ANTHONY SMALL *v.* COMMISSIONER OF CORRECTION
(AC 26245)

McLachlan, Harper and Dupont, Js.

Submitted on briefs March 31—officially released November 14, 2006

(Appeal from Superior Court, judicial district of New Haven, Hon. Anthony V. DeMayo, judge trial referee.)

Joseph Visone, special public defender, filed a brief for the appellant (petitioner).

Susanne E. Gill, senior assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

DUPONT, J. The petitioner, Anthony Small, appeals

following the habeas court's denial of his petition for certification to appeal from the judgment dismissing his petition for a writ of habeas corpus. The dispositive issue to be determined is whether either his trial or appellate counsel rendered ineffective assistance to him arising out of a jury instruction that did not contain the language of General Statutes § 53a-49 (a) (2).[1] We agree that his petition for certification to appeal should have been granted as to that issue but conclude that neither counsel rendered ineffective assistance, and, therefore, we affirm the habeas court's judgment on that issue.[2]

A certifiable issue exists, warranting an appeal to this court, if a petitioner can show that the habeas court abused its discretion. To do so, a 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 differently or that the questions involved deserve encouragement to proceed further. *Bowden* v. *Commissioner of Correction*, 93 Conn. App. 333, 338, 888 A.2d 1131, cert. denied, 277 Conn. 924, 895 A.2d 796 (2006).

The questions of whether trial counsel should have sought an instruction using the language of § 53a-49 (a) (2) or should have excepted to a charge that did not contain that language, or whether appellate counsel, on direct appeal, should have claimed that the lack of such an instruction denied the petitioner a fair trial are questions that are debatable among jurists of reason. No appellate case has decided those precise issues, and the issues are obviously debatable because the appellate panel in this case does not agree on the answers. The questions, therefore, of whether either counsel provided effective assistance to the petitioner deserved encouragement to proceed further, and the petition for certification should have been granted so that these questions could be answered.[3] See *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994).

Because certifiable issues, as stated, exist, we next discuss the merits of the petitioner's claim of ineffective assistance of counsel as to them. "The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut. In *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

(Internal quotation marks omitted.) *Nieves* v. *Commissioner of Correction*, 92 Conn. App. 534, 536, 885 A.2d 1268 (2005), cert. denied, 277 Conn. 903, 891 A.2d 2 (2006).

"The first part of the *Strickland* analysis requires the petitioner to establish that . . . counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [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. . . .

"Turning to the prejudice component of the *Strickland* test, [i]t is not enough for the [petitioner] to show that the errors [made by counsel] had some conceivable effect on the outcome of the proceeding. . . . Rather, [the petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.) *Bova* v. *Commissioner of Correction*, 95 Conn. App. 129, 135, 894 A.2d 1067, cert. denied, 278 Conn. 920, 901 A.2d 43 (2006).

The same two part analysis also applies to the petitioner's claim that his appellate counsel rendered ineffective assistance. "The first part of the *Strickland* analysis requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . While an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . .

"To satisfy the prejudice prong, a petitioner must . . . establish that, because of the failure of his appellate counsel to raise a [particular] claim, there is a reasonable probability that he remains burdened by an unreliable determination of his guilt." (Citations omitted; internal quotation marks omitted.) *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 171–73, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005).

The petitioner's habeas corpus petition, filed Febru-

ary 2, 2000, raised seven errors of the trial court, thirteen of trial counsel and five of appellate counsel, none of which involved the basic issue of this appeal for which the petitioner deems a new trial for felony murder is necessary. A second amended petition, filed March 31, 2000, for the first time, alleged ineffective assistance of both counsel for their failures to address this issue.[4] Not even the petitioner, therefore, originally viewed the issue as of paramount importance.

