AHMED KENYATTA EBRON *v.* COMMISSIONER OF CORRECTION
(SC 18627)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js.

Argued May 17—officially released October 23, 2012

Michael Proto, assistant state's attorney, with whom, on the brief, was *Michael Dearington*, state's attorney, for the appellant (respondent).

Jennifer Bourn, assistant public defender, for the appellee (petitioner).

Opinion

ZARELLA, J. The petitioner, Ahmed Kenyatta Ebron, pleaded guilty to a variety of criminal charges on the advice of his trial counsel. After he was sentenced, he filed a petition for a writ of habeas corpus, claiming, inter alia, that trial counsel had failed to advise him adequately regarding the state's offer of a plea bargain and that this failure constituted ineffective assistance of counsel. The habeas court rendered judgment granting the petition and ordered the trial court to vacate the petitioner's guilty plea and to allow the petitioner the opportunity to accept the original plea offer. Upon the habeas court's granting of her petition for certification to appeal, the respondent, the commissioner of correction, appealed to the Appellate Court, which affirmed the habeas court's judgment. *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 592, 992 A.2d 1200 (2010). We then granted the respondent's petition for certification to appeal to this court, limited to the following questions: First, "[d]id the Appellate Court properly affirm the habeas court's judgment that the petitioner received ineffective assistance of counsel in his criminal trial?" *Ebron* v. *Commissioner of Correction*, 297 Conn. 912, 995 A.2d 954 (2010). Second, "[i]f the Appellate Court properly affirmed the judgment, did the Appellate Court also properly affirm the habeas court's order for relief?" Id., 913. We answer the first question in the affirmative and the second question in the negative. Accordingly, we reverse in part the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts and procedural history. "In docket number CR-02-12149, the petitioner [was] convicted of [conspiracy to possess] narcotics with intent to sell. On May 20, 2003, he was sentenced to eight years incarceration, suspended after twenty months, followed by a three year conditional discharge. In 2005, the state charged the petitioner with various criminal offenses in several informations. Specifically, in docket number CR-05-40965, the state charged the petitioner with two counts of attempt to commit assault of [public safety personnel] in violation of General Statutes [(Rev. to 2005) § 53a-167c and General Statutes § 53a-49], one count of possession of a dangerous weapon in violation of General Statutes § 53-206 and one count of disobeying the signal of a police officer in violation of General Statutes [Rev. to 2005] § 14-223 (a). In docket number CR-05-41361, the state charged the petitioner with [inter alia] assault in the third degree in violation of General Statutes § 53a-61. Finally, in docket number CR-05-42862, the state charged the petitioner with assault in the third degree in violation of § 53a-61. On the basis of these charges, the petitioner was exposed to a period of incarceration of thirty-five years. The petitioner also faced a term of incarceration of six years and four

months due to the revocation of the conditional discharge from his earlier conviction. His total exposure for all of the charges . . . was forty-one years and four months of incarceration.

"Attorney Richard Silverstein represented the petitioner at all relevant times. Silverstein discussed the charges against the petitioner with assistant state's attorney John P. Doyle, Jr. Doyle offered to recommend an effective sentence of six years incarceration if the petitioner pleaded guilty to a violation of the conditional discharge, at least one count of attempt to commit assault of [public safety personnel] and several misdemeanors. Silverstein informed Doyle that he had discussed the offer with the petitioner and that the petitioner had rejected it. The petitioner then entered a plea of not guilty to all of the charges.

"Despite the petitioner's rejection, Doyle maintained the offer to the petitioner. At a pretrial conference on August 3, 2005, the state formally offered ten years incarceration, suspended after six years, with five years probation, in exchange for the petitioner's guilty plea. [Judge Alexander] indicated that the offer was appropriate, except that the proposed five years probation [should] be a conditional discharge.[1] Silverstein believed that this offer of six years incarceration was too high. He conveyed the offer to the petitioner and told him that he had three options: (1) accept the plea bargain offered by the state, with the sentence recommendation of ten years incarceration, suspended after serving six years; (2) proceed to a hearing on the violation of conditional discharge; or (3) enter an 'open plea,' or one with no recommendation from Doyle, before Judge Damiani. Silverstein informed the petitioner that he 'probably would not do much worse with Judge Damiani, or words to that effect.' . . . Silverstein never recommended that the petitioner accept the plea bargain offered by [Doyle].

