JESUS RUIZ *v.* COMMISSIONER OF CORRECTION
(AC 36175)

DiPentima, C. J., and Sheldon and Flynn, Js.

Argued November 13, 2014—officially released April 7, 2015

(Appeal from Superior Court, judicial district of

Tolland, Sferrazza, J.)

Damon A. R. Kirschbaum, with whom, on the brief, was *Vishal K. Garg*, for the appellant (petitioner).

Lisa Herskowitz, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. The petitioner, Jesus Ruiz, appeals from the judgment of the habeas court, denying his petition for a writ of habeas corpus, challenging his conviction of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A). On appeal, the petitioner claims that the habeas court improperly rejected his claims of ineffective assistance of counsel. Specifically, he claims that the habeas court improperly determined that (1) he was not prejudiced by his trial counsel's allegedly deficient performance in representing him at a pretrial hearing on the state's motion in limine seeking permission to videotape the testimony of the child victim[1] in his absence pursuant to *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988),[2] and (2) his trial counsel's decision not to pursue a suggestibility defense at trial did not constitute deficient performance. We reverse in part and affirm in part the judgment of the habeas court.

This court affirmed the petitioner's conviction in *State* v. *Ruiz*, 124 Conn. App. 118, 3 A.3d 1021, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010). In so doing, the court recited the following relevant facts: "The charges against the [petitioner] arise out of two incidents of inappropriate sexual contact he had with [the victim]. In January, 2006, the [petitioner] resided with [the victim], [the victim's] mother and [the victim's] older brother, S. [The victim's] younger sister, C, resided with an aunt. At the time of trial, [the victim] was eleven years old. The offenses occurred sometime between 2002 and 2003 when [the victim] was five or six years old and in the first or second grade. In January, 2006, when [the victim] was nine years old, she met with her school guidance counselor and Amy Gionfriddo, an investigative social worker for the department of children and families (department), regarding an unrelated matter. At that time, [the victim] reported to Gionfriddo one instance of sexual abuse by the [petitioner]. [The victim] went to live with her aunt and C during the investigation of that abuse. In April, 2006, [the victim] revealed to Carla Barrows, a department social worker assigned to the family and who conducted regular visits with [the victim] at her aunt's home, a second instance of the [petitioner's] abuse." (Footnote omitted.) Id., 120.

On October 2, 2012, the petitioner filed an amended petition for a writ of habeas corpus, claiming, inter alia, ineffective assistance of his trial counsel.[3] Following a trial, the habeas court filed a memorandum of decision on September 4, 2013, rejecting the petitioner's claims that his trial counsel, John Ivers and Robert Casale,

provided ineffective assistance in failing (1) at a *Jarzbek* hearing, to conduct an adequate cross-examination of the state's expert witness and to present an expert witness to rebut the state's claim, and (2) at trial, to pursue a suggestibility defense.[4] The habeas court found that the petitioner failed to prove that the outcome of his criminal trial would have been different but for his attorneys' allegedly deficient performance in connection with the *Jarzbek* hearing and, thus, that he failed to prove that he was prejudiced by said performance. The habeas court also found that counsel's decision not to pursue a suggestibility defense did not constitute deficient performance. The habeas court thus concluded that the petitioner was not deprived of his right to the effective assistance of counsel and denied his petition. On October 3, 2013, the court granted the petitioner's request for certification to appeal and this appeal followed.

We begin with the applicable standard of review and the law governing ineffective assistance of counsel claims. "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. . . .

"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. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [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. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [peti-

tioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [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. (Citations omitted; internal quotation marks omitted.) *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 363–65, 77 A.3d 777 (2013). With those principles in mind, we turn to the petitioner's claims on appeal.

I

The petitioner first challenges the habeas court's rejection of his claim that he was denied the effective assistance of counsel at his *Jarzbek* hearing. The petitioner contends that his trial counsel's representation of him at the *Jarzbek* hearing was deficient and that that deficiency resulted in the court's granting of the state's motion to videotape the victim's testimony, thereby depriving him of his right to confrontation under the sixth and fourteenth amendments to the United States constitution. The habeas court did not address the petitioner's claims of deficient performance, but, instead, rejected his claim of ineffective assistance on the ground that he failed to prove that he was prejudiced by any allegedly deficient performance, reasoning that even if the victim had testified in the presence of the petitioner, it is unlikely that her testimony would have been different from her videotaped testimony. The petitioner challenges the legality of the habeas court's determination that he was not prejudiced by his attorneys' allegedly deficient performance in representing him at the *Jarzbek* hearing, and argues that a presumption of prejudice arises when the right to confrontation is violated and, thus, that the habeas court erred in requiring him to prove that the outcome of his trial would have been different but for his counsel's alleged deficient performance. Although we disagree with the petitioner's contention that a presumption of prejudice arises any time the right to confrontation is violated, we conclude that the habeas court improperly based its lack of prejudice determination on the conclusion that the victim's testimony would have been the same as her videotaped testimony had she testified in the presence of the petitioner.

