JOHN LENTI *v.* COMMISSIONER OF CORRECTION
(AC 41647)

DiPentima, C. J., and Lavine and Eveleigh, Js.

Syllabus

The petitioner, who previously had pleaded guilty to burglary in the first degree and had admitted to five violations of probation as part of a plea agreement, filed an amended petition for a writ of habeas corpus, claiming, inter alia, that his guilty plea was not knowingly, intelligently and voluntarily given because the petitioner was under the influence of several heavy narcotics administered by Department of Correction personnel, rendering him unable to understand the plea agreement, and that his trial counsel was ineffective for failing to determine that the

petitioner was so heavily medicated that he was unable to understand and voluntarily enter a guilty plea. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. Held:

1. This court declined to review the petitioner's claim that the habeas court erred in determining that his guilty plea was made knowingly, intelligently and voluntarily because the petitioner failed to address the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal on this issue and addressed only the habeas court's purported error in concluding that his due process rights had not been violated; generally, a petitioner is not afforded appellate review of the habeas court's decision if he has failed to establish that the habeas court abused its discretion in denying the petition for certification.
2. The habeas court did not abuse its discretion in denying the petition for certification to appeal regarding the petitioner's ineffective assistance of counsel claim: although the habeas court did not make an explicit finding regarding the petitioner's claim of ineffective assistance of counsel, in light of the findings supported by the record, including findings that the petitioner was not impaired by the prescribed medications to the extent that he could not understand the proceedings or the terms of the plea agreement, that his decision to accept that offer was made cogently and voluntarily, that the petitioner responded appropriately to the trial court's questions during the plea canvass, and its determination that the petitioner's testimony was not credible, the habeas court did not err in concluding that the petitioner was not impaired by his prescribed medications to the extent that he could not understand the plea agreement and the plea proceedings; accordingly, the petitioner's ineffective assistance of counsel claim must fail.

Argued October 24, 2019—officially released February 4, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Douglas H. Butler, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, John Lenti, appeals following the denial 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 habeas court (1) improperly concluded that he had failed to establish that his plea was not made knowingly, intelligently, and voluntarily, and (2) abused its discretion in denying his petition for certification to appeal from the court's determination that he had received the effective assistance of counsel. Both of these claims rest on the petitioner's assertion that he was impaired at the time of his plea by the ingestion of medications prescribed by Department of Correction personnel. We disagree with this assertion and the petitioner's claims and, accordingly, dismiss the appeal.

The habeas court's memorandum of decision sets forth the following relevant facts and procedural history: "On August 12, 2013, the petitioner was on probation for five burglary offenses for which he had received a total, effective sentence of twenty years imprisonment, execution suspended after the service of two years, and five years of probation. On that day, the police arrested the petitioner for having unlawfully entered an elderly woman's home by damaging a garage door; displayed a handgun upon encountering the woman; and demanded that she give him money and her car keys or he would shoot her. The woman refused to comply, and the petitioner stole her cordless phone, as he fled the scene on foot.

"When the police apprehended him a short while later, the police retrieved a pellet gun nearby. The petitioner confessed to breaking into the victim's home while armed with the pellet gun. The petitioner faced charges of home invasion, attempted robbery first degree, and numerous misdemeanors." As a result of

this arrest, the petitioner also was charged with five counts of violation of probation in relation to the five prior burglary convictions for which he was then on probation. The petitioner owed a total of eighteen years for those convictions.

In exchange for pleading guilty to burglary in the first degree and admitting to five violations of probation, the state offered to recommend to the court a sentence of between ten and eighteen years of imprisonment. On March 27, 2014, the petitioner pleaded guilty in accordance with the state's offer. The petitioner responded appropriately to the court's canvass. Prior to sentencing, trial counsel asked Kenneth Selig, a board certified forensic psychologist, to analyze and assess the petitioner's mental status. On June 19, 2014, the court sentenced the petitioner to sixteen years of imprisonment followed by two years of special parole. The petitioner did not file a direct appeal.

On December 24, 2014, the petitioner commenced the present habeas action. On May 30, 2017, the petitioner filed an amended petition seeking to have his guilty pleas vacated. In his amended petition, the petitioner alleged that: (1) his guilty plea was not knowingly, intelligently, or voluntarily given because the petitioner was under the influence of heavy narcotics administered by Department of Correction personnel, rendering him unable to understand the plea agreement, and (2) his trial counsel was ineffective for failing to determine that the petitioner was so heavily medicated that he was unable to knowingly and voluntarily enter a plea. The respondent, the Commissioner of Correction, filed a return, alleging that the petitioner's due process claim was procedurally defaulted.[1] The habeas court conducted a trial on November 21, 2017, during which the petitioner, trial counsel and Robert H. Powers, a forensic toxicologist, testified. No witnesses were called by the respondent.

[1] The habeas court did not rule on the respondent's defense of procedural default.

On April 13, 2018, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus. The habeas court found that the petitioner failed to prove that his prescribed medications diminished his ability to understand the plea agreement or the proceedings. Further, the court found that, at the time he pleaded guilty, the petitioner understood the terms of the agreement and that his decision to plead was knowing and voluntary.

Thereafter, the petitioner filed a petition for certification to appeal, which the habeas court denied. The petitioner subsequently appealed, claiming that the habeas court had abused its discretion in denying his request for certification to appeal, solely with respect to the ineffective assistance of counsel claim.

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017). As to the first prong, the "standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request

for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis omitted; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 812, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

On appeal, the petitioner claims that the habeas court erred in determining that his guilty plea was made knowingly, intelligently, and voluntarily.[2] The petitioner fails to address the threshold issue of whether the habeas court abused its discretion in denying the petition for certification to appeal on this issue but only addresses the habeas court's purported error in concluding that his due process rights had not been violated. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 821. Generally, a petitioner is not afforded appellate review of the habeas court's decision if he has failed to establish that the habeas court abused its discretion in denying the petition for certification. See *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477, 722 A.2d 286 (1999).

