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ANTWAN SEASE *v.* COMMISSIONER
OF CORRECTION
(AC 44160)

Cradle, Clark and Flynn, Js.

Syllabus

The petitioner sought a writ of habeas corpus after having been convicted of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree in connection with a shooting. The petitioner had approached a car in a parking lot where he fatally shot one individual, and his coconspirator, Q, robbed another individual. Q later entered into a cooperation agreement with the state under which he agreed to testify truthfully at the petitioner's criminal trial. A presentence investigation report prepared by the Office of Adult Probation disclosed that the petitioner had an extensive mental health history, including diagnoses of schizophrenia and psychotic disorder, and had been prescribed a variety of psychiatric medications. In a prior habeas proceeding, the petitioner claimed, among other things, that his trial counsel had rendered ineffective assistance by failing to adequately investigate the petitioner's mental health history and to present any mitigation evidence resulting therefrom at the petitioner's sentencing. The court determined that the petitioner had failed to establish that he was prejudiced, under the second prong of *Strickland v. Washington* (466 U.S. 668), as a result of his trial counsel's performance with respect to sentencing. The court denied the petitioner's habeas petition and, thereafter, denied his petition for certification to appeal, after which he appealed to this court. On appeal, this court concluded that the habeas court had abused its discretion in denying the petitioner certification to appeal and rejected the habeas court's determination that he failed to prove that he was prejudiced with respect to his counsel's performance at sentencing. However, because the habeas court did not address whether counsel's performance at sentencing was deficient under the first prong of *Strickland*, this court retained jurisdiction over the petitioner's appeal and remanded the case to the habeas court to make findings from the record and, based on those findings, to determine whether counsel's performance at sentencing was deficient. On remand, the habeas court concluded that counsel had not rendered deficient performance at the sentencing proceeding, reasoning that counsel's decision not to investigate the petitioner's mental health background beyond that discussed in the presentence investigation report did not fall below the constitutional standard of reasonableness. *Held:*

1. The habeas court on remand improperly concluded that the petitioner's trial counsel did not render deficient performance in failing to investigate and to focus on the petitioner's mental health background at sentencing, as none of the court's justifications for counsel's inactions was objectively reasonable: the court's reliance on the decision of the prosecutor at the sentencing proceeding not to dispute the petitioner's mental health background was improper, as the prosecutor's decision did not necessarily mean that he or the Office of Adult Probation had acted as an advocate for the petitioner at sentencing, the prosecutor in his remarks having referred only to potential mental health issues, and the presentence investigation report having recommended that the petitioner receive a lengthy sentence, and the prosecutor's decision did not relieve the petitioner's trial counsel of his duty to present mitigation evidence at sentencing as an advocate on behalf of the petitioner; moreover, although the habeas court implied that it was necessary that there be some evidence in the record that mental health issues caused the petitioner's actions in order for counsel to have a duty to investigate the petitioner's mental health background, and that such evidence was lacking, the applicable rule of practice (§ 43-13) and American Bar Association guidelines suggest that such a duty exists and that it continues after conviction, prior to sentencing and after counsel receives the presentence investigation report; furthermore, to the extent that the court stated that trial counsel was in a tenuous position because the petitioner had argued

his innocence at sentencing prior to counsel's comments, that factual interpretation was clearly erroneous, as the petitioner's allocution occurred after counsel's remarks, nothing in the record suggested that counsel knew what the petitioner would say after the conclusion of counsel's remarks, and such reasoning did not justify counsel's decision to limit his comments at sentencing as to the petitioner's mental health history; accordingly, in light of the quantum of information available to counsel prior to sentencing, this court could not contemplate any objectively reasonable, strategic justification for counsel's admitted failure to conduct an investigation into the petitioner's mental health history, which was not consistent with established, prevailing professional norms and entitled the petitioner to have his sentences vacated and to have a new sentencing hearing.

2. The habeas court did not abuse its discretion in denying the petitioner certification to appeal as to his claim that his criminal trial counsel rendered deficient performance by failing to challenge the admission of certain uncharged misconduct testimony, the petitioner having failed to show that there were issues that were debatable among reasonable jurists that a court could resolve differently or that were adequate to deserve encouragement to proceed further: the petitioner could not prove that he was prejudiced by testimony from Q's mother that he previously had knocked her daughter's teeth out, there having been no reasonable probability that the result of his criminal trial would have been different without the admission of that testimony; moreover, Q's mother did not testify as to whether the petitioner had participated in the robbery and shooting, and, even if her testimony had been excluded, the jury had before it sufficient evidence of the petitioner's involvement in the robbery and shooting.
3. The petitioner could not prevail on his claim that the habeas court had abused its discretion in denying him certification to appeal as to his assertion that the state violated his right to due process by knowingly presenting false testimony from Q: there was no merit to the petitioner's contentions that the prosecutor's testimony at the habeas trial demonstrated that the prosecutor had expected that Q would testify falsely but presented Q's testimony anyway because it inculpated the petitioner and that the true nature of Q's cooperation agreement with the state was not to obtain truthful testimony but to secure favorable testimony that could corroborate the petitioner's involvement in the robbery and shooting, as the court's finding that Q's testimony that the agreement required him to testify truthfully was consistent with the written agreement's requirement that Q provide complete, truthful and accurate information and testimony, and, although Q was impeachable as to certain aspects of his testimony, that did not render false his testimony that the cooperation agreement required truthful testimony; moreover, Q's testimony was not false or misleading for purposes of governing due process principles, as the inconsistent statements he previously had given to the police concerned the nature of his involvement in the incident at issue, rather than that of the petitioner, and Q was vigorously cross-examined about those inconsistencies, which were for the jury to resolve; furthermore, this court declined the petitioner's invitation to exercise its supervisory authority over the administration of justice to vacate his conviction, as this was not a rare situation in which traditional protections were inadequate to ensure the fair and just administration of the courts.

Submitted on briefs December 12, 2022—officially released May 23, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Clark and Flynn, Js.*, with *Cradle, J.*, dissenting, which remanded the case for further factual findings; subsequently, the court, *Newson, J.*, made certain factual findings; thereafter, the court, *Newson, J.*, issued an articulation of its decision. *Appeal*

dismissed in part; reversed in part; judgment directed.

Vishal K. Garg, assigned counsel, filed a brief for the appellant (petitioner).

Sharmese L. Hodge, state's attorney, *James A. Killen*, senior assistant state's attorney, *James M. Ralls*, assistant state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, filed a brief for the appellee (respondent).

FLYNN, J. This habeas appeal returns to us following our decision in *Sease v. Commissioner of Correction*, 212 Conn. App. 99, 274 A.3d 129 (2022) (*Sease I*), in which we remanded the matter to the habeas court to make certain factual findings and determinations. The habeas court initially had addressed only the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and did not decide whether trial counsel’s performance at sentencing was constitutionally deficient under the first prong of *Strickland*.¹ In *Sease I*, we determined that the habeas court improperly concluded that the petitioner, Antwan Sease, had failed to prove prejudice under the second prong of *Strickland* with respect to his claim of ineffective assistance of counsel at sentencing.² *Sease v. Commissioner of Correction*, supra, 107–15. Because *Strickland* requires a prevailing habeas petitioner to prove both deficient performance and resulting prejudice; *Strickland v. Washington*, supra, 687; we remanded the matter to the habeas court for the making of underlying factual findings from the record and, based on those findings, for a determination under the first prong of *Strickland*, which requires a showing of constitutionally deficient performance. *Sease v. Commissioner of Correction*, supra, 117. We left undecided in *Sease I* the petitioner’s remaining claims, which were that the court abused its discretion in denying certification to appeal as to the petitioner’s claims that the habeas court improperly concluded that trial counsel did not render ineffective assistance of counsel by failing to challenge certain uncharged misconduct testimony and that the state violated the petitioner’s right to due process by the knowing presentation of false testimony.³ Our remand order in *Sease I* followed our Supreme Court’s decision in *Barlow v. Commissioner of Correction*, 328 Conn. 610, 182 A.3d 78 (2018), which held that “one way a reviewing court may remand a case to the original trial judge for additional proceedings without either triggering [General Statutes] § 51-183c or a dispute over its application is by not disturbing the original judgment in any way and *making clear that the remand is for the purpose of further factual findings*. . . . Accordingly, should additional findings be necessary from an existing record in order to enable the expeditious resolution of a case, even subsequent to the publication of an opinion, the reviewing court may retain jurisdiction over the appeal by means of a rescript that does not disturb the underlying judgment pending the remand and subsequent appellate proceedings.” (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Id.*, 614–15.

