
SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF TOLLAND
AT G.A. 19 (ROCKVILLE)

S.C. 20252

JOSEPH MOORE

v.

COMMISSIONER OF CORRECTION

BRIEF OF THE COMMISSIONER OF CORRECTION-APPELLEE
WITH ATTACHED APPENDIX

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COUNTERSTATEMENT OF THE ISSUE

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NATURE OF THE PROCEEDINGS COUNTERSTATEMENT OF THE FACTS

On October 26, 2010, a jury, *Mullarkey, J.*, presiding, convicted the petitioner, Joseph Moore, of first-degree robbery, in violation of General Statutes § 53a-134(a)(4); and the commission of a class B felony with a firearm, in violation of General Statutes § 53-202k. *Moore v. Commissioner of Correction*, 186 Conn. App. 254, 256 (2018), *cert. granted in part*, 330 Conn. 970 (2019). “The petitioner then pleaded guilty, in response to a part B information, that the aforementioned offenses were committed while [he was] on release[,] in violation of General Statutes § 53a-40b. The petitioner also pleaded guilty to a second part B information charging him with being a persistent felony offender[,] in violation of General Statutes § 53a-40(f). The trial court sentenced the petitioner to a total effective term of thirty-four years [of] incarceration.” (Brackets and commas added.) *Id.*

The petitioner appealed, the Appellate Court affirmed his first-degree robbery conviction, and this Court denied certification. *State v. Moore*, 141 Conn. App. 814, *cert. denied*, 309 Conn. 908 (2013).

Following a September 15, 2016 evidentiary hearing addressing the petitioner’s April 28, 2016 amended habeas petition, the habeas court, *Cobb, J.*, denied both the petition and, later, the petitioner’s petition for certification to appeal from the denial of his habeas petition. *Moore*, 186 Conn. App. at 257-60. The Appellate Court dismissed the petitioner’s appeal from the habeas court’s decision. *Id.* at 269-70. This Court granted the petitioner’s certification petition, limited to the following issue:

Did the Appellate Court properly conclude that trial counsel did not render ineffective assistance of counsel in advising the petitioner regarding the pretrial plea offers?

Moore, 330 Conn. at 970.

1. The facts underlying the petitioner's convictions

On direct appeal, the Appellate Court set out the facts that the jury reasonably could have found in convicting the petitioner:

At approximately 1 p.m. on July 13, 2009, the [petitioner] entered the New Alliance Bank in Columbia wearing a white tank top and dark sweatpants. Branch manager Penny Ritchie and tellers Maria DePietro and Michelle LaLiberty, who were working at the bank that day, observed the [petitioner] approach the check writer station. The [petitioner] then asked another patron, David Woodward, where the withdrawal slips were located, at which point the [petitioner] took a slip from the station and began to write on it. Photographs from the bank's security cameras introduced into evidence depict the [petitioner] writing on a piece of paper at the check writer station and then approaching the teller station with the piece of paper in his hand.

The [petitioner] approached Ritchie and handed her a deposit slip that read, "Give cash. I have gun." When Ritchie explained that she was not a teller, the [petitioner] ordered her to "[g]ive me the cash. Give it now." Ritchie then slid the deposit slip to DePietro, who unlocked her teller drawer. As she did, the [petitioner] demanded, "Hurry up, hurry up," and reached over the counter. DePietro then handed the [petitioner] \$3500 in cash.^[1]

The [petitioner] immediately exited the bank and Woodward followed. As Ritchie locked the bank's doors and DiPietro called 911, LaLiberty closed the bank's drive-through window. As she did, she saw the [petitioner] walking at the rear of the bank to a grassy strip between the drive-through lane and an adjacent firehouse. LaLiberty wrote down a description of the [petitioner] at that time. Approximately six hours later, the Connecticut state police apprehended the [petitioner] in a grassy area near Route 66 in Columbia. The [petitioner] subsequently reviewed and executed a waiver of *Miranda*^[2] rights form and agreed to speak with Detective Derek Kasperowski. The [petitioner] then admitted to robbing the bank and stated that he remembered "smoking crack before going into the bank, going to the bank teller and telling her to give him money." Although no firearm was found on the [petitioner's] person or the surrounding area, the \$3500 in cash was recovered.

Moore, 141 Conn. App. at 816-17.

¹ Ritchie wrote the words "black and white" on the back of the deposit slip, which was her shorthand for describing the petitioner as an African-American, who was wearing a white tank top. Trial Transcript (October 18, 2010):77; Petitioner's Exhibit:15.

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. The amended habeas petition

On appeal, the petitioner challenges only the habeas court's rulings as to the claims raised in paragraphs #s 40, 41 and 42 of his April 28, 2016 amended habeas petition. In those paragraphs, the petitioner alleged that he was denied the right to the effective assistance of counsel, pursuant to the sixth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution, as a result of his attorney's deficient advice concerning whether to accept the plea offers made by the prosecutor and Judge Sullivan. Petitioner's Appendix (Pap):9. Specifically, the petitioner grounded his ineffective assistance of counsel claim on: (1) the deficient performance of his attorney, Douglas Ovia, in failing to adequately advise him to accept either of the plea offers; and (2) the reasonable probability that, but for Ovia's inadequate advice, he would have accepted either of the offers and received a sentence that was more favorable than the sentence he received after going to trial and being convicted of first-degree robbery. Pap:9

3. The Appellate Court's summary of the proceedings below

The Appellate Court summarized the habeas proceedings below as follows:

[The petitioner alleged in his amended habeas petition, in relevant part,] that his constitutional right to effective assistance of counsel was violated, arguing that "trial counsel's performance was deficient because he failed to adequately counsel the petitioner about the advisability of accepting the plea offer" and that there was a "reasonable probability that -- but for trial counsel's deficient performance -- the petitioner would have accepted the plea offer and the court would have imposed a more favorable sentence than the petitioner received."

At the habeas trial on September 15, 2016, the habeas court heard testimony from Matthew Gedansky, the state's attorney in the petitioner's criminal case, Douglas Ovia, the petitioner's trial counsel, and the petitioner. In particular, the petitioner testified that he admitted from the beginning that he robbed the bank, but he believed that he was only guilty of robbery in the third degree because he only had handed the bank teller a note and never hurt

anyone.^[3] There was testimony that three plea offers were made to the petitioner: an offer for ten years to serve with five years of special parole; an offer for ten years to serve with two years of special parole; and an offer made at a judicial pretrial conference with *Sullivan, J.*, offering the petitioner fifteen years to serve if he pleaded guilty to one count of robbery in the first degree.^[4] Ovia testified that his notes indicated that he advised the petitioner to accept the offers and that he would never have told the petitioner to take this case to trial. In addition, Gedansky testified that he recalled Ovia telling him that Ovia had advised the petitioner to take the offer of ten years to serve with two years special parole. The petitioner testified that he rejected these offers because he had faith the state might present him with a more favorable offer, and that he believed he deserved only five years of imprisonment. There also was differing testimony between Ovia and the petitioner with respect to what Ovia advised as to the potential maximum sentence the petitioner faced if he was found guilty of all the charges, and whether he advised the petitioner of the potential maximum sentence he faced if he prevailed on a robbery in the third degree theory at trial.