"In *Petaway* v. *Commissioner of Correction*, 49 Conn. App. 75, 77–78, 712 A.2d 992 (1998), and, subsequently, in *Reddick* v. *Commissioner of Correction*, supra, 51 Conn. App. 477, this court refused to review the petitioners' ineffective assistance of counsel claims. In each of those cases, the petitioner raised the claim of ineffective assistance of counsel but failed to brief

[2] On appeal, the petitioner also claims that the habeas court erred in finding that he had failed to establish that his due process rights were violated when he involuntarily pleaded guilty because he was incompetent at the time he pleaded due to his "pervasive, persistent and debilitating" mental health issues. We do not consider this claim as it was not raised in the petitioner's operative petition for a writ of habeas corpus. See *Greene* v. *Commissioner of Correction*, 131 Conn. App. 820, 822, 29 A.3d 171 (2011) ("[h]aving not raised this issue before the habeas court, the petitioner is barred from raising it on appeal"), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012).

the threshold issue . . . of how the court had abused its discretion in failing to grant certification to appeal as to that underlying claim." *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 7–8, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002). Accordingly, we do not review the petitioner's first claim.

In addressing the petitioner's claim of ineffective assistance, we first note that it is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741, 937 A.2d 656 (2007).

The habeas court found that "the petitioner has failed to prove, by a preponderance of the evidence, that the prescribed drugs used by the petitioner in the days preceding his decision to plea[d] guilty, during the taking of his pleas, and between plea and sentencing impaired his ability to comprehend the information and advice given to him by defense counsel, the plea canvass conducted by the trial judge, or the interviews conducted between plea and sentencing." The court further found that "the petitioner understood the legal situation in which he was enmeshed, the terms of the plea agreement, and that his decision to accept that offer was made cogently and voluntarily."

During his habeas trial, the petitioner testified that he did not remember being sentenced and would

never have pleaded guilty had it not been for his overmedicated state. The habeas court found the petitioner's testimony not to be credible, specifically stating that his testimony was "inaccurate, self-serving, and contradicted by other, more credible evidence." As stated previously, we do not disturb the court's credibility determination on appeal. See *Orcutt* v. *Commissioner of Correction*, supra, 284 Conn. 741.

The habeas court noted that, although trial counsel testified that the petitioner complained that the medication he was taking had "unpleasant side effects" and that he wanted to discontinue that course of treatment, trial counsel also stated that the medication seemed to have no "detrimental influence on the petitioner's comprehension or judgment." Further, between plea and sentencing, Selig examined the petitioner over multiple sessions and produced a report[3] for the sentencing court that did not contain any complaints from the petitioner about his ability to make a knowing decision to plead guilty due to the medications. In his report, as the habeas court notes, Selig determined that the "combination of [medications] has been very helpful for [the petitioner] as has abstaining from addictive drugs." (Internal quotation marks omitted.) The habeas court also found that the petitioner responded appropriately to all of the court's questions during the plea canvass, including direct questions about whether the petitioner had taken any medications that affected his ability to understand the court.[4] Thus, the habeas court's finding that the petitioner was not negatively affected by his medications is not clearly erroneous.

Although the habeas court did not make an explicit finding regarding his claim of ineffective assistance of

[3] The petitioner's presentence investigation report and Selig's report were admitted into evidence under seal at the habeas trial.

[4] During the sentencing, the petitioner spoke on his own behalf and stated to the court, "I'm on the right medication now; I've been doing great."

counsel, it did find that the petitioner was not impaired by the prescribed medications to the extent that he could not understand the proceedings or that "his ability to comprehend the information and advice given to him by defense counsel" was impaired at the time he pleaded guilty. In light of the findings supported by the record, and the habeas court's credibility determinations, we do not disturb its implicit finding that trial counsel was not ineffective for failing to determine that the petitioner was impaired. Because the habeas court did not err in concluding that the petitioner was not impaired by his prescribed medications to the extent that he could not understand the plea agreement and the plea proceedings, the ineffective assistance of counsel claim must fail. Therefore, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

MICHAEL J. DUNKLING *v.* LAWRENCE BRUNOLI, INC., ET AL.
(AC 41634)

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

Syllabus

The defendants B Co. and its insurer appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner, which determined that B Co., a general contractor, was the principal employer of the plaintiff D, when he suffered a compensable injury while working for an uninsured subcontractor, M Co. B Co. had contracted with the state on a construction project, and B Co. then subcontracted work to M Co. and C Co. D was an employee of C Co. and worked on the construction project installing siding and gutters until he was laid off in November, 2014. B Co. warranted all the work performed against failures of workmanship and materials for one year after it left the worksite in September, 2014. In November, 2014, the state contacted B Co. about repairing a leaking

gutter. Thereafter, B Co. contacted M Co. and indicated that it was refusing final payment until the repairs were made. Subsequently, the president of M Co., R, hired D directly to repair the leaking gutter. On December 4, 2014, D and R traveled to the worksite to make the repairs, during which D fell from a ladder and sustained injuries. After a formal hearing, the commissioner found, inter alia, that D was an employee of M Co. and sustained a compensable injury, and ordered M Co. to accept compensability for D's injuries. Thereafter, the commissioner made a subsequent finding that B Co. was a principal employer pursuant to statute (§ 31-291) and, thus, also was liable for compensation benefits due to D, on the basis that B Co. initially subcontracted with M. Co. and that D's injuries were sustained as the result of B Co.'s direct communication and directive to M Co. to repair the gutters. On appeal, the board, inter alia, affirmed the commissioner's decision, finding that more than one entity may be deemed a claimant's principal employer. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the board committed error in affirming the commissioner's finding that B Co. was a principal employer pursuant to § 31-291, because B Co. was not in control of the worksite when D was injured: although B Co. was not present to oversee the repair, B Co. was in control of the worksite, as the state directed B Co. to repair the gutter and, thereafter, B Co. directed M. Co. to send a representative to the worksite, B Co. was obligated, pursuant to the contract, to complete the worksite project to the state's satisfaction, and B Co. was aware of the risks and dangers worksites presented but did not elect to supervise the gutter repair and did not repair the gutters itself; furthermore, B Co. could not prevail on its claim that the board's decision was unreasonable because a general contractor has no legal right to require a subcontractor to maintain workers' compensation insurance indefinitely; workers' compensation law provides benefits for workers who sustain injuries arising out of and in the course of employment, and the facts of the present case did not concern a future claim, as D was injured while he made repairs pursuant to B Co.'s direction to M Co., B Co. was in control of who made the repairs, and B Co. had the ability to supervise the repair or make the repair itself, if M Co.'s workers' compensation coverage was in doubt.
2. The board did not err in affirming the commissioner's ruling denying the defendants' motion to correct regarding communication between B Co. and the state concerning a warranty, as this claim was not relevant to employees or workers' compensation benefits in the present case; instead, the issue of warranty was relevant to B Co.'s relationship with the state, and any error the commissioner made in finding that B Co. warranted the construction at the worksite was harmless, as B Co. controlled the worksite by directing M Co. to send a representative to the worksite to repair the leaking gutter.

