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

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

LEON MERCER *v.* COMMISSIONER OF CORRECTION
(AC 45273)

Moll, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and unlawful restraint in the first degree, sought a writ of habeas corpus, claiming, *inter alia*, that his trial counsel, P, rendered ineffective assistance with respect to plea bargaining and during the criminal proceedings underlying his conviction. In addition to the sexual assault and unlawful restraint charges, the state initially charged the petitioner with risk of injury to a child because it mistakenly believed the victim to be under the age of sixteen at the time of the incident. It extended a plea offer to the petitioner on the basis of those three charges, which the petitioner rejected. On the first day of jury selection, the state filed a substitute information in which it additionally charged the petitioner with sexual assault in the fourth degree for subjecting a person under the age of sixteen to sexual contact without the person's consent. The following day, the state confirmed that the victim was sixteen at the time of the incident. Accordingly, on the second day of jury selection, the state filed a substitute amended information that, *inter alia*, charged the petitioner with sexual assault in the fourth degree on the basis that he had subjected another person to sexual contact without the person's consent and omitted the allegation that the victim was under the age of sixteen. Following these changes, P did not seek to reopen plea negotiations. During the trial, the state called the victim, her mother, T, and the police officer who investigated the incident, B, as witnesses. The defense called the petitioner and his wife, M, as witnesses. After the conclusion of closing arguments, but before the trial court charged the jury, the state withdrew the amended charge of fourth degree sexual assault because it was time barred pursuant to the applicable statute of limitations. This court affirmed the judgment of conviction, and our Supreme Court denied the petitioner's petition for certification to appeal. Thereafter, the petitioner filed the underlying habeas petition. The habeas court rendered judgment for the respondent, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court properly rendered judgment for the respondent on count one of the habeas petition, which alleged that P rendered ineffective assistance in connection with plea bargaining: the petitioner did not satisfy the prejudice prong of the test articulated in *Strickland v. Washington* (466 U.S. 668) because, in light of the petitioner's testimony at the habeas trial that he was uncertain as to whether he would have considered additional plea offers presented to him, he failed to meet his burden of demonstrating a reasonable probability that he would have accepted a new plea offer.
2. The habeas court properly rendered judgment for the respondent on count four of the habeas petition, which alleged that P rendered ineffective assistance during the criminal proceedings:
 - a. The habeas court correctly determined that the petitioner failed to establish prejudice under *Strickland* with respect to his claim relating to P's failure to move to dismiss the amended charge of fourth degree sexual assault as time barred prior to the state's withdrawal of that charge: contrary to the petitioner's claim, the victim's testimony related to the charge, namely, that the petitioner had touched her breast and rubbed her legs, which the state referenced in its closing argument and rebuttal, was not irrelevant to the other pending charges against him, and, even if it were, there was not a reasonable probability that such testimony or remarks in closing argument and rebuttal would have affected the outcome of the proceedings in light of the victim's other testimony detailing her account of the incident.
 - b. The habeas court correctly determined that the petitioner did not satisfy the prejudice prong of *Strickland* with respect to his claims predicated on P's failure to challenge certain testimony elicited by the state as inadmissible: the victim's testimony regarding statements she

made about the incident to T and to a forensic interviewer was isolated, brief, and did not describe the incident, and the victim provided lengthy and detailed testimony regarding her firsthand account of the incident; moreover, P did not act unreasonably in failing to challenge T's testimony regarding the petitioner's history of drunkenness and mistreatment of women, as P reasoned that T's presentation at the trial was poor, such that the jury would not view her as a credible witness, that highlighting seemingly damaging aspects of her testimony would not be beneficial, and that it was prudent to limit her opportunity to provide testimony because she was unpredictable; furthermore, B's testimony that he had located a photograph of the petitioner in the police department's "mug shot database" could not have measurably influenced the jury, as he referenced the database only once, and the state did not mention it during its closing argument or rebuttal; accordingly, on the basis of the entire record, the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different without the challenged testimony.

c. The habeas court properly determined that the petitioner failed to satisfy either prong of *Strickland* with respect to his claim relating to P's failure to impeach the credibility of the victim and T on cross-examination: contrary to the petitioner's claim, P's trial strategy relating to his cross-examination of the victim was not unreasonable, as even though he failed to impeach the victim as to her inconsistent statements regarding the date of the incident, he sought to impeach the victim by challenging other aspects of her testimony, he wanted to limit her time on the witness stand, and he did not believe that the jury would discount the victim's testimony about the incident on the basis of such inconsistent statements; moreover, the petitioner failed to establish any prejudice stemming from P's failure to impeach the victim regarding this testimony, as there was not a reasonable probability that the outcome of the trial would have been different had P tested the victim's recollection of the date of the incident; furthermore, P's failure to impeach T as to her prior convictions, her testimony about the date of the incident, her failure to report the incident promptly, her conflicting testimony regarding the manner in which the petitioner left her home on the night of the incident, and her consumption of alcohol on the night of the incident was not unreasonable because, through the testimony of T and the victim, the jury already was aware that T had a criminal history that involved providing false information to the police and that she was imbibing alcohol on the night of the incident, and the inconsistencies regarding the manner in which the petitioner exited T's home on the night of the incident were plainly in the record for the jury to resolve as the fact finder; additionally, there was not a reasonable probability that additional testimony from T on those topics would have benefitted the petitioner's defense or influenced the jury's verdict.

d. The habeas court correctly determined that the petitioner failed to establish prejudice under *Strickland* with respect to his claim relating to P's failure to challenge testimony elicited from the petitioner on cross-examination as inadmissible: the petitioner denied all questions in the state's isolated line of inquiry relating to whether the petitioner inappropriately touched another female, and the state did not probe the topic further; moreover, the petitioner's testimony regarding a domestic dispute with M was brief and lacking in detail and was not pursued further by the state; accordingly, given the balance of the record, including the victim's extensive testimony regarding her account of the incident, this court could not conclude that a reasonable probability existed that the jury's verdict was affected by the challenged testimony.

e. The habeas court correctly determined that the petitioner failed to establish that P's performance was deficient or prejudicial under *Strickland* with respect to his claim relating to P's failure to introduce purportedly exculpatory cell phone evidence: P's decision to refrain from offering the favorable cell phone evidence into the record was not unreasonable in light of his testimony at the habeas trial that the cell phone evidence also included unfavorable text messages that contradicted M's testimony at the criminal trial and that he did not want to give the state the opportunity to bring in those unfavorable messages, as doing so would risk diminishing M's credibility; moreover, on the basis of the entire record, the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different had P sought to offer the favorable text messages into evidence.

3. The habeas court's rejection of the application of the cumulative error rule to the petitioner's ineffective assistance of counsel claims was not improper: this court has previously stated that Connecticut law does not recognize the application of the cumulative error rule, and the court declined to revisit the issue in this appeal.

Argued September 11—officially released December 12, 2023

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Oliver, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Erica A. Barber, assistant public defender, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Joseph Corradino*, state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Leon Mercer, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that his criminal defense counsel, Attorney Dean Popkin, did not render ineffective assistance during the criminal proceedings underlying his conviction. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts, procedural history, and information relating to the petitioner's criminal charges, as set forth by this court in the petitioner's direct appeal from his conviction or as undisputed in the record, are relevant to our resolution of this appeal. "On April 4, 2014, the [petitioner] and his wife, Andrea Mercer (Mercer) were with Tangela S. (Tangela),¹ Mercer's half-sister, and other guests, at Tangela's apartment. They all left the apartment to drink wine at the Ramada Inn, leaving Tangela's six children, including the sixteen year old victim, and the two children of one of the guests in the apartment. The adults returned from the Ramada Inn at approximately 1 a.m. on April 5, 2014. The victim awoke when they entered.

"The [petitioner] was drunk, behaving in an obnoxious manner, and insulting Mercer. One of the other guests told him to leave, and the [petitioner] stated that he was going to his car. Instead of leaving the apartment and going to his car, however, the [petitioner] entered the bedroom where the victim was located. He and the victim engaged in conversation before the [petitioner] pulled the covers off the victim's legs and started rubbing them. The victim repeatedly tucked the blankets back under her in an effort to stop the [petitioner] from rubbing her legs and told the [petitioner] to leave. The [petitioner] pulled the covers off her, turned her over, put his hand over her nose and mouth, unbuttoned her pants, and forcibly touched her clitoris. Not long after, Tangela and Mercer walked down the hallway toward the bedroom. The [petitioner] jumped up, rushed out of the bedroom, and quickly left the apartment. The victim told [Tangela] what the [petitioner] had done, and Tangela reported it to the police.