In a memorandum of decision filed January 10, 2017, the habeas court denied the amended petition for a writ of habeas corpus, finding that the petitioner had failed to prove deficient performance or prejudice. In particular, the habeas court found that "Ovia had many discussions with the petitioner throughout the course of his representation," and that Ovia "went over the state's evidence with [the petitioner] and he advised the petitioner to take each of the deals as they were offered given the circumstances." Additionally, the habeas court found that Ovia "informed the petitioner that he was facing a maximum exposure of forty-eight and one-half years if convicted of robbery in the first degree due to the sentence enhancements the petitioner faced." The habeas court concluded that Ovia relayed the offers to the petitioner, properly

³ "At the habeas trial, Ovia testified that the petitioner had taken a position that the note recovered at the bank was not the note he had written and handed to the teller. Ovia testified that it was the petitioner's position that the note he handed to the teller never indicated that he had a gun, and that the teller had given him back the note prior to his running from the bank and jumping into a river. Gedansky indicated that the petitioner had a theory that the police had invented the note on which the state relied: Gedansky described this as a 'conspiracy theory.' Ovia also testified that he recalled contacting a handwriting expert to see if his evaluation of the note could give some support to the petitioner's theory. Ovia testified that after the handwriting analyst reviewed a copy of the note, the handwriting analyst indicated to him that he thought it 'would not be a good idea to call him as a witness.'" *Moore*, 186 Conn. App. at 258 n.2.

⁴ "Gedansky testified that Ovia was able to persuade him to reduce his initial offer of ten years to serve with five years special parole to ten years to serve with two years special parole." *Moore*, 186 Conn. App. at 258 n.3.

explained the state's evidence to him, and adequately warned him of the exposure he could face should he choose to go to trial.

Moore, 186 Conn. App. at 258-60.

4. The habeas court's decision

In a memorandum decision, the habeas court denied the petitioner's petition for a writ of habeas corpus. Pap:45. The court noted that the petitioner alleged that he had been denied his right to the effective assistance of counsel because Oviaan inadequately advised him about accepting plea offers and, but for that deficient advice, he would have accepted the offers and received a more favorable sentence than the one he received after going to trial and being convicted of first-degree robbery. Pap:41.

The habeas court undergirded its decision with the following factual findings: Prior to trial, State's Attorney Mathew Gedansky offered the petitioner a plea bargain of ten years to serve in prison and five years of special parole in exchange for a guilty plea to first-degree robbery. Pap:42. Oviaan persuaded Gedansky to reduce the special parole term to two years, and Gedansky held the offer open while Oviaan reasoned with and "beg[ged]" the petitioner to accept it, but the petitioner rejected it. Pap:42. Oviaan informed the petitioner that, when the case proceeded to a judicial pretrial, Judge Sullivan likely would offer a period of incarceration that would be greater than that offered by Gedansky. Pap:42. Gedansky was unwilling to reduce the period of time because of the petitioner's criminal history and the state's strong evidence. Pap:42. Judge Sullivan's subsequent offer of fifteen years to serve was also rejected by the petitioner. Pap:42.

During this pretrial period, Oviaan discussed the state's evidence with the petitioner, advised him that his maximum sentence exposure was forty-eight and a half years of incarceration if he was convicted of first-degree robbery and his sentence enhanced, and

advised him to accept Judge Sullivan's plea offer. Pap:42. The petitioner's rejection of the plea offer was based on his belief that he committed third-degree robbery because the deposit slip that he gave to the bank manager only demanded money and he had not injured anyone during the robbery. Pap:42. In the view of the petitioner, five years to serve was a reasonable sentence for committing third-degree robbery, and that term was the maximum he could receive for committing this offense. Pap:43. The petitioner maintained that, had he known that he would be sentenced to thirty-four years of incarceration for committing first-degree robbery, he would not have gone to trial. Pap:43.

At trial, the state's first-degree robbery evidence was based on "still photographs from a surveillance video depicting the petitioner entering the bank and writing a note that he presented to the bank [manager]." Pap:41. The note, which the state "recovered from the bank," ordered the manager to "[g]ive cash" and informed her that the petitioner had a "gun." Pap:41. The petitioner's theory of defense was that he did not write that note and, therefore, was guilty only of third-degree robbery due to the absence of proof of first-degree robbery's element of the threatened use of a gun in the course of committing the bank robbery. Pap:41. The petitioner maintained that, after the bank manager returned the note to him, he "ruined" it while running "through a river" in an escape attempt. Pap:41. However, no note was "recovered" from the petitioner when he was apprehended. Pap:41.

The habeas court concluded that the petitioner was not denied his right to the effective assistance of counsel because he failed to prove that Ovan's performance as counsel was deficient. Pap:45. The habeas court noted that Ovan relayed the plea offers to the petitioner, explained the "state's evidence," and warned him of the "exposure he could face should he choose to go to trial." Pap:45. In addition, the habeas court held that the petitioner failed to

prove that he was prejudiced by any deficient performance, given that he had “rejected both offers and informed the court that he would go to trial to prove that he did not commit a robbery in the first degree.” Pap:45

5. The Appellate Court decision

The Appellate Court dismissed the petitioner’s appeal on the basis that he failed to establish that the habeas court abused its discretion in denying his petition for certification to appeal from its denial of the habeas petition. *Id.* at 269-70. In reaching this holding, the Appellate Court determined that petitioner had not proven that his claim of ineffective assistance of counsel was meritorious. *Id.* at 259-69.

In relevant part, the Appellate Court characterized the petitioner’s ineffective assistance of counsel claim as asserting that Ovan’s performance as counsel was deficient for failing to provide the petitioner with key information that would have enabled him to “meaningfully weigh his options” in deciding whether to proceed to trial or accept the plea deals that were offered to him. *Moore*, 186 Conn. App. at 265. According to the Appellate Court, the petitioner maintained that Ovan’s advice on the “maximum exposure he faced if convicted of robbery in the first degree” was insufficient because it neglected to address his rationale for opting for a trial, which was that an acquittal on the first-degree robbery charge and a conviction on the lesser included offense of third-degree robbery could result in a prison sentence that was shorter than the prison terms in the plea offers. *Id.* The Appellate Court explained that the petitioner viewed Ovan as having a “duty” to advise him that the “maximum sentence at trial were he convicted only of robbery in the third degree would be ‘at least as severe’ or exceed the sentences of the plea offers initially made to him,” which meant that Ovan had a “duty” to “encourage” him on that specific basis to “accept the plea offers” rather

than pursue an “irrational and suicidal” trial strategy that hinged on being acquitted of first-degree robbery. *Moore*, 186 Conn. App. at 265, 267.