"On August 31, 2005, a hearing was scheduled for determination of the petitioner's violation of the conditional discharge. Silverstein informed Judge Damiani that the petitioner . . . elected to enter an open plea. The petitioner then pleaded guilty, pursuant to the *Alford* doctrine,[2] to violation of a conditional discharge for a felony, two counts of assault in the third degree and one count of attempt to commit assault of [public safety personnel]. Following a thorough canvass of the petitioner, Judge Damiani accepted his plea and informed him that he could receive a sentence of eighteen years and four months incarceration. The court ordered a presentence investigation (PSI) report;[3] see General Statutes § 54-91a;[4] and continued the matter for sentencing.

"On December 5, 2005, the court sentenced the petitioner to six years incarceration for violation of the conditional discharge, a consecutive five years incarcer-

ation for attempt to commit assault of [public safety personnel] and ordered an unconditional discharge on the conviction [of] two counts of assault [in the third degree] for a net effective sentence of eleven years. The petitioner unsuccessfully moved for review of the sentence.

"The petitioner then [filed a petition] for a writ of habeas corpus. In his second amended petition, filed October 24, 2007, [the petitioner] alleged that Silverstein provided ineffective assistance of counsel by failing to advise him properly with respect to the state's offer of six years incarceration. He further alleged that Silverstein provided ineffective assistance with respect to the charge of attempt to commit assault of [public safety personnel]. Finally, the petitioner claimed that his [*Alford*] plea . . . was invalid and constituted a violation of his right to due process." *Ebron* v. *Commissioner of Correction*, supra, 120 Conn. App. 563–66.

The habeas court determined that Silverstein's performance was deficient insofar as he failed to recommend to the petitioner that he accept the plea offer under which he would receive ten years incarceration, suspended after six years. Id., 571. "In support of this conclusion, the court noted that Silverstein should have known of the petitioner's egregious criminal record. Additionally, Silverstein should have known that [the petitioner's acceptance of an open plea would result in the generation of] a PSI report . . . by the office of adult probation. The court further indicated that Silverstein should have known that this report would provide greater details of the petitioner's criminal history. [Finally], the court observed that Silverstein should have known that there were no defenses to the principal charges of attempt to commit assault of [public safety personnel] and [the] violation of a conditional discharge." Id., 571–72.

Accordingly, the habeas court granted the petition for a writ of habeas corpus on the ground that "Silverstein had provided ineffective assistance of counsel with respect to the state's plea offer and that the petitioner was prejudiced thereby. The [habeas] court rejected the petitioner's claims with respect to the charge of attempt to commit assault of [public safety personnel] and that his plea was invalid. As a remedy, the [habeas] court directed the trial court to vacate the petitioner's plea and to afford him the opportunity to accept the state's offer of ten years incarceration, suspended after six years. If the petitioner were to accept this offer, he would then be resentenced in accordance with the plea bargain and . . . applicable law. The habeas court subsequently granted the respondent's petition for certification to appeal from the [judgment of the habeas court]." Id., 566. The Appellate Court affirmed the habeas court's judgment; id., 592; and this certified appeal followed.

After the appeal was filed, but before oral argument before this court, we ordered the parties to submit supplemental briefs addressing the impact of the United States Supreme Court's decisions in *Lafler* v. *Cooper*, U.S. , 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Missouri* v. *Frye*, U.S. , 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), on this case. In those cases, the United States Supreme Court held that habeas petitioners can establish a violation of the sixth amendment right to counsel by proving "a reasonable probability [that] they would have accepted the . . . plea offer had they been afforded effective assistance of counsel." *Missouri* v. *Frye*, supra, 1409; see also *Lafler* v. *Cooper*, supra, 1384 ("[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice"). In her supplemental brief, the respondent conceded that, contrary to the argument set forth in her initial brief to this court, *Lafler* and *Frye* establish that the failure to advise a client adequately about a plea offer can provide the basis for an ineffective assistance of counsel claim under the sixth amendment.[5] See *Lafler* v. *Cooper*, supra, 1385 (petitioner can establish prejudice in context of ineffective assistance of counsel claim by establishing reasonable probability that, if not for deficient performance of counsel, petitioner would have accepted plea offer, government would have presented offer to trial court, court would have accepted it, and terms would have been less severe than punishment that was imposed). The respondent argues, however, that the petitioner in the present case has not established prejudice because he did not establish that Judge Alexander would have accepted the plea offer if she had been apprised of the information that was made available to Judge Damiani.[6] The respondent also argues that the Appellate Court improperly upheld the habeas court's decision to order the trial court to resentence the petitioner in accordance with the original plea offer because, under *Lafler*, the trial court "may exercise discretion in determining whether the [petitioner] should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." Id., 1389.

