DANIEL J. OUELLETTE *v.* COMMISSIONER OF CORRECTION
(AC 33440)

Gruendel, Keller and Mullins, Js.

Argued September 22—officially released December 30, 2014

(Appeal from Superior Court, judicial district of Tolland, Bright, J.)

Kenneth Paul Fox, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Brenda L. Hans*, assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. Following a grant of certification to appeal by the habeas court, the petitioner, Daniel J. Ouellette, appeals from the judgment denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly concluded that he failed to demonstrate ineffective assistance of his appellate counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. After a trial, a jury found the petitioner guilty of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (3), larceny in the second degree in violation of General Statutes § 53a-123 (a) (3), conspiracy to commit larceny in the second degree in violation of §§ 53a-48 and 53a-123 (a) (3), assault in the second degree in violation of General Statutes § 53a-60 (a) (2), larceny in the fifth degree in violation of General Statutes § 53a-125a, and conspiracy to commit larceny in the fifth degree in violation of §§ 53a-48 and 53a-125a. *State* v. *Ouellette*, 295 Conn. 173, 176, 989 A.2d 1048 (2010). His convictions were upheld on appeal. Id., 192.

Our Supreme Court's decision outlines the following facts underlying the petitioner's convictions and the relevant procedural history. Pamela Levesque robbed a victim of her wallet at knifepoint and fled to a nearby vehicle, which was being operated by the petitioner. Id., 177. Levesque and the petitioner then left the scene by car. Id. Shortly after the robbery, the petitioner and Levesque drove to a Wal-Mart store. Id. The two attracted the attention of the store's loss prevention staff when Levesque attempted to purchase a camcorder with the victim's stolen credit card. Id., 177–78. The Wal-Mart staff questioned Levesque and the petitioner and summoned the police. Id., 178. Afterward, the victim identified Levesque as the person who had stolen her wallet and assaulted her. Id. The police located the victim's wallet in the vehicle that the petitioner was operating. Id.

For her role in these crimes, "Levesque was arrested and pleaded guilty to one charge of robbery in the first degree. At the plea hearing, the trial court granted the state's request to delay her sentencing until after the [petitioner's] trial, at which it was expected that Levesque would testify as a state's witness. The state also represented that it would recommend at Levesque's sentencing that she receive a sentence of twenty years incarceration, execution suspended after ten years, followed by five years probation.

"At the [petitioner's] trial, Levesque testified extensively as to the [petitioner's] role in the incident. Specifi-

cally, she testified that: it had been the [petitioner's] idea to 'rob an old lady'; she and the [petitioner] had discussed the plan before the incident; the [petitioner] had given her a knife to use to threaten the victim; the [petitioner] had used the victim's credit card to purchase gas; and the [petitioner] had driven to Wal-Mart in order for Levesque to purchase a camcorder with the victim's credit card. Levesque also acknowledged on direct examination that she had entered into a plea agreement under which, in exchange for her truthful testimony, the state would recommend a sentence of twenty years imprisonment, execution suspended after ten years, with five years probation, and would inform the sentencing court of her cooperation. Under the agreement, Levesque also retained the right to argue for a lesser sentence. The [petitioner] revisited the plea agreement on cross-examination, during which Levesque admitted that she believed 'it would lessen [her] sentence if there were somebody else responsible' and acknowledged that, if she had been the sole perpetrator, she would not have had the opportunity to testify against anyone else. During closing argument, the state reiterated that it was 'going to recommend that [Levesque] receive a sentence of ten years to serve followed by five years probation.' The jury found the [petitioner] guilty on all counts, and he subsequently was sentenced to a twenty year term of imprisonment, execution suspended after fourteen years, with five years of probation.

"At Levesque's sentencing hearing, the state set forth the facts of the case and several aggravating factors, including the advanced age of the victim, Levesque's use of a knife in the incident, and Levesque's role in planning and executing the robbery. The state's attorney then informed the court of Levesque's cooperation in testifying against the [petitioner] and concluded: 'I'd ask Your Honor to consider a sentence, taking into account all of these factors, the serious nature of the crime, the fact that an older person was the victim of the crime, and also that [Levesque] pled guilty and also cooperated and testified, as I said, truthfully and candidly in the course of the trial of the [petitioner]. I indicated that the cap was twenty years . . . suspended after ten [years] with five years probation. I would leave it up to Your Honor as to what you feel the appropriate sentence [is], given all the relevant factors.' The court sentenced Levesque to twelve years imprisonment, execution suspended after three years, with four years probation.