In rejecting the petitioner’s claim, the Appellate Court declined to adopt a broad “rule” that would impose on defense counsel the “duty ... to advise their clients on the total sentence exposure they face for each and every possible defense scenario” *Id.* at 265. In addition, the Appellate Court held, under the facts of this case, that Ovian performed adequately and professionally because he informed the petitioner of: (1) the overwhelming evidence against him,⁵ which the parties agreed meant that it was “highly unlikely that the petitioner could have prevailed” regarding the first-degree robbery charge; *id.* at 265-66; (2) a “maximum sentence of forty-eight and one-half years if he proceeded to trial; *id.* at 266; and (3) the “best course action,” pursuant to *Barlow v. Commissioner of Correction*, 150 Conn. App. 781, 800 (2014), which encompassed accepting each of the plea deals offered rather than going to trial. *Moore*, 186 Conn. App. at 266-67. Indeed, the Appellate Court pointed out that the petitioner acknowledged being “fully advised” regarding the first-degree robbery charge; *id.* at 267; and that, “from the beginning, ... Ovian’s advice to [the petitioner] was unequivocal ... [and] clear[:] ... [he] should be prepared for a conviction on the charge of robbery in the first degree should he choose to proceed to trial.” *Id.* at 268.

Finally, the Appellate Court opined that the “petitioner [] cited no relevant cases to support his claim on appeal and presented no evidence at the habeas trial to demonstrate that the prevailing professional norms in Connecticut made it necessary for Ovian to advise

⁵ The Appellate Court relied on the habeas court’s finding that “Ovian had many discussions with the petitioner throughout the course of his representation, where Ovian properly explained the state’s evidence to him [and] relayed the plea offers to him....” *Moore*, 186 Conn. App. at 267-68.

the petitioner in the manner he argue[d].” *Moore*, 186 Conn. App. at 269. The Appellate Court concluded that Ovia had, consistent with the sixth amendment, walked the fine line between, on the one hand, properly advising the petitioner to accept the plea deals, which advice would have been undercut by also “advising the petitioner of the consequence of a robbery in the third degree conviction [that] might only have encouraged his unfounded belief that the state only could prove the lesser offense when the evidence of robbery in the first degree was strong”; *id.* at 269 & n.10; and, on the other hand, not coercing acceptance of the plea offers. The Appellate Court pointed out that the petitioner: (1) “believed that the plea deals offered by the state were too high given his poor health, especially `for someone who [felt he] might not make it” and that “life was fleeting” due to a “heart attack.” *Id.* at 267 n.8, 269; and (2) “held strong, subjective, and unrealistic beliefs about his case,” including that he “should be convicted only of robbery in the third degree because he merely gave the bank teller a note and did not hurt anyone”; that “five years was a more reasonable sentence for his offense”; that the “maximum sentence he could receive for robbery in the third degree was five years”; and that he “had faith the state might present him with a more favorable offer.” *Id.* at 266–67.

ARGUMENT

I. PETITIONER’S COUNSEL RENDERED CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN ADVISING HIM ABOUT THE PRETRIAL PLEA OFFERS

The petitioner claims that Ovia rendered ineffective assistance of counsel, in violation of the sixth amendment to the United States constitution,⁶ by providing inadequate advice on

⁶ Although the petitioner also invokes the protections of article first, §§ 8 and 9, of the Connecticut constitution; Pbrf:19-20; his failure to separately analyze the state constitution requires that this Court limit its analysis to the federal constitution. *Ham v. Commissioner of Correction*, 301 Conn. 697, 703 n.6 (2011); see Petitioner’s Brief:19.

his decision to proceed to trial rather than accept the state's plea offer of ten years to serve and, subsequently, Judge Sullivan's offer of fifteen years to serve, which resulted in a sentence of thirty-four years of imprisonment following conviction and sentence enhancement. Petitioner's Brief (Pbrf):1-2, 24-31. The petitioner argues that he could have been dissuaded from going to trial and, thereby, avoided the disparity in prison terms between the plea offers he rejected and the sentence he received, if Ovian had advised him of the consequences of being convicted of the lesser included offense of third-degree robbery. Pbrf:2, 26-27.

The petitioner does not dispute that, in properly advising him to take the plea offers, Ovian adequately apprised him of the offers themselves, the overwhelming evidence he faced if he went to trial on the first-degree robbery charge, and, if convicted, his total prison exposure on that charge, including sentence enhancement based on his persistent offender status and the commission of another crime while on release on bond. Pbrf:1, 24. He maintains, nonetheless, that he required additional advice to address his belief that: (1) he was only guilty of third-degree robbery and could be acquitted at trial of first-degree robbery because he presented a bank teller with a note demanding money and stating that he had a gun, but no gun was recovered and no one saw him in possession of a gun; (2) five years of imprisonment was a reasonable sentence; and (3) he would be sentenced to five years or less of prison if he was convicted of third-degree robbery. Pbrf:2, 24.

According to the petitioner, Ovian should have apprised him that both Ovian and the prosecutor anticipated that, following a third-degree robbery conviction, he would be sentenced to more prison time than the five years he thought he would receive and the ten years that the prosecutor offered, and either the same prison time as the fifteen years that

Judge Sullivan offered, or more time, given that the prosecutor was “unequivocal” at the habeas trial that he would have recommended an enhanced sentence if the petitioner was convicted of third-degree robbery. Pbrf:2, 26-27. Such advice, the petitioner maintains, would have enabled him to understand that although it may have been an “unwise but rationale decision to take his chances” on a “Hail Mary” at trial, hoping to be acquitted of first-degree robbery and be sentenced on third-degree robbery to five years of incarceration, that decision would have been a “completely irrational,” and essentially tantamount to a “suicide mission,” if it was “likely” that the third-degree robbery sentence would be “more severe” than the plea offers of ten and fifteen years to serve, as was the case here. Pbrf:2. Expressed in another way by the petitioner, it would have been “rational” to “roll the dice ... in pursuit of the slim hope that the [sentencing] outcome” would be around five years of prison, which was more favorable than the plea offers, but “irrational” in this case because “there [wa]s no chance of a better outcome and a high probability that the outcome w[ould] be exponentially worse....” Pbrf:27-28.