The petitioner counters that the habeas court correctly determined that Judge Alexander would have accepted the plea offer and that neither *Lafler* nor *Frye* requires a habeas petitioner to establish that the trial court would have accepted the original plea offer even if the court had known about information that became available after the time that the plea would have been accepted. He further claims that the remedy that the habeas court ordered was appropriate because that court found that Judge Alexander would have accepted the plea agreement if not for the deficient performance of the petitioner's trial counsel. We conclude that the Appellate Court correctly determined that the habeas

court's finding of prejudice was supported by the evidence. We further conclude that the habeas court ordered an improper remedy, and, therefore, insofar as the Appellate Court upheld the habeas court's remedy, the Appellate Court's judgment must be reversed and the case must be remanded for further proceedings for a determination of the proper remedy.

We begin our analysis with the standard of review. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . 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. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 834–35, 970 A.2d 721 (2009).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of [the pertinent legal standard to] the habeas court's factual findings . . . however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) Id., 834.

In *Lafler*, the United States Supreme Court held that, to satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler* v. *Cooper*, supra, 132 S. Ct. 1385. The court elaborated on this standard in *Frye*, stating that

"[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework." *Missouri* v. *Frye*, supra, 132 S. Ct. 1410.

With respect to the appropriate remedy when prejudice has been established in this context, the court in *Lafler* stated: "Sixth [a]mendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. . . . Thus, a remedy must neutralize the taint of a constitutional violation . . . while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the [s]tate properly invested in the criminal prosecution. See [*United States* v. *Mechanik*, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986)] ([t]he reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences).

"The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges [that] the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea [offer]. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

"In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones [of] which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not

suffice. . . . In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

"In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear [on] the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.

"First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary . . . to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial." (Citations omitted; internal quotation marks omitted.) *Lafler* v. *Cooper*, supra, 132 S. Ct. 1388–89.

Before applying these principles to the circumstances of the present case, we must address what appears to be a possible tension between *Frye* and *Lafler*.[7] Specifically, under *Frye*, the habeas court is required to consider information that would have come to the trial court's attention after the defendant would have accepted the plea offer but before he would have been sentenced in determining whether the petitioner was *prejudiced* by the deficient performance of counsel. See *Missouri* v. *Frye*, supra, 132 S. Ct. 1410 (in determining whether petitioner was prejudiced, "in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain").[8] If the habeas court determines that, in light of this information, it is not reasonably probable that the trial court would have imposed the sentence embodied in the plea agreement, the prejudice prong has not been satisfied. See id., 1409 ("[d]efendants must . . . demonstrate a reasonable probability [that] the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if [the prosecution or the court]

had the authority to exercise that discretion under state law"). The court in *Lafler*, however, declined to rule out the possibility that a habeas court may be permitted to consider such information when exercising its discretion in crafting a *remedy*. *Lafler* v. *Cooper*, supra, 132 S. Ct. 1389 (in crafting remedy for lapsed plea violation, "it is not necessary [for the court] to decide as a constitutional rule that a [habeas] judge is required to prescind [that is to say disregard] any information concerning the crime that was discovered after the plea offer was made"). If the habeas court already has determined, however, that the petitioner was prejudiced because it is reasonably probable that the trial court *would have imposed the sentence embodied in the plea offer* even in light of an intervening circumstance, such as the court's review of a PSI report or a victim impact statement, it is difficult to understand why the court should be permitted to consider such a circumstance *again* when it exercises its discretion to determine whether the imposition of that sentence is the appropriate remedy. See id. ("the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between"). If the petitioner was prejudiced because it is reasonably probable that the sentence embodied in the plea agreement would have been imposed if not for the deficient performance of counsel, even considering intervening circumstances, it seems reasonably clear that the appropriate remedy is to impose that sentence. Indeed, it is difficult to imagine on what basis the court could conclude that a more severe sentence would be adequate to cure the prejudice to the petitioner under these circumstances.[9]

Accordingly, in order to avoid potentially conflicting findings at the prejudice and remedy stages of a habeas proceeding in a lapsed plea case, we conclude that, to establish prejudice, a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court. See *State* v. *Thomas*, 296 Conn. 375, 388, 995 A.2d 65 (2010) ("[a] trial court lacks the authority to unconditionally accept a guilty plea prior to considering the results of a pending [PSI] report"); see also Practice Book § 43-10.[10] We further conclude that, when a habeas court finds prejudice, then, in most cases, that court should order the trial court to determine the proper remedy in light of any information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence, such as a PSI report or a victim impact statement.[11] In our view, the determination of the appropriate remedy will, in most cases, more properly be made by the trial court

than by the habeas court because the former generally will have greater experience than the latter in crafting criminal sentences and, in some cases, may have access to information about the petitioner and the crime that is not available to the habeas court.

With these principles in mind, we turn to the respondent's claim in the present case that the Appellate Court incorrectly concluded that the habeas court's finding of prejudice was supported by the evidence because the petitioner did not establish a reasonable probability that Judge Alexander would have accepted the plea offer if she had been apprised of the information that later was made available to Judge Damiani in the PSI report.[12] We disagree. The habeas court found on the basis of Doyle's testimony that Judge Alexander "would have imposed [the] sentence [embodied in the plea agreement]" if the petitioner had accepted it. Although we agree with the respondent that the habeas court failed to consider whether Judge Alexander would have obtained a PSI report or a victim impact statement and, if so, whether she still would have imposed the sentence embodied in the plea agreement after considering that information; see footnote 10 of this opinion; the respondent does not dispute that the habeas court reasonably could have found that Judge Alexander would have conditionally accepted the plea agreement on the basis of Doyle's testimony.[13] See footnote 1 of this opinion. We have concluded that such a finding is sufficient to establish prejudice in this context and that whether the trial court would have ordered a PSI report or obtained a victim's statement, and, if so, the likely effect of that information on the sentence, should be considered at the remedy stage, not when the habeas court is determining whether there was prejudice. Accordingly, we conclude that the Appellate Court correctly determined that the habeas court's finding of prejudice was supported by Doyle's testimony.

The respondent also claims that the petitioner failed to meet his burden of establishing prejudice because he failed to establish that there was a reasonable probability that the trial court would have accepted the plea agreement by an objective standard rather than a subjective one. See, e.g., *Missouri* v. *Frye*, supra, 132 S. Ct. 1410 (in most instances, objective determination can be made as to whether judicial authority would have approved plea agreement). Specifically, the respondent claims that the petitioner was required to prove that a reasonable trial judge would have accepted the sentence, not that Judge Alexander in particular would have accepted it.

We recognize that there may be instances in which a particular trial judge has a sentencing practice that deviates from the standard or average trial court practice. Nevertheless, we conclude that, inasmuch as consistency in sentencing and the treatment of plea

agreements is an important goal of the criminal justice system, and inasmuch as trial judges are presumed to be aware of this goal and to act accordingly, when there is evidence that a particular judge had indicated that he would have conditionally accepted the plea agreement, such evidence is probative of the question of what a reasonable court would have done. We further conclude that such evidence is sufficient to prove prejudice in the absence of any evidence that the particular judge's practice deviated significantly from the normal practice or that the particular sentence would have been an outlier. Because there was no such evidence in the present case, we conclude that the factual finding that Judge Alexander would have conditionally accepted the plea agreement was sufficient to establish prejudice.