"After Levesque's sentencing, the [petitioner] appealed from the judgment of conviction to the Appellate Court claiming, inter alia, that he had been deprived of his constitutional rights to due process and to a fair trial because the state had withheld impeachment evidence concerning the true nature of the plea agreement between the state and Levesque. . . . Spe-

cifically, the [petitioner] claimed that the discrepancy[1] between the representations of the plea agreement at the [petitioner's] trial—that the state was going to *recommend* that Levesque be sentenced to twenty years incarceration, execution suspended after ten years, followed by five years probation—and the state's failure to *actually recommend* that sentence at Levesque's sentencing reflected an implicit understanding between Levesque and the state that if she testified favorably, the state would not make any such recommendation. . . . Acknowledging that he previously had not raised this claim, the [petitioner] sought review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). . . .

"The [petitioner] subsequently filed a motion for rectification and enlargement of the trial record to develop the record for his appeal. Specifically, the [petitioner] requested that the trial court: (1) include transcripts from Levesque's plea and sentencing proceedings; and (2) conduct an evidentiary hearing pursuant to *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000) (*Floyd* hearing), to solicit testimony and evidence relevant to whether the state knowingly had presented misleading testimony or suppressed impeachment evidence regarding its plea arrangement with Levesque.[2] The trial court granted the motion as to the transcripts, but denied it as to the *Floyd* hearing.

"The [petitioner] then filed a motion for review in the Appellate Court of the trial court's decision denying the *Floyd* hearing. The Appellate Court granted review, but denied the relief requested." (Citations omitted; emphasis in original; footnotes altered.) *State* v. *Ouellette*, supra, 295 Conn. 178–82. The petitioner did not raise the *Floyd* hearing issue in his underlying appeal to this court. See id., 183–84.

Following the denial of the relief requested in his motion for review, the petitioner, in a separate proceeding, continued to pursue his underlying appeal, in which he claimed that the state had withheld impeachment evidence concerning Levesque's plea agreement in violation of *Brady* v. *Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).[3] *State* v. *Ouellette*, supra, 295 Conn. 185. "With respect to [this claim], although the Appellate Court expressed serious concern 'that the state [had] represented in very definite terms that it was going to make a sentence recommendation but then only relayed that recommendation to Levesque's sentencing court by referring to the cap of twenty years suspended after ten' . . . it concluded that there was insufficient evidence in the record to conclude that the state improperly had withheld exculpatory information from the [petitioner]. . . . Accordingly, the Appellate Court concluded that the [petitioner's] claim failed under the third prong of *Golding*." (Citations omitted.) Id., 182–83. This court affirmed the petitioner's judg-

ments of conviction. Id., 182, citing *State* v. *Ouellette*, 110 Conn. App. 401, 403, 955 A.2d 582 (2008), aff'd, 295 Conn. 173, 989 A.2d 1048 (2010).

The petitioner then sought review in our Supreme Court, which initially granted certification on the following question concerning this court's denial of the request for a *Floyd* hearing: "In circumstances where the prosecutor adduced evidence that the state had entered into a plea agreement with its key witness pursuant to which the state would seek a particular sentence but then, after that witness' trial testimony, the state recommended a different, more lenient sentence for the witness, did the Appellate Court improperly refuse to remand the case to the trial court for an evidentiary hearing on the issue of whether the state's conduct violated the [petitioner's] due process rights?" *State* v. *Ouellette*, 289 Conn. 951, 951–52, 961 A.2d 417 (2008). In deciding the appeal, however, our Supreme Court rephrased the certified question to reflect more precisely the issue before that court as follows: "whether the Appellate Court properly concluded that *the record* did not establish that the state improperly had withheld impeachment evidence regarding Levesque's credibility." (Emphasis added.) *State* v. *Ouellette*, supra, 295 Conn. 185.

