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TYRONE PIERCE *v.* COMMISSIONER OF CORRECTION (AC 44188)

Elgo, Cradle and Flynn, Js.

Syllabus

The petitioner, who had been convicted of various crimes, sought a writ of habeas corpus, claiming, in count of one of his petition, that the state failed to disclose exculpatory evidence at his criminal trial, and, in counts two and three, that he was deprived of the effective assistance of counsel at his criminal trial and at his first habeas trial. The habeas court dismissed, sua sponte, pursuant to the applicable rule of practice (§ 23-29), the first count of the third amended petition, without providing the petitioner with prior notice or an opportunity to be heard. After a trial on the remaining two counts of the amended petition, the court denied those counts of the petition. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court abused its discretion in denying the petition for certification to appeal because, in light of our Supreme Court's decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), which held that a habeas court is required to provide prior notice to the petitioner of its intention to dismiss, sua sponte, a petition that it deems legally deficient and an opportunity to be heard, this court concluded that the resolution of the underlying claim of procedural error involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further.

2. The habeas court improperly dismissed the first count of the amended petition without first providing the petitioner with prior notice and an opportunity to submit a brief or written response addressing the proposed basis for dismissal: the Supreme Court's decisions in *Brown* and *Boria* governed the resolution of the merits of the petitioner's appeal and required reversal of the judgment with respect to the dismissal of count one; contrary to the claim of the respondent, the Commissioner of Correction, this court declined to permit the habeas court another opportunity to consider declining to issue the writ pursuant to the applicable rule of practice (§ 23-24), because counsel had been appointed and had filed the third amended petition on behalf of the petitioner prior to the court's dismissal of the first count, and it would strain logic to construe *Brown* as advising this court to direct the habeas court on remand to consider declining to issue a writ with respect to an amended petition that was filed after the writ had been issued; accordingly, on remand, should the habeas court again consider dismissal 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 and an opportunity to provide a written response.

Argued November 9, 2021—officially released August 15, 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, *Newson*, *J.*; judgment dismissing the first count of the petition and denying the remaining counts of the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed in part*; *further proceedings.*

Robert L. O'Brien, assigned counsel, with whom, on

the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Tamara Grosso*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Tyrone Pierce, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court dismissing sua sponte, pursuant to Practice Book § 23-29,[1] the first count of his third amended petition for a writ of habeas corpus.[2] On appeal, the petitioner argues that the court abused its discretion in denying his petition for certification to appeal because the court improperly dismissed the first count of his third amended petition in 2019 without first providing him with notice and an opportunity to be heard.[3] We agree with the petitioner that the court abused its discretion in denying his petition for certification to appeal. Furthermore, in light of our Supreme Court's decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and in *Brown*'s companion case, *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), which were decided in 2022, after the habeas court's 2019 dismissal of the first count of the petitioner's third amended petition, we agree that the habeas court committed error in dismissing that count pursuant to § 23-29 without first providing him with prior notice of its intention to dismiss and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal. Accordingly, we reverse in part the judgment of the habeas court.

The following procedural history is relevant to this appeal. The petitioner was convicted, following pleas of nolo contendere, to kidnapping in the first degree, sexual assault in the first degree, assault in the second degree, and tampering with a witness, and received a total effective sentence of ten years of incarceration, followed by fifteen years of special parole, to be served consecutively to a sentence he was already serving for a violation of probation.

On December 18, 2013, 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 the waiver of fees, both of which the court granted on January 17, 2014. The court issued the writ that same day. Appointed counsel filed an appearance on behalf of the petitioner on May 12, 2014. On April 1, 2019, the operative third amended petition was filed. In that three count petition, the petitioner claimed that his constitutional rights were violated because the state failed to disclose exculpatory evidence at his criminal trial, and that he was deprived of the effective assistance of counsel at his criminal trial and his first habeas trial.

By order dated May 8, 2019, the court, *Newson*, *J.*, sua sponte dismissed the first count of the third amended petition pursuant to Practice Book § 23-29 (3). Prior to dismissing that count, the court did not provide the

petitioner with an opportunity to be heard with respect to the dismissal. The petitioner filed a motion for reconsideration, which the court summarily denied. The petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g),[4] which the court denied.

Following a trial on the remaining two counts of the third amended petition, the habeas court issued a memorandum of decision, on January 23, 2020, denying the petition. The petitioner filed a petition for certification to appeal, which the court denied. This appeal, challenging only the dismissal of the first count of the petitioner's third amended petition, followed.

On November 30, 2021, this court stayed this 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.' "[5] The parties complied with our supplemental briefing order.[6]

As a threshold consideration, we must address the issue of whether the court abused its discretion in denying the petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused

its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

In light of our Supreme Court's recent decisions in *Brown* and *Boria*, as discussed herein, we conclude that the resolution of the underlying claim of procedural error involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further. Accordingly, we agree with the petitioner that the habeas court's denial of the petitioner's petition for certification to appeal reflected an abuse of its discretion.

Our Supreme Court's decisions in *Brown* and *Boria* govern our resolution of the merits of the present appeal and require a reversal of the habeas court's judgment with respect to the dismissal of count one. 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 first count of the petitioner's third amended petition 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 judgment with respect to that dismissal and to remand the case to the habeas court for further proceedings. If the habeas court, on remand, again chooses to consider dismissal on its own motion pursuant to § 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.

The respondent, the Commissioner of Correction, argues that, consistent with the rationale in footnote 11 of *Brown*; see footnote 5 of this opinion; we should

permit the habeas 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 the release of our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020).[7] In the present case, however, counsel had been appointed and had filed the third 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, e.g., *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 850–51, 287 A.3d 138 (2022).[8] "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.) *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 849–50.

The judgment is reversed only with respect to the first count of the third amended petition and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[1] Practice Book § 23-29 provides: "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;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

[2] Following a trial, the court also denied the remaining two counts of the petitioner's third amended petition for a writ of habeas corpus. The petitioner does not challenge the judgment as to those two counts.

[3] Because we agree with the petitioner's claim that the habeas court

improperly dismissed the first count of his petition without notice and an opportunity to be heard, and that claim is dispositive of the appeal, we need not, and do not, consider the petitioner's additional claim that the court erred in holding that his claim was barred by the doctrine of res judicata. The court, in its discretion, may choose to revisit this issue during the proceedings on remand, provided that it does so consistent with the procedure set forth in this opinion.

[4] General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

[5] 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. *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17–18. Furthermore, in footnote 11 of its decision, 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, 17 n.11.

[6] We thereafter issued a second supplemental briefing order asking the parties to file supplemental briefs "addressing the effect, if any, of this court's opinion in . . . *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616 [285 A.3d 1194 (2022)], on this appeal." The parties also complied with this supplemental briefing order.

[7] In *Gilchrist*, our Supreme Court explained that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. . . . If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to [Practice Book] § 23-24. . . . If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. *At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service.* . . . After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." (Citations omitted; emphasis added.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

[8] "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*, 218 Conn. App. 216, 225–26 n.6, 291 A.3d 641 (2023).