Argued November 21, 2019—officially released February 4, 2020

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District determining, inter alia, that the named defendant was the principal employer of the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision and the named defendant et al. appealed to this court. *Affirmed.*

Christopher J. Powderly, for the appellants (named defendant et al.).

Donna H. Summers, assistant attorney general, for the appellee (defendant Second Injury Fund).

Opinion

LAVINE, J. The defendants Lawrence Brunoli, Inc. (Brunoli) and its insurer, Liberty Mutual Insurance Company, appeal from the decision of the Compensation Review Board (board) affirming in part the supplemental findings and award of the Workers' Compensation Commissioner for the Fifth District (commissioner).[1] The defendants' central claim on appeal is that the board erred as a matter of law when it affirmed the commissioner's determination that, on the date that the plaintiff, Michael J. Dunkling, sustained a compensable injury, Brunoli was a principal employer pursuant to General Statutes § 31-291.[2] We affirm the decision of the board.

[1] All references to the defendants are to Brunoli and its insurer. Other parties named as defendants in the action are addressed by name subsequently in this opinion.

[2] The defendants claim that (1) the board's decision that Brunoli is a principal employer violates the rules of statutory construction, (2) the board committed legal error by affirming the commissioner's finding that Brunoli was a principal employer, (3) the board's reliance on *Hebert* v. *RWA, Inc.*, 48 Conn. App. 449, 709 A.2d 1149, cert. denied, 246 Conn. 901, 717 A.2d 239 (1998), was misplaced, (4) the board and the trial commissioner erred as a matter of law by incorporating warranty considerations in reaching their conclusions as to the applicability of § 31-291, (5) alternatively, if warranty considerations are relevant to the § 31-291 issues, the board erred as a matter of law by affirming the commissioner's denial of the defendants'

The record reveals the following procedural history and relevant facts. On December 4, 2014, Dunkling was repairing gutters at Brunoli's request when he fell from a ladder and suffered injuries. On December 23, 2014, he filed a form 30C,[3] seeking compensation benefits against Brunoli, which in turn filed a form 43,[4] denying that Dunkling's injuries arose out of and in the course of employment. Brunoli's subcontractors, Connecticut Metal Structures, LLC (Connecticut Metal), and Mid-State Metal Building Company, LLC (Mid-State),[5] were made parties to the action as well as the Second Injury Fund (fund).[6] Following a number of informal and pre-formal hearings, the case was tried before the commissioner on September 10, 2015, October 28, 2015, and January 5, 2016. The parties jointly stipulated that Brunoli had workers' compensation insurance on December 4, 2014, but neither Mid-State nor Connecticut Metal

motion to correct, which itself was legal error, (6) the board and the commissioner erred as a matter of law by including communications between Brunoli and the Department of Transportation as to leaking gutters in reaching their conclusions with respect to § 31-291, (7) alternatively, if communications among Brunoli, the state, and Mid-State Metal Buildings Company, LLC are relevant to the § 31-291 issues, the board erred as a matter of law by affirming the commissioner's denial of the motion to correct filed by Brunoli and its insurer, which itself was legal error.

[3] "A form 30C is the document prescribed by the . . . commission to be used when filing a notice of claim pursuant to the [Workers' Compensation Act]." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.3, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[4] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[5] Connecticut Metal and Mid-State are not parties to the present appeal.

[6] The fund assumed responsibility for Dunkling's injuries pursuant to General Statutes § 31-355 (b), which provides in relevant part that "[w]hen an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. . . ."

had such insurance on that date. Following the formal hearing, the commissioner issued his finding and award on June 20, 2016. The commissioner framed the issue as whether Dunkling was employed by Brunoli, Connecticut Metal, or Mid-State at the time of his injury on December 4, 2014.

In his original finding and award, the commissioner found that on July 19, 2012, the Department of Transportation (state) entered into a contract with Brunoli to act as the general contractor for a construction project in Colchester (worksite). The contract permitted Brunoli to subcontract work with Mid-State and Connecticut Metal. Brunoli warranted all work performed under the contract for a period of one year from September 16, 2014, when it left the worksite, against failures of workmanship and materials.

Connecticut Metal employed Dunkling as an hourly employee in 2013. Dunkling began installing siding and gutters at the worksite in January, 2014, and was paid at or above the prevailing wage. He continued to perform services at the worksite until June, 2014, and was employed by Connecticut Metal until November, 2014, when he was laid off.

In November, 2014, the state contacted Brunoli about a leaking gutter. On December 3, 2014, Bertrand Rompre, president of Mid-State, contacted Dunkling and requested that he return to the worksite with him to repair a leaking gutter. Rompre indicated to Dunkling that Brunoli refused final payment to Mid-State until the leak was repaired. Rompre agreed to pay Dunkling at his usual wage for repairing the gutter on December 4, 2014.

On December 4, 2014, Dunkling met Rompre at Mid-State's offices, and Rompre took him to the worksite and directed him to the location of the leak. Rompre provided Dunkling with materials, including a ladder, to repair the leak. Dunkling had been working for

approximately four hours[7] when the ladder Rompre provided retracted, causing him to fall and sustain multiple injuries. He has not worked since December 4, 2014. His medical bills totaled $16,675.26.

On the basis of the evidence, the commissioner found that Dunkling was a credible witness, who had sustained compensable injuries in the course and scope of his employment with Mid-State on December 4, 2014. The employer-employee relationship was the result of conduct between Dunkling and Rompre. The commissioner ordered Mid-State to accept compensability for Dunkling's reasonable and necessary treatment of the injuries he sustained, along with all related present and future medical treatment, including, but not limited to, permanent partial impairment to be determined at a future hearing.

On June 23, 2016, the fund filed a motion for articulation, stating that, at the September 10, 2015 hearing, the issue of principal employer under § 31-291 was identified. Brunoli and the fund had addressed the issue in their posttrial briefs, but the commissioner failed to address it in his finding and award. The fund asked the commissioner to reconsider his decision and to issue findings relevant to the issue of principal employer.

