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JOHNNY MARTINEZ *v.* COMMISSIONER OF CORRECTION (AC 45795)

Moll, Seeley and Keller, Js.

Syllabus

The petitioner, who had been convicted of felony murder and various other crimes in connection with a robbery, sought a writ of habeas corpus, claiming that his trial counsel, B, had provided ineffective assistance. A few weeks after the robbery, the petitioner made a formal statement to the police regarding his involvement in the incident. He admitted that he had participated in the robbery of the victim, who had died as a result of blunt force trauma to his head, and stated that he had stomped on the victim's head after another individual had struck the victim in the head multiple times with a hard object. Prior to trial, the petitioner was offered a plea deal that would have required him to plead guilty to the charge of felony murder in exchange for capping his sentence at thirty-five years to serve. B discussed the plea offer with the petitioner several times, addressing the elements that the state needed to prove to convict the petitioner of the offenses he was charged with, the total exposure the petitioner faced, the state's evidence, and the strength of the state's case, which included the impact of the petitioner's incriminating statement to the police. B did not specifically recommend that the petitioner accept or reject the plea deal, as she believed that the decision needed to be made by the petitioner. The petitioner, who maintained his innocence despite his statement to the police, rejected the plea offer and was found guilty of felony murder and various other crimes. He was sentenced to a term of fifty years of imprisonment, and his conviction was affirmed on appeal. Thereafter, the petitioner filed a habeas petition claiming that B had failed to advise him adequately regarding the plea offer because she had failed to explain the elements of the crimes charged against him and to inform or advise him as to the strength of the state's case. The habeas court rendered judgment denying the habeas petition, concluding that the petitioner had failed to meet his burden of demonstrating both that B had performed deficiently and that he was prejudiced by B's performance. On the granting of certification to appeal, the petitioner appealed to this court, claiming that B performed deficiently by failing to offer her opinion as to whether he should have taken a pretrial plea offer from the state and that he was prejudiced by that performance. *Held* that the habeas court did not err in concluding that the petitioner failed to demonstrate that he was prejudiced by B's allegedly deficient performance, as was required pursuant to *Strickland* v. *Washington* (466 U.S. 668): contrary to the assertion of the respondent Commissioner of Correction, the petitioner's claim on appeal that B improperly had failed to advise the petitioner of her opinion regarding whether he should accept or reject the plea offer was reviewable because it was sufficiently articulated during the habeas proceedings so as to give adequate notice to both the habeas court and the respondent, as, in his habeas petition, the petitioner made the general allegation that B had failed to advise him adequately regarding the plea offer in addition to claiming more specifically that B had provided ineffective assistance by failing to explain adequately the charges against the petitioner and the strength of the state's case and, during the habeas trial, testimony by B and the petitioner amply covered the issue and counsel for both parties addressed the claim during their respective closing arguments; moreover, the habeas court's determination that the petitioner failed to sustain his burden of proving that he would have accepted the plea deal but for B's constitutionally deficient performance was not erroneous because, during the habeas trial, both B and the petitioner testified that the petitioner had rejected the offer because he wanted to maintain his innocence, and the petitioner's testimony during his criminal trial supported the habeas court's finding that he was primarily concerned with proving his innocence; furthermore, the habeas court determined that the petitioner's testimony regarding whether he would have

accepted the plea deal if he had received adequate advice and professional assistance from B was not credible, and it was not for this court to reevaluate that determination; accordingly, this court did not need to determine whether B's performance was deficient.

Argued September 7—officially released October 17, 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*.

