IN RE SEQUOIA G. ET AL.*
(AC 44346)

Elgo, Suarez and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights as to her minor children, S, B and A. She claimed that the court improperly found that it was in the best interests of the children to terminate her parental rights. *Held* that there was ample evidence to support the trial court's conclusion that termination of the mother's parental rights was in the best interests of the minor children as the court's findings as to the children's best interests, made pursuant to statute (§ 17a-112 (k)), were factually supported and legally sound, such that this court would not substitute its

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

judgment for that of the trial court: it was not inappropriate for the court to have considered, as to the emotional ties factor in § 17a-112 (k) (4), the bond between the children and their foster parents, and, although the court did not specifically discuss the feelings and emotional ties of the children with respect to the mother when stating its findings, it did not follow that the court failed to consider those feelings and ties, as reading the court's decision as a whole revealed that the court considered them and that it determined that the children and the mother did not have a strong bond; moreover, when the court's decision was read as a whole, the court's factual findings supported its conclusion under § 17a-112 (k) (3) that the mother had not complied with her obligations in connection with certain of the court's orders, including that it was not clearly erroneous for the court to find that she had not fulfilled her obligations regarding visitation with the children; furthermore, as to A, the mother did not direct this court to any case law indicating that a court has an obligation, sua sponte, to consider a less onerous means of achieving permanency planning in the absence of a motion specifically seeking an alternative permanency plan, and, because the issue of whether a transfer of guardianship was appropriate for A was never raised in the trial court, it made no findings regarding whether such a transfer was in A's best interest and a more appropriate disposition for A than the one approved by the court.

Argued April 8—officially released June 8, 2021**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Litchfield at Torrington, Juvenile Matters, where the matter was tried to the court, *Hon. Joseph W. Doherty*, judge trial referee; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent mother).

Benjamin A. Abrams, assistant attorney general, with whom, on the brief, were *William Tong*, attorney

** June 8, 2021, the date that this opinion was released as a slip opinion, is the operative date for all substantive and procedural purposes.

general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Joseph A. Geremia, Jr., for the minor children.

Opinion

DiPENTIMA, J. The respondent mother, Michelle L., appeals from the judgments of the trial court terminating her parental rights with respect to her minor children, Sequoia, Benjamin and Anice.[1] On appeal, the respondent claims that the court improperly found that it was in the best interests of the children to terminate her parental rights. We disagree with the respondent and, accordingly, affirm the judgments of the trial court.

The following facts, which the court found by clear and convincing evidence, and procedural history, are relevant. "The family has an extensive history with [the Department of Children and Families (department)]. . . . On July 31, 2008, neglect petitions were filed with the Superior Court for juvenile matters with regard to Sequoia, Tevvon and Benjamin. The children were adjudicated neglected and a disposition of protective supervision was entered on April 29, 2009, and expired on June 17, 2009. On March 30, 2012, a ninety-six hour hold was invoked with regard to Sequoia, Tevvon, Benjamin and Anice. The hold was vacated on April 3, 2012. On April 8, 2012, neglect petitions were filed with the Superior Court for juvenile matters . . . regarding Sequoia, Tevvon, Benjamin and Anice. The children were adjudicated neglected and a disposition of protective supervision was entered on November 14, 2012, and expired on May 14, 2013. . . . Following a team meeting . . . the department was concerned about Sequoia returning to the care of either parent. She was placed in a therapeutic foster home.

[1] The court also terminated the parental rights of the father with respect to these three children. Because the father is not participating in this appeal, we will refer in this opinion to the respondent mother as the respondent.

"On November 21, 2016, Tevvon, Benjamin and Anice were removed from the father's care through an [order of temporary custody] . . . . Protective supervision of those three children was vested in the respondent. On January 26, 2017, and January 27, 2017, [the department] received referrals regarding the children's safety in [the respondent's] home. When [the department] responded to those referrals, [the respondent] reportedly yelled, screamed and used profanity. Tevvon, Benjamin and Anice were removed from her custody pursuant to a ninety-six hour hold on January 27, 2017. On January 30, 2017, an order of temporary custody was filed and granted. On March 30, 2018, the court granted a motion to modify the protective supervision to commitment regarding Tevvon, Benjamin and Anice. All three children were committed to [the custody of the petitioner, the Commissioner of Children and Families]. On April 23, 2018, [the petitioner] filed with the court four petitions for termination of parental rights regarding Sequoia, Tevvon, Benjamin and Anice." On September 24, 2019, prior to the start of evidence, the petitioner moved to withdraw [her] termination of parental rights petition as to Tevvon and, instead, filed a motion for permanent transfer of guardianship seeking to vest guardianship of Tevvon in his foster father, Gary R.

In its memorandum of decision, filed August 28, 2020, the court noted that the trial took place over the course of five days. The court stated that, despite having proper notice, the respondent was not present for trial and did not present any evidence or testimony to refute the grounds alleged in the termination of parental rights petitions. The court noted that, according to her counsel, the respondent was in Indiana. The court granted the petitioner's petition for a permanent transfer of guardianship as to Tevvon and appointed Gary R., as his permanent legal guardian.

The court found in the adjudicatory phase, by clear and convincing evidence, that the department made reasonable efforts at reunification; see General Statutes § 17a-112 (j) (1); and that the respondent had failed to achieve a sufficient degree of personal rehabilitation within the meaning of § 17a-112 (j) (3) (B).[2] The court proceeded to the dispositional phase, in which it determined that it was in the best interests of Sequoia, Benjamin and Anice that the respondent's parental rights be terminated with respect to those three children. This appeal followed.

On appeal, the respondent does not challenge either the conclusions the court made during the adjudicatory phase or the court's decision to transfer permanent guardianship as to Tevvon.[3] Her sole claim on appeal concerns the findings and conclusions made by the court during the dispositional phase, with respect to Sequoia, Benjamin and Anice. We do not agree with the respondent.

The following legal principles and standard of review guide our analysis. "This court will overturn a determination that termination of parental rights is in the best interests of a child only if the court's findings are clearly erroneous." *In re Kiara Liz V.*, 203 Conn. App. 613,

[2] "[A] hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights . . . exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase." (Internal quotation marks omitted.) *In re Alison M.*, 127 Conn. App. 197, 203–204, 15 A.3d 194 (2011).

[3] The petitioner filed a motion to strike portions of the respondent's appellate appendix that contained copies of documents that are dated after the close of evidence and after the court filed its memorandum of decision. All of the challenged documents pertain to Tevvon, and the respondent does not challenge the court's decision to transfer his permanent guardianship to Gary R. Because these documents are not evidence and, moreover, are not relevant to our resolution of the issues raised in this appeal, we do not consider them.

626, 248 A.3d 813 (2021).[4] "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [the child's] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015); see also General Statutes § 17a-112 (k).[5]

[4] The respondent acknowledges that reviewing courts apply a clearly erroneous standard to such claims, but invites us to apply a sufficiency of the evidence standard to our review of the court's best interest determination. See *In re Malachi E.*, 188 Conn. App. 426, 443–44 n.6, 204 A.3d 810 (2019) (declining to adopt evidentiary sufficiency standard of review to best interest determination as it is not used by our Supreme Court). The respondent, however, provides no law or analysis in support of her requested standard of review. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) (appellate courts not required to review issues improperly presented through inadequate brief).

[5] General Statutes § 17a-112 (k) provides in relevant part that, "in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled

The court made findings pursuant to each of the seven statutory factors in § 17a-112 (k) before determining, by clear and convincing evidence, that termination of the respondent's parental rights was in the best interests of Sequoia, Benjamin and Anice, who at the time of the court's decision were fifteen, twelve and nine years old, respectively. The respondent challenges the court's findings as to two of these factors.

The respondent argues regarding the emotional ties factor, § 17a-112 (k) (4), that the court did not comment on the relationship between the children and her, but rather focused solely on the relationship between the foster parents and the children. She contends that the court ignored the testimony of Anice's foster parent, Gary R., that she had weekly phone contact with the respondent and had expressed that she would like to live with the respondent or her father and, if that is not possible, she would like to continue living with Gary R.[6] We are not persuaded.

their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[6] The respondent also argues that the court ignored the testimony of Gary R. that Tevvon had weekly phone contact with the respondent. Given that the court did not terminate the respondent's parental rights regarding Tevvon and that the respondent expressly stated in her brief that she was not contesting the court's transfer of guardianship regarding Tevvon, we do not address this argument.

The court found as to the emotional ties factor that Benjamin has a positive relationship with his foster parents and Sequoia has a positive relationship with her foster mother, whom she approaches readily for affection and care. The court found that Anice would like to be adopted by Gary R. if she cannot return to her biological parents.

It was not inappropriate for the court to have considered the bond between the children and their foster parents. The plain language of § 17a-112 (k) (4) provides that the trial court shall consider and make written findings regarding "the feelings and emotional ties of the child . . . to . . . any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties . . . ." The court's findings as to the emotional ties factor indicate that the three children had been in their placements for more than one year at the time of its decision. In *In re Nevaeh W.*, 317 Conn. 723, 731–33, 120 A.3d 1177 (2015), our Supreme Court stated that "[n]othing in [§ 17a-112 (k) (4)], however, required the trial court to consider only the children's emotional ties with the respondent. . . . To the contrary, this court has repeatedly recognized that, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives. . . . Indeed . . . [i]n regard to children who have bonded with their foster parents, [o]nce new psychological relationships form, separation from the new parents becomes no less painful and no less damaging to a child than separation from natural or adoptive caregiving parents. . . . Termination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption." (Citations omitted; internal quotation marks omitted.)

Although the court did not specifically discuss the feelings and emotional ties of the children with respect to the respondent when stating its findings regarding § 17a-112 (k) (4), it does not follow that the court failed to consider those feelings and ties. Our Supreme Court stated in *In re Nevaeh W.*, that, "in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding" and determined that even though the trial court did not specifically mention the emotional ties between the children and the respondent in its statutory findings during the dispositional phase, that the memorandum of decision, when read as a whole, indicated that the court considered the children's emotional ties to the respondent. Id., 733.

In the present case, reading the court's decision as a whole reveals that the court considered the feelings and emotional ties the children had with the respondent. The court found that the respondent relocated to Indiana and visited one time in one year. The court also found that the respondent had difficulties "managing the children's behaviors during visits, as they were frequently arguing and fighting. She struggles with basic conversation and affection with the children, and needs to demonstrate active engagement in their lives and show interest in their well-being. . . . [The respondent] participated in the updated court-ordered psychological evaluations with [Jessica] Biren Caverly, [a psychologist], in August, 2017. . . . It was reported that [the respondent] consistently demonstrates emotional coldness, detachment and flattened affect, especially in interactions with the children. . . . It was reported that the parents cannot appreciate the traumatic environment they created for their children and how it can impact children long after removal from their home. It [was] reported that neither [the respondent] nor the father demonstrated any significant engagement or

bond with the children." The court further determined that Anice's desire to live with the respondent or her father is "not realistic or possible." The court also found that "Tevvon, Benjamin and Anice look to their older sisters Azelia and Sequoia more readily as parental and attachment figures tha[n] they do to either of their parents." It is clear from these findings that the court determined that the children did not have a strong bond with the respondent. Even if, however, such a bond were present, "the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination." *In re Kiara Liz V.*, supra, 203 Conn. App. 626.

The respondent's next argument concerns the court's findings regarding the extent to which she had fulfilled her obligations in connection with the orders of the court. See General Statutes § 17a-112 (k) (3). The following relevant specific steps were ordered by the court to facilitate reunification and agreed to by the respondent: "Keep all appointments set by or with [the department]. Cooperate with [the department's] home visits, announced or unannounced, and visits by the child(ren)'s court-appointed attorney and/or guardian ad litem. . . . Visit the child(ren) as often as [the department] permits." See *In re Shane M.*, 318 Conn. 569, 587, 122 A.3d 1247 (2015) (specific steps constitute order of court). The court found, inter alia, that the respondent had not fulfilled these court-ordered obligations.

The respondent contends that, because she has resided out of state, "it is unlikely that the [department] or the children's attorney and/or guardian[s] ad litem would conduct home visits. Regarding visitation with the children, the [respondent] did visit with the children when she was living in [Connecticut] and when she is able to make trips now back to [Connecticut], she arranges for visits with the children and, more importantly, she has weekly phone contact with the children." We are not persuaded by this argument.

When reading the court's decision as a whole, the court's factual findings support its conclusion that the respondent had not complied with the court orders at issue. The court found that, although the department had offered supervised visitation, the respondent did not continue visitation with Sequoia, Benjamin or Anice, but "left her children behind" and moved to Indiana. Evidence presented at trial supports this finding. A social worker with the department testified that after the respondent moved to Indiana in June, 2018, she had supervised visits with some or all three of the children in January, 2019, and June, 2019. A "Social Study in Support of Petition for Termination of Parental Rights,"[7] dated April 16, 2018, which was admitted as a full exhibit at trial, indicates that the respondent has not been consistent in keeping appointments with the department and has refused to permit the department to conduct home visits since November, 2017. In that social study, it was noted that the respondent has visited with the children, but struggled with appropriately parenting the children during visits. A subsequent "Social Study in Support of Permanency Plan," dated July 1, 2019, which was admitted as a full exhibit at trial, stated that the respondent had visited the children twice since she moved to Indiana in June, 2018. The court also had before it evidence of the children's varying degrees of phone contact

[7] Pursuant to General Statutes § 45a-717 (e): "(1) The court may, and in any contested case shall, request the Commissioner of Children and Families . . . to make an investigation and written report to it, within ninety days from the receipt of such request. The report shall indicate the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents, and any other factors which the commissioner . . . finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child. . . . (3) The report shall be admissible in evidence, subject to the right of a party to require that the person making it appear as a witness and be subject to examination."

with the respondent. The July 1, 2019 social study noted that Benjamin communicates with the respondent "a few times a month" on the phone, that Anice "does not communicate often on the phone" with the respondent and that Sequoia talks to the respondent weekly on the phone.

Particularly in light of the evidence that the respondent refused to allow the department to conduct home visits since November, 2017, and that she has visited with the children only twice in person since moving to Indiana in June, 2018, it was not clearly erroneous for the court to find that she had not fulfilled her obligations in connection with the court orders regarding visitation with the children.

Although the respondent did not file a motion for transfer of guardianship as to Anice, she additionally argues that the court erred in finding that it was in Anice's best interest to terminate the respondent's parental rights with respect to her because Anice, who resides in the same household as Tevvon, "would probably be happy" with a permanency plan similar to that of Tevvon, wherein guardianship would be transferred to Gary R. She contends that Gary R. testified that he would be willing to be a permanent resource for Anice and that terminating her parental rights with respect to Anice would subject her to further disruption wherein she would be removed from the home she lives in with Tevvon.

The respondent has not directed us to any case law indicating that a court has an obligation, sua sponte, to consider a "less onerous means of achieving permanency planning" in the absence of a motion specifically seeking an alternative permanency plan. Rather, our statutory scheme provides as follows: "A permanency plan is the proposal for what the long-term, permanent solution for the placement of the child should be. General Statutes §§ 17a-111b (c) and 46b-129 (k). Our statutory scheme provides five permanency options: (1)

reunification with a parent; (2) long-term foster care; (3) permanent guardianship; (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption. General Statutes §§ 17a-111b (c) and 46b-129 (k) (2). If during the course of the juvenile proceedings the child is placed in the care and custody of the petitioner . . . the petitioner must file a motion for review of a permanency plan within nine months of that placement. General Statutes § 46b-129 (k) (1) (A). When the petitioner files a motion to review a permanency plan, the respondent parents and qualifying relatives may file a motion in opposition to the proposed plan. General Statutes § 46b-129 (k) (1) (A). If the permanency plan is opposed, the court must hold an evidentiary hearing, at which [t]he commissioner shall have the burden of proving that the proposed permanency plan is in the best interests of the child or youth. General Statutes § 46b-129 (k) (1) (A). After the hearing, the court shall approve a permanency plan that is in the best interests of the child . . . and takes into consideration the child's . . . need for permanency. General Statutes § 46b-129 (k) (2). If the trial court approves a permanency plan of termination followed by adoption, the petitioner shall file a petition for termination of parental rights not later than sixty days after such approval if such petition has not previously been filed . . . . General Statutes § 46b-129 (k) (6) (A)." (Footnotes omitted; internal quotation marks omitted.) *In re Adelina A.*, 169 Conn. App. 111, 121–23, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

The respondent filed a motion in opposition to the proposed permanency plan in which she stated that it was in the best interests of the children that they be reunited with her, and she did not request a permanent transfer of guardianship as to Anice. Because the issue of whether a transfer of guardianship was appropriate

for Anice was never raised in the trial court, it made no findings regarding whether a transfer of guardianship was in Anice's best interests and a more appropriate disposition *for Anice* than the one approved by the court. See, e.g., *In re Azareon Y.*, 309 Conn. 626, 633–39, 72 A.3d 1074 (2013) (when respondent did not request trial court to consider alternatives to petitioner's permanency plan, record on appeal was inadequate to review substantive due process claim). We cannot review this aspect of the respondent's best interest claim because it was not raised in the trial court and no exceptional circumstances exist. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014); see also *In re Skylar B.*, 204 Conn. App. 729, 745, A.3d (2021) (only properly filed motion provides requisite notice to all interested parties and court of alternative disposition as well as evidence relevant for court to evaluate merits of transfer of guardianship versus termination of parental rights and adoption).

In the present case, there was ample evidence to support the court's conclusion that termination of the respondent's parental rights was in the best interests of Sequoia, Benjamin and Anice. The respondent chal-

lenged the court's findings only as to two of the statutory factors; both challenges we have rejected. Moreover, even if the respondent were able to demonstrate that error existed with respect to one or both of these factors, it would not necessarily affect our disposition of the appeal for "a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 102, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020). "The balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 497, 940 A.2d 733 (2008). We conclude that the court's findings as to the children's best interests are factually supported and legally sound and we will not substitute our judgment for that of the trial court.

The judgments are affirmed.

In this opinion the other judges concurred.

NANCY SCHOTT *v.* TERRENCE JOHN SCHOTT
(AC 43541)

Elgo, Alexander and DiPentima, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the decision of the trial court denying his motion to modify his alimony obligation. Pursuant to a separation agreement entered into by the parties and incorporated in the court's judgment of dissolution, the defendant was obligated to pay alimony to the plaintiff until, inter alia, the plaintiff's cohabitation with another individual. On appeal, the defendant claimed that, pursuant to the plain language of the separation agreement, the court was obligated to terminate his alimony obligation in light of evidence of the plaintiff's cohabitation. *Held* that the trial court improperly denied the defendant's motion to modify his alimony obligation: the separation agreement plainly and unambiguously provided, in mandatory language, that the defendant's alimony obligation shall be terminated upon cohabitation by the plaintiff, and the court found that, following the dissolution of the parties' marriage, the plaintiff cohabitated with another individual, which was substantiated by evidence adduced at a hearing on the motion; moreover, although the court expressly found that the plaintiff experienced a change in circumstances, it nonetheless failed to apply the relevant provision of the statute (§ 46b-86 (b)) regarding cohabitation, and, instead, sua sponte invoked § 46b-86 (a), which permits modification of an alimony order upon a showing of a substantial change in circumstances, which was error, as the defendant's postjudgment motion for modification was premised on cohabitation pursuant to § 46b-86 (b).

Argued April 20—officially released June 15, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Hon. Robert T. Resha*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Ficeto*, *J.*, denied the defendant's motion to modify alimony, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Prerna Rao, for the appellant (defendant).

Opinion

ELGO, J. The defendant, Terrence John Schott, appeals from the judgment of the trial court denying his postjudgment motion to modify his alimony obligation. He claims that, pursuant to the plain terms of the parties' separation agreement, the court was obligated to terminate that obligation once it found that the plaintiff, Nancy Schott, was cohabitating with another person. We agree and, accordingly, reverse the judgment of the trial court.

The relevant facts are not in dispute. The parties married in 1996. Following the subsequent breakdown of their marriage, they entered into a separation agreement that the court incorporated into its April 22, 2014 judgment of dissolution (separation agreement). Pursuant to §§ 5.1 and 5.3 of that agreement, the defendant was obligated to pay alimony to the plaintiff until "the death of either party, the [plaintiff's] remarriage, or the [plaintiff's] cohabitation according to the statutes . . . ."

On June 21, 2019, the defendant filed a postjudgment motion to modify his alimony obligation, which was predicated on the plaintiff's alleged cohabitation "with another individual for at least two years . . . ." The court held a hearing on the motion, at which the plaintiff testified that she had been living with Michael Cerone for approximately two years. The plaintiff also testified that she was in a romantic relationship with Cerone. At the conclusion of the hearing, the defendant asked the court to terminate his alimony obligation "retroactive as of two years for when [the plaintiff] and [Cerone] had moved in together or, alternatively, back to the date of the filing of this motion."

In its subsequent memorandum of decision, the court found that "[a]t some point [Cerone] moved into [the plaintiff's] home with her." The court further found that, "[i]n March, 2019, the plaintiff and Cerone purchased

a 2800 square foot home in Port St. Lucie. The plaintiff's name is on the deed, however the mortgage is solely in Cerone's name." The court nevertheless did not make any specific finding as to precisely when the plaintiff began her cohabitation with Cerone. After invoking the substantial change in circumstances provision of General Statutes § 46b-86 (a), the court stated: "The court finds that the plaintiff's living arrangement with Cerone is such that she receives a benefit. She has an ownership interest in the Port St. Lucie home. Her expenses, however, appear to remain the same. The evidence at the hearing indicates that the plaintiff continues to pay half the household expenses, including the mortgage, and bears the expense of maintaining her animals. She is disabled and has no ability to earn beyond her disability income. Although the plaintiff has experienced a change in circumstances, the court finds that the change is not such that it warrants a modification of alimony after considering the factors set forth in [General Statutes] § 46b-82." The court thus denied the defendant's motion for modification, and this appeal followed.[1]

On appeal, the defendant claims that the court improperly denied his motion to modify his alimony obligation. He contends that, pursuant to the plain language of the separation agreement, the court was obligated to terminate that obligation in light of the plaintiff's cohabitation with Cerone. We agree.

"It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties

[1] The plaintiff did not file a brief in this appeal. We, therefore, ordered that this appeal shall be considered on the basis of the defendant's brief and the record alone. See *Barr* v. *Barr*, 195 Conn. App. 479, 480 n.1, 225 A.3d 972 (2020).

from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . When the language is clear and unambiguous . . . the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 191–92, 112 A.3d 144 (2015); see also *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017) (whether contractual language is plain and unambiguous is question of law subject to plenary review).

We begin with the relevant provisions of the separation agreement. Sections 5.1 and 5.2 obligate the defendant to pay alimony to the plaintiff.[2] Critical to this appeal is § 5.3, which provides: "Alimony *shall terminate* upon the death of either party, the [plaintiff's] remarriage, or the [plaintiff's] cohabitation according to the [s]tatutes, but in any event no later than [ten] years from the date of the [plaintiff's] vacating the marital residence, whichever occurs first."[3] (Emphasis added.)

[2] Section 5.1 of the separation agreement provides: "The [defendant] shall pay the [plaintiff] alimony in the amount of [$175] per week beginning with the [defendant's] first pay-day after the [plaintiff] vacates the marital residence. Said payment will be by bank electronic funds transfer within 48 hours of receipt of the [defendant] receiving his paycheck."

Section 5.2 of the separation agreement provides: "The [defendant's] alimony obligation shall increase to [$220] per week when the [plaintiff] is no longer receiving dependent benefits from Social Security."

[3] As our Supreme Court has observed, § 46b-86 (b) is "known as the 'cohabitation statute,' " and defines cohabitation in relevant part as " 'living with another person,' " which entails "a fact specific determination." *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 485–86, 678 A.2d 469 (1996).

We conclude that § 5.3 of the separation agreement plainly and unambiguously provides that the defendant's alimony obligation shall be terminated upon cohabitation by the plaintiff. As was the case in *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 195, the separation agreement here "treats cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation absent an express provision to the contrary in the court's decree or incorporated settlement agreement." Moreover, the language of § 5.3, which provides in relevant part that alimony "shall terminate" upon the plaintiff's cohabitation, is mandatory in nature.

Particularly instructive in this regard is *Boreen* v. *Boreen*, 192 Conn. App. 303, 217 A.3d 1040, cert. denied, 333 Conn. 941, 218 A.3d 1046 (2019). In *Boreen*, the plaintiff claimed that the court "improperly concluded that the only remedy available upon a finding that she was 'living with another person' was to terminate the defendant's alimony obligation." Id., 305. This court rejected that argument in light of the mandatory language utilized by the parties in the separation agreement, which treated cohabitation as an event akin to death or remarriage. Id., 321. As we explained: "[T]he language employed by the parties in the separation agreement to direct terminating the alimony obligation is mandatory, not permissive. . . . [T]he agreement provides that alimony 'shall' terminate when the plaintiff commenced living with another person. The use of the word 'shall' usually connotes a requirement, unlike the word 'may,' which implies some degree of discretion." Id. We further noted that "'[t]he only remedy explicitly provided for in the separation agreement upon . . . a finding [of cohabitation] is to terminate the defendant's alimony obligation.'" Id., 320. For those reasons, this court concluded that "the parties clearly and unambiguously intended that the defendant's alimony obligation be terminated upon a court's finding

that the plaintiff is living with another person." Id., 321. That precedent compels a similar conclusion here.

In the present case, the court found that, following the dissolution of the parties' marriage, "[a]t some point [Cerone] moved into [the plaintiff's] home with her." The court further found that, "[i]n March, 2019, the plaintiff and Cerone purchased a 2800 square foot home in Port St. Lucie. The plaintiff's name is on the deed, however the mortgage is solely in Cerone's name." The evidence adduced at the hearing on the motion to modify substantiates those findings, and there is no dispute that the plaintiff was cohabitating with Cerone at some point after the dissolution judgment was rendered. Because the separation agreement entered into by the parties, and incorporated into the judgment of dissolution, plainly and unambiguously provides that the defendant's alimony obligation "shall terminate" upon the plaintiff's cohabitation, the court improperly denied the defendant's motion to modify.

In its memorandum of decision, the court expressly found that "the plaintiff has experienced a change in circumstances . . . ." The court nonetheless failed to apply the relevant provisions of the cohabitation statute; see General Statutes § 46b-86 (b); and instead sua sponte invoked the provisions of § 46b-86 (a), which permits modification of an alimony order upon a showing of a substantial change in circumstances. This was error, as the defendant's postjudgment motion for modification was premised on cohabitation pursuant to § 46b-86 (b), and not a substantial change in circumstances pursuant to § 46b-86 (a). As our Supreme Court repeatedly has instructed, "[§] 46b-86 (b) requires only a change of circumstances, not a substantial change as required by § 46b-86 (a)." (Internal quotation marks omitted.) *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 486, 678 A.2d 469 (1996); see also *Kaplan* v. *Kaplan*, 185 Conn. 42, 45–46, 440 A.2d 252 (1981). Once the court found that the plaintiff had been living with Cerone

and had experienced a change in circumstances, it was required to grant the defendant's motion to modify his alimony obligation in accordance with the plain mandate of the separation agreement.

The remaining question is the precise date on which that obligation terminated, which requires a factual determination as to when the plaintiff began cohabitating with Cerone. See *D'Ascanio* v. *D'Ascanio*, supra, 237 Conn. 485–86. Because the court did not make such a finding, further proceedings are necessary to resolve that factual issue.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

ADAM M. ZACHS *v.* COMMISSIONER OF CORRECTION (AC 43380)

Moll, Alexander and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder, sought a writ of habeas corpus, claiming, inter alia, that his criminal trial counsel, D and W, had rendered ineffective assistance. The petitioner, who had shot the victim during an altercation at a café, testified at trial that the gun he was carrying at the time of the shooting had accidentally discharged. When the state sought to present rebuttal testimony from six witnesses as to prior uncharged conduct by the petitioner related to his use of guns, the trial court, at the request of D, who sought to avoid a conflict of interest, admitted W pro hac vice for the purpose of cross-examining the state's rebuttal witnesses, two of whom were then represented by D in other matters. Neither D nor W thereafter cross-examined the rebuttal witnesses. The court, at D's request, instructed the jury as to certain lesser included offenses within the crime of murder and on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance. The petitioner alleged that D was ineffective because, inter alia, the affirmative defenses and lesser included offenses were inconsistent with the petitioner's trial testimony, that the only reasonable trial strategy would have been for

D to pursue a claim that the gun accidentally discharged and that the petitioner's conduct fit the parameters of the lesser included offense of manslaughter in the second degree. The petitioner also grounded his ineffective assistance of counsel claim in D's conflict of interest in concurrently representing two of the state's rebuttal witnesses and D's decision to have W handle the cross-examination of those witnesses, which the petitioner asserted was insufficient to ameliorate the possibility that he would be prejudiced by D's conflict of interest. The petitioner further asserted that D was ineffective in having conceded the issue of whether the petitioner had intended to kill the victim by asserting the affirmative defenses and by presenting a theory of the case at trial that was inconsistent with the petitioner's testimony that the gun accidentally discharged. The petitioner also asserted that W was ineffective for having failed to cross-examine the rebuttal witnesses. The habeas court denied the habeas petition, concluding, inter alia, that neither D nor W had rendered ineffective assistance, and that the petitioner mischaracterized the defense case D had presented in that D had argued repeatedly before the jury that the gun discharged accidentally. The court further determined that the petitioner had procedurally defaulted on and waived his claim that D's concurrent representation of the two rebuttal witnesses constituted an actual conflict of interest. The habeas court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court correctly denied the petitioner's claim that D rendered ineffective assistance, as the petitioner failed to establish that there was no tactical justification for D's defense strategy, which was consistent with the petitioner's testimony that the gun accidentally discharged: the evidence supported the court's finding that D's primary strategy was to argue that the gun was fired accidentally, as the first issue D discussed during closing argument to the jury was whether the petitioner intended to kill the victim, D later reminded the jury that it had to make a determination as to that issue, and he spent a significant amount of time arguing that the shooting was accidental; moreover, the petitioner's claim that it was unreasonable for D to present a defense that was inconsistent with the petitioner's testimony was misplaced, as D's strategy to show that the petitioner lacked the intent to kill the victim comported with the petitioner's explanation of how the gun discharged, it was not deficient performance to pursue defenses that were inconsistent with each other, and it was inconsistent with the principle that a defendant is innocent until proven guilty for the petitioner to suggest that D, by presenting the affirmative defenses, conceded that he intended to kill the victim, the trial court having made it abundantly clear to the jury that it had to first decide whether the petitioner was guilty of murder before it could reach the affirmative defenses; furthermore, D's decision to present the affirmative defenses and the supporting testimony of a psychologist was not unreasonable because of the mere

possibility that it could have led to the admission of the state's rebuttal evidence, as the psychologist had been called to testify before D requested jury instructions as to the affirmative defenses, the court, prior to the psychologist's testimony, had ruled against the admission of evidence of prior incidents in which the petitioner displayed guns, and the court instructed the jury that the rebuttal evidence could not be used as evidence of intent.

2. The petitioner could not prevail on his claim that the habeas court erred in concluding that he procedurally defaulted on and waived his conflict of interest claim as to D:

   a. The habeas court appropriately concluded that the conflict of interest claim was procedurally defaulted, as the petitioner could not establish good cause for not raising that issue on direct appeal; contrary to the petitioner's assertion that his claim could not be procedurally defaulted because the record was inadequate to raise it on direct appeal, the factual and legal basis of the claim was available to counsel at the time of appeal, as the record established that D explained the conflict to the trial court, which then explained to the petitioner that D would have a conflict if he cross-examined the rebuttal witnesses, the trial court acquired the petitioner's assent to proceed with W handling the cross-examination of the state's rebuttal witnesses, and the record revealed the immediate consequences of D's apparent conflict of interest, as W handled the cross-examination but asked no questions.

   b. The petitioner's claim that the habeas court improperly found that he waived his conflict of interest claim as to D was unavailing: the record indicated that D and the petitioner discussed the conflict during a recess at trial, and that the petitioner subsequently stated to the trial court his approval of having W cross-examine the rebuttal witnesses after the trial court advised him that D could not adequately and fairly cross-examine them as a result of the conflict; moreover, contrary to the petitioner's assertion that his waiver of D's conflict of interest was premised on cross-examination of the state's rebuttal witnesses actually occurring, the defense plan was not to ask any questions of the rebuttal witnesses, and, with the exception of two of the rebuttal witnesses who had heard from the petitioner about one of the prior incidents at issue, none of the state's six rebuttal witnesses was cross-examined; furthermore, the petitioner's waiver of his conflict of interest claim did not foreclose him from claiming that W's handling of those cross-examinations constituted ineffective assistance.

   c. The habeas court correctly determined that the petitioner had procedurally defaulted on his claim pursuant to *United States* v. *Cronic* (466 U.S. 648) that prejudice against him should have been presumed because of D's conflict of interest, the *Cronic* claim having had a factual basis that was identical to the petitioner's unsuccessful conflict of interest claim.

3. The habeas court correctly denied the petitioner's claim that he was entitled to a presumption of prejudice under *Cronic*, which was based

on his assertion that W rendered ineffective assistance by failing to cross-examine two of the state's rebuttal witnesses and to subject its case to meaningful adversarial testing: W's actions did not rise to a level that would constitute such a failure, and, even if it were presumed that it was error for W not to have cross-examined the two rebuttal witnesses, his failure was not complete, as the testimony of the rebuttal witnesses was admitted for the limited purpose of credibility, the issue concerned only two of dozens of witnesses who testified during trial, the substantially similar testimony of two other witnesses was unchallenged, and D subjected the state's case to meaningful adversarial testing through his objections, voir dire and cross-examinations of the state's witnesses, and presentation of four defense witnesses; moreover, although analysis of W's alleged failures was more appropriate pursuant to the performance and prejudice test for ineffective assistance of counsel under *Strickland* v. *Washington* (466 U.S. 668), no further analysis was necessary, the petitioner having explicitly stated that his claim should not be analyzed for prejudice under *Strickland*.

4. The habeas court did not improperly decline to consider the aggregate effect of the trial court's alleged errors; because the petitioner failed to prove each of his individual underlying claims of error and our Supreme Court has declined to adopt such a cumulative error analysis, it was not within this court's authority to grant the petitioner the relief he sought.

Argued April 15—officially released June 15, 2021

Procedural History

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

Jennifer B. Smith, with whom was *Aaron J. Romano*, for the appellant (petitioner).

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Adam M. Zachs, appeals from the judgment of the habeas court, *Newson*, *J.*, denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly

(1) denied his ineffective assistance of counsel claim regarding the defense strategy employed at his criminal trial by one of his defense attorneys, Attorney Edward J. Daly, Jr., (2) determined that his conflict of interest claim was both procedurally defaulted and waived, (3) denied his ineffective assistance of counsel claim regarding the failure of his other defense attorney, Attorney Brian W. Wice, to cross-examine the state's rebuttal witnesses at his criminal trial, and (4) declined to apply a cumulative prejudice approach and consider the aggregate effect of counsels' alleged errors. We affirm the judgment of the habeas court.

The jury in the petitioner's criminal trial reasonably could have found the following facts. On March 22, 1987, the petitioner went to the Prospect Café in West Hartford to watch a basketball game on television. Shortly thereafter, the victim, Peter Carone, and his fiancée, Kathleen O'Brien, arrived to watch the basketball game and sat next to the petitioner at the bar. The victim bought the petitioner a drink after he moved down a seat to make room for the victim and O'Brien. The petitioner, the victim, and O'Brien spent most of the afternoon seated at the bar together, having drinks and casually discussing the basketball game.

Later that evening, the victim told a joke to another patron at the bar about a "spit shine." As part of this joke, he spat on the bar and wiped it up with a napkin. The petitioner, a regular customer at the bar, was offended by the victim's actions. He sat at the bar for a few more minutes, then walked to the other end of the bar to tell the bartender and the waitress that he wanted to pay his bill and leave. The petitioner told the waitress that he was "disgusted" by the victim's actions, called him a "pig," and stated that "the only reason he's not going to deck the guy . . . was because there were ladies present." The petitioner then left the bar, and went to his car and sat in it for a few minutes before

reentering the bar to speak to the waitress about what had happened. As the petitioner approached the waitress, the victim turned to him to apologize and to discuss why the petitioner had left the bar. The petitioner and the victim spoke about the incident for a few minutes and then stepped outside the bar to talk. The petitioner testified that they both insisted that they did not want to fight.

The petitioner and the victim stood outside the bar "[i]immediately in front of [the] main door." Several witnesses had a partial view of where they were standing and intermittently looked out the window to see if a fight would break out. After about four minutes, the victim turned and approached the main door to the bar. Just as the victim reached the door, the petitioner shot him once in the back with a pistol that he had tucked into the waistband of his pants, killing the victim.[1]

The petitioner subsequently was charged with murder in violation of General Statutes § 53a-54a (a). At his criminal trial, he was represented by Attorney Daly and, for a limited portion of the trial, by Attorney Wice, who was licensed to practice law in Texas and was admitted by the trial court pro hac vice for the limited purpose of cross-examining the state's rebuttal witnesses. See part II of this opinion. Attorney Daly[2] requested jury instructions on the lesser included offenses of manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide. He also requested jury instructions on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance. With no objections from the state, the court granted those requests. After a jury

[1] The petitioner concedes that the state "presented undisputed evidence that the petitioner fatally shot the victim at [the] Prospect Café in [West] Hartford on March 22, 1987."

[2] The parties stipulated that Attorney Daly died on April 4, 2002. His file from the criminal trial could not be located.

trial, the petitioner was found guilty of murder and sentenced to sixty years of incarceration on October 13, 1988. The petitioner was released after posting an appeal bond and thereafter absconded to Mexico where he lived under an assumed identity until being returned to the United States in 2011. Although the petitioner had filed a direct appeal from the judgment of conviction, his appeal was dismissed after his disappearance on the basis of a motion filed by the state.

On September 28, 2012, the self-represented petitioner filed a petition for a writ of habeas corpus. The petitioner filed the operative petition, his fourth amended petition for a writ of habeas corpus, with the assistance of counsel on September 17, 2018. The fourth amended petition contained eight counts, five of which are relevant to this appeal. Specifically, in count two, the petitioner alleged that Attorney Daly rendered ineffective assistance by presenting an objectively unreasonable defense. In count three, the petitioner alleged that Attorney Daly had a conflict of interest that materially prejudiced his defense, and, in count four, he alleged that this conflict of interest entitled him to a presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In count five, the petitioner alleged that Attorney Wice, who handled only a small portion of the petitioner's criminal trial, was ineffective in failing to cross-examine two of the state's rebuttal witnesses. Count five included claims brought under *Cronic* and *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Last, in count eight, the petitioner alleged that the cumulative effect of his counsels' actions deprived him of a fair trial. The claims set forth in the remaining counts have not been advanced on appeal.

A trial on the habeas petition was held on November 26 and 27, 2018. On July 23, 2019, the habeas court, *Newson*, *J.*, issued a memorandum of decision in which

it denied each of the petitioner's claims. Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. The habeas court granted the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before we turn to the petitioner's claims, we briefly set forth our standard of review for habeas corpus appeals. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he 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. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

We first address the petitioner's claim that the habeas court improperly concluded that Attorney Daly did not provide ineffective assistance with regard to the defense strategy he employed at the petitioner's criminal trial. Specifically, the petitioner argues that the affirmative defenses advanced by Attorney Daly were objectively unreasonable and that the only reasonable trial strategy was to pursue a conviction of manslaughter that was based on a defense that the petitioner's gun had accidentally discharged. Additionally, the petitioner argues that the court's characterization of Attorney Daly's trial strategy was clearly erroneous. We agree with the court's characterization of Attorney Daly's strategic choices at trial and with the court's subsequent conclusion that the

petitioner failed to demonstrate that counsel's strategy was objectively unreasonable.[3]

The following additional facts are relevant to our resolution of this claim. To support the affirmative defenses posed by defense counsel, the petitioner testified at his criminal trial concerning an incident that occurred in February, 1986, when, while he was asleep, a large male kicked in his bedroom door. The petitioner explained that he went to bed early that night, then was suddenly awakened to find the large male standing over him and threatening to kill him. The individual threatened to kill the petitioner if he "ever tormented his sister again." The petitioner did not know to whom he was referring. After the incident, the petitioner testified that he became afraid to leave his house. A few days later, he saw an advertisement for a gun shop. The incident prompted the petitioner to purchase two firearms, a .22 caliber Beretta and, eventually, the nine millimeter Smith & Wesson that he used in the shooting. He explained that he had purchased these firearms because he was still scared from the encounter and carried one of them with him for "[e]very occasion."

The petitioner further explained that this incident greatly impacted how he handled the confrontation with the victim on March 22, 1987, and testified that he accidentally discharged the gun, which caused the victim's

[3] The petitioner also asserts in the introductory portion of his ineffective assistance of counsel argument in his brief that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated. However, beyond that cursory assertion, the petitioner's brief does not contain any substantive analysis of potential Connecticut constitutional violations. Accordingly, we decline to review these claims. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)); see also *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 420 n.13, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

death. The petitioner testified that he tried to end their conversation outside the bar, but the victim "stepped very close" to the petitioner and continuously told him that he thought it was "stupid" that he had left the bar. The petitioner became nervous and began to step backward, but the victim matched each step, moving toward the petitioner until his back was pressed against either a wall or a fence. The petitioner explained that "[e]verything was very dim and foggy and . . . in speaking to him, I felt like my brain wasn't in control of my mouth, that I was listening to the words come out of my mouth, that it wasn't me speaking them." He testified that he was instantly reminded of the break-in incident. It felt like there was a "movie screen" in his head and that all he could see was the individual who had broken into his bedroom. The next thing that the petitioner recalled was the victim hitting the side of his head, at which point the sensation of seeing a "movie screen" abruptly stopped. He suddenly realized that he was holding a gun and that the victim was standing in front of him, not the individual from the break-in. He did not remember drawing the gun. Then, the victim swung his hand and knocked the gun from the petitioner's hands, launching it upward. The petitioner explained that he reached out to catch the gun before it dropped to the ground, catching it "sandwiched between [his] two hands" with the barrel pointing toward himself. As he attempted to flip the gun around, he accidentally discharged it.

The petitioner did not consult with any physicians about the break-in incident prior to the confrontation with the victim, but, at the criminal trial, Attorney Daly called Charles A. Opsahl, a psychologist, who testified that he had met with the petitioner approximately forty to forty-five times beginning in October, 1987. Dr. Opsahl opined that the petitioner was suffering from post-traumatic stress disorder as a result of the break-in. He further opined that the petitioner entered a "dissociative

state"[4] during his argument with the victim as a result of his post-traumatic stress disorder and ultimately concluded that the dissociative state "had a major impact on his ability to control his behavior. . . . He was out of control because of the dissociative state."

The state presented rebuttal evidence from Anne M. Phillips, a clinical psychologist, and Peter M. Zeman, a psychiatrist. Dr. Phillips concluded, on the basis of her two interviews with the petitioner, that there was no evidence of cognitive impairment, a neuropsychological deficit, a thought disorder, or an impulse disorder. Dr. Zeman concluded, on the basis of his four interviews with the petitioner, that the petitioner did suffer from post-traumatic stress disorder of moderate intensity as a result of the break-in incident and that the petitioner experienced feelings of "depersonalization," a "very much more limited kind of dissociative phenomena" during the confrontation with the victim. Dr. Zeman ultimately concluded, however, that the petitioner did not enter a "full-blow[n] dissociative state" and that there was no evidence of "blocking of thought" or delusions.[5] He further concluded that "[the petitioner's] psychiatric condition did not substantially affect his behavior or his control at that time." The state also presented a number of lay witnesses in rebuttal who testified about two prior incidents during which the petitioner drew guns on other individuals.

[4] Dr. Opsahl defined dissociative state as "a technical term used to describe when a person essentially loses control of the person they are and becomes someone else or goes somewhere else in mental terms."

[5] Dr. Zeman defined "blocking of thought, thought disorder, and delusional thinking [as] all terms which describe a psychotic state of mind in which somebody who's extremely out of touch with reality on the basis, for example, of a psychotic illness such as schizophrenia, will have a jumbling of his or her thinking, thoughts will be confused, jumbled, out of order or there may be long periods of what are called blocking of thought where there's lapses of thought as if somebody's thoughts have just shut off and then start up again. I saw—I saw no evidence of that in my evaluation of [the petitioner]."

Attorney Daly requested jury instructions on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance,[6] as well as lesser included offenses of manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide.[7]

We first set forth the general principles surrounding ineffective assistance of counsel claims and our standard of review. "In *Strickland* v. *Washington*, [supra,

[6] The affirmative defense of mental disease or defect is a defense in "any prosecution for an offense" and provides that "it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." General Statutes § 53a-13 (a).

Extreme emotional disturbance is an affirmative defense to murder, which is set forth in the applicable statute defining murder: "Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person." General Statutes § 53a-54a (b).

[7] "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." General Statutes § 53a-55 (a).

"A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide." General Statutes § 53a-56 (a).

"A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person, except where the defendant caused such death by a motor vehicle." General Statutes § 53a-58 (a).

466 U.S. 687], 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." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011).

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness. . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] 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. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 425, 876 A.2d 1277, cert. denied, 275 Conn. 930, 883 A.2d 1246 (2005), cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006). "Furthermore, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, 184 Conn. App. 709, 726, 196 A.3d 388, cert. denied, 330 Conn. 949, 197 A.3d 389 (2018).

"To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 776, 138 A.3d 908 (2016).

"In a habeas appeal, although this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Griffin* v. *Commissioner of Correction*, 119 Conn. App. 239, 241, 987 A.2d 1037, cert. denied, 295 Conn. 912, 989 A.2d 1074 (2010).

Additionally, we note that the death of trial counsel, which deprives the petitioner of testimony on the reasoning behind strategic decisions, poses a "significant hurdle" to a habeas corpus petitioner seeking to prove a claim of ineffective assistance of trial counsel. *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 823, 234 A.3d 78, cert. granted, 335 Conn. 931, 236 A.3d 218 (2020); see footnote 2 of this opinion. "The death of the petitioner's trial counsel prior to a habeas corpus trial, however, does not absolve a petitioner of his heavy burden of overcoming the strong presumption that counsel provided effective assistance." Id. With the foregoing principles in mind, we now address the merits of the petitioner's claim.

The thrust of the petitioner's argument on his ineffective assistance of counsel claim is that the affirmative defenses Attorney Daly presented at the criminal trial were inconsistent with the petitioner's testimony and the lesser included offenses on which the court instructed the jury. He asserts that the only objectively reasonable trial strategy would have been for counsel to pursue a claim that the weapon was accidentally discharged and to argue that the petitioner's conduct fit the parameters of manslaughter in the second degree. The petitioner also argued before the habeas court that Attorney Daly, by offering the affirmative defenses, conceded the issue of intent and presented a theory of the case that was inconsistent with the petitioner's testimony that the gun accidentally discharged.

The habeas court rejected the petitioner's argument, finding that the petitioner had "wholly misstate[d] or mischaracterize[d] the defense case presented by Attorney Daly. While Attorney Daly did present evidence of a mental disease or defect the petitioner was suffering from at the time of this incident, he wholly maintained, as a first line of defense, that the gun went off accidentally and argued repeatedly before the jury that [it]

consider that fact in context with the state's obligation to prove that the petitioner fired the gun intentionally in order to convict him of murder." After making this finding, the court concluded that it was not objectively unreasonable for counsel to have presented the affirmative defenses and the lesser included offenses, questioning "how it could ever be objectively deficient performance for defense counsel to use available facts, especially the client's own story, to offer the jury information that, if accepted, would result in an acquittal on the most serious charge." Thus, the court resolved the ineffective assistance of counsel claim on the performance prong of *Strickland* and did not reach the issue of prejudice.

The petitioner first argues that it was clearly erroneous for the habeas court to find that an accidental discharge of the gun was Attorney Daly's "first line of defense." In making this assertion, the petitioner provides numerous examples in the record where Attorney Daly advanced the affirmative defenses. Our role, however, is simply to determine whether the court's finding has *some* support in the record, and, to fulfill this obligation, we look at the entire record and not merely portions of the record. See, e.g., *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–42, 937 A.2d 656 (2007); see also *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 690–91, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017). The court cited to several examples in Attorney Daly's closing argument during which he stressed that the primary issue in the case was whether the petitioner intended to kill the victim. Our review of the record reveals that, in Attorney Daly's closing argument, after a short explanation of the jury's role and a factual summary of the case, the first issue he discussed (in the form of a question he posed to the jury) was, "[d]id [the petitioner] intentionally kill [the victim] on March 22, 1987?" He later reminded the jury that the first determination it

had to make was whether the petitioner intended to kill the victim. Attorney Daly also spent a significant amount of time arguing that the shooting was accidental on the basis of the peculiar location of the wound and trajectory of the bullet, and the fact that only a single gunshot was fired. In making its assessment, the habeas court found that Attorney Daly used the evidence advanced in support of the affirmative defenses as an explanation for why the petitioner carried guns with him and why he would have drawn the gun. There is also support in the record for this finding.[8] In sum, it was not clearly erroneous for the habeas court to find that Attorney Daly's primary defense strategy was to argue that the gun was fired accidentally.

The petitioner next argues that it was objectively unreasonable to present a defense that was inconsistent with the petitioner's testimony. Because we agree that Attorney Daly's primary defense strategy was to show that the petitioner lacked the intent to kill the victim, which comports with the petitioner's explanation of how the gun discharged, the petitioner's primary argument is misplaced. To the extent that the petitioner argues that the affirmative defenses and lesser included offenses were inconsistent with *each other*, it is well established that it is not improper for defense counsel to pursue defenses that are inconsistent with each other. This court has concluded that it is consistent with

[8] During closing argument, Attorney Daly stated: "There's nobody in that jury box in this courtroom any unhappier than I am about the prospect of people such as [the petitioner] walking around with that weapon in their belt. I'm not justifying his having done it; I'm explaining to you why he did it . . . I'm trying to tell you he did it for some reason other than downright meanness. He did it . . . [because] it was the only way, the only—his only link with security. It's the only way he could feel secure." Attorney Daly further stated: "I respectfully suggest to you that the only person who would get all upset about it, who would eventually draw his gun, is somebody who was suffering from a mental disease or a defect of such a character as to destroy the control mechanisms in his mind. And when those mechanisms got interfered with, he took the loaded gun [out] of his pocket and it went off."

our case law to present "inconsistent and alternative theories of defense" to the jury. (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 129 Conn. App. 325, 330, 20 A.3d 75, cert. denied, 302 Conn. 947, 31 A.3d 382 (2011); see also *State* v. *Nathan J.*, 294 Conn. 243, 262, 982 A.2d 1067 (2009) (explaining that "it is axiomatic that a defendant may present inconsistent defenses to the jury").

The petitioner further argues that, by presenting the affirmative defenses, "Attorney Daly conceded that the petitioner intended to kill the victim, which conflicted with his request for [a jury instruction on] a lesser included offense, which the jury would only consider if [it] found that the petitioner did *not* possess the requisite intent to kill." (Emphasis in original.) This suggestion is inconsistent with the fundamental principle of our justice system that a defendant is innocent until proven guilty. See, e.g., *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The court made it abundantly clear to the jury that it first had to decide whether the petitioner was guilty of murder and that only then would it reach the affirmative defenses.[9] The jury was further instructed that, if the elements of the crime of murder were not found, it was then to proceed to the lesser included offenses. A defendant does not concede the elements of murder by advancing an affirmative defense of mental disease or defect, or extreme emotional disturbance. The state still had to prove that the petitioner had the required intent to kill in order to convict him of murder.

[9] The trial court instructed the jury: "If you find that the state has failed to prove to you beyond a reasonable doubt any one of these elements, then you must find the [petitioner] not guilty of murder. If you find that the state has convinced you of each of these elements beyond a reasonable doubt, you must then consider the two affirmative defenses the [petitioner] has raised in this case. . . . The burden that the [petitioner] has as to the affirmative defense . . . does not diminish in any way the burden that the state has of proving his intent, whether it be the general intent or specific intent."

Last, the petitioner argues that presentation of the affirmative defenses was unreasonable because it added "unnecessary complexities to the case" by allowing the state to call witnesses in rebuttal whose testimony tended to show "that the charged offense was not an isolated incident and that the petitioner engaged in a pattern of displaying his gun when threatened." In reviewing claims of ineffective assistance of counsel, we must make "every effort . . . 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." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679. At the time that Attorney Daly called Dr. Opsahl to lay the groundwork for the affirmative defenses, which was before Attorney Daly had requested the jury instructions, the court had already ruled against admitting evidence of the prior incidents in which the petitioner had displayed his guns. We do not find this strategic decision to be objectively unreasonable on the basis of a mere possibility that it could have led to the admission of the state's rebuttal evidence, particularly given that the court instructed the jury that the rebuttal evidence could *not* be used as evidence of intent.[10]

[10] The court instructed the jury as follows: "Now, you'll probably note that the state did not offer this in its direct case. And there is a reason for that. The law prohibits the state from offering past misconduct to show a propensity for doing misconduct. . . . Even with the admission of this evidence, you are not permitted to use that evidence in that way. The evidence is being admitted for two purposes. The first is that, what was admitted in the defense case was certain history of the [petitioner], particularly the event of February, 1986, in which he was—his bedroom door was alleged to have been kicked in and that he was threatened by an individual . . . . And [Dr. Opsahl] had given an opinion on the basis of that history that his purchase of guns and his use [of them] as in this particular case resulted in a loss of control or behavior. And from the standpoint that that event [in] February continued to come back and he was reenacting that event. So, it's allowed for the state, then, once that's offered, to show evidence whether or not there has been, on prior occasions, loss of control or behavior. So, this evidence . . . is to be used by you to determine whether

In reaching our conclusion on this claim, we stress that "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney"; (internal quotation marks omitted) *Ampero* v. *Commissioner of Correction*, supra, 171 Conn. App. 681; and that a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was "no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, supra, 184 Conn. App. 726. We cannot conclude that there was no tactical justification for Attorney Daly's defense strategy. Given that Attorney Daly's primary line of defense was consistent with the petitioner's testimony, it was not objectively unreasonable to provide additional layers of defense, supported by expert testimony, should the jury find the petitioner guilty of murder. We agree with the habeas court's skepticism as to whether "it could ever be objectively deficient performance for defense counsel to use available facts, especially the client's own story, to offer the jury information that, if accepted, would result in an acquittal on the most serious charge." The habeas court correctly concluded that the petitioner failed to establish that Attorney Daly's performance was deficient and, thus, correctly denied his ineffective assistance of counsel claim as to Attorney Daly.

II

The petitioner next claims that the habeas court erred in concluding that his conflict of interest claim as to Attorney Daly was both procedurally defaulted and waived. The petitioner also claims that the conflict of interest resulted in a complete structural breakdown of the adversarial system, thus warranting the presumption of prejudice under *Cronic*. The respondent, the

or not . . . Dr. Opsahl's opinion or diagnosis was based on factual matters. And, secondly, whether or not the [petitioner] has been truthful to the doctor in relating events and truthful with you in relating events."

Commissioner of Correction, argues that the habeas court properly determined that the petitioner's conflict of interest claim was both procedurally defaulted and waived. We agree with the respondent.[11]

The following additional facts are relevant to our resolution of this claim. In September, 1987, roughly one year before the petitioner's criminal trial, the petitioner's father contacted Attorney Wice, a high school friend who had a law practice based in Texas, and asked him to assist in the petitioner's representation. After receiving permission from Attorney Daly to assist him with the case, Attorney Wice flew to Connecticut to meet with the petitioner and his family. Attorney Daly agreed that Attorney Wice would act as second chair and assist with research, strategy, crafting a defensive theory, and anything else that would be helpful. During the next several months, Attorney Wice reviewed various discovery materials and frequently met with Attorney Daly to craft trial strategy. On January 20, 1988, Attorney Wice filed a motion for permission to appear as counsel pro hac vice so that he could join Attorney Daly in representing the petitioner at his criminal trial. The court denied the motion.[12] After the denial of the motion, Attorney Wice largely stopped assisting with trial preparation but still attended court every day with the petitioner.

Five days before the start of trial, the state filed a notice of intent to introduce evidence of prior bad acts, specifically testimony concerning two prior events during which the petitioner threatened strangers with a

[11] The petitioner asserts in the introductory portion of his conflict of interest argument in his brief that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated. For the same reasons set forth in footnote 3 of this opinion, we decline to review these claims.

[12] The petitioner challenged the denial of the pro hac vice motion in count one of the operative habeas petition. The habeas court concluded that the claim was procedurally defaulted. The petitioner has not challenged this ruling on appeal.

firearm. The state sought to introduce this testimony in its case-in-chief, but the court denied the request. After the defense rested, the state sought to introduce rebuttal testimony from six witnesses who would discuss these incidents and the petitioner's relationship with guns. The court maintained its prior ruling that the evidence would be inadmissible as proof of the petitioner's intent but allowed the state to present the testimony in an offer of proof to determine the admissibility of the evidence for the purpose of discrediting Dr. Opsahl. At that point, Attorney Daly requested a recess and a discussion with the prosecutor off the record, indicating that the presentation of the rebuttal witnesses "presents a rather grave problem for me." After the recess, Attorney Daly explained that two of the state's proposed witnesses, Robert Udolf and John Rubino, "are clients of mine and my office, and have been for some substantial period of time." Udolf and Rubino had been identified as potential state's witnesses during jury selection, but Attorney Daly did not raise the potential conflict at that time. He proposed that Attorney Wice be admitted pro hac vice for the limited purpose of cross-examining the state's rebuttal witnesses. The following exchange then occurred between the court and the petitioner:

"The Court: And [petitioner], would you come forward. You were in court when the names came up from [Attorney Daly] concerning the offer of certain evidence in connection with your conduct in front of certain offered witnesses. At that point, [Attorney Daly] indicated that he had represented two of these witnesses previously and that they were clients of his, which raises at least an apparent conflict. And that he wanted a recess in order to talk with you concerning his representation and his ability to be in a position to adequately and fairly cross-examine these witnesses. He had discussed this with you?

"[The Petitioner]: Yes, sir.

"The Court: And he's named the two witnesses to you that are—or previously had been clients of his?

"[The Petitioner]: Yes, Your Honor.

"The Court: And that, by virtue of that, that he does have a present conflict in cross-examining adequately and fairly those two witnesses.

"[The Petitioner]: Yes, sir.

"The Court: And he suggested, for that purpose, that another attorney be engaged by you to do that cross-examination.

"[The Petitioner]: Yes, Your Honor.

"The Court: And you're satisfied that he does have that conflict?

"[The Petitioner]: Yes, sir.

"The Court: And for that purpose you have asked [Attorney] Wice to stand in for at least those two witnesses?

"[The Petitioner]: Yes, sir.

"The Court: And [Attorney Daly] indicated that, rather than having some question about their testimony or the aggregate testimony, that [Attorney] Wice do the whole cross-examination of all of the witnesses concerning these two events.

"[The Petitioner]: Yes, Your Honor.

"The Court: And are you satisfied with that arrangement?

"[The Petitioner]: Yes, Your Honor."

The court then partially reversed its prior ruling on the motion for admission pro hac vice, allowing Attorney Wice to be admitted for this limited purpose, noting,

"I don't see the availability of another counsel who would be more equipped to do it because [Attorney] Wice has sat through the whole trial and knows all the evidence that's been presented. So that he's certainly in a—from a standpoint of knowledge—in a better position than any other counsel starting off."

With this arrangement in place, the state proceeded with its offer of proof outside the presence of the jury. Witnesses Thomas Cronin and Mark Higby described an incident in October, 1986, during which Cronin had a confrontation with the petitioner at the Prospect Café. While at the bar, Cronin's brother-in-law made a comment about a Jewish friend, which the petitioner overheard. Thirty minutes later, the petitioner approached Cronin and his brother-in-law, and said, "[d]on't you ever fucking say something about Jewish people again because, if you do, next time I come in here I'm going to be looking for you." The petitioner then lifted his shirt, revealing a gun tucked into his waistband. Attorney Daly explained to the court that he would handle cross-examination of the witnesses who testified about the October, 1986 first incident because his two clients, Udolf and Rubino, would testify about only the second incident. Nevertheless, Attorney Daly did not cross-examine either witness.

Witnesses Udolf, Rubino, Higby,[13] and Kevin McCurry then testified concerning an incident that occurred at the Pacifico Bar and Restaurant (Pacifico) in West Hartford on January 23, 1987. Udolf testified that he went to Pacifico to meet two women for drinks and that they had to ask the petitioner to stop "bothering" them. The petitioner followed the group outside and "start[ed] a major argument about something." Udolf testified that

[13] Higby was the petitioner's roommate at the time of these events. He was present at the Prospect Café during the confrontation in October, 1986, but heard from the petitioner about the second incident at issue, which occurred at the Pacifico Bar and Restaurant in West Hartford on January 23, 1987.

he began to feel scared and started to grab chemical Mace from his pocket, at which point the petitioner drew his gun, pointed it at Udolf, and said, "that's nothing, tough guy . . . ." Rubino testified that he went to Pacifico on January 23, 1987, and, as he was waiting for the valet to bring him his car, he saw the petitioner draw his gun on Udolf. McCurry testified that he was employed as the valet at Pacifico on the same night and also witnessed the confrontation. Higby testified that the petitioner later told him about the incident. Attorney Wice did not cross-examine any of the witnesses, although both he and Attorney Daly objected to the testimony being presented to the jury.

After the offer of proof, the court allowed the proffered evidence to be submitted to the jury for a limited purpose.[14] The witnesses were then recalled in the presence of the jury and walked through their testimony a second time. In addition, Julie Dolinger, a former roommate of the petitioner who did not testify during the offer of proof, also testified that the petitioner had showed her his guns and how to load them, and told her about the Pacifico incident. During the offer of proof, Attorney Daly had dealt with the two witnesses who testified about the Prospect Café incident, and Attorney Wice had dealt with the four witnesses who testified about the Pacifico incident. When their testimony was presented to the jury, however, Attorney Daly handled the testimony of the Prospect Café witnesses, Higby and Cronin, as well as the Pacifico incident witnesses, Higby, McCurry, and Dolinger, who were *not* his clients. He briefly cross-examined Higby and Dolinger but did not cross-examine Cronin or McCurry. Attorney Wice handled the testimony of the two Pacifico witnesses who were Attorney Daly's clients, Udolf and Rubino, but did not cross-examine either of them.

The petitioner claimed that Attorney Daly's concurrent representation of Udolf and Rubino resulted in an

[14] See footnote 10 of this opinion.

actual conflict of interest and that having Attorney Wice handle their cross-examination was insufficient to ameliorate the possibility that Attorney Daly's conflict would prejudice the petitioner. The respondent asserted in his return that the petitioner had procedurally defaulted on his conflict of interest claim by failing to raise it at trial or on direct appeal. The respondent claimed, as well, that the petitioner had waived the claim. The court agreed with the respondent, concluding that this conflict of interest claim was both procedurally defaulted and waived.

Before we address the petitioner's claims, we briefly set forth the law concerning conflicts of interest in criminal representation. "It is well established that the sixth amendment to the United States constitution guarantees the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

"In a case of a claimed conflict of interest . . . in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an *actual conflict of interest* adversely affected his lawyer's performance. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . Accordingly, an ineffectiveness claim predicated on an actual conflict of interest is unlike other ineffectiveness claims in that the petitioner need not establish

actual prejudice." (Emphasis in original; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 813, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

A

The petitioner first argues that the habeas court improperly determined that his conflict of interest claim regarding Attorney Daly was procedurally defaulted because he did not raise the claim at trial or on direct appeal. We agree with the habeas court that this conflict of interest claim could have been raised on direct appeal and, thus, the habeas court properly ruled that the claim was procedurally defaulted.

A habeas court's conclusion that a petitioner's claim was in procedural default involves a question of law, over which our review is plenary. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

We begin with a review of the procedural default rule. "Under the procedural default doctrine, a [petitioner] may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding, unless he can prove that his default by failure to do so should be excused." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 199, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018). Ordinarily, if the respondent "alleges that a [petitioner] should be procedurally defaulted from now making the claim, the [petitioner] bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016).

This cause and prejudice test derives from *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), and has been held by our Supreme Court to be "the appropriate standard for reviewability in a habeas corpus proceeding of constitutional claims not adequately preserved at trial because of a procedural default . . . ." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991); see also *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 (1993) (holding that "the *Wainwright* cause and prejudice standard should be employed to determine the reviewability of habeas claims that were not properly pursued on direct appeal").

The habeas court explained that the record was sufficient for the petitioner to raise his conflict claim on direct appeal: "The petitioner . . . [argues] that this matter required additional evidence to be developed during an evidentiary hearing, which could not have been accomplished on appeal. The petitioner's focus is misplaced. There is no question that an evidentiary hearing could not have been held during the appeal. However, there was an inquiry and a canvass regarding this conflict of interest on the record. The question of whether the canvass was legally sufficient, which the petitioner attempts to turn into the 'need' for an evidentiary hearing, is exactly what could have been challenged before the trial court or addressed by the Appellate Court, if the issue had been properly raised. . . . The petitioner again attempts to turn his failure to offer any prior challenge to a court ruling into a need for additional factual findings for the first time by way of collateral attack. If the trial court record was allegedly inadequate for review, then the petitioner must bear that burden because he has not offered any proof that something external to the defense prohibited a challenge from being made, an additional canvass requested, or from an appeal from being filed." (Citation omitted.)

The petitioner argues again on appeal that the claim could not be procedurally defaulted because the record was inadequate to raise the claim on direct appeal. Specifically, he contends that the testimony of Attorney Wice at the habeas hearing that he had not been prepared at the criminal trial for the cross-examination was necessary to establish the claim. Although our Supreme Court has stated that, "[a]lmost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim"; (internal quotation marks omitted) *State* v. *Crespo*, 246 Conn. 665, 687–88, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); this rationale does not apply to claims when the evidentiary record was adequate for review on direct appeal. See *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 811–13, 218 A.3d 638 (2019) (freestanding due process claim based on fabrication of evidence procedurally defaulted because petitioner was aware of alleged fabrication during criminal trial and at time of direct appeal).

In *Crespo*, our Supreme Court analyzed whether a defendant could seek review, in a direct criminal appeal, of a conflict of interest claim not raised at trial under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and concluded that the record was inadequate for a reviewing court to determine whether counsel's actions were the result of a legitimate trial strategy or a possible conflict: "We cannot know for certain from the record, however, whether [counsel's actions constituted a legitimate trial strategy], nor can we determine from the record whether [counsel] adequately explained to the defendant any possible conflict, if one existed, and obtained the defendant's consent to his continued representation. We may speculate regarding the divergence of [counsel's] and the defendant's interests, but

there are no facts from which we may conclude, as a matter of law, that a conflict actually existed. We have recognized that the trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action. . . . It is because of this typical lack of an adequate record that we ordinarily require a defendant to raise conflict of interest claims in a habeas corpus proceeding. . . . Although we cannot conclude with any degree of certainty from the record that the offer of the stipulation was an actual conflict of interest, we are equally unable to determine that it was not. Resolution of this issue, therefore, must await the development of an adequate factual record in an appropriate, posttrial proceeding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Crespo*, supra, 246 Conn. 693–94. Similarly, in *State* v. *Navarro*, 172 Conn. App. 472, 489–92, 160 A.3d 1116, cert. denied, 326 Conn. 910, 164 A.3d 681 (2017), this court declined to review a conflict of interest claim on direct appeal. We explained that, when a defendant identifies only "several *potential* conflicts," the record is inadequate to determine whether counsel labored under a conflict of interest, as a successful conflict of interest claim requires a showing of an *actual* conflict of interest. (Emphasis in original.) Id., 491.

The concerns highlighted in *Crespo* and *Navarro* are not present in this case, the record of which contains sufficient information for the conflict of interest claim to have been reviewed on direct appeal. The record reveals the exact nature of Attorney Daly's conflict of interest, and the canvass reveals that the court explained to the petitioner that Attorney Daly would have a "present conflict" if he were to cross-examine Udolf and Rubino. In *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 796, 799–800, 246 A.3d 1047, cert.denied, 336 Conn. 931, 248 A.3d 1 (2021), this court held that a habeas court improperly found that a conflict of interest

claim was defaulted where "[counsel] never raised the potential for a conflict of interest with the court, nor did the court raise the issue on its own. As such, it was not until the habeas trial itself that [counsel] explained on the record specifically *why*" he proceeded with the course of action that was claimed to have been tainted by the conflict of interest. (Emphasis in original.) Id., 798. In the present case, the record clearly establishes that Attorney Daly brought the conflict to the court's attention and explained the nature of the conflict. The court then discussed the conflict with the petitioner and acquired his assent to proceed with Attorney Wice handling the cross-examination of Udolf and Rubino. The record also reveals the immediate consequences of the apparent conflict, that Attorney Wice handled the cross-examination of Udolf and Rubino but ultimately asked no questions.

"[T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . . [For example] a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials . . . would constitute cause under this standard." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 568. The habeas court properly observed that the factual and legal basis for this claim was apparent on the record and, thus, available to counsel at the time of appeal. Accordingly, the petitioner cannot establish good cause for not raising the issue on direct appeal. The court appropriately concluded that the claim was procedurally defaulted.

B

The petitioner also claims that the habeas court improperly found that he had waived his conflict of interest claim regarding Attorney Daly. The respondent

argues that the court properly found that the petitioner's waiver was knowing and intelligent. We agree with the respondent.

"Where there is an actual or potential conflict . . . the court must obtain a valid waiver from the defendant if counsel is to continue to represent the defendant. A valid waiver of a constitutional right . . . must be knowing and intelligent, accomplished with sufficient awareness of the relevant circumstances and likely consequences. . . . [T]he fact that a defendant, with full awareness of the circumstances and consequences of the potential conflict, waives his right to the effective assistance of counsel must appear on the record in clear, unequivocal, unambiguous language." (Internal quotation marks omitted.) *DaSilva* v. *Commissioner of Correction*, 132 Conn. App. 780, 790, 34 A.3d 429 (2012). "If the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally . . . that he nevertheless chooses to hazard [the] dangers of waiving conflict-free representation, then his waiver may appropriately be accepted. . . . The waiver is not vitiated simply because the defendant, with the benefit of hindsight, might have chosen differently. A defendant need not be prescient in order to waive knowingly and intelligently the right to conflict-free representation." (Citations omitted; internal quotation marks omitted.) *State* v. *Tilus*, 157 Conn. App. 453, 467, 117 A.3d 920 (2015), appeal dismissed, 323 Conn. 784, 151 A.3d 382 (2016).

In concluding that the petitioner had waived his conflict of interest claim, the habeas court stated: "The record in the present case reveals that, after being notified of the conflict and being provided with the opportunity to discuss the matter with Attorney Daly, the petitioner indicated to the court that he had discussed the

nature of the conflict with counsel, that he understood it and the limitations that it placed on Attorney Daly, that he understood the proposed resolution of having Attorney Wice cross-examine the problematic witnesses, and that he was willing to proceed with the case. The waiver was adequate on its face, and the petitioner has failed to provide any evidence to support the allegation that he did not fully understand it or . . . was otherwise unsure of his decision." We agree with the court. The record indicates that the petitioner and Attorney Daly discussed the conflict during the recess, the court explained that Attorney Daly could not "adequately and fairly" cross-examine Udolf and Rubino as a result of the conflict, and that the petitioner approved of having Attorney Wice cross-examine the two witnesses.

The petitioner argues that his waiver was premised on cross-examination actually occurring, but neither the trial record nor the habeas record reveals that the petitioner was ever told cross-examination would occur or that he instructed Attorney Wice to cross-examine Udolf and Rubino. To the contrary, as the respondent points out, the record indicates that the petitioner was told that the plan was not to ask the witnesses any questions. Indeed, with the exception of the petitioner's roommates, who heard about the incident at Pacifico from the petitioner, *none* of the rebuttal witnesses who testified about the incidents at the Prospect Café and Pacifico was asked questions on cross-examination. Furthermore, that the petitioner waived his conflict of interest claim and approved of having Attorney Wice handle the cross-examination of Udolf and Rubino does not foreclose him from claiming that Attorney Wice's handling of those examinations was ineffective. We address that claim in part III of this opinion.

In sum, the court properly concluded that the conflict of interest claim was waived.

C

The petitioner also made a claim in a separate count of his habeas petition that Attorney Daly's conflict of interest "prevented him from subjecting the state's witnesses to any meaningful cross-examination," and, thus, prejudice should have been presumed under *United States* v. *Cronic*, supra, 466 U.S. 648. The habeas court also determined that the petitioner's *Cronic* claim was procedurally defaulted, which the petitioner now disputes.

The doctrine of procedural default is applicable to *Cronic* claims that could have been raised on direct appeal. See generally *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 153 A.3d 1264 (2017). Accordingly, for the same reasons discussed previously, we conclude that the habeas court correctly determined that the petitioner's *Cronic* claim was procedurally defaulted, as it has a factual basis that is identical to his conflict of interest claim.

III

The petitioner next claims that the habeas court improperly denied his claim of ineffective assistance as to Attorney Wice's failure to cross-examine Udolf or Rubino. The petitioner argues that Attorney Wice failed to subject the state's case to meaningful adversarial testing, and, therefore, prejudice is presumed under *Cronic*. The respondent argues that the court correctly determined that the petitioner was not entitled to a presumption of prejudice under *Cronic*. We agree with the respondent.

We reiterate the legal principles set forth in part I of this opinion, particularly that a claim of ineffective assistance of counsel requires a showing that counsel's performance was both deficient and resulted in prejudice to the petitioner. See *Vazquez* v. *Commissioner of Correction*, supra, 128 Conn. App. 430. "*Strickland*

recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . *Cronic* . . . which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554–55, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). "This is an irrebuttable presumption. See *State* v. *Frye*, 224 Conn. 253, 262, 617 A.2d 1382 (1992) (right to counsel is so basic that its violation mandates reversal even if no particular prejudice is shown and even if there is overwhelming evidence of guilt) . . . ." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 699–700, 142 A.3d 1095 (2016) (*McDonald*, *J.*, dissenting). "[C]ourts have rarely applied *Cronic*, emphasizing that only [nonrepresentation], not poor representation, triggers a presumption of prejudice." (Internal quotation marks omitted.) *Hutton* v. *Commissioner of Correction*, 102 Conn. App. 845, 856, 928 A.2d 549, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007). "The United States Supreme Court has emphasized . . . how seldom circumstances arise that justify a court in presuming prejudice, and concomitantly, in forgoing particularized inquiry into whether a denial of counsel undermined the reliability of a judgment . . . ." (Internal quotation marks omitted.) *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 531, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019). Our Supreme Court has further explained

that "specific errors in representation, for which counsel can provide some reasonable explanation, are properly analyzed under *Strickland*. . . . Counsel's complete failure to advocate for a defendant, however, such that no explanation could possibly justify such conduct, warrants the application of *Cronic*." (Citation omitted.) *Davis* v. *Commissioner of Correction*, supra, 556.

The habeas court concluded that the petitioner was not entitled to a presumption of prejudice under *Cronic*, explaining that, "[u]nlike the *Cronic* line of cases, the issue here does not deal with any witnesses in the state's case-in-chief; it only involves two of four witnesses who testified to the same incident, and the evidence was admitted only for a limited purpose of the credibility [and] the overall accuracy of one of the defense experts' opinion on the petitioner's mental health, and as to the credibility of inferences and testimony the petitioner gave about his familiarity with handling guns. Given the narrow issue involved, the fact that only two out of the dozens of witnesses who testified in the case were concerned, and the fact that the same or substantially similar testimony from two other witnesses remains unchallenged, this is not the type of issue that undermines the confidence in the fabric of the entire trial." (Footnote omitted.)

We agree with the court that Attorney Wice's actions do not rise to a level that our jurisprudence dictates would constitute a failure to subject the state's case to meaningful adversarial testing and thus require a presumption of prejudice. The second *Cronic* exception is exceedingly narrow. See *Leon* v. *Commissioner of Correction*, supra, 189 Conn. App. 533; *Hutton* v. *Commissioner of Correction*, supra, 102 Conn. App. 856. "[T]he United States Supreme Court made clear . . . that the second exception in *Cronic* applies only when the attorney's failure is complete, rather than simply an alleged failure at specific points in the trial . . . ."

Taylor v. *Commissioner of Correction*, supra, 324 Conn. 647 n.5. Even if we presume that it was error not to cross-examine Udolf and Rubino, it cannot be said that Attorney Wice's failure was "complete." As an example of an "utter lack of advocacy," in *Edwards* v. *Commissioner of Correction*, 183 Conn. App. 838, 851, 194 A.3d 329 (2018), this court found that counsel's actions had resulted in a failure to subject the state's case to any meaningful adversarial testing. This court summarized, stating that, "[a]lthough [counsel] claimed to have formed a 'theory of the case'—that the petitioner did not attack the victim—he did nothing at the petitioner's criminal trial to advance that theory. The petitioner consistently has claimed that he did not assault the victim. Despite the petitioner's adamance, [counsel] declined to cross-examine *any* of the three people who were present at the time of the assault. As noted previously, [counsel] failed to meaningfully cross-examine *any* of the state's witnesses except for a police officer, whom he asked irrelevant questions." (Emphasis added.) Id., 850.

Here, the petitioner challenges only Attorney Wice's failure to cross-examine two of the state's six rebuttal witnesses. Our review of the record confirms that the remainder of the state's case was subjected to meaningful adversarial testing. During the examination of the lead police detective, Attorney Daly conducted multiple voir dire examinations and objected frequently but did not conduct a cross-examination. He then, again, conducted multiple voir dire examinations during examination of the second police detective and conducted a cross-examination. He cross-examined the first law enforcement officers who responded to the crime scene, the state's medical and firearms experts, and the majority of the state's lay witnesses, including patrons and employees of the Prospect Café. Furthermore, Attorney Daly called four defense witnesses, including members of the petitioner's family and Dr. Opsahl.

Thus, the state's case was subjected to meaningful adversarial testing.

Accordingly, Attorney Wice's alleged failures are more appropriately analyzed under the performance and prejudice test outlined in *Strickland*. Because, however, the petitioner does not challenge on appeal the habeas court's determination that he failed to establish prejudice under *Strickland*, no additional analysis is necessary.[15] In fact, the petitioner explicitly stated in his brief to this court that "[h]is claim should not be analyzed for prejudice under *Strickland*." We agree with the habeas court that *Cronic* does not apply to the petitioner's claim; thus, the petitioner was required to prove prejudice, and the habeas court's finding of no prejudice stands unchallenged. The habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

IV

Last, the petitioner contends that the habeas court improperly declined to apply a cumulative prejudice approach to his claims and to consider the aggregate effect of counsel's alleged errors. The respondent argues that Connecticut state courts have declined to adopt a

[15] After resolving the *Cronic* claim, the habeas court resolved the petitioner's *Strickland* claim by concluding that the petitioner had failed to establish prejudice, concluding: "[T]he petitioner would need to show some actual harm . . . . Here, the petitioner failed to present Rubino or Udolf as witnesses to prove the allegedly helpful information that could have, or should have, been elicited form them via cross-examination, which, alone is sufficient to defeat his claim. . . . An additional basis is that [McCurry] and [Higby] were two additional witnesses who testified about the same incident . . . during the offer of proof and before the jury. Neither of them was subjected to any cross-examination during either proceeding, and the petitioner offers no challenges at all to the testimony or handling of either witness. Therefore, even if some challenge to the credibility of Udolf or Rubino had been offered, the testimony of these other two witnesses would have gone to the jury unchallenged. Therefore, the petitioner's claim fails because he has failed to show any harm . . . ." (Citations omitted.)

cumulative error approach and that, regardless, because the petitioner failed to demonstrate that counsel acted deficiently, there are no errors to accumulate. We agree with the respondent.

"Our 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." (Citations omitted; internal quotation marks omitted.) *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 cannot grant the relief the petitioner seeks.

Moreover, the habeas court concluded that, because "the petitioner has failed to prove each of the individual claim[s] upon which this final 'catchall' claim rests, it is not necessary to engage in any additional detailed discussion. [Because] all other claims have failed on their individual merits, this claim, too, fails." Thus, even if aggregate error analysis were viable here, it is not necessary to consider the aggregate effect of the alleged errors because we agree with the habeas court's disposition of the petitioner's individual claims.

The judgment is affirmed.

In this opinion the other judges concurred.

MARCUS FAIR *v.* COMMISSIONER OF CORRECTION (AC 43583)

Prescott, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted of murder and criminal possession of a firearm, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. Following an evidentiary hearing, the habeas court denied the petition, concluding that the petitioner had failed to demonstrate that his trial counsel had acted deficiently by failing to present certain expert testimony or to impeach a testifying witness, M, regarding M's alleged motivation to testify untruthfully, and that any failure on behalf of the petitioner's trial counsel to impeach M with respect to M's conflicting statements regarding the identification of the shooter did not prejudice the petitioner. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that the issues raised in his petition were debatable among jurists of reason, that the court could have resolved the issues in a different manner or that the questions were adequate to deserve encouragement to proceed further; the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance of his trial counsel, as the petitioner failed to demonstrate that the outcome of his trial would have been different if his trial counsel had presented evidence about the Jamaican etymology of a term that was allegedly used by the shooter when he fired his weapon, as there was no evidence that the term could be used only by a person of Jamaican descent and, in light of the evidence presented at trial that the shooter was wearing a Jamaican hat and fake dreadlocks, the jury could have inferred that the petitioner used the term in an effort to conceal his identity; moreover, the petitioner failed to present any credible evidence in support of his theory that M agreed to cooperate with the police to avoid criminal liability and also failed to demonstrate that any further inquiry into the matter was likely to have affected the jury's assessment of M's testimony; furthermore, the petitioner failed to demonstrate that he was prejudiced by his trial counsel's alleged failure to impeach M concerning the fact that M had made inconsistent statements to the police regarding the shooter's identity, as these statements were presented to the jury during the criminal trial and the state presented proof, independent of M's testimony, of the petitioner's guilt beyond a reasonable doubt.

Argued February 8—officially released June 15, 2021

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, *Hon. Samuel S. Sferrazza*, judge trial referee; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (petitioner).

Melissa E. Patterson, senior assistant state's attorney, with whom, on the brief, were *Sharmese Walcott*, state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Marcus Fair, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion by denying his petition for certification to appeal because he demonstrated that he was deprived of his right to the effective assistance of counsel during his underlying criminal trial. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

In 2005, the petitioner was convicted, following a jury trial, of murder in violation of General Statutes (Rev. to 2003) § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1). Following his conviction, the petitioner was sentenced by the trial court, *Espinosa*, *J.*, to a total effective term of sixty-five years of imprisonment. In an unsuccessful direct appeal to this court, the petitioner

raised a claim of instructional impropriety and a claim that the trial court had abused its discretion in excluding evidence of prior inconsistent identification statements. *State* v. *Fair*, 104 Conn. App. 519, 522, 525, 935 A.2d 196 (2007).

The following facts, as described by this court in its decision on the petitioner's direct appeal, are relevant to this appeal. "In the late evening of January 13, 2004, Dwayne Knowlin and Joshua Mims left Knowlin's home on Nelson Street in Hartford to get something to eat. As they walked home, the [petitioner] approached. The [petitioner] wore a black mask that concealed his head; his face was visible from his lips to his eyebrows. The [petitioner] stopped in front of Knowlin and Mims, took out a black revolver and opened fire. Knowlin and Mims immediately ran. After jumping a fence and with the [petitioner] no longer in sight, Knowlin collapsed, informing Mims that he was shot. Knowlin's breathing became labored, and Mims called for an ambulance. Knowlin died that evening.[1]

"The next day, Howard Fair, the uncle of the [petitioner], heard rumblings from family members that the [petitioner] was involved in the shooting. He confronted the [petitioner], who admitted to shooting Knowlin. The [petitioner] explained that he 'had a beef' with the 'kids on Nelson Street' and alleged that they had shot at him and his cousin a month earlier. The [petitioner] told his uncle that he wanted revenge. As Howard Fair recounted, the [petitioner] stated that 'he was going to get back at them, no one in particular, just said he's gonna, you know, they shot at him so he's going to go shoot back at them.' Fearing for his nephew's safety, Howard Fair encouraged the [petitioner] to turn himself in to the authorities.

[1] "Harold Wayne Carver II, the state's chief medical examiner, testified that the cause of Knowlin's death was 'a gunshot wound of the chest and abdomen.' " *State* v. *Fair*, supra, 104 Conn. App. 521 n.3.

On January 16, 2004, the [petitioner] and his uncle entered the Harford [P]olice [D]epartment. At that time, Howard Fair gave a statement implicating the [petitioner] in Knowlin's death, and the [petitioner] was arrested. The police subsequently presented a photographic array to Mims, who immediately identified the [petitioner] as the shooter. At trial, Mims testified that he had known the [petitioner] for approximately five years and that he observed the [petitioner's] face 'a whole minute' before the shooting." (Footnote in original.) Id., 521–22.

We note that, in addition to the foregoing facts, which were consistent with the state's theory of the case, there was also evidence before the jury of the following facts. On the night of the shooting, the petitioner wore a yellow, green, and red hat with fake dreadlocks attached to it. As the petitioner approached Knowlin and Mims, Mims heard someone ask the petitioner if he was "Budda." Another person replied, "no, that ain't Budda, that's Blirt." As the petitioner fired the gun, he said "bumbaclot."

When the police arrived at the scene, Sylvia Hernandez, a patrol officer for the Hartford Police Department, questioned Mims about what had occurred. Mims did not initially identify the petitioner as the shooter but told Officer Hernandez that the shooter was a black male with a medium complexion. Mims repeatedly stated that the shooter was wearing a "Jamaican hat." Officer Hernandez then asked Mims if the shooter was a Hispanic, black, or Jamaican male. Mims replied that he thought the shooter was a Jamaican male. The police then transported Mims to the police station where he provided a sworn, written statement about what happened, along with a description of the shooter.

During the course of the investigation of the shooting, the police recovered a baggie containing a black powdery substance in the driveway of 8 Clay Street, close to the location where first responders found Knowlin.

The police did not test the powder or the baggie, nor did they investigate who, if anyone, was in possession of the baggie at the time of the shooting.

On January 14 and 15, 2004, Detective Robert Davis of the Hartford Police Department received six voicemails from multiple anonymous persons who believed that the petitioner was involved in the shooting. On the basis of these voicemails, in which the callers included the petitioner's name and nickname, Detective Davis identified the petitioner as a suspect in the shooting.

On the evening of January 16, 2004, Howard Fair, accompanied by the petitioner, voluntarily went to the Hartford police station. Detective Davis had not made any attempt to locate the petitioner, nor did he request that the petitioner come to the police station. Detective Davis spoke to Howard Fair for approximately fifteen or twenty minutes before Howard Fair provided Davis with a sworn, written statement implicating the petitioner in Knowlin's death.[2]

On March 16, 2011, the petitioner, as a self-represented litigant, commenced the present habeas action. On March 6, 2012, the court appointed habeas counsel. On August 13, 2015, the petitioner, through counsel, filed a third amended petition for a writ of habeas corpus. The petitioner alleged that his confinement is unlawful because the representation afforded him by his trial counsel, Robert Meredith and Michael Isko, "was not within the range of competence displayed by lawyers with ordinary training and skill," and that,

[2] The defense presented evidence, through its cross-examination of Howard Fair, that, on January 14, 2004, the petitioner was under the influence of phencyclidine (PCP) when he confessed to shooting Knowlin. Howard Fair further testified that, on January 16, 2004, the petitioner was under the influence of PCP when he was present at the Hartford police station. Howard Fair also testified that he told the police that the petitioner was under the influence of PCP both when they arrived at the police station and when the petitioner confessed to him.

"[t]here [was] a reasonable probability that 'but for' [their] errors and omissions . . . the outcome of the petitioner's trial would have been different."[3] In his posttrial brief, the petitioner focused on the allegations that his trial counsel failed (1) "to introduce all the prior inconsistent statements of Mims regarding the description of the shooter," (2) "to offer expert testimony as to Jamaican slang to impeach Mims and point to third party culpability," (3) "to offer expert testimony regarding the effects of phencyclidine (PCP), also known as 'angel dust,' as those effects bear on diminished capacity to form requisite intent and as to the reliability of the petitioner's confessions," and (4) "to demonstrate Mims' motivation to cooperate with the police and falsely identify the petitioner as the shooter."

On July 7, 2017, and August 20, 2019, the habeas court, *Hon. Samuel S. Sferrazza*, judge trial referee, presided over the habeas trial. The petitioner called two witnesses to testify, private investigator Ken Novi and Officer Hernandez. Novi testified in relevant part about the meaning of the word "bumbaclot" and stated that it was a "Jamaican slang term." He also testified that he spoke to the petitioner during his investigation and that the petitioner spoke "Americanized English" and did not speak with a Jamaican accent. The petitioner's counsel examined Officer Hernandez,[4] in relevant part, about the description that Mims provided to her on the night of the shooting. She was unable to recall the details of Mims' statement. The petitioner's counsel asked a litany of questions about the murder investigation, to which Officer Hernandez repeatedly answered

[3] The petition also included a second count in which the petitioner asserted a violation of his confrontation rights under the United States constitution. In its memorandum of decision denying the petition, the habeas court stated that "the petitioner never discussed that claim in his posttrial brief, and the court regards that contention as abandoned." In the present appeal, the petitioner does not raise a claim related to that aspect of the court's ruling.

[4] Following the criminal trial, but before the habeas trial, Officer Hernandez changed her last name to McGrath. For the sake of consistency, we will continue to refer to her as Officer Hernandez.

that she did not remember the details of the investigation. The petitioner's counsel showed Officer Hernandez a police report that she prepared about the murder, and she testified that it did not refresh her recollection of the investigation.

On October 4, 2019, in a thorough memorandum of decision, the habeas court denied the third amended petition for a writ of habeas corpus. First, the court rejected the claim that the petitioner's trial counsel rendered deficient performance by virtue of the fact that they failed to present expert testimony concerning the effects of PCP use in an effort to undermine the reliability of the petitioner's confession to Howard Fair.[5] The court, observing that the petitioner failed to present expert testimony of such nature during the habeas trial, concluded that the petitioner failed to demonstrate what expert testimony would have been available to his trial counsel at the time of trial and, thus, had failed to demonstrate that they had acted deficiently in failing to present such evidence.

