****

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.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

ANGEL J. MORALES *v.* COMMISSIONER OF CORRECTION
(AC 45412)

Bright, C. J., and Moll and Suarez, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, intentional manslaughter in the first degree with a firearm, sought a writ of habeas corpus. He claimed that his trial counsel, W, rendered deficient performance by failing to abandon a theory of self-defense after the petitioner testified that the gun he was holding discharged by accident, causing the victim's death, thus negating the viability of the theory of self-defense. The petitioner had engaged in an altercation outside a club, during which the petitioner's friend struck the victim's friend in the head with a gun, which fell to the ground. The petitioner, who was struggling with the victim on the ground, retrieved the gun and fired a single shot into the victim's chest. The fistfight and subsequent shooting were captured on a video recording, and, in light of the video showing the victim attacking the petitioner and the petitioner picking up the gun and shooting the victim, W and the petitioner agreed to present to the jury a theory of self-defense. During his testimony, however, the petitioner claimed that the gun went off accidentally, in addition to testifying that he was being attacked by the victim, feared for his life, and believed that, had the victim obtained the gun, he would have shot the petitioner. In closing argument, W presented both a theory of accident and a theory of self-defense to the jury. The trial court included an instruction on self-defense in the charging instructions to the jury, which included instructions on, inter alia, murder, and the lesser included offenses of manslaughter in the second degree and criminally negligent homicide. At the habeas trial, the petitioner claimed, inter alia, that W failed to clearly and adequately argue the petitioner's defense to the jury and, in support thereof, presented the testimony of an expert witness, D, who claimed that W's performance was deficient in that, once the petitioner testified that the shooting was accidental, a claim of self-defense could no longer be asserted as that theory was inconsistent and negated by the petitioner's testimony. At the habeas trial, W testified that he believed the petitioner's testimony supported a self-defense theory and, accordingly, included self-defense in his closing argument, and also framed his closing argument with the alternative theory of accident, because the petitioner had testified that the shooting was an accident. The habeas court found that the petitioner failed to prove that W's closing argument constituted ineffective representation and that the petitioner had failed to sustain his burden of proving that he was prejudiced by W's allegedly deficient performance. The habeas court denied the petition for a writ of habeas, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. Contrary to the claim of the respondent, the Commissioner of Correction, the petitioner properly preserved for appellate review his claim that W's decision to argue self-defense to the jury was objectively unreasonable in light of the petitioner's testimony regarding the accidental discharge of the gun: although the habeas court did not address specifically whether W's decision to argue self-defense to the jury itself constituted ineffective assistance in light of the petitioner's testimony, in reaching its determination that W's closing argument did not fall below an objective standard of reasonableness, the habeas court considered whether W's decision to proceed with self-defense, rather than accident, as the primary theory of defense in his closing argument was within the broad range of legitimate defense strategies to pursue at summation; moreover, although in his amended petition, the petitioner phrased his claim simply that his trial counsel was deficient because, inter alia, he failed to clearly and adequately argue the petitioner's defense to the jury, it was sufficiently clear from the record that, throughout the habeas proceedings, the petitioner contended that W's representation was deficient because his closing argument was not in line with the defense strategy

to which the petitioner testified, specifically, that the shooting was accidental, and not intentional, counsel for both parties questioned W at the habeas trial regarding whether and how the petitioner's testimony at the criminal trial impacted his closing argument, why he chose to argue a self-defense theory to the jury, and his decision to present alternative theories of defense in his closing argument, indicating that both the respondent and the habeas court were aware that the petitioner's claim that W rendered ineffective assistance during his closing argument was based on the theory that W's decision to advance a theory of self-defense was objectively unreasonable given the petitioner's testimony at the criminal trial; furthermore, the petitioner's habeas counsel made arguments during summation at the habeas trial that mirrored the petitioner's claim on appeal.

2. The habeas court did not err in denying the petitioner's ineffective assistance of counsel claim: the defense strategy that W employed, which included presenting self-defense as the primary theory of defense while still allowing for the jury to find that the petitioner did not intend to fire the gun, was supported by ample tactical justifications and fell into the category of trial strategy or judgment calls which this court consistently has declined to second guess, and, accordingly, W's performance was not deficient; moreover, although portions of the petitioner's testimony were inconsistent with a claim of self-defense, W's presentation of alternative theories accounted for the possibility that the jury, having been presented with the video evidence of the altercation, might come to the conclusion that the petitioner had shot the victim in self-defense, a theory that the state bore the burden of disproving beyond a reasonable doubt; furthermore, contrary to the petitioner's assertion, the jury would not have had to wholly disbelieve the petitioner's testimony in its entirety in order to conclude that he had acted in self-defense, the jury was free to credit those portions of the petitioner's testimony in which he stated that he feared for his life when he dove for and picked up the gun and viewed that testimony as evidence supporting his theory of self-defense, and, therefore, portions of the petitioner's testimony that were inconsistent with the theory of self-defense did not render W's decision to present the theory of self-defense in closing argument constitutionally deficient; additionally, whereas self-defense was a complete defense to the charged offenses, the theory of accident would serve only to negate the element of intent, which would not have served as a defense to the offenses involving a lesser mental state, including reckless manslaughter, of which the jury found the petitioner guilty, the state did not have had the burden of disproving the theory of accident beyond a reasonable doubt, and, given that W's closing argument was consistent with the evidence presented in the case and afforded the jury two potential pathways to finding the petitioner not guilty of murder, this court could not conclude that there was no tactical justification for W's decision to argue both self-defense and accident in his closing argument.