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. Following the granting of his petition for certification to appeal, the petitioner, Johnny Martinez, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he alleged a claim of ineffective assistance of counsel. On appeal, the petitioner claims that his trial counsel, Attorney TaShun Bowden-Lewis, performed deficiently by failing to offer her opinion as to whether the petitioner should have taken a pretrial plea offer from the state and that he was prejudiced by trial counsel's deficient performance. We disagree and, accordingly, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. Shortly after 4 a.m. on November 2, 2010, the petitioner, Michael Mark, and Anthony Garcia were passengers in an automobile being driven by Manuel Vasquez. The four men were on their way to a "bootleg house" to purchase liquor that was sold when bars and package stores were not open for business. Around that time, the victim, Arnaldo Gonzalez, was walking to an election polling station where he was scheduled to work as a bilingual interpreter. Mark saw the victim and said that he intended to rob him. After Vasquez parked the automobile, both the petitioner and Mark exited the vehicle and followed the victim. Mark struck the victim in the back of the head with a hard object he had picked up from the ground. The victim immediately fell to the ground, and Mark struck him repeatedly. Thereafter, the petitioner stomped on the victim's head, causing blood to transfer onto one of the petitioner's sneakers. Mark took a backpack belonging to the victim, and he and the petitioner left the scene. The victim sustained multiple skull fractures and brain hemorrhaging and died as a result of blunt force trauma to his head.

In the following weeks, the petitioner received word that the Waterbury police wanted to speak with him regarding the incident. The petitioner subsequently went to the Waterbury Police Department and made a formal statement to the police about his involvement in the incident. In this statement, the petitioner admitted to the police that he had participated in the robbery of the victim and stomped on the victim's head after the victim had been struck in the head by Mark.

The petitioner was arrested on November 28, 2010, and charged with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c,[1] robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), robbery in the first degree in violation of § 53a-134 (a) (3), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, and tampering with physical evidence in violation of General Statutes

§ 53a-155.[2] On December 15, 2010, trial counsel was appointed to represent the petitioner. On July 14, 2011, the petitioner was offered a plea deal that called for the petitioner to plead guilty to the charge of felony murder, and, in exchange, his sentence would be capped at thirty-five years to serve, with a right to argue for no less than thirty-two years.

On September 14, 2011, the petitioner rejected the plea offer in court. The court, *Damiani*, *J.*, stated the terms of the plea and told the petitioner that "the state's going to be trying the case on the theory of felony murder. So, if there's a robbery completed or attempted . . . someone dies, you and the other person are equally culpable. That's the theory they're going to be going on; you understand that, right?" The petitioner answered in the affirmative. The court further asked the petitioner whether his trial counsel had "explained all this to [him]" and whether he knew "what the facts are, [and the] weaknesses and strengths of the state's case." The petitioner again answered in the affirmative. Finally, the court asked the petitioner whether he understood that the offer could not be renewed: "So, you come back to trial, you can't say you want to take this offer. It's got to be something more; do you understand, sir?" The petitioner indicated that he understood. A trial was held, and the petitioner was found guilty of felony murder, two counts of robbery in the first degree, conspiracy to commit robbery in the first degree, and tampering with evidence.[3] The petitioner was sentenced to a term of incarceration of fifty years, twenty-five years of which was a statutory mandatory minimum. The petitioner's conviction was affirmed on direct appeal. See *State* v. *Martinez*, 171 Conn. App. 702, 758, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

On April 8, 2021, the petitioner filed the operative amended petition for a writ of habeas corpus, in which he alleged in a single count that his trial counsel had provided ineffective assistance by failing to advise the petitioner adequately regarding the state's plea offer. Specifically, he alleged that trial counsel had failed to explain the elements of each of the crimes charged against him and to inform or advise him as to the strength of the state's case. A trial was held before the habeas court, *M. Murphy*, *J.*, on April 6, 2022, during which the petitioner was represented by counsel. The petitioner's trial counsel, the petitioner, and Attorney Frank Riccio, an expert witness who testified as to the best practices for advising a client as to a plea deal, each testified at the habeas trial.

