CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MARCELLO E.*
(AC 44211)

Alvord, Suarez and Bishop, Js.

Syllabus

Convicted of the crime of assault in the first degree in connection with the stabbing of the victim, his former partner and the mother of their two children, the defendant appealed to this court. He claimed that the trial court improperly admitted certain evidence of his alleged uncharged misconduct that pertained to two altercations he had with the victim prior to the date of the charged crime. Prior to trial, the state, pursuant to the applicable provision (§ 4-5 (c)) of the Connecticut Code of Evidence, sought to admit evidence of four prior altercations between the defendant and the victim for the purpose of establishing the defendant's intent to commit the charged crime. The trial court admitted evidence of two of the altercations, which occurred two and three years before the stabbing. In one incident, the victim sustained a concussion after the defendant punched her in the face; in another incident, he punched her in the mouth in the presence of their minor daughter. On appeal, the

* In accordance with our policy of protecting the privacy interests of victims in cases involving family violence, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

defendant claimed that the uncharged misconduct was not relevant to intent or similar in nature to the charged crime, and that the uncharged misconduct was more prejudicial than probative and, thus, harmful. *Held* that the trial court did not abuse its discretion in admitting uncharged misconduct evidence involving two prior altercations between the defendant and the victim, as that evidence was relevant and probative and, thus, admissible to prove his intent to assault the victim by stabbing her: the court reasonably could have found that the prior misconduct was sufficiently probative of intent because it involved the same victim and was of a similar nature as the charged conduct, which involved repeated stabs to the victim's head and body, evidence that the defendant previously struck the victim made it more likely that he intended to cause her serious physical injury by stabbing her, as the prior misconduct, which was not too remote, was probative of his attitude toward her well-being, and, contrary to defendant's assertion, the admission of the prior misconduct did not run afoul of the Supreme Court's determination in *State* v. *Juan J.* (344 Conn. 1) that uncharged misconduct is inadmissible to prove intent in general intent crimes; moreover, this court could not conclude that the trial court abused its discretion in determining that the probative value of the misconduct evidence outweighed its prejudicial effect, as the conduct and injuries underlying the misconduct, which did not involve the use of a weapon, were substantially less severe than that involved in the charged crime and were not likely to arouse the jurors' emotions so as to create undue prejudice, the misconduct evidence was litigated out of the jury's presence and did not consume an undue amount of trial time or create side issues, the state's questioning of the victim about it was limited and not inflammatory, and the defendant was not unfairly surprised by the misconduct evidence; furthermore, the court instructed the jury on three occasions that it could consider the misconduct evidence solely on the issue of intent, thereby restricting the state's use of the misconduct and limiting its prejudicial effect, the defendant's alibi that he was asleep at home when the stabbing occurred rested on his testimony and that of his mother and sister, which was contradicted by the testimony of investigating police officers that his mother and sister were not cooperative and would not provide them with any information, and, even if the court improperly admitted the misconduct evidence, in light of the strength of the state's case and the tailored introduction of the uncharged misconduct evidence, this court was left with a fair assurance that the evidence did not substantially affect the verdict.

(*One judge dissenting*)

Argued March 8—officially released October 18, 2022

Procedural History

Substitute information charging the defendant with the crime of assault in the first degree, brought to the

Superior Court in the judicial district of Hartford and tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

John R. Weikart, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Anthony Bochicchio*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Marcello E., appeals from the judgment of conviction, rendered after a jury trial,[1] of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On appeal, the defendant claims that the trial court improperly admitted uncharged misconduct evidence. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. The defendant and the victim met and began dating around 1995 when the victim was fifteen years old. The defendant and the victim had two children together, J, who was born in 1998, and S, who was born in 2003. At the time of S's birth, the defendant and

[1] This was the defendant's second trial on the charge of assault in the first degree. This court affirmed the defendant's conviction from his first trial on direct appeal. Subsequently, the defendant brought a petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel, which was denied. On appeal, this court reversed the judgment of the habeas court and remanded the case with direction to grant the petition for a writ of habeas corpus and to vacate the defendant's conviction. This court ordered a new trial, the outcome of which is the subject of the present appeal. Hereinafter, all references to the trial refer to the second trial, which took place in November, 2019.

the victim lived together in Hartford; they later moved, briefly, to South Windsor. In 2008, the defendant and the victim began to have problems in their relationship. The couple had several arguments that evolved from verbal disagreements to physical incidents. Following one such incident in October, 2009, the defendant stopped living with the victim and their children.

In November, 2011, the defendant resided at his mother's home with his mother, sister, nephews, and brother on B Street in Hartford. He and the victim had an arrangement wherein the defendant would pick up S from school, after 3 p.m., and bring her to his mother's house until the victim left her workplace. After the victim left work at about 5 p.m., she would pick up S at the home of the defendant's mother and then return to their home on M Street in Hartford. When the victim arrived at the home of the defendant's mother to pick up S, the victim typically would not go inside but instead would call S to come out because the victim "did not want to have any contact with [the defendant] at all."

On November 16, 2011, the defendant picked up S at school at about 3:45 p.m., took her to a fast-food restaurant, and brought her to his mother's home. After they arrived, the defendant went upstairs to his room. Thirty minutes before the victim picked up S, the defendant left the house with a backpack and got into a car. He did not return prior to S's leaving the house.

At about 5:30 p.m., the victim picked up S at the home of the defendant's mother. The victim and S then went to a grocery store to pick up food for dinner, which took, at most, twenty minutes. Then, they returned home to M Street, where the victim parked her car in the driveway. S got out of the car, walked to the back door, and entered the home first. The victim followed after grabbing her bag and the groceries.

The victim entered her home and turned to lock the back door when the defendant ran up to her and began stabbing her. Because the defendant was not wearing a face covering, the victim got a good look at him. The defendant repeatedly stabbed the victim in the head, leg, arm, and back, and pulled her outside. The victim yelled for J, who was already inside the home, to come help her. J ran outside, picked up the victim, brought her into their home, and locked the door. The victim originally thought she had been beaten, but upon hearing a gushing sound and feeling her leg, she told J, "your father stabbed me." The defendant ran toward a neighbor's fence on the side of the victim's home. Shortly thereafter, S called the defendant, told him about the attack on the victim, and the phone line promptly went dead.

At 5:58 p.m., two minutes after receiving a call that someone had been stabbed on M Street, a Hartford police officer arrived at the victim's home. As part of their investigation, officers spoke with J on November 16, 2011.[2] J told the officers that the victim had identified the defendant as her assailant.

Later that evening, two police officers went to the home of the defendant's mother to speak with the defendant. Officer Valentine Olabisi first spoke with the defendant regarding his whereabouts at the time the victim was attacked. Officer Olabisi testified that the defendant had told him that "he was with his mother all day and he hadn't left the house" but "refused to

[2] We note that the record contains conflicting information regarding J's age on the date of the attack on the victim at their home on November 16, 2011. The victim testified that her son, J, was born in April, 1998, which would support a finding that he was thirteen years old on the date of the attack. J testified that, at the time of the trial, in November, 2019, he was twenty-one years old. To the contrary, however, J also testified that, at the time he gave a statement to the police, on December 7, 2011, three weeks after the attack, he was eleven years old.

speak to [Officer Olabisi] any further." Thereafter, Detective Luis Poma attempted to make contact with the defendant, but the defendant's brother told him that the defendant "was agitated." When Detective Poma then asked him for the defendant's contact information, he told Detective Poma that the defendant's phone was broken.

As a result of the defendant's attack, the victim sustained multiple stab wounds, suffered a collapsed lung, received staples extending from the top of her head down to her ear, underwent three surgeries, and was hospitalized for five days.[3] After she was transported to a hospital, stabilized by medical personnel, and administered a large amount of pain medication, the victim told the police that "she did not see the suspect" and that she had been attacked by an "unknown person."[4] Five days after the attack, the victim identified the defendant as her assailant from a photographic array that the police had prepared.

Prior to trial, the defendant filed a motion for the disclosure of any evidence of uncharged misconduct that the state would seek to present at trial. On October 31, 2019, the court held a hearing on the admissibility of evidence of four incidents in which the defendant either had threatened or used violence against the victim. At the hearing, the state presented the testimony of the victim as to the four incidents.

[3] At the time of the trial in November, 2019, eight years after the attack, the victim testified that she continued to have difficulty walking and was expected to undergo additional surgeries due to the severity of her injuries from the attack.

[4] Officer Chris Hunyadi was the first officer at the crime scene on the night of the attack, and followed the victim to the hospital where he spoke with her after medical personnel administered care to her for her significant injuries. Officer Hunyadi testified that he remained at the hospital until he was relieved by the lead detective later that evening. Detective Poma, the lead detective investigating the assault, testified that he was not able to take the victim's statement on the night of the attack due to her medical condition.

The victim testified that the first incident occurred on January 30, 2007, at her workplace. The defendant showed up there and wanted the victim to "come speak to him about something that was going on" outside. When the victim refused to speak with him, the defendant entered her workplace and attempted to pull her outside. The victim ran from the defendant into a coworker's office. The defendant left the victim's place of work but continued to make threats to her over the phone. The victim did not recall the specific words he used to threaten her but recalled that they were "arguing back and forth."

The victim testified as to a second incident that occurred in March, 2008, at the home of the victim and the defendant in South Windsor. The victim was vacuuming, which "irritated [the defendant] because the vacuum was too loud." The victim asked the defendant to leave and "thought [the defendant] was leaving, and . . . he proceeded to punch [her] in . . . [the] head." The victim attempted to leave the room multiple times, but the defendant would not let her leave. According to the victim, the defendant eventually "had [her] on the ground. He punched [her] in [the] face. [She] got a concussion from that. And he just would not get out of [her] face." The victim attempted to leave the house, but the defendant pulled her back inside. She pleaded with the defendant to let her leave. The victim was eventually able to leave by saying that she needed to get their dog, who had run outside, and then ran to her neighbor's home to call the police.

The victim testified as to a third incident that occurred on October 13, 2009, at the home of the victim and the defendant when they lived in Hartford. Because the victim's car was overheating, she asked the defendant for a ride, but he did not give her one. She took her car to work, and it overheated on the highway. According to the victim, when she arrived home, the

defendant acted "like nothing happened" and as though her "safety was not a concern of his . . . ." The victim and the defendant proceeded to get "into an altercation where . . . something happened, and he punched [her] in [the] face, in [her] mouth in front of [their] daughter at the time and, like, blood was like squirting everywhere." A friend arrived and brought the victim and S to the police department to file a report.

The victim testified as to a fourth incident that occurred on December 16, 2009, after the defendant no longer lived with her. The defendant called the victim to try to get her to take him back. The defendant made threats to the victim and stated, "if I go down you go down with me . . . ."

The prosecutor argued that the four prior incidents were relevant to the defendant's motive and intent to commit the charged crime and stated that there was not "enough to offer them under identity." Defense counsel objected, arguing, principally, that the incidents were not relevant to either motive or intent and that they would be unduly prejudicial. Defense counsel argued that the incidents were not similar in nature to the charged crime because, in contrast to the prior incidents, during the charged crime, "there was no words, there was no threats. There was just an attack." Additionally, defense counsel argued, inter alia, that the prejudicial effect of the prior incidents was "[overwhelming, especially] in view of the nature of the actual allegations of the serious assault."[5]

[5] During the pretrial hearing, defense counsel argued that the incidents were too remote in time, given that they had occurred ten or more years before trial, and that the court should consider the passage of time from the dates of the incidents to the date of the second trial, rather than the passage of time from the dates of the incidents to the date of the crime. See footnote 1 of this opinion. The defendant does not renew this argument on appeal. We note, however, that "[t]he relevant time interval for measuring remoteness is the time elapsed between the charged and uncharged misconduct." *State* v. *Acosta*, 326 Conn. 405, 407 n.2, 164 A.3d 672 (2017).

The prosecutor argued that the incidents revealed a pattern of "escalating violence towards one particular individual which goes directly to . . . motive, which is essential, and intent, which needs to be proved." Additionally, the prosecutor argued that "the fact that [the prior incidents of misconduct] are less egregious than the incident offense, makes [them] more admissible." In responding to the defendant's argument that the misconduct evidence was not similar to the charged offense, the prosecutor argued that "similarity is important if you're looking to admit the evidence [for] identity, which we are not." Additionally, the prosecutor maintained that, were the court to admit the prior misconduct evidence at trial, he would not seek to offer any evidence of convictions or arrests resulting from the incidents or seek to elicit testimony from the victim that she had called the police.

After hearing the victim's testimony regarding the uncharged misconduct evidence and during counsel's arguments, the court requested that the prosecutor summarize the nature of the conduct that was charged in the case and the nature of the victim's testimony. The prosecutor responded: "In this case, basically, [the victim] will testify that she had come home from picking up her daughter. Her daughter went to the house first. She was going into the house. . . . [A]s she was walking in she was attacked from behind, and . . . thought at the time she was being assaulted. She didn't realize she was stabbed until the attack was over. She was stabbed several times causing serious physical injury. And she's going to testify that [the defendant] is the individual who stabbed [her]." The court further inquired whether the victim was stabbed multiple times and the location of her wounds. The prosecutor stated that she was stabbed multiple times on her head and body and that "[t]here was significant injury to her legs

and to her head. She will testify, I believe, that there was no warning and no lead up . . . to it."

On the first day of trial, the court orally ruled on the admissibility of the uncharged misconduct evidence. The court stated that, "[p]ursuant to § 4-5 of the [Connecticut] Code of Evidence these prior incidents are admissible only if they satisfy the relevancy standard set forth in [§] 4-1 of the [Connecticut Code of Evidence] and [the] balancing test set forth in [§] 4-3 [of the Connecticut Code of Evidence]. Consistent with those . . . code provisions, the court has considered the extent to which these prior incidents are relevant to the issues of intent and motive, and then undertaken to balance the probative value of each incident against that incident's prejudicial effect.

"In considering the prejudicial effect of the other crimes evidence, the court has considered such prejudice that could arise, for example, from the creation of side issues, the possible risk of jury confusion, or a risk that the jury's emotion would be so aroused by learning of these prior incidents so as to create undue prejudice. At the outset the court has recognized that as our Appellate Court has stated most recently in *State* v. *Anthony L.*, 179 Conn. App. 512 [179 A.3d 1278, cert. denied, 328 Conn. 918, 181 A.3d 91 (2018)], and *State* v. *Morales*, 164 Conn. App. 143 [136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016)], and I quote, when instances of a defendant's prior misconduct involved the same victim as the crimes for which the defendant is presently being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that victim and thus of his intent as to the incident in question, closed quote.

"I have also taken into account that our law makes clear that where, as here, a defendant has pleaded not guilty the defendant places in issue all elements of the

charges against him including the element relating to intent. Moreover, all elements remain challenged by the defendant in the eyes of the law even if the defendant plans to pursue a defense that centers not on his mental state but on whether or not he was the perpetrator of the crime."

The court then addressed each of the four incidents of uncharged misconduct separately. The court excluded evidence of the first incident, which allegedly occurred at the victim's workplace, because "neither the nature of the physical contact [the victim] described nor the threat bears sufficiently on the defendant's intent in the present case." The court also excluded evidence of the fourth incident, the phone call on December 16, 2009, when the defendant allegedly threatened the victim by saying, "if I go down you go down . . . ." The court concluded that admitting evidence of the phone call would require the victim to contextualize and explain events that occurred two years prior to the crime at issue and would "create a risk that the jury would become confused and would certainly create side issues."

The court ruled that it would permit the state to introduce evidence of two of the four incidents, specifically, the second and third incidents. As to the second incident, in which the defendant allegedly punched the victim in the head during an argument and restrained her from leaving their home, the court found those facts "to be probative of the defendant's intent in the present case and sufficiently probative so as to outweigh any prejudicial effect." Balancing the probative value of the evidence against its prejudicial effect, the court concluded that the incident was "not so remote in time to the charged offense to eliminate its probative value and when compared to the facts claimed in the charged case, is not such as is likely to arouse the jury's emotions." Additionally, the court concluded that, because

the second incident did not involve a weapon, the jurors' emotions would not be so aroused by the behavior during that incident and that they would be able to "separate that incident from the present one." Finally, the court addressed the "dissimilarity" between the charged stabbing incident and the prior assault, and noted that courts have held "that prejudice is lessened by virtue of that dissimilarity."

The court found that the third incident, in which the defendant allegedly punched the victim in the mouth after her car overheated, was "relevant to the issue of intent in the present case." Balancing the probative value of the evidence against its prejudicial effect and relying on precedential case law, the court determined that the third incident was "not too remote, nor is it too similar to the present case, nor is it so serious as to be such as to arouse the jury's emotion." Therefore, the court concluded that evidence of the third incident was "probative of [the defendant's] intent in the present case and sufficiently probative so as to outweigh its prejudicial effects."

The court stated that it was "permitting those incidents to be considered by the jury only as to intent, not as to motive." The court further instructed the prosecutor to ensure that he did not question the victim in a manner so as to elicit information "regarding police involvement or court proceedings that may have followed the incident[s] . . . ." Additionally, the court directed that "[t]he state also shall elicit testimony regarding these two prior incidents in a non-inflammatory manner." Finally, the court stated that it was "prepared to give an instruction regarding the use to which these prior incidents may be put" and that it would do so in its final charge to the jury and immediately before or after the victim testified to these incidents, whichever defense counsel preferred. Defense counsel

responded that he would prefer that the court give the limiting instruction after the victim testified.

Prior to the start of evidence, the court instructed the jury that "[s]ome evidence in this case may be admitted for a limited purpose only. If I instruct you that particular evidence has been admitted for a limited purpose, then you may consider that evidence only for the limited purpose that I explain to you and not for any other purpose." At trial, the victim testified, in less detail than during the hearing,[6] as to the second and

[6] The entire colloquy between the prosecutor and the victim regarding the uncharged misconduct evidence before the jury was as follows:

"Q. Now I'm going to fast-forward a bit to 2008. . . . [W]ere you now living in South Windsor?

"A. Yes.

"Q. And it was still you and the defendant and your two children that we mentioned.

"A. Right.

"Q. Now, at this point did you begin to start to begin to have some problems in the relationship?

"A. Yes.

"Q. I draw your attention to March of 2008. Do you recall getting in an argument with the defendant on that date?

"A. Yes.

"Q. And do you recall what started the argument?

"A. Yes.

"Q. Okay. What gave rise to the argument?

"A. I asked him to leave and it became verbal and then it became physical.

"Q. And that was an argument where he eventually hit you in that incident. Correct?

"A. Yes.

"Q. Now, I'm going to move up to October 13th of '09, you're now living in Hartford at that point?

"A. Yes.

"Q. And where were you in Hartford at that point?

"A. What, my address?

"Q. Yeah.

"A. [M] Street.

"Q. And still with the same two children?

"A. Yes.

"Q. And the defendant is living with you also. Correct?

"A. Right.

"Q. And did you get—I'm going to draw your attention to October 13, I believe, of 2009, did you get in an argument again on that date?

third incidents discussed previously. With respect to the March, 2008 incident, the victim testified that she had "asked [the defendant] to leave and it became verbal and then it became physical," and he hit her. With respect to the incident on October 13, 2009, the victim testified that she and the defendant got into an argument and that he punched her in the face.

After the victim testified, and, as requested by defense counsel, the court instructed the jury regarding the limited purpose of the uncharged misconduct evidence.[7]

"A. Yes.

"Q. And what caused the argument on that date?

"A. My car had overheated and he went and helped me get to work that day, so that's how it all transpired.

"Q. And then there was an argument?

"A. Yes.

"Q. And at that point he eventually—he punched you in the face on that day. Correct?

"A. Yes.

"Q. Now, about that time did the defendant stop living with you and the children?

"A. Yes."

[7] The court instructed the jury: "Ladies and gentlemen, I just want to give you an instruction at this point. You recall in the preliminary instructions I gave you a short time ago, I mentioned evidence that may be admitted for a limited purpose. Just now you've heard [the victim] describe incidents that she stated occurred in 2008, and another incident that occurred in 2009, during the course of a relationship with the defendant, and that in each of those incidents that she described there was a physical assault by the defendant against her person.

"This evidence of alleged conduct of the defendant prior to the date of the charged offense, which as you know occurred in 2011, these prior acts are not being admitted to prove the bad character propensity or criminal tendencies of the defendant, but solely to show or to establish what the defendant's intent may have been at the time he's alleged to have committed the specific crime charged here. You may not consider the evidence of these prior acts as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate that he has a criminal propensity to engage in criminal conduct. You may consider this evidence of these prior incidents only if you believe it occurred, and further, only if you find that it logically, rationally and conclusively bears on the issue of whether or not the defendant had the intent to commit the crime that is charged in this case.

"On the other hand, if you do not believe the evidence of these prior incidents or even if you do, if you do not find that it logically, rationally,

The court instructed the jury that it could consider the victim's testimony regarding the prior acts "solely to show or to establish what the defendant's intent may have been at the time he's alleged to have committed the specific crime charged here." Further, the court warned the jury that it "may not consider the evidence of these prior acts as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate that he has a criminal propensity to engage in criminal conduct. You may consider this evidence of these prior incidents only if you believe it occurred, and further, only if you find that it logically, rationally and conclusively bears on the issue of whether or not the defendant had the intent to commit the crime that is charged in this case." Defense counsel did not object to the substance or timing of these instructions.

The defendant presented an alibi defense at trial. The defendant's mother and sister both testified that, on the evening the victim was attacked, the defendant was at his mother's home. They both testified that the defendant's mother called out to the defendant from the living room at about 6 p.m. but that he did not come downstairs from his room. The defendant's mother then walked upstairs and shook the defendant to wake him.

and conclusively bears on the issue of the defendant's intent at the time of the crime charged in this case, then you may not consider this testimony relating to the incidents in the past for any purpose whatsoever. In other words, you may not allow your mind uncritically to believe that the defendant must be or is more likely to be the person who committed the crime charged in this case merely because of the misconduct he may have directed toward [the victim] previously, nor may you believe that the defendant is or is more likely to be guilty of the offense here charged merely because of the alleged prior misconduct.

"Rather, as I have explained, you are permitted to consider this evidence of prior incidents between the defendant and [the victim] as she has just described only if you believe that they occurred, and then only to the extent that you find their occurrence may bear on the issue of whether the defendant possessed the requisite intent to commit the crime alleged in this case. These alleged prior incidents may not be considered by you for any other purpose."

The defendant's mother and sister testified that at least one police officer[8] came to their home on November 16, 2011, to speak with the defendant regarding the attack on the victim. Although the defendant's mother and sister both testified that they would have provided information to the officers on the night of the attack or at any time thereafter, had they been contacted, Officer Olabisi testified, to the contrary, that "[the defendant's mother and sister] were not cooperative, and they wouldn't provide any information."

The defendant testified in his own defense and maintained that he was not responsible for the attack on the victim. He testified that, after he brought S from school to his mother's house, he helped her with her homework, and then went upstairs to bed. He stated that the next thing he remembered was his mother waking him up. According to the defendant, S called him shortly after that, at 6:01 p.m. but the phone disconnected on her end. He testified that he was cooperative with Officer Olabisi, the first officer to arrive at the home of the defendant's mother, and that Detective Poma called him twice that night and hung up on him.