Argued April 11—officially released July 4, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Carlos Cruz*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Angel J. Morales, appeals, following the granting of certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that he failed to establish that he was deprived of the effective assistance of counsel during his criminal trial. We disagree, and, accordingly, affirm the judgment of the habeas court.

The jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal, at the petitioner's criminal trial. "On the evening of August 29, 2013, the [petitioner] drove with his friend, Christopher Spear, and two female companions to a nightclub in downtown Hartford known as 'Up or On the Rocks.' The [petitioner] parked his car in a nearby parking lot located in the area of High Street and Church Street. Also at the club that night were the victim, Miguel Delgado, his brother, Jose Delgado,[1] and a friend, Steven Castano, all of whom had arrived by taxi. While on the second floor of the club and with the [petitioner] present, Delgado and Spear bumped into each other; Spear spilled his drink on Delgado. An argument ensued, during which Spear made a racially charged threat to shoot someone. Returning from the bar, Castano found the two men arguing and tried to separate them. Spear, however, slapped the drink Castano was holding at him, the victim, and Delgado. At that point, the club's security escorted Spear, the [petitioner], and their companions out of the club while detaining the victim, Delgado, and Castano inside the club in an effort to defuse the situation and prevent violence.

"Club security held the victim and Delgado in the club for about ten minutes. When they left, Delgado and Spear renewed their argument outside of the nightclub where the [petitioner] had been waiting with Spear. With the [petitioner] present, Spear again threatened to shoot someone. Although their friends, but not the [petitioner], attempted to defuse the altercation, Delgado and Spear agreed to engage in a fistfight, and the parties proceeded to the parking lot where the [petitioner] had parked his car.

"When the men reached the parking lot, Spear struck Delgado on the head with a hard object injuring him. When Spear attempted to retrieve the object, which had fallen to the ground, Delgado punched him, rendering him unconscious. Despite the fact that Spear was unconscious on the ground, Delgado continued to beat Spear, causing him significant injuries to his head and face.

"Meanwhile, the [petitioner] recognized that the object with which Spear struck Delgado was a gun. The [petitioner] went to pick it up, but the victim, who was

behind him, engaged the [petitioner] and the two men struggled with each other on the ground. In the course of the ensuing struggle, the [petitioner] obtained the gun. As the victim stood up, he struck the [petitioner] in the face and the [petitioner] fired a single shot, which struck the victim in the chest.

"The victim ran toward Allyn Street where he collapsed on the sidewalk. Despite intervention by Delgado, a passerby who administered cardiopulmonary resuscitation, and medical personnel, the victim later died at the hospital at 2:15 a.m. of a gunshot wound to his chest.

"After shooting the victim, the [petitioner] fled. He discarded the gun in a garbage receptacle. He then drove away, leaving behind Spear and the women who had accompanied them.

"On October 29, 2014, in a single long form information, the state charged the [petitioner] with murder in violation of General Statutes (Rev. to 2013) § 53a-54a and reckless manslaughter in the first degree with a firearm in violation of [General Statutes] § 53a-55a (a) (murder charges), as well as criminal possession [of a firearm]." (Footnote in original.) *State* v. *Morales*, 172 Conn. App. 329, 332–34, 160 A.3d 383, cert. denied, 327 Conn. 988, 175 A.3d 1244 (2017).

The following additional facts and procedural history are relevant to our resolution of this appeal. Attorney John R. Williams represented the petitioner in the criminal proceedings. The petitioner and Williams agreed, prior to trial, to pursue a theory of self-defense. Accordingly, on November 14, 2014, the petitioner submitted a request that the court charge the jury concerning self-defense. The petitioner's criminal trial took place over the course of five days from November 17 through 21, 2014. At trial, the state introduced a cell phone video taken by a bystander, that captured the fight and the shooting. In the video, the petitioner and the victim are depicted tussling with each other on the ground. The victim stands up and strikes the petitioner as the petitioner is getting up off the ground, raising his arm, and shooting the victim. After the victim was shot, he ran out of frame. "At trial, the [petitioner] stipulated that he shot the victim, but he testified both that the gun accidentally discharged and that he was acting in self-defense." Id., 334. The following exchanges took place on direct examination between the petitioner and Williams:

"[The Petitioner]: So I was on the ground and I was tussling with someone and, you know, I turned around and as I turned around, you know, to try to get up I had got punched in the face and I had lost my balance and I was actually falling and that's when the gun discharged. . . . [A]nd the gun actually goes off accidentally and—and I fall down.

* * *

"[Williams]: Why did you dive for that gun?