"On August 27, 2015, the [petitioner] was arrested. Because the state thought that the victim was under the age of sixteen at the time of the incident, the state's September 14, 2015 long form information charged the [petitioner] with sexual assault in the first degree in violation of [General Statutes] § 53a-70 (a) (1), unlawful restraint in the first degree in violation of [General Statutes] § 53a-95, and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The age of the victim [was] an important factor in determining the

severity of the charges. Sexual assault in the first degree, in violation of § 53a-70 (a) (1), is a class A felony, rather than class B, if the victim is under the age of sixteen,² and a necessary element for the charge of risk of injury to a child in violation of § 53-21 (a) (2) is that the victim is under sixteen.³

“On March 11, 2016, the [petitioner] rejected a plea offer of ten years [of] incarceration, execution suspended after four years, in connection with those three charges and proceeded to trial. On April 27, 2017, the first day of jury selection, the state filed a substitute long form information in which it additionally charged the [petitioner] with sexual assault in the fourth degree for ‘subject[ing] another person, under sixteen (16) years of age, to sexual contact without such person’s consent’ in violation of General Statutes § 53a-73a (a) (2).⁴ It was not until after court adjourned for the day on April 27, 2017, that the state confirmed that the victim was sixteen—not fourteen as it had previously erroneously believed—at the time of the incident.

“On April 28, 2017, the second day of jury selection, the state filed a substitute amended information that charged the [petitioner] with sexual assault in the first degree in violation of § 53a-70 (a) (1), sexual assault in the fourth degree in violation of § 53a-73a (a) (2),⁵ and unlawful restraint in the first degree in violation of § 53a-95, correcting the charges as to the victim’s age.” (Footnotes in original; footnote omitted.) *State v. Mercer*, 191 Conn. App. 288, 289–91, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

During its case-in-chief, the state called four witnesses, including (1) the victim, (2) Tangela, and (3) Sergeant John Burke, who investigated the incident and prepared the petitioner’s arrest warrant. During the petitioner’s case-in-chief, Popkin called as witnesses (1) Mercer and (2) the petitioner. In addition, the court admitted several exhibits in full into the record. During the habeas trial in the present action, Popkin testified that the defense strategy was (1) to discredit the victim and Tangela and to establish that they had submitted a false claim against the petitioner, and (2) to demonstrate that the police investigation of the incident was inadequate.

“Following a trial, the jury found the [petitioner] guilty of sexual assault in the first degree and unlawful restraint in the first degree. [On September 6, 2017] [t]he court sentenced the [petitioner] to a total effective term of twelve years of incarceration, execution suspended after five years, two years of which were mandatory, and ten years of probation.” *Id.*, 292. This court affirmed the judgment of conviction;⁶ *id.*, 293; and our Supreme Court denied the petitioner’s ensuing petition for certification to appeal. *State v. Mercer*, 333 Conn. 938, 218 A.3d 1048 (2019).

In November, 2019, the petitioner filed the underlying five count petition for a writ of habeas corpus, of which only counts one and four are relevant to this appeal.⁷ In count one, the petitioner alleged that Popkin rendered ineffective assistance with respect to plea bargaining stemming from his failures, inter alia, (1) to ascertain, prior to trial, that the victim was over the age of sixteen at the time of the incident, and (2) to take appropriate action upon learning, on the second day of jury selection, the victim's correct age at the time of the incident, including seeking to reopen plea negotiations. In count four, the petitioner alleged that Popkin rendered ineffective assistance in a myriad of ways during the criminal proceedings.

On August 27, 2020, the respondent, the Commissioner of Correction, filed a return denying the petitioner's material allegations. The respondent also asserted four special defenses.⁸ On August 31, 2020, the petitioner filed a reply (1) noting his withdrawal of count two, to which the respondent's first special defense was directed, and (2) responding to the allegations of the respondent's remaining special defenses.

The matter was tried to the habeas court, *Oliver, J.*, over the course of four days between October 20, 2020, and March 31, 2021. The court admitted various exhibits in full into the record, including copies of the transcripts of the petitioner's criminal trial, and heard testimony from (1) the petitioner, (2) Mercer, (3) Popkin, (4) Kenneth Simon, the petitioner's legal expert, (5) Richard Emanuel, the petitioner's appellate counsel on his direct appeal from his conviction, and (6) James Oulundsen, a private investigator and a digital forensic examiner. Thereafter, the parties filed posttrial briefs. On October 25, 2021, the court issued a memorandum of decision rendering judgment in the respondent's favor on the four remaining counts of the habeas petition.⁹ On October 29, 2021, the petitioner filed a petition for certification to appeal, which the court granted on the same day. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the petitioner's claims, we set forth the well settled standard of review governing a habeas court's judgment on ineffective assistance of counsel claims. "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. . . . In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Citations omitted; internal quotation marks omitted.) *Nelson v.*

Commissioner of Correction, 208 Conn. App. 878, 887–88, 265 A.3d 987 (2021), cert. denied, 341 Conn. 902, 268 A.3d 1186 (2022).

“[I]t is well established that [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. . . .

“To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland v. Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (Internal quotation marks omitted.) *Morales v. Commissioner of Correction*, 220 Conn. App. 285, 304–305, 298 A.3d 636, cert. denied, 348 Conn. 915, 303 A.3d 603 (2023).

“It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner’s failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” (Citations omitted; internal quotation marks omitted.) *Soto v. Commissioner of Correction*, 215 Conn. App. 113, 120, 281 A.3d 1189 (2022).

On appeal, the petitioner raises three overarching claims. First, the petitioner asserts that the court improperly rendered judgment in the respondent’s favor on count one of his habeas petition, which alleged that Popkin rendered ineffective assistance in connection with plea bargaining. Second, the petitioner asserts that the court improperly rendered judgment in the respondent’s favor on count four of his habeas petition, which alleged that Popkin rendered ineffective assistance in a litany of ways during the criminal proceedings. Third, the petitioner asserts that the court improperly rejected the application of the cumulative error rule to his ineffective assistance of counsel claims. We address each

claim, including any subclaims, in turn.

I

The petitioner first claims that the habeas court improperly rendered judgment in favor of the respondent on count one of his habeas petition, which alleged that Popkin rendered ineffective assistance vis-à-vis plea bargaining. The petitioner asserts that the court incorrectly concluded that he failed to satisfy either the performance prong or the prejudice prong under *Strickland* with respect to his ineffective assistance of counsel claim set forth in count one. We conclude that the court correctly determined that the petitioner did not satisfy the prejudice prong of *Strickland* and, therefore, properly rendered judgment in the respondent's favor on count one.

“Pretrial negotiations implicating the decision of whether to plead guilty is a critical stage in criminal proceedings . . . and plea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts. . . .

“[Ordinarily] [t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, [petitioners] must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [Petitioners] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” (Internal quotation marks omitted.) *Betts v. Commissioner of Correction*, 188 Conn. App. 397, 411–12, 204 A.3d 1221, cert. denied, 331 Conn. 919, 206 A.3d 186 (2019). This standard requires flexibility under the circumstances of the present case, where (1) there is no dispute that the plea offer rejected by the petitioner was negotiated under the mistaken belief that the victim was under the age of sixteen at the time of the incident¹⁰ and (2) the petitioner claimed in part that he was prejudiced by Popkin's failure to seek to reopen plea negotiations in order to negotiate a new plea offer with the knowledge of the victim's correct age at the time of the incident. In this situation, the focus is not on the plea offer that was rejected, but on the potential presentation of a new plea offer.

The following additional procedural history is relevant to our resolution of this claim. In count one of his habeas petition, the petitioner alleged that Popkin's

performance during the plea bargaining stage was deficient because he failed, inter alia, (1) to ascertain that the victim was over the age of sixteen at the time of the incident, thereby “allow[ing] the petitioner to formally reject a plea offer on [an] invalid charge in favor of the perils of a trial,” and (2) to take appropriate action, including seeking to reopen plea negotiations, after discovering the victim’s correct age. The petitioner further alleged that Popkin’s deficient performance prejudiced him because “there is a reasonable probability that [he] would have forwent the trial and struck a plea bargain that was appropriately suited to the case and more favorable to him.” The petitioner maintained these claims in his posttrial brief.

In its decision, the court stated that “Popkin testified credibly at the habeas trial that he had extensive discussions with the petitioner regarding the state’s plea offer, but the petitioner rejected it because he maintained his innocence and was not interested in an offer that carried a period of incarceration. . . . Popkin also testified that he again approached the petitioner about reopening plea negotiations after the discovery of the victim’s actual age and requisite amendment of the charges, but the petitioner remained insistent on moving forward with a trial. [Popkin] further testified that, although the petitioner was adamant in his decision to proceed to trial . . . Popkin may have been able to change the petitioner’s opinion had [the petitioner] been presented with an offer that did not require jail time, but such an offer was not likely given the first degree sexual assault charge that remained in the substitute amended information and carried a two year mandatory minimum sentence. The petitioner testified at the habeas trial that he rejected the state’s plea offer because he maintained his innocence, and he was not sure if he would have considered additional offers had they been extended during the remainder of the case.