The petitioner’s claim lacks merit. O’vian was not obliged to advise the petitioner that he would be exposed to a twenty-year prison term upon being convicted of the lesser included offense of third-degree robbery, and that there was a high probability that he would be sentenced to a prison term exceeding the ten-year and fifteen-year prison terms in the plea offers. This advice was unnecessary because O’vian’s advice on the greater offense of first-degree robbery effectively apprised the petitioner that, due to the state’s overwhelming evidence, he never could have been acquitted of first-degree robbery and that, therefore, chancing an acquittal would be irrational in light of the high likelihood of a conviction carrying a prison exposure of forty years. The sixth amendment did not impose upon O’vian the duty

to do more in order to force the petitioner from the irrational position he took in going to trial instead of accepting the plea offers. And even if Ovian's advice was deficient, there was no resulting prejudice because the advice of a competent attorney on this matter would have been insufficient to counter the petitioner's intransigent and irrational risk-taking and persuade him to accept the plea offers. Finally, and alternatively, the petitioner's proof of Ovian's deficient performance was insufficient because it was founded on his failure to apprise the petitioner of the likely sentencing consequences of a third-degree robbery conviction, but Ovian ultimately testified at the habeas hearing that he could not remember what advice he gave the petitioner on that matter.

A. Pertinent Law And Standard Of Review

1. Right to the effective assistance of counsel

A criminal defendant's right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, *Strickland* requires that a petitioner in a habeas proceeding show both that his counsel performed deficiently and that the petitioner was prejudiced by that deficient performance. *Michael T. v. Commissioner of Correction*, 307 Conn. 84, 91 (2012). To establish deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness"; *Strickland*, 466 U.S. at 688; and courts on review must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in order to avoid "the distorting effects of hindsight." *Id.* at 689. To establish prejudice, the petitioner must show that, but for the deficient performance of his counsel, it is "reasonably likely" that the result would have been different. (Internal quotation marks omitted.) *Harrington v. Richter*, 562 U.S. 86, 111

(2011). Satisfaction of the “reasonably likely” standard for proving prejudice obliges the petitioner to demonstrate that there is a “substantial, not just conceivable,” “likelihood” of a different result. (Internal quotation marks omitted.) *Harrington*, 562 U.S. at 112. The “reasonably likely” standard does not require a showing that counsel’s actions more likely than not altered the outcome, but the difference between the reasonably-likely prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. (Internal quotation marks omitted) *Id.*

When a habeas court, under the sixth amendment’s two-pronged test, resolves the question of whether a petitioner was denied the effective assistance of counsel, it exercises broad discretion in finding facts, and those findings may not be disturbed on review unless they are clearly erroneous. *Ebron v. Commissioner of Correction*, 307 Conn. 342, 351 (2012), *cert. denied sub. nom. Arnone v. Ebron*, 569 U.S. 913 (2013). But the habeas court’s legal conclusions, drawn from its factual findings, are subject to plenary review. *Id.*

2. Counsel’s advice on accepting a plea offer or going to trial

The sixth amendment’s right to the effective assistance of counsel applies to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162-69 (2012); *Missouri v. Frye*, 566 U.S. 134, 138, 140-45 (2012).

a. Application of the performance prong of the ineffective assistance of counsel test to plea negotiations

In this case, the Appellate Court relied on the decisions in *Sanders v. Commissioner of Correction*, 169 Conn. App. 813 (2016), *cert. denied*, 325 Conn. 904 (2017), and *Barlow v. Commissioner of Correction*, 150 Conn. App. 781, *cert. denied*, 325 Conn. 904 (2017), to explicate the general jurisprudence concerning plea negotiations and counsel’s obligations to the petitioner in making recommendations concerning the choice between the pleas

offered and a trial. *Moore*, 186 Conn. App. at 264. This Court should overrule *Sanders* and *Barlow* on this matter and be guided instead by the analysis of the Second Circuit Court of Appeals in *Purdy v. United States*, 208 F.3d 41 (2d Cir. 2000), which is in line with *Strickland's* principle that there is no one way for defense counsel to advise his client about whether to accept plea offers or proceed to trial. *Strickland*, 466 U.S. at 699-69, 696.

In *Sanders*, 169 Conn. App. at 832, and *Barlow*, 150 Conn. App. at 796-97, the Appellate Court held that there is no *per se* rule requiring that counsel, in the performance of his duties, provide specific recommendations to a petitioner regarding whether to take plea offers. Instead, the Appellate Court determined that counsel is obligated to provide the petitioner with his "professional advice, assistance and opinion on the petitioner's best course of action concerning the state's plea offer." (Emphasis added.) *Sanders*, 169 Conn. App. at 830, 832. As the *Barlow* court explained, conveyance of the "best course of action" regarding the plea offer to the petitioner involves evaluating whether to proceed to trial or accept a plea offer and identifying the most favorable outcome. 150 Conn. App. at 800. Therefore, according to the Appellate Court, counsel's performance is deficient if he advises the petitioner regarding the "strength and weaknesses of the state's case," "potential exposure" at sentencing, and the "terms of the plea offer" without also apprising him of the "best course of action" to undertake. *Sanders*, 169 Conn. App. at 831. The Appellate Court viewed this "best course of action" requirement as striking the right balance between the petitioner's likely heavy reliance on his counsel's opinions and the petitioner's ultimate prerogative, free from coercion by his counsel, to decide whether to plead guilty or proceed to trial. *Barlow*, 150 Conn. App. at 798-99.

Notably, the *Barlow* and *Sanders* decisions, which have not been evaluated by this Court, foreswore a rule requiring counsel to convey a specific recommendation to the petitioner about whether to accept a plea offer or proceed to trial, requiring counsel instead to provide advice that is only marginally less specific and directive: the best course of action in making that choice. In contrast, in earlier decisions on this matter; see *Vazquez v. Commissioner of Correction*, 123 Conn. App. 424, 430 (2010), *cert. denied*, 302 Conn. 901 (2011), and *Edwards v. Commissioner of Correction*, 87 Conn. App. 517, 523-24 (2005); the Appellate Court invoked *Purdy*. In *Purdy*, the Second Circuit Court of Appeals examined its decision in *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997), and determined that *Boria* created no “*per se* rule that defense counsel must always expressly advise the defendant whether to take a plea offer.” *Purdy*, 208 F.3d at 48; see also *id.* at 46 (rejecting “*per se* rule that counsel not only must inform each client of the probable costs and benefits of accepting a plea offer, but also, in so many words and regardless of the particular circumstances, must advise the defendant to either plead guilty or not”). The *Purdy* Court considered a *per se* rule to be a “blunt instrument”; *id.* at 46; that was not “well calibrated to gauge the ineffective assistance of counsel.” *Id.* at 48. Instead, the Court in *Purdy* invoked and relied on *Strickland’s* bar against using “mechanical rules” to adjudicate a claim of ineffective assistance of counsel, “warning that [n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel,” and allowance that there are “countless ways to provide ineffective assistance of counsel.” *Purdy*, 208 F.3d at 48 (quoting *Strickland*, 466 U.S. at 688-89, 696).