On September 21, 2022, the habeas court, on remand, issued a memorandum of decision in which it determined that trial counsel’s failure to focus further on or

to engage in further independent investigation of the petitioner's mental health background with respect to the sentencing hearing did not fall below the constitutional standard of reasonableness.

Having made no determination in *Sease I* as to whether the petitioner ultimately prevailed on his claim of ineffective assistance of counsel at sentencing and having left undecided the petitioner's additional appellate claims, we must now resolve, after remand, the following claims of the petitioner. The petitioner claims that the habeas court improperly (1) determined on remand that his trial counsel's failure to investigate his mental health background prior to sentencing and his failure to focus further on that background during sentencing arguments did not fall below the exercise of reasonable professional judgment under the first prong of *Strickland*, (2) rejected his claim that trial counsel rendered ineffective assistance by failing to challenge uncharged misconduct testimony by a state's witness, and (3) rejected his claim that the state violated his right to due process by the knowing presentation of false testimony. The habeas court denied the petitioner's petition for certification to appeal, and he claims that the court abused its discretion in so deciding. We agree with only the petitioner's claim that the court improperly determined that his trial counsel had not rendered constitutionally deficient performance at sentencing, and we disagree with the petitioner's other claims. Accordingly, we reverse the judgment of the habeas court only with respect to the petitioner's claim of ineffective assistance of counsel at sentencing, vacate the petitioner's sentences, and order a new sentencing hearing.

Before turning to the petitioner's claims, we briefly summarize the underlying facts, which the jury reasonably could have found and were the subject of his direct appeal to this court. See *State v. Sease*, 147 Conn. App. 805, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014). On October 3, 2009, the petitioner and his coconspirator, Quan Morgan (Quan), met at the residence of Quan's mother, Shirley Williams, and proceeded to leave on foot under the guise of getting something to eat for Courtney Morgan, who was Williams' daughter, the petitioner's girlfriend, and Quan's sister. *Id.*, 807. At approximately 2:30 a.m., the petitioner and Quan, each armed with a .38 caliber handgun that the petitioner had provided, walked to the rear of Club Vibz in Hartford and robbed two men in the presence of several witnesses. *Id.*, 807–808. The petitioner walked up to a car in which the victim, Haslam, was seated and, after telling Haslam to “‘empty your [f—] pockets,’” fatally shot Haslam in the chest. *Id.*, 808. Quan, a cooperating witness for the state, was the only witness to identify the petitioner as the second perpetrator involved in the Club Vibz incident. Following a jury trial, the petitioner was acquitted of murder in violation

of General Statutes § 53a-54a. He was convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48. The petitioner was sentenced to thirty years' incarceration for felony murder, twenty years' incarceration for robbery, and ten years' incarceration for conspiracy to commit robbery, which sentences were to run consecutively to each other, for a total effective sentence of sixty years' incarceration. Additional facts and procedural history will be set forth as necessary.

I

The petitioner argues in his supplemental brief⁴ to this court that the habeas court improperly determined on remand that his trial counsel's failure to investigate his mental health background and failure to focus further on that background during his sentencing arguments did not fall below the exercise of reasonable professional judgment under the first prong of *Strickland*. We agree with the petitioner.

We note that, because the habeas court denied the petitioner's request for certification to appeal, our first step ordinarily would be to analyze whether the petitioner satisfied the first hurdle of demonstrating that the court abused its discretion in denying such certification. See, e.g., *Johnson v. Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008). Under the unusual procedural posture of the present case, however, we already have determined in *Sease I* that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal with respect to his claim that his trial counsel rendered ineffective assistance at sentencing. *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 104. In so determining, we reasoned that "[t]he record in the present case reveals an unusually troubled, traumatic, and extensive mental health history, significant parts of which were not also in the presentence investigation report. The petitioner had both audio and visual hallucinations throughout his life, was professionally diagnosed with schizophrenia, psychotic disorder, and post-traumatic stress disorder, and he was prescribed a variety of psychiatric medications including Risperdal, Ritalin, Risperidone, and Trazodone. . . . His ineffective assistance of counsel claim involves issues that are debatable among jurists of reason, are such that a court could resolve the issues in a different manner and raise questions that deserve encouragement to proceed further." *Id.*

We now turn to the merits of the petitioner's claim, our review of which is guided by the following standards. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb

the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Soto v. Commissioner of Correction*, 215 Conn. App. 113, 119, 281 A.3d 1189 (2022).

"A convicted [petitioner's] claim that counsel's assistance was so defective as to require reversal of a conviction [or sentence] . . . has two components. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, supra, 466 U.S. 687.

Because the petitioner's claim concerns trial counsel's performance, the following additional standards are relevant. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . [T]o satisfy the performance prong [of the *Strickland* test], a [petitioner] must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Citations omitted; internal quotation marks omitted.) *Gaines v. Commissioner of Correction*, 306 Conn. 664, 679–80, 51 A.3d 948 (2012). "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Emphasis omitted; internal quotation marks omitted.) *Jordan v. Commissioner of Correction*, 341 Conn. 279, 288, 267 A.3d 120 (2021), quoting *Strickland v. Washington*, supra, 466 U.S. 689. In reconstructing the circumstances, "a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . ." (Internal quotation marks omitted.) *Spearman v. Commissioner of Correction*, 164 Conn. App. 530, 539, 138 A.3d 378, cert. denied, 321

Conn. 923, 138 A.3d 284 (2016), quoting *Michael T. v. Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015), quoting *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).⁵ Accordingly, our review of the petitioner’s claim requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported trial counsel’s decisions concerning the sentencing hearing and, second, to consider whether those reasons were objectively reasonable. See *Jordan v. Commissioner of Correction*, supra, 341 Conn. 291–92 (“our plenary review requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported [trial counsel’s] decisions . . . and, second, to consider whether those reasons were objectively reasonable”).

A criminal defendant’s right to constitutionally effective assistance of legal counsel is a constitutional right guaranteed by the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. See, e.g., *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624, cert. denied sub nom. *Dzurenda v. Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013). A claim of ineffective assistance of counsel at sentencing is not designed to protect a petitioner from an erroneous conviction but, instead, protects his or her right to have constitutionally effective counsel at sentencing. Ultimately, the sentence to be imposed by the trial judge is largely within that judge’s discretion. The difficulty in measuring whether the constitutional right to have effective counsel both properly investigate a petitioner’s psychiatric history and argue such history in mitigation is not to be deemed hollow simply because it is difficult to measure whether the failure to do so affected the sentence imposed. This is so even though the precise effect of the failure to do so cannot be ascertained.