“Based on the credible evidence adduced at the habeas trial, the court finds that . . . Popkin discussed and properly advised the petitioner as to reopening plea negotiations with the petitioner in light of the amended charges, and therefore his conduct did not constitute deficient performance. The petitioner also failed to present evidence that the state would have conveyed an alternative offer, or that the trial court would have accepted an alternative agreement had it been presented. Furthermore, pursuant to the petitioner’s own testimony at the habeas trial, it is not reasonably probable that the petitioner would have accepted a different plea offer had it existed. As a result, the petitioner failed to sustain his burden of establishing either deficient performance or prejudice as to these claims”

The petitioner asserts that the court incorrectly concluded that he failed to demonstrate either that Popkin’s performance vis-à-vis plea bargaining was deficient or

that he was prejudiced by Popkin's conduct. With regard to prejudice, the petitioner contends that the court committed error in determining that he could not establish prejudice because he maintained his innocence, arguing that "[t]here are two problems with the court's conclusion: (1) the duty to investigate and the obligation to explore a plea disposition exists regardless of whether a client professes his innocence; and (2) whatever willingness to plead the petitioner exhibited before trial is not dispositive of what he would have done if he were properly advised about the charges against him and the available options."¹¹ The petitioner does not, however, focus sufficient attention on the court's determination that it was "not reasonably probable that [he] would have accepted a different plea offer had it existed," as supported by his own testimony that he was uncertain as to whether he would have considered additional plea offers presented to him.¹² In light of the petitioner's failure to meet his burden to demonstrate a reasonable probability that he would have accepted a new plea offer, we conclude that the court correctly determined that the petitioner did not demonstrate prejudice with respect to his ineffective assistance of counsel claim set forth in count one of the habeas petition and, therefore, properly rendered judgment in the respondent's favor on count one.

II

The petitioner next claims that the habeas court improperly rendered judgment in the respondent's favor on count four of his habeas petition, which alleged that Popkin rendered ineffective assistance in a multitude of ways during the criminal proceedings. Specifically, the petitioner contends that the court incorrectly rejected his claims that Popkin rendered ineffective assistance when he failed (1) to move to dismiss, as time barred, an amended charge of sexual assault in the fourth degree that the state presented on the second day of jury selection and withdrew following closing arguments, (2) to challenge, as inadmissible, testimony elicited by the state on direct examination from (a) the victim, (b) Tangela, and (c) Burke, (3) to impeach adequately, on cross-examination, the credibility of (a) the victim and (b) Tangela, (4) to challenge, as inadmissible, testimony elicited from the petitioner by the state on cross-examination, and (5) to introduce purportedly exculpatory cell phone evidence. For the reasons that follow, we conclude that the court properly rendered judgment in the respondent's favor on count four of the habeas petition.

At the outset, we set forth the following additional relevant legal principles governing ineffective assistance of counsel claims. "In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation

fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . 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, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . .

“[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [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” (Emphasis omitted; internal quotation marks omitted.) *Morales v. Commissioner of Correction*, supra, 220 Conn. App. 305–306.

“An evaluation of the prejudice prong involves a consideration of whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . We do not conduct this inquiry in a vacuum, rather, we must consider the totality of the evidence before the judge or jury. . . . Further, we are required to undertake an objective review of the nature and strength of the state's case. . . .

[S]ome errors will have had pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . .

“In other words, [i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable. . . . Notably, the petitioner must meet this burden not by use of speculation but by demonstrable realities.” (Citations omitted; internal quotation marks omitted.) *Madera v. Commissioner of Correction*, 221 Conn. App. 546, 555–56, 302 A.3d 910 (2023).

A

First, the petitioner asserts that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin’s failure to move to dismiss, as time barred, the amended fourth degree sexual assault charge prior to the state’s withdrawal of the amended charge. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On April 27, 2017, the first day of jury selection, the state filed a substitute information charging the petitioner, inter alia, with sexual assault in the fourth degree on the basis that he had “subjected another person, under sixteen (16) years of age, to sexual contact without such person’s consent” The following day, the second day of jury selection, after the state had realized that the victim was over the age of sixteen at the time of the incident, the state filed a substitute amended information charging the petitioner, inter alia, with sexual assault in the fourth degree on the basis that he had “subjected another person to sexual contact without such person’s consent,” omitting the prior allegation that the victim was under the age of sixteen. Popkin did not oppose the substitution of the amended fourth degree sexual assault charge. On May 22, 2017, after the conclusion of closing arguments but before the trial court, *Dennis, J.*, had charged the jury, the state withdrew the amended fourth degree sexual assault charge on the basis that the amended charge was a class A misdemeanor; see General Statutes § 53a-73a (b); and, therefore, was time barred pursuant to the applicable statute

of limitations. During the ensuing jury charge, the court instructed the jury “that for legal reasons, that have absolutely nothing to do with the evidence in this case or your consideration of the charges, we have removed one of the charges, the [amended] sexual assault in the fourth degree [charge]”

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin’s conduct was deficient in that he failed to object to or move to dismiss as untimely the amended charge of sexual assault in the fourth degree prior to the state’s withdrawal of the amended charge, “thus resulting in the presentation of evidence and closing arguments on that charge.” In his posttrial brief, the petitioner expounded on his prejudice claim, arguing that “[t]he existence of the [amended fourth degree sexual assault] charge enabled the state to present supporting evidence that would have been otherwise immaterial and to argue the petitioner’s guilt. More particularly, the state elicited testimony from the victim that the petitioner touched her breast and rubbed her legs. . . . During summations, the state urged the jury to convict the petitioner [on the amended charge]. The state reviewed the elements it had to prove to obtain a conviction . . . [and made] graphic remarks [that] were clearly harmful.¹³ Coupled with the evidence presented, the remarks quite reasonably could have influenced the jury’s view of the petitioner and its verdict on the [other] charges” (Citations omitted; footnote added.)

In its decision, the court, *Oliver, J.*, stated that “Popkin testified at the habeas trial that he realized that the [amended fourth degree sexual assault] charge was outside the statute of limitations prior to jury deliberations, and that he viewed this as a benefit to the petitioner due to the decreased exposure he faced upon that discovery. The court finds that [Popkin’s] discovery of the time barred charge after closing argument but prior to jury deliberations did not prejudice the petitioner by sufficiently undermining confidence in the outcome of the trial. . . . As a result, the petitioner failed to carry his burden of proving the prejudice prong [under *Strickland*]” (Citation omitted.)

The petitioner contends that the court incorrectly concluded that he failed to demonstrate prejudice resulting from Popkin’s failure to move to dismiss the time barred amended fourth degree sexual assault charge prior to the state’s withdrawal of the amended charge. The petitioner asserts that, while the amended charge remained operative, the state was able (1) to introduce evidence that was irrelevant to the other pending charges, namely, testimony elicited from the victim that the petitioner had touched her breast and rubbed her legs, and (2) to make harmful remarks during its closing argument and rebuttal. We are not convinced.

Contrary to the petitioner's position, we construe the victim's testimony regarding the petitioner touching her breast and rubbing her legs as being connected to the other charges that had been filed against the petitioner, as such conduct was a part of the series of events leading up to the incident. Indeed, while addressing the first degree sexual assault charge during its closing argument, the state referenced the victim's testimony that the petitioner had touched her breast, arguing that the petitioner had "kind of groomed her to begin with." Even assuming that the victim's testimony at issue was immaterial, the jury heard additional testimony from the victim that the petitioner had (1) pulled her into the middle of the bed, (2) covered her nose and mouth with his hand, (3) held her leg down by putting his knee on it, and (4) unbuttoned her pants, put his hand down her pants, and touched her clitoris. In light of this additional testimony, we cannot discern a reasonable probability that the victim's testimony about the petitioner touching her breast and rubbing her legs affected the outcome of the proceedings. Likewise, during its closing argument and rebuttal, in addition to making the remarks recited by the petitioner in his posttrial brief; see footnote 13 of this opinion; the state also highlighted the victim's testimony regarding her account of the incident. Thus, we conclude that it is not reasonably probable that the state's remarks at issue affected the jury's verdict.

In sum, we conclude that the court correctly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

B

Second, the petitioner asserts that the court improperly rejected his ineffective assistance of counsel claims predicated on Popkin's failure to challenge, as inadmissible, testimony elicited by the state on direct examination from (1) the victim, (2) Tangela, and (3) Burke. We are unpersuaded.