According to the *Purdy* Court, the *Boria* Court’s “ultimate[] h[o]ld[ing] was] only that[,] under the circumstances of that case, [the defendant’s] lawyer had failed to adequately

advise his client” before he decided to proceed to trial. *Purdy*, 208 F.3d at 46. That advice was limited to “discussions” about “trial strategy” because the petitioner professed his innocence and refused to consider a plea offer, not wanting to be embarrassed in front of his children in pleading guilty, even though he was exposed to a prison term of twenty years to life in a drug case that was almost impossible to win at trial, the plea offer of one to three years in prison was in his “best interests”; and counsel believed that his client’s refusal to accept the offer would be “suicidal.” *Id.* at 46-47. Therefore, the *Purdy* Court reasoned, the *Boria* Court’s references to a defense lawyer’s duty to advise his client about accepting or rejecting a plea offer, which were drawn from professional responsibility standards,⁷ a

⁷ As the *Purdy* Court pointed out, the *Boria* Court relied on language that was deleted from the American Bar Association’s Model Code of Professional Responsibility, to the effect that a defense lawyer has a duty in a criminal case to advise his client whether a plea offer is desirable. *Purdy*, 208 F.3d at 47 (citing to *Boria*, 99 F.3d at 496). The Code’s current standards, tracked by Connecticut’s Code of Professional Conduct, contain no such language and mandate generally that, in a criminal case, a lawyer is required to abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered. Rule 1.2(b) of Connecticut’s Rules of Professional Conduct (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); Rule 1.4 (a) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

manual of trial instructions written by a legal scholar, and *Von Moltke v. Gilles*, 332 U.S. 708, 721 (1948) (plurality opinion), constituted “non-binding dicta.”⁸ *Purdy*, 208 F.3d at 46-48.⁹

The *Purdy* Court then held that, in the case under review, counsel offered reasonable advice to the defendant, a “sophisticated businessman,” by informing him “fully of the strength of the government’s case against him, together with the nature of the government’s plea offer. *Id.* at 46-48. The *Purdy* Court reasoned that counsel was not obliged to expressly advise the defendant to take the plea offer because it was not necessarily in his “best interests,” given that: (1) the offer was not “significantly less than [what] his exposure would be at trial (twelve] to [twenty-four] months at most”); and (2) it was rational to go to trial knowing the “formidable” case against him, the likely sentences, and risk of a “somewhat greater sentence” if convicted, “hop[ing to] get[] an acquittal and thus achiev[e] his primary goal of avoiding incarceration altogether....” *Id.* at 45-48. In these circumstances, the court

⁸ In *Von Moltke*, a woman, who was arrested and arraigned on espionage charges and was briefly represented by appointed counsel during arraignment, pleaded not guilty; later, without counsel and only upon the advice of law enforcement, she changed her plea to guilty. Four justices agreed with the petitioner that she did not have adequate legal advice and therefore her plea was not knowing and voluntary. 332 U.S. at 709-20. The plurality then identified the advice from counsel that was lacking, including “an informed opinion as to what plea should be entered.” *Id.* at 721. Two justices would have remanded for fact finding on the alleged advice of the FBI agents and the waiver of counsel, and three justices dissented. *Id.* at 727-41. The *Purdy* Court appears to have understood the finding in *Von Moltke* of an unknowing and unintelligent guilty plea to be a byproduct of an overall “fail[ure] to educate the defendant as to her legal rights.” 208 F.3d at 48.

⁹ In *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003), the Court, without referencing *Purdy*, invoked *Boria* for the general proposition that defense counsel has a duty to provide his client with professional advice on whether to accept a plea offer. However, the *Pham* Court added that “[e]ven if there might be circumstances where defense counsel need not render advice as to acceptance of a plea bargain, there can be no doubt that counsel must always communicate to the defendant the terms of any plea bargain offered by the prosecution.” (Internal quotation mark omitted.) *Id.*

in *Purdy* determined, counsel had “successfully steered a course between the Scylla of inadequate advice and the Charybdis of coercing a plea.” 208 F.3d at 45.

Thus, consistent with *Strickland*, *Purdy* stands for the proposition that, in advising a client about whether to accept a plea offer or go to trial, defense counsel need not always expressly recommend the “best course of action” to follow, contrary to the holdings in *Sanders* and *Barlow*. In this case, as set out below, Ovian correctly recommended that the petitioner pled guilty to first-degree robbery without any recommendation concerning a third-degree robbery conviction. Although Ovian’s recommendation also satisfied *Sander’s* and *Barlow’s* “best course of action” requirement, his advice is properly understood under the sixth amendment’s case-by-case approach as a correct combination of express advice and no advice at all. This Court is obliged to follow this constitutionally dictated, flexible approach, which undoubtedly will make a difference in future cases where defense counsel offers no advice to his client on whether to accept a plea offer or proceed to trial.

b. Applying the prejudice prong of the ineffective assistance of counsel test to plea negotiations

As for the application of the prejudice prong of the ineffective assistance of counsel test to counsel’s inadequate advice regarding the petitioner’s decision whether to accept a plea offer or go to trial, the petitioner must show that there was a reasonable probability that, absent the deficient performance of his counsel, he would have accepted an offer of a sentence that was less severe than the sentence he received after a trial and conviction, the prosecutor would not have canceled the offer, and the trial court would have accepted it. *Lafler*, 566 U.S. at 163-64; *Sanders*, 169 Conn. App. at 827.

3. Gambling on the decision to take a plea or go to trial

For sixth amendment purposes, an analysis of the rationality of risk-taking undergirding the decision to go to trial or accept a plea offer is governed by the United States Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958 (2017). The *Lee* Court explained that "[w]here a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one[,] [b]ut [that] common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial," and that the "respective consequences of a conviction after trial and by plea must also be considered." *Id.* at 1966. The *Lee* Court further explained that, even without a "realistic defense to a charge," the "smallest chance of success at trial" would constitute a rational "Hail Mary" if a petitioner perceives the sentencing "consequences" of the charge and the plea offer to be "similarly dire" or "not markedly harsher," thereby rendering the risk "attractive" and worth taking. *Id.* at 1966-67, 1969. The *Lee* Court offered the examples of a "charge carrying a [twenty]-year sentence" and a "similarly dire" "prosecution's plea offer [of] [eighteen] years"; *id.* at 1967; *Purdy*, 208 F.3d at 45-48 (same; plea not significantly less than sentence exposure of twelve-to-fourteen months); and a charge carrying prison time and certain deportation that would not be "markedly harsher" than the plea offer's prison time of "a year or two [less]" and deportation. *Lee*, 137 S. Ct. at 1969.

