BERDON, J., dissenting. I respectfully dissent. I would grant the writ of habeas corpus and order a new trial for the petitioner, Jeanette Poulin, because she did not have effective assistance of trial counsel as guaranteed by the federal and state constitutions. This resulted in her pleading guilty to the charge of manslaughter of her infant child, which charge was barred by the statute of limitations.

Fourteen years after the death of her infant son, the petitioner was charged with the murder of the child, a crime for which there is no statute of limitations. There was no evidence that the petitioner intentionally caused the death of her infant son. Indeed, even the trial attorney for the petitioner, during the habeas hearing, conceded that proof of intentional murder was unlikely.

Even if it was proven that the petitioner had caused the child's death by placing a cloth in the child's mouth to quiet him (the only proof of which was a blue cloth fiber found in the child's mouth), as she was accused of doing to another child who was removed from her care, that does not establish the intent necessary to prove murder. See *State* v. *Robertson*, 254 Conn. 739, 783, 760 A.2d 82 (2000) (to act intentionally as required for murder conviction, defendant must have had conscious objective to cause victim's death). The pediatrician's suspicion or belief that the child suffocated also does not establish the necessary intent.

Notwithstanding the claims of the majority, there was not a scintilla of evidence that would support a charge of intentional murder. The majority, for support, focuses on the "factual allegations . . . in the arrest warrant application and the evidence from the petitioner at the habeas hearing." The simple answer to the majority's reliance on the arrest warrant is to read the thirty-three pages of the arrest warrant application.[1] There is not a single allegation or even collective allegations in the application that would support probable cause for intentional murder. As to the majority's reliance on the petitioner's testimony in the habeas hearing admitting that she had reviewed the state's evidence with her attorney, the simple answer is that she did not have effective assistance of counsel. This, coupled with the fact that she was a person with mental problems and low intelligence who was under the care of a psychiatrist, led her to believe, contrary to the evidence, that the state had a case for intentional murder.

Given the totality of the circumstances, it is not conceivable that the jury would return a verdict of guilty of intentional murder in this case, and, if such a verdict had been returned, it would not have been sustained on appeal. There may have been sufficient evidence to

convict the petitioner of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3) ("under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person") or manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1) ("recklessly causes the death of another person"), but the statute of limitations would be a complete defense to these crimes.

The trial attorney's concern was that although the statute of limitations applied to manslaughter, he was not certain whether it could be a defense to manslaughter as a lesser offense included within murder, the offense with which the petitioner originally had been charged. The trial attorney testified: "I don't believe Connecticut has decided that specific issue." Case law from Connecticut was not necessary to guide the trial attorney on this issue. Common sense would dictate that if the statute of limitations is a defense to a crime, it would also be a defense to that particular crime as a lesser included offense. See, e.g., *Askins* v. *United States*, 251 F.2d 909, 912 (D.C. Cir. 1958); *Padie* v. *State*, 557 P.2d 1138, 1140 (Alaska 1976); *People* v. *Picetti*, 124 Cal. 361, 362, 57 P. 156 (1899); *People* v. *Di Pasquale*, 161 App. Div. 196, 198, 146 N.Y.S. 523 (1914); see generally annot., 47 A.L.R.2d 887 (1956). An attorney of reasonable competence would have come to this conclusion.[2] The majority justifies its position by stating that it is possible that the trial court could have determined the issue in a way that was unfavorable to the petitioner; however, we have appellate courts to assure that such errors are corrected.

The trial attorney never advised the petitioner of this common sense conclusion that he should have made as an attorney. Instead, he advised the petitioner to plead guilty to manslaughter and, in effect, to waive the statute of limitations. Simply put, the trial attorney's performance was deficient.

Nevertheless, even if I agreed with the majority, I would grant the petition for habeas corpus and order a new trial for another reason. Although the majority does not reach the issue because it was not raised before the habeas court,[3] the canvass of the petitioner as to her guilty plea did not comport with due process, and trial counsel's failure to object denied her effective assistance of counsel. We have the authority to address the issue even though it was not preserved. Practice Book § 60-5 provides in relevant part: "The [appellate] court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." Furthermore, the rule must be interpreted liberally to "facilitate business and advance justice . . . ." Practice Book § 60-1.

In this case, we should do so for two other reasons.

The habeas attorney on appeal addressed the issue, and counsel for the respondent, the commissioner of correction, although objecting because it was not raised before the habeas court, addressed the substance of the issue. Second, if we do not address this issue, it will be the subject of another petition for ineffective assistance of habeas counsel. See *Lozada* v. *Warden*, 223 Conn. 834, 844–45, 613 A.2d 818 (1992). Simply put, it makes sense to address the issue at this time.

Like the waiver of other statutory rights, "[a]ny waiver of the statute [of limitations] must, of course, be voluntary and intelligent and a waiver presents a question of fact in each case." *State* v. *Littlejohn*, 199 Conn. 631, 641, 508 A.2d 1376 (1986); see also *United States* v. *Wild*, 551 F.2d 418, 424–25 (D.C. Cir.), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977). During the plea proceeding, the only statement by the trial judge that could possibly be construed as obtaining the petitioner's consent to a waiver of the statute of limitations to the charge of manslaughter was the following: "At the time of trial, you would also [have] an opportunity to put on a defense to these charges. Again, there will be no defense because there will be no trial. Do you understand that?" The petitioner expressly replied in the affirmative. Clearly, the foregoing is not sufficient because it did not elicit from the petitioner a knowing, voluntary and intelligent waiver of the statute of limitations defense to manslaughter.[4] See *State* v. *Littlejohn*, supra, 638–39.

In sum, I would conclude that the petitioner has shown that, but for the ineffective assistance of counsel, she would not have pleaded guilty to manslaughter and would have gone to trial. See *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 157, 662 A.2d 718 (1995). I would grant the petition for a writ of habeas corpus, reverse the conviction of manslaughter and order a new trial for the petitioner.

Accordingly, I dissent.

[1] I refrain from reprinting the extensive arrest warrant here because it would be an unnecessary waste of paper; however, my thorough review of the warrant did not reveal any allegations that would support probable cause for intentional murder.

[2] If this was not the law, the state could always avoid the statute of limitations as to manslaughter by charging murder and then seeking manslaughter as a lesser included offense.

[3] The special public defender who brought and tried the habeas petition before the habeas court is not the same attorney who represents the petitioner on this appeal.

[4] Whether a waiver of a statute of limitations defense to a crime must be in writing, as the petitioner argues, need not be decided.