Preliminarily, we note that, in collectively addressing the petitioner's subclaims stemming from Popkin's failure to challenge certain testimony elicited by the state on direct examination, the court noted that "Popkin testified at the habeas trial as to his tactics in raising objections during a trial generally, indicating that he tries not to object too often because he believes frequent objecting can lead to a loss of credibility with the jurors as he attempts to build a rapport with them. He further testified that he tends to raise speaking objections when he does object for transparency purposes so that the jurors understand why he is raising the objection."

in denying his ineffective assistance of counsel claim grounded on Popkin's failure to challenge the victim's testimony regarding statements that she made about the incident to Tangela and to a forensic interviewer. We disagree.

The following additional procedural history is relevant to our disposition of this claim. During the state's case-in-chief, on direct examination, the victim provided testimony detailing her account of the incident. The victim further testified, without objection from Popkin, that (1) immediately after the incident, she told Tangela that the petitioner had been "touching" her, and (2) following the incident, she was interviewed by a forensic interviewer, whom she told "pretty much what [she] told" the jury on direct examination. Subsequently, on direct examination, Tangela testified that the victim told her that the petitioner had "touched" the victim. Immediately thereafter, the court issued a limiting instruction to the jury that Tangela's testimony regarding the victim's statement to her was offered "for the effect on [Tangela] and what she then did," not for the truth of the statement. Following the limiting instruction, Tangela testified that she "kind of like lost it" after hearing the victim's statement, and she ran to the front door only to discover that the petitioner and Mercer had driven away. The forensic interviewer did not testify at the trial, and neither the videotape of the forensic interview nor the interviewer's report was admitted into evidence; however, while cross-examining the victim, Popkin asked the victim questions regarding some of her statements made during the forensic interview.¹⁴

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to object to or move to strike the victim's testimony regarding what she told Tangela and the forensic interviewer about the incident. In his posttrial brief, the petitioner maintained that Popkin should have challenged the admissibility of the victim's testimony because the victim's credibility had not been impeached, rendering the testimony, which consisted of prior consistent statements, inadmissible pursuant to § 6-11 of the 2009 edition of the Connecticut Code of Evidence.¹⁵ The petitioner further argued that Popkin's conduct prejudiced him because the inadmissible testimony bolstered the victim's credibility, which, the petitioner posited, was paramount to the state's case against him. The petitioner additionally observed that (1) during its rebuttal, the state relied on the inadmissible testimony,¹⁶ and (2) at the jury's request, the victim's testimony was replayed in its entirety for the jury.

In its decision, the court stated that, "[a]t the habeas trial . . . Popkin testified that he did not object to the victim's testimony on hearsay grounds because he did

not wish to call additional attention to the detrimental statements. He made a decision not to maximize the negative information and instead let it pass and move on. ‘Experienced litigators utilize the trial technique of not objecting to inadmissible evidence to avoid highlighting it in the minds of the jury.’ . . . *State v. Davis*, 76 Conn. App. 653, 665, 820 A.2d 1122 (2003). . . . Popkin also indicated several times during his habeas trial testimony that he did not find the victim to be a credible witness and that it was a strategic decision to get her off the stand as quickly as possible. As a result, the court finds that . . . Popkin’s tactical approach in deciding not to object to or move to strike the highlighted portions of the victim’s testimony cannot be deemed an unreasonable decision that constituted deficient performance. Furthermore, the petitioner failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different had counsel objected to the testimony.”

The petitioner claims error as to the court’s determinations that he failed to demonstrate that Popkin’s performance was deficient or that he suffered prejudice as a result of Popkin’s conduct. With respect to prejudice, the petitioner maintains that (1) the victim’s testimony regarding her prior consistent statements bolstered her credibility, which was critical to the state’s case against him, (2) during its rebuttal, the state relied on the victim’s testimony; see footnote 16 of this opinion; and (3) the jury heard a playback of the victim’s entire testimony, thereby illustrating its importance.

After a careful review of the record, we conclude that the petitioner failed to demonstrate a reasonable probability that Popkin’s failure to challenge the victim’s testimony regarding her statements to Tangela and the forensic interviewer about the incident affected the outcome of the proceedings. The victim’s testimony about the statements at issue was isolated, brief, and did not describe the incident. In contrast, the victim provided lengthy and detailed testimony regarding her firsthand account of the incident. Notwithstanding the state’s remarks during its rebuttal or the playback of the victim’s testimony to the jury, we are not convinced that there is a substantial likelihood that a different result would have been reached without the victim’s testimony at issue. Accordingly, we conclude that the court properly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

The petitioner next contends that the court improperly denied his ineffective assistance of counsel claim stemming from Popkin’s failure to challenge testimony by Tangela about the petitioner’s history of drunkenness and his mistreatment of women. We are not per-

suated.

The following additional procedural history is relevant to our disposition of this claim. During its case-in-chief, on Tangela's direct examination, the state asked Tangela what, if anything, happened with regard to the petitioner on the night of the incident. Tangela testified, without objection from Popkin, that the petitioner "became very drunk, which he's always drunk when we go out. . . . He's always with us women, drunk, obnoxious, rude, falling, bust[ing] his head, blood, disrespecting [Mercer], calling her B-I-T-C-H's, saying that we don't look like sisters, [Mercer is] Black and ugly, how do we look like this, just putting her down, hurting her. . . . [It happens] [a]ll the time. When he drinks he's a different person." Without objection from Popkin, Tangela further testified: (1) one of the guests at her home on the night of the incident asked the petitioner to leave, telling the petitioner, "come on, you're rude, you're obnoxious, you're a pig and disrespecting [Mercer], there's other women in here, I don't want to hear that, you need to leave, you need to go"; (2) Tangela and the other guests at her home "just let the situation [concerning the petitioner] go with [Mercer] because [Mercer is] used to it"; (3) after the victim had told her about the incident, Tangela "thought about [the petitioner's] actions and his ways of the last ten years of knowing who [the petitioner] is and his obnoxious behavior when we're out and how he has a tendency of disrespecting not only [Mercer] but all the women who are around him, touching other friends and family members," and "just began feeling guilty and hurt in [her] heart for entertaining a person such as [the petitioner] in [her] home when [she] knew better"; and (4) she had welcomed the petitioner into her home prior to the incident notwithstanding his behavior, "but it was just . . . different—night and day when he drank."

On May 19, 2017, the second day of trial, Popkin filed a motion requesting that the trial court strike Tangela's testimony as improper character evidence and instruct the jury to disregard the testimony. The court, *Dennis, J.*, reserved its ruling on the motion. On May 22, 2017, the third day of trial, immediately before Popkin had rested the petitioner's case-in-chief, Popkin withdrew the motion to strike and for a curative instruction, explaining that, "[a]t this point, I think I would just be highlighting some of the comments if I ask the court to rule on that motion and instruct the jury"

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to object to or move to strike Tangela's testimony "concern[ing] the petitioner's purported bad character, specifically, a history of drunkenness and mistreatment of women." In his posttrial brief, the petitioner maintained that Popkin's conduct was deficient in that he failed to challenge Tangela's testi-

mony on the basis that, among other things, it constituted (1) inadmissible character evidence pursuant to § 4-4 (a) of the 2009 edition of the Connecticut Code of Evidence¹⁷ and (2) inadmissible prior misconduct evidence pursuant to § 4-5 (a) of the Connecticut Code of Evidence.¹⁸ The petitioner further maintained that Popkin's conduct prejudiced him because (1) Tangela's testimony reasonably could have inflamed the jury and (2) the jury reasonably could "have used [Tangela's] testimony to speculate that if the petitioner had a history of disrespecting women when he was intoxicated, it would not be a leap for him to engage in physical abuse and molestation."

In its decision, the court stated that "Popkin . . . testified that he did not object to [Tangela's] testimony concerning the petitioner's alleged history of drunkenness and mistreatment of women because, although he believed the testimony to be objectionable . . . [Tangela was] not [a] credible [witness], he believed that objecting would draw additional attention to damaging allegations rather than benefit his case, and part of his strategy was to have [Tangela] finish testifying as quickly as possible. He testified that he filed the motion to strike and for curative instruction because he was concerned about the testimony, but then made a strategic decision not to pursue it because he did not find [Tangela] to be credible and did not believe the testimony would be used by the jury to convict the petitioner. . . . Pursuant to the foregoing, the court finds that . . . Popkin's tactical approach in deciding not to object to or move to strike the highlighted portions of [Tangela's] testimony cannot be deemed an unreasonable decision that constituted deficient performance. Furthermore, the petitioner failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different had counsel objected to the testimony."

