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DONALD LEFFINGWELL *v.* COMMISSIONER OF CORRECTION
(AC 41663)

Alvord, Prescott and Elgo, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of various crimes and other offenses, sought a writ of habeas corpus, claiming, inter alia, that certain legislative changes to a risk reduction earned credit program had been improperly applied to him by the respondent, the Commissioner of Correction. The habeas court, sua sponte and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's amended petition pursuant to the rule of practice (§ 23-29), concluding that it lacked subject matter jurisdiction over the petition and that the amended petition failed to state a claim on which habeas corpus relief could be granted. On the granting of certification, the petitioner appealed to this court. *Held*:

1. Contrary to the respondent's claims, the petitioner's appeal was not moot: although the petitioner was no longer incarcerated, he was serving a seven year period of special parole with an end date in 2027, and, if the petitioner were to prevail on his appellate claim, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate his risk reduction earned credits, thereby advancing his effective release date and reducing the amount of time he is required to spend on special parole; moreover, the petitioner's opportunity to be heard regarding the dismissal of his claims by virtue of his appeal before this court did not constitute an adequate substitute to make an appropriate record before the habeas court; furthermore, read broadly, the petitioner's petition for habeas corpus did not address whether the petitioner had received all of the risk reduction earned credits to which he claimed to be entitled or only a portion thereof, thus, the respondent, without pointing to anything else in the factual record, could not prevail on his claim that the petitioner's appeal was moot as he had already received the benefits of the risk reduction earned credits underlying his petition.
2. In light of our Supreme Court's recent decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), this court concluded that, although the habeas court was not obligated to conduct a hearing before dismissing the amended petition, it was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the amended petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal, which it did not do; accordingly, on remand, should the habeas court again elect to exercise its discretion to dismiss the amended petition on its own motion pursuant to Practice Book § 23-29, the court must comply with *Brown* and *Boria* by providing the petitioner with prior notice and an opportunity to submit a brief or written response addressing the proposed basis for dismissal.

Argued January 11—officially released March 21, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *Temmy Ann Miller*, assigned counsel,

for the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, former solicitor general, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Donald Leffingwell, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing sua sponte, pursuant to Practice Book § 23-29,[1] his amended petition for a writ of habeas corpus. In that petition, he claimed, inter alia, that his federal and state constitutional rights were violated as a result of legislative changes pertaining to the administration and application of risk reduction earned credits (RREC).[2] On appeal, the petitioner claims that the court improperly dismissed his petition without first providing him with notice and an opportunity to be heard. In accordance with our Supreme Court's decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), we conclude that the habeas court should not have dismissed the habeas petition pursuant to § 23-29 without first providing the petitioner with notice and an opportunity to submit a brief or other written response addressing the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court and remand for further proceedings in accordance with this decision.

The following procedural history is relevant to this appeal. The petitioner pleaded guilty to multiple robberies and other offenses that he committed in 2010. He received a total effective sentence of eleven and one-half years of incarceration followed by seven years of special parole. On August 18, 2014, the petitioner filed a petition for a writ of habeas corpus as a self-represented party. He simultaneously filed a request for the appointment of counsel and an application for waiver of fees, both of which the court granted on August 21, 2014. The court subsequently issued the writ. Appointed counsel filed an appearance on behalf of the petitioner on October 19, 2015. An amended petition for a writ of habeas corpus was filed on January 26, 2017. The petitioner filed a fourteen count revised amended petition on October 31, 2017, which constitutes the operative petition.

By order dated March 23, 2018, the court, *Hon. Edward J. Mullarkey*, judge trial referee, sua sponte dismissed the habeas action pursuant to Practice Book § 23-39 (1), (2) and (5). Prior to dismissing the action, the court did not provide the petitioner with an opportunity to be heard with respect to the dismissal.[3] The petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g), which the court granted. This appeal followed.