The court explained that it was necessary to reword the certified question because "although the [petitioner] claimed within the context of his motion for review that the Appellate Court should order a *Floyd* hearing to determine *whether* the state had withheld impeachment evidence relating to the actual nature of its plea agreement with Levesque in violation of his right to due process, in his appeal to that court, he represented that the record *as it existed* was sufficient to establish that due process violation." (Emphasis in original.) Id., 183. According to our Supreme Court, the trial court's denial of a *Floyd* hearing was not properly before it because the Appellate Court had denied the petitioner's motion for review in a proceeding separate from the merits of his appeal.[4] Id., 183–84.

The Supreme Court concluded that because the necessity of a *Floyd* hearing was decided and disposed of by this court not in the petitioner's appeal, but in a separate motion proceeding, the petitioner could not resurrect that claim merely by taking a certified appeal from a decision that addressed the merits of the petitioner's appeal. Id. Our Supreme Court, thus, reviewed the petitioner's *Brady* claim based only on the record as it stood, and concluded "that the Appellate Court properly determined that the record did not establish the existence of an undisclosed agreement or understanding, and that, therefore, the [petitioner] could not prevail under *Golding*." Id., 189.[5]

On December 9, 2010, the petitioner filed a second amended petition for a writ of habeas corpus. Although

the petitioner presented multiple grounds in support of his petition, the only ground relevant to this appeal is set forth in count three, in which the petitioner asserts that his appellate counsel provided ineffective assistance by failing to get the issue of the trial court's denial of his request for a *Floyd* hearing before our Supreme Court. After conducting a hearing, the habeas court, *Bright, J.*, rendered judgment denying the petition.

In its decision, the habeas court noted that "the petitioner was unable to produce any evidence of an undisclosed agreement between the state and Levesque." The habeas court determined that, even if a *Floyd* hearing had been held, "the evidence presented in his habeas proceeding proved that the record would be the same in all material respects." The habeas court concluded: "Assuming that there is a reasonable probability that the Supreme Court would have ordered the *Floyd* hearing if the issue had been presented to it, the court finds that the petitioner has failed to prove any prejudice from the lack of such a hearing." The habeas court granted the petition for certification to appeal to this court and this appeal followed. Additional facts will be set forth as appropriate.

The petitioner's appeal is based on the purported ineffective assistance of his appellate counsel. As a prelude to our discussion of the issues on appeal, we first set forth the relevant law.

"Our review of the judgment of the habeas court is carefully circumscribed. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Whether the representation a [petitioner] received . . . was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 173, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). In order to satisfy the performance prong, the petitioner must show that "appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 131 Conn. App. 805, 808, 29 A.3d 166 (2011). In order to satisfy

the prejudice prong, the petitioner must demonstrate that "there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . [T]o determine whether a habeas petitioner had a reasonable probability of prevailing on appeal, a reviewing court necessarily analyzes the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." *Small* v. *Commissioner of Correction*, supra, 722.

The petitioner claims that the habeas court erred in concluding that he failed to prove prejudice. The petitioner raises three arguments in support of his contention that the habeas court erroneously concluded that he failed to prove prejudice. First, he argues that he proved prejudice by demonstrating that, had the trial court's denial of his request for a *Floyd* hearing been raised to our Supreme Court, there was a reasonable probability that the court would have ordered a *Floyd* hearing. Second, he argues that the habeas court erred in concluding that the state did not have an undisclosed agreement with Levesque. Third, he argues that he demonstrated prejudice per se due to his inability to cross-examine Levesque about an undisclosed agreement between her and the state. None of these arguments have merit.[6]

The petitioner first argues that he proved prejudice by demonstrating that, had the trial court's denial of his request for a *Floyd* hearing been properly raised as a claim in his appeal, there was a reasonable probability that our Supreme Court would have ordered a *Floyd* hearing. We are not persuaded.

As previously stated, to establish prejudice under *Strickland*'s second prong, the petitioner must show that he "would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial." Id. If our Supreme Court had ordered a *Floyd* hearing, however, that alone would not have merited reversal of the petitioner's convictions. Indeed, our courts order "*Floyd* hearings to explore claims of *potential Brady* violations . . . ." (Emphasis added.) *State* v. *Ortiz*, 280 Conn. 686, 713 n.17, 911 A.2d 1055 (2006). "The prerequisite of any claim under the *Brady*, *Napue* [v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)] and *Giglio* [v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)] line of cases is the existence of an undisclosed agreement or understanding between the cooperating witness and the state." (Internal quotation marks omitted.) *Orellana* v. *Commissioner of Correction*, 135 Conn. App. 90, 100, 41 A.3d 1088, cert. denied, 305 Conn. 913, 45 A.3d 97 (2012).