The petitioner contends that the court incorrectly concluded that he failed to satisfy either the performance prong or the prejudice prong under *Strickland* with respect to Popkin's failure to challenge Tangela's testimony. With respect to the performance prong, the petitioner maintains that it was not objectively reasonable for Popkin to forgo challenging Tangela's testimony given the nature of the crimes with which the petitioner was charged. Remaining mindful that "[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," and that we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Morales v. Commissioner of Correction*, supra, 220 Conn. App. 305–306; we conclude that Popkin did not act unreason-

ably in failing to challenge Tangela's testimony on the basis of his reasoning that (1) Tangela's presentation at the criminal trial was poor, such that the jury would not view her to be a credible witness, (2) highlighting seemingly damaging aspects of Tangela's testimony would not be beneficial, and (3) Tangela was unpredictable, such that limiting Tangela's opportunity to provide testimony was prudent.¹⁹ Moreover, on the basis of the entire record, including the victim's extensive testimony regarding the incident, we conclude that the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different without Tangela's testimony. Accordingly, we conclude that the court correctly determined that the petitioner failed to satisfy either prong under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

3

The petitioner also contends that the court committed error in denying his ineffective assistance of counsel claim grounded on Popkin's failure to challenge testimony by Burke that he had located a photograph of the petitioner in the police department's "mug shot database." This claim is unavailing.

The following additional procedural history is relevant to our resolution of this claim. During its case-in-chief, on Burke's direct examination, the state asked Burke what "investigatory steps" he took to identify the petitioner. Burke testified: "So, we had a database at the police department. I believe on the original police report it had [the petitioner's] name and address, but there wasn't a birthday. They just gave an age, I believe it was thirty-eight. So, I really didn't know who [the petitioner] was. *But we do have a database at the department, a mug shot database. So, I searched the database for [the petitioner], I found a Leon Mercer in the age range that it was, and I printed out the picture which would eventually be shown to [the victim] . . . [t]o verify that this is the correct Leon Mercer that we are investigating.*" (Emphasis added.) Popkin did not object to or move to strike this testimony.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to object to or move to strike Burke's testimony that he located the petitioner's photograph in a "mug shot database." In his posttrial brief, the petitioner argued that Popkin's conduct was deficient in that he failed to challenge, as inadmissible, Burke's testimony referring to the mug shot database on the basis that the testimony was (1) irrelevant to the state's case, as identity was not a contested issue, and (2) highly prejudicial because it suggested that the petitioner previously had been arrested, thereby undermining his credibility and enabling the jury to infer that he was more likely to have committed the

crimes with which he was charged.²⁰ The petitioner further argued that, in light of the prejudicial effect of Burke's testimony, the prejudice prong of *Strickland* was satisfied.

In its decision, the court acknowledged that, during the habeas trial, Popkin testified that he should have objected to Burke's testimony concerning the mug shot database. The court further stated that, "in light of the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the court grants deference to . . . Popkin's trial strategy of limiting the use of objections so as not to highlight certain pieces of detrimental testimony and to build credibility with the jurors. Even if the court determined that . . . Popkin's failure to object in the instances where he acknowledged during his habeas testimony that in hindsight he should have objected was deficient, the petitioner failed to sustain his burden of proving that there is a reasonable probability that, but for counsel's failure to object, the result of the petitioner's trial would have been different."

In addition to challenging the court's determination that Popkin's performance was not deficient with respect to his failure to challenge Burke's testimony regarding the mug shot database, the petitioner claims that the court committed error in determining that he failed to demonstrate prejudice resulting from Popkin's conduct. The petitioner contends that, "[i]n a close case such as this, which depended on a credibility contest between the petitioner and the victim, the jury's knowledge of the petitioner's criminal history clearly could have tipped the balance in favor of the state and altered the outcome of the trial." We are not convinced. Burke's testimony referenced the mug shot database only once, and the state did not mention the mug shot database during its closing argument or its rebuttal. Moreover, on the basis of the record as a whole, including the victim's extensive testimony concerning her account of the incident, we do not agree that a single reference to the petitioner's photograph in a mug shot database could have measurably influenced the jury. Because the petitioner failed to establish a substantial likelihood that the outcome of the proceedings would have been different without Burke's testimony regarding the mug shot database, we conclude that the court correctly determined that the petitioner did not satisfy the prejudice prong as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

C

Third, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claims predicated on Popkin's failure, on cross-examination, to impeach the credibility of (1) the victim and (2) Tangela. We disagree.

As this court has explained, “[o]nce an attorney makes an informed, strategic decision regarding how to cross-examine a witness, that decision is virtually unchallengeable. . . . An attorney’s line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel’s trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance.” (Citation omitted; internal quotation marks omitted.) *Chase v. Commissioner of Correction*, 210 Conn. App. 492, 501, 270 A.3d 199, cert. denied, 343 Conn. 903, 272 A.3d 199 (2022).

1

The petitioner contends that the court improperly denied his ineffective assistance of counsel claim stemming from Popkin’s failure, on cross-examination, to impeach the victim as to her testimony identifying the date of the incident. We disagree.

The following additional procedural history is relevant to our adjudication of this claim. In the original and substitute informations filed by the state, the state alleged that the incident occurred on or about April 5, 2014. During the state’s case-in-chief, on direct examination, the victim testified that the incident occurred in the early morning hours of April 5, 2014. Popkin did not cross-examine the victim about the date of the incident. The next day, the state filed a motion in limine in response to a request made by Popkin to introduce portions of the videotaped forensic interview of the victim, including a portion of the interview reflecting that the victim had told the forensic interviewer that the incident had transpired in March, 2014, rather than in April, 2014. Following argument, the trial court granted the state’s motion in limine. During the petitioner’s case-in-chief, on direct examination, the petitioner and Mercer testified that the gathering at Tangela’s home, during which the incident occurred according to the state, had taken place at the end of March, 2014.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to impeach the credibility of the victim by confronting her with her prior inconsistent statement to the forensic interviewer about the date of the incident. In his posttrial brief, the petitioner argued that Popkin was deficient in failing to challenge the victim’s testimony that the incident had occurred on April 5, 2014, with her prior inconsistent statement to the forensic interviewer. The petitioner further argued that prejudice resulted from Popkin’s deficient conduct, as Popkin missed an opportunity, *inter alia*, to diminish the victim’s credibility and to advance his defense theory that the victim had submitted a false claim.

In its decision, the court stated that, “[a]t the underlying criminal trial, the petitioner and . . . Mercer testified that the get-together occurred on Saturday evening, March 29, 2014, into Sunday morning, March 30, 2014. However, every long form information filed by the state alleged that the incident occurred on or about April 5, 2014. During trial, the state repeatedly oriented the victim to the April 5, 2014 date absent objection by [Popkin]. That date did not conform, however, with the victim’s videotaped forensic interview indicating that the incident occurred on a Friday in March [2014]. The state’s discovery revealed that the complaint was made to the police on Monday, April 7, 2014. . . .”

“Popkin did not inquire about the different dates during his cross-examination of the victim. He testified at the habeas trial that the goal at trial was to obtain an acquittal, and not a conviction on a lesser included offense. He also expected the trial to be a credibility contest between the petitioner and the victim, and indicated that the defense strategy was to discredit the victim and demonstrate that the police investigation was inadequate. When questioned as to how he attempted to discredit her testimony . . . Popkin testified that he pointed to inconsistencies in her description of how the physical act took place and the layout of the apartment. He further testified that he wanted to get her off the stand fairly quickly to minimize the sympathetic nature of her young age, and he did not believe that pointing out that she was incorrect about the date would lead the jury to disregard all of the allegations she made regarding the sexual assault, noting ‘if somebody’s a victim of a sexual assault, if they get the date wrong doesn’t necessarily mean that they weren’t sexually assaulted on a different date, they just got the date wrong.’”

“Based on the foregoing, the court finds that . . . Popkin’s questioning of the victim was an exercise of sound trial strategy and thus the petitioner failed to prove that counsel’s cross-examination [of the victim] was deficient. The petitioner also failed to prove that he was prejudiced thereby by demonstrating what evidence additional cross-examination would have elicited and how it would have changed the outcome of the trial.”

The petitioner maintains that the court erred in determining that he failed to satisfy the performance and prejudice prongs of *Strickland* with regard to Popkin’s failure to impeach the victim’s testimony regarding the date of the incident. With respect to the performance prong, the petitioner contends that (1) the record reveals that Popkin’s trial strategy included discrediting the state’s evidence that the incident occurred on April 5, 2014, yet Popkin failed to advance this strategy by challenging the victim’s testimony about the date of the incident, and (2) it was “inexcusable” for Popkin to fail

to impeach the victim “on a critical issue as basic as the date” of the incident. The court, however, credited Popkin’s testimony that (1) he sought to impeach the victim by challenging other aspects of her testimony and (2) he opted against cross-examining the victim as to the date of the incident because (a) he wanted to limit her time on the witness stand and (b) he did not believe that the jury would discount the victim’s testimony about the incident if it learned that the victim had made a prior inconsistent statement about the date of the incident. On the basis of the evidence credited by the court, we agree with the court that Popkin’s trial strategy as to his cross-examination of the victim was not unreasonable. We further agree with the court that the petitioner failed to establish prejudice, as we are not convinced that there is a reasonable probability that the outcome of the trial would have been different had Popkin tested the victim’s recollection of the date of the incident with the forensic interview, conducted when the victim was sixteen years old and which delved into the victim’s account of a sexual assault, during which the victim indicated that the incident had occurred on a Friday in March, 2014. Accordingly, we conclude that the court properly determined that the petitioner did not satisfy either prong under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

2

The petitioner also contends that the court committed error in denying his ineffective assistance of counsel claim grounded on Popkin’s failure, on cross-examination, to impeach Tangela as to (1) two prior convictions, (2) her testimony about the date of the incident and her failure to report the incident to the police promptly, (3) her conflicting testimony about the manner in which the petitioner left her home on the night of the incident, and (4) her testimony about her consumption of alcohol on the night of the incident. This claim is unavailing.