No expert witness at the habeas trial testified for the petitioner that either counsel's performance was deficient. An expert witness is not essential to show that an attorney's performance was so deficient that it fell below the standard of reasonably effective assistance, but in many cases, expert testimony is useful. The habeas court, in this case, without any expert testimony that either counsel was ineffective, ruled that neither of them rendered ineffective assistance to the petitioner.

The petitioner was originally charged with one count of capital felony in violation of General Statutes § 53a-54b (8), two counts of felony murder in violation of General Statutes § 53a-54c, one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48,[5] and one count of kidnapping in the second degree in violation of General Statutes § 53a-94. He was found guilty of all counts, after a jury trial, except for the count of kidnapping. On direct appeal, the conviction of capital felony was vacated, and the case was remanded for resentencing on the felony murder conviction. *State* v. *Small*, 242 Conn. 93, 116, 700 A.2d 617 (1997). On remand, he was sentenced to a total effective term of forty-five years imprisonment. Thus, after direct appeal, the petitioner avoided a sentence of life imprisonment without the possibility of release on the count of capital felony and, after trial, avoided a sentence for the class B felony of kidnapping in the second degree "for which three years of the sentence imposed may not be suspended or reduced by the court." General Statutes § 53a-94 (b).

The petitioner claims that he was charged with felony murder on the basis of the predicate crime of attempt to commit robbery in the first degree and that the jury should have been instructed on attempt as provided in § 53a-49 (a) (2). The flaw in the petitioner's statement of the issue is that he was not charged with the predicate crime of attempt to commit robbery pursuant to § 53a-49 (a) (2). The petitioner could have been charged properly with both felony murder; General Statutes § 53a-54c; and attempt to commit the crime of robbery; General Statutes § 53a-49 (a) (2); see *State* v. *Gayle*, 64 Conn. App. 596, 781 A.2d 383, cert. denied, 258 Conn. 920, 782 A.2d 1248 (2001); but the petitioner was *not* charged with both crimes.[6]

The court began its substantive instructions by defin-

ing robbery in the first degree, as set forth in § 53a-134 (a) (2).[7] It then instructed the jury with respect to the essential elements of felony murder as follows: "[A] person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit . . . robbery in the first degree and in the course of and in the furtherance of such crime or flight therefrom, he or another participant, if any, causes the death of [a] person other than one of the participants . . . .

"In order for you to find the accused guilty of felony murder, the state must prove beyond a reasonable doubt each of these following elements: that the accused, acting alone or with one or more other persons, committed or attempted to commit the crime of robbery in the first degree . . . . Two, that the defendant or another participant in the crime of robbery in the first degree, [or] the attempt to commit the same, caused the death of another person. Three, that the defendant or another participant caused the death while in the course of and in the furtherance of the commission or attempted commission of . . . robbery in the first degree, or in the immediate flight therefrom, [a]nd that the victim[s] . . . were not participants in the crime. . . .

"You understand that in order to prove the felony murder, you have to be satisfied beyond a reasonable doubt that . . . another [person], and this defendant, acting alone or with one or more persons, committed or attempted to commit an attempted robbery in the first degree. Two, that the accused or another participant in the crime of attempted robbery in the first degree caused the death of another person. Three, that the defendant or another participant caused the death while in the course of and in the furtherance of the commission of the attempted commission of the crime of robbery or the immediate flight therefrom. And four, that the victims . . . were not participants in the crime."

The petitioner claims that the instructions, as quoted, misled the jury because they failed to define properly an element of felony murder, namely, "attempt" to commit robbery, as outlined in § 53a-49 (a) (2), and that both his trial and appellate counsel provided ineffective representation for their failure to pursue that claimed impropriety. The court's instruction used the words of § 53a-54c, but not those of § 53a-49 (a) (2). The petitioner attempts to analogize the present case to cases in which the trial court failed to instruct the jury on an essential element of an offense, and this court on appeal concluded that it was reasonably possible that the jury was misled. The respondent, the commissioner of correction, claims that the court instructed the jury on each and every element of the offense of felony murder. The respondent claims that because the petitioner was

not charged with attempt to commit robbery, pursuant to § 53a-49 (a) (2), the court was not bound to charge the jury on that statute's definition of attempt, and the jury was free to apply the ordinary meaning to the word "attempt."

The petitioner's trial counsel admittedly did not seek an instruction using the words of § 53a-49 (a) (2), nor did he take exception to the instruction that lacked these words. Trial counsel was obviously aware that the petitioner was charged with § 53a-54c, a crime that does not specify that the attempted robbery be in any particular degree, as the same statute does specify in the case of other crimes such as sexual assaults or escape.[8] Because the petitioner was not charged with the separate crime of § 53a-49 (a) (2), counsel could not know if an element of the crime of felony murder that the state needed to prove was an attempt to commit robbery in the first, second or third degree, as described in General Statutes §§ 53a-133, 53a-134, 53a-135 and 53a-136. He was also aware that the definitional section of General Statutes § 53a-3 had no definition of the word "attempt." Given the statutory framework, it was reasonable of him not to seek an instruction containing the words of § 53a-49 (a) (2). Furthermore, the defense of the petitioner at trial was "mere presence" at the scene of the murders. The trial strategy, therefore, was to convince the jury that the petitioner was not involved in any attempt to commit a robbery and not involved in any robbery at all. Any specific instruction as to attempt to commit a robbery would dilute that strategy. Trial counsel could have concluded reasonably not to seek any instruction as to that statute. The petitioner has failed to show that trial counsel provided ineffective assistance.

Appellate counsel raised six issues on appeal, the primary one being a successful claim that the capital felony murder charge should be dismissed.[9] The number of issues that can be raised in an appellate brief or orally argued is not limitless. Appellate counsel knew of the petitioner's trial strategy and was familiar with the crimes with which he was charged and convicted. In view of the more viable claims that could be pursued on direct appeal, appellate counsel did not pursue the claim relating to the jury instruction that the petitioner now asserts. She did not provide ineffective assistance to the petitioner. On the contrary, she was successful in vacating the conviction that would have imprisoned him for life and also raised other claims that might, if successful, have given him a new trial.

The burden a "petitioner must sustain for a favorable outcome on his ineffective assistance of [appellate] counsel claim is a higher one than he would have had to sustain had the actual merits of the same issue been raised on direct appeal." *Valeriano* v. *Bronson*, 209 Conn. 75, 87, 546 A.2d 1380 (1988). It is possible to omit

a dispositive issue on appeal and nevertheless to have provided adequate counsel under the sixth amendment to the United States constitution. Id.

We conclude that neither counsel rendered ineffective assistance to the petitioner. We also conclude, on the basis of case law and the precepts of *Strickland*, that the conviction of the petitioner on two counts of felony murder was reliable.

In *State* v. *Sinclair*, 197 Conn. 574, 580, 500 A.2d 539 (1985), the defendant challenged his conviction of burglary in the second degree under General Statutes § 53a-102 (a) on the basis that the trial court failed to include the statutory definition of "intent" in General Statutes § 53a-3 (11) during instructions to the jury on the elements of the offense. Reviewing the charge in its entirety, our Supreme Court concluded that the jury had been instructed adequately on the element of intent. *State* v. *Sinclair*, supra, 581. According to the court, "[t]he word intent was used in its ordinary sense"; id.; in the trial court's instructions, despite the fact that the word was defined by statute.

In the present case, the word "attempt" is not defined in either the definitional section of our Penal Code, § 53a-3, nor is it defined in § 53a-54c, the statute defining felony murder, with which the petitioner was charged. We therefore conclude that even if the language of § 53a-49 (a) (2) were relevant, the jury could have found that the state proved the element of "attempt" of § 53a-54c by using its ordinary definition. Attempt is a much used English word with a common definition. To attempt, according to Webster's, is "to make an effort to do, get, have, etc." Webster's New World College Dictionary (4th Ed. 2002). Having reviewed the charge in its entirety with the principles of *Sinclair* in mind, we conclude that the word "attempt" was used in its ordinary sense, in a manner which clearly conveyed what had to be proved by the state to justify a conviction.

Cases other than *Sinclair* also indicate that statutory definitions need not always be provided to a jury. See *State* v. *Sargent*, 87 Conn. App. 24, 42–44, 864 A.2d 20, cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005); see also *State* v. *Maresca*, 173 Conn. 450, 460–61, 377 A.2d 1330 (1977). In the present case, no statutory definition exists, except if a statute, under which the petitioner was not charged, is consulted.

Here, the petitioner was not charged with a violation of § 53a-49 (a) (2), making it all the more certain that the jury was not misled by the lack of the language of that statute and that the petitioner's conviction for felony murder was reliable. In short, the petitioner cannot cross-pollinate the crime of felony murder with the separate crime of criminal attempt as provided in § 53a-49 (a) (2).

To be successful on a habeas corpus petition, which is a collateral attack on a conviction, "a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal." (Internal quotation marks omitted.) *Lozada* v. *Warden*, 223 Conn. 834, 840, 613 A.2d 818 (1992). The task of showing that the conviction resulted from a breakdown in the adversary process, rendering a result unreliable is "herculean." Id., 843. The petitioner has failed in that task.

The appeal, as it relates to the petitioner's claim of ineffective assistance of counsel due to counsel's cross-examination of two witnesses and counsel's failure to request an instruction on prior inconsistent statements, is dismissed;[10] and the judgment dismissing the petition for writ of habeas corpus claiming ineffective assistance of trial and appellate counsel due to counsels' failure to take exception to the trial court's felony murder instruction is affirmed.

In this opinion McLACHLAN, J., concurred.

[1] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[2] The facts pertinent to the petitioner's trial are set forth fully in *State* v. *Small*, 242 Conn. 93, 700 A.2d 617 (1991), and need not be repeated.

[3] The petitioner also argues that his trial counsel was ineffective for failing to cross-examine two of the state's witnesses adequately or to request a jury instruction on prior inconsistent statements. We do not consider the latter claim because the habeas court did not address it, and the petitioner did not seek an articulation pursuant to Practice Book § 66-5; see *Bowden* v. *Commissioner*, supra, 93 Conn. App. 342. Neither that claim, nor that of inadequate cross-examination, comprises an abuse of discretion for failure to grant a petition for certification to appeal. The habeas court correctly concluded that trial counsel fully cross-examined the witnesses, a conclusion with which we agree. The claim of ineffective assistance of counsel as to these claims is not supported by the record. The appeal is dismissed as to these claims.

[4] The habeas court granted the motion of the petitioner to amend his amended petition.

[5] No claim is made in this appeal that either counsel was ineffective in their representation of the petitioner as to his conviction of the charge of conspiracy to commit robbery in the first degree.

[6] In the event that the petitioner was charged and found guilty of both crimes, he could have been sentenced separately for both crimes. See *State* v. *Fernandez*, 27 Conn. App. 73, 92–96, 604 A.2d 1308, cert. denied, 222 Conn. 904, 606 A.2d 1330 (1992).

[7] As fully discussed by the court in its instructions, General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (2) is armed with a deadly weapon . . . ." General Statutes § 53a-133 further provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

[8] General Statutes § 53a-54c provides: "A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree,

aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

[9] Other claims appellate counsel raised were that (1) the trial court should have charged on an affirmative defense to felony murder, (2) evidence of the petitioner's prior felony convictions should not have been presented to the jury, (3) his motion for a new trial should have been granted because a juror was a neighbor of the petitioner, (4) the court's instruction on reasonable doubt shifted the burden of proof to the petitioner and (5) the petitioner's conviction required a coconspirator's conviction to be upheld on appeal before the petitioner's conviction could be affirmed.

[10] See footnote 3 of this opinion.