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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

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KYLLE BREWER *v.* COMMISSIONER OF CORRECTION
(AC 41635)

Prescott, Moll and Cradle, Js.

Syllabus

The petitioner, who had been convicted of the crime of manslaughter in the first degree 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. The respondent, the Commissioner of Correction, argued on appeal that, because the petitioner was no longer incarcerated and was serving a probationary period, the appeal was moot. *Held* that, pursuant to this court's reasoning and conclusions in *Leffingwell* v. *Commissioner of Correction* (218 Conn. App. 216), the appeal was not moot and the habeas court 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* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), 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 9—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

CRADLE, J. The petitioner, Kylle Brewer, 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 was convicted of manslaughter in the first degree with a firearm and other offenses and received a total effective sentence of thirty years of incarceration, execution suspended after fifteen years, followed by five years of probation. On August 21, 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 28, 2014. The court subsequently issued the writ. An amended petition for a writ of habeas corpus was filed on September 30, 2014. Appointed counsel filed an appearance on behalf of the petitioner on January 9, 2017.

By order dated March 19, 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 motion for reconsideration on the grounds that the dismissal "improperly precluded [him] from amending his petition [filed in a self-represented capacity] and denied [him the] right to be present for arguments on a dispositive matter." On April 13, 2018, the court summarily denied that motion. 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 September 24, 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 Correction*, 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.

In addition to the issues that we asked the parties to address in their supplemental briefs, the respondent raised a number of arguments suggesting that the appeal is now moot.[5] At oral argument before this court, the respondent raised an additional mootness argument not contained in his supplemental brief.

The arguments asserted by the parties in their supplemental briefs and at oral argument, as to the effect of *Brown* and *Boria* on this appeal and the respondent's mootness arguments, are identical to those considered in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. 216, A.3d (2023), which we also decide today. We conclude that our examination of the same issues in *Leffingwell* thoroughly resolves the claims in the present appeal and that there is nothing in this case that would mandate a different result. Accordingly, we adopt the reasoning and conclusions in *Leffingwell* in resolving the issues raised in the present appeal.

We also adopt the following reasoning and conclusion set forth in *Leffingwell* as to the remand order. "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* [v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020). In the present case, however, [the petitioner had filed an amended petition and] counsel had been appointed . . . 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.' . . . *Hodge* v. *Commissioner of Correction*, [216 Conn. App. 616, 623–624, 285 A.3d 1194 (2022)]; 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.' . . . See *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 850." (Footnote in original.) *Leffingwell* v. *Commissioner of Correction*, supra, 218 Conn. App. 286–88.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion and this court's decision in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. , A.3d (2023).

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 the parole eligibility dates of certain incarcerated persons. 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 [General Statutes] § 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] Although the petitioner is no longer incarcerated, he is on probation

until November 1, 2024. 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, like the parties in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. , A.3d (2023), submitted a joint response arguing that the appeal was not moot in light of *Dennis* v. *Commissioner of Correction*, 189 Conn. App. 608, 615–16, 208 A.3d 282 (2019), stating in relevant part: "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 [probation]." In *Dennis*, this court cited to our Supreme Court's decision in *Murray* v. *Lopes*, 205 Conn. 27, 529 A.2d 1302 (1987), in which, during the pendency of his appeal from the denial of his petition for a writ of habeas corpus, the petitioner was released from confinement and began serving a period of probation. *Dennis* v. *Commissioner of Correction*, supra, 615. In addressing a mootness argument similar to that asserted in *Dennis*, we noted that our Supreme Court in *Murray* had concluded that "the petitioner's appeal was not moot, despite his release from confinement, because, although no longer 'confined,' he was still serving the probationary portion of his sentence." Id. The court in *Murray* reasoned that it could afford the petitioner practical relief because an order directing the respondent to recalculate the petitioner's sentence with the credits sought by the petitioner would affect the period of probation and result in the petitioner completing his probationary period sooner by advancing his release date. *Murray* v. *Commissioner of Correction*, supra, 30–31. Accordingly, the fact that the petitioner in this case is on probation, and the petitioner in *Leffingwell* was serving a period of special parole, does not impact our analysis of the respondent's mootness claims in this appeal. It is unclear why the respondent elected to change its 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.' . . . Id., 133." *Leffingwell* v. *Commissioner of Correction*, supra, 218 Conn. App. n.6.