The habeas court summarized the testimony of the petitioner's trial counsel as follows: "[Trial counsel] testified at the habeas trial that, at the time she represented the petitioner, she had been employed as a public defender for over a decade and had prior experience representing defendants facing murder charges. [Trial

counsel] testified that she discussed the plea offer with the petitioner several times, in writing and verbally, at both the courthouse and the correctional facility at which the petitioner was housed. [Trial counsel] also testified that she had numerous discussions with the petitioner, both in writing and verbally, regarding what the state needed to prove for each offense he was charged with and the total exposure the petitioner faced as a result of the charges. [Trial counsel] further testified that she discussed the state's evidence and the strength of the state's case with the petitioner, including the incriminating statement the petitioner made to the police wherein he admitted to stomping the victim [on] the head. [Trial counsel] also testified that the decision to accept the plea or to go to trial was ultimately the petitioner's decision, but that she informed the petitioner of the strengths and weaknesses of his options given the fact that he was a young man with small children. [Trial counsel] testified that the petitioner ultimately rejected the plea offer approximately two months after it was conveyed to him."

The petitioner testified that his trial counsel had discussed with him what the state would need to prove for felony murder but that he did not understand it. The petitioner further testified that he had difficulty reading and understanding what his trial counsel had told him but could not remember whether he had told her that he had difficulty reading. The petitioner also testified that trial counsel had told him that, if he was found guilty at trial, his sentence could be up to double the state's plea offer of thirty-five years. He testified that, although he had difficulty remembering, he believed that his trial counsel had talked to him about the strength of the state's case.

In a memorandum of decision dated July 22, 2022, the habeas court rendered judgment denying the operative habeas petition. In doing so, the court concluded that the petitioner had failed to meet his burden of demonstrating that his trial counsel performed deficiently "in advising the petitioner about the plea offer." The court found that the petitioner's trial counsel "is an experienced public defender who testified credibly that she discussed the elements of the charged offenses that the state would have to prove to convict the petitioner, the potential sentences resulting from convictions of the charged offenses, the strength of the state's case, and the plea offer with the petitioner on numerous occasions, both verbally and in writing. [Trial counsel] also advised the petitioner concerning his options with the plea offer given the facts of his case and his personal circumstances. [Trial counsel] further indicated that there was no evidence that the petitioner did not understand their discussions. As a result, the court finds that [trial counsel's] advisement did not constitute deficient performance . . . [and] that the petitioner failed to sustain his burden of proving that the petitioner was

prejudiced by trial counsel's performance." Thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court.

Before we begin our analysis of the petitioner's ineffective assistance of counsel claim, we must first address the argument of the respondent, the Commissioner of Correction, that the petitioner's claim on appeal is not reviewable. In the petitioner's operative amended petition for a writ of habeas corpus, he alleged that his trial counsel failed to properly advise him regarding the state's plea offer, including failing to explain to him adequately the elements of the charges he was facing and to inform him as to the strength of the state's case. On appeal, the petitioner argues that his trial counsel was ineffective in failing to advise him whether he should have accepted or rejected the plea offer. Specifically, the petitioner argues that his trial counsel's performance was deficient in that she did not offer her opinion as to whether the petitioner should have accepted the plea offer for the charge of felony murder, and that he was prejudiced by counsel's deficient performance. According to the respondent, this claim is being raised for the first time on appeal and, thus, is not reviewable. The petitioner counters that this underlying theory of deficient performance was presented and explored "throughout the case." As the petitioner noted in his appellate reply brief to this court, "[a]s part of [his] claim that the petitioner's trial counsel failed to adequately explain the strength of the state's case, the petitioner presented evidence that part of this duty was to provide a professional opinion as to whether the petitioner should accept or reject the plea offer." This was demonstrated, the petitioner argued, through the questioning of trial counsel during direct examination at the habeas trial regarding whether counsel had advised the petitioner to accept or to reject the plea offer.

"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. . . . 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 determination 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." (Citations omitted; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 298–99, 298 A.3d 636 (2023).

A review of the record before the habeas court reveals that the claim on appeal was sufficiently articulated during the habeas proceedings so as to give adequate notice to both the habeas court and the respondent. Although the petitioner alleged in his operative habeas petition that his trial counsel provided ineffective assistance by failing to explain adequately the charges against him and the strength of the state's case, the petitioner also made the more general allegation that trial counsel had failed to advise him adequately regarding the plea offer. Also, during the habeas trial, the petitioner pursued, on multiple occasions, a theory that his trial counsel should have, but failed to, advise the petitioner as to her opinion regarding whether he should accept the plea offer.