The commissioner held an additional formal hearing on July 22, 2016, and issued a supplemental finding and award on October 28, 2016, making the following additional findings. Brunoli had contracted with the state and subcontractors to build a structure at the

[7] The record discloses that while Rompre and Dunkling were present at the worksite, a state employee pointed out six or seven additional leaks, which Rompre directed Dunkling to repair so they would not have to return. On appeal, Brunoli argues that it asked Mid-State to repair just one leak and, therefore, it should not be responsible for the injuries Dunkling sustained when he was fixing the other leaks, if at all. The defendants' argument regarding the number of leaks Dunkling repaired is meritless. Brunoli was withholding payment from Mid-State due to gutter leaks, and Mid-State wanted to be paid. Rompre decided to have Dunkling fix all of the leaks while they were present.

worksite as part of its trade or business. Dunkling was injured within the specified area of the worksite. Although it is undisputed that Brunoli initially subcontracted with Mid-State, the injuries that Dunkling had sustained on December 4, 2014, came about in response to Brunoli's communication and directive to Mid-State that it summon a representative to the worksite for gutter repair, even though no Brunoli representative remained on the worksite.[8] The commissioner reached the additional conclusion that Brunoli was a principal employer pursuant to § 31-291 on December 4, 2014.

The defendants filed a petition for review of the commissioner's supplemental finding and award, stating that the commissioner erroneously found that Brunoli "satisfied the requirements necessary to be deemed a principal employer, contrary to the underlying facts and applicable law." On December 9, 2016, the fund filed a motion to correct that contained sixteen items.[9] On December 11, 2016, the defendants filed a motion to correct that contained nineteen items.[10] The commissioner denied each of the motions to correct in its entirety.

The defendants' petition for review was heard by the board on September 29, 2017. The board issued its opinion on April 25, 2018. The board noted that, on appeal, Brunoli took the position that the worksite where Dunkling was injured was substantially complete on December 4, 2014; see footnote 7 of this opinion; and that,

[8] The record demonstrates that construction at the worksite was substantially complete on September 16, 2014, and that Brunoli withdrew from the worksite on September 24, 2014. The state took occupancy of the building beginning on September 29, 2014.

[9] The board summarized the corrections sought by the fund, to wit: "corrections clarifying the nature of the business relationship between Brunoli and its subcontractors, as well as corrections to the 'Order' language in the Supplemental Finding regarding the obligations owed to [Dunkling] by both Mid-State and Brunoli."

[10] The board summarized the corrections sought by the defendants, to wit: Brunoli "sought to substitute findings that [it] was no longer in control of the premises on the date of [Dunkling's] injury and the party controlling the premises was the [state]."

because Brunoli did not exercise control over the worksite, § 31-291 does not apply to the facts of the case. The fund, however, contended that the facts before the commissioner supported his finding that Brunoli had sufficient control over the worksite to apply § 31-291. The board agreed with the fund and affirmed the commissioner's supplemental finding that Brunoli is liable to Dunkling as a principal employer.

The fund also argued to the board that the case should be remanded for resolution of various issues related to the relief to which Dunkling is entitled, but were not addressed in the commissioner's supplemental finding. The fund noted that more than one entity may be deemed a claimant's principal employer and that each entity in the chain between the general contractor and the claimant's immediate employer may be found liable for the claimant's injuries. See *Samaoya* v. *Gallagher*, 102 Conn. App. 670, 678, 926 A.2d 1052 (2007), citing to *Palumbo* v. *Fuller Co.*, 99 Conn. 353, 365, 122 A. 63 (1923). The fund had raised the multiple employer issue in its motion to correct, which the commissioner denied. The board determined that it was error for the commissioner to have denied that portion of the fund's motion to correct. Moreover, the board stated that the commissioner's supplemental finding did not establish a wage rate for Dunkling or the duration of his disability so that the amount of his compensation could be calculated. The board, therefore, remanded the case to the commissioner for additional proceedings.

The defendants thereafter appealed to this court, essentially claiming that the board erred as a matter of law in affirming the commissioner's finding that Brunoli was a principal employer within the meaning of § 31-291 on December 4, 2014.[11]

[11] Although the board remanded the case to the commissioner for additional findings, this court has jurisdiction to hear the appeal pursuant to General Statutes § 31-301b, which provides: "[A]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensa-

The standard of review in workers' compensation matters is well established. The board's "hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts." (Internal quotation marks omitted.) *Sellers* v. *Sellers Garage, Inc.*, 92 Conn. App. 650, 651, 887 A.2d 382 (2005). "[T]he power and duty of determining the facts [rest] on the commissioner, the trier of facts. . . . It matters not that the basic facts from which the [commissioner] draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.

"[The] scope of review of actions of the [board] is . . . limited. . . . The decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Citation omitted; internal quotation marks omitted.) *Hebert* v. *RWA, Inc.*, 48 Conn. App. 449, 452–53, 709 A.2d 1149, cert. denied, 246 Conn. 901, 717 A.2d 239 (1998).

I

The defendants claim that the board erred by affirming the commissioner's finding that Brunoli was a principal employer under § 31-291, arguing that Brunoli was not in control of the premises when Dunkling was injured. The essence of Brunoli's claim is that because it substantially had completed construction at the worksite and had withdrawn in September, 2014, it was no longer in control of the worksite on December 4, 2014. We disagree.

tion Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

Resolution of this claim is a matter of statutory construction. "The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny . . . or when its construction of a statute has not been time-tested." (Citation omitted; internal quotation marks omitted.) *Gill* v. *Brescome Barton, Inc.*, 317 Conn. 33, 42, 114 A.3d 1210 (2015).

"[I]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] act . . . the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 85, 144 A.3d 1075 (2016).

"The purpose of § 31-291 is to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on. . . . Any reasonable reading of § 31-291 makes it clear that the principal employer is ultimately liable for payment of a [workers'] compensation claim for an injury received while at work." (Citation omitted;

internal quotation marks omitted.) *Hebert* v. *RWA, Inc.*, supra, 48 Conn. App. 455–56.

Our Supreme Court has stated that, "[i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citation omitted; internal quotation marks omitted.) *Hart* v. *Federal Express Corp.*, 321 Conn. 1, 19, 135 A.3d 38 (2016); see also Regs., Conn. State Agencies § 31-301-8.

General Statutes § 31-291 provides in relevant part: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is part or process in the trade or business of such principal employer, and *is performed in, on or about premises under his control*, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. . . ." (Emphasis added.) Our appellate courts previously have construed § 31-291 and, in particular, the element of control of the premises.

There are three primary elements of § 31-291. See *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, 6 Conn. App. 60, 72, 504 A.2d 1376, cert. denied, 199 Conn. 808, 508 A.2d 769 (1986). "One, the relation of the principal employer and contractor must exist in work wholly or in part for the former. Two, the work must be in, on or about the premises controlled by the principal employer; and three, the work must be a part or process in the trade or business of the principal employer." (Internal quotation marks omitted.) *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 193, 355 A.2d 32 (1974). The parties agree that the first and third elements of the statute are met in the present

case. They disagree as to whether Brunoli was in control of the worksite.

"The term control in [the context of § 31-291] has a specific meaning. It is merely descriptive of the work area and is used instead of such words as owned by him or in his possession in order to describe the area in a more inclusive fashion. The emphasis is upon limitation of the area within which the accident must happen rather than upon actual control of the implements which caused the accident." (Internal quotation marks omitted.) *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, supra, 6 Conn. App. 72–73.

The board affirmed the commissioner's finding that Brunoli had a contract with the state to construct a building at the worksite. It also found that Brunoli initially subcontracted with Mid-State to perform siding and gutter work at the worksite. After the state informed Brunoli that there was a problem due to a leaky gutter over a pass door, Brunoli contacted Rompre at Mid-State, one of its original subcontractors, and informed him that it was withholding payment due to the leak. Brunoli directed Mid-State to summon a representative to the worksite to repair the leak.[12] Rompre contacted Dunkling and asked him to fix the leaking gutter. Dunkling met Rompre at Mid-State and went to the worksite with him to repair the gutter. A state employee at the worksite pointed out additional leaks to Rompre. It was while Dunkling was repairing one of the other leaks; see footnote 6 of this opinion; that he fell from the ladder. The commissioner concluded that Brunoli was a principal employer. Brunoli took an

[12] Dunkling initially was employed by Connecticut Metal to perform siding and gutter work at the worksite. The record discloses that on November 14, 2014, Andrew Milovitsch, a state employee, contacted Peter Gavin, Brunoli's vice president, to inform him of a gutter leak over a pass door. Gavin communicated with Rompre and asked him to have the leak fixed. Rompre was unable to reach Robert Pelletier, a principal of Connecticut Metal, and therefore, contacted Dunkling directly.

appeal to the board claiming that it was not a principal employer because it was not in control of the worksite. The board affirmed the commissioner's finding that Brunoli was a principal employer on the basis of this court's decision in *Hebert* v. *RWA, Inc.*, supra, 48 Conn. App. 449.

In *Hebert*, the claimant was injured while he was employed by a subcontractor to install a rubber roof on a restaurant on behalf of the general contractor. Id., 451. The claimant filed a workers' compensation claim against both the subcontractor and the general contractor, who both failed to carry workers' compensation insurance. Id. The commissioner found that the claimant sustained a compensable injury and that the general contractor was a principal employer. Id., 452. The general contractor appealed to the board, claiming that the commissioner improperly had found that he was in control of the premises where the claimant was injured. Id., 454. He alleged that "he did not control the premises because he did not own them, have a trailer or office on them or have the ability to control the [claimant's] activities. The evidence shows, however, that [the general contractor] visited the job site daily, inspected the ongoing work and asked the [claimant] to address certain problem areas on the roof before proceeding. [The general contractor] alone dealt with the owners of the premises and he was ultimately responsible to them for the satisfactory completion of the work." Id. He also claimed that the nature of his business was residential remodeling, not roof installation. Id.

This court affirmed the board's decision and adopted its reasoning that the general contractor "obtained the contract for installation of the roof by dealing directly with the restaurant and that he then hired [the subcontractor] to install the roof. [The general contractor] negotiated the contract price with the restaurant and with [the subcontractor], reserving a fee for himself.

The case law is settled that as long as the subcontractor's operations entered directly into the successful performance of the commercial function of the principal employer . . . those operations are a part of the process of the trade or business of the principal employer." (Citation omitted; internal quotation marks omitted.) Id., 454–55. *Hebert* is on point with the facts before us.

In the present case, Brunoli negotiated a contract with the state to construct a building at the worksite. It also subcontracted with Mid-State and Connecticut Metal to perform services at the worksite. Brunoli was obligated to complete the worksite project to the satisfaction of the state. Brunoli informed Rompre that it was withholding payment because of a leak and directed Rompre to send a representative to the worksite to fix it. The fact that the state not only permitted, but also directed Brunoli to go to the state owned worksite to repair the leak is evidence that Brunoli was in control of the worksite where the leak occurred. Brunoli argues that, unlike the general contractor in *Hebert*, it did not go to the worksite to oversee the gutter repair. That is a distinction without a difference in the present case. Brunoli was required to fix the leak and had control over who repaired the gutter. It directed Mid-State to send a representative to the worksite to fix the gutter. Brunoli, as a general contractor, surely is aware of the risks and the dangers present at a worksite and it could have gone to supervise the gutter repair if it had concerns and had elected to do so. Instead, it delegated the responsibility to its subcontractor, Mid-State.

Brunoli claims that the board's decision is unreasonable and bad policy for several reasons because a general contractor has no legal right to require a subcontractor to maintain workers' compensation insurance indefinitely. Our decision, however, does not stand for the proposition that a general contractor must require a subcontractor to maintain workers' compensation insurance indefinitely. Our workers' compensation law

provides benefits for workers who sustain injuries arising out of and in the course of employment. See, e.g., *Spatafore* v. *Yale University*, 239 Conn. 408, 417–18, 684 A.2d 1155 (1996). The issue in the present appeal is limited to its facts. After Brunoli and its subcontractors substantially had completed construction at the worksite, Brunoli directed one of its subcontractors to return to the worksite to repair a leaking gutter. Brunoli controlled whom it directed to repair the leak. Brunoli asked Mid-State to repair the gutters. Unfortunately, Dunkling was injured while he was repairing the gutter at Brunoli's direction. This case is about what happened on December 4, 2014, not in the future. If Brunoli had questions about Mid-State's workers' compensation coverage, it could have inquired. It also could have gone to the worksite to supervise the repair or it could have repaired the gutters itself if Mid-State's compensation coverage was in doubt.