The following additional procedural history is relevant to our adjudication of this claim. During the state’s case-in-chief, on direct examination, Tangela testified in relevant part that (1) the incident occurred on April 5, 2014, but she did not report the incident to the police immediately because she was “very confused” and wanted to contact Mercer first,²¹ (2) she was drinking wine throughout the night of the incident, and (3) in 2006, she was convicted for falsely reporting an incident in the second degree.²² In addition, on direct examination, Tangela provided two different accounts regarding the petitioner’s exit from her home on the night of the incident. In one account, Tangela testified that she saw the petitioner leave the kitchen approximately twenty minutes before she had escorted Mercer out of her home and that she had discovered that the petitioner and Mercer had driven away shortly after the victim

had told her about the incident. In the other account, Tangela testified that, while accompanying Mercer out of the home, she observed the petitioner standing in her bedroom over her bed, and, when she approached the bedroom, she saw the petitioner “running out of [her] bedroom with his hands sort of in front of him and . . . stumbling and falling towards the front door.” Popkin did not explore these topics while cross-examining Tangela.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to impeach Tangela’s credibility adequately. In his posttrial brief, the petitioner argued that Popkin’s conduct was deficient in that he failed to undermine Tangela’s credibility on cross-examination by (1) eliciting additional testimony about the background of her prior conviction for falsely reporting an incident in the second degree, (2) eliciting testimony with respect to a 2015 conviction for interfering with a police officer²³ in violation of General Statutes (Rev. to 2009) § 53a-167a,²⁴ (3) questioning her as to the inconsistency in her testimony regarding the petitioner’s exit from her home on the night of the incident, (4) questioning her as to her testimony about the date of the incident and her decision to wait to report the incident to the police, and (5) eliciting additional testimony about her consumption of alcohol on the night of the incident, as the victim had testified before Tangela had taken the stand that the party guests, including Tangela, appeared to be “a little tipsy” and “intoxicated” when they returned from the Ramada Inn on the night of the incident. The petitioner further argued that Popkin’s deficient conduct prejudiced him because Popkin failed to seize an opportunity to undermine Tangela’s credibility, whom the petitioner characterized as “an important prosecution witness.”

In its decision, the court stated that “Popkin did not believe that [Tangela’s] testimony appeared credible to the jurors and his strategy in questioning her was to limit her time on the witness stand. The court finds that . . . Popkin’s questioning of [Tangela] was an exercise of sound trial strategy and thus the petitioner failed to prove that counsel’s cross-examination was deficient. The petitioner also failed to prove that he was prejudiced thereby by demonstrating what evidence additional cross-examination would have elicited and how it would have changed the outcome of the trial.”

The petitioner maintains that the court erred in determining that he failed to satisfy the performance and prejudice prongs of *Strickland* with regard to Popkin’s failure to impeach Tangela adequately on cross-examination. With respect to the performance prong, applying the same reasoning set forth in part II B 2 of this opinion, we conclude that the petitioner failed to

demonstrate that Popkin's failure to impeach Tangela as to the topics at issue constituted deficient performance. In addition, we agree with the court that the petitioner failed to establish prejudice. Through the testimony of Tangela and/or the victim, the jury already was aware that Tangela (1) had a criminal history that involved providing false information to the police and (2) was imbibing alcohol on the night of the incident. We cannot discern that there is a reasonable probability that additional testimony on cross-examination with respect to these topics would have influenced the jury's verdict. We also are not convinced that there is a reasonable probability that probing Tangela's inconsistent testimony as to the petitioner's exit from her home on the night of the incident would have affected the outcome of the trial, as the inconsistency plainly was in the record for the jury to resolve as the fact finder. Additionally, with regard to Tangela's testimony about the incident occurring on April 5, 2014, along with the short delay in her reporting of the incident, the petitioner did not demonstrate that any testimony beneficial to his defense would have resulted from additional questioning on these topics. Put simply, it is pure conjecture that Tangela would have altered her testimony regarding the date of the incident and the timing of her reporting of the incident, such that the petitioner failed to demonstrate a reasonable probability that challenging Tangela's testimony at issue would have resulted in a different outcome at trial.

In sum, we conclude that the court properly determined that the petitioner failed to satisfy either of the *Strickland* prongs as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

D

Fourth, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin's failure to challenge, as inadmissible, testimony elicited from the petitioner by the state on cross-examination. We disagree.

The following additional procedural history is relevant to our resolution of this claim. During the petitioner's case-in-chief, the state elicited testimony from Mercer on cross-examination that she had filed for divorce from the petitioner on April 26, 2016, although she "never went through with it."²⁵ Subsequently, while cross-examining the petitioner, the state asked the petitioner whether (1) he was "swearing and argumentative" with Mercer on the night of the incident and (2) he had domestic disputes with Mercer in the past. The petitioner responded "[n]o" to both questions. The state then asked the petitioner whether, on April 25, 2016, the police were called to his home in response to a domestic dispute. The petitioner testified that the police responded to a domestic dispute call on that date, which

stemmed from an argument between the petitioner and Mercer about the impending divorce action that Mercer filed the following day.²⁶ Popkin did not object to the state's questions or move to strike the petitioner's testimony. Shortly thereafter, the state asked the petitioner whether (1) it was true that the incident was not the first time that he had "touched another female," (2) he had a prior relationship with one of the guests at Tangela's home on the night of the incident, and (3) he had ever touched the guest in question "inappropriately." Popkin did not object to these questions. The petitioner responded "[n]o" to each inquiry.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing (1) to object to the state's questions or to move to strike the petitioner's ensuing testimony regarding the 2016 domestic dispute between the petitioner and Mercer, and (2) to object to the state's questions regarding the petitioner touching another female. In his posttrial brief, the petitioner contended that Popkin's performance was deficient in that he failed to challenge (1) the state's questions as improper and (2) the petitioner's testimony concerning the 2016 domestic dispute on the basis that the testimony constituted improper character evidence and uncharged misconduct evidence that had no probative value to the crimes with which the petitioner was charged and did not concern a lack of veracity. In addition, the petitioner argued that there was no basis in the record to accuse the petitioner of touching another female. The petitioner further argued that he was prejudiced by Popkin's deficient conduct, as (1) the testimony concerning the 2016 domestic dispute was highly damaging and (2) notwithstanding his testimony denying having touched another female, the jury could have been influenced by the state's questions on that topic.

In its decision, the court stated that, "[a]t the habeas trial . . . Popkin testified that the [state's] questions did not strike him as objectionable but he probably should have objected. He further testified that no objection would have foreclosed the questions about the domestic dispute. As to the questions that accused the petitioner of touching another female in the past, counsel testified that he believed the petitioner's answers were appropriate and his responses were neutral at worst. Based on the credible evidence, the court finds that the petitioner failed to demonstrate that counsel's strategy fell outside the wide range of reasonable professional assistance, and therefore failed to prove deficient performance. The petitioner also failed to sustain his burden of proving that there is a reasonable probability that, but for counsel's failure to object, the result of the petitioner's trial would have been different."