The following exchanges from the habeas trial are informative. On direct examination, trial counsel was asked whether she had ever told the petitioner her "opinion as to whether the state would prevail at trial?" Trial counsel responded, "[n]o. But I let him know the weaknesses of our case, the strengths, that kind of a thing, and how—again, how damning the statement was, and if it was not going to be suppressed how that could definitely be very harmful." Trial counsel subsequently was asked, "[d]id you ever advise [the petitioner] to reject or accept the plea deal?" She responded, "[n]o. I let him know that was his decision, but I informed him of the, again, the strengths and weaknesses of what would happen, the options, if he chose to accept the offer or chose not to—to accept the offer." The respondent did not object to this line of questioning at any point.

The petitioner also testified during the habeas trial as to whether his trial counsel ever had advised him to accept the plea offer. On direct examination, the petitioner was asked, "[d]id [trial counsel] ever give you her thoughts as to whether the state would win at trial?" He responded, "[n]o, I don't think so. I don't know." He was then asked, "[d]id [trial counsel] ever discuss with you what your best option was to work out your case?" He responded, "[n]o. She left that to me to—if I want to take the deal—or the plea deal—excuse me—or to go to trial." The petitioner was then asked, "[s]o, did [trial counsel] ever advise you to accept the plea offer?" He responded, "[n]o." The petitioner was also questioned as to whether trial counsel had

advised him to reject the plea offer, to which he stated, "not that I know of. I don't remember." The petitioner also was asked whether his trial counsel had advised him to go to trial and whether he would have accepted the plea deal if recommended to do so by trial counsel, to which he responded, "I believe so . . . if she would have told me . . . listen, if I was you or if the best—best situation, I would take the plea—I would have took—I definitely would have listened to her if she would have told me to take the plea deal." Again, the respondent did not object to any of the questions regarding whether trial counsel had advised the petitioner to take the plea deal.

Finally, in closing arguments, the petitioner's counsel argued, citing *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 153 A.3d 8 (2016) (overruled by *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 298 A.3d 588 (2023)), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017), that "merely explaining the offer isn't enough . . . trial counsel must also provide her professional advice as to what is the best option, taking the plea or going to trial." (Citation omitted.) The respondent's counsel, in turn, rebutted this point, arguing in closing that "[w]hether or not the [petitioner] takes the deal is ultimately his decision . . . . [U]ltimately, [the petitioner] indicated he was innocent. . . . [E]ven if [trial counsel had] told him 'you have to take this particular offer' . . . there's nothing in the record to indicate that [the petitioner] would have, in fact, accepted that deal, given his belief that he was innocent."

The record shows that the examination of and testimony by both trial counsel and the petitioner during the habeas trial amply covered the issue of whether trial counsel had advised the petitioner as to whether he should have taken the plea deal. The petitioner and trial counsel both responded to questions concerning that issue, and the respondent had an opportunity to cross-examine the witnesses on that point. Moreover, both the petitioner's and the respondent's counsel addressed the claim during their respective closing arguments. The record reflects that, although the petitioner did not list it as one of the grounds in his operative habeas petition, he considered trial counsel's failure to advise him regarding whether he should have accepted the plea offer as part of his claim of ineffective assistance of counsel. The habeas court also concluded that "the petitioner [had] failed to sustain his burden of proving that trial counsel's performance was deficient in advising the petitioner about the plea offer." Accordingly, we undertake a review of the petitioner's claim.[4]

Before we address the substance of the petitioner's ineffective assistance of counsel claim, we first set forth our standard of review and general principles governing ineffective assistance of counsel claims. "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 . . . ." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 304. "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. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 780, 272 A.3d 189 (2022).