As a preliminary matter, we note that, in *Sease I*, we determined that the habeas court improperly concluded that the petitioner had failed to prove prejudice under the second prong of *Strickland*, “remanded [the case] to the habeas court for the making of underlying factual findings from the record and based on those findings for a determination of whether the petitioner has shown that his counsel’s representation of him at sentencing constituted constitutionally deficient performance under the first prong of *Strickland*,” and retained jurisdiction over the appeal. See *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 117.

On remand, the habeas court concluded that trial counsel’s investigation prior to sentencing and performance at the sentencing hearing did not fall below the constitutional standard of reasonableness. The court stated that “[m]ost working regularly in the criminal dockets would agree, without need for citation, that

the vast majority of defendants have some level of legitimate mental health in their background. The question for defense counsel is often, ‘how much mileage’ [he or she] can gain out of it as a factor in defending their client. The next reasonable question a defense attorney must ask themselves is how directly or indirectly can counsel connect the mental health issues to the case at hand. While the fact that the petitioner in the present case had a prior mental health history was not contested by anyone, there was also zero evidence in the record that his mental health issues played the slightest hand in the petitioner’s actions.” The court noted that, at the sentencing hearing, the state conceded the petitioner’s mental health background and that, “[d]espite the state’s concession, defense counsel did reiterate the broad facts related to the petitioner’s mental health issues.” The court noted that trial counsel argued at the sentencing hearing, “Judge, the reason he’s here is because, as [the state] even alluded to, society sort of let him go. I mean, he had mental problems. He was hiding in a bathroom, he witnesses [his uncle kill the uncle’s girlfriend], he was abused, his mother had problems with substance abuse” The court further reasoned, “[t]o put it generally, this court is being asked to decide whether counsel’s failure to investigate the [petitioner’s] mental health background and to further focus on that background during his sentencing arguments fell below ‘the exercise of reasonable professional judgment’ within a case where [1] there was no dispute from the state to the petitioner’s personal or mental health background as reported in the [presentence investigation] report, and [2] where there was no actual evidence in the record that the petitioner’s mental health had any relation to the crimes for which he was sentenced; and [3] where the [petitioner], just prior to counsel’s sentencing comments, argued his innocence.”

The habeas court went on to state: “Counsel’s decision on what he argued during the petitioner’s sentencing cannot be viewed in a vacuum. It must be viewed in the context that his client always maintained his innocence of the acts in question, *even* reiterating his innocence (i.e., lack of acceptance of responsibility) just before defense counsel was to make his sentencing arguments. Arguing a client’s mental health generally connotes some concession that the client *did* engage in particular conduct *because of* or that it was *caused by* the mental health related issues, but this was an issue—his own responsibility for the conduct—the petitioner disputed to the very end of his sentencing. Further, as testified to by defense counsel at the habeas trial, the petitioner’s mental health was never raised to him as a potential factor for any of the conduct alleged. In other words, defense counsel was in the tenuous position of accepting that his client was asserting his factual innocence throughout the entirety of the repre-

sentation and being questioned for failing to frame arguments seeking leniency from the court that would generally appear to be saying, ‘he did these things *because of his mental health.*’ . . . Based on the foregoing, and under the circumstances as they occurred in the present case, counsel’s failure to focus further on, or to engage in further independent investigation of, the petitioner’s mental health background for sentencing did not fall below the constitutional standard of reasonableness.” (Citations omitted; emphasis omitted; footnotes omitted.)

Upon our receipt of the habeas court’s memorandum of decision after remand, we ordered the parties to “file supplemental briefs . . . addressing the September 21, 2022 memorandum of decision of the habeas court, *Newson, J.*, in response to this court’s remand order, including: (1) whether the habeas court sufficiently complied with this court’s order to make ‘factual findings from the record’; and (2) whether the habeas court properly determined that trial counsel’s representation of the petitioner at sentencing did not constitute constitutionally deficient performance under the first prong of *Strickland.*”

In his supplemental brief, the petitioner argues that the habeas court did not sufficiently comply with this court’s remand because it made factual findings based on “vague generalities,” and sought “to have the court affirm its judgment by ignoring the actual evidence presented at trial.” The petitioner contends that this court, nevertheless, can address the merits of the argument presented in his supplemental brief because the undisputed facts and uncontroverted evidence establish as a matter of law that trial counsel’s performance at sentencing was deficient under the first prong of *Strickland*. The respondent, the Commissioner of Correction, argues in his supplemental brief that the habeas court sufficiently complied with our remand order and that the court’s decision on remand contains sufficient implicit and explicit factual findings to permit review and resolution of the question of whether the petitioner satisfied his burden pursuant to the first prong of *Strickland*. The respondent further argues that the habeas court properly determined that trial counsel’s representation at sentencing did not constitute constitutionally deficient performance under the first prong of *Strickland*. We agree with the parties that we can review the issues briefed by the parties. The decision of the habeas court, including its explicit and implicit findings and conclusions, and the record provide a sufficient basis from which we can analyze whether the court properly determined on remand that trial counsel’s performance at sentencing was not constitutionally deficient.

It is evident from the court’s decision on remand that it determined that the petitioner did not overcome the presumption that his trial counsel’s challenged inaction

be considered sound strategy at sentencing. Although our examination of the possible strategic reasons for counsel's inaction is not limited to those contemplated by the habeas court, we determine, in the exercise of our plenary review, that none of the court's possible strategic justifications for trial counsel's inactions are objectively reasonable and also note that one such reason is based on the habeas court's clearly erroneous factual interpretation of the record. The possible strategic justifications provided by the habeas court for trial counsel's conduct are that the prosecutor did not dispute the petitioner's mental health background as reported in the presentence investigation report; there was no evidence that the petitioner's mental health played any role in his actions during the Club Vibz incident; and trial counsel was in a tenuous position in that the petitioner had argued his innocence just prior to trial counsel's remarks at sentencing. We examine each possible justification in turn.

We begin with the court's point that the prosecutor did not dispute the petitioner's mental health background as reported in the presentence investigation report. First, if a prosecutor does not dispute the mental health background in the presentence investigation report, that does not necessarily mean that the petitioner had an advocate at sentencing who presented mitigating evidence as to his mental health history. This is so because the prosecutor, clearly, is not an advocate for the petitioner; his defense counsel is. Second, although the prosecutor in the present case commented at sentencing that he had "some sympathy" for the petitioner after reading the presentence investigation report, he further stated that the petitioner's exposure to violence, "potential mental health issues," questionable support system, and abuse "didn't mitigate the severity of this offense." Indeed, the prosecutor referred only to "potential" mental health issues in his sentencing comments, when the presentence investigation report showed *actual* professionally diagnosed schizophrenia, psychotic disorder, and post-traumatic stress disorder, for which the petitioner was prescribed a variety of psychiatric medications. The prosecutor argued that the court "has the potential essentially to impose a life sentence" upon the petitioner. Additionally, the presentence investigation report was compiled not by an advocate for the petitioner, but by the Office of Adult Probation, which recommended at the conclusion of the presentence investigation report that the petitioner receive "a lengthy period of incarceration." It was within the duty and the province of trial counsel to present mitigating evidence at sentencing as an advocate on behalf of the petitioner.