Consequently, in order to merit reversal of the petitioner's underlying convictions or the granting of a new trial, and fulfill the prejudice prong of *Strickland*, the

petitioner's potential *Floyd* hearing would have had to reveal evidence of an undisclosed agreement or an understanding between the state and Levesque that would warrant a reversal of his convictions or a new trial. The petitioner would not have prevailed on appeal merely by obtaining a *Floyd* hearing because, as we will discuss in more detail, the petitioner made no showing that an undisclosed agreement or understanding existed between the state and Levesque that was different from the agreement that the jury and the petitioner's sentencing judge heard. Therefore, the habeas court properly examined the results of a potential *Floyd* hearing, not merely whether our Supreme Court would have ordered such a hearing.

The petitioner next argues that the habeas court erred in finding that no evidence was presented of an undisclosed agreement between the state and Levesque. We disagree.

The petitioner first contends that the discrepancy between the state's representation to the jury regarding Levesque's plea agreement at the petitioner's criminal trial and what actually occurred at Levesque's sentencing hearing implies an undisclosed agreement or understanding. We are not persuaded.

The difference between the state's representation during the petitioner's criminal trial and at Levesque's sentencing already was challenged during the petitioner's underlying appeal. Our Supreme Court concluded that the difference between the state's representation at the petitioner's trial, namely, that the state would recommend for Levesque a twenty year prison sentence with ten years to serve followed by five years of probation, and what actually transpired at Levesque's sentencing, namely, that the state merely informed the sentencing court that the maximum sentence under Levesque's plea agreement was twenty years incarceration, suspended after ten years, followed by five years probation, and left the sentencing to the court's discretion, did not establish an undisclosed agreement or understanding that violated the petitioner's due process rights. See *State* v. *Ouellette*, supra, 295 Conn. 189. We lack the authority to abrogate that decision.[7]

The petitioner additionally maintains that the testimony of Scott J. Murphy, the state's attorney at both the petitioner's criminal trial and Levesque's sentencing hearing, revealed that an undisclosed agreement between the state and Levesque existed. We disagree.

The following procedural history from the habeas trial[8] is relevant to the petitioner's contention. Murphy testified: "[T]he agreement that I had with [Levesque's] attorney concerning her case was what was presented to the jury." Murphy maintained that there were no side agreements or hidden understandings between the state and Levesque, and that there were no further discus-

sions about changing Levesque's plea agreement after she testified. Murphy acknowledged that, although he may have been "careless" with his characterization of Levesque's plea agreement at her sentencing hearing, it was his understanding that when he uses the word "cap" at sentencing hearings, it "means the state is recommending that sentence . . . ." Murphy testified that he did not push for a longer sentence after he was notified about Levesque's sentence because, he testified, he knew that he would not change the mind of the sentencing judge.

Murphy's testimony supported the habeas court's conclusion that "[a]ny discrepancy in how the state's agreement with Levesque was presented appears . . . to be the product of carelessness and nothing more nefarious." The petitioner presented no other evidence to impugn the habeas court's conclusion or any other evidence to support his allegation of an undisclosed agreement. Consequently, we conclude that the habeas court's finding that the petitioner failed to demonstrate the existence of an undisclosed agreement is not clearly erroneous.

Finally, the petitioner asserts that the state denied his right to effectively cross-examine Levesque by withholding information about her plea deal, which constituted per se prejudice under *Strickland*. We disagree.

The petitioner cites *Smith* v. *Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968), to support his contention that, if he were denied the right of effective cross-examination, there "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (Internal quotation marks omitted.) Nonetheless, the petitioner's claim is premised on the existence of an undisclosed agreement or understanding between the state and Levesque about which he was not able to question Levesque at trial. As stated previously, however, the habeas court concluded that the petitioner presented no evidence that such an agreement existed and held that "the record would be the same in all material respects" even if a *Floyd* hearing had been held. Nothing in the record indicates that any undisclosed agreement or understanding existed that would have prevented the petitioner from effectively cross-examining Levesque. Consequently, the habeas court correctly ruled that, even if our Supreme Court would have ordered a *Floyd* hearing if the issue had been presented to it, the petitioner failed to prove any prejudice from the lack of such a hearing.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Our Supreme Court noted that "[t]here was no discrepancy with regard to the state's representations about Levesque's testimony or her right to argue for a lesser sentence; that is, the [petitioner's] jury and the court at Levesque's sentencing heard exactly the same representations as to those aspects of her plea agreement." *State* v. *Ouellette*, supra, 295 Conn. 181 n.5.