During direct examination by his counsel, the defendant acknowledged that he and the victim had troubles in the past "like any other couples . . . ." On cross-examination, the defendant stated that he had physical altercations with the victim in the past and that, after the last incident in 2009, they stopped living together.

The following colloquy between defense counsel and the defendant took place during redirect examination:

"Q. [The prosecutor] indicated that you had a physical altercation with her in the past?

[8] The defendant's sister testified that she recalled two officers coming to her mother's home. The defendant's mother testified that she recalled one officer coming to her home.

"A. In the past.

"Q. With [the victim] in the past. Correct?

"A. Yes, sir.

"Q. And you accepted responsibility for it?

"A. Yes, sir.

"Q. You pled guilty to it?

"A. Yes, sir."

During closing argument, the prosecutor reminded the jury that it could consider evidence of the defendant's prior conduct: "Now, you also heard about some prior conduct by the defendant towards [the victim]. When I asked the defendant the relationship went bad, yeah, like everybody's. But you got physical. Simple response was yes. That can be considered by you." Additionally, in setting forth the elements of the charge of assault in the first degree, the prosecutor argued that, "if you have a serious physical injury and intent to cause a serious physical [injury] . . . the question then becomes who committed the act. I'd argue that there is only evidence of one particular party that would be the defendant." During rebuttal argument, the prosecutor stated: "I can agree with [defense] counsel that the issue in this case is identification."

During closing argument, defense counsel argued: "[The defendant] said that he had a physical altercation with his wife three years before the incident. But certainly nothing even close to the level of violence we see in this case and certainly with no weapon of any type. And to his credit he took responsibility for his actions and pled guilty. If he's guilty, he pleads guilty."

After the close of evidence and closing arguments, the court, again, instructed the jury that it could consider the victim's testimony regarding the uncharged

misconduct evidence only for the limited purpose of proving that the defendant had the intent to commit the crime with which he was charged.[9] The jury found the defendant guilty of assault in the first degree. The court imposed a sentence of twenty years of incarceration.[10]

By way of a motion for a new trial, the defendant renewed his challenge to the admission of the two incidents of prior uncharged misconduct evidence. He argued that "[a]llowing the jury to hear about them even for a limited purpose was much more prejudicial than probative." Additionally, he emphasized the difference between the misconduct and the crime at issue, arguing that the prior incidents were "domestic matters" that "happened about two or three years prior to the incident" at issue and "came nowhere [near] the level of violence in this case." The court orally denied the motion. Thereafter, this appeal from the judgment of conviction followed.

The defendant's sole claim on appeal is that the trial court abused its discretion in admitting evidence of his prior misconduct. He argues that the evidence was not relevant or material, and, even if deemed to have probative value, its prejudicial effect outweighed any such probative value and was harmful. In response, the state maintains that the trial court acted well within its discretion in admitting the prior misconduct evidence after finding it relevant and not unduly prejudicial. The state additionally maintains that, even if the admission of the

[9] The language used by the court paralleled the limiting instruction it gave the jury after the victim testified regarding the uncharged misconduct evidence. See footnote 7 of this opinion.

[10] Following his conviction of assault in the first degree, the defendant admitted that, as a result of his criminal conduct, he had violated the terms of his probation as set forth under a separate docket number. The court, *Gold*, *J.*, imposed an additional sentence of three years of incarceration on the violation of probation charge to be served concurrently with the sentence on the assault conviction.

prior misconduct was improper, the defendant has not satisfied his burden of demonstrating harm resulting from its admission. We agree with the state.

"Although [e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime, such evidence is admissible if it is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior uncharged misconduct is admissible for a proper purpose, we have adopted a two-pronged test: First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Patrick M.*, 344 Conn. 565, 597, 280 A.3d 461 (2022); see Conn. Code Evid. § 4-5 ("(a) [e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person" but is admissible for other purposes, "(c) . . . such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony").

"Our standard of review on such matters is well established. The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only [when] abuse of discretion is manifest or [when] an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 598. "In determining whether there has been an abuse of

discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Franko*, 142 Conn. App. 451, 460, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013).

The defendant argues on appeal that "this court should conclude that in the present case, where the defendant was charged with using a deadly weapon to carry out an out-of-the-blue ambush style stabbing attack on his ex, more than two years after the end of their relationship, the trial court abused its discretion by admitting evidence that he twice, during their relationship, inflicted a lesser degree of violence on her without a weapon in the context of escalating domestic arguments that resulted in much less severe injuries. . . . Moreover, where the nature of the attack, as shown by the state's uncontested evidence, left little doubt that the perpetrator of the attack on [the victim] acted with the specific intent to cause serious physical injury, and where identity of the perpetrator was the central issue for the jury, the prejudicial effect of the uncharged misconduct evidence far outweighed any marginal probative value, because the jury, in attempting to resolve the identity issue, was likely to employ an impermissible inference that the defendant had a propensity to violence against [the victim]."

We first consider the probative value of the prior misconduct evidence. The trial court found that the prior misconduct evidence from (1) the vacuuming incident in March, 2008, and (2) the car overheating incident on October 13, 2009, was "probative of the defendant's intent in the present case . . . ." We agree with the court that the evidence of uncharged misconduct was relevant to the issue of intent.

The defendant was charged with assault in the first degree in violation of § 53a-59 (a) (1),[11] which is a specific intent crime. *State* v. *Sivak*, 84 Conn. App. 105, 110, 852 A.2d 812, cert. denied, 271 Conn. 916, 859 A.2d 573 (2004). Therefore, "the state bore the burden of proving the following elements beyond a reasonable doubt: (1) the defendant possessed the intent to cause serious physical injury to another person; (2) the defendant caused serious physical injury to such person . . . and (3) the defendant caused such injury by means of a deadly weapon or a dangerous instrument."[12] *State* v.

[11] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

[12] In his brief, the defendant argues that this court must examine both general intent and specific intent to cause serious physical injury. As part of his argument, the defendant cites *State* v. *Gilligan*, 92 Conn. 526, 536–37, 103 A. 649 (1918), and urges this court to limit the use of prior misconduct to instances in which the state's case is "reasonably consistent with a theory that the charged offense was committed innocently, i.e., by accident or mistake." The defendant contends that, because "[t]here is no imaginable interpretation of [the state's] evidence that would be consistent with accident or mistake," the uncharged misconduct evidence was not relevant to prove general intent, i.e., voluntariness of action.

The state contends, inter alia, that the defendant's argument, premised on *Gilligan*, presents a new legal ground that was not raised before the trial court and refers this court to our recent decision in *State* v. *McKinney*, 209 Conn. App. 363, 385–88, 268 A.3d 134 (2021), cert. denied, 341 Conn. 903, 268 A.3d 77 (2022). We address the defendant's argument because it relates to his claim before the trial court that the uncharged misconduct evidence was not relevant to intent.

We find the defendant's reliance on *Gilligan* to be misplaced. In so deciding, we are persuaded by our Supreme Court's rationale in *State* v. *Beavers*, 290 Conn. 386, 963 A.2d 956 (2009), in which the court stated: "We disagree . . . with the defendant's reliance on *State* v. *Gilligan*, [supra, 92 Conn. 526], wherein a convalescent home owner was convicted of murdering one of her patients by arsenic poisoning. On appeal, this court concluded that the trial court had abused its discretion when, for purposes of proving malice and intent, as well as absence of accident or mistake, it admitted into evidence the fact that three of the home's other patients also had recently died of arsenic poisoning. . . . We view the venerable *Gilligan* decision as confined to its facts, because it focuses largely on the unduly

Holmes, 75 Conn. App. 721, 740, 817 A.2d 689, cert. denied, 264 Conn. 903, 823 A.2d 1222 (2003).

At the outset, we address the defendant's contention that, because intent was not at issue during the trial and he pursued an alibi defense, the court abused its discretion in admitting the uncharged misconduct evidence under the intent exception to the hearsay rule as set forth in § 4-5 (c) of the Connecticut Code of Evidence. We disagree.

"[I]ntent, or any other essential element of a crime, is *always at issue* unless directly and explicitly admitted before the trier of fact." (Emphasis in original; internal quotation marks omitted.) *State* v. *Irizarry*, 95 Conn. App. 224, 233–34, 896 A.2d 828, cert. denied, 279 Conn. 902, 901 A.2d 1224 (2006); see also *Estelle* v. *McGuire*, 502 U.S. 62, 69–70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (noting that "prosecution's burden to prove every element of [a] crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense" and holding that extrinsic act evidence is not constitutionally inadmissible merely because it relates to issue that defendant does not actively contest). "Because intent is almost always proved, if at all, by circumstantial evidence, prior misconduct evidence, where available, is often relied

prejudicial impact of that uncharged misconduct evidence in light of the fact that the state already had introduced ample evidence of absence of mistake or accident, including that the victim had received multiple large doses of arsenic, the defendant's delay in seeking medical attention and 'unseemly haste' in getting rid of the body, the defendant's failure to notify the victim's relatives of his death, a loan of money from the victim to the defendant, and the defendant's impending need for the victim's room for another paying patient." (Citation omitted.) *State* v. *Beavers*, supra, 405–406 n.20; see also *State* v. *Gilligan*, supra, 533 ("[t]he authorities on the subject are so numerous, and the relation between the commission of one offense and of another similar offense depends so much upon the nature of the offense and on the circumstances of each case, that we confine our discussion to the crime of murder by poisoning").

upon." (Internal quotation marks omitted.) *State* v. *Chyung*, 325 Conn. 236, 263, 157 A.3d 628 (2017).

In its oral ruling on the admissibility of the uncharged misconduct evidence, the court stated that the defendant had pleaded not guilty to the charge of assault in the first degree and that "all elements remain challenged by the defendant in the eyes of the law even if the defendant plans to pursue a defense that centers not on his mental state but on whether or not he was the perpetrator of the crime." The defendant did not directly and explicitly admit before the trier of fact that he had the intent to cause serious physical injury. Therefore, the state bore the burden of proving that the defendant had the intent to cause serious physical injury to the victim. See *State* v. *Erhardt*, 90 Conn. App. 853, 860 n.2, 879 A.2d 561 ("The defendant argues that intent was not an issue in this case because he testified that the victim injured herself and that intent was not a focus of the state's case. That argument is meritless. The defendant did not admit that he had an intent to cause physical injury; therefore, this was a contested issue that the state had to prove, and evidence regarding that issue was relevant and material."), cert. denied, 276 Conn. 906, 884 A.2d 1028 (2005). The trial court reasonably could have determined that the uncharged misconduct evidence was relevant to prove intent.

The defendant further argues that the uncharged misconduct evidence was irrelevant to whether he intended to cause serious physical injury to the victim on the night of the charged conduct because "there must be some particular, articulable connection between the uncharged misconduct and the specific intent element the state is required to prove." Specifically, the defendant claims that "[t]he absence of similarity between the charged and uncharged misconduct severely limited its probative value . . . ." Additionally, he contends that, "even if the defendant acted intentionally in 2008

and 2009 [the years in which the uncharged misconduct incidents occurred], it is not at all clear that he acted with an intent to cause serious physical injury." The state responds that the uncharged misconduct evidence "placed their relationship in context and demonstrated [the defendant's] attitude and motivation against [the victim], and, thus, his intent to engage in an assault that caused [the victim] serious physical injury." We agree with the state.

In admitting the prior misconduct evidence for the purpose of showing the defendant's intent to commit assault in the first degree, the court relied on *State* v. *Anthony L.*, supra, 179 Conn. App. 525, and *State* v. *Morales*, supra, 164 Conn. App. 180, for the principle that, "when instances of a defendant's prior misconduct involved the same victim as the crimes for which the defendant is presently being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that victim and thus of his intent as to the incident in question . . . ."

In *Anthony L.*, the defendant appealed from his conviction of sexual assault in the first degree, risk of injury to a child, and sexual assault in the third degree, claiming in relevant part "that the trial court abused its discretion by admitting evidence of uncharged misconduct because the evidence was more prejudicial than probative." *State* v. *Anthony L.*, supra, 179 Conn. App. 523. On appeal, this court determined that prior misconduct evidence of the defendant's "sexual interest in the complainant, upon which the defendant acted by sexually abusing the complainant before and during the charged period," was relevant to the defendant's motive and intent. Id., 525. Specifically, this court determined that, "[w]hen instances of a criminal defendant's prior misconduct involve the same [complainant] as the crimes for which the defendant is presently being tried, those acts are especially illuminative of the defendant's

motivation and attitude toward the [complainant], and, thus, of his intent as to the incident in question. . . . [Therefore] because the [prior] misconduct . . . involved the same complainant and was of the same nature as the misconduct charged, it was material to prove the defendant's lustful inclinations toward the complainant." (Citations omitted; internal quotation marks omitted.) Id., 525–26. Similarly, the court in the present case reasonably could have found that the prior misconduct evidence, specifically, the defendant's punching and hitting the victim in the head and mouth, was sufficiently probative of the defendant's intent in the present case because it involved the same victim and was of a similar nature as the charged conduct—repeated stabs to the victim's head and body. See id., 526; see also *State* v. *Erhardt*, supra, 90 Conn. App. 860 ("prior incidents of physical violence by the defendant toward the same victim are relevant and material to indicate that he intended to cause the victim physical injury in the stabbing incident").

Our law does not require that the uncharged misconduct evidence be identical to the charged crime to be probative of the defendant's intent. See *State* v. *Erhardt*, supra, 90 Conn. App. 860 ("[t]he high degree of similarity required for admissibility on the issue of identity is not required for misconduct evidence to be admissible on the issue of intent" (internal quotation marks omitted)). In the present case, the two incidents, involving the defendant's assault of the victim by hitting and punching her, were sufficiently similar to the charged assault on the victim, which involved the defendant stabbing her. See *State* v. *Epps*, 105 Conn. App. 84, 94, 936 A.2d 701 (2007) (upholding admission of evidence of prior misconduct, as relevant to intent, involving defendant's punching and hitting victim where charged incident involved defendant's pouring gasoline on victim and igniting it, resulting in extensive burns), cert.

denied, 286 Conn. 903, 943 A.2d 1102 (2008); *State* v. *Erhardt*, supra, 858–60 (upholding admission of evidence of prior misconduct, as relevant to intent, involving defendant's head-butting victim where charged incident involved defendant's cutting of victim's face with knife and holding knife to her throat).

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable." (Internal quotation marks omitted.) *State* v. *Kantorowski*, 144 Conn. App. 477, 487, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013). Evidence that the defendant previously had struck the victim made it more likely that he intended to cause her serious physical injury by stabbing her because it was probative of "the defendant's attitude toward the well-being of the victim in the present case." *State* v. *Urbanowski*, 163 Conn. App. 377, 405–406, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017). We therefore conclude that the prior misconduct evidence was relevant and probative and, thus, admissible for the purpose of establishing the defendant's intent to commit assault in the first degree.

Our determination that the evidence was relevant to intent does not contravene the guidance of our Supreme Court's recent decision in *State* v. *Juan J.*, 344 Conn. 1, 276 A.3d 935 (2022).[13] In that case, the defendant was

[13] *State* v. *Juan J.*, supra, 344 Conn. 1, was decided after oral argument in this appeal. This court ordered both parties to file supplemental briefs addressing the impact, if any, of that decision on the present appeal, and the defendant and the state filed their briefs on July 21 and 22, 2022, respectively. In his supplemental brief, the defendant argues that *Juan J.* is controlling authority "establishing the inadmissibility of uncharged misconduct evidence to prove general intent in this case." He further argues that *Juan J.* also supports a conclusion that the uncharged misconduct evidence in the present case was inadmissible to prove specific intent because its prejudicial impact outweighed its probative value. The state argues that "[t]he rule

convicted of the following general intent crimes: one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), arising out of two charged incidents of sexual abuse involving inappropriate touching. Id., 5. At trial, the court admitted uncharged misconduct evidence of prior incidents of sexual abuse by the defendant against the complainant for the purpose of showing the defendant's intent. Id., 8–9. Specifically, in addition to testifying regarding the two charged incidents of inappropriate touching, the complainant testified that "the defendant touched her inappropriately '[o]ver ten times,' that the inappropriate touching took place '[f]requently'; she agreed with the prosecutor that the touching took place 'about ten times and [that] it was essentially the same conduct each of those times,' and she testified that the touching continued after December 24, 2015, until she began living with [her older cousin] in June, 2016." Id., 9. The court also admitted into evidence as full exhibits video recordings of two forensic interviews of the complainant, in which she stated, among other things, that the touching occurred "all the time" and "every other day."[14] (Internal quotation marks omitted.) Id., 10. She also stated in one of the forensic interviews that "the defendant had

created in *Juan J.* precluding the admission of prior misconduct evidence on the issue of intent in the prosecution of a general intent crime, where the theory of defense is that the conduct did not occur at all, does not apply factually or legally to the present case. Indeed, to conclude that admission of the prior misconduct evidence in the present case was improper under *Juan J.* would require this court to extend *Juan J.*'s holding, a result that finds no support in our law and runs contrary to the very rationale undergirding the Supreme Court's analysis and outcome in *Juan J.*"

[14] The video recordings were admitted into evidence under the hearsay exception for medical diagnosis and treatment set forth in § 8-3 (5) of the Connecticut Code of Evidence. See *State* v. *Juan J.*, supra, 344 Conn. 10.

performed oral sex on her, put his mouth on her breasts, and digitally penetrated her anus." Id.

On appeal, the defendant in *Juan J.* argued that the trial court had abused its discretion in admitting the uncharged misconduct evidence, as "intent was not presumptively at issue because he was charged only with general intent crimes, not specific intent crimes," and "intent was not affirmatively at issue because his theory of defense was that the conduct never happened at all, not that the conduct occurred as a result of unintentional actions." Id., 17.

Our Supreme Court in *Juan J.* first recognized "the fine line between using uncharged misconduct to prove intent and using it to show the defendant's bad character or propensity to commit the crime charged." Id., 20. After discussing the risk that the evidence will be used improperly, the court stated: "In light of these concerns, the state's introduction of uncharged misconduct is properly limited to cases in which the evidence is needed to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove." (Internal quotation marks omitted.) Id. The court then set forth the elements the state was required to prove and noted that all the crimes charged were crimes of general intent. See id. The court turned to a discussion of how the burden of proof differs when prosecuting general intent crimes as opposed to specific intent crimes, "in which intent is a legislatively prescribed element that the state must prove beyond a reasonable doubt unless explicitly admitted by the defendant." Id., 22.[15] Ultimately, our Supreme Court held that, "in a

[15] The court in *Juan J.* rejected the state's reliance on cases involving specific intent crimes "to support the proposition that the defendant's intent in a general intent case is always in issue unless directly and explicitly admitted before the trier of fact." (Internal quotation marks omitted.) *State* v. *Juan J.*, supra, 344 Conn. 22 n.9. The court reiterated that "the state's burden of proving intent in a specific intent crime case differs significantly from its burden in a general intent crime case and unfairly borders on

general intent crime case, in which the theory of defense is that the conduct did not occur at all, rather than a theory of defense in which the conduct occurred unintentionally, uncharged misconduct is irrelevant and inadmissible to prove intent." Id., 4–5. Thus, the court's holding is not controlling of the present case, in which, as we already have explicated, the defendant was charged with a specific intent offense, and the state, at trial, bore the burden of proving beyond a reasonable doubt that he acted with the specific intent required for the commission of the charged offense. Rather, the purpose for admitting the uncharged misconduct evidence in the present case—to prove that the defendant had the specific intent to cause serious physical harm—falls squarely within the limited parameters of *Juan J.*, which permit the introduction of uncharged misconduct in cases "in which the evidence is needed to prove a fact that the defendant has placed, or conceivably will place, in issue, *or a fact that the statutory elements obligate the government to prove*." (Emphasis added; internal quotation marks omitted.) Id., 20.

Next, we address whether the evidence was unduly prejudicial. "To determine whether the prejudicial effect of evidence outweighs its probative value, a trial court is required to consider whether the evidence may (1) unduly arouse the jury's emotions, hostility or sympathy, (2) create a side issue that will unduly distract the jury from the main issues, (3) consume an undue amount of time, or (4) unfairly surprise the defendant, who, having no reasonable ground to anticipate the evidence, is . . . unprepared to meet it. . . . We defer to the ruling of the trial court because of its unique position to [observe] the context in which particular evidentiary issues arise and its preeminent position to

propensity evidence when used in such a way. The state cannot use the logic of specific intent cases to overwhelm a general intent case with uncharged misconduct." Id.

weigh the potential benefits and harms accompanying the admission of particular evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 600.

"We are mindful that [w]hen the trial court has heard a lengthy offer of proof and arguments of counsel before performing the required balancing test, has specifically found that the evidence was highly probative and material, and that its probative value significantly outweighed the prejudicial effect, and has instructed the jury on the limited use of the evidence in order to safeguard against misuse and to minimize the prejudicial impact . . . we have found no abuse of discretion. . . . Proper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct. . . . Furthermore, a jury is presumed to have followed a court's limiting instructions, which serves to lessen any prejudice resulting from the admission of such evidence." (Internal quotation marks omitted.) *State* v. *Wilson*, 209 Conn. App. 779, 821, 267 A.3d 958 (2022).

The defendant argues that "admissibility for the purpose of proving intent in the present case could only have been based on reasoning that the past incidents of violence by the defendant against [the victim] made it more likely that the defendant wanted to hurt [the victim] on November 16, 2011, and that he therefore committed the charged offense." He argues that, in this context, the evidence was equivalent to prohibited propensity evidence.[16] The state responds that "the trial court properly analyzed the prejudicial effect of admitting the prior misconduct vis-à-vis its probative value

[16] In support of his argument, the defendant relies on precedent from various federal circuit courts of appeals that "employ an analysis to assist in determining whether uncharged misconduct evidence ostensibly admitted to prove one of the permissible purposes, such as intent, actually runs afoul of the impermissible purpose of showing propensity." Given the availability of appellate authority in our state, we do not find the federal cases persuasive.

and concluded that the prior misconduct did not create undue prejudice." We agree with the state.

After a hearing on the admissibility of the uncharged misconduct evidence, the trial court carefully considered the state's offer of four incidents of misconduct and the defendant's arguments in opposition and determined that evidence of only two of the incidents was admissible. In explicating its determination as to each incident, the court expressly considered the "creation of side issues, the possible risk of jury confusion, or a risk that the jury's emotions would be so aroused by learning of these prior incidents so as to create undue prejudice." Finally, the court limited the purpose for and manner by which the state could introduce the evidence. Specifically, the court limited the state to introduction of the evidence for the purpose of intent, prohibited the state from questioning the victim "regarding police involvement or court proceedings that may have followed the incident[s]" and required the state to "elicit testimony regarding these two prior incidents in a non-inflammatory manner." See *State* v. *Patterson*, 344 Conn. 281, 296, 278 A.3d 1044 (2022) (finding significant "the degree to which the trial court exercised its discretion to limit the extent of the evidence of the prior shootings it admitted").