The court's next point was that there was "zero evidence in the record that [the petitioner's] mental health issues played the slightest hand in the petitioner's actions." There would not necessarily be such evidence

in the record, as trial counsel's theory of defense focused on identification.⁶ This identification defense was understandable given that Quan was the only witness who identified the petitioner as the shooter. We reject, however, the premise implicit in the habeas court's conclusion that there must necessarily be some evidence that mental illness caused the petitioner to act as he did in order for defense counsel to have a duty to investigate the mental health history and/or argue it to the court in mitigation at sentencing. The habeas court cited no authority for its premise nor are we aware of any. Indeed, our rules of practice and the American Bar Association guidelines suggest there is such a duty and that it continues after conviction, prior to sentencing, and after receipt of the presentence investigation report. See *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 106–107; see also Practice Book § 43-13.

Sentencing arguments are not as restricted as the habeas court suggested. In a law review article, John B. Meixner, Jr., notes that past scholarly works focused on sentencing mitigation in the capital context and examines how mitigation works in cases outside of that context. J. Meixner, Jr., “Modern Sentencing Mitigation,” 116 Nw. U. L. Rev. 1395, 1414–16 (2022). Meixner noted that all potential mitigating factors “either mitigate based on the ‘nature and circumstances of the offense’ or the ‘history and characteristics of the defendant.’” *Id.*, 1417. Meixner termed the latter type of mitigation as “‘personal mitigation’ because the focus is on the individual person rather than the offense.” *Id.* What Meixner referred to as a “personal mitigation” factor is incorporated into Practice Book § 43-13, which is entitled “Familiarization with Report by Defense Counsel,” and provides: “Defense counsel shall familiarize himself or herself with the contents of the presentence or alternate incarceration assessment report or both, including any evaluative summary, and any special medical or psychiatric reports pertaining to the client.” It is evident from the wording of § 43-13 that a defense counsel's duty to familiarize himself with any special mental health records of his client is not limited to mental health conditions that influenced in whole or in part a criminal defendant's actions at the time of the crime but that such duty extends to personal mitigation factors, including, in the present case, the petitioner's troubled and traumatic past and professionally diagnosed mental illnesses, and to any special medical or psychiatric reports. It is also evident from the wording of this rule that this obligation continues even after receipt of the Office of Adult Probation's presentence investigation report. See Practice Book § 43-13.

The court's final point was that trial counsel was in a “tenuous position” because, prior to trial counsel's remarks at sentencing, the petitioner had argued his innocence. To the extent that the court's reasoning

could be construed to mean that trial counsel was in a tenuous position because the petitioner maintained his innocence throughout the criminal trial, such reasoning does not provide a reasonable strategic justification for limiting sentencing comments as to the petitioner's mental health history. By this logic, most defense counsel, whose clients were convicted following a trial, would have a strategic justification for limiting sentencing remarks relating to a defendant's mental health history, as a criminal defendant exercises his constitutional right to a trial precisely because he *maintains his innocence*. In *Donald v. Commissioner of Correction*, 216 Conn. App. 63, 284 A.3d 665 (2022), cert. denied, 346 Conn. 911, 289 A.3d 596 (2023), the petitioner had maintained his innocence throughout the criminal proceedings against him, but the presentence investigation report nevertheless put counsel on notice of the need to gather additional records. Because counsel did not do so, this court determined that counsel's performance was deficient, explaining that, "[a]lthough the petitioner's relationship with trial counsel had broken down by the time of sentencing, that did not relieve counsel of his obligation to gather mitigating information from and about the petitioner prior to that time, or to present such information in support of a plea for leniency on the petitioner's behalf at his sentencing hearing." *Id.*, 102.

To the extent that the court states that trial counsel was in a tenuous position because the petitioner argued his innocence at the sentencing hearing prior to trial counsel's sentencing comments, the court's factual interpretation of the record in this regard is clearly erroneous.⁷ The petitioner's allocution, in which he maintained his innocence, occurred *after* trial counsel's remarks at sentencing, and not before. At the start of the sentencing hearing, the petitioner detailed the errors he thought were committed by his trial counsel and stated that he wanted to discharge counsel and represent himself at sentencing but ultimately changed his mind and proceeded with counsel. It was only *after* trial counsel made his comments at sentencing that the petitioner stated that he was "being convicted for something [he] didn't do." Nothing in the record suggests that trial counsel knew what the petitioner would say after counsel concluded his remarks to the sentencing court. Additionally, in trial counsel's comments at sentencing, he stated that whether he believed the petitioner to be innocent did not matter because the jury had found him guilty. Trial counsel began his comments at sentencing by expressing that "it may not appear to be that he is, but I think he's sorry. I think he's going to tell you he's sorry at the appropriate time. [The victim] is not here, and no matter what I say, on behalf of my client we apologize to the family." Trial counsel, whose theory of the defense was centered on identification, further stated at sentencing that he did not think that

the petitioner was the shooter, but that “it doesn’t matter what I think, but the jury found that he was the shooter. . . . They did convict him. And they convicted him, I believe, because they felt he was there.” Second, as we previously stated, sentencing arguments concerning a defendant’s mental health background as mitigation are not restricted to arguments concerning culpability but can include arguments wherein mental health concerns constitute a personal mitigation factor, which focuses on the individual defendant rather than on the offense.

For the foregoing reasons, none of the habeas court’s proffered strategic justifications for counsel’s conduct concerning the sentencing hearing was objectively reasonable. However, our focus in the present case is not just on evaluating whether trial counsel’s decision not to focus further on the petitioner’s mental health background at sentencing was objectively reasonable but is also directed at determining whether the investigation supporting trial counsel’s decision not to introduce further mitigating evidence at sentencing was itself objectively reasonable. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 522–23, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

“[I]n *Wiggins* . . . the United States Supreme Court held that although defense counsel was aware of certain aspects of the defendant’s background, counsel’s failure to compile a complete social history of the defendant was objectively unreasonable and, thus, counsel rendered deficient performance by failing to make a fully informed decision when deciding against presenting such mitigation evidence.” (Internal quotation marks omitted.) *Donald v. Commissioner of Correction*, supra, 216 Conn. App. 100–101 n.15. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . That is, counsel’s decision to forgo or truncate an investigation must be directly assessed for reasonableness in all the circumstances In assessing the reasonableness of an attorney’s investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. . . . In addition, in contrast to our evaluation of the constitutional adequacy of counsel’s strategic decisions, which are entitled to deference, when the issue is whether the investigation supporting counsel’s [strategic] decision to proceed in a certain manner was itself reasonable . . . we must conduct an objective review of [the reasonableness of counsel’s] performance Thus, deference to counsel’s strategic decisions does not excuse an inadequate investigation” (Citations omitted; emphasis omitted; internal quota-

tion marks omitted.) *Skakel v. Commissioner of Correction*, 329 Conn. 1, 32, 188 A.3d 1 (2018), cert. denied sub nom. *Connecticut v. Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

On remand, the habeas court determined that, “under the circumstances as they occurred in the present case, counsel’s failure . . . to engage in further independent investigation of . . . the petitioner’s mental health background for sentencing did not fall below an objective standard of reasonableness.” In resolving the petitioner’s *Strickland* claim, we affirmatively contemplate the possible strategic reasons that might have supported trial counsel’s decisions limiting his investigation, and, second, we consider whether those reasons were objectively reasonable. See *Jordan v. Commissioner of Correction*, supra, 341 Conn. 291–92. Trial counsel’s statements at the sentencing hearing indicate that he was unaware of some of the petitioner’s mental health history; he commented: “But you know, anybody that reads this presentence report has got to come away and say, well, he didn’t have much of a chance, did he? . . . And some of the things in this report, Your Honor, I was unaware of. I was unaware that . . . some of the mental problems that he had that are mentioned. In talking to him over the last year or so, I did go to see him three or four times, Your Honor, at the jail. And sometimes—you know, I’m not sure if we were on the same wavelength. You know, I would talk to him, and we would—so, we got through, and I’m not a psychiatrist and I’m not a doctor. You know, I talk to people all the time. Like I say, I was unaware of some of the things that came out of this [presentence investigation report], but looking back now, what I read, I could filter it through and put it together in my equation of when I talked to him and some of the things that we talked about or some of the times we talked. Sometimes, you know, I wasn’t reaching him, and now I know that maybe there was a reason I wasn’t able to reach him. But I’d ask the court to be merciful. I know it’s hard, but I think he deserves some mercy, Your Honor.” The petitioner’s trial counsel did not go further into the petitioner’s history and treatment for mental illness.