The petitioner claims that the court committed error in determining that Popkin's performance was not defi-

cient and that he was not prejudiced by Popkin's conduct. With respect to prejudice, the petitioner asserts that (1) the state's case was weak and (2) the state's questions and the petitioner's attendant testimony contributed to the state's improper "smear campaign" against him. We do not agree. With regard to the state's questions regarding the petitioner touching another female, the petitioner responded "[n]o" to each question, and, thereafter, the state did not probe the topic further. As such, we do not perceive any prejudice stemming from this isolated line of inquiry.²⁷ Additionally, we cannot conclude that prejudice resulted from the petitioner's testimony regarding the 2016 domestic dispute, which was brief, lacking in detail, other than describing that the domestic dispute related to the divorce action and was limited to "just yelling at each other," and not pursued further by the state. Moreover, given the balance of the record, including the victim's extensive testimony regarding her account of the incident, we cannot conclude that a reasonable probability exists that the jury's verdict was affected by the petitioner's testimony. Accordingly, we conclude that the court correctly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

E

Fifth, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin's failure to introduce purportedly exculpatory cell phone evidence. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On May 18, 2017, before the start of the evidentiary portion of trial, Popkin stated on the record that (1) Mercer recently informed him that she had discovered an old cell phone that she had used around the time of the incident and (2) a forensic evaluation of the cell phone was underway. On May 19, 2017, the second day of trial, Popkin called Mercer as a defense witness. Mercer testified in relevant part that she (1) had "been happily married for the majority of [her] marriage" to the petitioner and (2) had seen the petitioner drunk "a handful of times" during their marriage. On May 22, 2017, the third day of trial, Popkin conveyed to the trial court that he did not intend to offer the cell phone evidence into the record.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to introduce certain cell phone evidence, including text messages (1) reflecting that the gathering at Tangela's home during which the incident was alleged to have occurred was held in March, 2014, not April, 2014, as testified to by the victim and Tangela at trial, and (2) showing, by implication, that

the incident did not occur. In his posttrial brief, the petitioner contended that Popkin's performance was deficient in that he failed to introduce text messages from Mercer's cell phone that were favorable to his defense. Specifically, the petitioner cited text messages exchanged between Mercer and Tangela reflecting that (1) on March 29, 2014, (a) Mercer asked Tangela what her plans were that evening, and (b) Tangela replied that she was having food and drinks before going to the Ramada Inn and that Mercer was invited to join, and (2) on March 30, 2014, (a) at 3:26 a.m., Mercer told Tangela that she had "made it home," (b) approximately seventeen minutes later, Tangela replied, "[o]k love u," and (c) approximately three minutes later, Mercer replied, "[l]ove u too."²⁸ The petitioner maintained that the text messages revealed that (1) the gathering at which the incident was alleged to have occurred was held in March, 2014, corroborating the petitioner's and Mercer's testimony as to the same and undermining the victim's and Tangela's testimony that the incident had occurred on April 5, 2014, (2) Tangela waited approximately one week, rather than a matter of days, to contact the police to report the incident, which supported the defense's false claim theory, and (3) there was no animosity between Mercer and Tangela after Mercer had left Tangela's home following the gathering, thereby (a) contradicting Tangela's testimony that the victim immediately informed her of the incident and (b) suggesting that the incident did not occur. The petitioner further argued that he was prejudiced by Popkin's conduct, as "[t]he text messages could reasonably have shaken the credibility of the victim and [Tangela] and altered the entire evidentiary picture."

In its decision, the court stated that "Popkin testified at the habeas trial that he was made aware of the text messages and arranged for [a company] to download the [contents of Mercer's phone]. He received the contents of the phone on the first day of trial, shared the contents with the state, and ultimately decided not to introduce the texts after his review of the contents. . . . Popkin testified that the text messages supported the contention of the petitioner and [Mercer] that the get-together occurred in March, [2014] not April, [2014] and the final text message from [Tangela] to [Mercer] on that night of the incident was '[o]k love u.' [Popkin] explained that the download also included text messages between the petitioner and [Mercer] that were unfavorable to the petitioner concerning his alcohol problem and resulting marriage problems and had the potential to diminish [Mercer's] credibility to the jury. . . . Popkin testified that he believed the harm in introducing the text messages outweighed the benefit.

"Pursuant to [Popkin's] credible testimony, the court finds that . . . Popkin's decision to not submit the cell phone evidence fell within the wide range of reasonable professional assistance and thus did not constitute defi-

cient performance. Moreover, the petitioner failed to sustain his burden of proving that there is a reasonable probability that the result of the petitioner's trial would have been different had the cell phone evidence been presented."

The petitioner asserts that the court committed error in determining that Popkin's failure to introduce the cell phone evidence did not constitute deficient performance and that he was not prejudiced by Popkin's conduct. With respect to the performance prong, the petitioner maintains that it was not objectively reasonable for Popkin to forgo offering the favorable text messages in light of other, unfavorable text messages on Mercer's phone, particularly text messages concerning the petitioner's consumption of alcohol and marital problems with Mercer, arguing that Popkin could have sought to exclude the admission of the unfavorable text messages. Again bearing in mind that "[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," and that we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Morales v. Commissioner of Correction*, supra, 220 Conn. App. 305–306; we conclude that Popkin's decision to refrain from offering the favorable cell phone evidence into the record was not unreasonable. The court credited Popkin's testimony at the habeas trial that (1) the unfavorable text messages contradicted Mercer's testimony at the criminal trial that (a) she generally was happy in her marriage with the petitioner and (b) she had observed the petitioner drunk only "a handful of times," and (2) Mercer "came across very strongly" at the criminal trial and he "did not want to do anything to diminish—risk diminishing her credibility by text messages and then opening the opportunity for the state to bring in the [text messages] that were not favorable to [the petitioner]." Under these circumstances, Popkin's representation with respect to his treatment of the cell phone evidence was reasonable.²⁹ Moreover, on the basis of the entire record, including the victim's detailed testimony regarding the incident, we conclude that the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different had Popkin sought to offer the favorable text messages. Accordingly, we conclude that the court correctly determined that the petitioner failed to establish that Popkin's performance was deficient or prejudicial under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

The petitioner’s final claim is that the habeas court improperly declined to apply the cumulative error rule to his ineffective assistance of counsel claims. This claim is unavailing.

The following additional procedural history is relevant to our resolution of this claim. In his posttrial brief, the petitioner argued that the habeas court could conclude that prejudice resulted from the cumulative effect of Popkin’s alleged errors. The habeas court rejected this argument, citing this court’s opinion in *Zachs v. Commissioner of Correction*, 205 Conn. App. 243, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021), which held in relevant part that “[o]ur appellate courts . . . have consistently declined to adopt this [cumulative error analysis]. When faced with the assertion that the claims of error, none of which individually constituted error, should be aggregated to form a separate basis for a claim of a constitutional violation of a right to a fair trial, our Supreme Court has repeatedly decline[d] to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts. . . . Because it is not within the province of this court to reevaluate decisions of our Supreme Court . . . we lack authority under the current state of our case law to analyze the petitioner’s ineffective assistance claims under the cumulative error rule.” (Internal quotation marks omitted.) *Id.*, 281.

The petitioner maintains that whether the cumulative error rule is cognizable in our state is an open question, citing our Supreme Court’s decision in *Breton v. Commissioner of Correction*, 325 Conn. 640, 159 A.3d 1112 (2017). In *Breton*, which was released in 2017, our Supreme Court stated that “[i]t appears to be an open question whether . . . claims [predicated on the cumulative error rule] are cognizable under Connecticut law.” *Id.*, 703. Our Supreme Court declined to resolve this question because it previously had concluded in the opinion “that any purported deficiencies caused no prejudice to the petitioner In other words, there is no prejudice to aggregate.” *Id.* More recently, this court has iterated that Connecticut law does not recognize the application of the cumulative error rule. See *Zachs v. Commissioner of Correction*, *supra*, 205 Conn. App. 281; *Cooke v. Commissioner of Correction*, 194 Conn. App. 807, 819, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020). We decline to revisit this issue in this appeal.³⁰ See, e.g., *Aviles v. Barnhill*, 217 Conn. App. 435, 450, 289 A.3d 224 (2023) (“[I]t is well established that one panel of this court cannot overrule the precedent established by a previous panel’s holding. . . . As we have often stated, this court’s policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. [That] may be accomplished only if the appeal is heard en

banc. . . . Prudence, then dictates that this panel decline to revisit such requests.” (Internal quotation marks omitted.).

The judgment is affirmed.

In this opinion the other judges concurred.

¹ “In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim’s identity may be ascertained. See General Statutes § 54-86e.” *State v. Mercer*, 191 Conn. App. 288, 289 n.2, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

² “General Statutes § 53a-70 (b) (2) provides in relevant part: ‘Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age’ See also General Statutes § 53a-70 (b) (1) ([e]xcept as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony’.” *State v. Mercer*, 191 Conn. App. 288, 290 n.3, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

³ “General Statutes § 53-21 (a) provides in relevant part: ‘Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony’” *State v. Mercer*, 191 Conn. App. 288, 290–91 n.4, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

⁴ “General Statutes § 53a-73a (b) provides: ‘Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.’” *State v. Mercer*, 191 Conn. App. 288, 291 n.5, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

⁵ “The state later withdrew the charge of sexual assault in the fourth degree because the statute of limitations had expired.” *State v. Mercer*, 191 Conn. App. 288, 291 n.7, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

⁶ On appeal from the judgment of conviction, the petitioner raised what this court construed to be an ineffective assistance of counsel claim. *State v. Mercer*, supra, 191 Conn. App. 289 n.1. This court declined to reach the merits of that claim for lack of an adequate record. *Id.*, 293.