The following additional facts are relevant to the petitioner's challenge to the habeas court's prejudice determination. Prior to trial, "[t]he state filed a motion to videotape [the victim's] testimony outside the presence of the [petitioner] pursuant to [General Statutes] § 54-86g (a) and *State* v. *Jarzbek*, supra, 204 Conn. 704–705. The court held a hearing to determine whether [the victim] had the ability to testify reliably in the presence of the [petitioner]. Pamela Goldin, a licensed clinical social worker employed by the Child Guidance

Clinic for Central Connecticut, Inc., for more than twenty-seven years, testified that she had been treating [the victim] for two years. According to Goldin, [the victim] has 'weak language skills,' '[h]er ability to express herself is below average for her age,' she has poor self-esteem, she becomes 'overwhelmed with anxiety' and she is 'very easily intimidated.'

"Goldin discussed a specific experience with [the victim]. She testified that [the victim] was distraught that her mother did not believe the accusations that she had made about the [petitioner]. When Goldin and [the victim] prepared for a session at which [the victim's] mother also would be present, Goldin testified that [the victim] talked at length about all the things she wanted to make sure she told her mother. Goldin testified that [the victim] 'froze' when the time came for [the victim] to speak to her mother. She could not speak and said very little of what she wanted to say, even though she was in a 'secure, familiar setting with a number of people there with whom she was comfortable and felt supported.' Goldin testified that this behavior occurred at two separate sessions. She testified that during her work with [the victim], she and [the victim] discussed the allegations that [the victim] had made against the [petitioner] 'so that if she wanted to discuss at length what happened with [the petitioner] that she could. And she did tell me a little bit, but she was clearly uncomfortable discussing it at great length. And I didn't press her.' She stated that testifying in the [petitioner's] presence, in addition to being a 'real hardship for [the victim]' that would 'set her back emotionally,' would cause [the victim] to 'freeze.' Goldin testified: 'I don't think she'd speak—I think she'd just be totally intimidated.' 'I doubt that she would . . . speak in the way that people are going to need her to speak in order to give the information you'll be asking of her.'

"Following the hearing, the court found: '[Goldin] observed [the] child for almost two years. How [the victim] reacts when this incident would come up. How, when she confronted the mother, she became [mute and] left the room. . . . [K]nowing this young girl for two years, [Goldin testified that the victim] could not testify truthfully and reliably in front of the [petitioner]. [Goldin gave] her reasons why, based upon her anxiety level, she'd be frightened, she'd be intimidated, her lower level of education, her low level of esteem . . . . I find [that] the state has met its burden by clear and convincing evidence pursuant to *Jarzbek*. . . . [Goldin] also said that [the victim] would be so stressed . . . I just can't take two years of treatment and ignore it. She didn't meet this young girl a week or a month ago.' Accordingly, the court granted the state's motion." (Footnote omitted.) *State* v. *Ruiz*, supra, 124 Conn. App. 122–24. This court affirmed the trial court's ruling granting the state's *Jarzbek* motion. Id., 128.[5]

The primary concern when a court determines whether to allow a witness' testimony to be videotaped is the effect on the accused's sixth and fourteenth amendment right to confrontation. "Pursuant to § 54-86g, the trial court is afforded the discretion necessary to grant a motion to have a child victim testify outside of the presence of the defendant. The [ability] of a witness [to testify reliably] is a matter peculiarly within the discretion of the trial court and its ruling will be disturbed only in a clear case of abuse or of some error in law." (Internal quotation marks omitted.) *State* v. *Bronson*, 258 Conn. 42, 49–50, 779 A.2d 95 (2001). The trial court must conduct an assessment of the victim's reliability as a witness pursuant to the test set forth in *Jarzbek*, in which our Supreme Court held: "We . . . mandate a case-by-case analysis, whereby a trial court must balance the individual defendant's right of confrontation against the interest of the state in obtaining reliable testimony from the particular minor victim in question. . . . [A] trial court must determine, at an evidentiary hearing, whether the state has demonstrated a compelling need for excluding the defendant from the witness room during the videotaping of a minor victim's testimony. In order to satisfy its burden of proving compelling need, the state must show that the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question. Furthermore, the state bears the burden of proving such compelling need by clear and convincing evidence." (Citation omitted; footnote omitted.) *State* v. *Jarzbek*, supra, 204 Conn. 704–705. "[I]n light of the constitutional right of confrontation at stake here, the primary focus of the trial court's inquiry must be on the *reliability* of the minor victim's testimony, not on the *injury* that the victim may suffer by testifying in the presence of the accused." (Emphasis added.) Id., 705.

The petitioner contends that his trial counsel's deficient representation of him at the *Jarzbek* hearing resulted in the court's granting of the state's motion to videotape the victim's testimony, thereby depriving him of his constitutional right to confrontation. The petitioner argues that the violation of his right to confrontation gave rise to a presumption of prejudice and that he thus did not need to prove prejudice as required under the second prong of *Strickland*. We disagree.

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . This does not require a showing that counsel's actions more likely than not

altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. . . . The likelihood of a different result must be substantial, not just conceivable. . . .

"Moreover, [i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The 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." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 313 Conn. 360, 376–77, 98 A.3d 23 (2014), cert. denied sub nom. *Anderson* v. *Semple*, U.S. (80 U.S.L.W. 3678, February 23, 2015).

"Since *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the United States Supreme Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. . . . Despite the strong interests that support the harmless-error doctrine, the [c]ourt in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. . . . Errors that are not subject to harmless error analysis go to the fundamental fairness of the trial. . . . Structural [error] cases[6] defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected . . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair. . . .

"This court has found error to be structural only when the error renders a trial fundamentally unfair and is not susceptible to a harmless error analysis . . . . In most cases involving constitutional violations, however, this court applies harmless error analysis. See, e.g., *State* v. *Carpenter*, 275 Conn. 785, 832–33, 882 A.2d 604 (2005) (admission of statements in violation of constitutional right to confrontation was harmless

error), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Padua*, 273 Conn. 138, 166–67, 869 A.2d 192 (2005) (although improper jury instruction violated due process rights, error harmless); *State* v. *Montgomery*, 254 Conn. 694, 715–18, 759 A.2d 995 (2000) (admission of evidence concerning defendant's silence was harmless error despite violation of due process rights)." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 504–506, 903 A.2d 169 (2006).

"The protection that the confrontation clauses afford to a criminal defendant is not . . . absolute." *State* v. *Jarzbek*, supra, 204 Conn. 693; see also *State* v. *Bonello*, 210 Conn. 51, 55, 554 A.2d 277, cert. denied, 490 U.S. 1082, 109 S. Ct. 2103, 104 L. Ed. 2d 664 (1989). Thus, a violation "of the defendant's sixth and fourteenth amendment guarantees of confrontation, does not require an automatic reversal." *State* v. *Milner*, 206 Conn. 512, 528, 539 A.2d 80 (1988); see also *State* v. *Lewis*, 211 Conn. 185, 190, 558 A.2d 237 (1989). Consequently, such a violation of "the constitutional protection of the confrontation clause . . . is subject to harmless error analysis. . . . A new trial is therefore required only if the exclusion of the proffered evidence is not harmless beyond a reasonable doubt."[7] (Citation omitted; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 805, 91 A.3d 384 (2014).

Because the right to confrontation is not absolute, and the violation of that right is subject to harmless error analysis, it stands to reason that, in the context of a habeas proceeding for ineffective assistance of counsel, prejudice is not presumed when that ineffective assistance results in a violation of the right to confrontation.[8] Thus, in a habeas action, the petitioner must show that there is a reasonable probability that, but for his counsel's allegedly deficient performance, the result of his trial would have been different.[9] Put another way, in a habeas action, in which the burden is on the petitioner to prove prejudice suffered as a result of his counsel's allegedly deficient performance, the petitioner must prove that the state would not have been able to prove that the violation of his right to confrontation was harmless error.

The determination of "[w]hether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise per-

mitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Madigosky*, 291 Conn. 28, 45, 966 A.2d 730 (2009). Specific to a violation of the right to confrontation, the United States Supreme Court has admonished, however, that "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy* v. *Iowa*, 487 U.S. 1012, 1021–22, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

Here, the habeas court ruled that, as to his claim of ineffective assistance in connection with the *Jarzbek* hearing, the petitioner needed to prove, "by a preponderance [of the evidence], not only that the *Jarzbek* motion would have been denied and/or the *Marquis*[10] motion granted, but that these hypothetical outcomes create a reasonable probability that he would have been acquitted." The habeas court went on to explain: "Assuming, arguendo, that the victim had to testify in person and in the presence of the petitioner, there was absolutely no persuasive evidence presented at the habeas trial that her testimony or believability would have been altered. This was not a case where the victim recanted her accusations against the petitioner or even wavered as to the content of those accusations. The petitioner cannot have it both ways. He cannot argue that the victim was so capable of testifying accurately in person that videotaped testimony was unnecessary under *Jarzbek* analysis and simultaneously argue for presumption that the victim, when subjected to the inquisitorial presence of the jury and the petitioner, would have been too intimidated to testify or would have dramatically contradicted her video testimony."

That constitutes the entirety of the habeas court's prejudice analysis, and it is on the basis of the focus of that analysis that the habeas court's judgment cannot stand. The speculation of what may have occurred if confrontation had been permitted, which was the sole basis for the lack of prejudice explicated by the habeas court, is precisely the inquiry that is proscribed under *Coy*. As stated in *Coy*, an examination of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged or unaltered, but, rather, must have been examined on the basis of the remaining evidence presented at trial. To be sure, a harmlessness analysis in a case involving a violation of the right to confrontation entails an examination of the unconfronted witness' testimony, but only insofar as it relates to the whole of the state's case— the importance of the witness' testimony in the prosecution's

case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and the overall strength of the prosecution's case without it. In other words, the more central or material the testimony of the unconfronted witness to the state's case, the less likely it is that the state will be able to prove that the constitutional violation was harmless beyond a reasonable doubt. And in the context of this habeas proceeding, the court's analysis must be framed in terms of whether the petitioner proved that the state could not have proved that a violation of the right to confrontation was harmless beyond a reasonable doubt based upon the aforementioned considerations. Only then can the petitioner satisfy the prejudice prong of *Strickland*.

In light of the foregoing, this case must be remanded to the habeas court for consideration of prejudice in accordance with this opinion, and, if necessary for the ultimate resolution of the petitioner's ineffective assistance claim, consideration of the petitioner's allegations of deficient performance, and any applicable special defenses filed by the respondent, the Commissioner of Correction.

II

The petitioner also claims that the habeas court erred in concluding that his trial counsel's performance was not deficient in failing to pursue a suggestibility defense at trial. More specifically, as framed by the habeas court, the petitioner argued that his trial counsel "failed to call Dr. David Mantell to attack the efficacy of the interview methods used by the medical and investigative personnel who examined the victim and that they failed to cross-examine these witnesses and other constancy of accusation witnesses regarding possible unintentional implantation of a false memory of sexual assault in a particularly vulnerable child's mind." In ruling on this claim, the habeas court's memorandum of decision thoroughly and thoughtfully states the facts and the applicable law. After examining the record and the briefs and considering the arguments of the parties on appeal, we are persuaded that the habeas court correctly determined that the petitioner failed to prove that his trial counsel's decision not to pursue a suggestibility defense constituted deficient performance, or thus deprived him of effective assistance of counsel. See *Girolametti* v. *Rizzo Corp.*, 144 Conn. App. 77, 78–79, 70 A.3d 1162 (2013). We, therefore, adopt the court's well reasoned memorandum of decision as the proper statement of the relevant facts, issues and applicable law as to this issue. *Ruiz* v. *Warden*, 53 Conn. Supp. 347, A.3d (2013). No useful purpose would be served by repeating that discussion here. See *Pellecchia* v. *Killingly*, 147 Conn. App. 299, 302, 80 A.3d 931 (2013).

The judgment is reversed only as to the petitioner's

claim of ineffective assistance of his trial counsel in connection with the *Jarzbek* hearing and the case is remanded for further proceedings on that claim in accordance with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[2] In cases involving the alleged sexual abuse of children, the practice of videotaping the testimony of a minor victim outside the physical presence of the defendant is, in appropriate circumstances, constitutionally permissible. To that end, in such cases, the state files a motion pursuant to *State* v. *Jarzbek*, supra, 204 Conn. 683, and a hearing is held to determine whether it is necessary to exclude a defendant from the room during the videotaping of a child victim's testimony in order to preserve the accuracy and reliability of that testimony.

[3] The petitioner also had alleged in his petition that his appellate counsel was ineffective. The habeas court determined that the petitioner abandoned that claim, and that determination has not been challenged on appeal.

[4] The petition does not contain an express allegation that trial counsel was deficient in failing to pursue a suggestibility defense, and the respondent, the Commissioner of Correction, thus argues that any claim of error on the part of the habeas court in rejecting such a claim is unreviewable by this court. Both parties, however, briefed this specific claim of deficient performance in their posttrial briefs to the habeas court. Because the claim was not only fully briefed by the parties but thoroughly considered and resolved on its merits by the habeas court in its memorandum of decision, we reject the respondent's contention that this issue is not properly before us on appeal.

[5] In response to the state's *Jarzbek* motion, the petitioner had filed a motion pursuant to *State* v. *Marquis*, 241 Conn. 823, 699 A.2d 893 (1997), seeking to have the victim examined by a defense expert. The court denied that motion.

[6] "Examples of such structural errors include, among others, racial discrimination in the selection of a grand jury or petit jury and the denial of a defendant's right to counsel, right to a public trial, or right to self-representation. See, e.g., *Batson* v. *Kentucky*, 476 U.S. 79, 100, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (racial discrimination in selection of petit jury); *Vasquez* v. *Hillery*, 474 U.S. 254, 263–64, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (denial of right to public trial); *Faretta* v. *California*, 422 U.S. 806, 836, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (denial of right to self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335, 344–45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (denial of right to counsel); see also *Tumey* v. *Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (denial of right to impartial judge). . . . [*Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) [instructional error concerning the reasonable doubt standard]." *State* v. *Artis*, 314 Conn. 131, 151–52, 101 A.3d 915 (2014).

[7] This jurisprudence is consonant with, as it must be, that of the United States Supreme Court. In *Maryland* v. *Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the court stated that "[w]e have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." (Emphasis in original.) Id., 844. The court explained: "[O]ur precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . a preference that must occasionally give way to considerations of public policy and the necessities of the case . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 849. In *Coy* v. *Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the United States Supreme Court held: "We have recognized that other types of violations of the Confrontation Clause are subject to that harmless-error analysis, see *e. g.*, *Delaware* v. *Van Arsdall*, 475 U.S. [673, 679, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)], and see no reason why denial of face-to-face confrontation should not be treated the same." *Coy* v. *Iowa*, supra, 1021.

[8] The primary authority upon which the petitioner relies in arguing that

there is a presumption of prejudice when the right to confrontation is violated is *State* v. *Bronson*, supra, 258 Conn. 42. In *Bronson*, which was a direct appeal from a criminal conviction, our Supreme Court held that the trial court erred in denying the defendant's motion for a court-appointed expert to examine the victim when the ability of the victim to testify reliably came into question. In *Bronson*, the victim's therapist had testified that the victim was capable of testifying in open court, but the victim broke down on the witness stand during her testimony. Id., 47. Because the victim had been deemed capable of testifying in open court, the state informed the court and the defendant that videotaping the victim's testimony would not be necessary. Id. Upon the victim's emotional breakdown, the state requested a *Jarzbek* hearing to determine whether the victim's testimony should be videotaped. Id., 49. The defendant then sought a continuance to prepare for that hearing, but the court denied that request, conducted the *Jarzbek* hearing that same afternoon, and ruled that expert testimony was not necessary and granted the state's motion to videotape the victim's testimony. Id. Our Supreme Court held that the trial court abused its discretion in not granting the defendant's motion for a court-appointed expert to examine the victim and that "at the point in the proceedings at which the *Jarzbek* hearing was held, there was on record an expert's opinion [determining that the victim was capable of testifying in the defendant's presence], and the immediately preceding occurrences were not sufficient, in content and length, conclusively to rebut that opinion." Id., 55. The court further concluded that "in these particular circumstances, harm may be presumed. It would be impossible for the defendant to establish now that, had the motion been granted, the court-appointed expert would have testified that [the victim] could have testified in the defendant's presence." Id. Because the court in *Bronson* carefully limited its presumption of prejudice to the facts presented before it, its ruling cannot be construed to transcend all of the other applicable law in which it has been declared that a violation of the right to confrontation is subject to harmless error analysis. Moreover, as the respondent aptly argues, *Bronson* is distinguishable in that it is a direct appeal and that the defendant in that case therefore was not afforded an opportunity to show that he had been prejudiced by the trial court's error. Here, the petitioner has been afforded that right in the habeas proceeding.

[9] In criticizing the judgment of the habeas court, the petitioner attempts to distinguish the case law relied upon by the habeas court by asserting that there is a presumption of prejudice when deficient performance of counsel causes a second constitutional violation, i.e., the violation of the right of confrontation. The petitioner has provided no legal support for this proposition, nor are we aware of any.

[10] The petitioner filed a motion pursuant to *State* v. *Marquis*, 241 Conn. 823, 699 A.2d 893 (1997), to have the victim examined by a defense expert.