4. Applicable Statutes

The petitioner was charged and convicted of violating General Statutes § 53a-134 (a)(4), which provides in pertinent part that "a person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133

..., he ... threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, ... other firearm”

General Statutes § 53a-133 provides that,

[a] person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

In addition, the trial court instructed on the third-degree robbery, pursuant to General Statutes § 53a-136, which provides that “a person is guilty of robbery in the third degree when he commits robbery as defined in section 53a-133.” Petitioner’s Exhibit 19 (Trial Transcript, October 26, 2010):66-69.

5. The petitioner’s sentence exposure

On the first-degree robbery charge, the petitioner was exposed to a forty-year prison term due to: (1) the charge of first-degree robbery, a class B felony, being subject to treatment as a class A felony due to the petitioner’s persistent felony offender status and, therefore, carrying a maximum sentence of twenty-five years of imprisonment; General Statutes §§ 53a-134(b) and 53a-40(f) and (m); (2) the sentence being subject to a five-year prison enhancement because the robbery was alleged to have been committed with a firearm; General Statutes § 53a-202k; and (3) the charge of committing a felony while on release carrying a maximum sentence of ten years of prison. General Statutes § 53a-40b(1) (Rev. to 2011).

On the lesser included offense of third-degree robbery, the petitioner was exposed to a twenty-year prison term due to: (1) third-degree robbery, which is a class D

felony, carrying a maximum sentence of five years of prison; General Statutes §§ 53a-136(b) and 53a-35a(8) (Rev. to 2011); (2) the petitioner's persistent serious felony offender status subjecting that five-year maximum to an enhancement of ten years, by treating the class D felony as a class C felony; General Statutes § General Statutes § 53a-40(c) and (j) (Rev. to 2011); and (3) the offense of committing a felony while on release carrying a maximum sentence of ten years of prison. General Statutes § 53a-40b(1) (Rev. to 2011).

B. It Was Sufficient For Sixth Amendment Purposes that Petitioner's Counsel Properly Advised Him To Accept The Plea Offers

The petitioner subjectively adopted a trial strategy of seeking an acquittal on the charge of first-degree robbery, conceding guilt on the lesser-included offense of third-degree robbery, and being sentenced to a five-year prison term. The petitioner argues that Ovan's advice to accept the plea offers of ten and fifteen years to serve was constitutionally deficient because it did not inform him that, even if convicted of third-degree robbery, he had "no chance" of receiving a sentence of five years to serve. This argument is flawed and therefore unpersuasive. The irrational part of the petitioner's strategy was obtaining an acquittal on the charge of first-degree robbery. Ovan advised him that such an acquittal was highly improbable and that he should plead guilty rather than risk the forty-year prison exposure if convicted at trial of first-degree robbery. Under these circumstances, as the Appellate Court correctly determined, Ovan had no additional duty to advise the petitioner that a third-degree robbery conviction, which would occur only if he were acquitted of first-degree robbery, exposed him to a prison term of twenty years. The petitioner overlooks a key fact: in taking a chance on a first-degree robbery acquittal, the petitioner risked a forty-year prison exposure that was far more severe than the twenty-year prison exposure he risked in taking a chance on a third-degree robbery conviction.

The chief pitfall in the petitioner's claim stems from his examination of the risk he accepted in proceeding to trial rather than pleading guilty. The petitioner assesses the risk, and therefore the rationality of pursuing the smallest chance of success a trial – a "Hail Mary" – based on comparing his twenty-year prison exposure on a third-degree robbery conviction to the five-year prison term he sought. Pbrf:27-28. Instead, he should have first compared his forty-year prison exposure on a first-degree robbery conviction to a five-year prison term, where the true risk of long-term confinement lay, and then compared that risk to the risk of prison exposure attending the lesser included offense of third-degree robbery. It is this comparison of the prison risk the petitioner was apprised of and the prison risk he did not learn of that demonstrates the adequacy of Ovia's advice to plead guilty.

Under *Lee*, 137 U.S. 1958, the petitioner's "Hail Mary" in chancing a first-degree robbery acquittal was irrational because it was predicated on risking a trial in the absence of any "realistic defense" and in the face of a forty-year prison exposure, which was "markedly harsher" than the five-year prison term he sought. *Id.* at 1967, 1969. For purposes of the performance prong of the sixth amendment's two-pronged test for the effective assistance of counsel; *Michael T.*, 307 Conn. at 91; Ovia adequately apprised the petitioner of the irrationality of his "Hail Mary" by informing him of the plea offers, advising him to accept the offers because he was looking at a first-degree robbery conviction if he went to trial facing the state's overwhelming evidence, and telling him that he would be exposed to a maximum prison term of around forty years.

There can be no doubt that Ovia clearly apprised the petitioner of his lack of any realistic defense to first-degree robbery and the forty-year prison exposure it carried. During plea bargaining, the petitioner posited an improbable theory of defense: he committed third-

degree robbery rather than first-degree robbery because he took bank money without threatening to use a gun. Habeas Transcript (HT):111, 114-15. In his discussions with Ovia, the petitioner founded this theory on a series of unsupported assertions to the effect that the deposit slip he handed to a bank manger contained a written notation that demanded cash, but referenced no gun. The petitioner sought to explain away the state's evidence of a deposit slip bearing a notation referencing a gun with the assertion that this deposit slip was not the one he wrote on, in as much as the bank manager handed the actual deposit slip back to him and he lost it in a river fleeing from law enforcement. HT:48, 86. In addition, the petitioner attempted to cast doubt on the state's evidence of the manager describing the written notation on the deposit slip as demanding cash and referencing having a gun with the unfounded assertion that the bank employees were afraid of African Americans. HT:49. He also questioned the authenticity of the state's deposit slip by attributing significance to that deposit slip having been found subsequent to the robbery in a bank "shred" can. HT:43.

But the petitioner's theory as to why the case did not implicate first-degree robbery plainly hung on the frayed thread of the improbability of: (1) the simultaneous existence of two deposit slips demanding cash, but one only referencing a gun; (2) the bank manager falsely concocting a reference to a gun in the notation on the deposit due to her presumed racial animus; and (3) the petitioner entering a river and losing the true deposit slip there. Attorney Ovia's advice easily cut that thread by presenting the petitioner with the prosecutor's evidence of the bank manager's writing on the back of the deposit slip. Petitioner's Exhibit:21 (Ovia's Notes, February 26, 2010). This evidence tied the deposit slip with the written gun threat and demand for money that the state had in-hand to the deposit slip the petitioner gave to the bank manager during the robbery by revealing that the bank

manager surreptitiously wrote the words “black and white” on the back of that deposit slip at the time of the robbery, that those words constituted an accurate shorthand description of the petitioner as an African-American who was wearing a white tank top shirt, and that the bank manager was able to identify her handwriting. See Petitioner’s Exhibit:15 (Trial Transcript, October 18, 2010):77. In addition, the evidence apprised the petitioner of the bank manager’s reasonable explanation for the deposit slip having been found in a shred can, which was that, after the robbery, she put the deposit slip into an envelope in her locked desk for safekeeping, that, the next day, she inadvertently threw the deposit slip away in a can under the desk during the continuing commotion of the robbery, and that she retrieved it for the police when she realized her mistake. See Petitioner’s Exhibit:15 (Trial Transcript October 18, 2010):90-91.¹⁰ Finally, the prosecutor’s evidence highlighted for the petitioner the improbability that when he was apprehended by the police and found to be dirty and very wet, consistent with running through the woods and a swamp area for approximately six hours, he managed to retain the bank money but not the deposit slip. Petitioner’s Exhibit:16 (Trial Transcript, October 20, 2010):102-03.

Also irrational under *Lee*, although less so than risking forty-years of prison without a realistic chance of success, was the petitioner’s “Hail Mary” in chancing a five-year prison sentence on a third-degree robbery conviction, notwithstanding a twenty-year prison exposure and, therefore, the risk of a “markedly harsher” sentence. 137 S. Ct. at 1967, 1969. The risk of the imposition of that maximum twenty-year prison term is evidenced by the

¹⁰ Also, Ovia contacted a handwriting expert to see if his evaluation of the deposit slip could give some support to the petitioner’s theory, but the expert reviewed the deposit slip and informed Ovia that it would not be a good idea to call him as a witness. *Moore*, 186 Conn. App. at 258 n.2.

prosecutor's testimony at the habeas trial to the effect that, if the petitioner was convicted of third-degree robbery, he would have tried to obtain a prison sentence of "up to the penalties for robbery one," and at least twenty years of prison, by seeking to enhance the third-degree robbery sentence based on the petitioner's persistent offender status, adding the charge of committing a robbery while on release, and attempting to arrange a "global disposition" of all of his cases from other judicial districts, including the commission of a robbery while on probation. HT:15-17, 20-21. On the other hand: (1) Judge Sullivan offered a fifteen-year prison term on a plea to the greater offense of first-degree robbery; (2) a third-degree robbery conviction meant that there was insufficient proof that the petitioner threatened to use a firearm in the commission of a robbery; and (3) the trial court was not obliged to sentence the petitioner to the maximum prison terms carried by the charged offenses or order that the sentences run consecutively.

Tellingly, advice from Ovan that the petitioner was exposed to twenty years of prison if he was convicted of third-degree robbery, and that the actual sentence would probably fall within a fifteen-to-twenty-year range, would not have influenced the petitioner's decision to go to trial. This is so because, in deciding to proceed to trial, the petitioner already had accepted and taken on a greater risk, with more severe consequences – namely, in chancing a first-degree robbery acquittal, the high probability of a forty-year prison exposure. The sixth amendment did not oblige Ovan to pursue the petitioner into the warren of his irrational gambling on guilt and confinement knowing all the while that, realistically, there would be no payoff. At a minimum, Ovan had no such duty in the absence of the petitioner incurring a new risk with far harsher consequences than a forty-year prison exposure. Moreover, all Ovan would have encountered had he followed the petitioner along this pathway was the

petitioner's irrationality, which, to the extent it ever could have been dispelled, would have required a level of forcefulness in loosening the petitioner's grip on going to trial that bordered on coercion, which is precisely what the sixth amendment prohibits. See *Beans v. Black*, 757 F.2d 933, 936 (8th Cir.) (no duty to force client from intransigent position), *cert. denied*, 474 U.S. 979 (1985); *Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993) (same). Ovia properly did not encroach on the petitioner's autonomy by taking his irrational decision to go to trial away from him; see generally *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-11 (2018); but neither was he required to continue to remonstrate with him about his irrationality.

Thus, consistent with the sixth amendment, Ovia competently performed as counsel by: (1) specifically recommending that the petitioner accept the plea offers, based on advice about the improbability of success at trial and the severe sentencing consequences of a first-degree robbery conviction; and (2) offering no advice about the sentencing consequences of a third-degree robbery conviction. The lack of any constitutional imperative for Ovia to explain the best course of action regarding a third-degree robbery conviction and sentencing, contrary to *Sanders* and *Barlow*, supports *Purdy's* flexible approach to an attorney advising a defendant under the unique circumstances of the case whether to take plea offers or proceed to trial. Not only should this Court adopt *Purdy*, but it is obliged to do so, because that case is closely aligned with *Strickland's* fundamental principle that there exists no one way for an attorney to competently advise his client and avoid coercive conduct. *Purdy*, 208 F.3d at 48 (relying on *Strickland*, 466 U.S. at 688-89, 696).

C. Any Deficient Advice On Accepting The Plea Offers Was Not Prejudicial

Finally, assuming, *arguendo*, that Ovia's advice on whether to take the ten-and-fifteen-year plea offers or go to trial was deficient, the petitioner has failed to demonstrate

that there was a reasonable probability that he would have accepted the offers and, therefore, been prejudiced by that deficiency. *Sanders*, 169 Conn. App. at 826.¹¹ Simply put, it was improbable that the petitioner would have accepted the plea offers due to the intransigent nature of his decision to go to trial. The petitioner's intransigency was a byproduct of his irrationality in chancing a first-degree robbery conviction without a realistic defense and in the face of a forty-year prison exposure. And that intransigency was hardened by the fact that, as Ovia testified, and his case notes reveal, the petitioner had concluded that incarceration for more than four years was "too much" due to his concern over his "personal circumstances." HT:53. Those circumstances implicated his deteriorating mental and physical health stemming from a series of heart attacks and bypass surgery, all of which made him feel that "life was fleeting" and that he was "not going to be around much longer." HT:53; Petitioner's Exhibit:21 (Ovia's Notes) (September 25, 2009), (February 26, 2010), (November 13, 2009), (July 9, 2010), and (August 13, 2010). The petitioner's intransigence undercuts his assertion that he would have accepted the plea offers if competently advised by counsel to accept them. *Meszaros v. United States*, 201 F. Supp. 3d 251, 276 (E.D.N.Y. 2016); see *Chrzaszcz v. United States*, 2015 WL 2193713, at *16 (D. Ariz. May 11, 2015) (no reasonable probability of defendant accepting plea offers if competent counsel offered additional evidence of likelihood of losing at trial, where defendant "fixated" on his assertion of innocence based on lack of awareness of drugs in truck), *aff'd*, 671 F. App'x 968 (9th Cir. 2016).

¹¹ Fifteen years to serve appears to be the operative offer because, although the prosecutor offered ten years to serve and agreed to Judge Sullivan's offer of fifteen years to serve, the record on this matter only reflects the prosecutor's testimony that, based on his experience with Judge Sullivan, Judge Sullivan would not have offered the petitioner ten years to serve or less. HT:17.