"[The Petitioner]: I mean, at the time I'm in the city I'm not—I don't know anyone. You know it's a gun. People are trying to fight us or whatnot. I'm so scared that I wasn't thinking or I mean I just [tried] to get out of harm's way, you know what I mean. My friend is getting attacked, there's a gun available. I tried to get it, you know, I tried to get possession of it so no one [would] harm me or anybody I'm with . . . .

* * *

"[Williams]: Now, what do you mean then as the shooter when you say [the gun] accidentally discharged?

"[The Petitioner]: I mean, as I [was] hit and I was falling down that's when the gun went off. I didn't have—I didn't mean to aim it or shoot somebody with it. It was just in my motion that it discharged.

"[Williams]: Well, were you holding that gun and pointing it at the individual who, in fact, was shot?

"[The Petitioner]: Yes.

"[Williams]: And why were you doing that?

"[The Petitioner]: I was being attacked and I panicked. I mean everything happened so fast in that situation I wasn't thinking. You know I got hit and everything happened so quickly.

"[Williams]: Could you tell us whether or not you were in fear?

"[The Petitioner]: Yes.

"[Williams]: What was the nature of your fear? What were you afraid of?

"[The Petitioner]: To be honest with you, I was scared the whole time. I didn't want to be there ever since when the drink spilled and on the way I was nervous the whole time, so you know so as soon as my friend got attacked and I see a gun I'm fearing, you know, the worst for my life and whatnot . . . .

"[Williams]: And is that why you pointed the gun at him?

"[The Petitioner]: I remember when I was on the ground I turned and [got] hit and as I was falling I fell to the right so my body shifted left so that's when the gun probably . . . turned a left direction and . . . the gunshot went off. I didn't have no intention [of] hurting nobody or whatnot.

* * *

"[Williams]: Did you believe that you were being attacked by the person who got shot?

"[The Petitioner]: Yes, I was attacked.

"[Williams]: And did you believe that he was going to hurt you?

"[The Petitioner]: Yes. I felt like if he were to get possession of—of, you know, the gun that he would have did the same thing to me."

On cross-examination, the following exchange occurred between the petitioner and the prosecutor:

"[The Prosecutor]: And the gun accidentally went off. You pulled the trigger.

"[The Petitioner]: I did, but not intentionally.

"[The Prosecutor]: How do you pull the trigger and not intentionally?

"[The Petitioner]: As same as how you crash a car from driving. I mean it just happened.

* * *

"[The Prosecutor]: Are you saying you accidentally pulled the trigger because you were drunk?

"[The Petitioner]: No.

"[The Prosecutor]: Are you saying that the gun just went off when you fell?

"[The Petitioner]: Yes.

"[The Prosecutor]: You know that a gun just can't go off without pulling the trigger, right?

"[The Petitioner]: I know that, ma'am. I mean everything happened so fast. I mean, I acted with instinct. It was instantaneous."

After the close of evidence, the court, *Dewey*, *J.*, heard argument on the parties' proposed jury instructions. As a result of the petitioner's testimony that the shooting was accidental, the state objected to the petitioner's proposed self-defense instruction. In response, Williams maintained that the evidence supported the instruction, notwithstanding the petitioner's testimony. Williams argued that "[t]he act of taking the gun into his hand and . . . pointing it in the general direction of the assailant is a sufficient predicate act to impose criminal liability and, therefore, the [defense of] self-defense is applicable to that." The court agreed that the evidence warranted a self-defense instruction as evidenced by its inclusion in the jury charge. In addition to the murder charge in count one, the court included an instruction on the lesser included offenses of manslaughter in the first degree with a firearm,[2] manslaughter in the second degree with a firearm, and criminally negligent homicide. The court further instructed the jury that self-defense constituted a "complete" defense to each of those charges.

In his closing argument, Williams contended that the

state had failed to prove that the petitioner acted with the requisite mental state to support a criminal conviction and that the state had failed to meet its burden of proving beyond a reasonable doubt that the petitioner did not act in self-defense. At the outset, Williams stated: "Obviously, we submit that there's not any evidence of intent to kill, but that again is only the beginning, because this is a self-defense case." Before addressing the self-defense argument, Williams reviewed each of the charged offenses and lesser included offenses with the jury, emphasizing the state's burden to prove that the petitioner possessed the requisite mental state required for each offense beyond a reasonable doubt. Williams then reviewed, in detail, the video of the shooting with the jury and argued that the state could not prove beyond a reasonable doubt that the shooting was not justified by self-defense.[3] At no point in his closing argument did Williams concede that the petitioner intended to kill the victim.

"The jury returned a verdict of not guilty on the murder charge, but it found [the petitioner] guilty of the lesser included offense of intentional manslaughter in the first degree with a firearm. Additionally, the jury found the [petitioner] guilty of reckless manslaughter in the first degree with a firearm, and criminal possession. The court accepted the jury's verdict but a month later vacated the guilty verdict on the reckless manslaughter charge because of double jeopardy concerns. The court then sentenced the [petitioner] to thirty-five years [of] incarceration, suspended after twenty years, with five years [of] probation on the intentional manslaughter conviction, and five years [of] incarceration and a fine of $5000 for the criminal possession conviction. The court ordered that the sentences be served concurrently for a total effective sentence of thirty-five years [of] incarceration, suspended after twenty years, with five years [of] probation, and a $5000 fine." *State* v. *Morales*, supra, 172 Conn. App. 334. This court affirmed the judgment of conviction on direct appeal. Id., 350.