Trial counsel testified as follows at the habeas trial concerning whether he had conducted an investigation into the petitioner’s mental health prior to sentencing:

“Q. And did anything in your interactions with the petitioner make you think that mental health may have been an issue?

“A. I’m not a mental health expert. You know, I—I mean, I don’t judge people, and I don’t judge their, you know, their sanity. I thought he was competent. Other than that, if he had any deficiencies, I was either unaware of them or not knowledgeable enough to discern them. But I thought he was capable of understanding the charges against him, and he was able to cooper-

ate with me in the defense.”

* * *

“Q. Okay. And did you conduct any kind of investigation into any kind of mental health issues that may have been present for the petitioner prior to his sentencing?”

“A. No.

“Q. Okay. And why wouldn’t you have done that?”

“A. Well, I mean I didn’t see him [as] being a mental status that like you’re suggesting.”

Trial counsel further testified that he could not think of a situation in which an investigation between the verdict and sentencing would be necessary.

Our review of the record reveals that trial counsel commented at the sentencing hearing that he previously was unaware of some of the contents of the presentence investigation report⁸ and admitted at the habeas trial that, prior to sentencing, he had not conducted an investigation into the petitioner’s mental health because he did not discern that mental health concerns may have impacted the petitioner. Our analysis of whether trial counsel’s actions in failing to investigate are objectively reasonable is guided by prevailing professional norms. See, e.g., *Gaines v. Commissioner of Correction*, supra, 306 Conn. 679–80. “Although the reasonableness of any particular investigation necessarily depends on the unique facts of any given case . . . counsel has certain baseline investigative responsibilities” (Citation omitted.) *Skakel v. Commissioner of Correction*, supra, 329 Conn. 33. Prevailing norms, as described in our rules of practice and by the American Bar Association guidelines, suggest that there is a duty to investigate the mental health history of an accused, that such duty continues in the time frame after conviction and prior to sentencing following receipt of the presentence investigation report. As we pointed out in *Sease I*: “Practice Book § 43-13 requires that a defense counsel familiarize himself not only with the contents of the presentence investigation report, but also with ‘any special medical or psychiatric reports pertaining to the client.’ Prevailing norms of practice as reflected in the American Bar Association Standards are guides for determining what is reasonable. We, therefore, look to the following American Bar Association Standards for defense counsel at sentencing. ‘Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client’s background’ A.B.A. Standards for Criminal Justice: Defense Function (4th Ed. 2017) standard 4-8.3 (a) . . . ‘Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused.’ *Id.*, standard 4-8.3 (c). ‘Defense counsel should gather and submit to the presentence officers,

prosecution, and court as much mitigating information relevant to sentencing as reasonably possible’ Id., standard 4-8.3 (d). ‘If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. . . . In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court’s presentence report’ Id., standard 4-8.3 (e).” (Citation omitted.) *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 106–107.

Trial counsel’s failure to conduct an investigation prior to sentencing in the context of the present case was not consistent with established prevailing professional norms. See *Meletrich v. Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019) (“a defendant must show that, considering all of the circumstances, counsel’s representation fell below an objective standard of reasonableness as measured by prevailing professional norms” (internal quotation marks omitted)). Practice Book § 43-13 requires that trial counsel familiarize himself with any special medical or psychiatric reports pertaining to the petitioner, and the American Bar Association standards⁹ suggest that he should have sought to verify the information in the presentence investigation report. Although trial counsel suggested in his testimony before the habeas court and his sentencing comments that he was not able to discern from his interactions with the petitioner that he may be impacted by mental health concerns, a review of the presentence investigation report, as is required by § 43-13, would have sufficiently alerted trial counsel to such possibility. The quantum of information available to trial counsel prior to sentencing reveals that, according to the presentence investigation report, the petitioner had been diagnosed with several severe mental health concerns, and the last time the petitioner reported taking any medication was in early 2009, which was several months before the Club Vibz incident in October, 2009. This would reasonably raise the question of what effect the petitioner’s lack of medication had on his hallucinations,¹⁰ particularly in light of Quan’s testimony at the petitioner’s criminal trial that “in the mix of going to get something to eat, it was when [the petitioner] started talking to himself. He says, they got to be him, they got to be him. I asked him, what are you talking about,” which suggests that perhaps the petitioner was hearing voices at the time of the Club Vibz incident. This information, which was known prior to the petitioner’s sentencing hearing, would lead a reasonable attorney to investigate further.¹¹ However, trial counsel, by his own admission at the habeas trial, indicated that he did not conduct any investigation into the petitioner’s mental health history prior to sentencing.

An investigation prior to sentencing reasonably

would have revealed the following significant details of the petitioner's mental health history, which were included in the petitioner's mental health records and admitted as full exhibits at the habeas trial but were not part of the presentence investigation report. We detailed these discrepancies in *Sease I* as follows: "Unlike the summary description contained in the presentence investigation report, his mental health records provide illuminating details of his battle with mental health concerns. The presentence investigation report made no mention of the petitioner having experienced visual hallucinations in which he had visions of his deceased aunt speaking to him. In contrast, the mental health records described how he was disturbed by his visual hallucinations of his murdered aunt accusing him of causing her death and that he began hearing audio command hallucinations when he was eight years old, but that those hallucinations went away spontaneously only to reappear in 2005, when the petitioner was approximately sixteen years old. The presentence investigation report made no mention that the mental health records indicated that the petitioner began treating with a psychiatrist in 2006, when he was seventeen years old and in the ninth grade. Unlike the presentence report, the mental health records note that he had received special education services since he was in the fifth grade. The presentence investigation report under the heading 'Substance Abuse' mentioned the petitioner's use of alcohol and marijuana, but did not mention, as did his mental health records, that he smoked marijuana in an attempt to quiet his hallucinations. The presentence investigation report briefly mentioned that the petitioner experienced hallucinations and had attacked innocent people based on them, but the mental health records explained that the petitioner was arrested after obeying an audio command hallucination to assault a police officer, thereafter, attempted to set the jail in which he was held on fire, and, subsequently, after attempting suicide, was transferred to a psychiatric facility where he was given medication for sleep, but where he received no antipsychotic medication. The mental health records also provided the following details concerning the petitioner's hallucinations and paranoia, which were not mentioned in the presentence investigation report. These records indicated that prior to seeking treatment from a psychiatrist in 2006, the petitioner hallucinated daily, experienced paranoia, and was frightened that people wanted to kill him. The mental health records further indicated that the petitioner stated during a 2006 visit with a psychiatrist that, since leaving jail, he felt that he could resist any command hallucinations that told him to do something dangerous to himself or others. Unlike the presentence investigation report, the progress notes detailed his battle with these symptoms and stated that, at various points during his treatment, the petitioner thought that the radio and television talked about him, was fearful that some-

one might want to harm him, wanted to stay in the apartment to avoid problems, and thought that one of his therapists was a witch who intended to steal his soul. The mental health records noted that the petitioner was paranoid, was not able to make eye contact comfortably, and seemed quite scared and distracted. The presentence investigation report mentioned that the petitioner had taken medication but did not detail the effect that medication had on his hallucinations. In contrast, the mental health records included an initial assessment from 2006 when the petitioner was seventeen years old as well as progress notes until June, 2009, a few months before the underlying crimes. The mental health records detail how, after gradually increasing the dosage of medication, the petitioner's audio hallucinations became muffled and described how once the petitioner began taking a specific dosage of medication, he experienced substantial improvement, began smiling, and had no residual hallucinations. The records further detail how the petitioner's hallucinations and paranoia returned and began increasing after he ran out of medication." *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 111–13. Such details of the petitioner's unusually troubled, traumatic, and extensive mental health history contained in the petitioner's mental health records but not in the presentence investigation report are "a classic kind of mitigating information that courts routinely consider in fashioning criminal sentences, which defense attorneys are duty bound to gather and present on behalf of their clients whenever it is reasonably available to them." *Donald v. Commissioner of Correction*, supra, 216 Conn. App. 100.

In light of the information available to counsel prior to sentencing and the prevailing professional norms, we cannot contemplate any objectively reasonable strategic justification for trial counsel's admitted failure to conduct an investigation into the petitioner's mental health background prior to sentencing. As a result of the objectively unreasonable limits on trial counsel's investigation, his decision not to present further mental health history as mitigation at sentencing is rendered uninformed.¹² See *Skakel v. Commissioner of Correction*, supra, 329 Conn. 32–35 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [W]hen counsel's failure to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, no deference or presumption of reasonableness is warranted." (Citations omitted; internal quotation marks omitted.)). Under the unusual circumstances of the present case, we can discern no reasonable tactical justification for the course taken at sentencing. See, e.g., *Spearman v. Commissioner of Correction*, supra, 164 Conn. App. 540–41 ("[a]s a general rule, a habeas petitioner will be

able to demonstrate that trial counsel’s decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken” (internal quotation marks omitted)). Accordingly, we conclude that the court improperly determined that trial counsel rendered constitutionally adequate performance at sentencing. In light of our determination in *Sease I*, that the petitioner had proven the prejudice prong of his claim of ineffective assistance of counsel at sentencing, and in light of our exercise of both clearly erroneous and plenary review where appropriate, the petitioner, having now prevailed on both prongs of *Strickland*, is entitled to a reversal of the judgment of the habeas court as to his claim of constitutionally ineffective assistance of trial counsel at sentencing and to have his sentences vacated and to have a new sentencing hearing. See *Davis v. Commissioner of Correction*, 319 Conn. 548, 568–69, 126 A.3d 538 (2015), cert. denied sub nom. *Semple v. Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). We now address the petitioner’s remaining claims, which the petitioner raised in his initial appellate brief and which we did not address in *Sease I* and which, if sustained, would result in a reversal of the judgment of conviction. See *Copas v. Warden*, 30 Conn. App. 677, 686–88, 621 A.2d 1378, cert. denied, 226 Conn. 901, 625 A.2d 1374 (1993).

II

The petitioner next claims that the habeas court improperly denied his claim that his right to effective assistance of counsel was violated by trial counsel’s failure to challenge uncharged misconduct testimony. We conclude that the court did not abuse its discretion in denying certification to appeal as to this issue.

“Faced with the habeas court’s denial of certification to appeal, a petitioner’s first burden is to demonstrate that the habeas court’s ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles.” (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, supra, 285 Conn. 564, quoting *Simms v. Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). “In determining whether the habeas court abused its discretion in denying the petitioner’s request for certification, we necessarily must consider the merits of the petitioner’s underlying claims to determine whether the habeas court reasonably determined that the petitioner’s appeal was frivolous.” *Taylor v. Commissioner of Correction*, 284 Conn. 433, 449, 936 A.2d

Our consideration of the merits of this claim is guided by the factors set forth by the United States Supreme Court in *Strickland v. Washington*, supra, 466 U.S. 668. To prevail on a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance was constitutionally deficient and that the deficient performance resulted in prejudice. *Id.*, 687.

The following additional facts are relevant. At the petitioner's criminal trial, Williams testified on direct examination that the petitioner showed up at her residence on the night in question and then left with Quan to get Courtney Morgan something to eat, but that, "[w]hen we first moved there, [the petitioner] wasn't coming around." When asked, "[w]as there a reason why he wasn't coming around," Williams answered that she "wasn't speaking with [the petitioner] and didn't want to have anything to do with him because he knocked [her] daughter's teeth out." On cross-examination, Williams was asked: "[The petitioner] didn't necessarily see you, I couldn't quite hear what you said the reason was, but it doesn't matter. He didn't see you, but you were aware that he was coming by to see Courtney?" Williams responded, "No. What I said was, he would occasionally come by. He stopped coming by the house—I had him stop because of the situation that happened with him and my daughter, which he knocked her tooth out; so, I wasn't speaking to him and wasn't allowing him to come to the house, and then all of a sudden he started coming back to the house." Trial counsel did not object to or move to strike the uncharged misconduct testimony.¹³

In rejecting the petitioner's claim, the habeas court reasoned that the petitioner's failure to present testimony from Williams at the habeas trial was fatal to his claim that trial counsel was ineffective for failing to adequately cross-examine Williams as to the uncharged misconduct testimony. Although the court did not expressly state its reasoning for rejecting the portion of this claim in which the petitioner alleged that counsel rendered ineffective assistance for failing to "otherwise challenge" Williams' uncharged misconduct testimony, it denied this claim of ineffective assistance of counsel and the habeas petition in its entirety, thereby inherently rejecting the portion of the claim, the rejection of which is now being challenged on appeal.¹⁴ See, e.g., *DeMattio v. Plunkett*, 199 Conn. App. 693, 716–17, 238 A.3d 24 (2020) (addressing claim on merits where trial court's decision revealed it did not expressly but, rather, inherently rejected argument).

The petitioner could not prove that the admission of the uncharged misconduct testimony prejudiced him within the meaning of the second prong of *Strickland*. To establish prejudice under *Strickland*, a petitioner "must show that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, supra, 466 U.S. 694. We conclude that there is no reasonable probability that, without the admission of this uncharged misconduct evidence, the result of the petitioner's criminal trial would have been different. Williams' testimony placed the petitioner at her residence before and after the incident at Club Vibz, but she did not testify as to whether the petitioner had participated in the shooting. Even if Williams' uncharged misconduct testimony had been excluded, the jury had before it sufficient evidence of the petitioner's involvement in the robbery and shooting of the victim and, therefore, it was not reasonably probable that the result of the trial would have been different. Because the petitioner failed to show that there are issues that are debatable among reasonable jurists, that a court could resolve differently or that are adequate to deserve encouragement to proceed further, we conclude that the court did not abuse its discretion in denying the petitioner certification to appeal as to this claim. See *Johnson v. Commissioner of Correction*, supra, 285 Conn. 564.

III

The petitioner's final claim is that the court improperly denied his claim that the state violated his right to due process by knowingly presenting false testimony from his coconspirator, Quan. We conclude that the court did not abuse its discretion in denying certification to appeal as to this issue.

We address the merits of the petitioner's claim in order to determine whether the habeas court abused its discretion in denying the petitioner's request for certification to appeal. See *Taylor v. Commissioner of Correction*, supra, 284 Conn. 449. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair . . . and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Adams v. Commissioner of Correction*, 309 Conn. 359, 371–72, 71 A.3d 512 (2013). "Whether a prosecutor knowingly presented false or misleading testimony [in violation of a defendant's due process rights] presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those

facts subject to de novo review.” (Internal quotation marks omitted.) *Donald v. Commissioner of Correction*, supra, 216 Conn. App. 85, quoting *Greene v. Commissioner of Correction*, 330 Conn. 1, 14, 190 A.3d 851 (2018), cert. denied sub nom. *Greene v. Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019).

The following additional facts and procedural history are relevant. Trial counsel testified at the habeas trial that his theory of the defense focused on identification. Quan was the only witness who identified the petitioner as the second perpetrator involved in the Club Vibz incident. The state entered into a cooperation agreement with Quan wherein he pleaded guilty to felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree in connection with the incident at Club Vibz, and agreed to testify truthfully at the petitioner’s trial in exchange for a promise that he would receive a sentence of no less than twenty-five years and no more than sixty years. The cooperation agreement was disclosed to the petitioner and his counsel.

At the petitioner’s criminal trial, Quan testified on direct examination that he had pleaded guilty to felony murder, robbery in the first degree, and conspiracy to commit robbery relating to the Club Vibz incident and that he entered into a cooperation agreement with the state wherein he was required to “[t]ell the truth.” Regarding the events leading up to and including the Club Vibz incident, Quan testified, in relevant part, on direct examination at the petitioner’s criminal trial as follows. In the morning, the petitioner was at Williams’ residence, where Courtney Morgan and Quan also resided. Quan and the petitioner left on foot to get Courtney Morgan something to eat, but the petitioner “started talking to himself,” saying, “they got to be him, they got to be him.” The petitioner and Quan walked to the parking lot at Club Vibz. According to Quan, the petitioner “speeds up, walks over to the car, leans over and says something to the guy and two seconds later he shoots him. But in the mix of that after he shoots the guy, I tell the other guy [Middleton] to turn around and get on the floor.” Quan stated that he did not take anything from Middleton. Quan further testified that he “knew who killed this guy . . . at Vibz,” but that he “wasn’t entirely true in the beginning” with the police because he “wasn’t trying to be incarcerated.” When asked on cross-examination whether, pursuant to the cooperation agreement, “you have to tell the truth,” Quan responded in the affirmative. Quan was thoroughly cross-examined regarding the inconsistent versions of events that he had given to the police. Some of the inconsistencies highlighted during cross-examination were that Quan incorrectly told the police that he was not at the scene of the Club Vibz shooting and instead told the police he was at a gas station when he saw the petitioner fleeing the scene and, in another

statement, said that he was stopped at a traffic signal with his son in the car in which they were riding when he saw the petitioner fleeing the scene. He also testified on cross-examination that he had incorrectly told the police that he did not have a gun on the night in question when, in fact, he did have a gun during the Club Vibz incident, and that he had incorrectly told the police that three gunshots were fired when, as he testified at the petitioner's criminal trial, only one gunshot had been fired. On cross-examination, Quan admitted to having been untruthful to the police and explained that he "didn't want to implicate myself at a crime scene to put myself in jail."

Reginald Early, a detective with the Hartford Police Department, who was the lead investigator in the Club Vibz shooting, testified at the petitioner's criminal trial that there was no forensic evidence tying the petitioner to the crimes and that Quan was the only witness to identify the petitioner as the second perpetrator. He further testified that, in the five statements that Quan had given to the police, some of the information he provided was untruthful and that "he left bits and pieces out, he always—he did that numerous times" At the habeas trial, Early testified that Quan initially told the police that he had witnessed the petitioner commit the crimes and denied involvement but that he thought, based on the information Quan had provided, that Quan was more than simply a witness to the Club Vibz incident. He further testified that Quan gave additional statements, and that Early believed that Quan was "sometimes truthful, but he would stretch the truth when he had more involvement" and was "hesitant or reluctant about coming, you know, clean," but that each time he met with Quan, he "got a little bit more."

The petitioner argues that the state violated his right to due process when it knowingly presented false testimony from Quan. He contends that Quan's testimony at the petitioner's criminal trial was inconsistent with his prior statements to the police and that "[t]he written agreement was nothing more than a smoke screen that enhanced [Quan's] credibility in front of the jury by suggesting that the prosecution agreed with [Quan's] version of events. In reality, however, the prosecution cared only about whether [Quan] implicated the petitioner. [Quan's] favorable treatment was conditioned on implicating the petitioner, not on providing truthful testimony." In response to the respondent's contention that the petitioner failed to identify in his main appellate brief which part of Quan's testimony was false, the petitioner clarified in his reply brief that the portion of Quan's testimony claimed to be false was Quan's characterization of the cooperation agreement as having required him to provide truthful testimony. The petitioner argues in his reply brief that his "claim of false testimony does not rely on any precise inconsistency between [Quan's] testimony and his prior statements.

Rather, the issue here is that the prosecuting authority expected that [Quan] would not testify truthfully but presented his testimony anyway because it implicated the petitioner.” He contends that Attorney David Zagaja, who was the prosecutor in the petitioner’s criminal trial, “confirmed the true nature of the agreement” in his testimony at the habeas trial that “the prosecuting authority knew that [Quan] would testify falsely about what happened during the shooting.” In support of his argument, the petitioner highlights the following italicized portion of the habeas trial testimony of Zagaja:

“Q. And then do you recall during the trial of [the petitioner] that [Quan] testified that nothing was taken from Mr. Middleton—

“A. Right—

“Q. —and that a robbery did not occur?

“A. Right.

“Q. Did you find that to be consistent with his previous statement that he had robbed that individual?

“A. No. And that’s why I say, to the degree we use the word consistent, he was all over the place because, initially, he said he had nothing to do with any of the robbery.

“Q. Okay.

“A. But what I’m saying is, is I, obviously, had to objectively look at what he was offering and how it was presented in court *and my one objective was, can I use him to establish that the other player was the petitioner, and I believe he did.*

“Q. But part of the cooperation agreement that he signed was that he would be truthful in all testimony.

“A. Correct. But I knew going in that he gave two diametrically opposed versions, so I knew already that that was most probably never going to be nailed down—

“Q. So, really, the—

“A. —and I knew that—

“Q. —agreement wasn’t necessarily for truthful testimony but more for favorable testimony.

“A. The testimony that would—that I could corroborate with other pieces of evidence.

“Q. *So, again, not necessarily truthful as he’s giving a different version of events, but as long as it was favorable in [the petitioner’s] case, he would still get the benefit of that agreement?*

“A. *My understanding was yes.*” (Emphasis added.)

We disagree with the petitioner’s contention that Quan’s testimony that the cooperation agreement required him to testify truthfully was false or misleading. First, the petitioner’s argument regarding Zaga-

ja's testimony at the habeas trial is without merit. Although the portion of Zagaja's testimony highlighted by the petitioner might be subject to differing interpretations when considered only in isolation, when his testimony is viewed in context, it negates the petitioner's interpretation of Zagaja's habeas testimony, which is that the nature of the cooperation agreement was not to seek to have Quan testify truthfully but to secure favorable testimony. In other words, when Zagaja's testimony is viewed in context, it is clear that, although he was aware that Quan's testimony would be impeachable in certain aspects, namely, as to the prior inconsistent statements that he gave to the police, he was seeking truthful testimony from Quan that he could corroborate regarding the petitioner's involvement. Second, the habeas court did not agree with the petitioner's interpretation of Zagaja's testimony because it did not find that the cooperation agreement was a smoke screen. The court found, in the context of rejecting the petitioner's claim that the state failed to disclose an unwritten understanding it had with Quan,¹⁵ that "the petitioner has offered nothing more than innuendo and insinuation in support of his claim that the 'real' agreement was something other than what was documented in writing." This finding of the court, that the written agreement reflected the true agreement between the parties, is supported by evidence in the record. The cooperation agreement, which was admitted as a full exhibit at the habeas trial, provides that "[i]t is further understood and agreed that Quan Morgan at all times must give complete, truthful and accurate information and testimony," and this is consistent with Quan's testimony at the petitioner's criminal trial that the agreement required him to testify truthfully.