On October 1, 2021, this court granted the parties' joint motion to stay the appeal pending a final resolution of the appeals in *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 1, and *Boria* v. *Commissioner of Cor-*

rection, supra, 345 Conn. 39, which were then pending before our Supreme Court and involved similar claims. After our Supreme Court officially released its decisions in *Brown* and *Boria*, we ordered the parties to file supplemental briefs "addressing the effect, if any, of [*Brown* and *Boria*] on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24.' "[4] The parties complied with our supplemental briefing order.

The petitioner argued in his supplemental brief that the record clearly demonstrates that the habeas court dismissed the underlying operative petition sua sponte without affording the petitioner proper notice and an opportunity to be heard. He further argued that, pursuant to the Supreme Court's holdings in *Brown* and *Boria*, he was entitled, at minimum, to an opportunity to submit a brief or a written response prior to the dismissal of his petition, and, therefore, the court's judgment of dismissal must be reversed. Regarding whether the habeas court should be instructed on remand to consider whether to decline to issue the writ pursuant to Practice Book § 23-24, the petitioner took the position that the habeas court should be permitted to screen the petition in accordance with § 23-24 because the judgment of dismissal occurred before our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), and, therefore, fell within the directive of our Supreme Court in *Brown*. See *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

The respondent argued in his supplemental brief that the decisions in *Brown* and *Boria* had no effect on the present appeal "because the court is deprived of subject matter jurisdiction." According to the respondent, the present appeal should be dismissed as moot because the petitioner had been "entirely discharged from custody, and the courts can no longer grant him any practical relief." Alternatively, the respondent argued that the appeal was moot because the petitioner already had been provided with the remedy mandated by *Brown* and *Boria* by virtue of the present appeal. The respondent explained: "[The] [p]etitioner here received the opportunity to be heard that [Practice Book] § 23-29 requires, albeit before [the Appellate Court] and not the habeas court. And he has seized that opportunity by fully presenting his arguments on the merits through a brief and a reply brief. Further, his claims involve pure questions of law that are controlled by established precedents that *Brown* and *Boria* neither questioned nor overruled: his claims relating to [RREC] and parole eligibility are foreclosed as a matter of law by *Perez* v. [*Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017)] and *Petaway* v. [*Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dis-

missed, 324 Conn. 912, 153 A.3d 1288 (2017)]." The respondent argued that any error was harmless and a remand in this matter is both unnecessary and a waste of judicial resources. Finally, the respondent took the position that, if we were to reverse and remand, it is clear in the present case that the habeas court accepted the initial petition and issued the writ, and, therefore, Practice Book § 23-24 no longer applies and "the habeas court will instead be required to dismiss the petition under [Practice Book] § 23-29."

Oral argument before this court was scheduled for January 11, 2023. On December 14, 2022, this court notified the parties "to be prepared to address [at oral argument] whether this appeal is moot because the petitioner has been released from custody but appears to be on special parole with an end date of April 16, 2027." At oral argument, in addition to the mootness arguments raised in his supplemental brief, the respondent asserted a new argument as to why the appeal was moot. Specifically, the respondent argued that the petitioner had in fact received all the RREC to which he claimed he was entitled.

Because they nominally implicate the subject matter jurisdiction of this court, we first address the respondent's arguments that the current appeal is moot. "Under our well established jurisprudence, [m]ootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the [appellant] in any way. . . . In other words, the ultimate question is whether the determination of the controversy will result in practical relief to the complainant. . . . Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Richards* v. *Commissioner of Correction*, 164 Conn. App. 862, 865, 138 A.3d 440 (2016).