On January 22, 2021, the petitioner filed an amended petition for a writ of habeas corpus in this matter claiming that Williams had provided ineffective assistance during the petitioner's criminal trial. The petitioner alleged that Williams had been ineffective in that he (1) "failed to adequately counsel and prepare the petitioner to testify in the underlying case," (2) "failed to meaningfully discuss his theory of defense with the petitioner so as to avoid the possibility of the jury being left with the impression that the petitioner was asserting seemingly contradictory defenses of self-defense and accident," and (3) "failed to clearly and adequately argue the petitioner's defense to the jury." The respondent, the Commissioner of Correction, filed his return on March 16, 2021, denying the allegations of ineffectiveness.

The court, *M. Murphy, J.*, conducted a habeas trial on October 25 and 26, 2021, at which the petitioner testified in support of his petition and presented the testimony of Williams and an expert witness, Attorney Christopher Duby. At trial, the court admitted several exhibits, including transcripts from the underlying criminal proceeding and the video of the shooting that was admitted into evidence at the criminal trial. On February 17, 2022, the court issued a memorandum of decision denying each of the petitioner's claims. As to his first claim, the court found that the petitioner failed to demonstrate that Williams' counseling and preparation of the petitioner to testify constituted deficient performance. The court also rejected the petitioner's second claim, reasoning that the petitioner had not overcome the presumption that Williams' decisions could be considered sound trial strategy given the circumstances.

Last, the court rejected the petitioner's third claim, determining that "[a] review of the transcript of [Williams'] closing argument shows that counsel discussed the state's burden of proving the absence of self-defense at length. He informed the jurors that they were required to evaluate what the petitioner thought at the time of the incident based [on] the evidence presented and determine what a reasonable person would have believed and done in those circumstances. [Williams] also showed the jurors the videotape evidence again during his closing argument, highlighting the brutal, continuous attack on the petitioner's friend and the struggle between the petitioner and the decedent. The court finds pursuant to its review that [Williams'] closing argument was in line with the defense strategy and did not fall below an objective standard of reasonableness. The petitioner failed to prove that the argument constituted constitutionally ineffective representation, particularly considering the deference entitled to counsel's summation."

As to all three claims, the court also found that the petitioner had failed to sustain his burden of proving that he was prejudiced by Williams' allegedly deficient performance. The court thereafter granted the petition for certification to appeal filed by the petitioner, and this appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner challenges only the court's finding as to his third claim alleging that Williams rendered ineffective assistance when he "failed to clearly and adequately argue the petitioner's defense to the jury." In particular, the petitioner claims that "Williams' decision to argue self-defense to the jury when the [petitioner's] testimony negated the viability of that defense was objectively unreasonable and served only to confuse the jury" and that he was prejudiced by this deficient performance. The respondent disagrees, contending that (1) the petitioner's claim on appeal is

not preserved, (2) Williams' argument of self-defense was not deficient as it fell within the wide range of reasonable trial strategy, and (3) in the alternative, the petitioner has failed to demonstrate that the habeas court erred in finding that the petitioner was not prejudiced by Williams' alleged deficient performance.

I

As an initial matter, we must address the respondent's claim that the petitioner failed to properly preserve his claim for appellate review. The respondent maintains that, "[a]lthough [the petitioner's] habeas counsel's comments in summation briefly touched upon the specific claim he now presents on appeal, the habeas court never ruled on the petitioner's claim. Instead, the habeas court's memorandum of decision only addressed the question of whether counsel effectively communicated the defense of self-defense to the jury during closing argument. Thus, while the habeas court found that Williams effectively argued self-defense to the jury, the habeas court did not address whether his decision to argue self-defense to the jury *itself* constituted ineffective assistance of counsel in light of the petitioner's testimony." (Emphasis in original.) We disagree with the respondent.

The following legal principles are relevant to our analysis. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"); Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority").

"As our Supreme Court has explained, principles of fairness dictate that both the opposing party and the trial court are entitled to have proper notice of a claim. . . . Our review of a claim not distinctly raised at the trial court violates that right to notice. . . . [A]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge . . . . Accordingly, the determina-

tion of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 655, 273 A.3d 252, cert. denied, 343 Conn. 922, 275 A.3d 212 (2022); see also *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408, 114 A.3d 168 ("this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim" (internal quotation marks omitted)), cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015).