For the foregoing reasons, we conclude that the board properly affirmed the commissioner's finding that Brunoli is a principal employer.

II

The defendants also claim that the board improperly affirmed the commissioner's ruling denying their motion to correct with respect to communication between Brunoli and the state concerning a warranty. The issue of a warranty in the present case is a red herring, as it is relevant to Brunoli's relationship with the state, and is not relevant to its employees and workers' compensation benefits. To the extent that the commissioner erred in finding that Brunoli warranted the construction at the worksite, it is harmless error, if any. As we stated in part I of this opinion, Brunoli controlled the worksite by directing Mid-State to send a representative to the worksite to repair the leaking gutter. Brunoli may have been obligated to the state to fix the leak, but workers' compensation coverage in the present case is a separate issue.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

GIFTON G. BAGALLOO *v.* COMMISSIONER OF CORRECTION (AC 41765)

DiPentima, C. J., and Keller and Bright, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, W, rendered ineffective assistance by failing to inform him adequately about his ineligibility for presentence confinement credit and by failing to request that the trial judge award him that confinement credit. On March 31, 2009, the petitioner, while serving a sentence for a narcotics offense and a violation of probation, was arrested for conspiracy to commit murder. The petitioner pleaded guilty to the conspiracy charge and, on December 10, 2013, received a sixteen year sentence. Although the petitioner was held in custody on the homicide case, in lieu of bond, since March 31, 2009, pursuant to statute (§ 18-98d [a] [1] [B]), he did not receive credit for the time he spent in confinement from that date to September 9, 2011, the date his sentence for the narcotics offense and violation of probation terminated. The petitioner only received presentence confinement credit toward the sixteen year sentence from September 10, 2011, to December 10, 2013. The habeas court conducted a trial, during which the petitioner and W testified. The court rendered judgment denying the habeas petition, concluding, inter alia, that W had not rendered ineffective assistance of counsel and that he informed the petitioner adequately about the length of his sentence. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner's claim that W rendered ineffective assistance because he failed to properly inform the petitioner that he would not receive credit for the time he spent in presentence confinement from March 31, 2009, to September 9, 2011, before the petitioner pleaded guilty to conspiracy to commit murder, was unavailing; the habeas court found that W had specifically informed the petitioner that the petitioner's resolution of the narcotics and violation of probation case created a dead time scenario whereby the petitioner would receive no confinement credit against any prison sentence for the homicide case that preceded the completion of that earlier sentence, and, thus, because the habeas court found that W's testimony was credible as to his communications with the petitioner regarding the dead time he would be serving, it did not abuse its discretion in denying the petition for certification to appeal with regard to that claim.

2. The petitioner could not prevail on his claim that W provided ineffective assistance by failing to ask the trial judge to order the Department of Correction to award presentence confinement credit, despite the fact that the petitioner was ineligible for such credit under § 18-98d (a) (1) (B), which was based on the petitioner's claim that because the Department of Correction has a policy of honoring court awarded confinement credit, even if the petitioner did not qualify for it under § 18-98d, and requesting the credit would not have harmed the petitioner, W rendered deficient performance by not making such a request; contrary to the petitioner's claim, our Supreme Court previously has made clear that awarding credit for presentence confinement is permissible only for defendants who qualify under § 18-98d, and, therefore, W could not have rendered deficient performance for failing to request confinement credit for which the petitioner was not eligible under the applicable statute.

Argued October 23, 2019—officially released February 4, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Judie Marshall, for the appellant (petitioner).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *John C. Smriga* and *Matthew C. Gedansky*, state's attorneys, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, Gifton G. Bagalloo, appeals after the denial 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 habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus in which he alleged, inter alia, that his trial counsel provided ineffective assistance when

the petitioner entered into a plea agreement. Because the petitioner has failed to demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal, we dismiss the appeal.

In its memorandum of decision, the habeas court set forth the following relevant facts and procedural history. "On November 10, 2008, the [trial] court sentenced the petitioner to seven years [of] imprisonment, execution suspended after three years, and three years [of] probation for a narcotics offense and a violation of probation. While serving that sentence, the police, on March 31, 2009, arrested the petitioner for conspiracy to commit murder . . . [to which he pleaded guilty], and [he] received a sixteen year sentence on December 10, 2013.

* * *

"The three year sentence terminated on September [9], 2011. Under General Statutes § 18-98d (a) (1) (B),[1] the petitioner only received pretrial jail credit toward

[1] General Statutes § 18-98d (a) (1) provides: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. In the case of a fine, each day spent in such confinement prior to sentencing shall be credited against the sentence at a per diem rate equal to the average daily cost of incarceration as determined by the Commissioner of Correction."

the sixteen year sentence beginning *after* that date. This was so because previous to that date he was confined as a *sentenced* prisoner. *Lee* v. *Commissioner of Correction*, 173 Conn. App. 379, 385–86, [163 A.3d 702, cert. denied, 326 Conn. 924, 169 A.3d 233] (2017). In short, although held in custody on the homicide case, in lieu of bond, since March 31, 2009, the calculation set forth in § 18-98d (a) (1) (B) disallowed jail credit as long as the earlier, three year sentence continued to run. The petitioner has received pretrial jail credit for confinement from September 10, 2011, to December 10, 2013." (Citations omitted; emphasis in original; footnote added.)

On or about April 21, 2014, the petitioner filed a motion to withdraw his guilty plea. In the motion, the self-represented petitioner argued that his plea was not knowing and voluntary because he was not advised adequately by his trial counsel, John Walkley, about the length of his sentence and the amount of jail credit he would receive from his pretrial confinement. On June 23, 2014, the trial court denied the motion. In denying the motion, the court found that because the presentence jail credit was never part of the plea agreement, the court did not have to ensure that the petitioner was aware of the impact of § 18-98d (a) (1) (B) on the plea agreement or that he would be serving "dead time."[2] The petitioner did not appeal from the denial of this motion.

On December 19, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus. On May 1, 2017, the petitioner, represented by counsel, filed an amended petition. In his amended petition, the petitioner alleged that (1) Walkley rendered ineffective

[2] "[D]ead time is prison parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time on another sentence." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 179 Conn. App. 160, 163 n.2, 178 A.3d 1079 (2018).

assistance by failing to inform him adequately about his ineligibility for jail credit and by failing to request that the sentencing judge award him jail credit, and (2) his guilty plea was not knowingly, intelligently and voluntarily given because he was not informed properly about the length of his sentence. On August 10, 2017, the respondent, the Commissioner of Correction, filed a return in response, claiming that the petitioner's petition was procedurally defaulted because he failed to appeal the trial court's denial of his motion to withdraw his guilty plea. See Practice Book § 23-30 (b). The habeas court conducted a trial, during which the petitioner and Walkley testified.

On April 30, 2018, the habeas court issued a memorandum of decision in which it denied the petition for habeas corpus relief. The habeas court found that the petitioner failed to satisfy the "good cause and prejudice" standard to overcome the procedural default for failing to appeal from the trial court's denial of his motion to withdraw his guilty plea. The habeas court also determined that the petitioner's trial counsel had not rendered ineffective assistance and that he informed the petitioner adequately about the length of his sentence.

Thereafter, the petitioner filed a petition for certification to appeal from the habeas court's judgment. The petitioner sought to raise two issues on appeal: (1) whether the court erred in finding that the petitioner failed to show cause sufficient to overcome procedural default for his claim that his guilty plea was not knowing, intelligent and voluntary,[3] and (2) whether the court erred in finding that the petitioner failed to prove ineffective assistance of counsel. The habeas court denied the petition. This appeal followed.

[3] The petitioner included this issue on his petition for certification to appeal; however, this issue was not briefed and the petitioner does not challenge this determination by the habeas court on appeal.

On appeal, the petitioner argues that the habeas court (1) abused its discretion in denying the petitioner's request for certification to appeal, and (2) erred in denying the petitioner's claim that his trial counsel rendered ineffective assistance. We disagree.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective

assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington* [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [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." (Citations omitted; internal quotation marks omitted.) *Coward* v. *Commissioner of Correction*, 143 Conn. App. 789, 794–96, 70 A.3d 1152, cert. denied, 310 Conn. 905, 75 A.3d 32 (2013).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claims that trial counsel provided ineffective assistance. With the foregoing principles in mind, we now address the petitioner's claims.

I

The petitioner first claims that his trial counsel was ineffective because he failed to inform the petitioner about the length of his sentence before entering into the plea agreement. Specifically, the petitioner argues that Walkley did not communicate that the petitioner would not receive credit for the time he spent in presentence confinement from March 31, 2009, to September 9, 2011. The petitioner further argues that had he known that he would not receive credit for the 893 days he spent in presentence confinement, he would have rejected the plea and elected to go to trial instead.

The following additional facts are necessary for the disposition of this claim. At the habeas trial, the court found that Walkley had "specifically informed the petitioner that the petitioner's resolution of the other case . . . created a 'dead time' scenario whereby the petitioner would receive no jail credit against any prison sentence for the homicide case that preceded the completion of that earlier sentence." The court further determined that Walkley's testimony was "very credible" about his communications with the petitioner regarding the unavailability of presentence jail credit and that he would be serving " 'dead time.' "[4] Therefore,

[4] The petitioner argues that Walkley's testimony that he did not recall the specific conversations he had with the petitioner regarding the unavailability of jail credit demonstrates that Walkley did not provide effective assistance of counsel. In response the respondent cites *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 517 n.2, 142 A.3d 243 (2016) (expressing concern with trial court's finding fault with counsel for his failure to recall "all of the advice he gave the petitioner" by noting that "the habeas court

the petitioner's claim that Walkley did not inform him about his ineligibility for jail credit fails because "[a]s an appellate court, we do not reevaluate the credibility of testimony, nor will we do so in this case. The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . This court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316–17, 34 A.3d 1046 (2012). Because the habeas court found Walkley's testimony credible as to informing the petitioner of the "dead time" he would be serving, we do not disturb the court's finding that Walkley's performance was not deficient. See *Corbett* v. *Commissioner of Correction*, supra, 316–17. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal with regard to this claim.

II

The petitioner's second claim is that Walkley provided ineffective assistance by failing to ask the sentencing judge to order the Department of Correction to award presentence confinement credit, despite the fact that the petitioner was ineligible for such jail credit under § 18-98d (a) (1) (B). The petitioner argues that because the Department of Correction has a policy of honoring court awarded jail credit, even if the petitioner does not qualify for it under § 18-98d, and requesting the credit would not have harmed the petitioner, Walkley

must presume that counsel acted competently and the burden lies with the petitioner, as the party asserting ineffectiveness, to overcome this presumption and prove that [counsel] failed to give the required warning"). This binding precedent disposes of the petitioner's argument.

rendered deficient performance by not making such a request.

During testimony before the habeas court, the petitioner sought to demonstrate that because it is a common practice in Connecticut for attorneys to request jail credit at sentencing, Walkley acted deficiently by failing to request it. The habeas court, however, disagreed and held: "In *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 950 A.2d 1220 (2008), our Supreme Court disabused trial courts, attorneys, and the [Department of Correction] from the delusion that judges could recoup [presentence] jail credit and circumvent the disqualification posed by the text of § 18-98d (a) (1) by judicial fiat. Id., 802–803. This court has held that defense counsel cannot be faulted for declining to make such an unlawful request. *Palmenta* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-13-4005461-S (May 21, 2014), aff'd sub nom. *Palmenta* v. *Commissioner of Correction*, 161 Conn. App. 901, 125 A.3d 302, cert. denied, 320 Conn. 909, 128 A.3d 507 (2015)." See also *Gooden* v. *Commissioner of Correction*, 169 Conn. App. 333, 338, 339–40 and n.3, 150 A.3d 738 (2016). In addition, the habeas court noted, and the record demonstrates, that Walkley testified that he attempted to ask the prosecutor to include in the recommended sentence the " 'dead time' " that the petitioner had served before trial.

On appeal, the petitioner argues that § 18-98d "strongly indicates that a sentencing court has no discretion to deny a valid request for jail credit." The petitioner's reliance on our Supreme Court's decision in *Washington* in support of this proposition is misplaced because, although that court did discuss how § 18-98d mandates that presentence confinement credit be granted to a defendant who qualifies for it under the statute, the petitioner here could not make a "valid request" for jail credit because he did not qualify for

presentence confinement credit under § 18-98d. Indeed, contrary to the petitioner's argument, our Supreme Court in *Washington* made clear that awarding jail credit for presentence confinement is permissible only for defendants who qualify under § 18-98d. See *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 802–803. Consequently, we agree with the habeas court that Walkley cannot be considered to have rendered deficient performance for failing to request jail credit for which the petitioner was not eligible under the statute. See *Weathers* v. *Commissioner of Correction*, 133 Conn. App. 440, 444, 35 A.3d 385 (holding that "[t]he petitioner has not demonstrated that effective representation requires that an attorney, at the time of sentencing, ask for every conceivable type of sentencing consideration, including credit to which he lacks any entitlement by operation of law"), cert. denied, 304 Conn. 918, 41 A.3d 305 (2012). Accordingly, the habeas court properly determined that the petitioner's trial counsel did not render deficient performance by not requesting unauthorized jail credit from the trial court.

On the basis of the foregoing, we conclude that the habeas court properly determined that Walkley did not render ineffective assistance of counsel by failing to request presentence confinement credit for which the petitioner was ineligible under § 18-98d. The petitioner has failed to prove any of the three criteria that constitutes an abuse of discretion. Accordingly, the petitioner has not demonstrated that the habeas court abused its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* AVERY CORPREW
(AC 41112)
(AC 41154)

Elgo, Bright and Devlin, Js.

Syllabus

The defendant, who, in two separate cases, previously had been convicted on guilty pleas of two counts of the sale of a narcotic substance, appealed to this court from the judgments of the trial court denying his motions to correct an illegal sentence. The trial court sentenced the defendant in each case to five years of incarceration followed by seven years of special parole, to be served concurrently. Thereafter, the defendant filed motions to correct an illegal sentence, alleging that his sentences were illegal because they included a period of special parole, which is not a definite sentence. The trial court denied his motions and the defendant filed separate appeals to this court, which, sua sponte, consolidated the appeals. On appeal, the defendant claimed that his sentences were prohibited because special parole is not a definite sentence. *Held* that the trial court properly denied the defendant's motions to correct an illegal sentence: the combination of the defendant's period of incarceration of five years followed by a period of seven years of special parole totaled twelve years, which did not exceed the maximum sentence of incarceration of twenty years for each conviction of the sale of a narcotic substance pursuant to statute ([Rev. to 2013] § 21a-278 [b]), and, accordingly, the defendant's sentences were explicitly authorized by statute and were not illegal.

Argued October 25, 2019—officially released February 4, 2020

Procedural History

Information, in the first case, charging the defendant with the crimes of sale of a narcotic substance and possession of narcotics, and information, in the second case, charging the defendant with the crimes of sale of a narcotic substance and possession of narcotics, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty in each case to sale of a narcotic substance; thereafter, the state entered a nolle prosequi in each case as to the count of possession of narcotics

and the court rendered judgments in accordance with the pleas; subsequently, the court denied the defendant's motions to correct an illegal sentence, and the defendant filed separate appeals with this court, which consolidated the appeals. *Affirmed.*

Avery Corprew, self-represented, the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, *Christian Watson*, supervisory assistant state's attorney, and *Mary Rose Palmese*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Avery Corprew, appeals from the judgments of the trial court denying his motions to correct an illegal sentence.[1] On appeal, the defendant claims that the trial court improperly concluded that the sentences imposed on him for a term of incarceration followed by a period of special parole were authorized by statute and, thus, were not illegal. We affirm the judgments of the trial court.

The following procedural history is relevant to the defendant's claim on appeal. On September 16, 2015, the defendant pleaded guilty in each of two separate cases to a single count of sale of a narcotic substance in violation of General Statutes (Rev. to 2013) § 21a-278 (b). He was sentenced on each count to five years of incarceration, followed by seven years of special parole, to be served concurrently.

On June 15, 2017, the defendant, in each case, filed a motion to correct an illegal sentence pursuant to

[1] Although the defendant filed two appeals in this matter, they were consolidated for briefing purposes.

Practice Book § 43-22, in which he argued that his sentence was illegal because it included a period of special parole, which is not a definite sentence, as required by statute. The court held a hearing on the defendant's motions on October 2, 2017. In a memorandum of decision issued on October 17, 2017, the court denied the defendant's motions, concluding that the imposition of special parole was statutorily authorized, and, therefore, that the defendant's sentences were not illegal. These appeals, which have been consolidated, followed.

On appeal, the defendant asserts the same argument that he raised in his motions to correct an illegal sentence—that his sentences of five years of incarceration followed by seven years of special parole are prohibited by statute because special parole is not a definite term of imprisonment, as required under General Statutes § 53a-35a.[2] This court's decision in *State* v. *Farrar*, 186 Conn. App. 220, 199 A.3d 97 (2018), is dispositive of the defendant's claim on appeal. In rejecting Farrar's claim that the term of special parole imposed on him was illegal because it is not a definite term of imprisonment as required under § 53a-35a, this court concluded that "special parole is a status duly authorized by General Statutes [Rev. to 2013] § 53a-28 (b).[3] . . . [General

[2] General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court . . . ."

[3] General Statutes (Rev. to 2013) § 53a-28 (b) provides in relevant part: "Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment and a period of special parole as provided in section 54-125e."

Pursuant to General Statutes § 54-128 (c), "[t]he total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." See also General Statutes (Rev. to 2013) § 54-125e.

Statutes (Rev. to 2013) §] 53a-28 (b) (9) and [General Statutes §] 54-128 (c) explicitly authorize a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole do not exceed the statutory maximum for the crime for which the defendant was convicted." (Footnote added and omitted.) Id., 223. Because the combined terms of imprisonment and special parole imposed on Farrar did not exceed the maximum sentence of incarceration for the crime of which he was convicted, this court concluded that his sentence was explicitly authorized by statute and did not constitute an illegal sentence. Id., 222, 223–24.

Here, in each case, the defendant received a definite period of incarceration of five years followed by a period of seven years of special parole. Because the combination of those terms, twelve years, does not exceed the maximum sentence of incarceration of twenty years for the defendant's conviction of sale of a narcotic substance in each case pursuant to General Statutes (Rev. to 2013) § 21a-278 (b),[4] the defendant's sentences were explicitly authorized by statute and therefore were not illegal. Accordingly, the trial court properly denied the defendant's motions to correct an illegal sentence.

The judgments are affirmed.

[4] General Statutes (Rev. to 2013) § 21a-278 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. . . ."