The respondent first argues that the appeal is moot because the petitioner has been "entirely discharged from custody, and the courts can no longer grant him any practical relief." The respondent's argument is wholly without merit. In *Dennis* v. *Commissioner of Correction*, 189 Conn. App. 608, 614–17, 208 A.3d 282 (2019), this court explained that a petitioner's claim pertaining to presentence confinement credits was not rendered moot by the petitioner's release from incarceration to a period of special parole because, if the petitioner were to prevail on his appellate claim, an order modifying the original sentence to include the credits sought likely would "lead to the advancement of his release from special parole by approximately that same amount of time." Similarly, here, although the petitioner is no longer incarcerated, he is serving his seven years

of special parole, which has a current end date of April 16, 2027. The petitioner could still benefit from any retroactive modification of his definite sentence due to RREC because it would advance his effective release date from prison and reduce the amount of time he is required to spend on special parole. The respondent's arguments to the contrary are unavailing.[5]

The respondent next argues that the appeal is moot because the petitioner already has received the remedy mandated by *Brown* and *Boria* by virtue of the present appeal. Although not cloaked in the guise of mootness, this court rejected a similar argument in *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616, 621 n.7, 285 A.3d 1194 (2022), in which the respondent argued "that *Brown* and *Boria* do not require this court to reverse the judgment of dismissal and to remand the case to the habeas court because the petitioner has received an opportunity to be heard regarding the dismissal of his claims, which involve pure questions of law, by virtue of this appeal, and this court is best positioned to address the merits of the petitioner's claims." As this court explained in *Hodge*, however, "we construe *Brown* and *Boria* to *mandate* a reversal of the judgment of dismissal and a remand to the habeas court. Indeed, in *Boria*, one of the claims raised by the petitioner was [an RREC] challenge claim, which the habeas court dismissed for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1)." (Emphasis added.) Id. In other words, the Supreme Court certainly did not construe the opportunity for appellate argument as an adequate substitute for an opportunity to make an appropriate record before the habeas court.

The final mootness claim of the respondent, made for the first time at oral argument, is that the petitioner has already received the benefits of the RREC underlying his petition, and, accordingly, he can be afforded no additional practical relief. In support of this argument, the respondent directs us to allegations in the operative petition that the respondent would have us construe as admissions by the petitioner that he had received the credits sought. Reading the petition broadly, however, we do not construe it as addressing whether the petitioner has received *all* of the credits he claims he is entitled to or only a portion thereof. Because the respondent has not pointed to anything else in the factual record before us that supports his argument, we reject it without prejudice to the respondent raising it on remand to the habeas court along with the necessary evidentiary support for his position.

Turning finally to the merits of the present appeal, we agree with the petitioner that our Supreme Court's decisions in *Brown* and *Boria* govern our resolution of the present appeal and require a reversal of the habeas court's judgment of dismissal. In *Brown*, our Supreme Court held "that [Practice Book] § 23-29 requires the

habeas court to provide prior notice of the court's intention to dismiss, on its own motion, a petition that it deems legally deficient and an opportunity to be heard on the papers by filing a written response. The habeas court may, in its discretion, grant oral argument or a hearing, but one is not mandated." *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43 (adopting reasoning and conclusions set forth in *Brown*). Here, the court dismissed the petitioner's amended appeal without providing him with an opportunity to submit either a brief or a written response. Accordingly, the proper remedy is for us to reverse the court's dismissal of the operative petition and to remand the case to the habeas court for further proceedings. If the habeas court on remand again chooses to consider dismissal of the operative petition on its own motion pursuant to Practice Book § 23-29, the court must comply with the procedures set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and affording the petitioner an opportunity to provide a written response.