Our Supreme Court has emphasized that whether a claim was distinctly raised frequently depends on whether a petitioner presented evidence or elicited testimony "that would have supported the allegation," or presented "any argument that would have alerted either opposing counsel or the habeas court that he was pursuing that allegation." *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 599, 188 A.3d 702 (2018); id., 602 n.7 ("[w]e emphasize that our conclusion that the petitioner failed to distinctly raise the claim that [trial counsel] rendered deficient performance . . . relies on the fact that the petitioner both presented no evidence and made no argument to the habeas court on the issue"). See, e.g., *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 540–42, 198 A.3d 52 (2019) (petitioner distinctly raised claim where record demonstrated he elicited testimony supporting allegation, presented argument on allegation, respondent did not object to argument, and habeas court's memorandum of decision reflected understanding of allegation).

We conclude that the petitioner in the present case distinctly raised before the habeas court the claim that he now advances on appeal. Although, in his amended petition, the petitioner phrased his claim simply as "[t]he petitioner's trial counsel's performance was deficient because . . . he failed to clearly and adequately argue the petitioner's defense to the jury," it is sufficiently clear from the record that, throughout the habeas proceedings, the petitioner contended that Williams' representation was deficient because "his closing argument was not 'in line with the defense strategy' as [the petitioner] had testified [that] the shooting was accidental, not intentional," and that it was unreasonable for Williams to argue a theory of self-defense to the jury because self-defense was inconsistent with the petitioner's testimony.

Our review of the habeas trial transcripts reveals that both parties questioned Williams regarding whether and how the petitioner's testimony at the criminal trial

impacted his closing argument, why he chose to argue a self-defense theory to the jury, and his decision to present alternative theories of defense in his closing argument. In addition, the petitioner elicited testimony from Duby that supported the allegation that, because the petitioner testified that the shooting was accidental, Williams' decision to argue self-defense in closing argument was objectively unreasonable.[4]

Moreover, the petitioner's habeas counsel made the following arguments during summation, which mirror those the petitioner makes on appeal: "[H]ow do you [reconcile] self-defense and accident in light of [the petitioner's] testimony at the underlying criminal trial? And that is the question that [Duby] seemed to indicate that he couldn't explain how you can still be arguing self-defense after your client testifies that it in fact was an accident. By testifying that it's an accident undercuts the claim of self-defense and pretty much makes the defense unassertable. But to continue to argue it to a jury leads to confusion . . . . Now, [Williams] himself said that he counseled self-defense. And under this unique set of facts, Your Honor, I can't . . . fault him for counseling that. But once [the petitioner] had decided on the defense of accident, [Williams] should have pursued that knowing full well that that's what the testimony was going to bear out.

"[The petitioner's third claim] is that he failed to clearly and adequately argue the petitioner's defense to the jury. I think [Williams'] closing argument sort of speaks for itself, Your Honor. And I will encourage Your Honor to review that. He clearly argues self-defense. He clearly tries to intertwine an accident defense in regards to that, which we pose as two contradictory things. You can't accidentally discharge a gun but yet intend to defend yourself. They don't work. They're legally opposite. . . .

"I think [Williams] failed to properly counsel [the petitioner] as to the theory of defense, improperly [prepared] him in his testimony before the court, and failed to adequately argue this to the jury. I would pose that it's ineffective assistance of counsel, and I'd ask Your Honor to grant the habeas petition. I would go on to further say that I do believe that the outcome here would've been different. I believe that if this had been consistently argued to the jury under the theory of accident or the theory of self-defense, I think there is a very good likelihood that a jury would have seen this differently. Because in each particular case because of the nature of the way the state had charged this case with an intentional manslaughter as well as with a reckless manslaughter, I think the jury would've seen this one way or—could've seen this one way or the other. And I think the result ultimately could've been different. Instead, the convictions came back as both a conviction for intentional and a conviction for reckless."

Furthermore, the record makes clear that both the respondent and the habeas court were aware that the petitioner's claim that Williams rendered ineffective assistance during his closing argument was based on the theory that Williams' decision to advance a theory of self-defense was objectively unreasonable given the petitioner's testimony at the criminal trial. In response to the closing argument of the petitioner's counsel at the habeas trial, the respondent's counsel argued that Williams' actions were reasonable in that "what [Williams] did was try to come up with a consistent defense that's going to be clear to the jury" given the state of the evidence in the case.

As for the habeas court, in reciting the relevant law on this issue in its memorandum of decision, it stated that "[c]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important *because of the broad range of legitimate defense strateg*[*ies*] *at that stage*. Closing arguments should sharpen and clarify the issues for resolution by the trier of fact . . . but *which issues to sharpen and how best to clarify them are questions with many reasonable answers*." (Emphasis added; internal quotation marks omitted.) The court concluded that Williams' "closing argument was in line with the defense strategy and did not fall below an objective standard of reasonableness. The petitioner failed to prove that the argument constituted constitutionally ineffective representation, particularly considering the deference entitled to counsel's summation. Moreover, *the petitioner failed to prove that it was reasonably probable that the outcome of the proceedings would have been different had* [*Williams*] *argued the defense strategy differently to the jurors*." (Emphasis added.) Similarly, in evaluating the petitioner's second claim—that Williams was ineffective in failing to meaningfully discuss the theory of defense with the petitioner—the habeas court concluded that there was "no evidence that a different defense strategy, including that of an accidental shooting, would have changed the outcome of the proceedings in light of the evidence presented by the state."