[2] "Pursuant to *State* v. *Floyd*, supra, 253 Conn. 700, a trial court may

conduct a posttrial evidentiary hearing to explore claims of potential *Brady* [v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] violations . . . when a defendant was precluded from perfecting the record due to new information obtained after judgment. . . . In order to warrant such a hearing, a defendant must produce prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial. . . . The trial court's decision with respect to whether to hold a *Floyd* hearing is reviewable by motion for review pursuant to Practice Book § 66-7 . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, supra, 295 Conn. 182 n.7.

[3] "In *Brady* v. *Maryland*, supra, 373 U.S. 87, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. To establish a *Brady* violation, the defendant must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the defendant, and (3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *State* v. *Wilcox*, 254 Conn. 441, 452, 758 A.2d 824 (2000).

[4] Despite its conclusion that the issue of the denial of the petitioner's request for a *Floyd* hearing was not properly before it, our Supreme Court reiterated that "courts should ordinarily grant *Floyd* hearings when a defendant can produce prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial. . . . Although the existence of an undisclosed agreement is a fact based inquiry for the determination of the trial court . . . favorable consideration provided to a witness after testimony for the state may, in some cases, raise the inference of such an agreement." (Citations omitted.) *State* v. *Ouellette*, supra, 295 Conn. 188 n.9.

[5] Our Supreme Court agreed with this court that the purported discrepancy between the state's representations at the petitioner's criminal trial and the state's conduct at Levesque's sentencing hearing was "disturbing"; *State* v. *Ouellette*, supra, 295 Conn. 189; and under its supervisory powers, directed that sentencing courts thereafter inquire into both "the nature of any plea agreement between the state and the witness, and any representations concerning that agreement made during the trials at which the witness testified." Id., 191–92.

[6] The petitioner additionally claims, for the first time in his reply brief, that Levesque's testimony at the habeas trial concerning the petitioner's ownership of the knife that was used during the robbery undermined her credibility and demonstrated that the petitioner would have proven an undisclosed agreement if a *Floyd* hearing had been held. It is well established that "[c]laims . . . are unreviewable when raised for the first time in a reply brief." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 144 Conn. App. 503, 512 n.9, 72 A.3d 1245, cert. denied, 310 Conn. 939, 79 A.3d 891 (2013). Such is the case here, and, accordingly, we do not consider that argument.

[7] The petitioner purports that the difference between the ten years incarceration that the state represented to the jury would be recommended for Levesque, and the three years incarceration to which she actually was sentenced by the sentencing court creates an inference of an undisclosed agreement. The petitioner has cited no legal authority, and we have found none, suggesting that a judge's imposition of a sentence that is less than the cap indicates an undisclosed agreement. Indeed, it is well settled that the trial judge, and not the state's attorney, has the discretion to order a criminal sentence. See *Miller* v. *Commissioner of Correction*, 29 Conn. App. 773, 777, 617 A.2d 933 (1992) ("[w]hile plea agreements are an essential part of the disposition of criminal cases, the right, duty and discretion of the trial judge to fashion an appropriate sentence in each case cannot be undermined by a plea agreement entered into between the parties").

[8] In its memorandum of decision, the habeas court characterized the proceedings before it as "an opportunity to essentially conduct a *Floyd* hearing during the habeas trial . . . ."

[9] We reject the petitioner's contention that the habeas court erred by restricting its ruling to *Strickland*'s prejudice prong and by not considering whether his appellate counsel rendered deficient performance. "A court evaluating an ineffective assistance claim need not address both components of the *Strickland* test if the [claimant] makes an insufficient showing on one." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 464, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006).

Because the petitioner failed to satisfy *Strickland*'s prejudice prong, we conclude that the habeas court did not err in declining to analyze his claim with reference to *Strickland*'s performance prong. See id.