MCDONALD, J., concurring. Although I agree with the majority opinion, I write separately because I believe that the uncharged misconduct testimony and jury instructions gave rise to unfair prejudice, which, being unpreserved, as no exception was taken on these grounds and not the subject of review on appeal or under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), or plain error claims by the defendant, cannot be reviewed in this appeal.

Before the jury, R.N., testified that, as a teenager, she continued to baby-sit for her cousin's children while being crudely sexually abused by the defendant on three occasions because she did not know how to say "no" to her cousin, with whom she was close, after three years of baby-sitting. She also testified at trial that she did not want to break up her cousin's marriage and that "if I honestly had thought that he would have done it to other children—I think I felt that he wouldn't do it." R.N.'s testimony showed that the defendant would take advantage of his wife's young cousin for sexual gratification at the couple's home. From that testimony, the jury could find that the defendant, at the least, exhibited bad character.

In *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008) (en banc), our Supreme Court set forth the conditions for admission into evidence of uncharged propensity evidence. To minimize the risk of undue prejudice, its admission must be "accompanied" by an appropriate cautionary instruction to the jury, referring to footnote 36 of the opinion. Id., 474.[1] The *DeJesus* court lastly required that "prior to" admitting the evidence, the trial court must provide the jury with an appropriate cautionary instruction regarding the proper use of such evidence. Id., 477.[2] The *DeJesus* court also referred, in footnote 37, to the cautionary instruction given by the trial judge in *DeJesus*, which minimized the risk of undue prejudice. Id., 475 n.37.[3] That instruction expressly prohibited the jury from using such evidence as evidence of the bad character of the defendant, or as evidence of a tendency to commit criminal acts in general, or as proof that he committed the acts charged in that case. Id. That instruction concluded the evidence was only to be considered "for the sole and limited purpose of assisting [the jury] in determining whether the defendant has engaged in a characteristic method or pattern in the commission of criminal acts of which the charged conduct is a part and on the issue of the defendant's intent." Id.

The record in this case fails to reflect that the trial court gave any cautionary instruction concerning the use of the uncharged sexual misconduct evidence when R.N. testified.[4] See *State* v. *Andersen*, 132 Conn. App.

125, 131–36, 135 n.9, 31 A.3d 385 (2011). The only uncharged misconduct instruction given in this case was after the evidence was closed and before the case went to the jury.

The state argued before us that the instruction given to the jury before deliberations minimized any prejudice arising from R.N.'s testimony. As *DeJesus* pointed out, the admission of the evidence, as in this case, was "for the purpose of showing propensity." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 474. However, the state's request to charge did not limit the use of the evidence only to the issue of propensity, upon which it was offered. Instead, the request referred, in brackets, to the evidence of the victim's abuse and that of the teenage baby-sitter.[5] The defendant's request to charge also failed to limit the use of the evidence to the issue of propensity.[6] The court's charge did not limit the use of the evidence to the issue of propensity. It also did not prohibit the use of the evidence to find that the defendant was of bad character or as evidence of a tendency to commit criminal acts in general.[7]

However, the defendant in his appeal did not seek review of the given instruction on appeal, under *State* v. *Golding*, supra, 213 Conn. 233, or as plain error under Practice Book § 60-5.

The state argued before us that the admission of R.N.'s evidence was harmless because of the other evidence against the defendant and because the court's instruction was based directly on language in *DeJesus*. I do not agree because *DeJesus* clearly and repeatedly set forth the timing and requirements of a cautionary instruction. Here, the unfair prejudice was not minimized but any review must await, because of defense counsel's actions, review by habeas corpus if undertaken for ineffective assistance of counsel. See *State* v. *Kitchens*, 299 Conn. 447, 496–98, 10 A.3d 942 (2011) (identifying benefits and availability of habeas review for claims of ineffective assistance of counsel based on waiver of an improper jury instruction).[8]

Accordingly, I respectfully concur.