Given the foregoing, it is clear to us that, in reaching its determination that Williams' closing argument did not fall below an objective standard of reasonableness, the habeas court considered whether Williams' decision to proceed with self-defense rather than accident as the primary theory of defense in his closing argument was within the broad range of legitimate defense strategies to pursue at summation. Accordingly, we conclude that the petitioner adequately preserved his claim for our review. See *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 598.

II

We now address the merits of the petitioner's claim. Specifically, the petitioner argues that "Williams' decision to argue self-defense to the jury when [the petitioner's] testimony negated the viability of that defense was objectively unreasonable and served only to confuse the jury." The respondent disagrees and argues that "the petitioner has not demonstrated that [Williams'] decision to argue self-defense to the jury fell outside the wide range of reasonable professional assistance and constituted an error so great that counsel was not functioning as the counsel guaranteed by the sixth amendment to the constitution of the United States." We agree with the respondent.

We begin by setting forth the applicable standard of review and principles of law that govern the petitioner's claim. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary . . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"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. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . In any case pre-

senting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. 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. . . .

"[J]udicial 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* [*petitioner*] *must overcome the presumption that*, *under the circumstances*, *the challenged action might be considered sound trial strategy*. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 216–19, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022).

The thrust of the petitioner's claim on appeal is that Williams' representation was deficient because "his closing argument was not 'in line with the defense strategy' as [the petitioner] had testified the shooting was accidental, not intentional." In advancing this argument, the petitioner aptly notes that "Connecticut considers accident and self-defense separate and inherently inconsistent claims, although a defendant may raise them as alternative theories." *State* v. *Singleton*, 292 Conn. 734, 753 n.14, 974 A.2d 679 (2009). Indeed, "it is

well established that it is not improper for defense counsel to pursue defenses that are inconsistent with each other." *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 259, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021); see also *State* v. *Nathan J.*, 294 Conn. 243, 262, 982 A.2d 1067 (2009) ("it is axiomatic that a defendant may present inconsistent defenses to the jury"); *Jackson* v. *Commissioner of Correction*, 129 Conn. App. 325, 330, 20 A.3d 75 (holding that habeas court properly concluded "that there is no problem with presenting inconsistent and alternative theories of defense" (internal quotation marks omitted)), cert. denied, 302 Conn. 947, 31 A.3d 382 (2011). According to the petitioner, however, "although it is legally permissible for defense counsel to argue inconsistent theories to the jury, this does not alter the fact that [in the present case] the defenses, and testimony, are indeed inconsistent." Thus, the petitioner contends that "it was unreasonable for [Williams] in [the petitioner's] case to present inconsistent defenses where [the petitioner's] testimony was that the shooting was accidental, not intentional." (Emphasis omitted.) We are not convinced.

The following additional facts are relevant to our resolution of this claim. At the habeas trial, Williams testified that he had spent significant time speaking with the petitioner about their defense strategy. Williams acknowledged that from the outset of the case the petitioner claimed that the shooting was "something he did not intend to do, this horrible sudden development." Williams went on to testify that "[o]n the other hand of course . . . we were confronted with the video . . . ." Although Williams recognized that accident and self-defense were both possible theories in the petitioner's case, he felt that the video of the shooting was an important piece of evidence that impacted what defenses were available. According to Williams, "it was much, much more difficult to stand by [the petitioner's assertion that] this was an accident given what you see in the video. And that was certainly emphasized by the prosecutor before we got to put on our case. It certainly looked like, it looked like he pointed the gun and pulled the trigger." Therefore, Williams testified that he advised the petitioner that adopting a theory of self-defense was the best available option in his case.

Williams also testified that, although it is ultimately the petitioner's decision whether to testify, it would be inconceivable to present either an accidental shooting or self-defense theory without the petitioner's testimony. Williams stated that he has tried hundreds of criminal cases and noted that he does his best to prepare his clients to testify without crossing a line by telling them what they must say while on the stand. Williams testified that, during their preparation, he counseled the petitioner to discuss the theory of self-defense while on the witness stand and that the petitioner acknowl-

edged that he would not testify about an accident because such testimony could be confusing to the jury. Thus, Williams testified that he was "shocked" when the petitioner testified and "got off the reservation on self-defense and started talking about [accident] . . . . And at that point it became my job to figure out a way to try to put those two things together."

Williams testified that he believed that the petitioner's testimony ultimately did support a self-defense theory and, accordingly, included self-defense in his closing argument. Williams acknowledged, however, that, because the petitioner had testified that the shooting was an accident, he framed his closing argument as "pleading [an] alternative [theory]." This was exemplified by his statement to the jury: "Ladies and gentleman, there's a number of things you have to find. And, if you find that it is completely accidental and he didn't intend to do it, then he's not guilty. And, if you . . . believe that the state has proven beyond a reasonable doubt that he intended to shoot him, then you should turn to the issue of did he act in self-defense. And, remember that the defendant has no burden whatsoever in that respect, that the burden is on the state to disprove that this was in self-defense. And these are the elements. Her Honor is going to charge you, and this . . . case classically fits all of those elements."