Moreover, in ruling on the admissibility of the two incidents of uncharged misconduct, the trial court stated that, "when compared to the facts claimed in the charged case, [the uncharged misconduct evidence was] not such as is likely to arouse the jury's emotions." Specifically, the court noted that the misconduct evidence "does not involve the use of a knife" and that it is not "so serious . . . ." In his principal brief, the defendant acknowledges that the uncharged misconduct evidence did not involve a weapon and was not as serious as the charged crime.

The trial court carefully reasoned that the conduct and injuries underlying the uncharged misconduct were substantially less severe than that involved in the charged crime. See *State* v. *Patrick M.*, supra, 344 Conn. 601 ("[t]his court has repeatedly held that [t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative viciousness in comparison with the charged conduct" (internal quotation marks omitted)); *State* v. *Patterson*, supra, 344 Conn. 298 (same). As a result of the charged conduct, the victim suffered multiple stab wounds to her head, back, arm, and leg, which required three surgeries and continues to cause her discomfort. Evidence that the defendant previously hit and punched the victim was far less severe than the conduct and injuries involved in the charged offense and, therefore, was unlikely to unduly arouse the emotions of the jurors. See *State* v. *Patrick M.*, supra, 601; *State* v. *Patterson*, supra, 298.

Additionally, the introduction of the uncharged misconduct evidence did not consume an undue amount of trial time or create side issues, given that only two of twenty-six pages of the victim's testimony referenced the misconduct, and the prosecutor did not belabor his examination of her. See *State* v. *James G.*, 268 Conn. 382, 401, 844 A.2d 810 (2004) (admission of prior misconduct evidence did not result in "trial within a trial" when it consisted of only twenty-five of approximately 500 pages of trial transcript and "state's attorney did not belabor his examination of [the witness]" (internal quotation marks omitted)). Consistent with the court's ruling, the prosecutor's questioning of the victim was limited and not inflammatory. See footnote 6 of this opinion. The victim testified that she and the defendant got into an argument in March, 2008, "[she] asked him to leave and it became verbal and then it became physical," and the defendant hit her. Additionally, the victim testified that, on October 13, 2009, she and the defendant

got into an argument concerning her car overheating, and he punched her in the face.

Moreover, the admissibility of the prior misconduct evidence was litigated outside the presence of the jury, and the defendant does not claim that he was unfairly surprised by the evidence. The court carefully considered the state's proffer, of both the misconduct evidence and the conduct underlying the charged offense, and the defendant's objections, and ultimately permitted the state to introduce into evidence only two of four incidents in a "non-inflammatory manner." See *State* v. *Beavers*, 290 Conn. 386, 406, 963 A.2d 956 (2009) ("the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect mitigates against a finding of abuse of discretion" (internal quotation marks omitted)).

Last, it is significant that the court gave a limiting instruction to the jury on three separate occasions: during its preliminary instructions, after the victim testified to the uncharged misconduct evidence, and in its final charge to the jury. By instructing the jury to consider the evidence solely on the issue of intent, the court restricted the parameters of the state's use of the prior misconduct evidence, thereby limiting its prejudicial effect. See footnote 7 of this opinion; see also *State* v. *Kantorowski*, supra, 144 Conn. App. 492 (court did not abuse its discretion in admitting uncharged misconduct evidence where "the court heard a detailed offer of proof and arguments of counsel before it performed the required balancing test" and confined state's use of uncharged misconduct evidence to limit prejudice). "Absent evidence to the contrary, we presume that the jury followed the court's limiting instruction." (Internal quotation marks omitted.) *State* v. *Wilson*, supra, 209 Conn. App. 827.

Considering the record as a whole, we cannot conclude that the trial court abused its discretion in

determining that the probative value of the prior misconduct evidence outweighed its prejudicial effect.[17]

Having determined that the prior uncharged misconduct evidence was properly admitted, we need not address the defendant's argument that the admission of that evidence was harmful. Nevertheless, even if we were to assume, arguendo, that the court improperly admitted the evidence, we agree with the state that the defendant has not satisfied his burden of proving that the admission was harmful.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *State* v. *Urbanowski*, supra, 163 Conn. App. 407. "[W]hether [an improper evidentiary ruling that is not constitutional in nature] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be

[17] "The trial court has some degree of choice in balancing the probative value of uncharged misconduct evidence against its prejudicial effect . . . and . . . a different trial court might arrive at a different conclusion. We hold only that, on the present record, the trial court's decision to admit the challenged evidence was not arbitrary or unreasonable. See, e.g., *State* v. *Smith*, [313 Conn. 325, 336, 96 A.3d 1238 (2014)] ([T]he question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable.)." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 602 n.13.

whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id.

The defendant argues that the admission of the prior misconduct evidence was harmful because "the state's case was not a particularly strong one." Specifically, the defendant points to the "substantial alibi evidence" that he presented at trial in comparison to the victim's "inconsistent" testimony and J's testimony that "his memory of the events . . . was poor." Additionally, the defendant contends that "it is highly likely that the evidence that the defendant had a history of violence toward [the victim] influenced the verdict" because it was "precisely the type of evidence that has the tendency to excite jurors' passions and influence their judgment." The state responds that its evidence was strong in comparison to the defendant's alibi defense and that the trial court's "careful limitations on the introduction of the evidence reduced any harm." We agree with the state.

The state's case was strong. The victim provided a detailed account of the incident and a description of her injuries, which were corroborated by photographs and additional testimony presented by the state. Additionally, the victim responded affirmatively when the prosecutor asked her whether, on the night of the attack, she "got a good look" at her assailant. She further testified that, within minutes after the attack, she told J, "your father stabbed me." J corroborated the victim's identification and testified that he told the police, on the night of the attack, that the victim's assailant was his father. Moreover, S's testimony established that the defendant had left his mother's home thirty minutes prior to the victim's arrival and that he knew that the victim and S were heading home. Finally, when

S called the defendant and told him about the attack on the victim, the defendant's phone line immediately went dead.

In contrast, the defendant's alibi defense was not corroborated by the testimony of uninterested third parties but rested on his testimony and that of his mother and sister. The alibi defense also was not based on uncontroverted evidence, for it was explicitly contradicted by the testimony of the investigating police officers. Although the defendant's mother and sister testified that the defendant was asleep in his bed at 6 p.m., a few minutes after the attack, they never mentioned that to the officers who came to their home, despite knowing that the defendant was being questioned about his whereabouts that evening. Moreover, despite the contention of the defendant's mother and sister that they would have provided information to the officers had they been contacted, Officer Olabisi testified that "they were not cooperative, and they wouldn't provide any information." Additionally, the defendant testified that he was cooperative with Officer Olabisi's requests on the night of the attack and that Detective Poma had been "harassing" him over the phone that night. In comparison, the officers testified that the defendant would not provide any form of identification upon request, that he refused to speak with them a second time because he was "agitated," and "that his phone was broken."

Moreover, the court took significant precautions to ensure that the circumstances surrounding admission of the prior misconduct evidence were fair. As previously discussed, the trial court ordered the prosecutor not to elicit evidence of what, if any, law enforcement involvement there was or criminal charges that arose out of the incidents. Defense counsel, however, elicited additional testimony concerning past physical altercations and incorporated that testimony into his closing

argument. As noted previously in this opinion, on direct examination, the defendant acknowledged in his testimony that he and the victim had troubles in the past "like any other couples . . . ." On cross-examination, he stated that he had physical altercations with the victim in the past and that, after the last incident in 2009, they stopped living together. On redirect examination, defense counsel elicited testimony from the defendant that he had pleaded guilty following a past physical altercation with the victim. During closing argument, defense counsel argued: "[The defendant] said that he had a physical altercation with his wife three years before the incident. But certainly nothing even close to the level of violence we see in this case and certainly with no weapon of any type. And to his credit he took responsibility for his actions and pled guilty. If he's guilty, he pleads guilty." Thus, defense counsel himself emphasized the challenged evidence in his closing argument.

The trial court also restricted the victim's testimony about the prior misconduct to exclude potentially inflammatory details and instructed the jury, on multiple occasions, not to consider the prior misconduct as evidence of the defendant's propensity to commit the charged crime. See footnote 7 of this opinion; see also *State* v. *Raynor*, supra, 337 Conn. 565 n.23 (noting that "limiting instructions may feature more prominently in a harmless error analysis"). The prosecutor followed the trial court's orders when eliciting testimony from the victim regarding the uncharged misconduct evidence, which was not a prominent part of the state's case. These careful limitations on the introduction of the prior misconduct evidence reduced any harm to the defendant. See *State* v. *Urbanowski*, supra, 163 Conn. App. 408–10 (lack of prominence of uncharged misconduct evidence in addition to detailed limiting instructions are factors that mitigate against finding of harm).

Last, we note that the uncharged misconduct was less severe than the charged conduct and that the prosecutor's reference to the uncharged misconduct in his closing argument was brief. Cf. *State* v. *Juan J.*, supra, 344 Conn. 33 (admission of uncharged misconduct evidence was harmful, and trial court's limiting instructions could not "cure the potential prejudice to defendant" where uncharged misconduct was "far more severe and frequent" than charged conduct and prosecutor relied on it in closing argument (internal quotation marks omitted)).

In light of the strength of the state's case in comparison to the defendant's alibi defense, and the tailored introduction of the uncharged misconduct evidence, we are left with a fair assurance that the evidence did not substantially affect the verdict. Therefore, even if the court's evidentiary ruling was improper, the defendant has failed to demonstrate that the admission of the uncharged misconduct evidence was harmful.

The judgment is affirmed.

In this opinion SUAREZ, J., concurred.

BISHOP, J., dissenting. In 1990, noted scholar Professor Edward J. Imwinkelried[1] wrote that the admissibility of uncharged misconduct evidence is the single most important issue in contemporary law. While I am not gifted with such an encyclopedic understanding of the history of the law, it is evident that the issue of whether evidence of prior misconduct should be admitted against a defendant in a criminal trial continues to vex

[1] Edward J. Imwinkelried is the Edward L. Barrett, Jr., Professor of Law Emeritus at the University of California, Davis School of Law. Professor Imwinkelried is the author of several treatises and law review articles dealing with evidentiary issues, including, most notably, the topic of the admission of prior misconduct evidence in a criminal trial.

our courts.[2] This difficult case fits Imwinkelried's profile of cases involving this most important issue.

While I take no issue with the majority's recitation of facts from the underlying trial, I note only that many facts relating to the identification of the defendant, Marcello E., as the assailant and facts relating to his behavior on the day of the assault were contested at trial. The jury could, and apparently did, accept the facts as presented by the state.

Prior to trial, the defendant filed a motion for disclosure of uncharged misconduct. On October 31, 2019, the court held a hearing on the admissibility of the prior uncharged misconduct evidence. The defendant asked the court to exclude, at trial, any evidence of the defendant's prior violence toward the victim. Before the trial evidence started, the court indicated that the state would be permitted to introduce the testimony of the

[2] See E. Imwinkelried, "The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition," 51 Ohio St. L.J. 575, 576 (1990). In making this assertion, Professor Imwinkelried was referring specifically to rule 404 (b) of the Federal Rules of Evidence concerning the admissibility of prior bad acts, a federal rule with relevant parallels to § 4-5 of the Connecticut Code of Evidence. See id., 575–76. Indeed, a review of Westlaw indicates that, since 2002, the admissibility of evidence of prior misconduct was an issue in 355 cases in the United States Court of Appeals for the Second Circuit and, in the same time period, the parallel issue of the admissibility of prior misconduct under the Connecticut Code of Evidence was a salient issue in 245 cases in this court. Whether those numbers support the accuracy of Imwinkelried's claim, the issue of the admission of prior misconduct evidence in a criminal trial remains a dynamic issue for trial and reviewing courts because the improper admission of prior misconduct evidence puts at risk a defendant's right to the presumption of innocence. As Judge Clark of the United States Court of Appeals for the Fifth Circuit aptly put it: "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes." *United States* v. *Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

victim that, two and three years before the assault at issue, the defendant had punched her in the face.[3]

At trial, the victim testified that, in 2008, three years before the assault in question, while she and the defendant were living together, they had an argument during which she "asked [the defendant] to leave and it became

[3] Unlike the situation in the present case, in which the court determined the admissibility of the prior misconduct evidence before the start of evidence, other jurisdictions resolve this issue after the close of the state's case-in-chief. To minimize the risk of undue prejudice in the introduction of prior misconduct evidence, the United States Court of Appeals for the Second Circuit has adopted an approach that appears fair to both the government and the defendant. In *United States* v. *Bok*, 156 F.3d 157, 166 (2d Cir. 1998); the court opined: "Although it is generally the favored practice for the trial court to require the government to wait before putting on its similar act evidence until the defendant has shown that he will contest the issue of intent . . . such evidence is admissible during the [g]overnment's case-in-chief if it is apparent that the defendant will dispute that issue." (Citation omitted; internal quotation marks omitted.) Id.; see also *United States* v. *Inserra*, 34 F.3d 83, 90 (2d Cir. 1994); *United States* v. *Muhammad*, Docket No. 3:12CR00206 (AVC), 2013 WL 6091860, *1 (D. Conn. November 19, 2013).

Most recently, in *State* v. *Juan J.*, 344 Conn. 1, 24 n.12, 276 A.3d 935 (2022), our Supreme Court expressed its own concern about the procedures utilized in Connecticut for the introduction of prior misconduct evidence in criminal trials. The court acknowledged that it previously had expressed a willingness to "leave it to the sound discretion of our trial courts to determine the precise procedure to employ in a particular case, consistent with their duty to safeguard against undue prejudice in cases involving uncharged misconduct evidence." (Internal quotation marks omitted.) Id. The court continued: "We note with approval, however, procedures employed by several other state and federal courts when defendants have sought to remove the issue of intent through a particular defense theory, thereby implicating how trial courts should handle the admission of uncharged misconduct evidence. By detailing the procedures undertaken in these jurisdictions, we merely intend to emphasize the caution that courts must take in admitting this evidence and that, often, a court's appropriate exercise of its discretion becomes more informed as the trial plays out." Id. The court then continued by citing examples in both state courts and in the federal courts within the Second Circuit. Id., 24–25 n.12. Our Supreme Court's gentle reminder to the trial courts is noteworthy. A trial procedure such as that recommended by the Second Circuit, which does not permit the government to introduce prior misconduct evidence in its case-in-chief unless it knows that the issue for which such evidence is offered is actually at issue, would alleviate the risk of undue prejudice that lingers in our present practice of permitting the state to introduce such evidence in its case-in-chief whether or not the defendant actually contests the particular issue.

verbal and then it became physical." The prosecutor then asked: "And that was an argument where he eventually hit you in that incident. Correct?" The victim responded, "[y]es." The victim also testified to an incident in 2009 when she and the defendant were living together in Hartford. The victim testified that she and the defendant again got into an argument. In her answer to the prosecutor's question of whether he had punched her in the face on that day, the victim said, "[y]es."

The majority has concluded that this evidence of the defendant's prior misconduct involving the victim was admissible because it was relevant to prove intent, more probative than prejudicial, and that the defendant was not harmed by its admission. Respectfully, I disagree. I believe, instead, that the evidence of the defendant's prior misconduct was not relevant to prove the intent of the assailant to attack and stab the victim multiple times with a knife or the assailant's intent to thereby cause her serious physical injury. Rather, I believe, the only purpose and likely effect of this evidence was to improperly demonstrate to the jury that the defendant had the propensity to commit acts of domestic violence against the victim.[4] Additionally, and contrary to the

[4] Although I believe that the evidence of the defendant's prior assaults on the victim should not have been admitted as proof of intent because the only purpose of this evidence was to prove the defendant's propensity toward violence against the victim, there may, in fact, be merit in allowing such evidence to prove propensity in a domestic violence case, as some writers have urged. See, e.g., A. Kovach, note, "Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future," 2003 Ill. L. Rev. 1115 (2003); D. Ogden, comment, "Prosecuting Domestic Violence Crimes: Effectively Using Rule 404 (b) to Hold Batterers Accountable for Repeated Abuse," 34 Gonz. L. Rev. 361 (1998); P. Vartabedian, comment, "The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence," 47 Santa Clara L. Rev. 157 (2007). But see E. Collins, "The Evidentiary Rules of Engagement in the War against Domestic Violence," 90 N.Y.U. L. Rev. 397, 415–22 (2015).

In Connecticut, our Supreme Court already has recognized what has been termed battered women's syndrome. In *State* v. *Vega*, 259 Conn. 374, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002), our Supreme Court concluded "that evidence of the defendant's

conclusion reached by the majority, I believe this evidence was harmful to the defense. For these reasons, I respectfully dissent.

As the majority has accurately reported, § 4-5 of the Connecticut Code of Evidence generally prohibits the

prior incidences of violence toward the victim was relevant to the prosecution's case in that it demonstrated the manifestation of the battered women's syndrome as it affected the victim" and, "therefore, that the evidence of the defendant's prior misconduct substantiates the theory that there existed a system of criminal activity on the part of the defendant." Id., 398; see also *State* v. *Borrelli*, 227 Conn. 153, 172–73, 629 A.2d 1105 (1993).

Thus, it appears that we already have come part of the way toward allowing prior misconduct in domestic violence cases as propensity evidence without explicitly acknowledging we are doing so. For example, in *State* v. *Kantorowski*, 144 Conn. App. 477, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013), this court opined: "When instances of a criminal defendant's prior misconduct involve the same victim as the crimes for which the defendant presently is being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that victim, and, thus, of his intent as to the incident in question." (Internal quotation marks omitted.) Id., 488; accord *State* v. *Morlo M.*, 206 Conn. App. 660, 690–91, 261 A.3d 68, cert. denied, 339 Conn. 910, 261 A.3d 745 (2021). These cases reflect an understanding that, in matters of domestic violence, past violent behavior by a defendant against the victim is a reasonable predictor of future similar bad acts. Perhaps it may be time for us to explicitly acknowledge this fact in order not only to recognize that domestic violence is often a repeated offense characterized by escalating levels of coercive control, often starting out as verbal and emotional control and resulting, over time, in incidents of serious physical violence, as already acknowledged by our Supreme Court in *State* v. *Vega*, supra, 259 Conn. 396–98. Finally, it should be noted that the phrase "battered women's syndrome" has been criticized for its focus on the victim and not on the behavior of the assailant; the suggestion has been made that, in discussing this phenomenon of escalating bad behavior in a domestic relationship, the term "coercive control" is more apt. See E. Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control," 58 Alb. L. Rev. 973, 975–76 (1995).

In addition to scholarly writings, the issue of whether in cases of domestic violence, past acts of violence by a defendant against the same victim should be admitted for propensity purposes has been the subject of recent rule making and legislation in other states. In Alaska, the legislature amended its Code of Evidence to provide, inter alia: "In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. . . ." Alaska R. Evid. 404 (b) (4).

California took a similar tack when its legislature enacted a provision within the state's Evidence Code in 1996 to permit the admission of prior acts of domestic violence in certain situations as propensity evidence. See generally *People* v. *Merchant*, 40 Cal. App. 5th 1179, 1192, 253 Cal. Rptr. 3d 766 (2019) (discussing § 1109 of Evidence Code, which "reflects the [l]egislature's determination that in domestic violence cases, similar prior offenses are uniquely probative of a defendant's guilt on a later occasion"), review denied, California Supreme Court, Docket No. S259179 (January 22, 2020).

Akin to California's approach, Illinois amended its relevant statute, although not as broadly, to permit evidence of a defendant's prior conviction for domestic battery against the same victim. In part, the Illinois statute provides: "Evidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member . . . stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution for any of these types of offenses when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant." 725 Ill. Comp. Stat. Ann. 5/115-20 (a) (West 2008). Interpreting that statute, the Illinois Supreme Court in *People* v. *Chapman*, 965 N.E.2d 1119, 1124 (Ill. 2012), held that the statute had partially abrogated the common-law rule against the admission of propensity evidence. See also *People* v. *Dabbs*, 239 Ill. 2d 277, 284–85, 940 N.E.2d 1088 (2010), cert. denied, 563 U.S. 964, 131 S. Ct. 2158, 179 L. Ed. 2d 942 (2011).

In Michigan, its legislative body amended that state's Code of Evidence in 2019 to permit the admission of evidence of past acts of domestic violence for any purpose for which the offer is relevant, thus removing its ban against propensity evidence in the domestic violence context. See Mich. Comp. Laws Serv. § 768.27b (1) (LexisNexis Cum. Supp. 2021). Subsequent to the passage of this amendment, the Michigan Appeals Court interpreted the statute as permitting evidence of past acts of domestic violence as a demonstration of the defendant's propensity to commit acts of violence against women who were or had been romantically involved with him. See *People* v. *Farmer*, Docket No. 345496, 2020 WL 3120259, *10 (Mich. App. June 11, 2020).

Although Iowa has not adopted a rule expressly permitting propensity evidence in cases involving domestic violence, the Iowa Court of Appeals tacitly acknowledged that such evidence may be admitted to prove propensity in domestic violence cases because, in domestic violence, "each incident is 'connected to the others.' " *State* v. *Syperda*, Docket No. 18-1471, 2019 WL 6893791, *11 (Iowa App. December 18, 2019) (decision without published opinion, 941 N.W.2d 596). In reaching this conclusion, the court in *Syperda* appears to have carved out a common-law exception to the ban against propensity evidence to accommodate the reality that domestic violence cases are often repeated, interconnected offenses. See id.

Finally, Colorado amended its criminal code in 2021 to permit evidence of prior misconduct in certain domestic violence criminal trials. In its introduction to this amendment to its code, the Colorado General Assembly opined: "The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse and can consist of

admission of evidence of prior misconduct to prove the bad character, propensity, or criminal tendency of the defendant, with certain exceptions. One of those exceptions, the one relied on in the case at hand, is that such evidence may be admissible to prove the defendant's intent to commit the crime with which he is charged. But such evidence must be both relevant and material to an issue in the case. In the case at hand, I believe it was neither.

Section 4-1 of the Connecticut Code of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." It is significant that proof of relevancy requires, as well, that the proffered evidence be material and, "[t]he materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law." Conn. Code Evid. § 4-1, commentary.

At trial in this matter, the prior misconduct of the defendant was purportedly admitted for the sole purpose of proving his specific intent to commit the crime of assault in the first degree in violation of General Statutes § 53a-59 (a), which provides in relevant part that a person is guilty of assault in the first degree when, "(1) [w]ith intent to cause serious physical injury to another person, he causes such injury to such person

harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence." Colo. Rev. Stat. § 18-6-801.5 (1) (LexisNexis 2021).

Although these developments in other jurisdictions do not represent an avalanche of change, they are an acknowledgment that the admission of prior misconduct evidence in domestic violence cases is different because these cases often involve repeated coercive behavior that often results in physical injury. I believe, respectfully, that these developments may be worthy of study in Connecticut.

. . . by means of a deadly weapon or dangerous instrument . . . .'' Thus, the state was required to prove that the assailant assaulted the victim with the specific intent to cause serious physical injuries.

At the outset, I note that our Supreme Court in the venerable decision of *State* v. *Gilligan*, 92 Conn. 526, 103 A. 649 (1918), held that evidence of similar but unconnected crimes must be excluded because it violates the rules of policy that forbids the state initially to attack the character of the accused and that bad character may not be proved by particular acts.[5] I believe, respectfully, that the overarching language of *Gilligan* sets the table for the discussion of the admission of prior misconduct evidence in a criminal trial.

In the matter at hand, the prior misconduct evidence should have been excluded as irrelevant and immaterial to the issue of intent for separate but related reasons.

First, the evidence of the defendant's prior misconduct was irrelevant and immaterial to prove the assailant's intent to cause the victim serious physical harm

[5] At oral argument before this court, the state contended that *State* v. *Gilligan*, supra, 92 Conn. 526, is inapplicable to the case at hand because, in *State* v. *Beavers*, 290 Conn. 386, 405 n.20, 406, 963 A.2d 956 (2009), Justice Norcott, in dicta, suggested that *Gilligan* should be confined to its facts. Respectfully, given *Gilligan*'s history as a recitation of foundational law regarding the use of prior misconduct evidence in a criminal trial, I believe the dicta of *Beavers* should be closely scrutinized before discarding *Gilligan*'s principal tenet that evidence of a defendant's guilt of a prior crime is inadmissible to prove that a defendant is guilty of the crime charged against him. Citing *Gilligan*, our Supreme Court has stated: ''The reason for the rule is that in the setting of a jury trial the danger of prejudice from evidence that the accused is a person of bad character and thus more likely to have committed the crime charged is deemed to outweigh the probative value of such evidence and may have no direct tendency to prove the crime charged.'' *State* v. *Holliday*, 159 Conn. 169, 172, 268 A.2d 368 (1970); see also *State* v. *Conroy*, 194 Conn. 623, 626, 484 A.2d 448 (1984); *State* v. *Esposito*, 192 Conn. 166, 169, 471 A.2d 949 (1984); *State* v. *Onofrio*, 179 Conn. 23, 28, 425 A.2d 560 (1979); *State* v. *Jonas*, 169 Conn. 566, 572–73, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); *State* v. *Simborski*, 120 Conn. 624, 630–31, 182 A. 221 (1936).

because such an intent was evident from the nature of the attack itself and was not contested at trial. Additionally, this evidence was irrelevant and immaterial because of the important dissimilarity between the prior incidents and the assault for which the defendant was on trial.

There was no dispute during the trial of this matter as to the issue of intent. The defense made no suggestion that the assailant struck the victim accidently or by mistake or that the assailant did not intend to cause the victim serious physical injury. In short, the state's evidence that the assailant attacked the victim with a knife and stabbed her multiple times was more than adequate evidence of the intent the state was required to prove to secure a conviction for the crime of assault in the first degree. Previously, this court has stated: "Intent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . It is axiomatic that a factfinder may infer an intent to cause serious physical injury from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading up to and immediately following the incident." (Internal quotation marks omitted.) *State* v. *Vasquez*, 68 Conn. App. 194, 207, 792 A.2d 856 (2002); accord *State* v. *Madagoski*, 59 Conn. App. 394, 399–400, 757 A.2d 47 (2000), cert. denied, 255 Conn. 924, 767 A.2d 100 (2001). Additionally, it is axiomatic that, in assessing the intent of an assailant, a jury may infer that a defendant intends the natural consequences of his voluntary act. See, e.g., *State* v. *Pagan*, 158 Conn. App. 620, 628, 119 A.3d 1259, cert. denied, 319 Conn. 909, 123 A.3d 438 (2015). The court's

charge to the jury in this matter was in accord with these basic tenets.

Also, the prosecutor argued to the jury in closing argument that the significant injuries to the victim were sufficient to establish the defendant's specific intent to cause serious physical injury to the victim.

In sum, on this point, I believe that the admission of the prior assaults against the victim by the defendant were not relevant to prove that the defendant had the specific intent to stab her and cause her serious physical injury, as required by the applicable statute, because the act itself was ample proof of the assailant's intent in this regard.

Recently, our Supreme Court revisited the question of whether an element must be genuinely at issue in order for evidence of prior misconduct to be admissible at trial. See *State* v. *Juan J.*, 344 Conn. 1, 4–5, 276 A.3d 935 (2022). In *Juan J.*, the court concluded that, "in a general intent crime case, in which the theory of defense is that the conduct did not occur at all, rather than a theory of defense in which the conduct occurred unintentionally, uncharged misconduct is irrelevant and inadmissible to prove intent." Id.[6] The court in *Juan J.* "noted the fine line between using uncharged misconduct to prove intent and using it to show the defendant's bad character or propensity to commit the crime charged. . . . The risk that the evidence will be used improperly is particularly high when the uncharged misconduct is 'extrinsic,' meaning, separate and distinct from the crime charged, because the uncharged misconduct 'is practically indistinguishable from prohibited

[6] While this appeal was pending, our Supreme Court issued its decision in *State* v. *Juan J.*, supra, 344 Conn. 1, and, consequently, this court ordered counsel in the present case to submit supplemental briefs on the impact of *Juan J.* on the issues in this appeal. In response, the state takes the position, and the majority concludes, that *Juan J.* is inapposite because *Juan J.* involved a general intent crime and not one involving specific intent.

propensity evidence. Uncharged misconduct may logically be used to rebut a claim of mistake or no knowledge . . . but to use misconduct at one time to prove an intent to do the same thing at another time borders on the forbidden theme of "once a thief always a thief." . . . E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.15.6, p. 176; see also *State* v. *Conroy*, 194 Conn. 623, 626, 484 A.2d 448 (1984) ('[E]vidence of similar but unconnected crimes is generally not admissible to prove a criminal defendant's guilt. Such evidence can show no more than the defendant's bad character or an abstract disposition to commit a crime; it provides no proof of guilt of the specific offense in question.')." (Citation omitted.) *State* v. *Juan J.*, supra, 20. In light of these concerns, the state's introduction of uncharged misconduct is properly limited to cases in which the evidence is needed to "prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove." (Internal quotation marks omitted.) Id.

While I acknowledge that *Juan J.* involved a crime of general intent, I believe the court's reasoning in *Juan J.* is equally applicable to the case at hand because the defendant, in this instance, did not dispute any aspects of the crime itself, including the assailant's specific intent; instead, he presented an alibi defense that he was not present while the attack took place. In my view, respectfully, the nature of the defense in the case at hand makes irrelevant not only the issue of the attacker's intent to stab the victim but his intent to cause her serious physical harm. Accordingly, and contrary to the majority's assertion, I believe the reasoning of *Juan J.* is directly applicable to the underlying facts at hand and buttresses the defendant's claim that evidence of his prior misconduct incorrectly was admitted into evidence.

I am aware, of course, of earlier decisional law in Connecticut that prior instances of misconduct may be admitted to prove intent even though intent may not be a contested issue, if specific intent must be proven by the state and if the prior acts are sufficiently similar to the crime at issue.

In issuing its ruling permitting the state to offer the uncharged misconduct evidence, the trial court specifically relied on *State* v. *Anthony L.*, 179 Conn. App. 512, 525, 179 A.3d 1278, cert. denied, 328 Conn. 918, 181 A.3d 91 (2018), and *State* v. *Morales*, 164 Conn. App. 143, 180, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016), in support of its decision to permit the state to adduce evidence of the defendant's past acts of violence against the victim. Although I agree that the cases cited by the trial court appear facially to support the court's reasoning, there are also significant legal and factual differences between those cases and the facts at hand in this case.[7] In *Anthony L.*, the defendant was convicted of sexual assault in the first degree, risk of injury to a child, and sexual assault in the third degree. There, the state was permitted to introduce evidence that the defendant had sexually assaulted the same victim on dates earlier than the time frame

[7] I acknowledge that I am troubled by our jurisprudence that permits the state to offer evidence on an issue about which there is no dispute, but our Supreme Court's decision in *State* v. *Juan J.*, supra, 344 Conn. 25 n.12, regarding the proper procedure for determining whether prior misconduct evidence should be admitted may be a signal that we are moving away from that point of view. Learned treatises and other jurisdictions have taken a different tack than our past cases have on this question. In his treatise on evidence, Imwinkelried advanced the premise that, for prior misconduct evidence to be admissible to prove intent, the question of intent must be in genuine dispute. See E. Imwinkelried, Uncharged Misconduct Evidence (Rev. Ed. 1998). In making this assertion, Imwinkelried acknowledged that jurisdictions in the United States are not in agreement on this point. Id.; see also E. Imwinkelried, "The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition," 51 Ohio St. L.J. 575, 593–96 (1990).

charged in order to prove his intent. *State* v. *Anthony L.*, supra, 523. This court determined on appeal that the admission of the prior misconduct evidence was not an abuse of discretion. Id., 527. In part, this court's reasoning on review was that the defendant's prior uncharged sexual misconduct "was of the same nature as the misconduct charged"; id., 526; and thereby demonstrated the defendant's sexual interest in the minor victim and, accordingly, was sufficiently material and relevant on the issue of the defendant's intent. Id., 525–26. But there is no such similarity in the present case between the prior acts of misconduct and the facts of the case at hand.

In *Morales*, also cited by the trial court, the defendant was convicted of strangulation in the second degree, unlawful restraint in the first degree, threatening in the second degree, and assault in the third degree. The trial court in *Morales* permitted the state to elicit evidence of a prior threat by the defendant to the victim as evidence of his specific intent as to the charge of threatening in the second degree even though the defendant, on appeal, asserted that there was no genuine issue of intent at trial. *State* v. *Morales*, supra, 164 Conn. App. 177. But, unlike the incidents of prior misconduct at issue in the present case, the incidents in *Morales* were strikingly similar. The victim testified that in the prior incident the defendant had held a knife to her while threatening her—behavior nearly identical to the conduct for which the defendant was charged. Id., 173. On appeal, the defendant claimed that the prior misconduct evidence should not have been admitted because there was no genuine issue regarding intent. He argued that evidence of the prior threat was immaterial because he had implicitly conceded the issue of intent by denying that he had engaged in the behavior. Id., 177–78. In rejecting the defendant's argument, the court opined: "[I]ntent, or any other essential element of a crime, is

always at issue unless directly and explicitly admitted before the trier of fact. . . . [The] prosecution's burden to prove every element of [a] crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense . . . ." (Citations omitted; internal quotation marks omitted.) Id.

I believe that, unlike the prior misconduct evidence in *Anthony L.* and *Morales*, the evidence of the defendant's prior attacks on the victim was not material because of the dissimilarity between these prior incidents and the assault for which the defendant was on trial. Neither prior incident demonstrated the defendant's intent to assault the victim with a knife or the intent to cause her serious physical injury. It is also noteworthy that, in both prior acts involving the defendant and the victim, the violence ensued from a heated argument between them and did not involve the use of any extrinsic instrumentality, but, in the case at hand, the trial evidence indicates that the attack on the victim was sudden and did not follow any heated dispute between the parties. Indeed, the victim testified that, since their separation approximately two years before the incident in question, she and the defendant had nothing to do with each other and that, when she went to the home of the defendant's mother to pick up their daughter, S, after school, she avoided contact with the defendant, who also lived there. Accordingly, there was no evidence of any interactions, let alone arguments or heated exchanges between the victim and the defendant for a period of two years leading up to the assault for which the defendant was tried. But similarity between the prior misconduct and the crime charged at trial must be sufficient to make evidence of the prior misconduct probative of the defendant's intent. In *State* v. *Chyung*, 325 Conn. 236, 263–64, 157 A.3d 628 (2017), our Supreme Court approved of the admission of evidence of prior

misconduct because there were "substantial similarities" between the prior misconduct and the charged crimes, including the use of a firearm in both instances.

In sum, the similarity between the prior incidents and the assault at issue must bear sufficient commonalities to be probative of the defendant's intent to commit the crime in question, a requirement absent from the state's proof in the matter at hand, as the prior acts of misconduct bore an insufficient nexus to the assault under review to make them material at trial. Although the prior acts involved the defendant's striking the victim, the differences in manner and severity and the circumstances surrounding each act are sufficiently dissimilar to negate the probative value of the evidence of the past acts.

Additionally, as to the issue of similarity, and in regard to the element of specific intent required to prove the crime of assault in the first degree, there is no evidence that, in the prior incidents, the defendant utilized a weapon or that he intended or did, in fact, cause serious physical injury to the victim. Although the prior misconduct by the defendant, as testified to by the victim, was the result of the heat of the moment and spontaneous, there can be no question that the assault on the victim in the present case was deliberate and vicious. Those important dissimilarities belie a sufficient connection to make them probative of a specific intent on the part of the defendant to cause the victim serious physical injury by the use of a dangerous instrument.

Additionally, the prior misconduct was, in the language of one legal writer, extrinsic rather than intrinsic to the brutal attack on the victim with a knife. In his treatise on evidence, Judge Prescott discusses the distinction between intrinsic and extrinsic conduct as it relates to the admissibility of prior misconduct to prove

intent—the latter defined as separate and distinct from the crime charged. See E. Prescott, supra, § 4.15.6, p. 176. Judge Prescott comments: "If . . . the prior uncharged misconduct is 'extrinsic,' namely, separate and distinct from the crime charged, the use of uncharged misconduct to prove intent is problematic because it is practically indistinguishable from prohibited propensity evidence." Id.

In my view, the evidence of the defendant's prior assaults on the victim, both spontaneous and occurring while the defendant was inflamed by some argument with the victim, are significantly different from the facts of the present assault to make evidence of the prior acts immaterial on the issue of intent.

Having determined that the evidence of the defendant's past assaults on the victim were not relevant to prove his intent to brutally attack her with a knife, causing multiple stab wounds, I, nevertheless, briefly discuss whether the admission of the prior misconduct evidence was more prejudicial than probative. I believe it was. "In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Patterson*, 344 Conn. 281, 296, 278 A.3d 1044 (2022). In reaching my conclusion that the evidence of the defendant's prior misconduct should not have been admitted into evidence, I am aware of the great deference that must be given to the trial court when it engages in this balancing analysis.

Nevertheless, the trial court's discretion in this regard is not boundless.[8] As noted, I do not believe that the prior misconduct evidence was probative of the defendant's intent to assault the victim with the intent to cause her serious physical injury. My reasons have already been stated. Assuming, arguendo, that this evidence was minimally probative, I believe that it was substantially more prejudicial than probative.

As to the prejudicial impact of the prior misconduct evidence, I note that, at the outset of the victim's testimony, the prosecutor brought to the jury's attention that the defendant had twice before assaulted the victim. It is difficult not to believe that this very damaging evidence influenced the jury's view of the ensuing evidence, including the veracity of the defendant's alibi witnesses. In short, I believe that the likelihood that this damaging evidence skewed the jury's view of the defendant is substantial. Although it cannot be said that the prior misconduct was gruesome as compared with the assault in question, I believe it may be particularly difficult for a jury to hear that a defendant has twice before assaulted a victim but now is innocent of yet another assault. In short, by any reckoning, I believe that the prejudicial impact of this evidence substantially outweighed any remote relevance it may have had.

Also, the court's provision of limiting instructions regarding the defendant's prior acts of misconduct may

[8] As already noted herein, the court made the decision to admit this evidence before the evidence portion of the trial had commenced. It is difficult to understand how a judge, even the most diligent, can effectively balance the probative value of this evidence against its prejudicial effect without first hearing the state's case-in-chief. For this reason, our Supreme Court's admonition in *State* v. *Juan J.*, supra, 344 Conn. 25 n.12, and the practice of the United States Court of Appeals for the Second Circuit, as outlined in footnote 3 of this dissenting opinion, appear particularly appropriate because deferring a ruling until the finish of the state's case in order to determine which issues are actually in play enhances the likelihood that any judicial ruling on this matter will be fair both to the state and to the defendant.

not entirely cure any prejudice emanating from the admission of those facts. See, e.g., *State* v. *Juan J.*, supra, 344 Conn. 33 (holding that limiting "instructions to the jury on the proper use of this evidence [only for purposes of intent] could not cure the potential prejudice to the defendant" because "[t]he uncharged misconduct was admitted not to prove propensity but to prove the irrelevant issue of intent" (internal quotation marks omitted)).

Having determined that the court incorrectly admitted evidence of the two prior occasions of the defendant's misconduct, I turn next to the question of whether the admission of this evidence was harmful. Under the particular circumstances of this case, I am persuaded that it was.

At the outset, it is undisputed that it is the defendant's burden to prove that an evidentiary error was harmful, but, unlike the state's burden of proving that an error of constitutional magnitude is harmless beyond a reasonable doubt, the defendant's burden is less strict. In *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019), our Supreme Court recently articulated the well established law governing harmless error review of nonconstitutional evidentiary claims. As enunciated in *Fernando V.*, "a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict," and "cases that present the jury with a credibility contest characterized by equivocal evidence . . . [are] far more prone to harmful error." (Internal quotation marks omitted.) Id. Additionally, when the evidentiary error involves the improper admission of uncharged misconduct evidence, "the most relevant factors to be considered are the strength of the state's case and the impact of the improperly admitted evidence on the trier of fact." (Internal quotation marks omitted.) *State* v. *Martin V.*,

102 Conn. App. 381, 388, 926 A.2d 49, cert. denied, 284 Conn. 911, 931 A.2d 933 (2007).

On the basis of my careful review of the record, I believe the scales heavily tip in favor of the defendant's argument on the question of harm because, without the evidence of the defendant's prior misconduct, the evidence of the defendant's guilt was in equipoise—that is, the state's case, shorn of the evidence of prior misconduct, likely would not have led to a determination by the jury that the defendant was guilty beyond a reasonable doubt. In short, I do not believe a reasonable review of the evidence provides a basis for a fair assurance that the evidence of prior misconduct did not affect the verdict.

Unlike my colleagues in the majority and the argument of the state, I do not believe that the state's case, without the prior misconduct evidence, was strong. The evidence at trial was a credibility contest in which the only real issue was the *identity* of the assailant. Indeed, as the prosecutor acknowledged in his closing rebuttal argument, the issue in this case was the identification of the assailant. This was, in fact, the only issue in the case. Identification of the assailant was the only issue argued by the prosecutor after he had indicated that the jury could reasonably infer specific intent by reference to the circumstances of the crime itself and after he had reminded the jury of the defendant's prior misconduct against the victim.

Additionally, although I understand that circumstantial evidence may be a sufficient basis for the conviction of a defendant, it is noteworthy that, other than the victim's identification of the defendant, there was no direct evidence of the defendant's involvement in this assault. There was no forensic evidence, no inculpatory statements, no weapon found that could be tied to the defendant, no shoe prints, or any other similar evidence.

Additionally, as to circumstantial evidence, there was no evidence that the defendant and the victim had any contact for two years prior to the incident in question and, accordingly, no argument between the victim and the defendant, which, arguably, might have shed some light on the defendant's identity as the assailant. In sum, the issue of identity, the only issue at trial, was clouded because there was no evidence of any dispute between the victim and the defendant or other participants that might have given rise to this vicious attack—unlike the defendant's earlier assaults on the victim, both of which arose following heated arguments between the defendant and the victim.

Although there was identification evidence pointing to the defendant, this evidence was conflicting and also was rebutted by the defendant's alibi defense. The state's first witness at trial was Sergeant Chris Hunyadi of the Hartford Police Department. He stated that, when this attack occurred, he had been a patrol officer and, in that capacity, arrived at the scene at M Street in Hartford where he saw the victim lying in a pool of blood in "the back stairwell or the back entryway of the home."[9] He indicated that he also went to the hospital where he had the opportunity to speak with the victim. Hunyadi testified that, during this conversation, the victim told him that she had not seen her attacker and that the person who attacked her was unknown to her. On redirect examination by the prosecutor, Hunyadi testified that he had spoken with the victim after she had been administered a large amount of pain medication and after medical personal had stabilized her.

In its attempt to diminish the importance of this colloquy, the state, and the majority, in turn, point to the

[9] Evidence from the trial reveals that, at the time of the attack, just before 6 p.m. on November 16, 2011, it was dark and the rain was heavy. Additionally, a police photograph of the backdoor of the victim's home in the area in which she was attacked shows that the door was not illuminated by any light on the door on the outside of the house. See state's exhibit 3.

medication administered to the victim when she was hospitalized after the attack as a reason for her inability to identify the defendant as her attacker at that time. The jury, however, was provided no information concerning the particular medications administered to the victim or the potential impact they might have had on her ability to recollect and to articulate the events as she experienced them. Thus, it is not reasonable to infer the likely affect any medications may have had on the victim's ability to recall and, specifically, to identify the person who had assaulted her. From this record, we are left only with the evidence that the victim told Hunyadi at the hospital shortly after the assault that she did not see her attacker and did not know who had attacked her.

Hunyadi's testimony that the victim was unable to identify her attacker and that the victim said she had not seen him presented a contrast to the jury when the victim herself later testified that she did recognize the defendant as her attacker at the scene and told her son, J, shortly after the attack that it had been the defendant who attacked her. The jury, then, was left with conflicting stories regarding the victim's identification or nonidentification of the defendant as her assailant.

Furthermore, as noted previously in this dissenting opinion, before the victim was asked any questions at trial about the assault at issue, the prosecutor asked her about being assaulted by the defendant on two previous occasions. She testified that, in 2008, she and the defendant had gotten into an argument that turned physical, during which he hit her. The prosecutor then moved to the second incident, which occurred in 2009. The victim testified that she and the defendant had gotten into another argument, during which the defendant punched her in the face.[10]

[10] The court immediately thereafter gave an appropriate limiting instruction to the jury. Although there was no objection to the propriety of the court's limiting instruction, I note that, in reviewing it, the court's statement

Another pillar of the state's evidence was the victim's positive identification of the defendant from the photographic array prepared by the Hartford Police Department. But the array process was significantly flawed because it included a photograph of the defendant, a man with whom the victim had lived for several years and with whom she had borne children. Such an array can hardly be seen as a random selection of potential suspects.[11]

The victim and the defendant's son, J, testified, as well. He was eleven years old at the time of the incident. At trial, he was a difficult witness.[12] At one point, he

to the jury that it could consider the defendant's past acts of misconduct as evidence of his intent to assault the victim in this matter could easily have been taken by the jury as a suggestion of identification, a result surely not intended by the court but emblematic of the difficulty in admitting prior misconduct evidence on the issue of intent when the only issue in the matter is, in fact, the identity of the assailant.

Also, although we are instructed that we must presume that a jury will abide by the proscriptions recited in a limiting instruction, our naivety cannot be boundless. See, e.g., *Jackson* v. *Denno*, 378 U.S. 368, 388 n.15, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (reciting authorities debunking notion that juries can overlook evidence they should not have heard); see also *Bruton* v. *United States*, 391 U.S. 123, 129 n.4, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (reciting authorities that have "refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions"); A. Diaz, comment, "Restoring the Presumption of Innocence: Protecting a Defendant's Right to a Fair Trial by Closing the Door on 404 (b) Evidence," 51 St. Mary's L.J. 1001, 1015–16 (2020) ("psychological research indicates that juries are unable to ignore inadmissible evidence").