In the present case, the habeas court denied the petitioner's habeas petition on the ground that he failed to satisfy both the performance prong and the prejudice prong. On appeal, the petitioner challenges both grounds for the court's decision. We, however, need not decide whether the petitioner's trial counsel rendered deficient performance because, even if we assume that counsel's performance was deficient, the petitioner has failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance.[5] See *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667, 289 A.3d 1206 (2023) (failure of petitioner to satisfy either prong of *Strickland* is fatal to habeas petition); *Santiago* v. *Commissioner of Correction*, 213 Conn. App. 358, 366, 277 A.3d 924 ("[b]ecause both [the deficient performance and prejudice] prongs [of the *Strickland* test] . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 345 Conn. 903, 282 A.3d 466 (2022).

"[T]o satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (Internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 352, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013);

see also *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 355–56, 273 A.3d 680 (2022). Furthermore, "[i]n the context of rejected plea offers . . . the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous." *Barlow* v. *Commissioner of Correction*, supra, 357.[6] "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id. With respect to the prejudice prong, the petitioner argues that the habeas court erroneously determined that he failed to sustain his burden of proving that he would have accepted the plea deal but for the constitutionally deficient performance of his trial counsel. The petitioner also asserts that the habeas court erred in finding that he was not credible on the issue of whether he would have accepted the plea deal. We are not persuaded.

During the habeas trial, trial counsel testified that the petitioner rejected the plea offer because he wanted to maintain his innocence. The petitioner also conceded this during the habeas trial when he was asked why he rejected the plea offer, as he responded, "I didn't do anything. I was innocent. So, I—I just wanted to go to—I wanted to prove my innocence."[7]

A review of the transcripts from the criminal trial, which were made a part of the record in the habeas proceedings, supports the habeas court's finding that the petitioner was primarily concerned with proving his innocence. On many occasions throughout the criminal trial, the petitioner declared his innocence. Notably, the petitioner testified (1) that it was Mark who had killed the victim, stating, "what Mark did is what [Mark] did, you know, we tried to stay—all of us tried to stay as far away as we [could] from that situation, that was his problem"; (2) that he was not present when Mark killed the victim, stating, "I wasn't there physically when the person died . . . I wasn't there physically"; and (3) that he had never stomped on the victim's head, despite his initial statement to the police in which he admitted to doing so. On the basis of this record, the habeas court's factual findings that "[t]he petitioner's primary concern at the time he rejected the plea offer was proving his innocence" and, therefore, that he would not have accepted the plea offer if he had received adequate advice and professional assistance from his trial counsel, were not clearly erroneous.

Furthermore, in its memorandum of decision, the habeas court stated that it did "not credit the petitioner's . . . testimony that, in retrospect, he would have

accepted the plea offer." "As an appellate court, we do not reevaluate the credibility of testimony, nor will we do so in this case. The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . This court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316–17, 34 A.3d 1046 (2012); see also *Perez* v. *Commissioner of Correction*, 194 Conn. App. 239, 242, 220 A.3d 901 ("[a]ppellate courts do not second-guess [the habeas court, as] the trier of fact with respect to credibility" (internal quotation marks omitted)), cert. denied, 334 Conn. 910, 221 A.3d 43 (2019). The habeas court's determination that no prejudice had been established was based, in part, on its credibility assessment of the petitioner's testimony, and it is not for this court to reevaluate that credibility determination. Therefore, on the present factual record, "we will not second-guess the habeas court's credibility determination." *Barlow* v. *Commissioner of Correction*, supra, 343 Conn. 368.

Accordingly, we agree with the habeas court's conclusion that the petitioner failed to show that he was prejudiced by trial counsel's allegedly deficient performance.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 53a-54c was amended by No. 15-211, § 3, of the 2015 Public Acts, which made technical changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] General Statutes § 53a-155 was amended by No. 15-211, § 9, of the 2015 Public Acts, which made changes to the statute that are not relevant to this appeal. For convenience, we refer to the current revision of the statute.