When asked if arguing both accident and self-defense "thwarted the self-defense claim" and caused confusion for the jury, Williams testified that "thwarted is not quite the word I would have used. If [the petitioner] was claiming that it was an accident, that's his burden. If he's claiming self-defense, then that's not his burden." Although Williams recognized that it could be potentially confusing to a jury to argue both theories, he testified that, "legally, it's entirely appropriate." Moreover, Williams testified that when a client testifies in an unexpected way, an attorney has to "roll with the punches" and that he did so by presenting the two seemingly contradictory theories of accident and self-defense to the jury.

The petitioner's expert witness, Duby, testified at the habeas trial that asserting a theory of self-defense presents an incredibly fact intensive inquiry for the jury, and the likelihood of success depends, to a great extent, on whether the defendant's testimony about the underlying events is persuasive and aligns with the other evidence presented. Duby agreed with Williams' assessment that the video of the shooting supported a theory of self-defense. Nevertheless, Duby testified that, once the petitioner testified that the shooting was accidental, a claim of self-defense could no longer be asserted in the case. Duby opined that a claim of self-defense was contrary to the petitioner's testimony that he did not intend to fire the gun and, therefore, Williams erred in continuing to argue self-defense to the jury. At the same

time, Duby acknowledged that no matter how much an attorney prepares a client to testify, a client "almost always" says something unfavorable to the case while on the stand.

On appeal, the petitioner neither contends that Williams erred in determining that self-defense was the appropriate defense strategy at the outset of the case nor challenges the habeas court's finding that Williams' conclusion that self-defense was the best strategy to pursue was a reasonable strategic decision. Rather, the petitioner argues that, once he testified that the shooting was accidental and that he had not intended to fire the gun, it became objectively unreasonable for Williams to continue with the theory of self-defense and present it to the jury in closing arguments because that theory was inconsistent with and "negated" by the petitioner's testimony. According to the petitioner, because "the jury would have to *wholly disbelieve* [the petitioner's] testimony that the shooting was accidental" for him to succeed on the claim of self-defense, there was "no possible benefit to . . . asking the jury to reject [the petitioner's] testimony." (Emphasis in original.)

We disagree with the petitioner's arguments because they reflect a misunderstanding of the appropriate standard for determining whether the petitioner was deprived of his constitutional right to effective counsel. "The test for deficient performance is whether trial counsel's strategy was objectively reasonable considering all of the circumstances . . . ." (Citation omitted.) *Crenshaw* v. *Commissioner of Correction*, supra, 215 Conn. App. 223. We conclude that Williams' strategy met this standard.

Williams' presentation of a theory of self-defense during his closing argument relied on much of the evidence presented in the criminal trial. Although the petitioner testified that he did not intend to shoot the gun, he also testified that he was being attacked by the victim, feared for his life, and believed that, had the victim obtained the gun, he would have shot the petitioner, all of which supported a theory of self-defense. Notably, the video of the shooting supported the theory of self-defense and was inconsistent with the accidental discharge theory. The petitioner's own expert witness, Duby, acknowledged that "it looked to me like [the petitioner] was defending himself," and "I don't [think] that you could look at that video and say conclusively that [the petitioner is] not defending himself." Duby further testified: "I don't think . . . a person not involved in the incident can look at that video and think that there's a real bona fide way of saying that you didn't intend that outcome."

Consequently, rather than rely exclusively on the theory of accident, which was supported only by a portion of the petitioner's testimony, Williams' presentation of

alternative theories accounted for the possibility that the jury might view the video of the shooting and come to the same conclusion that both Williams and Duby had reached—that the petitioner shot the victim in self-defense. Significantly, self-defense constituted a complete defense to each of the charged offenses and all of the lesser included offenses brought against the petitioner. Moreover, the state bore the burden of disproving it beyond a reasonable doubt. See *State* v. *Singleton*, supra, 292 Conn. 747 ("only the state has a burden of persuasion regarding a self-defense claim" (internal quotation marks omitted)). Therefore, although portions of the petitioner's testimony were inconsistent with a claim of self-defense, we nevertheless conclude that, in light of all of the evidence the jury heard and saw, it was sound trial strategy for Williams to present self-defense to the jury in his closing argument.

Furthermore, contrary to the petitioner's assertion, the jury would not have had to "wholly disbelieve" the petitioner's testimony in its entirety in order to conclude that he had acted in self-defense. (Emphasis omitted.) "[The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Covington*, 184 Conn. App. 332, 343, 194 A.3d 1224 (2018), aff'd, 335 Conn. 212, 229 A.3d 1036 (2020). Thus, the jury was free to credit those portions of the petitioner's testimony in which he stated that he feared for his life when he dove for and picked up the gun and view that testimony as evidence supporting the theory of self-defense. Therefore, that portions of the petitioner's testimony were inconsistent with the theory of self-defense does not render Williams' decision to present the theory of self-defense in closing argument constitutionally deficient.

