PENDING "FINALITY" on (1) Connecticut Attorney General, William Tong, 55 Elm Street, Hartford CT. 06106... (2) U.S. Attorneys Office for the District of Connecticut, Connecticut Financial Center, 157 Church Street, New Haven CT. 06510.. (3) U.S. Attorneys Office for the Southern District of New York, 1 Saint Andrews Plaza, New York, N.Y. 10007... (4) U.S. Solicitor General, Room 5616, Department of "JUSTICE", 950 Pennsylvania Avenue, N.W. Washington D.C. 20530-0001... "AN"... The forgoing document(s) in this "ACTION" were mailed first-class postage prepaid on April 30th, 2020 placed in the institutions "LEAGAL" mail system... Then "AGAIN" on May 20, 2020!!!

I declare under penalty of "PERJURY" that the forgoing is "TRUE" and "CORRECT"...

Executed at Cheshire Ct. Cheshire CT. on April 30th, 2020... Then May 20, 2020!!!

BY: MM "Factual Innocence"!!!
MICHAEL A. YOUNG