Simply put, the petitioner strongly believed that he only deserved five years of prison, and no amount of advice would have changed that. The petitioner's claim that he would have accepted the ten-and-fifteen-year plea offers but for Ovia's deficiencies is a classic example of *post hoc* assertions that the sixth amendment rejects. *Lee*, 137 S. Ct. at 1967.

D. Alternatively, The Petitioner Failed To Prove That His Counsel's Advice To Accept The Plea Offers Was Deficient Because Counsel Could Not Remember The Advice He Conveyed

Alternatively, the petitioner failed to establish the factual predicate of his deficient performance allegation – namely, that Ovia did not apprise him that a third-degree robbery conviction carried a twenty-year sentence exposure. This is so because Ovia could not remember whether he apprised the petitioner of such a sentence. Although the habeas court did not find that the petitioner was not so advised, the record concerning Ovia's inability to recall this matter is not subject to dispute. Therefore, this Court can make the legal determination that the petitioner's deficient performance allegation was unproven based on Ovia's lack of memory.¹² *Sallahdin v. Mullin*, 380 F.3d 1242, 1251-52 (10th Cir. 2004) (collecting cases), *cert. denied*, 544 U.S. 1052 (2005); *Budziszewski v. Commissioner of Correction*, 322 Conn. 504, 516 n.2 (2016) (petitioner cannot prove counsel necessarily failed to offer adequate advice on deportation consequences from counsel's inability remember all advice given); *Betts v. Commissioner of Correction*, 188 Conn. App. 397, 407 (agreement with habeas court that record shows failure of proof of incompetent representation pursuant

¹² The respondent did not raise this argument in either the habeas court or Appellate Court or seek certification based on its rationale. However, it may be considered by this Court because it offers only a new reason why Ovia's performance as counsel was not deficient rather than a new legal claim. *Michael T. v. Commissioner of Correction*, 319 Conn. 623, 635 n.7 (2015); accord *Jobe v. Commissioner of Correction*, 334 Conn. 636, 646 n.2 (2020).

to *Strickland* where parties could not recall if they discussed minimum and maximum penalties for pending charges or cumulative maximum exposure on all charges during plea-offer conversations), *cert. denied*, 331 Conn. 909 (2019).

Here, the record of the habeas trial shows Ovian's uncertain and therefore shifting memory of the advice he gave to the petitioner on the sentencing consequences of a third-degree robbery conviction. On direct examination, Ovian first testified – responding to petitioner's counsel's query as to whether he had any discussions with the petitioner about what would happen if, at trial, the defense prevailed under the lesser included theory of robbery three – that plea negotiations were “a long time ago”; that “[n]ormally [the lesser included offense] would be part of the of the discussion”; but that he could not “say for sure.” HT:76. Ovian then stated that his notes showed that he had been “focus[ing]” on the “ceiling” rather than the “floor”; HT:77; that he informed the petitioner that he could expect sentence “enhancement to occur”; HT:78; that his notes were about the “maximum exposure for the typical canvass”; HT:79-80; and that, “[t]ypically, part of that discussion is that you might do better than this ... under ... a split verdict or ... favorable sentencing.” HT:80. The petitioner's counsel asked if Ovian informed the petitioner that he should take the plea offers because he would get twenty years of prison even if he won on robbery three, and Ovian responded, “I don't know if I used that actual language.” HT:80. Ovian explained, “pausing ... [to] try[] to think back,” that, “normally,” when he did “maximums,” he did “the total maximum” rather than “different maximums based on convictions on just some of the charges.” HT:81. Regarding robbery three, Ovian thought he “would have said that “you are still at risk of going to jail on ... the lesser charges and that's something that you have to consider in either accepting or rejecting the offer.” HT:81. However, Ovian pointed out that he did not indicate

that there was a “strong likelihood” of prevailing under the “theory of the case ... that it was robbery three,” and he informed the petitioner that he “should assume that he would be looking at robbery one.” HT:81-82. Finally, in response to petitioner’s counsel’s question as to whether he told the petitioner that he should get it out of his head that he would get less than ten years, and that he could get more than ten years even if he won on a theory of third-degree robbery, Oviaan replied that, “based on [his] notes,” which did not “show” robbery three, he “would have to say that [the petitioner] didn’t have a specific number” and that there had been a “more general discussion” on the matter. HT:82.

However, on cross-examination, Oviaan took a different tack. Oviaan testified that, “initially,” the petitioner said he would “accept an offer somewhere in the range of four years”; HT:95; and Oviaan then answered, “Yes,” to respondent’s counsel’s query whether he informed the petitioner that, “even if convicted of ... robbery three, he was facing ... three-and-a-half years ... and could potentially be exposed to another ten years for committing a crime while out on bond.” HT:96. Similarly, Oviaan said, “Yes,” to respondent counsel’s query whether he informed the petitioner that, if convicted of robbery three, he likely[, almost assuredly,] faced “more than ten years” due to “other enhancements” via a “Part B [information],” including a “probation [violation] in Hartford ...” HT:96-97. As to what Oviaan would have told the petitioner when Judge Sullivan offered fifteen years, Oviaan asserted that he “never would have recommended a trial” HT:97.

On redirect examination, Oviaan changed tack again, reprising his testimony on direct examination. Oviaan could not say that he informed the petitioner that winning on robbery three could get him twenty years. HT:102. Oviaan pointed out that his notes only showed the “maximum for robbery one,” but not the “maximum for robbery three”; HT:102; and he

asserted that he “instinctively” responded in the affirmative to the questions of respondent’s counsel “because there was all this talk of enhancements....” HT:104. Ovia explained that he did not “think” he gave the petitioner “a maximum for ... robbery three alone,” but he “probably” told the petitioner he “could get a[n] enhanced penalty on any of the[] charges given his status.” HT:104.

Ultimately, on recross-examination, in reply to respondent’s counsel’s query whether he told the petitioner that he “would not do better than either the ten-year[] or the fifteen-year pre-trial offers[,] [g]iven the evidence[] [a]nd his history,” Ovia replied, “I would think that’s what I said, but I can’t say for sure.” (Emphasis added.) HT:108.

Thus, because, in the end, Ovia could not remember what advice he gave the petitioner on the sentencing consequences of a third-degree robbery conviction, the petitioner did not prove that his counsel’s advice was deficient and that, therefore, he received the ineffective assistance of counsel. *Michael T.*, 307 Conn. at 91; see also *Budziszewski*, 322 Conn. at 516 n.2; *Betts*, 188 Conn. App. at 407.

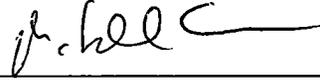
CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Court’s determination that the petitioner did not prove that his counsel provided ineffective assistance during plea negotiations.

Respectfully submitted,

COMMISSIONER OF CORRECTION

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CERTIFICATION

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.



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