With respect to whether we should permit the court another opportunity to consider declining to issue the writ pursuant to Practice Book § 23-24, we decline to include this as part of our remand order. The court's dismissal in the present case occurred prior to our Supreme Court's decision in *Gilchrist*. In the present case, however, counsel had been appointed and filed a revised amended petition on behalf of the petitioner prior to the habeas court's dismissal. As this court previously has clarified in declining to apply footnote 11 of *Brown* in similar cases, "[i]t would strain logic to construe footnote 11 of *Brown* as advising that we should direct the habeas court on remand to consider declining to issue the writ under § 23-24 vis-à-vis the amended petition, which was filed after the writ had been issued. Moreover, affording the habeas court on remand another opportunity to consider declining to issue the writ under § 23-24 vis-à-vis the original habeas petition, in effect, would vitiate the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended." (Emphasis omitted.) *Hodge* v. *Commissioner of Correction*, supra, 216 Conn. App. 623–24; see also *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 850–51, 287 A.3d 138 (2022).[6] "Although the present dismissal occurred prior to *Gilchrist*, we are not persuaded that we should apply the rationale in footnote 11 of Brown to the present case. Unlike in *Brown* and *Boria*, the dismissal in the present case occurred not merely after the writ had issued but after counsel had appeared on the petitioner's behalf and an amended petition was filed. . . . The fact that an amended petition had been filed at the time of the court's dismissal in this case leads us to conclude that the proper course

on remand is not for the court to first consider whether declining to issue the writ under . . . § 23-24 is warranted." (Footnote omitted.) See *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 849–50.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . (5) any other legally sufficient ground for dismissal of the petition exists."

[2] On July 1, 2011, General Statutes § 18-98e became effective and authorized the Commissioner of Correction, in his discretion, to award a maximum of five days per month of RREC to reduce a sentence. In 2013, the legislature amended General Statutes § 54-125a (b) (2), to preclude RREC from being applied to advance certain incarcerated persons' parole eligibility dates. See Public Acts 2013, No. 13-3, § 59.

[3] In its decision dismissing the action, the habeas court, citing to *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017), and *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017), provided the following reasons for dismissing the petition: "[T]he present petitioner's offense date *precedes* the enactment of RREC and the effective date of § 18-98e. Because the petitioner has no right to earn and receive discretionary RREC, and any changes, alterations and even the total elimination of RREC at the most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the habeas corpus petition and that the petition fails to state a claim for which habeas corpus relief can be granted." (Emphasis in original.)

[4] In *Brown*, our Supreme Court had directed this court to remand the case to the habeas court with direction to first consider whether any grounds existed for it to decline to issue the writ under Practice Book § 23-24. Furthermore, in footnote 11 of its opinion, the court in *Brown* also stated: "We are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist* [v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020) (analyzing interplay between Practice Book §§ 23-24 and 23-29)]. . . . In cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

[5] We note that, in response to an earlier order from this court requesting simultaneous memoranda addressing why this appeal should not be dismissed as moot because the petitioner no longer was incarcerated, the respondent and the petitioner submitted a joint response arguing that this case was not moot in light of *Dennis* v. *Commissioner of Correction*, supra, 189 Conn. App. 615–16, stating: "The parties agree that if the petitioner were to successfully prevail on his claim, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate RREC . . . thereby advancing his effective release date from prison and reducing the amount of time he is required to spend on special parole." It is unclear why the respondent elected to change his prior position.

[6] In *Howard* v. *Commissioner of Correction*, 217 Conn. App. 119, 287 A.3d 602 (2022), we expanded upon our reasoning in *Hodge* and *Villafane*. In *Howard*, although counsel had been appointed for the petitioner, no amended petition was filed prior to the habeas court dismissing the petition sua sponte pursuant to Practice Book § 23-29 without providing notice and an opportunity to be heard. Id., 132. This court concluded that the appointment of counsel alone provided a compelling reason not to apply footnote 11 of *Brown*, explaining: "Our Supreme Court has explained that the purpose of appointing counsel in habeas actions, following the issuance of the writ, is so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced. . . . In the present case, the habeas court appointed counsel to represent the petitioner, and counsel will have an opportunity to address any potential deficiencies in the original petition

that he filed in a self-represented capacity. In light of this fact, and the length of time in which the habeas action has been pending on the court's docket, we conclude that permitting the court on remand to decline to issue the writ pursuant to Practice Book § 23-24 could lead to an unjust outcome that our Supreme Court would not have intended." (Citation omitted; internal quotation marks omitted.) Id., 133.