[1] In *DeJesus*, our Supreme Court did not set forth the precise content of such a cautionary instruction. Instead, it noted that the following instruction regarding the admission of evidence of uncharged misconduct under rule 413 of the Federal Rules of Evidence had been approved by the United States Court of Appeals for the Tenth Circuit: "In a criminal case in which the defendant is [charged with a crime exhibiting aberrant and compulsive criminal sexual behavior], evidence of the defendant's commission of another offense or offenses . . . is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the [information]. Bear in mind as you consider this evidence [that] at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in the [information]. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the [information]." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 474 n.36.

[2] "[P]rior to admitting evidence of uncharged sexual misconduct under the propensity exception adopted herein, the trial court must provide the jury with an appropriate cautionary instruction regarding the proper use of

such evidence. See footnote 36 of this opinion." *State* v. *DeJesus*, supra, 288 Conn. 477.

[3] "The trial court minimized the risk of undue prejudice to the defendant by issuing the following cautionary instruction to the jury: "Remember, I told you that certain evidence might be admitted for one purpose but not another. This evidence has been admitted; first, to demonstrate or show a characteristic method or pattern in the commission of criminal acts; and second, on the issue of the defendant's intent. The evidence of alleged prior misconduct by the defendant . . . is not part of the offense charged in this case. It is for you and you alone . . . to evaluate the testimony in this case, all of the testimony, including this testimony and to determine whether you credit it in whole, in part, or not at all. You are expressly prohibited from using this evidence that you have just heard of prior alleged misconduct as evidence of the bad character of the defendant or as evidence of a tendency to commit criminal acts in general or as proof that he committed the acts charged in this case for which he is being prosecuted. The weight, if any, that you choose to give to this evidence is up to you. That is your job as jurors, to evaluate the evidence.

"If you find this evidence of prior alleged misconduct credible you may consider it for the sole and limited purpose of assisting you in determining whether the defendant has engaged in a characteristic method or pattern in the commission of criminal acts of which the charged conduct is a part and on the issue of the defendant's intent." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 475 n.37.

[4] The record also reflects that the trial judge failed to give any cautionary instruction concerning the use of the uncharged sexual misconduct evidence when the victim, K.J., testified.

[5] The state submitted the following request to charge as to uncharged sexual misconduct:

"In a criminal case in which the defendant is charged with a crime exhibiting aberrant and compulsive criminal sexual behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.[6] However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. [In this case, evidence was presented that the defendant had penetrated the vagina of the complainant, [K.J.], with his finger at the family home in Waterbury, and that he had sexually assaulted her in the camper in Thomaston. Additionally, evidence was presented that the defendant had sexual contact with the baby-sitter, [R.N.], at the Waterbury home on three occasions: specifically, that the defendant touched [R.N.]'s chest and vagina, and that he penetrated her vagina with his finger.] Bear in mind as you consider this evidence that at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information."

[6] "The Supreme Court, in *State* v. *DeJesus*, [supra, 288 Conn. 474 n.36], suggested this instruction, but left open its precise content. The trial court should consider adapting this language to the specific purpose for which the evidence was offered."

[6] The defendant submitted the following request to charge as to uncharged sexual misconduct: "You have also heard testimony in this case about what is called uncharged misconduct. In criminal cases which contain charges such as those in this trial, evidence of a defendant's commission of another offense or offenses may be admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove [the defendant] guilty of the crimes charged in this trial. Bear in mind as you consider this evidence that at all times the [s]tate has the burden of proving beyond a reasonable doubt that [the defendant] committed each of the elements of the offenses charged in this trial. I remind you that [the defendant] is not on trial for any act, conduct or offense not charged in the information for this case."

[7] The court charged the jury with the following instruction just prior to deliberations:

"In a criminal case in which the defendant is charged with a crime exhibiting aberrant or compulsive criminal sexual behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.

"However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime—crimes charged in the information. Bear

in mind, as you consider this evidence, that at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information."

[8] The same conduct by trial counsel and appellate counsel also pertains to uncharged misconduct evidence from K.J. as to the defendant's lustful disposition toward her, the kindergarten victim, in this case. For a contrast, see *State* v. *Andersen*, supra, 132 Conn. App. 131–36, 135 n.9.