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ALVORD, J., concurring. I write separately because I agree with the argument of the respondent, the Commissioner of Correction, that the performance of defense counsel, Lawrence Hopkins, at the sentencing hearing was not deficient. His decision to forgo an argument regarding mitigating circumstances in an emotionally charged courtroom was a strategic decision that should have been afforded deference by the habeas court.

At the beginning of the sentencing hearing, Judge Damiani stated that he had read the presentence investigation report. Furthermore, the trial judge's familiarity with the case was evidenced by his next remark that "[w]e did, in fact, pretry this matter in great detail." Judge Damiani's preliminary remarks were followed by statements of five family members of the victim, including his father and two sisters. The remarks addressed the devastating effect, on each of their lives, wrought by the victim's death. When Hopkins was given the opportunity to argue any mitigating factors, he responded that there was nothing left to say on his part. The petitioner likewise declined to speak. The court then told the petitioner: "If you have a conscience, sir, you have to deal with this the rest of your life. When you leave here I hope the tears and the crying will echo in your mind while you spend your lonely hours in jail."

During the habeas trial, Hopkins testified that he had been practicing law, primarily criminal defense work, for approximately twenty-five years when he undertook the representation of the petitioner. Most of his practice involved the defense of serious felony charges, including murder. When Hopkins was asked by the Assistant State's Attorney about his performance at the sentencing hearing, he testified: "[T]he impact of the victim's family at the sentencing hearing was quite substantial in their grief and their loss and it was very persuasive to the court under the circumstances. . . . Nothing I could have said under the circumstances was going to change what [Judge Damiani] ultimately decided to do, and so for me to really make any argument that he was already familiar with under the circumstances I thought would have been more hurtful than helpful at the time."

When the habeas court made further inquiry, Hopkins expanded on his reasons for forgoing an argument at the sentencing hearing: "The circumstance was that at the sentencing there was a large crowd of people, most of whom were related to the victim—his father, brother, sister, so on and so forth. It was one of those very emotion-packed hearings where under the circumstances and due to the fact that there was a death, you know, the emotions were running high.

“The judge was clearly affected by that fact and sympathetic to the family and sympathetic to the victim. He was fully aware of what the [petitioner’s] record was and his background was through the presentence report.

“None of the facts, as presented by either the victim’s family or the state, were in dispute, and so at that point the only thing I could have said would have been perfunctory and under the circumstances probably would have elicited more of a negative response from the court than a positive one, and because he was familiar with anything that I could have said, I thought it was better not to say anything under the circumstances and simply let the court make its decision based on what it knew, which was all that I knew.”

From this review of the transcript, it is clear that Hopkins carefully assessed the volatile situation and made the conscious decision to forgo argument for a lesser sentence at the hearing. It was not an inadvertent omission or oversight on his part. Such a strategic decision by an experienced criminal defense attorney is precisely the type of conduct to which a habeas court should afford deference. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Strickland v. Washington*, 466 U.S. 668, 688–89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, *under the circumstances*, the challenged action might be considered sound trial strategy.” (Citation omitted; emphasis added; internal quotation marks omitted.) *Id.*, 689.

Although the judgment of the habeas court, as noted by the majority, can be affirmed on the prejudice prong of *Strickland* alone; see *Hall v. Commissioner of Correction*, 124 Conn. App. 778, 783, 6 A.3d 827 (2010),

cert. denied, 299 Conn. 928, 12 A.3d 571 (2011); I believe that it is important to note that the petitioner also failed to prove deficient performance of counsel as required under the first prong of *Strickland*. The failure of defense counsel to speak at a defendant's sentencing hearing does not, *under all circumstances*, constitute deficient performance and may, as in the present case, be a strategic decision that is entitled to deference by a habeas court. Although the habeas court reached the right result, it improperly determined that Hopkins' representation was deficient at the sentencing hearing. For that reason alone, I write this separate concurrence.