Finally, we are not persuaded by the petitioner's argument that accidental discharge was objectively the better defense strategy to pursue once the petitioner had testified that the shooting was an accident. As noted previously, the accident defense was not supported by the video of the shooting, which Duby acknowledged appeared to show that the petitioner intended to fire the gun at the victim. Given that the jury would have reason to doubt the petitioner's version of the incident, it certainly was reasonable for Williams to decide to focus on the defense best supported by the video evidence. Furthermore, whereas self-defense was a complete defense to the charged offenses, the theory of accident would serve only to negate the element of intent. See *State* v. *Moye*, 119 Conn. App. 143, 153, 986 A.2d 1134 ("[a]ccident is not a justification for a crime . . . it negates only one element of the crime, namely,

intent" (internal quotation marks omitted)), cert. denied, 297 Conn. 907, 995 A.2d 638 (2010). It thus would not have served as a defense to the offenses involving a lesser mental state, including reckless manslaughter—of which the jury found the petitioner guilty. In addition, the state would not have borne the burden of disproving the theory of accident beyond a reasonable doubt. Id., 153 ("[b]ecause a claim of accident is not a defense but merely negates the intent element of the crime, we disagree with the defendant's contention that the court had to charge explicitly that the jury could not convict the defendant unless the state proved, beyond a reasonable doubt, that the death was not an accident"). For these reasons, we reject the petitioner's argument that abandoning the agreed upon strategy of self-defense and "proceed[ing] with the defense of accidental discharge only" was the only reasonable strategy for Williams' closing argument.

In reaching our conclusion, we emphasize that "a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Zachs* v. *Commissioner of Correction*, supra, 205 Conn. App. 262. Further, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough* v. *Gentry*, 540 U.S. 1, 5–6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). At the habeas trial, Williams testified that he presented the jury with both accident and self-defense as "alternative" theories of defense in an effort to "roll with the punches" after having been shocked by the petitioner's testimony. Accordingly, rather than foreclose the reasonable and well supported theory of self-defense, Williams adapted to the petitioner's testimony and wove it into a cohesive closing argument while preserving the previously agreed upon self-defense strategy. Given that Williams' closing argument was consistent with the evidence presented in the case and afforded the jury two potential pathways to finding the petitioner not guilty of murder, we cannot conclude that there was no tactical justification for Williams' decision to argue both self-defense and accident in his closing argument.

For the foregoing reasons, we agree with the habeas court's conclusion that the petitioner did not meet his burden of demonstrating that Williams' closing argument and defense strategy therein were objectively unreasonable. We conclude that the defense strategy that Williams employed, which included presenting self-defense as the primary theory of defense while still allowing for the jury to find that the petitioner did not intend to fire the gun, was supported by ample tactical justifications and "falls into the category of trial strategy

or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 132, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Thus, we conclude that Williams' performance was not deficient.[5] Consequently, the habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] "Although Miguel Delgado and Jose Delgado share a surname, herein we refer to Miguel Delgado as the victim and to Jose Delgado by his surname." *State* v. *Morales*, 172 Conn. App. 329, 332 n.1, 160 A.3d 383, cert. denied, 327 Conn. 988, 175 A.3d 1244.

[2] The court included instructions on both intentional manslaughter in the first degree and reckless manslaughter in the first degree.

[3] Williams argued: "Now, at this point, you can see up the left—the fight which is going on on the ground between [the victim] and [the petitioner]. Now, what do we see here? It is [the victim] who begins to rise. Now, you can see that [the petitioner] is still essentially prone on the ground and [the victim], at this point, seems to be in a crouched position. He's now, [the victim] is now standing bending over. [The petitioner] . . . appears to be on his belly. Look it, you see . . . [the victim] pulling back his arm to strike . . . [the petitioner]. [The petitioner] is still on his knees, again, you can see a strike taking place there. [The petitioner] is clearly is being assaulted. Again, you see here [the victim] standing in a fighting stance. [The petitioner] still on his knees. [The victim] clearly is advancing on [the petitioner]. Again, [the petitioner is] still on his knees. [The victim] still in a fighting stance and there the shot is discharged. . . .

"[T]he video doesn't make a mistake. The distance between the shooter and the person who was shot is crystal clear from that video and what was happening at that instant is crystal clear from that video. Again, it is so important and indeed it's required by the law that you put yourselves in that position. Had you been in that position, had you seen what [the petitioner] saw in the moments leading up to this, had you then having . . . been on the ground literally on your stomach while you're being attacked by the brother of the person who with his friend has just been in the process of inflicting clearly great physical injury upon the other fellow at no point off your knees what would you have done?"

[4] For example, when asked whether, after a "review of [the petitioner's] testimony and seeing that [the petitioner] testified that the discharge of the firearm was accidental," he had "an opinion as to whether or not a self-defense claim could've been asserted in this case," Duby replied, "[n]o, it could not have been." Duby further testified that "[Williams] would know that the [petitioner] said this was an accident, that he couldn't then argue something that required a jury to find that it was intentional" and that presenting the case on a theory of self-defense after the petitioner's testimony was "the wrong play."

[5] Accordingly, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Williams' closing argument. See, e.g., *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637–38, 212 A.3d 678 (2019) (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently).