DOCKET NOS. TSR-CV21-5000834	STATE OF CONNECTICUT SUPERIOR COURT G.A. 19	SUPERIOR COURT
MICHAEL FORTIN	2024 MAY 16 A 11: 24	JUDICIAL DISTRICT OF TOLLAND ---
V.		HABEAS DOCKET
COMMISSIONER OF CORRECTION		MAY 16, 2024

MEMORANDUM OF DECISION

Michael Fortin, the petitioner, has filed this petition for a writ of habeas corpus in which he alleges that trial counsel was ineffective and the prosecutor engaged in impropriety during the trial. For the reasons set forth in this decision, the petition is denied.

I. BACKGROUND

A jury convicted Fortin of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). At trial, he was represented by Attorney David Channing. He was sentenced by the trial court, *Graham, J.*, to thirty-two years' incarceration, followed by ten years of special parole. He appealed his convictions, represented by Attorney Mark Rademacher, claiming that "(1) the trial court improperly allowed the state to introduce evidence of several instances of misconduct stemming from his prior use of the firearm that was used to shoot and kill the victim in this case, (2) the trial court abused its discretion by denying his motion for a mistrial after a state's witness inadvertently testified regarding a prior incident involving the defendant's discharge of a flare gun that the state previously had conceded, and the trial court ruled, was inadmissible, and (3) his constitutional right to confrontation was violated when the trial court allowed into evidence certain hearsay testimony that he did not have a permit to carry a firearm." State v. Fortin, 196 Conn. App. 805, 807, 230 A.3d 865, cert. denied, 335 Conn. 926, 234 A.3d 979 (2020). Our Appellate Court affirmed. Id. He then filed this petition for a writ of habeas corpus and counsel amended it for the

final time in January 2024. In this petition, he first alleges that trial counsel failed to: 1) engage in an effective investigation of his criminal history and mitigating evidence; 2) communicate with him; 3) present appropriate mitigation at sentencing; 4) object to instances of prosecutorial impropriety; 5) prepare him for his testimony; 6) object to hearsay statements; 7) effectively cross-examine witnesses and 8) effectively object and argue the admissibility of misconduct evidence and offer a stipulation as to identity. He next alleges that the prosecutor committed impropriety in various ways during questioning of witnesses and closing argument. The respondent raises the defense of procedural default as to the second count.

The court heard evidence on April 29 and May 9, 2024 from Attorney Channing, Dr. Jozlyn Hall and Fortin. The parties submitted exhibits.

II. FACTS

Our Appellate Court identified the following facts presented to the jury:

> At approximately 9 p.m. on July 3, 2015, the defendant rode his motorcycle to Lakeside Drive in Andover to observe a fireworks display at Andover Lake. He parked his motorcycle in the middle of a gravel right-of-way that led to a boat launch and walked to the boat launch to watch the fireworks.
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> John Totri and Jason Marchand, the victim, lived on Lakeside Drive. Shortly after the defendant parked his motorcycle, Totri and the victim, who had both been drinking alcoholic beverages all day, approached the defendant at the boat launch and demanded that he move his motorcycle from the right-of-way. Following a heated discussion, the defendant agreed to move his motorcycle. As the defendant "took off" on his motorcycle, small rocks were sprayed from the roadway toward Totri and the victim. The victim ran after the defendant but was unable to catch him. Totri and the victim then went to the victim's house to roast marshmallows in his firepit.
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> Approximately one hour later, while Totri and the victim were sitting by the firepit, the defendant returned to Lakeside Drive. As the defendant dismounted his motorcycle, he heard the voices of Totri and the victim coming from the victim's yard. The defendant approached the victim's yard with his helmet on and "a loaded gun with a round chambered." The victim "bolted out of his chair" and ran into the roadway, toward the defendant. After a brief physical altercation, the defendant fired his gun into the ground.

Approximately thirty seconds later, the defendant fired two more shots, both of which hit the victim. The victim ultimately collapsed in his yard, and the defendant fled on his motorcycle. The victim was taken to a hospital in an ambulance and was pronounced dead shortly thereafter.

On the following day, the defendant, with the assistance of his girlfriend, Carli Fandacone, disposed of his gun and his motorcycle; he threw his gun into a swamp and pushed his motorcycle off a bridge and into the Connecticut River.

The lead case officer on the ensuing investigation, Connecticut State Police Detective Jeffrey Payette, issued a bulletin to law enforcement agencies in the area to be on the lookout for a motorcycle that fled the area of the crime scene on the night of July 3, 2015. Payette undertook an investigation of other incidents involving firearms in the Andover area, which ultimately led him to the defendant, who was arrested on November 17, 2015.

...

On February 22, 2017, the defendant filed a motion in limine to preclude the admission into evidence of, inter alia, four instances of misconduct relating to the firearm that was used to shoot and kill the victim. Specifically, the defendant sought to preclude evidence that (1) on May 21, 2014, he stole that firearm from its lawful owner, (2) on September 25, 2014, he discharged that firearm on Hop River State Park Trail, (3) in the fall of 2014, he threatened another person by pointing that firearm at him, and (4) between the summers of 2014 and 2015, he fired that firearm. In his motion, the defendant argued that the misconduct evidence was irrelevant and highly prejudicial.

On March 2, 2017, the court held a hearing on the defendant's motion to preclude. At that hearing, defense counsel indicated that he had "prepared a stipulation in which [the defendant] will stipulate that [he] fired the [firearm] that resulted in the death of [the victim]." The court observed, and defense counsel acknowledged, that the stipulation was unsigned. The state refused the defendant's offer to stipulate on the ground that it had the burden to prove beyond a reasonable doubt every element of the crimes with which the defendant was charged and that it was entitled to do so through the introduction of admissible evidence. The state argued that, because there was, in fact, no stipulation, the court could not consider it as alternative evidence in assessing the admissibility of the challenged misconduct evidence. The court agreed with the state, and explained: "I can't deal with theoretical stipulations." The court reasoned: "[I]f the two of you are going to enter a stipulation later ... then I've got to ask myself ... how that affects the prejudice versus the probative. ... I am saying that I'm being asked to rule on these matters in advance of them being presented at trial, and if something significant changes, such as a stipulation that proves out the very facts this evidence is offered for, then I would reserve the right to revisit

this because ... I think it affects the balancing of probative versus prejudicial. ... So, I'm going to proceed on the assumption [that] there is no stipulation because there is no stipulation yet, and if it turns out the stipulation occurs, then counsel will bring that to my attention because it may affect my ruling." The court and the parties thus proceeded to discuss the probative value versus the prejudicial effect of the offered misconduct evidence in the absence of any stipulation.

The court granted in part and denied in part the defendant's motion to preclude. The court summarized its ruling as follows: "As to the theft of the firearm in question, that it was stolen is—[the] motion [is] granted as to the fact it was stolen, but only to that extent. As to the discharge of the firearm on Hop River State Park Trail, the motion [is] denied. As to the incidents where the defendant pointed a firearm at someone in the fall of 2014, it is—the motion is granted only to the extent of the pointing of the firearm at someone, not otherwise, and the motion is denied as to the extent it is that the defendant possessed and fired a firearm between the summers of 2014 and 2015." The court thus allowed the state to present evidence of the challenged instances of prior misconduct to the jury in accordance with its ruling.

State v. Fortin, supra, 196 Conn. App. 807.

1. Attorney David Channing

Attorney Channing testified that he started representing Fortin at the outset of the case. He was aware of Fortin due to his pending case of firing a flare gun at an individual on a walking trail. He believed that the state was interested in Fortin for the murder and so met with him at the courthouse in lockup. Another attorney, Attorney Kathryn Mallach, was assisting him with this case and he had a social worker, Sue Lucas-Deneen, also working on this case. She talked to Fortin prior to the trial and was present in the courtroom during trial but he could not recall if she interviewed him. He used his investigator in this case and did not recall the investigator being present during every day of the trial.

He met with Fortin both at the correctional institution and in court. He met with Fortin to prepare him to testify at trial. In preparation, they "went over what happened several times." Attorney Channing provided Fortin with all of the discovery and then would ask him questions and write down the answers. He then provided what he wrote down to Fortin.

He testified that the state had a long list of witnesses and he did not believe that there was a need to have co-counsel with him at trial.

He recalled pretrial evidentiary issues relating to uncharged misconduct, including Fortin shooting his girlfriend with a flare gun and the other pending case in which he shot at a trail walker. There was "a lot of uncharged misconduct." He filed a motion to preclude the uncharged misconduct as a tactic, knowing that some of the requests would not be granted. He did not specifically recall preparing Fortin to respond to questions that may go into precluded areas but testified that he would have. He testified that he believed Fortin discharging his gun at his girlfriend was extremely prejudicial. He did not recall whether they interviewed Fortin's girlfriend. He recalled she had a prosthetic eye as a result of that injury, that she testified at trial and that he could observe her injury in court. He would have sought to preclude any testimony about Fortin's juvenile record. He recalled discussing another pending Manchester case with Fortin and recalled that there was evidence about it at the trial.

They pursued the defense of self-defense at trial. They discussed and considered Fortin's ability to retreat during the incident. Fortin had an injury to his leg that made it difficult for him to run very fast.

He was aware of Fortin's mental health issues and his Asperger's diagnosis. He may have learned of this from Fortin. He observed that Fortin had a flat affect and would stare unblinking. Fortin wanted to be liked, but he was awkward in his social interactions with Attorney Channing. Attorney Channing considered how that would have appeared to a jury in a courtroom and during his testimony. Attorney Channing took steps to mitigate those concerns by practicing the direct examination testimony with Fortin. He did not make the jury aware of Fortin's diagnosis. Attorney Channing and his social worker weighed whether to introduce evidence of the Asperger's diagnosis and they decided against it to avoid "any prejudice against people with mental health problems" and

"any confusion by the jury as to whether his perception of danger was reasonable." He was aware that a diagnosis of Asperger's could impact a person's ability to read social cues and they considered whether that would have led Fortin to misunderstand the victim's intentions. However, their theory was that it was obvious to anyone that the victim meant Fortin harm and this theory did not require a diagnosis of Asperger's to prove. Attorney Channing considered consulting with an expert and presenting expert testimony but decided against it for the same reasons as above. He believed that the diagnosis could have instead led the jury to believe that Fortin's belief and fear of threat from the victim was unreasonable.

Attorney Channing testified that there was a witness who testified that Fortin did not have a pistol permit. He recalled there was hearsay testimony but did not object to it. He believed it would have harmed his client to challenge the lack of a pistol permit, since he wanted to be believable to the jury.

He recalled offering a stipulation that Fortin fired the shot in this incident at trial. He could not recall specifically the strategy behind the stipulation. He discussed the stipulation with Fortin but did not recall if Fortin was on board with the stipulation. However, he did not recall having a disagreement with Fortin about the stipulation. He did not believe that the state was on board with the stipulation, but put it on the record because "he was just trying" to preclude harmful prior misconduct testimony.

Attorney Channing did not recall whether he objected to the state's comments during closing argument and did not recall the state making reference to Charles Manson.

Attorney Channing would have reviewed the PSI prior to sentencing but any mention in the PSI of Fortin's Asperger's diagnosis did not alter his decision not to present such testimony at sentencing. He recalled consulting with Dr. Black and did not believe that the state had access to that information. Attorney Channing did not recall whether he presented any mitigation at

sentencing related to Fortin's diagnosis. He was aware that Fortin's affect would impact his ability to express remorse at sentencing. He did nothing to counter that impression.

Attorney Channing believed that Fortin got a fair trial and a fair sentence.

2. Dr. Jozlyn Hall

Dr. Hall is a mitigation specialist with extensive experience. She was hired to interview Fortin. She reviewed his presentence investigation report, transcripts, medical records and a prior evaluation performed by a Dr. Black. She also subjected Fortin to a "battery of testing," including screenings for PTSD, substance abuse and mental health issues. His current diagnosis includes autism spectrum disorder. Autism spectrum disorder mainly manifests as an inability to read social cues and to correctly read nonverbal communication. Those on the spectrum have difficulty maintaining eye contact and may also maintain inappropriately long eye contact. During her interview, Fortin avoided making eye contact. There is also a difficulty to develop and maintain relationships. A fascination with inanimate objects is a hallmark of autism spectrum disorder. She observed these behaviors during her interview with Fortin and in his records and history. She testified that individuals on the spectrum also have difficulty in communicating with their lawyers and would affect the way they testify at trial. She testified that one would observe a "flat affect," revealed by a lack of facial expressions and interest in the conversation. This would be a concern not only for a witness testifying, but also a defendant sitting in court throughout a trial.

At the time of the incident, he was under the age of twenty-one and she testified about the hallmarks of juvenile brain development. She testified that Dr. Black's report and Fortin's substance abuse history were critical mitigation evidence. Dr. Black's report identifies Aspergers as a diagnosis. She also believed that his substance abuse at a young age was also important.

She testified that Dr. Black noted Fortin's fascination and preoccupation with a gun, that this was a symptom of his diagnosis and this preoccupation does not indicate an increased level of dangerousness.

According to her, had a behavioral health expert's opinion been presented at sentencing, it would have helped to explain much of Fortin's behavior and disposition. It would have also been helpful to point out his age and the brain development at twenty-one years of age.

3. Michael Fortin

Fortin testified that he was 21 years old on the date of the incident. Attorney Channing represented him throughout the trial and Attorney Mark Rademacher represented him on appeal.

Fortin and Attorney Channing discussed self-defense as their theory at trial. They discussed his inability to retreat due to the victim grabbing him by the collar and his auto-accident injury that made it difficult for him to run. That auto-accident resulted in a juvenile conviction. He discussed this with Attorney Channing and told him about medical records related to the injury, which Attorney Channing subpoenaed.

Fortin voluntarily decided to testify at trial. He made this decision after spending numerous occasions discussing his testimony with Attorney Channing. According to Fortin, Attorney Channing did not go over potential questions with him, but they discussed the discovery and Fortin provided his version of events. They discussed acts of prior misconduct and how to get them precluded from admission. They discussed stipulating to some of the facts to keep prior misconduct evidence out. He was comfortable with the stipulation since he was not disputing that he fired the fatal shots and he was willing to sign it. Attorney Channing told him that the state would not go along with it but believed that it was up to Judge Graham to accept it or not.

Fortin was twenty-one at the time of the incident. He was diagnosed at the age of seventeen with Asperger's. Attorney Channing was aware of his diagnosis because of Dr. Black's report. He

described symptoms as difficulty communicating with others, social cues, limited interest, repetitive behaviors and fascination with inanimate objects. He did not recognize it when he was younger, but it has become noticeable over time. He testified about a fascination with mechanical objects and guns, which persists to this day. He testified that his symptoms impacted the incident because of the breakdown of the social interaction when he returned to the boat launch.

He testified that he did not review the PSI with Attorney Channing prior to sentencing but has since done so.

III. LEGAL ANALYSIS

A. PROCEDURAL DEFAULT

"In essence, the procedural default doctrine holds that a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." Hinds v. Commissioner of Correction, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016); Orcutt v. Commissioner of Correction, 284 Conn. 724, 737, 937 A.2d 656 (2007) ("As a general matter, a defendant who files a petition for a writ of habeas corpus will be deemed to have procedurally defaulted unless he exhausts at least one of those remedies.").

In applying the doctrine of procedural default, courts must consider two steps. First, was the claim, raised for the first time in a habeas proceeding, able to be raised at trial or on direct appeal. Hinds v. Commissioner of Correction, supra, 151 Conn. App. 852; Gaskin v. Commissioner of Correction, 183 Conn. App. 496, 511, 193 A.3d 625 (2018); Orcutt v. Commissioner of Correction; supra, 284 Conn. 724. If a petitioner is not required to raise the claim at trial or on direct appeal;

State v. Leecan, 198 Conn. 517, 504 A.2d 480 (1986); or the factual predicates for the claim are not apparent on the record and require additional testimony; Collins v. Commissioner of Correction, 202 Conn. App. 789, 798–99, 246 A.3d 1047, cert. denied, 336 Conn. 931, 248 A.3d 1 (2021) (holding conflict of interest claim is not subject to the procedural default doctrine and declining to apply cause and prejudice test, as the record on direct appeal was not adequate to review the claim); Gaskin v. Commissioner of Correction, supra, 183 Conn. App. 511-512 (petitioner did not procedurally default on claim of undisclosed agreement with witness "where trial counsel thoroughly cross-examined [witness] regarding the state's promise to him, to no avail, and that information regarding [witness'] sentencing only became available after the conclusion of the petitioner's criminal trial...;" appellate court "[failed] to see how the petitioner could 'properly raise' his claim on appeal from the record"); see also Taylor v. Commissioner of Correction, 324 Conn. 631, 646, 153 A.3d 1264 (2017) (holding that claim of structural error based on complete denial of counsel was apparent on the record and subject to procedural default); then he has not procedurally defaulted and this ends the inquiry.

If, however, the petitioner has raised a claim in a habeas petition that could have and should have been raised at trial or on direct appeal, courts then consider the second step: whether there is cause to excuse the default and prejudice to the petitioner. Salters v. Commissioner of Correction, 141 Conn. App. 81, 88, 60 A.3d 1004 (where factual predicate for Brady claim was clear from the record, petitioner procedurally defaulted for not raising it on appeal), cert. denied, 308 Conn. 932, 64 A.3d 330 (2013).. "Under [the cause and prejudice] standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. The cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance." (Cleaned up.) Johnson v. Commissioner of

Correction, 285 Conn. 556, 567–68, 941 A.2d 248 (2008); Hinds v. Commissioner of Correction, 321 Conn. 56, 71, 136 A.3d 596 (2016). Typically, cause and prejudice is met by making a showing of ineffective assistance of counsel; Johnson v. Commissioner of Correction, supra, 285 Conn. 569–70; Sinchak v. Commissioner of Correction, 173 Conn. App. 352, 366, 163 A.3d 1208, cert. denied, 327 Conn. 901, 169 A.3d 796 (2017); but it is not the only way. See e.g., Reed v. Ross, 468 U.S. 1, 14, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984) ("cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests [and] the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.")

If a petitioner cannot demonstrate cause and prejudice, the claim will be deemed procedurally defaulted. Where the cause is alleged to be ineffective assistance of counsel, however, a reviewing court must engage in an analysis of whether failure to raise the claim in a prior proceeding was deficient performance on the part of counsel and, had counsel properly raised the claim, would it have resulted in a different outcome for the petitioner. "It is true that a successful ineffective assistance of counsel claim can satisfy the cause and prejudice standard so as to cure a procedurally defaulted claim. Indeed, if a petitioner can prove that his attorney's performance fell below acceptable standards, and that, as a result, he was deprived of a fair trial or appeal, he will necessarily have established a basis for cause and will invariably have demonstrated prejudice." (Cleaned up.) McCarthy v. Commissioner of Correction, 192 Conn. App. 797, 810, 218 A.3d 638 (2019).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

It is well established that a criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut

constitution. Horn v. Commissioner of Correction, 321 Conn. 767, 775, 138 A.3d 908 (2016). Thus, because "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair;" (internal quotation marks omitted) Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 686.

1. Two-part test

To determine whether a petitioner is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation at trial, courts apply the familiar two-part test adopted by the United States Supreme Court in Strickland. Skakel v. Commissioner of Correction, 329 Conn. 1, 30, 188 A.3d 1 (2018). A petitioner's claim that trial counsel's assistance was so defective as to require reversal of a conviction has two components. "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Internal quotation marks and citations omitted.) Skakel v. Commissioner of Correction, supra, 30. Without a showing as to both components, it cannot be said that the conviction resulted from a breakdown in the adversary process, rendering the result unreliable. Strickland v. Washington, supra, 466 U.S. 687. However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of

lack of sufficient prejudice ... that course should be followed." Strickland v. Washington, supra, 697; State v. Fortin, 279 Conn. 493, 525-26, 903 A.2d 169 (2006); Aillon v. Meachum, 211 Conn. 352, 362, 559 A.2d 206 (1989).

2. Performance Prong.

The sixth amendment "does not guarantee perfect representation, only a reasonably competent attorney.... Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 30-31. With respect to the first part of the Strickland test, "the proper standard for attorney performance is that of reasonably effective assistance." Strickland v. Washington, supra, 466 U.S. 687. "Consequently, to establish deficient performance, the petitioner must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." Skakel v. Commissioner of Correction, supra, 31. "Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court." Id.

It is well established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, supra, 466 U.S. 691. "Because, however, pretrial investigation and preparation are key to effective representation by counsel[,] counsel is not free to simply ignore or disregard potential witnesses who might be able to provide exculpatory testimony." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 34. "Similarly, a decision by counsel to forgo an investigation into the possible testimony of a potentially significant witness is constitutionally impermissible unless counsel has a sound justification for doing so; speculation, guesswork or uninformed assumptions about the

availability or import of that testimony will not suffice. Instead, counsel must seek to interview the witness to determine the value of any testimony that he may be able to provide." Id. 34–35.

Courts "have repeatedly found that a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." (Cleaned up.) Avila v. Galaza, 297 F.3d 911, 918–19 (9th Cir. 2002); Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir.1994) (defense counsel was deficient for failing to investigate or introduce at defendant's brother's confessions).

3. Deficient performance in regards to mitigation at sentencing

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v. Washington, supra, 466 U.S. 690-91. Thus, "counsel must first evaluate what 'conceivable line[s] of mitigating evidence' exist and then decide whether following any of those lines would likely lead to evidence that 'would ... assist the defendant at sentencing.'" Lampkin v. State, 470 S.W.3d 876, 911 (Tex. App. 2015), citing Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). In Wiggins v. Smith, "the United States Supreme Court held that although defense counsel was aware of certain aspects of the defendant's background, counsel's failure to compile a complete social history of the defendant was objectively unreasonable and, thus, counsel rendered deficient performance by failing to make a fully informed decision when deciding

against presenting such mitigation evidence." Breton v. Commissioner of Correction, 325 Conn. 640, 669, 159 A.3d 1112 (2017). In deciding whether counsel's actions in failing to investigate further mitigation were reasonable, courts "must take into account all of the information available to counsel that has informed his or her judgment...." Doan v. Commissioner of Correction, 193 Conn. App. 263, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019).

The ABA Standards for Criminal Justice: Defense Function, (4th ed. 2017), also highlight the importance of investigating mitigation information. Standard 4-8.3 (d) directs defense counsel to "gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible," and 4-8.3 (e) directs that, where "a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary... In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary."

4. Prejudice Prong

When defense counsel's performance is found to not be reasonable, a new trial is required only if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, 466 U.S. 694. "The question, therefore, is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38.

"The reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things

would have been different." United States v. Dominguez Benitez, 542 U.S. 74, 83, n.9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). It is a lesser standard than preponderance of the evidence. See Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); Chinn v. Shoop, 598 U.S. --, 2022 WL 16726032 (*Jackson, J.*, dissenting from denial of certiorari, November 7, 2022) (noting that the Court has "repeatedly said" that reasonable probability is "a qualitatively lesser standard"). Thus, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case . . . because the result of a criminal proceeding can be rendered unreliable, and thus the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (Cleaned up.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38. Instead, a petitioner must establish that the deficient performance gives rise to a loss of confidence in the verdict. Id.

5. Prejudice at sentencing

"Sentencing by its nature is a discretionary decision that requires the trial court to weigh various factors and to strike a fair accommodation between a defendant's need for rehabilitation or corrective treatment, and society's interest in safety and deterrence." (Internal quotation marks omitted.) State v. Wade, 297 Conn. 262, 284, 998 A.2d 1114 (2010). In determining whether prejudice results from deficient performance at sentencing by way of failing to uncover and present mitigating evidence, the United States Supreme Court, at least in the capital felony context, has required courts to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding [and reweigh] it against the evidence in aggravation." Williams v. Taylor, 529 U.S. 362, 397–98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Court has reaffirmed "the principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335

(2002); State v. Peeler, 271 Conn. 338, 449, 857 A.2d 808 (2004). In making an individualized assessment of the punishment to be imposed, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (Citation omitted.) Penry v. Lynaugh, supra, 319. The sentencer must be told if a defendant has the "kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability." Wiggins v. Smith, supra, 539 U.S. 535. Of course, a defendant's explicit instructions that mitigation not be pursued, interference with counsel's efforts to investigate mitigation or failure to cooperate with investigative efforts are factors to be considered in determining prejudice. Breton v. Commissioner of Correction, supra, 325 Conn. 670, citing Cummings v. Secretary for the Dept. of Corrections, 588 F.3d 1331, 1358–59 (11th Cir. 2009), cert. denied sub. nom. Cummings–El v. McNeil, 562 U.S. 872, 131 S. Ct. 173, 178 L. Ed. 2d 103 (2010). In Breton, our Supreme Court held that, in order to prove prejudice under Strickland, the petitioner must make two showings if, as a threshold matter, it is established that the petitioner made a knowing and intelligent decision not to present mitigating evidence. First, "the petitioner must show that if he had been advised more fully about the mitigating evidence, there is a reasonable probability he would have permitted trial counsel to present such evidence at trial." (Citations omitted.) Id., 680. "Second, the petitioner must establish that, if such evidence had been presented, a reasonable probability exists that the result would have been different." (Citation omitted.) Id., 681. Breton involved the death penalty.

However, the jurisprudence for determining prejudice stemming from a failure to present mitigating evidence at sentencing in a non-capital case is not well developed. See C. B. Hessick, "Ineffective Assistance at Sentencing," 50 B.C. L. Rev. 1069 (2009).

Thus, in a previous case, this court adopted various factors to be considered in determining whether a petitioner has proven prejudice stemming from counsel's failure to present mitigation at sentencing. See Joshua Cruz v. Commissioner of Correction, Superior Court, judicial district of Tolland, Docket No. CV 16-4007793-S (January 6, 2020, *Bhatt, J.*), aff'd, 206 Conn. App. 17, 257 A.3d 399, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021).

Given Connecticut's statutory sentencing scheme, this court has identified the following non-exclusive list of factors it will consider when determining prejudice stemming from counsel's failure to investigate and present mitigation evidence at sentencing:

1. The range of sentence the petitioner was exposed to and whether the maximum sentence pursuant to that range was lesser than the maximum allowable by law;
2. How far below the maximum sentence the petitioner could have received was the sentence actually imposed;
3. The sentencing court's reasoning for imposing the sentence it did;
4. The strength of the state's case and the viability of any defenses;
5. Whether mitigation evidence was presented;
6. The nature of the mitigating evidence – in other words, whether the evidence serves to explain the petitioner's actions or to demonstrate the petitioner's diminished moral culpability for reasons including, but not limited to, his background;
7. Counsel's reasons for failing to present the mitigating evidence at issue;
8. Whether the mitigating evidence not presented is cumulative of other mitigation presented at the time of sentencing;
9. The petitioner's criminal history.

An analysis of these factors will permit the court to determine whether the missing information undermines the court's confidence in the sentence actually imposed.

In essence, in order for a petitioner to demonstrate prejudice stemming from a failure to investigate and present mitigation evidence, the evidence must contain information that was not presented to the sentencing court through either the PSI or the comments of counsel or others speaking at the sentencing. It must be of a nature that courts routinely consider at the time of sentencing: evidence exploring and highlighting the defendant's background, his moral and legal culpability, positive aspects of his character and other facts that show his ability to be rehabilitated and likelihood of rehabilitation and becoming a productive member of society. If the area the missing evidence touches upon is duplicative of information already provided to the sentencing court, then in order for it to have an impact on the prejudice analysis, it must be so significant that it demonstrates that the evidence already provided was so insufficient as to render its impact meaningless.

C. DISCUSSION

1. Ineffective Assistance of Counsel

Fortin alleges that trial counsel failed to: 1) engage in an effective investigation of his criminal history and mitigating evidence; 2) communicate with him; 3) present appropriate mitigation at sentencing; 4) object to instances of prosecutorial impropriety; 5) prepare him for his testimony; 6) object to hearsay statements; 7) effectively cross-examine witnesses and 8) effectively object and argue the admissibility of misconduct evidence and offer a stipulation as to identity.

Fortin's claims must be denied. He has not proven that Attorney Channing failed to engage in an investigation of his criminal history and mitigating evidence. The record reveals that Attorney Channing was aware of Fortin's criminal history, filed a motion to preclude evidence about his prior acts of misconduct, which was granted in part, and was aware of Fortin's diagnosis of Asperger's. His social worker met with Fortin and it appears that a sentencing memorandum was submitted to

the trial court.[1] There is no credible evidence that Attorney Channing failed to communicate with Fortin. Attorney Channing presented mitigation at sentencing and argued forcefully on Fortin's behalf. Attorney Channing met with Fortin to practice his testimony, in part to work on negating the effect of Fortin's flat affect. He made a strategic decision not to object to the hearsay testimony about Fortin not having a pistol permit because he did not believe it would have been helpful to challenge the fact that Fortin did not, in fact, possess any permit. The court finds that Attorney Channing's cross-examination of witnesses was appropriate and reasonable. Finally, the court notes that Attorney Channing offered the stipulation as to identity, but the state did not agree to the stipulation and thus, even if Fortin had signed it, it is unclear to this court how it would have been admitted at trial, over the state's objection.

The crux of Fortin's claims appears to be centered around Attorney Channing's failure to account for, and present testimony and mitigation about, his Asperger's diagnosis. However, the record reveals the opposite: Attorney Channing was aware of the diagnosis and recognized the impact that the condition had on Fortin's social skills, his ability to read cues and his affect in front of the jury and while testifying. He discussed this with his social worker and made the reasonable strategic decision not to present that evidence to the jury. Attorney Channing was concerned about prejudice towards individuals with mental health issues and also the impact that the diagnosis may have on their self-defense claim. Further, he assessed that the evidence was clear that there was a direct threat made toward Fortin and the diagnosis was not needed to explain Fortin's state of mind at that time. Thus, he did not perform deficiently.

Even assuming he performed deficiently by failing to object to assumed instances of prosecutorial impropriety and by failing to present mitigating evidence of the Asperger's diagnosis at

[1] This sentencing memorandum was not presented to this court.