[3] "Additionally, the jury found the [petitioner] guilty of murder in violation of . . . § 53a-54a (a). At the time of sentencing, the court, pursuant to *State* v. *Miranda*, 145 Conn. App. 494, 508, 75 A.3d 742 (2013) (vacatur is proper remedy for double jeopardy violation caused by cumulative homicide convictions arising from killing of single victim), aff'd, 317 Conn. 741, 753–54, 120 A.3d 490 (2015), reasoned that it could not properly impose a sentence with respect to the murder and felony murder counts under which the [petitioner] was found guilty. Accordingly, the court vacated the [petitioner's] conviction of murder." *State* v. *Martinez*, 171 Conn. App. 702, 705 n.1, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

[4] We also note that the respondent has not been prejudiced by our review of this claim in light of our conclusion that the petitioner failed to meet his burden of demonstrating that he was prejudiced by the allegedly deficient performance of his trial counsel. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to properly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim").

[5] On August 10, 2023, this court, sua sponte, ordered the parties to file simultaneous supplemental briefs to address the impact of *Maia* v. *Commis-*

sioner of Correction, 347 Conn. 449, 298 A.3d 588 (2023), on the present appeal. In *Maia*, our Supreme Court addressed the issue of whether trial counsel provided ineffective assistance in failing to advise the petitioner in that case as to whether he should accept a plea offer from the court and, specifically, discussed the factors defense counsel must weigh in determining whether to make such a recommendation. Id., 461–63. In light of our determination in the present case that the petitioner failed to satisfy the prejudice prong of *Strickland*, which obviates any need for this court to address the performance prong and to determine whether counsel performed deficiently in failing to advise the petitioner as to whether he should have accepted or rejected the plea offer, we need not address the impact, if any, of *Maia* on the present appeal.

[6] In *Barlow*, our Supreme Court addressed the issue of whether a petitioner met his burden of establishing prejudice in the context of a rejected plea offer. *Barlow* v. *Commissioner of Correction*, supra, 343 Conn. 357. In doing so, the court addressed a claim raised by the respondent in that case that the habeas court, in finding that the petitioner was prejudiced by his trial counsel's deficient performance, did not comply with the recent dictates of the United States Supreme Court in *Lee* v. *United States*, 582 U.S. 357, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). *Barlow* v. *Commissioner of Correction*, supra, 362–66. In *Lee*, the petitioner alleged that his "counsel's deficient performance led him to accept a guilty plea rather than go to trial," which resulted in his conviction and mandatory deportation. *Lee* v. *United States*, supra, 360, 364. The issue on appeal before the United States Supreme Court was whether the petitioner established prejudice. Id., 360. In addressing that issue, the court stated: "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id., 369. The parties in *Barlow* disagreed as to whether the habeas court should have properly incorporated the contemporaneous evidence requirement of *Lee* to a case involving a rejected plea offer. *Barlow* v. *Commissioner of Correction*, supra, 362–63. Our Supreme Court in *Barlow* did not decide that question, however, because it determined that, even if the contemporaneous evidence requirement set forth in *Lee* did apply to rejected plea offers, "the record in [that] case contain[ed] sufficient contemporaneous evidence to substantiate the petitioner's after-the-fact testimony that he would have accepted the plea deal but for his attorney's deficient performance." Id., 365. In the present case, we do not find it necessary to reach this open question due to the fact that the habeas court's finding of no prejudice was based on its determination that the petitioner's testimony that he would have accepted the plea offer was not credible, which determination is " 'unassailable.' " *Heywood* v. *Commissioner of Correction*, 211 Conn. App. 102, 116, 271 A.3d 1086, cert. denied sub nom. *Tajay H.* v. *Commissioner of Correction*, 343 Conn. 914, 274 A.3d 866 (2022).

[7] Although the petitioner stated during the habeas trial that he would have taken an *Alford* plea, there is no evidence that an *Alford* plea was ever offered and, if so, whether it would have been acceptable to the state. See generally *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (defendant who pleads guilty under *Alford* doctrine does not admit guilt but acknowledges that state's evidence against him is so strong that he is prepared to accept entry of guilty plea). The petitioner's counsel conceded this point during oral argument before this court. The petitioner's testimony, therefore, that he would have accepted an *Alford* plea does not demonstrate that he would have accepted the plea offer that was extended if trial counsel had provided effective assistance.