[11] To be sure, the defendant makes no claim on appeal that evidence of the photographic array was improperly admitted. Nevertheless, in assessing the strength of the state's case, it is reasonable to closely consider the persuasiveness of the array because it included a photograph of the man with whom the victim had lived for several years. The value of this array to a jury not already swayed by the evidence of the defendant's prior assaults on the victim is dubious.

[12] At one point, under questioning by the prosecutor, J blurted out, "I don't want to answer no more questions. I'm done. I don't want to be involved in this." When the court admonished him that he was to answer the questions that were being posed to him, he responded: "Crazy." It is unlikely that this exchange would have enhanced the witness' credibility before a jury untainted by the prior misconduct evidence.

testified that the victim probably had said that the defendant had attacked her, but, he stated, he did not remember. Further in his testimony, he acknowledged that he had given the police a statement in which he had said that the victim had told him that the defendant had attacked her. He stated, as well, that, when he came upon the scene by the entryway, he saw a man moving away fast whose features were like the defendant's features.

Another witness called by the state, Louis Poma, a detective with the Hartford Police Department at the time of the charged crime, testified that he had assembled a photographic array that included a photograph of the defendant, and, when shown to the victim, she had identified the defendant as her assailant.

Against this identification testimony, the defendant presented an alibi that he was in bed at the home of his mother, O, at B Street in Hartford while the attack on the victim took place. Supporting him in this alibi defense were O and his sister, D.

O testified that the defendant lived in a bedroom on the second floor of her home.[13] She stated that, on the day in question, the defendant had arrived at her home at approximately 4:45 p.m. with S and that, shortly after their arrival, the defendant went upstairs to his bedroom. She explained that there had been an arrangement between the victim and the defendant, both S's parents, that the defendant would pick up S from school in the afternoon, bring her to B Street, often after stopping for some fast food, and that, once there, S would wait for the victim to pick her up after she had left her workplace. That was the course, O indicated, on

[13] Based on my review of the trial transcript, it does not appear that either the state or the defense introduced any evidence regarding the distance between the victim's home and the home where the defendant was then living.

November 16, 2011. She continued in her testimony that, at approximately 6 p.m., she received a phone call from an old friend, after which she called upstairs to the defendant. Not receiving any response, she went to the defendant's room where she discovered him sound asleep in his bed. She indicated that she had to shake the defendant to awaken him. In response to questioning from defense counsel, she noted that there was no sign of rainwater in the room, rain having fallen that evening, and that the defendant was then wearing a T-shirt and sweatpants. Notably, she testified that the defendant could not have left the residence after his return home with S because she would have heard the squeaking of the door to the home when anyone left.

D testified that she also lived with her mother and the defendant at the B Street residence. On the day in question, she indicated that she had arrived home at approximately 5:40 p.m., and recalled that O had received a phone call at approximately 6 p.m., after which O retrieved the defendant from his room and both of them came downstairs. D testified that the defendant "looked [like] he just woke up, bed head. It looked like she woke him up from a sleep."

Finally, as to the alibi defense, Sergeant Valentine Olabisi of the Hartford Police Department, who was a patrol officer at the time of the attack on the victim, testified that he went to the B Street residence on the night of the incident where he spoke with the defendant, who asserted that he had been home during the day. Olabisi acknowledged on cross-examination that, when he was with the defendant, he did not appear to be wet and that there was no water in the area of the first floor.

Because there was incomplete and conflicting identification evidence and alibi evidence, even from family members, that the defendant was elsewhere at the time of the attack, and an absence of any direct proof of the

defendant's guilt, this circumstantial evidence case was not strong. Without the evidence of the defendant's prior assaults on the victim, it is not reasonable to conclude, with any assurance, that the jury would have found the defendant guilty.

In conclusion, I believe that the reasoning of *United States* v. *Miller*, 673 F.3d 688 (7th Cir. 2012), poignantly illustrates the problem of permitting the admission of prior misconduct evidence when the issue for which it is purportedly offered is undisputed and the evidence of prior misconduct tends to prove only the defendant's propensity to commit the charged offense. In *Miller*, the United States Court of Appeals for the Seventh Circuit was confronted with the admission at trial of a defendant's prior acts of misconduct involving the possession of drugs with the intent to distribute them. Id., 692. On review, the court in *Miller* observed that, although the defendant's prior acts did, in fact, demonstrate an intent to distribute and the current charge also included, as an element of the offense, the intent to distribute, the trial court should not have admitted the prior acts on the issue of intent because that issue was "not meaningfully disputed by the defense." Id., 697. Rather, the defendant claimed that the drugs were not in fact his and that he had not even been staying in the room where the drugs were found. Id., 696. In reversing the judgment of the trial court, the Seventh Circuit opined: "And this is where the district court erred . . . . The court focused on whether intent was at issue based on [the defendant's] defense and on the government's obligations of proof. Having concluded that intent was at issue, the court turned to analyze prejudice and . . . simply stated that the evidence was highly probative of intent. Had the court asked more specifically how the prior conviction tended to show intent eight years later, it would have recognized that it was dealing with propensity evidence all the way

down. Unless there is a persuasive and specific answer to the question, 'How does this evidence prove intent?' then the real answer is almost certainly that the evidence is probative only of propensity." Id., 699. *Miller*'s operative facts are strikingly similar to those we confront in the case at hand. The defendant's intent to strike the victim two and three years before the incident in question was not probative of any intent by the defendant to assault the victim with a knife with the intent to cause her serious bodily harm. Simply put, this evidence proved nothing more than that the defendant had the propensity to be violent against the victim, which is expressly excluded by § 4-5 (a) of the Connecticut Code of Evidence.

For the foregoing reasons, I respectfully dissent.

RAVON DONALD *v.* COMMISSIONER OF CORRECTION
(AC 44258)

Suarez, Clark and Sheldon, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with his involvement in an armed robbery and shooting, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel rendered ineffective assistance by failing to adequately investigate his troubled background and upbringing and to present that information as mitigation evidence at the sentencing proceeding. The petitioner, who was nineteen years old at the time of the robbery, was sentenced to seventy-five years of imprisonment. He thereafter filed an application for sentence review with the Sentence Review Division of the Superior Court. Before the start of the habeas trial, the sentence review division granted the petitioner's application for a sentence reduction and concluded that the seventy-five year sentence for nonhomicidal offenses was disproportionate and should be reduced to a term of forty-five years. The petitioner thereafter amended his habeas petition to allege that, had the mitigation evidence been presented to the sentence review division, a reasonable probability existed that he would have received a greater sentence reduction than the thirty years that was ordered. The petitioner testified at the habeas

trial that he had been sexually abused as a child, had begun using illegal drugs at age eleven and was consuming drugs and alcohol regularly by age twelve. He testified that he had had little to no relationship with his father, who was a drug user, and had been constantly exposed to violence throughout his youth, during which he became a member of a street gang and witnessed a friend being shot in the head. The petitioner further stated that he had been diagnosed with behavioral and mental health problems during his childhood and had experienced periods of homelessness when he was not institutionalized in group homes and mental health facilities for lengthy periods of time. D, a social worker, who had reviewed the petitioner's records from those facilities, confirmed substantial portions of his social history and testified about the probable adverse effects of his childhood and upbringing on his behavior as a young man. The habeas court analyzed the petitioner's claim under the test set forth in *Strickland* v. *Washington* (466 U.S. 668) for determining whether a petitioner received ineffective assistance and rendered judgment denying the habeas petition. The court concluded that, although the performance of the petitioner's trial counsel at the sentencing proceeding was so paltry as to be tantamount to having had no counsel at all, the petitioner failed to prove that he was prejudiced by that deficient performance before the sentence review division because he did not present evidence to show that the sentence review division would have rendered a decision more favorable to him than the thirty year reduction it ordered. The habeas court further concluded that it could not review or alter the sentence review division's determination because that body's decisions are final under the Sentence Review Act (§ 51-194 et seq.). The court thereafter granted the petitioner certification to appeal. *Held*:

1. The petitioner could not prevail on his claim that the state violated his due process right to a fair trial by presenting false or misleading testimony about its agreement with one of his alleged accomplices, H, to testify against him and by failing to disclose material evidence concerning the credibility of a police detective who led the investigation of the armed robbery and shooting:

   a. The record did not support the petitioner's claim that the state promised H that his sentence would be reduced in exchange for his testimony, as the habeas court found that H never indicated that he had been promised any specific term of incarceration or number of years as a sentence reduction, which was disclosed through his testimony.

   b. Although the state failed to disclose the detective's personnel records, which indicated that he had a disciplinary record, there was no reasonable probability that the outcome of the petitioner's trial would have been different had those records been disclosed; in the present case, impeachment of the detective through the use of his disciplinary record would not have overcome the overwhelming evidence that supported

the petitioner's conviction, which included H's testimony and a video recording that showed the petitioner committing the crime.

2. Although the habeas court correctly required the petitioner to prove under *Strickland* that he was prejudiced by his trial counsel's deficient performance, the judgment had to be reversed and the case remanded for a new trial in light of the court's erroneous determination that it was barred from reviewing or granting relief from the sentence review division's modification of the petitioner's sentence:

a. This court rejected the assertion by the respondent Commissioner of Correction that the habeas court's judgment could be affirmed on the alternative ground that the petitioner failed to prove that his trial counsel rendered deficient performance at the sentencing proceeding: the respondent never presented to the habeas court his claim that, in the absence of expert testimony to establish that competent counsel would have presented the petitioner's mitigation evidence at the sentencing proceeding, the court improperly found that trial counsel's failure to present that evidence constituted deficient performance; moreover, the court's ruling was sufficiently supported by its findings that the petitioner's trial counsel presented almost no argument on his behalf at sentencing, relied almost exclusively on an incomplete presentence investigation report, and failed to investigate and present to the sentencing court any of the substantial mitigation information the petitioner had presented to the habeas court about his troubled background.

b. The habeas court did not err in determining that the petitioner was required to prove under *Strickland* that he was prejudiced by his trial counsel's deficient performance, as the court correctly concluded that the petitioner was not entitled to a presumption of prejudice pursuant to *United States* v. *Cronic* (466 U.S. 648) and *Davis* v. *Commissioner of Correction* (319 Conn. 548): the performance of the petitioner's trial counsel did not constitute or result in a complete denial of representation necessary to invoke the *Cronic* presumption, as counsel alluded to portions of the presentence investigation report that mentioned mitigating facts about the petitioner's background, counsel argued that the petitioner had a conscience, which raised hope for his redemption, based on the petitioner's sometimes unsolicited cooperation with the police about criminal activity, and counsel attempted to help the petitioner preserve his claim of innocence by advising him not to offer his version of the events at issue during his interview for the presentence investigation report.

c. The habeas court erred in ruling that it was barred from reviewing or granting relief as to the deficient performance by the petitioner's trial counsel because of the statutorily mandated finality of the sentence review division's decision to modify the petitioner's sentence; in the present case, the habeas court had the authority under *State* v. *Nardini* (187 Conn. 109) to hear and decide the petitioner's constitutional challenge to his modified sentence and to order a proper remedy for the

violation of his right to the effective assistance of counsel, if such a violation were proved at the habeas trial, in the form of an order that his sentence be vacated and his case returned to the trial court for resentencing.

d. This court was persuaded that the absence of the extensive information concerning the petitioner's troubled background and upbringing from the trial court record sufficiently undermined confidence in the sentence review division's determination that the thirty year reduction in the petitioner's sentence was sufficient to remedy the disproportionality of the original seventy-five year sentence: because trial counsel's deficient performance prevented the petitioner from presenting the mitigation evidence to the sentence review division, which is limited to reviewing challenged sentences for disproportionality solely on the basis of the record before the trial court, there was a reasonable probability that the sentence review division's order would have been more favorable to him if counsel's deficient performance had not deprived it of such mitigating information; accordingly, the habeas court's judgment denying the petitioner's claim of ineffective assistance of counsel at sentencing had to be reversed and the case remanded to the trial court for a new sentencing hearing.

Argued March 2—officially released October 18, 2022

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, *Bhatt*, *J.*; thereafter, the petitioner filed an amended petition; judgment denying the petition; subsequently, the court denied the petitioner's motion for reconsideration, and the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed*; *further proceedings*.

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

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Angela R. Macchiarulo* and *Michael Proto*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

SHELDON, J. Following the granting of his petition for certification to appeal, the petitioner, Ravon Donald, appeals from the judgment of the habeas court denying his fourth amended petition for a writ of habeas corpus, in which he challenged the constitutionality of his conviction of and modified total effective sentence for five felony offenses of which a jury had found him guilty in connection with an armed robbery and the shooting of two clerks at a grocery store in Hartford on December 22, 2011. On appeal, the petitioner contends that the habeas court improperly rejected his claims that (1) the state violated his due process right to a fair trial in the underlying criminal trial by (a) knowingly presenting false or misleading testimony to the jury concerning the details of its agreement with one of his alleged accomplices, Tierais Harris, to testify against him in that trial and (b) failing to disclose material evidence to him, for his use in that trial, concerning the credibility of two of the state's witnesses, both his alleged accomplice, Harris, and the lead detective in the case, Reginald Early, who testified to the petitioner's alleged confession to participating in the armed robbery and shootings on which the charged offenses were based; and (2) his trial counsel in the underlying criminal trial, J. Patten Brown III, rendered ineffective assistance in connection with the petitioner's sentencing after that trial by failing to present an effective argument urging leniency on the petitioner's behalf and failing to support such an argument by developing and presenting to the trial court any of the extensive mitigating information about the petitioner's troubled background and upbringing to which he and his expert witness, Jodi DeSauteles, a social worker employed by the public defender's office, later testified at the habeas trial. Although we conclude that the petitioner failed to establish either of his due process claims, we agree with the petitioner that his

trial counsel rendered ineffective assistance in connection with his sentencing and that he was prejudiced by such ineffective assistance with respect to his current total effective sentence, which was later imposed on him by order of the Sentence Review Division of the Superior Court (review division) after it determined that his original total effective sentence was disproportionate and should be reduced by thirty years of imprisonment to remedy its disproportionality. Accordingly, we affirm the habeas court's judgment insofar as it rejects the petitioner's due process claims but reverse that judgment insofar as it rejects his claim of ineffective assistance of counsel at sentencing and remand the case to the habeas court with direction to vacate his modified total effective sentence in the underlying criminal case and to remand the case to the trial court for resentencing.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner's first jury trial commenced on April 7, 2014, but ended with a mistrial when the jury was unable to reach a unanimous verdict. Following the mistrial, on or about June 10, 2014, the state offered the petitioner a plea bargain under which he would be sentenced to a term of eighteen years of imprisonment followed by seven years of special parole if he would agree to plead guilty to his pending charges. The petitioner declined to accept the state's offer. On February 5, 2015, following a second jury trial on the same charges, a jury found the petitioner guilty as charged of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), assault in the first degree in

violation of § 53a-59 (a) (5), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[1] As a result of that verdict, the petitioner was exposed to a maximum possible sentence on all charges of eighty-five years of imprisonment.

On April 2, 2015, the court sentenced the petitioner to a total effective sentence of seventy-five years of imprisonment, fifteen years of which were mandatory, followed by ten years of special parole. On April 9, 2015, after the petitioner was sentenced, he filed a timely application for sentence review with the review division. Thereafter, on August 18, 2015, while his sentence review application was pending, he timely appealed to this court from his underlying judgment of conviction, and the appeal was transferred to our Supreme Court.

On May 2, 2017, our Supreme Court affirmed the petitioner's conviction in the underlying criminal case by issuing its decision in his direct appeal. *State* v. *Donald*, 325 Conn. 346, 157 A.3d 1134 (2017). In that decision, our Supreme Court, in language later adopted by the habeas court in its memorandum of decision, set forth the facts established in the petitioner's underlying criminal trial concerning the criminal conduct at issue and the subsequent police investigation that led to the petitioner's arrest and conviction in connection therewith: "On the evening of December 22, 2011, the victims, Nicholas Ulerio and Brunilda Villa-Rodriguez, were working behind the counter at Ulerio Grocery Store (grocery store) on Homestead Avenue in Hartford. The [petitioner] and . . . Harris, both wearing masks, entered the grocery store. The [petitioner] was armed with an antique revolver and Harris was armed with a BB gun. The [petitioner] approached the counter and

[1] Although § 29-35 (a) was the subject of amendments in 2011 and 2016; see Public Acts 2011, No. 11-213, § 47; Public Acts 2016, No. 16-193, § 9; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

shot the victims multiple times, inflicting serious injuries upon both victims. He then kicked a door repeatedly to gain access to the area behind the counter and proceeded to take approximately $100 from the cash register. The [petitioner] and Harris then left the grocery store. The robbery was recorded on the store's surveillance cameras. . . .

"Detective . . . Early of the Hartford Police Department was the lead detective assigned to investigate the robbery at the grocery store. Early had known the [petitioner] for three years, which resulted in a rapport between them. The [petitioner] felt comfortable enough speaking with Early that in the days prior to the robbery he had attempted to contact Early for help because he was homeless. On the basis of a voice mail message that the [petitioner] had left for Early on December 19, 2011, in which the [petitioner] had sought to turn in an antique revolver to the police for cash, Early believed that the [petitioner] may have participated in the robbery.

"On January 6, 2012, Early contacted the [petitioner] and arranged to meet him in Keney Park, telling the [petitioner] that the purpose of the meeting was to resolve an outstanding warrant. Early and a second detective, Kevin Salkeld, waited for the [petitioner] in an unmarked police vehicle. The [petitioner] arrived at Keney Park at approximately 3:30 p.m., driving a pickup truck. The [petitioner] then voluntarily sat in the front passenger seat of the police vehicle, with Early seated in the driver's seat and Salkeld seated in the backseat. Early spoke with the [petitioner] and the [petitioner] agreed to accompany the detectives to the police station to turn himself in on the outstanding warrant. At that point the [petitioner] understood that he was under arrest. The [petitioner] then informed the detectives that the pickup truck he had driven to Keney Park was stolen and contained drugs. The detectives arranged

for other officers to come and tow the vehicle. While waiting for the officers to arrive, Early asked the [petitioner] if he knew anything about the robbery on Homestead Avenue and if he was willing to speak to the police about the robbery. The [petitioner] responded, "'[y]eah, I know about that . . . .'" Salkeld interpreted the [petitioner's] response to mean that the [petitioner] admitted that he had been involved in the robbery. The detectives did not ask the [petitioner] any additional questions about the robbery while at Keney Park.

"The detectives then transported the [petitioner] to the police station, completed the processing of his arrest on the outstanding warrant, and placed him in an interrogation room, where they had him wait while they prepared to question him. The detectives provided *Miranda*[2] warnings to the [petitioner] and at 5:18 p.m., the [petitioner] signed a waiver indicating that he understood his rights and did not wish to invoke them. Subsequently, the detectives questioned the [petitioner] for several hours during which time he provided a detailed statement in which he admitted to participating in the robbery and shooting the victims. Early transcribed the [petitioner's] oral statement into a written statement that the [petitioner] could read and sign. The [petitioner] provided a description of the gun that he used in the robbery, which was the same gun he had previously contacted Early to discuss turning in to the police for cash. He identified the person to whom he sold the gun after the robbery and selected him from a photographic array. The [petitioner] also identified Harris as the other individual involved in the robbery and selected him from a photographic array. Although the [petitioner] initially expressed a desire not to sign the statement, as documented in the statement itself, at approximately 9:30 p.m. the [petitioner] signed it. . . . Subsequent to

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

providing the signed statement, the [petitioner] was arrested and charged . . . .'' (Footnote omitted.) Id., 349–51.

On April 27, 2016, while the petitioner's direct appeal and sentence review application were still pending, the petitioner filed his initial petition for a writ of habeas corpus in this action. Thereafter, on March 6, 2018, the petitioner filed a third amended habeas petition, in which he pleaded four claims of error with respect to his conviction of the charges and original total effective sentence in the underlying criminal case, namely, that (1) his trial counsel's representation of him, both at trial and at sentencing, violated his right to the effective assistance of counsel, (2) the state's knowing presentation of false or misleading testimony at the trial violated his due process right to a fair trial, (3) the state's failure to disclose material evidence favorable to him, at or before the trial, also violated his due process right to a fair trial, and (4) his original total effective sentence of seventy-five years of imprisonment plus ten years of special parole violated his right to be free from cruel and unusual punishment.

On March 12, 2018, the respondent, the Commissioner of Correction, filed a return to the third amended habeas petition pursuant to Practice Book § 23-30,[3] in which he denied or left the petitioner to his proof as to the allegations of the petition and pleaded as a special defense to the petitioner's due process claims that the petitioner had procedurally defaulted on those claims by failing to raise them at trial or on direct appeal, and that he had done so without good cause for or prejudice

[3] Practice Book § 23-30 provides: ''(a) The respondent shall file a return to the petition setting forth the facts claimed to justify the detention and attaching any commitment order upon which custody is based.

''(b) The return shall respond to the allegations of the petition and shall allege any facts in support of any claim of procedural default, abuse of the writ, or any other claim that the petitioner is not entitled to relief.''

sufficient to excuse such procedural defaults. On April 10, 2018, pursuant to Practice Book § 23-31,[4] the petitioner filed a reply to the respondent's return, in which he denied that he had procedurally defaulted on his due process claims and pleaded that he could show good cause for and prejudice sufficient to excuse any procedural default that might otherwise be claimed to have arisen from his failure to raise either of those claims at trial or on direct appeal.

Before the start of the habeas trial, on August 16, 2018, a three judge panel of the Superior Court, sitting by designation as the review division, issued its memorandum of decision on the petitioner's application for sentence review, in which it concluded that the petitioner's original total effective sentence was disproportionate, and that that sentence should be reduced by thirty years of imprisonment, to a term of forty-five years of imprisonment, followed by fifteen years of special parole, to remedy its disproportionality.[5] At the hearing before the review division, the petitioner's new counsel[6] had argued that the petitioner's seventy-five year sentence of imprisonment for the nonhomicidal offenses of which he had been convicted in the underlying criminal case was disproportionate to those offenses because it exceeded the maximum sentence for murder. The state had argued in opposition to the petitioner's application

[4] Practice Book § 23-31 provides: "(a) If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petition, the petitioner shall file a reply.

"(b) The reply shall admit or deny any allegations that the petitioner is not entitled to relief.

"(c) The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. The reply shall not restate the claims of the petition."

[5] The review division may modify sentences only in accordance with the provisions of Practice Book § 43-23 et seq. and General Statutes § 51-194 et seq.

[6] At the hearing before the review division, the petitioner was represented by Attorney John Franckling.

that the petitioner's total effective sentence was not disproportionate because the petitioner's conduct in committing those offenses had involved unnecessary and extreme violence that seriously injured two people. In the words of the assistant state's attorney who argued on behalf of the state, the underlying armed robbery and shootings of the two store clerks, as shown on the grocery store's video recording of the incident, was "the most serious case of this nature that he had ever seen."