⁷ In count two of the habeas petition, the petitioner alleged a violation of his right to due process during the plea bargaining stage of the criminal proceedings. The petitioner withdrew count two prior to trial. In counts three and five, the petitioner alleged that Popkin rendered ineffective assistance during jury selection and with respect to an application for sentence review, respectively. The habeas court, *Oliver, J.*, rendered judgment in favor of the respondent, the Commissioner of Correction, on counts three and five. The petitioner is not challenging on appeal those portions of the judgment.

⁸ The respondent’s first three special defenses were directed to counts two or three of the habeas petition. See footnote 7 of this opinion. The respondent’s fourth special defense asserted deliberate bypass directed to count four of the habeas petition.

⁹ See footnote 7 of this opinion.

¹⁰ The state’s original information, which was operative at the time that the petitioner had rejected the plea offer, charged the petitioner with risk of injury to a child, which included an allegation that the victim was under the age of sixteen. See General Statutes § 53-21 (a) (2). During the habeas trial, Popkin testified that the plea negotiations that culminated in the rejected plea offer were based on the belief that the victim was under the age of sixteen.

¹¹ The petitioner also contends that he met his burden to show a reasonable probability that (1) the state would have been receptive to a new plea offer to lesser charges and (2) a new plea offer would have contained terms that were less onerous than the judgment and sentence imposed. In light of our conclusion that the court properly determined that there was not a reasonable probability that the petitioner would have accepted a new plea offer, we need not discuss the merits of these additional contentions.

¹² The petitioner does not raise a distinct claim that the habeas court’s factual findings in connection with its adjudication of count one of the habeas petition were clearly erroneous; however, in his appellate briefs, the

petitioner refers to a portion of his habeas trial testimony stating that he would have considered other plea offers had they been conveyed to him. Other portions of the petitioner's testimony, however, indicate that he was equivocal with regard to whether he would have considered other plea offers. "[I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Delena v. Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022). Thus, the court acted properly in crediting the portions of the petitioner's testimony evincing uncertainty as to his willingness to consider additional plea offers. Moreover, the court credited testimony by Popkin that the petitioner had conveyed to Popkin that he would not accept a plea offer that included a period of incarceration, and the record contains no evidence indicating that it was reasonably probable that a new plea offer *without* jail time would have been offered by the state and deemed acceptable by the trial court.

¹³ The petitioner cited the following portion of the state's closing argument: "We also have to prove the [petitioner] had the specific intent to obtain sexual gratification or to—or to humiliate the [victim]. In this case, the state would submit that clearly happened here. [The petitioner] clearly did what he did because he wanted to be sexually gratified. He wanted to humiliate [the victim]."

The petitioner also cited the following portion of the state's rebuttal argument: "Sexual assault in the fourth degree has different elements [than sexual assault in the first degree], that's why we charge[d] [sexual assault in the fourth degree] as well. [The petitioner] [g]rabbed [the victim's] boob, he grabbed her butt, stuck his hand in her pants. I mean, look at each and every element of the crimes charged and line it up with—with the [victim's] testimony . . ."

¹⁴ Specifically, Popkin questioned the victim about her statements to the forensic interviewer detailing the manner in which the petitioner had touched her.

¹⁵ Section 6-11 of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "**(a) General rule.** Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.

"**(b) Prior consistent statement of a witness.** If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment. . . ."

¹⁶ During its rebuttal, the state argued in relevant part: "So, really, if you want to come down to it, it's what [the victim] says, right? It's what [the victim] says as it was relayed to Tangela, as it was relayed to [the forensic interviewer], as it—as it was relayed to you here in court. And I would venture the bet, a good bet, if [the victim's] story was different from the day it happened when she told [Tangela], if it was different from the day that she told [the forensic interviewer], and if anything in her story . . . from what she told us on—on the stand, that would have been grounds for an exploration on cross-examination, but it wasn't explored."

¹⁷ Section 4-4 (a) of the 2009 edition of the Connecticut Code of Evidence provides: "**Character evidence generally.** Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

"(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

"(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

"(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness."

¹⁸ Section 4-5 of the Connecticut Code of Evidence provides: "**(a) General**

rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

“(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

“(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

“(d) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person’s conduct.”

¹⁹ Popkin testified that “[Tangela’s] appearance before the jury, she was a piece of work to say the least. You never knew what was going to come out of her mouth. So—and she came across in my estimate and she was a very poor witness” Popkin further testified that “you had to have observed [Tangela] on the [witness] stand. She came across as not credible, and I did not think that offering an objection would gain me anything—an objection to this would gain me anything. She was just so out there. I didn’t think . . . there’s any need to draw more attention to it. Just [inaudible] she had a strange way of testifying, and I didn’t think it was detrimental to [the petitioner].” In addition, Popkin testified that “[Tangela] did not come across, in my opinion, very well. She was all over the place, she was moving around oddly, she was—did not seem to be, as I recall, her demeanor was just inappropriate for a courtroom.”

²⁰ In support of his argument, the petitioner cited *State v. Bell*, 152 Conn. App. 570, 99 A.3d 1188 (2014), for the proposition that “our Supreme Court has cautioned against the use of police mug shots because, such photographs indicate prior arrests, not otherwise admissible, which present an accused person in an unfavorable light before the jury.” (Internal quotation marks omitted.) *Id.*, 578–79.

²¹ In her testimony, Tangela did not identify the precise date on which she reported the incident to the police. The victim testified that Tangela “gave it a day before she called the police.” Burke testified that the police report relating to the incident was generated on April 7, 2014, and he was assigned to the case on April 8, 2014. The court found that, according to the state’s discovery, the complaint was made on April 7, 2014.

²² See General Statutes (Rev. to 2005) § 53a-180c (a) (“[a] person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, such person gratuitously reports to a law enforcement officer or agency (1) the alleged occurrence of an offense or incident which did not in fact occur, (2) an allegedly impending occurrence of an offense or incident which in fact is not about to occur, or (3) false information relating to an actual offense or incident or to the alleged implication of some person therein”).

²³ During the habeas trial, Emanuel testified that, while representing the petitioner in his direct appeal from his conviction, Emanuel acquired a copy of Tangela’s criminal history from the Connecticut State Police, which was admitted as a full exhibit at the habeas trial, from which he learned of Tangela’s 2015 conviction for interfering with a police officer. Upon discovering that conviction, Emanuel proceeded to order a transcript from the attendant criminal proceedings, which was admitted as a full exhibit at the habeas trial and which revealed that the basis of the interfering with a police officer charge, to which Tangela had pleaded guilty, was that Tangela had given false and misleading information to the police officer.

²⁴ General Statutes (Rev. to 2009) § 53a-167a (a), as amended by Public Acts 2010, Nos. 10-36, § 22, and 10-110, § 51, provides: “A person is guilty of interfering with an officer when such person obstructs, resists, hinders

or endangers any peace officer, special policeman appointed under section 29-18b, Department of Motor Vehicles inspector appointed under section 14-8 and certified pursuant to section 7-294d, or firefighter in the performance of such peace officer's, special policeman's, motor vehicle inspector's or firefighter's duties."

²⁵ The petitioner does not claim that Popkin rendered ineffective assistance with regard to Mercer's testimony on cross-examination concerning the divorce filing.

²⁶ On cross-examination, the petitioner testified that the domestic dispute was not physical but, rather, limited to him and Mercer "just yelling at each other."

²⁷ Moreover, we cannot conclude that any prejudice resulted from the state's questions alone because, "[a]s we repeatedly have recognized, a question from counsel is not evidence of anything." (Internal quotation marks omitted.) *State v. Grant*, 154 Conn. App. 293, 317, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). Indeed, during the jury charge, the trial court, *Dennis, J.*, instructed the jury that "[q]uestions and objections by the attorneys are not evidence."

²⁸ The text messages in Mercer's phone were downloaded onto a flash drive that was admitted as a full exhibit during the habeas trial.

²⁹ We further observe that Popkin testified at the habeas trial that "there were some [text] messages that would have also supported [what Tangela] had said had transpired. Even if it was on a different day, they still supported [Tangela's] story too that she made these text messages. [Tangela] tried to reach . . . Mercer and she was unable to reach [Mercer] . . . or . . . Mercer had to put her off. So, they cut both ways in terms of that as well." The text messages admitted into evidence at the habeas trial reflect that, on March 31, 2014, following Mercer's text message to Tangela the prior day reading "[l]ove u too," (1) Tangela reached out to Mercer stating, "[w]hen u get this message I need u to call me urgent matter," (2) Mercer replied that she was preparing to go to an airport and asked whether it was "[t]oo late/early now," and (3) Tangela then replied, "[n]o I'm fine when will u get back home I need to talk with u face to face." As the respondent argued in his posttrial brief, these text messages also were unfavorable to the petitioner.

³⁰ During oral argument, the petitioner's counsel stated that she raised the cumulative error rule claim in this appeal to preserve it for review by our Supreme Court.
