SOLOMON BOYD *v.* COMMISSIONER
OF CORRECTION
(AC 36150)

Gruendel, Keller and Borden, Js.

Argued February 17—officially released May 5, 2015

(Appeal from Superior Court, judicial district of Tolland, Newson, J.)

Anthony J. Musto, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, was *Matthew C. Gedansky*, state's attorney, for the appellee (respondent).

Opinion

BORDEN, J. The petitioner, Solomon Boyd, appeals from the judgment of the habeas court sua sponte dismissing his second petition for a writ of habeas corpus. The petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal from the judgment of the habeas court, and (2) improperly dismissed the habeas petition pursuant to Practice Book § 23-29 without providing him with fair notice and conducting a hearing.[1] The respondent, the Commissioner of Correction, agrees that the petitioner should have been provided fair notice and a hearing, and only contests the scope of the habeas petition that should have been given a hearing. We reverse the judgment of the habeas court and remand the case for further proceedings.

The following facts and procedural history are relevant to this appeal. The petitioner was convicted after a jury trial of murder in violation of General Statutes § 53a-54a, and was sentenced by the trial court to fifty years of imprisonment. His conviction was affirmed following a direct appeal to our Supreme Court. See *State* v. *Boyd*, 295 Conn. 707, 710–11, 992 A.2d 1071 (2010), cert. denied, U.S. , 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011). The petitioner filed a petition for writ of habeas corpus, which was amended on November 16, 2012. In that petition, the petitioner alleged that his trial counsel provided ineffective assistance due to her failure to investigate the state's seizure of his cell phone and use of cell phone tracking data as evidence, as well as her failure to present testimony that the petitioner claims would have established an alibi for him at the time of the murder.[2] On May 21, 2013, the habeas court dismissed the petition after a full trial. This court subsequently dismissed an appeal from the habeas court's ruling. *Boyd* v. *Commissioner of Correction*, 153 Conn. App. 911, 101 A.3d 969, cert. denied, 315 Conn. 910, 105 A.3d 237 (2014).

Prior to the conclusion of his first habeas appeal, the petitioner, acting as a self-represented party, filed a second petition for habeas relief on May 6, 2013, using the standard form provided by the state. The petitioner alleged that he was deprived of his due process rights at trial because his trial counsel failed to challenge the admissibility of evidence allegedly seized illegally and failed to cross-examine witnesses properly.[3] The petitioner also alleged that the state committed prosecutorial impropriety by proffering false testimony. The habeas court dismissed the second habeas petition sua sponte, and denied the petition for certification to appeal. This appeal followed.

As a threshold matter, we address the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal. "In

Simms v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our Supreme Court] concluded that . . . [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court." *Blake* v. *Commissioner of Correction*, 150 Conn. App. 692, 695, 91 A.3d 535, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). We agree with both parties that the issues raised in the present appeal are "debatable among jurists of reason," and, as a consequence, necessitate further review. We therefore conclude that the habeas court abused its discretion in denying the petition for certification to appeal and proceed directly to the merits of the petitioner's appeal. See *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 572–73, 941 A.2d 248 (2008).

Our Supreme Court has noted that "[b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims." *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 93, 644 A.2d 340 (1994). This court previously has held that it is an abuse of discretion by the habeas court to dismiss a habeas petition sua sponte under Practice Book § 23-29 without fair notice to the petitioner and a hearing on the court's own motion to dismiss. *Mitchell* v. *Commissioner of Correction*, 93 Conn. App. 719, 725–26, 891 A.2d 25, cert. denied, 278 Conn. 902, 896 A.2d 104 (2006). Our Supreme Court recognizes a single exception to the hearing requirement: when the petition alleges the same grounds for relief sought in a previously denied petition, and fails to allege new facts or evidence required by § 23-29 (3). *Negron* v. *Warden*, 180 Conn. 153, 158, 429 A.2d 841 (1980). Our Supreme Court has emphasized, however, that the habeas court may waive the hearing requirement only under narrowly defined circumstances, as recognized by the wide scope of the exception in § 23-29 (3). *Mercer* v. *Commissioner of Correction*, supra, 93; see also *Carter* v. *Commissioner of Correction*, 109 Conn. App. 300, 304 n.5, 950 A.2d 619 (2008).

Two recent cases decided by this court, *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009), and *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012), are instructive for the present case. In both *Anderson* and *Carter*, this court reversed in part the judgment of the habeas court because each of the successive petitions contained a new ground for habeas relief. *Anderson* v. *Commissioner of Correction*, supra, 795; *Carter* v. *Commissioner of Correction*, supra, 397. Similar circumstances exist in the present case because the petitioner alleged a new ground upon

which his second habeas petition could have been granted, i.e., prosecutorial impropriety.

It is of particular importance that the petitioner had requested the appointment of counsel when filing his second habeas petition. By sua sponte dismissing the petition before any counsel was appointed, the habeas court prevented the petitioner from accessing the legal services needed to help clarify the grounds presented and to ensure that they were not duplicative of the petitioner's prior habeas petition.

The respondent concedes, and we agree, that the petitioner should have been afforded fair notice and a hearing before the court sua sponte dismissed the second habeas petition, and agrees with the petitioner that the proper course of action is to remand this case to the habeas court for a hearing. The respondent argues, however, that the hearing should be limited to whether the new claims of prosecutorial impropriety should be dismissed under Practice Book § 23-29. We agree with the respondent to the extent that the second habeas petition in its current form contains a duplicative claim of ineffective assistance of counsel predicated upon the same facts and evidence as alleged in the first amended petition for a writ of habeas corpus. We caution, however, that nothing in this opinion should be read as foreclosing the opportunity for the petitioner, or his counsel if one is appointed for him, to amend the current petition to articulate any new facts or evidence he wants to proffer or to state new grounds upon which he believes habeas relief should be granted, including the opportunity to clarify whether his claim of ineffective assistance of counsel is founded upon new facts or evidence not reasonably available at the time of his prior petition.

The judgment is reversed and the case is remanded to the habeas court for further proceedings according to law.

In this opinion the other judges concurred.

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon the motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . [or] (5) any other legally sufficient ground for dismissal of the petition exists."

[2] The petitioner was represented by counsel during his first habeas trial.

[3] In response to the form's request to state all facts and details to support the petitioner's claim, the petitioner stated: "My trial attorney was ineffective in that she withheld evidence and failed to investigate. She failed to secure a fair trial in denying me the right to be heard. She failed to cross-examine witness[es] properly. Furthermore witnesses for the prosecution committed perjury and fraud. The prosecution knew this prior to [trial] and [forwarded] the lies anyway nor did my attorney or prosecutor attempt to rectify such false statements."