In its memorandum of decision, the review division agreed with the sentencing court that "the video of the robbery is shocking. The actions of the [petitioner] require the imposition of a sentence of substantial incarceration." It noted, however, that it had to "examine the entire record before determining if the [sentence] imposed is appropriate and proportional." After conducting that examination, the review division made the following observations: "The record reveals that there were two codefendants in this case. One defendant participated in the robbery by entering the store prior to the robbery and advising his companions that no customers were present. That defendant was prosecuted and sentenced to twelve years, suspended after thirty-four months. The second defendant, who entered the store armed with a BB gun was also prosecuted and he received a sentence of fourteen years of imprisonment, followed by six years of special parole. It must also be noted that, at the time of the robbery, the petitioner was nineteen years old. Although the petitioner was an adult at the time of his offense, his relative youth and immaturity are factors that should be considered in determining an appropriate sentence. In addition, a record of criminal convictions is always a significant factor in sentencing. The petitioner's prior criminal history consisted of a single conviction for a misdemeanor, for which he had received a sentence of an unconditional discharge. In addition, the petitioner had pending

charges for larceny and drug offenses." The review division concluded its review of the petitioner's sentence as follows: "After a careful review of the record and an analysis of the offense and the background and age of the petitioner . . . the sentence imposed in this case was disproportionate." The review division therefore ordered that the petitioner's underlying case be returned to the Superior Court for the judicial district of Hartford with direction that he be resentenced on all charges to a total effective sentence of forty-five years of imprisonment, followed by fifteen years of special parole. On October 3, 2018, the modified total effective sentence was imposed on the petitioner pursuant to the review division's order.

Four days before the start of the habeas trial, on February 7, 2019, the respondent filed a motion to dismiss count four of the third amended habeas petition for lack of subject matter jurisdiction on the ground of mootness based on the review division's intervening order that the petitioner's original sentence of imprisonment be reduced by thirty years. The habeas court did not rule on that motion before the start of the habeas trial.

The evidentiary portion of the habeas trial took place on two nonconsecutive days: February 11 and June 17, 2019. On February 13, 2019, after the first day of trial, the court ordered the parties to file interim trial briefs on or before March 29, 2019, to address, inter alia, the following issues: (1) whether count four of the third amended habeas petition was moot in light of the review division's order that the petitioner's original sentence be reduced; and (2) whether the habeas court was barred from considering the constitutionality of the petitioner's modified sentence imposed by order of the review division.[7]

[7] The court also ordered briefing on whether it was barred from considering the constitutionality of the petitioner's modified sentence on the basis of any of the special defenses raised by the respondent and whether the

On March 28, 2019, the petitioner filed his interim trial brief to address the issues raised in the court's February 13, 2019 order. He argued in his brief that count four of the third amended habeas petition was not moot because he was "not claiming that the [review] division made an incorrect decision, based on the record before it. Rather, the petitioner is arguing that his sentence remains disproportionate, even after the modification, in light of his age, criminal history, personal background, and other mitigating information. That mitigating information was never before the [review] division nor the original sentencing court, due to the ineffective assistance of [his] trial counsel. A habeas proceeding is the appropriate mechanism to review such a miscarriage of justice, based upon trial counsel's deficient performance." (Emphasis omitted.) The petitioner's brief further noted that it had been an oversight on the part of his habeas counsel not to seek leave to file a further amendment to his habeas petition to reflect the review division's intervening order that his original total effective sentence be reduced. Accordingly, on the same day that the petitioner filed his interim trial brief, he filed a motion requesting leave to file a fourth amended petition for a writ of habeas corpus, which the habeas court granted the following day. The fourth amended habeas petition, which became operative on the day it was filed, changed the allegations of the third amended habeas petition to reflect the intervening reduction of the petitioner's original total effective sentence by order of the review division.

The respondent also filed his interim trial brief on March 28, 2019. He first argued in that brief that, because the petitioner's seventy-five year sentence no longer existed, count four of the petitioner's third

court had to conduct an in camera review of the internal affairs and personnel records when the police department had not asserted any statutory privilege and sought to quash the release of the records.

amended habeas petition had become moot. He also argued that, even if the petitioner could challenge the constitutionality of his modified sentence on the ground of ineffective assistance of counsel in connection with his original sentencing, he could not prevail on that claim because his trial counsel's allegedly deficient performance at sentencing had not in fact caused him prejudice, assertedly because his modified sentence is "commensurate with the nature of the crime and other relevant sentencing factors."

After the parties filed their interim trial briefs, the evidentiary portion of the habeas trial continued on June 17, 2019. On that day, the petitioner presented his own lengthy testimony, which the habeas court would later credit, describing his troubled background and upbringing since childhood, including that he had little to no relationship with his drug abusing father; he had endured repeated sexual abuse by older children as a small child; he had been introduced to and been brought up as a member of a notorious criminal street gang, the Bloods, by his sister's boyfriend, who was then his only male role model; he had constantly been exposed to violence throughout his youth; he started using illegal drugs at the age of eleven and, by the age of twelve, was consuming drugs and alcohol regularly; he had frequently been institutionalized for extended periods of time in group homes and mental health facilities; he had been diagnosed with several behavioral and mental health problems during his childhood but had received only sporadic and inconsistent treatment for those problems; and he had experienced poor living conditions, including periods of homelessness, whenever he was not institutionalized. The petitioner also presented testimony from DeSauteles,[8] a social worker employed by the public defender's office, who had interviewed

[8] DeSauteles was disclosed as an expert for the petitioner on March 14, 2019, subsequent to the first day of the habeas trial.

him extensively about his background and upbringing before the habeas trial. DeSauteles, whose testimony the habeas court also credited, confirmed substantial portions of the petitioner's social history, to which he had testified at the habeas trial, based on her review of official records she had obtained from several of the group homes, institutions and treatment facilities in which the petitioner had been housed, supervised or hospitalized as a child. That information had been requested by the probation officer who prepared the presentence investigation report (PSI) but was never received by her from the keepers of those records before the PSI was drafted and submitted. DeSauteles also offered a detailed analysis of the probable adverse effects of such a difficult childhood and upbringing on the petitioner's behavior as a young man, based on several well-known risk factors that affect the behavior of persons with similar backgrounds and social histories, as identified by the Centers for Disease Control and Prevention (CDC). She testified that these factors "help to explain why a client would react in a certain way to a certain situation."

On June 3, 2020, the habeas court issued its memorandum of decision denying the petitioner's fourth amended habeas petition. As to the petitioner's due process claims, the habeas court concluded that, although the petitioner had not procedurally defaulted on those claims, he had not established his entitlement to prevail on either such claim. It therefore rejected both of those claims on the merits.

As to the petitioner's claim in count one of ineffective assistance of counsel in connection with his original sentencing, the court first concluded that trial counsel had rendered a constitutionally deficient performance in connection with the petitioner's sentencing because his advocacy efforts on behalf of the petitioner were so "paltry" as to be "tantamount to having no counsel

at all." In support of this conclusion, the court noted that counsel had spoken only briefly on the petitioner's behalf at the sentencing hearing, he had limited his remarks to a few brief references to the petitioner's PSI, and he had presented no other information or materials in support of a plea for leniency. The record before the sentencing court thus lacked any of the extensive mitigating information about the petitioner's troubled background and upbringing, or its probable effects on the petitioner's behavior as a young man, that the petitioner and his expert witness had described in their testimony at the habeas trial and the habeas court had found to be significant, credible, and compelling.

Turning next to the question of whether trial counsel's deficient performance at sentencing had caused the petitioner to suffer actual prejudice, the habeas court first stated that "[t]he petitioner did not present any evidence from which the court [could] conclude that the sentencing court would have imposed a different total effective sentence" on the petitioner if his counsel had not performed deficiently at sentencing. Thereafter, however, the court went on to note that, despite the lack of evidence that the sentencing court would have imposed a different sentence on the petitioner if it had known of the extensive mitigating evidence that trial counsel had failed to present to it, the review division had ruled that the petitioner's original total effective sentence was disproportionate and that it should be reduced by thirty years of imprisonment to remedy its disproportionality. In light of that ruling, to which all three of the review division's judges had agreed after they had carefully reviewed the record and analyzed "the nature of the offense and the background and age of the petitioner," the habeas court concluded that, if trial counsel had not performed deficiently at the petitioner's sentencing, the imposition of a lesser

sentence on him would have been "objectively probable."

Notwithstanding this conclusion, because the petitioner's claim of prejudice arising from trial counsel's deficient performance at his original sentencing was now directed, under his fourth amended habeas petition, to the modified total effective sentence that was later imposed on him by order of the review division, the court went on to consider whether counsel's deficient performance at sentencing had caused the petitioner prejudice before the review division as well. It answered this question in the negative, explaining that it could not make such a finding "for two reasons: first, the petitioner ha[d] not presented any evidence to show that the sentence review division's decision would have been even more favorable to him than the thirty year reduction [it previously ordered] and second, to so hold would require this court to vacate the sentence review division's decision on substantive grounds, which involves exercise of authority this court does not possess." As to the first of these reasons, the court offered no explanation as to why, if trial counsel had rendered a competent performance at the petitioner's original sentencing by presenting the extensive mitigating information about petitioner's troubled background and upbringing to the trial court, and thus causing such information to be included in the record that came before the review division, such previously unpresented evidence would not potentially have warranted a more substantial reduction of his original sentence than the thirty year reduction that the review division initially ordered. As to the second of these reasons, the court ruled, more particularly, that a habeas court cannot review or alter any sentence after it has been modified by order of the review division because the discretionary decisions of the review division under the Sentence

Review Act, General Statutes § 51-194 et seq.,[9] as to whether and how a sentence should be modified to remedy its alleged disproportionality are final, and thus are not reviewable or alterable on direct appeal or in other postconviction proceedings such as habeas corpus actions.

On July 22, 2020, after the habeas court denied the petitioner's postsentencing motion for reconsideration,[10] in which he claimed for the first time that the habeas court should have presumed, under *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), that he was prejudiced by his trial counsel's deficient performance at sentencing rather than requiring him to prove that he had been prejudiced by that deficient performance, as otherwise required to establish ineffective assistance of counsel under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the petitioner filed a petition for certification to appeal from the habeas court's final judgment, which the court granted on July 28, 2020. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the state violated his due process right to a fair trial at his underlying criminal trial by (1) knowingly presenting false or misleading testimony to the jury concerning the details of its agreement with one of his alleged accomplices, Harris, to testify against him in that trial and (2) failing to disclose material evidence to him, for his use in that trial, concerning the credibility of two of the state's witnesses, both Harris and the lead detective in the case, Early,

[9] General Statutes § 51-196 (d) provides in relevant part: "The decision of the review division in each case shall be final . . . ."

[10] The motion was styled as a "motion for reconsideration, or in the alternative, to open the judgment, amend the habeas petition and reargue."

who testified to the petitioner's alleged confession to having participated in the armed robbery and shootings on which the charged offenses were based. We address each claim in turn.

A

The petitioner argues that the habeas court erred in concluding that he failed to prove his claim that the state presented false testimony from Harris. Specifically, the petitioner asserts that Harris testified falsely at his criminal trial regarding Harris' alleged agreement with the state for a sentence modification in exchange for testimony against the petitioner on behalf of the state. The petitioner contends that "Harris' testimony misled the jury because he withheld the fact that the [state] had promised to support a modification . . . and that he anticipated that his sentence would be reduced substantially . . . ." He further contends that, "even if this court finds that the [state] made no promises, Harris' testimony was nonetheless misleading because it suggested to the jury that the [state's] only role in the sentence modification process was an agreement for a hearing." The respondent argues that there is no evidence that Harris testified falsely or in a misleading manner about his agreement with the state and that, even if Harris did testify falsely, there is no reasonable likelihood that the misleading testimony could have affected the judgment. We agree with the respondent that the evidence does not support the petitioner's claim.

The following additional facts are relevant to our resolution of this claim. At the petitioner's criminal trial, the state presented testimony from Harris. The following colloquy occurred during Harris' direct examination by the prosecutor:

"Q. Now, so it's clear, you expect to get permission from the state, which is myself, to get back in front of

[the] sentencing judge, okay, and you're looking for a modification downward on your sentence, right? You understand that?

"A. Yes.

"Q. And that is your truthful testimony today?

"A. Yes.

"Q. Okay. And you also hope that the state, which would be me, would speak positive about how you assisted in this matter?

"A. Yes."

During cross-examination, the following colloquy occurred between trial counsel and Harris:

"Q. . . . [Y]ou were told that you could go back to the judge and get less time, correct?

"A. I wasn't guaranteed any—I wasn't guaranteed anything.

* * *

"Q. Okay. And the only other way [your sentence] could change is if you testify here today and you're allowed to go before the judge, and then the judge that originally sentenced you can lower your time, correct?

"A. I don't know what you mean by that. Like it was promised that it was going to happen?

"Q. No, I just asked you that's the only way it could happen, correct?

"A. Yeah, that's the only way it could happen.

"Q. And you want the prosecutor, this gentleman here, to go tell the judge good things about you, that you cooperated, correct?

"A. Hopefully, yes.

"Q. And you would—you would agree with me that it's not in your best interest for him to go tell the judge that you did not testify truthfully over there, correct?

"A. It honestly really don't matter.

"Q. It doesn't matter?

"A. No.

"Q. Why doesn't it matter?

"A. Because if he talked to her or not it's only her decision to do what she feel in the case.

"Q. Yeah, but you want him to say good things about you, don't you?

"A. I want—I want everybody to say good things about me.

"Q. Okay. And you want to help yourself, right?

"A. Who wouldn't?"

During redirect examination, the following colloquy occurred between the prosecutor and Harris:

"Q. Now, and you answered this. The ultimate decision of whether you receive a modification downwards on your sentence, the ultimate decision is the judge, isn't it?

"A. Yes.

"Q. So, you're actually taking a risk by testifying today?

"A. Yes.

"Q. Because you don't know what the end result will be?

"A. Yes."

Thomas LaPointe, a private investigator hired by the petitioner in preparation for the habeas trial, also testified at the habeas trial. LaPointe testified that he interviewed Harris in August, 2017, and that Harris told him that a modification in his sentence would be "up to the judge, but he could get [ten], [five], or maybe even go home." LaPointe further testified that he recalled "there was a promise in [Harris'] mind" and that Harris told him that he would not have testified if there was not a deal in place. However, LaPointe also testified that he did not "remember [Harris] saying anything about a promise. I remember him saying there was a conversation between a habeas attorney and a prosecutor, but I don't know—I'm not sure if he said the word, promise."

In its memorandum of decision, the habeas court found that "Harris never indicated that the [state] had promised any specific term of incarceration or number of years the sentence reduction would confer." In analyzing the petitioner's due process claim, the habeas court concluded that "the claim . . . must fail because the petitioner has failed to show that Harris presented false or misleading testimony that the state failed to correct."

We are guided by the following legal principles in resolving this claim. "Whether a prosecutor knowingly presented false or misleading testimony presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review." *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 14, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019).

"The rules governing our evaluation of a prosecutor's failure to correct false or misleading testimony are derived from those first set forth by the United States

Supreme Court in *Brady* v. *Maryland*, 373 U.S. 83, 86–87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) . . . . In *Brady*, the court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the [prosecutor]. . . . [T]he *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013).

"[D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception." (Citation omitted; internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 15.

The petitioner asserts that the agreement between Harris and the state included a promise by the state that his sentence would be reduced. The record does not support this assertion. In support of this claim, the petitioner principally relies on LaPointe's testimony at the habeas trial. The habeas court, however, made a finding of fact[11] that Harris never indicated that the

[11] "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Budziszewski* v. *Connecticut Judicial Branch*, 199 Conn. App. 518, 523, 237 A.3d 792, cert. denied, 335 Conn. 965, 240 A.3d 283 (2020).

state had "promised any specific term of incarceration or number of years" for a sentence reduction. "An agreement by a prosecutor with a cooperating witness to bring the witness' cooperation to the attention of the judge who later sentences the witness on his own pending criminal charges is a deal that must be disclosed to the defendant against whom [she] testifies, even if the deal does not involve a specific recommendation by the prosecutor for the imposition of a particular sentence." (Internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 759, 187 A.3d 1163 (2018). This is precisely the kind of deal that Harris had with the state, and the record reveals that, contrary to the petitioner's assertion, it *was* fully disclosed through Harris' testimony at the underlying criminal trial.

Accordingly, we conclude that Harris did not testify falsely or in a misleading manner, and, thus, the habeas court properly concluded that the petitioner failed to prove this claim.

B

The petitioner also claims that the court erred in concluding that the state did not fail to disclose material, exculpatory evidence. Specifically, the petitioner contends that the state knew of and failed to disclose internal affairs complaints that had a bearing on the credibility of Early.[12] The petitioner argues that, had

[12] The petitioner also claims that the state knew of and failed to disclose evidence of Harris' bias in favor of the state. The claim of bias stems from the petitioner's prior assertion that Harris had an undisclosed agreement with the state for a sentence modification in exchange for testimony against the petitioner in the underlying criminal trial. In part I A of this opinion, however, this court rejected that claim, concluding that the record did not support a finding that the state had promised any specific sentence reduction to Harris, but had simply agreed to bring Harris' cooperation to the attention of the judge who would later sentence him on his own pending criminal charges, all of which was fully disclosed through Harris' testimony. The petitioner's claim as to Harris' allegedly undisclosed bias thus necessarily fails, and we need not address it further.

this evidence been presented, there is a reasonable probability that the outcome of his criminal trial would have been different. The respondent argues that no material, exculpatory information existed with respect to Harris' agreement with the state and that the disclosure of the internal affairs records would not have overcome the evidence presented by the state against the petitioner. We agree with the respondent.

The following additional facts, as found by the habeas court, are relevant to our resolution of this claim. "Another component of the defense strategy . . . was impeaching the credibility of . . . Early . . . . According to Early, the petitioner contacted him three days before the . . . incident to ask about selling a long barrel revolver to Early as part of a police buyback program. Early recorded the voice mail the petitioner left for him inquiring about the gun buyback program. The video of the robbery and shooting showed an individual who looked like the petitioner firing a weapon that resembled a long barrel revolver. Viewing the store video of the incident prompted Early to contact the petitioner and arrange a meeting with him. Early met with the petitioner to discuss the robbery and shooting. The petitioner acknowledged to Early that he had information about what happened . . . and was willing to speak further about the incident. After [another detective] joined them, the detectives and the petitioner went to the police station for further questioning that eventually resulted in the petitioner's statement admitting his involvement.

"[The petitioner's trial counsel] made his standard discovery request by way of a motion filed once the case was on the trial list. Prior to a case being on the trial list, [trial counsel's] practice is to essentially make the same request via a letter to the state's attorney. These requests include any information concerning witnesses who have a personal interest in cooperating with

the prosecution. The prosecutor gave [the petitioner's trial counsel] access to the state's file and provided him with copies of what the state had. The case proceeded to trial after the discovery between the state and defense, and, after the first trial resulted in a hung jury, the petitioner was convicted after the second trial.

"[The petitioner's trial counsel] indicated that he requested Early's personnel file. Although Early's personnel file was not disclosed as a result of his request, [trial counsel] did not subpoena the personnel file. [Trial counsel] did not know, therefore, that Early had a disciplinary record involving excessive use of force, making false statements, and abuse of power. Consequently, [trial counsel] was unable to use such information to attempt to impeach Early's credibility on cross-examination."

The following principles govern our analysis of this claim. "As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, [t]o establish a *Brady* violation, the [defendant] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [defendant], and (3) it was material [either to guilt or to punishment]. . . . Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *State* v. *Bryan*, 193 Conn. App. 285, 315, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

"Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. . . . Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused

that, if suppressed, would deprive the defendant of a fair trial . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . . In evaluating the reasonable probability standard, we should be aware of what adverse effect the nondisclosure may have had on the [petitioner's] preparation or presentation of his case and that we should act with an awareness of the difficulty of reconstructing in a [posttrial] proceeding the course that the defense and the trial would have [otherwise] taken . . . . On the other hand, we must also recognize that the mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial, [however, does] not establish materiality in the constitutional sense." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 316–17.

On the basis of the record, we conclude that there is no reasonable probability that the outcome of the petitioner's trial would have been different had the state disclosed Early's personnel records. Although the records could have been used to impeach Early's testimony, such impeachment would not have overcome the overwhelming evidence adduced at trial supporting the petitioner's conviction, including a video of the petitioner committing the crime and Harris' testimony against the petitioner. "[T]his was not a case in which the prosecution's case hinge[d] entirely on the testimony of [the witness in question] . . . . Rather . . . there was ample evidence to support the petitioner's conviction. . . . Therefore, we cannot say that the fact that the state did not disclose the evidence [in question]

. . . undermines our confidence in the jury's verdict, as there was no reasonable probability that the jury would have reached a different verdict if it had heard and considered this undisclosed impeachment evidence." (Citations omitted; internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 160, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

II

The petitioner's final claim on appeal is that the habeas court erred in denying his claim that his trial counsel had rendered ineffective assistance in connection with his original sentencing in the underlying criminal case. We first set forth the relevant legal principles that govern our analysis of that claim.

"The sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. . . . This right is incorporated to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 183 Conn. App. 838, 843, 194 A.3d 329 (2018). "Under the two-pronged *Strickland* test, a [petitioner] can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient, and (2) the deficient performance resulted in actual prejudice. . . . To demonstrate deficient performance, a [petitioner] must show that counsel's conduct fell below an objective standard of reasonableness for competent attorneys. . . . To demonstrate actual prejudice, a [petitioner] must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors." (Internal quotation marks omitted.) Id.

"To establish prejudice, [i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . A

claimant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 77, 127 A.3d 1011 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1095 (2016). "A reasonable probability is one which is sufficient to undermine confidence in the result." *Ruffin* v. *Commissioner of Correction*, 106 Conn. App. 396, 399, 943 A.2d 1105, cert. denied, 286 Conn. 922, 949 A.2d 481 (2008).

"*Strickland* recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . [*United States* v. *Cronic*, supra, 466 U.S. 648] . . . 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. . . . This is an irrebuttable presumption." (Citation omitted; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, supra, 183 Conn. App. 843–44.

The second listed scenario in which prejudice arising from trial counsel's deficient performance may be presumed, which the petitioner claims is relevant to what occurred in the present case, has been held to involve "an actual breakdown of the adversarial process, which occurs when counsel completely fails to advocate on a defendant's behalf. . . . Counsel's complete failure to advocate for a defendant . . . such that no explanation could possibly justify such conduct, warrants the application of *Cronic*." (Citations omitted; internal quotation marks omitted.) *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 32, 257 A.3d 399, cert.

denied, 340 Conn. 913, 265 A.3d 926 (2021). "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). "[C]ases have emphasized that the second *Cronic* exception is exceedingly narrow. . . . [C]ourts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice." (Internal quotation marks omitted.) Id., 533.

"The [s]ixth [a]mendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though counsel's absence [in these stages] may derogate from the accused's right to a fair trial. . . . The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. . . . The precedents also establish that there exists a right to counsel during *sentencing* . . . . [See *Glover* v. *United States*, 531 U.S. 198, 203–204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001)]. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of [additional] jail time has [s]ixth [a]mendment significance. [Id., 203]. . . . *Lafler* v. *Cooper*, 566 U.S. 156, 165, 132

S. Ct. 1376, 182 L. Ed. 2d 398 (2012); see also *Ebron* v. *Commissioner of Correction*, [120 Conn. App. 560, 581–82, 992 A.2d 1200 (2010)] (habeas court properly determined that petitioner suffered prejudice when trial counsel's deficient performance resulted in additional incarceration); see id., 582 (The petitioner suffered the prejudice of . . . [additional] incarceration as a direct result of [trial counsel's] deficient performance. . . . Further, the outcome of the proceedings was affected directly by the petitioner's counsel . . . and [resulted in] the loss of a lesser sentence.)." (Emphasis in original; internal quotation marks omitted.) *Dennis* v. *Commissioner of Correction*, 189 Conn. App. 608, 628–29, 208 A.3d 282 (2019). To prevail on a claim of ineffective assistance of counsel at sentencing, the petitioner must therefore prove, except in the limited circumstances where prejudice may be presumed under *Cronic*, that there is a reasonable probability that he would have received a more favorable sentence than he did receive had it not been for his trial counsel's constitutionally deficient performance in connection with his sentencing.

"The issue of whether the representation that a [petitioner] received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, the question requires plenary review unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, supra, 183 Conn. App. 843.

In the present case, the petitioner argues, more particularly, that the habeas court erred in ruling that (1) it had no power to review or alter his challenged sentence on the ground of ineffective assistance of counsel because that sentence had been imposed on him by order of the review division after it had reviewed his original sentence for alleged disproportionality and made its final, unreviewable decision as to how that

sentence should be modified to remedy its proven disproportionality, (2) to establish his claim of ineffective assistance of counsel at sentencing, the petitioner had to prove that he was prejudiced by his trial counsel's deficient performance at sentencing under the rule of *Strickland* v. *Washington*, supra, 466 U.S. 668, and that it could not be presumed that he had been prejudiced by that deficient performance under the authority of *United States* v. *Cronic*, supra, 466 U.S. 648, and (3) the evidence presented by the petitioner to prove that he was prejudiced by his trial counsel's deficient performance in connection with his original sentencing was insufficient to meet his burden of proving prejudice under the second prong of the test set forth in *Strickland*. The respondent disputes each of these claims of error and further argues, as an alternative basis for affirming the habeas court's denial of the petitioner's claim of ineffective assistance of counsel at sentencing, that the petitioner failed to meet his threshold burden of proving that his trial counsel's performance at sentencing was constitutionally deficient under the first prong of *Strickland*. The petitioner opposes the respondent's challenge to the habeas court's ruling that his trial counsel rendered a constitutionally deficient performance in connection with his original sentencing.

A

Before addressing the petitioner's several arguments as to why the habeas court erred in denying his claim of ineffective assistance of counsel at sentencing under the second prong of *Strickland*, we will consider the respondent's argument that the habeas court's denial of that claim should be affirmed on the alternative ground that the petitioner failed to prove, as a preliminary matter, that his trial counsel's performance in connection with that sentencing was constitutionally deficient. The following additional facts are relevant to the habeas court's challenged ruling as to trial counsel's

deficient performance in connection with the petitioner's sentencing.

On April 2, 2015, at the petitioner's original sentencing hearing in the underlying criminal case, the trial court, *Kwak*, *J.*, began by addressing a motion from the petitioner's trial counsel to withdraw as counsel of record, which had been filed with the court on the day before sentencing. The motion to withdraw noted that the petitioner had filed a grievance against trial counsel, accusing him of ethical lapses and of violating the attorney-client privilege, and stated that, as a result of such allegations against him, counsel wanted to withdraw from the case because he "would rather not have the appearance [of an actual conflict of interest] hanging as a cloud [over the case] . . . ." At the hearing on his motion to withdraw, trial counsel told the court that, on the day before, the petitioner had informed him that he did not "want me on his case and didn't want to discuss the case with me . . . ." The court denied the motion from the bench,[13] then proceeded directly to sentencing.

In the ensuing sentencing proceeding, trial counsel briefly addressed the court as follows on behalf of the petitioner: "As you know, my client has indicated in communications [that] he wishes to appeal and maintains his innocence, but I'll address a couple matters in the [PSI] I just want to highlight for Your Honor's consideration. . . . [I]t's not discussed extensively—but there's some issues with his upbringing if you read between the lines, where his mother sent him off, and

[13] The court informed the petitioner of its ruling as follows: "Sir, I understand you wish for [your trial counsel] to withdraw as your counsel. But for today's purposes, you do not get a new attorney. . . . I've observed [trial counsel] throughout the entire trial. He represented you very adequately; it was a tough case for him to win, and the jury found you guilty. So, there's nothing he did that I observed during the trial that would warrant him being removed from this case."

I think to the extent that you could interpret them as not being that way. I think that [he has had a] life of seemingly being kind of [a] drifter . . . . He's just a guy involved in very low-level misconduct and was kind of almost living on the streets at some point. . . . Detective Early also did mention . . . that [the petitioner] had in the past provided information to him, sometimes solicited sometimes unsolicited, about criminal activity and drug dealing in the neighborhood. So, I think that speaks to the fact that there is some conscience there and some hope of redemption in the future. And again, I am reiterating that my client wants to appeal and I'm assuming for the sake of this proceeding that everything is correct in the [PSI]."[14]

[14] The PSI was completed on February 27, 2015, without input from the petitioner's trial counsel, and included the following pertinent information. The petitioner did not provide an offender's version at the advice of his trial counsel. The PSI noted that the petitioner did not have a relationship with his father and that, at the age of seven, his mother placed him in foster care because she could not handle him. He spent three years at The Children's Village in Dobbs Ferry, New York, where he was diagnosed with attention deficit hyperactivity disorder and anger issues and was prescribed medications to treat those disorders, which he took between the ages of seven and fifteen. At the age of ten, after spending time back home with his mother, the petitioner spent time in a psychiatric hospital in Valhalla, New York, from which he ran away on numerous occasions in an effort to be reunited with his mother, who had moved to Connecticut. The petitioner's mother stated that the petitioner seemed to look for negative company, and his sister stated that he always hung around the wrong people. The petitioner indicated that, prior to his arrest in the present case, he became homeless and was taken in by a married couple in Hartford, who saw him sleeping in a park and wanted to help him. The couple described the petitioner as being respectful toward them and helpful around their home.

In 2012, while incarcerated, the petitioner was diagnosed with cancer after discovering a lump on his chest. As a result, he underwent six weeks of radiation and chemotherapy. Additionally, the PSI revealed that the petitioner began smoking marijuana at the age of eleven and that he had tried cocaine a few times, used ecstasy pills, and became addicted to heroin. The petitioner's disciplinary history with the Department of Correction includes thirteen disciplinary reports. The PSI also indicated that the petitioner is a member of a gang.

Various records were requested from the New York Office of Children and Family Services, The Children's Village, and the psychiatric hospital in

Thereafter, having also heard from the state, the victims via a victim impact statement, and the petitioner himself, the trial court made remarks concerning the nature of the crime, the impact of the crime on the victims, and the petitioner's background and its impact on the court's sentencing decision. Concerning the petitioner's background, in particular, the court remarked as follows: "According to the PSI, the [petitioner] was in foster care for a few years because his mother was not able to control him. He has a history of substance abuse, including marijuana, cocaine, ecstasy, and heroin. [The petitioner] has a history of not being able to follow the rules. . . . According to the PSI, he may have had a mild or moderate mental health disorder, which this court has taken into consideration in the sentence. [The petitioner] may not have had the best of childhoods but it certainly was not the worst and it doesn't explain his actions and does not excuse his heinous behavior, but the court will show some leniency due to that fact. But make no mistake, the court considers [the petitioner] a significant danger to society. . . . And I know [the petitioner] apologized to the victims but I'm not sure whether that was a sincere apology. . . . Of all the factors that must be considered, the ones that weigh heavily in the court's mind are the nature and circumstances of the offenses, the harm to the victims, and the need for just punishment." The court then imposed a total effective sentence of seventy-five years of imprisonment, fifteen of which were mandatory, followed by ten years of special parole.

On June 3, 2020, the habeas court issued its memorandum of decision denying the fourth amended habeas

Valhalla, but, as of the time of the writing of the PSI, no records had been received.

Finally, the summary recommendation in the PSI stated: "The offender has a minimal prior record, however, based on the extreme nature of the instant offense a lengthy period of incarceration is warranted . . . ."

petition. In its memorandum of decision, the habeas court found that, at the sentencing hearing, trial counsel did not have any information beyond that which was already included in the PSI. The PSI did not extensively discuss the details of the petitioner's background, to which the petitioner testified at the habeas trial. On this subject, the habeas court stated: "Significant and extensive evidence was presented at the habeas trial by the petitioner and . . . DeSauteles. This evidence is compelling and should have been available to [the petitioner's trial counsel] to present at sentencing. Although the attorney-client relationship had deteriorated between the conclusion of the . . . trial and the sentencing, which prompted the petitioner to unsuccessfully seek the replacement of [his trial counsel, trial] counsel's efforts at sentencing were paltry at best. [Trial counsel] referenced the PSI report and made almost no argument on the petitioner's behalf. [Trial counsel's] lack of advocacy at sentencing was tantamount to having no counsel at all. The court finds that [trial counsel] was deficient for failing to investigate, compile, and present mitigating evidence at the petitioner's sentencing."

In support of the respondent's claim of evidentiary insufficiency as to the element of deficient performance, he argues that the petitioner presented no evidence at the habeas trial that trial counsel's relatively brief remarks at sentencing and sole reliance on the petitioner's PSI to bring information about his troubled background and upbringing to the attention of the sentencing court fell below an objective standard of reasonableness, as required to establish deficient performance. He objects, in this regard, to the petitioner's alleged failure to establish the prevailing professional norms governing the conduct of defense attorneys at sentencing in 2015, to introduce evidence as to what a reasonably competent defense attorney would have

done in that time frame to prepare himself for sentencing, or to present additional mitigating evidence to the trial court that was not included in the PSI. The respondent further argues that the petitioner failed to present evidence as to whether a reasonably competent defense attorney would have procured and presented to the sentencing court the kind of risk assessment analysis to which the petitioner's expert, DeSauteles, testified at the habeas trial. Finally, he contends that the petitioner presented no evidence that trial counsel's representation fell below an objective standard of reasonableness when the petitioner's relationship with counsel had deteriorated to the point that the petitioner had filed a grievance against counsel and refused to talk to him on the eve of sentencing, prompting counsel to move to withdraw from the petitioner's case. The respondent did not argue that he had answers to any of these questions, but only that the petitioner had not supplied those answers himself in the evidence he presented to the habeas court. To prevail on this argument, the respondent bears the burden of establishing that the habeas court erred in ruling that the petitioner's trial counsel rendered a constitutionally deficient performance in connection with his original sentencing.

A major portion of the "[s]ignificant and extensive evidence" that was presented at the habeas trial by the petitioner and DeSauteles, which the habeas court described as "compelling" and found should have been "available to [trial counsel] to present at sentencing," is a classic kind of mitigating information that courts routinely consider in fashioning criminal sentences, which defense attorneys are duty bound to gather and present on behalf of their clients whenever it is reasonably available to them.[15] This is information about the

[15] "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [I]n *Wiggins* v. *Smith*,

petitioner's personal background and social history, at least some of which was gathered and reported to the trial court by the probation officer who prepared the PSI in this case. Such information goes directly to the petitioner's prior behavior and responses to past criminal punishments imposed on him, to his proven willingness and ability to follow through with and respond appropriately to educational opportunities and courses of treatment previously made available to him, and to his resulting potential for successful rehabilitation without the need for such serious punishment to deter him from future criminal behavior as might otherwise be the case. It also sheds light on his circumstances at the time he offended in the case before the court, offering insights as to what led him to engage in such conduct and whether, and in what circumstances, he is likely to engage in similar conduct in the future.

In the present case, the initial source of information about the petitioner's background and upbringing was the petitioner himself. He described his difficult childhood in detail to the probation officer who prepared his PSI, listing specifically all of the group homes, hospitals, and treatment facilities where he had been housed and treated since his mother first sent him away at the age of six. Although the social history section of his PSI briefly mentioned several of these homes, institutions and treatment facilities by name, it did not describe in any detail what treatment the petitioner received while at those facilities, or what behaviors he exhibited, problems he experienced, or progress he made while there.

[539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)] . . . the United States Supreme Court held that although defense counsel was aware of certain aspects of the defendant's background, counsel's failure to compile a complete social history of the defendant was objectively unreasonable and, thus, counsel rendered deficient performance by failing to make a fully informed decision when deciding against presenting such mitigation evidence." (Citation omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112 (2017).

That was because the official records of such placements and courses of treatment were never provided to the probation officer who prepared the PSI, despite her request for them, before she submitted the PSI. Indeed, although the PSI was completed on February 27, 2015, more than one full month before the date of sentencing and signed on March 31, 2015, two days before the date of sentencing, no addendum to the PSI was ever prepared to reflect that the requested records had never been provided to the probation officer who prepared the PSI or thus to inform the trial court of their contents. Moreover, although trial counsel received and reportedly read the PSI before sentencing, he never took note of or attempted to remedy the unavailability of such records with the probation officer who prepared the PSI, or thus to the trial court, before the petitioner's sentencing. Had he done so, he would have learned the details of his nineteen year old client's checkered childhood, including thirteen years of institutionalization and treatment, as described by the petitioner himself and confirmed by DeSauteles, who did obtain and examine those records before she testified at the habeas trial. The habeas court credited DeSauteles' testimony concerning the petitioner's supervision and treatment records and their contents, as well as the petitioner's testimony concerning his background, which the records confirmed.

Although the petitioner's relationship with trial counsel had broken down by the time of sentencing, that did not relieve counsel of his obligation to gather mitigating information from and about the petitioner prior to that time, or to present such information in support of a plea for leniency on the petitioner's behalf at his sentencing hearing. See *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 670, 159 A.3d 1112 (2017) ("a defendant's refusal to assist in discovering certain evidence does not relieve counsel of his or her obligation to investigate

and seek such evidence from other sources" (emphasis omitted)). First, counsel could and should have begun the process of compiling mitigating information about the petitioner from the petitioner himself much earlier than the day before sentencing, when the petitioner reportedly refused to speak with him. See *Sease* v. *Commissioner of Correction*, 212 Conn. App. 99, 106–107, 274 A.3d 129 (2022) ("Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. . . . If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary." (Citations omitted; internal quotation marks omitted.)) Second, the PSI clearly indicated that the petitioner had cooperated with the probation officer who prepared the PSI at his PSI interview by informing her about his troubled background and the history of his supervision and treatment, the accuracy of which was confirmed by DeSauteles' testimony. This demonstrated that, if trial counsel had spoken with his client earlier about his upbringing and obtained the missing records himself, he could have obtained a great deal of useful mitigating information that was not included in the PSI for later use at the petitioner's sentencing. For example, armed with such information, counsel could have informed the trial court that its impression of the quality of the petitioner's childhood was incorrect, for unlike the bland and understated description of it offered by the trial court in its sentencing remarks, the petitioner's childhood was, in fact, much worse. Accordingly, the habeas court appropriately found that trial counsel's failure to take even minimal steps to prepare for and to deliver an advocate's presentation to the sentencing court based on such disturbing information, instead of relying exclusively on the incomplete PSI for that purpose, marked his

efforts at sentencing as "paltry," and constituted a constitutionally deficient performance that was tantamount to having no counsel at all.

In making its finding that trial counsel performed deficiently, the habeas court also credited and relied on DeSauteles' testimony concerning the manner in which the petitioner's behavior as a young adult was probably affected by his troubled childhood and diminished life prospects due to the several types of risk factors that apply to persons with his background, as identified by the CDC. This evidence was introduced by the petitioner at the habeas trial without objection. The respondent never claimed before the habeas court, as he does on appeal, that that evidence furnished an improper basis for finding that trial counsel's failure to present it to the trial court at sentencing constituted deficient performance in the absence of expert testimony specifically establishing that competent counsel would have developed and presented it in aid of a client's sentencing in 2015. Therefore, because such an argument was never presented to or considered by the habeas court when making its determination that the petitioner had met his burden of proving deficient performance by his trial counsel, it cannot appropriately be relied on by the respondent in this appeal as a basis for affirming the habeas court's judgment on the alternative ground that the petitioner failed to prove deficient performance under the first prong of *Strickland*. See *State* v. *Juan J.*, 344 Conn. 1, 16–17, 276 A.3d 935 (2022) (declining to review unpreserved claim of alternative ground to affirm judgment); *Mangiafico* v. *Farmington*, 331 Conn. 404, 429, 204 A.3d 1138 (2019) (applying to alternative ground for affirmance rule that appellate court will not consider claim, constitutional or otherwise, that has not been raised and decided in trial court).

We conclude that the habeas court's challenged ruling is sufficiently supported by its findings as to deficiencies in counsel's performance—particularly, by counsel's

presentation of almost no argument for the petitioner at sentencing, his near exclusive reliance on the incomplete PSI to describe the petitioner's background and social history, and his failure to investigate, to compile and to present to the trial court any of the substantial mitigating information about the petitioner's troubled background—to sustain that ruling. Accordingly, we must determine if such deficiencies caused the petitioner sufficient prejudice to prevail on his claim of ineffective assistance of counsel at sentencing.

B

We next address the petitioner's argument that the habeas court erred in concluding that, despite its initial assessment that his trial counsel's representation of him at sentencing was so deficient as to be tantamount to having no counsel at all, the petitioner was not entitled to a presumption that he was prejudiced by counsel's performance under *United States* v. *Cronic*, supra, 466 U.S. 648, but, instead, was required to prove that he had been prejudiced by that deficient performance under the second prong of the test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 668. The habeas court reached that conclusion in its memorandum of decision denying the petitioner's postsentencing motion for reconsideration, in which the petitioner first claimed that prejudice should have been presumed in the present case under *Cronic*. The habeas court ultimately ruled that trial counsel's performance in connection with the petitioner's sentencing, despite its proven deficiencies, was not so poor and incomplete as to raise a presumption of prejudice under *Cronic*, and thus that the proper standard for determining if the petitioner was sufficiently prejudiced by that performance to prevail on his claim of ineffective assistance of counsel at sentencing was the standard set forth in *Strickland*.

The relevant portion of the habeas court's ruling on the motion for reconsideration, with which we fully

agree, is as follows: "In *Cronic*, the court held that such a presumption will apply under 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' The court 'elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a defendant 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.' *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 555, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). Importantly, the presumption recognized in *Cronic* 'must be interpreted narrowly and applied rarely.' *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 649, 153 A.3d 1264 (2017), citing *Vasquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 436–38, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011). In order for *Cronic* to apply, 'counsel's failure to advocate for the defendant during the sentencing proceeding must be complete, rather than at specific points.' . . . *Davis* v. *Commissioner of Correction*, supra, [556], citing *Bell* v. *Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). 'Various courts, in explaining the line that divides *Strickland* and *Cronic*, have likewise held 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*. . . . In the spirit of *Bell*, courts have drawn a distinction between "maladroit performance" and "nonperformance" by applying *Cronic* in cases where counsel's conduct goes beyond "bad, even deplorable assistance" and

constitutes "no representation at all . . . ." (Citations omitted.) *Davis* v. *Commissioner of Correction*, supra, 556." To illustrate this point, the habeas court took special note of our Supreme Court's decision applying *Cronic* in *Davis*, in which counsel not only did nothing to advocate for the petitioner at sentencing, but went further to agree with the prosecutor's recommendation that the court impose the maximum sentence on the petitioner. Id., 561.

In light of these authorities, the habeas court concluded that *Cronic* did not apply in the present case because the petitioner's trial counsel, deficient though his performance was, did more than " 'simply attend' " the sentencing proceeding. Rather, it found, trial counsel had provided the PSI to the petitioner and was familiar with his criminal record. In addition, it noted, trial counsel had "made some remarks, albeit very brief, in support of the petitioner in an attempt to mitigate the petitioner's situation." Accordingly, the court ruled that the present case is distinguishable from *Davis* because, unlike in *Davis*, trial counsel in the present case had done at least something, however minimal, to advance his client's interests at sentencing.

We agree with the habeas court that, under our law, the distinction between cases in which a presumption of prejudice under *Cronic* may appropriately be applied to an ineffective assistance of counsel claim and those in which such a presumption is unwarranted is that in the former, unlike the latter, counsel's challenged representation constitutes or results in the complete denial of representation to the accused, rather than poor, even deplorable, representation. Accord *Cruz* v. *Commissioner of Correction*, supra, 206 Conn. App. 27–34; *Leon* v. *Commissioner of Correction*, supra, 189 Conn. App. 531; *Edwards* v. *Commissioner of Correction*, supra, 183 Conn. App. 843–44.

We also agree with the habeas court that the record before it showed that the petitioner's trial counsel had done at least something to advance the petitioner's interests at sentencing, and thus that counsel's performance did not constitute or result in a complete denial of representation. In addition to the short list of steps the court found that trial counsel had taken to advance the petitioner's interests at sentencing in the present case, the record also shows that trial counsel alluded, in his brief sentencing remarks, to portions of the PSI that mentioned mitigating facts about the petitioner's background, including the petitioner's occasional homelessness and his very minor criminal record. Counsel also made an argument to the sentencing court that the petitioner had a conscience, raising hope for his redemption, based on his sometimes unsolicited cooperation with the police concerning drug dealing and other criminal activity in the neighborhood.

Furthermore, the court could have found that trial counsel had attempted to assist the petitioner in connection with his sentencing by advising him, as the record shows, not to offer a defendant's version of the charged offenses at his PSI interview. Such advice was clearly designed to help the petitioner preserve his claim of innocence in anticipation of his planned appeal, where he intended to seek a new trial at which he could continue to proclaim his innocence. On the basis of those actions, which trial counsel took to assist the petitioner in connection with his sentencing, trial counsel's representation of the petitioner did not constitute or result in a complete denial of representation of the sort required to invoke the *Cronic* presumption. The habeas court therefore did not err in determining that *Strickland*, rather than *Cronic*, applied to the prejudice prong of the petitioner's claim of ineffective assistance of counsel at sentencing.

C

We next turn to the petitioner's argument that the habeas court erred in ruling that, despite trial counsel's deficient performance at sentencing, the habeas court had no power to review or order a remedy for that deficiency, even if it caused the petitioner prejudice, because such an order would result in altering the modified sentence imposed by order of the review division, in putative violation of the finality provision of the Sentence Review Act. The habeas court appears to have based this ruling, which it made initially in its final memorandum of decision then repeated in its postjudgment memorandum of decision denying the petitioner's motion for reconsideration, on language in the Sentence Review Act providing that "[t]he decision of the review division in each case shall be final . . . ." General Statutes § 51-196 (d). On appeal, the petitioner argues that this statutory language does not render any "sentence" imposed by order of the review division immune from legal challenge, but ensures only that all "decisions" of the review division on the limited issues it is statutorily empowered to decide—specifically, whether a challenged sentence is disproportionate, and, if so, how that sentence should be modified to remedy its disproportionality—shall be final and, thus, not reviewable.