Next, the court addressed the claim that the petitioner's trial counsel rendered deficient performance in failing to impeach Mims regarding his motivation to testify untruthfully. Specifically, the petitioner argued that his trial counsel failed to establish that Mims' identification and trial testimony was influenced by his expectation of favorable treatment by the police. This argument

[5] In its memorandum of decision, the court referred to the petitioner's claim that such expert testimony could have "undermined the reliability of the petitioner's *confessions* to his uncle and the police." (Emphasis added.) Later in its decision, the court referred to the fact that "[t]he crux of the prosecution case was the petitioner's *multiple confessions* to committing the crime." (Emphasis added.) We note that there was no evidence before the jury that the petitioner provided the police with a confession. Although, during the criminal trial, the court denied the petitioner's motion to suppress statements that he had made in the presence of law enforcement, the state did not introduce any such statements in evidence. As we have explained, however, the jury had before it evidence of the petitioner's confession to his uncle, Howard Fair. We are not persuaded that this inaccuracy in the court's decision undermines its analysis.

was related to the discovery of the baggie containing a black powder by the police, near the location where first responders found Knowlin. The court stated: "Defense counsel unsuccessfully attempted to cross-examine Mims regarding whether he expected to receive some benefit in the form of the police ignoring the discovery of a baggie containing a black powder close to the victim's body . . . . The trial judge sustained the state's objection to this line of questioning because of an insufficient nexus between Mims and the baggie to support an inference of favorable treatment by the police in exchange for Mims' identification of the petitioner as the shooter." The court further stated: "The trial judge did allow cross-examination as to whether the police inquired of Mims about the baggie. Mims testified that the police never mentioned that discovery at all. It should be recalled that at the time the baggie was seized, Mims *refused* to disclose that he knew who shot his friend. That identification came about one week later.

"No credible evidence was adduced at the habeas trial to support the petitioner's suspicion on this point. Mims conceded he withheld pertinent information from the police on the night of the homicide. The police received [evidence concerning] the petitioner's admissions a few days later without any assistance from Mims. Mims' later identification of the petitioner was not the basis for the petitioner's arrest, but simply confirmed the veracity of the petitioner's multiple admissions to the crime.

"Also, defense counsel adequately cross-examined Detective Gregory Gorr [of the Hartford Police Department] about whether the baggie or its contents were subjected to testing or further investigation. Detective Gorr acknowledged that they were not. The court finds that the petitioner has failed to prove deficient performance as to this specification of ineffective assistance." (Emphasis in original.)

Next, the court addressed the petitioner's remaining allegations of deficient performance, all of which were related to his trial counsel's alleged failure to adequately impeach Mims with respect to aspects of his identification of the petitioner as the shooter. The court observed that the petitioner's arguments focused on the fact that, on the night of the shooting, Mims failed to identify the petitioner, described the shooter as a Jamaican male, and stated that the shooter was wearing a black mask. The petitioner also attached great significance to Mims' statement that the shooter had used the term "bumbaclot." The petitioner argued that if his trial counsel had presented evidence concerning the etymology of that term, it would have tended to cast doubt on the accuracy of the identification. The court rejected all of these arguments on the ground that, even if deficient performance was rendered by the petitioner's trial counsel, it did not prejudice the petitioner.

The court observed that, at the habeas trial, the petitioner presented evidence that the term "bumbaclot" was "a highly offensive Rastafarian insult" but that "[d]efense counsel [at the time of the criminal trial] never produced expert testimony as to its meaning or culture of origin. In other words, the jury was never informed that the term was Jamaican slang." The court stated: "At the criminal trial, Mims testified that he had heard the word previously, although he did not know its precise meaning. The petitioner argues that, had the jury known the term was Jamaican, it would have discredited Mims' identification of the petitioner, who is not Jamaican, and cast doubt on the petitioner's confession."

The court rejected that conclusion and stated: "Mims also testified that the shooter wore a . . . dreadlock wig and hat. That is, the shooter appeared to impersonate a person of Jamaican background. The use of a Jamaican insult is also consistent with Mims' testimony on that issue. Under the particular circumstances before

the jury in the petitioner's case, such testimony was not unequivocally exculpatory or even significantly so."

The court further stated: "Although in his testimony Mims denied that he initially described the shooter as Jamaican, the jury heard the evidence through a police witness that he had. Mims explained that he only characterized the perpetrator's hat as Jamaican and not the person wearing it. In any event, the jury knew that Mims admitted [to] deceiving the police on the night of the shooting.

"The petitioner also tried to attach importance to the fact that Mims originally described the shooter as wearing a black mask, without modifying that description as a football type mask. The court regards that omission as trivial. . . .

"Also, Mims' description of the shooter as dressed in black and of medium complexion carries little probative weight. Mims acknowledged trying to deceive the police about the fact [that] he knew the shooter. He admitted he failed to tell the police about the fake dreadlocks. His initial description was rather nondescript; no distinctive clothing; medium complexion.

"In his posttrial brief, the petitioner characterized Mims as the 'crux' of the state's case. This is an overstatement of Mims' role, although he was an important witness. The crux of the [prosecution's] case was the petitioner's multiple confessions to committing the crime. . . . Mims' testimony was *confirmatory* rather than *primary*.[6]

"There was no credible evidence proffered at the habeas trial that Mims was coached to [identify] the

[6] We interpret the court's description in this regard to reflect its belief that Mims' testimony helped to establish the certainty of what was shown by *other* inculpatory evidence that was presented by the state at the criminal trial, including the evidence of the petitioner's confession to Howard Fair.

petitioner nor that Mims even knew the police had a suspect in custody when he [selected] the petitioner's photograph as the shooter from the [photographic] array 'immediately.' " (Emphasis in original; footnote added.)

On October 11, 2019, the habeas court denied the petitioner's certification to appeal. This appeal followed.[7] Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the legal principles and the standard of review relevant to this claim. "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

[7] In his petition for certification to appeal, the petitioner stated that the grounds on which he proposed to appeal were related to the habeas court's errors in (1) "denying the petitioner's claims," (2) "the assessment of prejudice," (3) "its findings," and (4) "its application of the law." He also stated that these grounds included "any issues which are unearthed after a thorough review by appellate counsel."

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* standard] 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. . . . 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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citations omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

Although the petitioner argues that the court improperly rejected his claim of ineffective assistance of counsel, he has, in this appeal, narrowed the specific allegations of ineffective representation on which he relies. The petitioner focuses on his argument that his trial counsel's failure to reasonably impeach Mims' identification testimony constituted deficient performance and that, "even in the face of [the petitioner's] supposed confession, properly discrediting Mims would have sufficiently undermined confidence in the verdict, such that the petitioner proved prejudice" before the habeas court. In his brief to this court, the petitioner focuses on only two claims from his third amended petition: that his trial counsel failed (1) to "utilize available evidence about the Jamaican patois word 'bumbaclot' to the advantage of the petitioner's defense" and (2) to "utilize other available evidence to support the petitioner's defense by impeaching Mims . . . ."[8] We agree with

[8] The petitioner does not raise a claim of error related to the habeas court's rejection of his claim of ineffective assistance as it relates to expert testimony concerning PCP.

We note that the petitioner also argues that he "litigated, but did not brief or argue," a claim that his trial counsel was ineffective for failing to object

the habeas court that the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance on which he relies. Accordingly, we will not address the performance prong of the *Strickland* standard.

We first address the petitioner's contention that he was prejudiced by his trial counsel's failure to produce evidence about the word "bumbaclot." Specifically, the petitioner argues that his trial counsel failed to present evidence of the word's Jamaican origin, which could have cast doubt on whether the petitioner, who is not Jamaican, was the shooter. At the habeas trial, Novi testified about the meaning of the word "bumbaclot" and its Jamaican etymology. Novi noted that, in the neighborhood where the murder occurred, "there are a lot of Jamaican restaurants, and there are . . . people of Jamaican descent there." At the criminal trial, Mims testified that the petitioner lived in a neighborhood near the location of the murder. At the criminal trial, Mims testified that he "ha[d] no idea" what the word "bumbaclot" meant but that he had heard the word before.

We agree with the habeas court that the facts to which Novi testified were unlikely to have affected the outcome of the trial. The essence of the petitioner's argument is that Novi's testimony would have led the jury to conclude that the petitioner, who is not of Jamiaican descent, would have been unlikely to have used the term "bumbaclot." The petitioner's argument seems

on hearsay grounds to Howard Fair's testimony about the rumors he heard about the petitioner's involvement in the murder. He contends, "[n]evertheless, that [this] issue is relevant to this court's prejudice inquiry." The petitioner raised an argument of this nature in his third amended petition. He did not, however, discuss the claim in his posttrial brief, and the habeas court did not address the claim in its memorandum of decision. Accordingly, we cannot review the claim. See *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705 ("[a] reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court"), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

to rest on the faulty premise that the term at issue could be used only by a person of Jamaican descent. As the habeas court observed, however, in light of the evidence presented at the criminal trial that, at the time of the shooting, the petitioner was wearing a mask, headwear described as a "Jamaican hat," and fake dreadlocks, the jury could have inferred that the petitioner had used the Jamaican term as part of an overall attempt to conceal his identity. Thus, we agree with the habeas court that, even if the jury heard testimony about the meaning and origin of the word "bumbaclot," it is unlikely that this testimony would have affected the outcome of the trial.

We next address the petitioner's contention that he was prejudiced by his trial counsel's failure to adequately impeach Mims on the basis of Mims' prior inconsistent statements concerning the shooter and his alleged desire to avoid criminal liability stemming from the discovery by the police of the powdery substance near the location where first responders found Knowlin.[9] We begin by addressing the claim that the petitioner's trial counsel rendered ineffective assistance by failing to adequately impeach Mims with respect to his desire to avoid prosecution for the black substance. We note that during Mims' cross-examination at the criminal trial, the petitioner's counsel showed Mims a picture of the baggie and asked him to confirm that he was never charged with a crime in connection with it. The state objected to this question on relevance grounds, and, after a sidebar conference, the court directed the petitioner's counsel to rephrase the question.[10] The petitioner's counsel then asked Mims if anyone from the Hartford Police Department asked him about a substance that was found in the driveway of 8 Clay Street,

[9] The petitioner has not pointed to anything in the record that supports his assertion that Mims had a motive to cooperate with the police or even that Mims could have faced criminal liability in connection with the baggie of black powder that the police discovered.

[10] The court stated: "The question will be . . . did the police ask you about any substances that were found that day."

to which he replied "[n]o." Shortly thereafter, the petitioner's counsel cross-examined Detective Gorr, who testified that the police did not test the baggie for fingerprints or DNA. Detective Gorr also testified that the police "didn't have any reason to believe it was related to [their] primary [crime] scene" on Nelson Street.[11] As the habeas court observed, the petitioner's trial counsel did attempt to pursue a line of inquiry related to Mims' motivation to cooperate with the police but abandoned this strategy when it became clear that the police did not connect the baggie to Mims and, therefore, that he never faced criminal liability in connection with its discovery. As the habeas court correctly observed, there simply was no credible evidence presented in support of the petitioner's theory at the criminal or habeas trials. Accordingly, the petitioner failed to demonstrate that any further inquiry into this subject by his trial counsel was likely to have affected the jury's assessment of Mims' testimony.

Additionally, the petitioner is unable to demonstrate that he was prejudiced by his trial counsel's alleged failure to impeach Mims concerning the fact that he made prior inconsistent statements to the police concerning the shooter. As the habeas court correctly observed, Mims testified at the criminal trial that, on the night of the shooting, he had deceived the police by refusing to identify the petitioner as the shooter. Thus, despite being provided with evidence that Mims was initially deceptive in terms of identifying the petitioner, the jury found the petitioner guilty of the crimes with which he was charged.

We also agree with the habeas court that the petitioner's focus on efforts made by his trial counsel to undermine the accuracy of Mims' identification of him as the

[11] The evidence reflects that Knowlin was shot in front of 20 Nelson Street, which was the primary crime scene. He then ran with Mims and collapsed near 8 Clay Street, which is where the baggie was found.

shooter overlooks the fact that, independent of Mims' testimony, the state presented proof beyond a reasonable doubt of his guilt. As the habeas court aptly observed, the police had learned about the petitioner's involvement in the murder before Mims identified him as the shooter. There was evidence before the jury that Detective Davis first learned that the petitioner was a suspect from the voicemails he received on January 14 and 15, 2004. On January 16, 2004, the petitioner voluntarily arrived at the police station with Howard Fair, who provided a statement that the petitioner had confessed to him about his role in the shooting. The jury heard ample testimony from Howard Fair about the petitioner's confession. Only after Detective Davis received these anonymous tips and Howard Fair's statement did he present Mims with a photographic array that included a photograph of the petitioner. Mims identified the petitioner from this photographic array within a matter of seconds.[12]

We agree with the habeas court that Mims' testimony was an important aspect of the state's case, yet, in light of the totality of the evidence available to the jury, we are not persuaded that the outcome of the case would have been different had the petitioner's trial counsel impeached Mims in the manner prescribed by the petitioner. Accordingly, we conclude that the petitioner failed to demonstrate that he was prejudiced by his trial counsel's performance.

For the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the issues raised in his petition for certification to appeal are debatable among jurists of reason, that the court could resolve the issues in a different manner, or that the questions

[12] The habeas court stated: "There was no credible evidence proffered at the habeas trial that Mims was coached to [identify] the petitioner nor that Mims even knew the police had a suspect in custody when he [selected] the petitioner's photograph as the shooter from the [photographic] array 'immediately.' "

are adequate to deserve encouragement to proceed further. Thus, the petitioner has failed in his burden of demonstrating that the court's denial of his petition for certification to appeal reflected an abuse of discretion.

The appeal is dismissed.

In this opinion the other judges concurred.