The court properly determined that Quan's testimony was not false or misleading for purposes of governing due process principles. It reasoned that "[t]his claim does not warrant substantive discussion. What the petitioner attempts to do here is to equate disputed testimony with objectively 'false' testimony. The dispute in this case was that [Quan] was the only perpetrator witnesses were able to identify, and [Quan] was the only person to identify the petitioner as the second perpetrator. However, [Quan] also gave numerous inconsistent statements to [the] police. These inconsistencies were presented to the jury, and it was exclusively the jury's province to determine whether [it] believed any part of what he said. . . . Finally, the record reflects [the petitioner's trial counsel] vigorously cross-examining [Quan] about his numerous inconsistent statements, and there is no claim that the [petitioner] was not provided with a copy of each of [Quan's] statements. Therefore, since defense counsel would have had actual notice of any alleged 'falsehoods' in [Quan's] statements, there can be no violation of due process based on the state's alleged failure to correct

them.” (Footnotes omitted.) Although Quan gave inconsistent statements to the police, those inconsistencies concerned the nature of *his* involvement in the Club Vibz incident, he was cross-examined regarding those inconsistencies, and it was up to the jury to resolve such inconsistencies. See *State v. Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) (evidentiary inconsistencies are for jury to resolve and it is within province of jury to believe all or only part of witness’ testimony). Quan remained consistent in his statements in one important aspect: the petitioner’s participation in the shooting at Club Vibz. That Quan was impeachable on certain other aspects of his testimony does not render false his testimony that the cooperation agreement required truthful testimony.

Additionally, the petitioner argues that we should exercise our supervisory powers over the administration of justice to vacate his conviction. We decline to do so. This is not a rare situation in which traditional protections are inadequate to ensure the fair and just administration of the courts. See, e.g., *State v. Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014).

We conclude that the petitioner has failed to demonstrate that the resolution of his claim that the state violated his right to due process by the knowing presentation of false testimony is debatable among reasonable jurists, that a court could resolve the claim differently or that the question raised is adequate to deserve encouragement to proceed further. See, e.g., *Simms v. Warden*, supra, 230 Conn. 616. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

The judgment of the habeas court is reversed only with respect to the petitioner’s claim of ineffective assistance of counsel at sentencing and the case is remanded to that court with direction to grant the petition for a writ of habeas corpus on that claim, to vacate the petitioner’s sentences, and to order a new sentencing hearing; the appeal is dismissed with respect to the petitioner’s remaining claims.

In this opinion the other judges concurred.

¹ Because *Strickland* requires a petitioner to prove both constitutionally deficient performance and resulting prejudice in order to prevail on a claim of ineffective assistance of counsel, the court’s determination of no prejudice was fatal to the petitioner’s claim and, accordingly, the court was not required to also address the performance prong of *Strickland*. See, e.g., *Echeverria v. Commissioner of Correction*, 193 Conn. App. 1, 9–10, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019).

² In so deciding, we first determined that the court had abused its discretion in denying certification to appeal as to the petitioner’s claim of ineffective assistance of counsel at sentencing. See *Sease v. Commissioner of Correction*, supra, 212 Conn. App. 104.

³ In its initial memorandum of decision, the habeas court denied the following claims of the petitioner, which are relevant to this appeal: ineffective assistance of trial counsel due to a failure to investigate the petitioner’s mental health background and failure to focus further on that background as mitigation evidence at sentencing; ineffective assistance of trial counsel

due to a failure to cross-examine, impeach and otherwise challenge certain uncharged misconduct testimony; and a violation of the petitioner's federal right to due process as a result of the state's knowing presentation of false testimony. The habeas court denied the petitioner's request for certification to appeal.

⁴ Following the habeas court's decision on remand, we ordered the parties to file supplemental briefs addressing the habeas court's factual findings and determination as to the first prong of *Strickland* regarding trial counsel's performance at sentencing.

⁵ In *Spearman v. Commissioner of Correction*, supra, 164 Conn. App. 539–40 n.5, this court noted that “[t]he admonition in *Strickland* to avoid reliance on hindsight cuts both ways, however, as we also cannot rely on hindsight to justify the choices made by an attorney. . . . Thus, as articulated by the United States Supreme Court, courts may [neither] indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions . . . [nor] may they insist counsel confirm every aspect of the strategic basis for his or her actions.” (Citations omitted; internal quotation marks omitted.)

⁶ Nonetheless, we note that the petitioner's mental health background in this case could be viewed as mitigation evidence impacting the petitioner's culpability. Regardless, however, of whether such mitigation evidence is categorized as relating to the petitioner's culpability based on his cognitive ability or whether it goes to personal mitigation, thereby focusing on the petitioner's individual circumstances rather than the offense, his mental health history constitutes mitigating evidence.

⁷ “[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (Internal quotation marks omitted.) *Heywood v. Commissioner of Correction*, 211 Conn. App. 102, 115, 271 A.3d 1086, cert. denied sub nom. *Tajay H. v. Commissioner of Correction*, 343 Conn. 914, 274 A.3d 866 (2022).

⁸ When asked on direct examination at the habeas trial if he had reviewed the presentence investigation report prior to the sentencing hearing, trial counsel responded, “I believe so.”

⁹ Although the American Bar Association standards are not a bright-line rule, those standards inform our decision.

¹⁰ The petitioner's mental health records revealed that his hallucinations and paranoia would return and increase when he ran out of medication.

¹¹ We note that, at the start of the sentencing hearing, the petitioner wanted to discharge counsel but changed his mind and decided to proceed with counsel. Any breakdown in the relationship between the petitioner and trial counsel by the time of sentencing did not relieve trial counsel of the obligation to gather mitigating information. See *Donald v. Commissioner of Correction*, supra, 216 Conn. App. 102.

¹² Trial counsel testified at the habeas trial that he did not have any strategic basis for failing to present evidence in mitigation at sentencing, if he had any, that the petitioner had been diagnosed with post-traumatic stress disorder. When further questioned whether there was a strategic basis to not present evidence of the petitioner's mental health history with schizophrenia as mitigation at sentencing, trial counsel responded that, “at sentencing, the judge had the same [presentence investigation report] I did, and if it reflected a mental health illness . . . I would know that the judge had that information in front of him just like I did. . . . So, I don't know how much I would stress it.”

¹³ Williams' testimony regarding the petitioner's prior misconduct was unrelated to the crimes charged and, essentially, constituted extraneous information to explain why she had stopped the petitioner from visiting her residence for a period of time. It was not admitted to prove knowledge, intent, motive, and common scheme or design, was not otherwise relevant or material and, therefore, was inadmissible. See *State v. Ellis*, 270 Conn. 337, 354–55, 852 A.2d 676 (2004); see also Conn. Code Evid. § 4-5.

¹⁴ In the operative habeas petition, the petitioner claimed, in relevant part, that his trial counsel rendered ineffective assistance because “he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Williams.”

¹⁵ The petitioner emphasizes that he does not challenge on appeal the habeas court's rejection of his claim that the state failed to disclose an unwritten understanding between it and Quan.