The petitioner's reading of the Sentence Review Act is consistent with its plain language, which provides only that the "decision of the review division in each case shall be final . . . ." General Statutes § 51-196 (d). That reading is confirmed, moreover, by controlling Connecticut case law, which holds that, notwithstanding the act's finality provision, illegalities in sentences modified by order of the review division can be reviewed and remedied by way of either a writ of error or a writ of habeas corpus. See *State* v. *Nardini*, 187 Conn. 109, 127–28, 445 A.2d 304 (1982) (if sentence modified by review division "is illegal in any respect

the appropriate remedy for correcting such illegality is by appeal to this court . . . by writ of error . . . *or by writ of habeas corpus*" (citations omitted; emphasis added)); see also *Morrison* v. *Commissioner of Correction*, 57 Conn. App. 145, 146–49, 747 A.2d 1058 (clarifying that, whereas appropriate procedural vehicle for challenging legality of any reviewable ruling by review division itself is writ of error, appropriate procedural vehicle for challenging constitutionality of any sentence imposed by review division "on the basis of ineffective assistance of counsel or the denial of the petitioner's right to counsel" is writ of habeas corpus), cert. denied, 253 Conn. 920, 755 A.2d 215 (2000).

In the present case, in the first count of the operative habeas petition, the petitioner did not challenge any reviewable ruling by the review division itself, much less any unreviewable discretionary decision by it as to either the disproportionality of his original sentence or the extent to which that sentence should be modified to remedy its proven disproportionality. Instead, he claimed that his modified sentence was an unconstitutional product of ineffective assistance of counsel because his trial counsel's deficient performance in connection with his original sentencing had prevented the review division from having access to and considering all of the detailed mitigating information about his troubled background, which his trial counsel had failed to present to the trial court. If the petitioner's trial counsel had properly investigated, developed and presented such information to the trial court, the petitioner argued, then the review division, like the habeas court in this case, would have had such mitigating information before it as part of the trial court record when it reviewed and ordered the modification of his original sentence for disproportionality. Had such information been available to the review division, he claims, there is at least a reasonable probability that the review division

would have ordered a more favorable modification of his original sentence than the thirty year reduction it did order, for different reasons, when it acted without the benefit of such mitigating information.

We conclude that the habeas court had the authority to hear and decide such a constitutional challenge to the petitioner's modified sentence under *State* v. *Nardini*, supra, 187 Conn. 127–28, and to order a proper remedy for the violation of his right to the effective assistance of counsel, if such a violation were proved at the habeas trial, in the form of an order that his sentence be vacated and his case returned to the trial court for resentencing. Accordingly, the habeas court erred in ruling that it was barred from reviewing or granting relief as to that claim because of the statutorily mandated finality of the review division's discretionary disproportionality and sentence modification decisions.

D

Having determined that the habeas court properly required the petitioner to prove, under *Strickland*, that he was prejudiced by his trial counsel's deficient performance at sentencing, we next review the petitioner's claim that the habeas court erred in concluding that he failed to meet his burden of proof on that issue with respect to his current total effective sentence, as modified by order of the review division. The habeas court based its ruling on what it described as the petitioner's failure to present "any evidence to show that the . . . review division's decision would have been even more favorable to him than the thirty year reduction [it previously ordered] . . . ." The petitioner disputes this conclusion, contending that he met his burden of proof on that issue by making two related showings: first, that as a result of trial counsel's deficient performance in connection with his original sentencing, involving

counsel's failure to present to the sentencing court significant mitigating information about the petitioner's troubled background and upbringing, such mitigating information was not made part of the trial court record, and thus was unavailable to the review division for the purposes of reviewing his original sentence and determining if and how it should be modified to remedy its alleged disproportionality; and second, that the likely effect of such unpresented mitigating information on the review division's assessment of how much his original sentence should be modified to remedy its disproportionality, as the review division would have assessed it in light of such new information, was so substantial as to undermine confidence that the thirty year sentence reduction it ordered when acting without knowledge of such mitigating information would have been found sufficient to remedy such disproportionality. On that basis, the petitioner claims that he has demonstrated a reasonable probability that his current total effective sentence would have been shorter or more favorable to him than it now is had his trial counsel not rendered deficient performance in connection with his original sentencing. The respondent disagrees, arguing that the petitioner's current sentence, as modified by the review division, is commensurate with the seriousness of the offenses of which he was convicted in light of all relevant sentencing factors.

We conclude that the likely impact of the mitigating information that trial counsel failed to present at the petitioner's original sentencing undermines confidence in his original sentence. It thereby follows that such deficiency undermines confidence in the review division's modification because the review division was confined to the limited mitigating evidence presented at the original trial.

1

To begin, there is no question that the direct and immediate cause of the review division's inability to

consider the extensive mitigating information concerning the petitioner's troubled background and upbringing was trial counsel's failure to present such information to the trial court at sentencing. This is so because the review division's statutorily prescribed function is limited to reviewing challenged sentences for alleged disproportionality and ordering that they be modified, if and to the extent necessary to remedy their proven disproportionality, solely on the basis of the record before the trial court when such sentences were imposed. This is confirmed by the Sentence Review Act itself, which establishes and prescribes the powers of the review division, by our rules of practice that govern the manner in which the review division must exercise its statutory authority, and by controlling Connecticut case law interpreting and enforcing these provisions.

Section 51-196 provides in relevant part: "(a) The review division . . . may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review . . . . (b) . . . In reviewing any judgment, said division may require the production of presentence or precommitment reports and any other records, documents or exhibits connected with such review proceedings. . . ."

Practice Book § 43-25 provides: "The clerk of the court in which the application is filed shall forward the necessary documents to the review division." Practice Book § 43-26 further provides: "The defendant, at the time the application for review is filed, may request the clerk to forward to the review division any documents in the possession of the clerk previously presented to the judicial authority at the time of the imposition of sentence." Pursuant to Practice Book § 43-27, "[a] hearing upon an application . . . shall be conducted expeditiously upon receipt by the review division of the materials submitted by the clerk . . . . The parties may file

such briefs or memoranda as are appropriate to assist the division in the discharge of its duties." Finally, Practice Book § 43-28 provides: "The review division shall review the sentence imposed and determine whether the sentence should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended." These provisions focus the attention of the review division on documents and materials that were in the trial court record at the time the challenged sentence was imposed and contemplate that the review of a challenged sentence can take place on the basis of such materials as soon as they are transmitted to the review division.

Consistent with that procedure, our Supreme Court has made it clear that, although review of a challenged sentence for alleged disproportionality can properly involve consideration of any sentencing factor, including "the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended"; Practice Book § 43-28; the only evidence bearing on such factors that may appropriately be considered in determining if the sentence as imposed was disproportionate is that which was available to the trial court when it imposed the challenged sentence. Thus, for example, in *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 777, 167 A.3d 952 (2017), the petitioner appealed from the review division's dismissal of his application for sentence review and reduction, in which he sought a reduction of his fifty-five year sentence based on his postsentencing cooperation with the state as a witness in a murder case. Our Supreme Court affirmed the review division's judgment, observing as

follows: "In reaching its decision, the . . . review division explained that it could not lawfully consider the petitioner's cooperation with the state because that cooperation did not take place until after the petitioner's sentencing, and, therefore, the sentencing court could not have known about it." Id., 778; see *State* v. *Nelson*, Superior Court, judicial district of New Britain, Docket No. CR-05-220383-A (November 2, 2012) (54 Conn. L. Rptr. 904, 905); see also *Nelson* v. *Commissioner of Correction*, 208 Conn. App. 878, 265 A.3d 987 (2021), cert. denied, 341 Conn. 902, 268 A.3d 1186 (2022). This decision confirms that the review division is limited, in reviewing a challenged sentence, to considering only those materials that were before the trial court at the time of the petitioner's initial sentencing.

Because the review division can only consider information and materials that were put before the trial court when the sentence under review was imposed, any alleged failure by trial counsel to present such materials to the sentencing court necessarily affects not only the original sentencing proceeding but any subsequent sentence review proceeding as well. Thus, trial counsel's failure in the present case to present mitigating information to the original sentencing court cannot be remedied before the review division by presenting such information directly to it, and sentence review counsel's failure to proffer such materials to the review division cannot be considered a separate act of ineffective assistance which operates as an independent intervening cause of their unavailability to the review division for the purpose of conducting its review.

2

As for the petitioner's claim that the extensive mitigating information about his troubled background and upbringing, which his trial counsel failed to present to the sentencing court, and thus to make part of the

trial court record for purposes of sentence review, was sufficient to undermine confidence in the review division's determination that a thirty year reduction of his original total effective sentence was sufficient to remedy its disproportionality, the petitioner relies initially on his own testimony and that of his expert, DeSauteles, which the habeas court found to be extensive, credible and compelling.

At the habeas trial, the petitioner testified, more specifically, that he had grown up in urban communities beset by high crime and poverty. When he was five or six years old, he witnessed his mother being attacked by her boyfriend. The New York Office of Children and Family Services (family services office) became involved in the petitioner's life as a result of his mother's neglect. His father used crack cocaine and had no relationship with the petitioner. At the age of seven, the petitioner was subjected to sexual abuse. In November, 1999, the petitioner was admitted to a psychiatric hospital, which, he testified, was a horrible experience. He was subsequently housed for two years at a group foster care home, where he was treated for behavior management and attention deficit hyperactivity disorder.

The petitioner joined a criminal street gang, the Bloods, at the age of eleven. In addition, he also began to use drugs and alcohol around that time. At the age of twelve, the petitioner witnessed his friend being shot in the head by a rival gang member, and, subsequently, the petitioner began to carry a gun. In September, 2004, he was institutionalized at Hollinswood Hospital as a result of further intervention by the family services office. In March, 2005, he was again placed in foster care. The petitioner was briefly placed in a group home, Cardinal McCloskey Community Services, but was discharged after just one week following an incident with another resident. He was then sent to a psychiatric

hospital to be treated for physical aggression and sexually provocative behavior.

The petitioner was next discharged to McQuade Diagnostic Center (McQuade), another group home, with diagnoses of oppositional defiant disorder and conduct disorder. The petitioner, on several occasions, ran away from McQuade to be with his family. He remained at McQuade for a few years before moving back to The Children's Village in August, 2007. The Children's Village was unable to care for the petitioner, however, because he continually ran away, and so he was discharged in 2009.

After being discharged from The Children's Village, the petitioner made his way to Hartford in another effort to find and rejoin his family. A few weeks after arriving in Hartford, however, at the age of sixteen, the petitioner was imprisoned at Manson Youth Institution. After his discharge, he was again arrested and imprisoned at Northern Correctional Institution. After his second discharge, the petitioner lived on the streets or stayed with random women. He self-medicated with drugs. Within seven months, the petitioner was back in prison for the crimes at issue in this case. In October, 2012, the petitioner was diagnosed with cancer, for which he underwent surgery, chemotherapy, and radiation.[16]

[16] The petitioner also testified at the habeas trial that, when he was five years old, his mother's boyfriend drank a lot of alcohol, was violent with the petitioner, his sister, and his mother, and beat the petitioner on multiple occasions. In addition, he witnessed his mother's boyfriend choke his mother in the kitchen of their home, and he and his sister grabbed a "bucket of knives" and a "bat" in an effort to help their mother. He testified that, when he was seven, his godsister "used [to] make [him] perform oral sex on her," and that "[i]t happened often." Also, when he was seven, he spent approximately three months in his father's care over the course of a summer. He testified that, during that time, his stepbrother would beat him and "make [him] go in the corner, face the corner, and [make] [him] kneel on rice and stuff like that." He never saw his father again after that summer. During his time spent at a psychiatric hospital in Valhalla, New York, he was often put in five point restraints. Throughout his childhood, his older sister was

At the habeas trial, DeSauteles also testified concerning the petitioner's background, and the habeas court credited her testimony, stating: "DeSauteles met with the petitioner five times, obtained background information from him during these sessions, and then applied . . . CDC . . . risk factors to all the information she collected. These risk factors . . . are not something within an individual's control and help to explain why they would act a certain way. Risk factors may be grouped by source; thus, there are individual, family, peer social, and community risk factors. [DeSauteles] concluded that multiple risk factors in all the risk factor groups can be used to explain the petitioner's behavior." She also responded in the affirmative to a question on direct examination asking whether "the kinds of issues that [affect] a person's decision making as a juvenile still affect the decision making of an eighteen year old."

DeSauteles testified that she reviewed several records that corroborated the information that the petitioner had related to her during their meetings concerning his background. These materials included records from the Behavioral Health Center at Westchester Medical Center in Valhalla, New York, The Children's Village in Dobbs Ferry, New York, and the New York family services office.

She "concluded that multiple risk factors in all [of] the risk factor groups can be used to explain the petitioner's

his primary caretaker, even though she herself was a child, because his mother spent weeks at a time working in New Jersey. The only role model he had in his life other than his sister was his sister's boyfriend, who ultimately introduced him to the Bloods. He testified that, as a result of being made a member of the Bloods at age eleven, he witnessed a lot of violence, including daily fights and frequent shootings. At age eleven, he had sex with a prostitute who was more than twenty years older than him, and, on more than one occasion, he had sexual relations with much older adult women. At age twelve, he did not attend school on a regular basis; however, he consumed drugs and alcohol regularly. At the age of sixteen, he was stabbed during a gang related altercation.

behavior. . . . [T]he petitioner has a low IQ, early involvement in drugs at age eleven, desensitization to violence through exposure to violence at a young age, and low commitment to academic achievement. . . . [T]he petitioner experienced harsh disciplinary practices, low parental involvement, low emotional attachment to parents and caregivers, low parental education and income, and parental substance abuse and criminality. . . . [T]he petitioner experienced associations with delinquent peers, had a lack of involvement in conventional activities, poor academic performance, low commitment to school, and social rejection by peers. . . . [T]he petitioner grew up with diminished economic opportunities and in a community where there is a large concentration of poor residents." She also testified that, in her experience, mitigation evidence is generally helpful at sentencing and that she, or someone with her credentials, would have been able to provide the petitioner's trial counsel with the same analysis of the risk factors applicable to the petitioner that she had given if such a witness had been contacted by trial counsel before sentencing.

The foregoing information concerning the petitioner's troubled background and upbringing that was presented to the habeas court and found to be so substantially mitigating as to render trial counsel's failure to investigate, to compile and to present it at sentencing a constitutionally deficient performance, is the kind of information that the review division was empowered to consider and rely on in evaluating and remedying, if and to the extent appropriate, the alleged disproportionality of his challenged sentence. It sheds light on the underlying reasons for his criminal behavior in light of his negative life experiences and may be found to affect the degree to which substantial criminal punishment is necessary or appropriate to protect the public in light of the deterrent, rehabilitative, isolative, and

denunciatory purposes for which the sentence was intended.

Consistent with this understanding, the review division in the present case expressly considered certain aspects of the petitioner's background that were documented in the trial court record, including his relative youth and immaturity and his very minor criminal record. The habeas court noted, however, that such information in the trial court record was extremely limited compared to the detailed information about the petitioner's background to which he testified at the habeas trial and DeSauteles had confirmed in her testimony, based on her multiple interviews with the petitioner and her examination of records from the facilities that had housed and treated the petitioner in his youth.

The trial court record is devoid of many notable facts concerning the petitioner's background, which were not included either in the PSI or in trial counsel's very limited sentencing remarks, and thus were not available for consideration by the review division when reviewing the petitioner's challenged sentence. The particular information not available for consideration by the review division included all information pertaining to the petitioner's exposure to violence at a young age, both as a gang member and otherwise; the petitioner's frequent sexual abuse by older children when he was seven years old; details concerning the petitioner's troubled relationship with his drug abusing father; details concerning his relationship with his mother, who frequently could not care for him herself and left him in the control of his teenage sister when she went out of town to work; and details concerning the time the petitioner spent at various institutions that housed and treated him in his youth, including the Behavioral Health Center at Westchester Medical Center in Valhalla, New York, The Children's Village in Dobbs Ferry, New York, and the family services office.

The review division based its finding of disproportionality and its resulting order that his original total effective sentence be reduced by thirty years of imprisonment on the petitioner's argument that that original sentence was longer than the maximum sentence for murder, and thus was far too lengthy for the nonhomicidal offenses of which he had been convicted. The habeas court's determination of deficient performance by trial counsel at sentencing, by contrast, was based on counsel's failure to compile and to present to the trial court substantial, previously unpresented mitigating information about the petitioner's troubled background and upbringing. The habeas court found that trial counsel's failure to compile and to present such information constituted deficient performance because it deprived the sentencing court of substantial mitigating information that should have been available to it in determining how to sentence the petitioner. Notably, the habeas court also found that "[s]ignificant and extensive evidence was presented at the habeas trial by the petitioner and . . . DeSauteles. This evidence is compelling and should have been available to [the petitioner's trial counsel] to present at sentencing. . . . [Trial counsel] referenced the PSI report and made almost no argument on the petitioner's behalf."

In determining whether there is a reasonable probability that trial counsel's effective assistance at sentencing would have produced a more favorable outcome for the petitioner, the habeas court did not need to find that a different, more favorable modified sentence would, in fact, have been imposed on the petitioner had counsel presented the missing mitigating information to the sentencing court and thereby made that same information available to the review division as part of the trial court record. Instead, the habeas court had to examine the information not presented to the trial court

at the petitioner's original sentencing due to trial counsel's deficient performance and determine if its absence from the trial court record, and hence from the record before the sentence review division, undermines confidence in the ultimate outcome of the sentence review process. See *Ruffin* v. *Commissioner of Correction*, supra, 106 Conn. App. 399. In this appeal, we must therefore determine whether the absence of such information concerning the petitioner's background from the trial court record undermines confidence in the review division's determination that the disproportionality of the petitioner's sentence could appropriately be remedied by a thirty year reduction of his total effective sentence rather than a greater reduction of that sentence. We conclude that the potential impact of the previously unpresented mitigating information about the petitioner's troubled background and upbringing on the petitioner's sentence was so substantial, and that the unavailability of such information to the review division when it ordered the thirty year sentence reduction, essentially for different reasons, so undermines confidence in the sufficiency of that reduction to remedy the true nature and extent of the original sentence's disproportionality, as to undermine confidence in the petitioner's sentence, as modified.

In *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 99, this court employed a similar approach in determining if a habeas petitioner had been prejudiced by the failure of his trial counsel to present substantial mitigating evidence concerning his mental health history before the trial court that sentenced him in a murder case. The court in *Sease* applied the standard set forth in *Strickland* to a claim of ineffective assistance of counsel at sentencing in which the petitioner argued that his trial counsel "was ineffective by failing to properly investigate and to adequately present evidence of the petitioner's mental health history in

mitigation at the sentencing hearing." Id., 105. In this court's analysis of the prejudice prong of the ineffective assistance of counsel claim, we described our task as follows: "[We] must determine whether, in light of the mitigating evidence that was presented at the habeas trial and not presented at sentencing, there is a reasonable probability that the sentence would have been less severe. . . . The United States Supreme Court has observed that, '[e]ven though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of [additional] jail time has [s]ixth [a]mendment significance.' " (Citation omitted.) Id., 107–108.

In *Sease*, as in the present case, the sentencing court had before it for its consideration the contents of the petitioner's PSI and the remarks made at sentencing by the petitioner's trial counsel. Id., 108. This court examined the differences between the information contained in the PSI and in the petitioner's mental health records, which were admitted at the petitioner's habeas trial, in order "to determine whether there was a reasonable probability that the additional information contained in the mental health records but not in the [PSI] could have had an effect on the severity of the petitioner's sentence had those records been provided to the sentencing court as mitigating evidence." Id., 111. This court "emphasize[d] that the [PSI] failed to provide the detailed and expanded psychiatric history that was presented in the two mental health records that were admitted as full exhibits at the habeas trial." Id., 113. "The effectiveness of trial counsel at the sentencing hearing is not rendered harmless by the [PSI] . . . . A [PSI] gives a sentencing judge the benefit of a summary background it has gathered on a defendant. It makes a recommendation as to whether incarceration is appropriate; however, the Office of Adult Probation is not an

advocate for a criminal defendant before the sentencing court. The role as trial counsel and as an advocate includes relating to the sentencing court how a client's lengthy mental health history could justify some mitigation of the court's sentence unless there are strategic or other good reasons not to do so." Id., 110–11. This court concluded that, "[i]nstead of having illuminating evidence from the mental health records before it, the sentencing court had only the summary [PSI] that recommended a lengthy sentence and trial counsel's statement that he was unaware 'of some of the things that came out of this [PSI]' concerning the petitioner's mental health concerns. Had the sentencing court been aware of the lengthy, detailed psychiatric history in the petitioner's mental health records, there is a reasonable probability that his sixty year sentence would have been less severe." Id., 114–15.

In the present case, as in *Sease*, the habeas court found credible the substantial mitigating information concerning the petitioner's troubled background that had been presented to it at the habeas trial and determined that it was far more detailed and persuasive than the information presented to the sentencing court in trial counsel's sentencing remarks and the PSI. Specifically, the habeas court stated: "According to the petitioner, he was born with meningitis and was hospitalized for six weeks at birth. Since then, the petitioner's life has been replete with a lengthy litany of hardships. It would serve little purpose to repeat all the details provided by the petitioner about his very troubled life and upbringing. The court accepts his recounting as true. The petitioner's experiences reflect exposure to the individual, family, peer social, and community risk factors identified by . . . DeSauteles, and therefore can be used to try to explain and mitigate his actions resulting in his conviction. [Trial counsel] did not present in any detail any of the petitioner's background at

sentencing; instead, counsel simply relied on the PSI report and its contents."[17] The habeas court thus concluded that the petitioner had met his burden under *Strickland* of proving that trial counsel's failure to present such detailed information to the sentencing court constituted a constitutionally deficient performance.

We are persuaded that the extensive information concerning the petitioner's troubled background and upbringing that was presented to the habeas court but not to the trial court at sentencing, and which was not before the review division when it reviewed and ordered the modification of the petitioner's original sentence, is sufficiently mitigating to undermine confidence that the thirty year reduction of that sentence, as ordered by the review division, would have been found sufficient to remedy the disproportionality of that sentence had counsel not failed to present such information in connection with the petitioner's original sentencing. Because the absent information supports different reasons for determining that the petitioner's original sentence was disproportionate than those advanced before the review division, we conclude that there is a reasonable probability that the review division's order modifying his original sentence would have been even more favorable to him than the thirty year reduction it did order if counsel's deficient performance had not deprived it of such mitigating information.

The judgment is reversed as to count one of the fourth amended habeas petition only with respect to the claim

[17] "[D]ue process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial. Rather, judges may consider a wide variety of information. . . . [T]he trial court may consider . . . information relative to the circumstances of the crime and to the convicted person's life and circumstance. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come." (Internal quotation marks omitted.) *State* v. *Suzanne P.*, 208 Conn. App. 592, 611, 265 A.3d 951 (2021).

that the petitioner's trial counsel provided ineffective assistance at sentencing and the case is remanded to the habeas court with direction to grant the fourth amended habeas petition as to count one in part, to vacate the petitioner's modified total effective sentence and to remand the case to the trial court for resentencing; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.