Because the habeas court properly found that the petitioner was prejudiced by his trial counsel's deficient performance, we conclude that the case must be remanded to the habeas court so that it may issue an order directing the trial court to determine whether the petitioner "should receive the term of imprisonment the government offered in the plea, the sentence he received, or something in between."[14] *Lafler* v. *Cooper*, supra, 132 S. Ct. 1389. In exercising its discretion to determine the appropriate remedy, the trial court may consider the petitioner's "earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions" and "information concerning the crime that was discovered after the plea offer was made." Id. Thus, to prove that there is a reasonable probability that Judge Alexander would have imposed the sentence embodied in the plea agreement, the petitioner must prove that there is a reasonable probability that one of the following scenarios would have occurred: (1) Judge Alexander would not have ordered a PSI report or received other information unfavorable to the petitioner before sentencing,[15] and, therefore, there would have been no reason for Judge Alexander ultimately to impose a more severe sentence than that embodied in the plea offer; (2) if Judge Alexander would have ordered a PSI report or received other unfavorable information before sentencing, such information would not have induced Judge Alexander to impose a more severe sentence than that embodied in the plea agreement; or (3) if there is no reasonable probability that Judge Alexander would have imposed the sentence embodied in the plea offer after considering the PSI report or other unfavorable information, there is still a reasonable probability that she would have imposed a significantly less severe sentence than the sentence actually imposed by Judge Damiani, and the petitioner would not have withdrawn his plea.[16] If the petitioner can prove one of these scenarios, the trial court should order the state to reissue the original plea offer and impose sentence accordingly.[17]

If the trial court concludes that, in light of the information contained in the PSI report, there is no reason-

able probability that Judge Alexander would have imposed the sentence embodied in the plea agreement or a significantly less severe sentence than the one Judge Damiani actually imposed, the court should provide the petitioner with the opportunity to withdraw his original plea and to be tried. Cf. Practice Book § 39-10 (if, after considering PSI report, trial court concludes that sentence embodied in plea agreement is inappropriate, it shall "afford the defendant the opportunity . . . to withdraw the plea"). Although the United States Supreme Court in *Lafler* and *Frye* did not expressly indicate what should happen under these circumstances, it appears to us that the court intended that, if the court finds a lapsed plea violation, the court should attempt to place the habeas petitioner, as nearly as possible, in the position that he would have been in if there had been no violation. Because, under Practice Book § 39-10, the petitioner would have been afforded an opportunity to withdraw his plea and to stand trial if Judge Alexander had determined that, in light of the information in the PSI report, the sentence embodied in the plea agreement was too lenient, we conclude that the appropriate remedy would be for the trial court to afford a similar opportunity to the petitioner if it determines that there is a reasonable probability that Judge Alexander would have made that determination.

The judgment of the Appellate Court is reversed insofar as it upheld the decision of the habeas court to order the trial court to vacate the petitioner's plea, to allow the petitioner the opportunity to accept the original plea offer, and to resentence the petitioner accordingly, and the case is remanded to the Appellate Court with direction to remand the case to the habeas court with direction to order the trial court to determine the proper remedy in accordance with this opinion; the judgment of the Appellate Court is affirmed insofar as it upheld the habeas court's finding of prejudice.

In this opinion the other justices concurred.

[1] Doyle testified at the habeas proceeding that Judge Alexander "thought [that] the state's offer was appropriate and that she would not be adjusting it, lowering it or changing it." When asked if he had any reason to believe that Judge Alexander would not have imposed the agreed on sentence if the petitioner had accepted the plea offer, Doyle stated that Judge Alexander was "a quite experienced judge," and that she would have indicated that the plea offer was too high or too low if she did not intend to accept it. Accordingly, Doyle believed that "[Judge Alexander] would have imposed [on] that day [of the hearing] the ten after six [years] and probably a five year conditional discharge."

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[3] In its memorandum of decision, the habeas court stated that "the [PSI report states] that the petitioner, who was thirty-two years old, had the following criminal record: three convictions for sale of narcotics, three violations of probation, two convictions for possession of controlled substances, single convictions for assault on a police officer, and carrying a pistol without a permit, as well as three misdemeanor convictions. The report stated that the petitioner 'accepts little or no responsibilit[y] for [his present] offenses and, in two instances, blames the victims.' The probation officer recommended the maximum period of incarceration."

[4] General Statutes § 54-91a provides in relevant part: "(a) No defendant convicted of a crime, other than a capital felony, the punishment for which

may include imprisonment for more than one year, may be sentenced, or the defendant's case otherwise disposed of, until a written report of investigation by a probation officer has been presented to and considered by the court, if the defendant is so convicted for the first time in this state; but any court may, in its discretion, order a presentence investigation for a defendant convicted of any crime or offense other than a capital felony. . . ."

[5] The sixth amendment right to effective assistance of counsel is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Evitts* v. *Lucey*, 469 U.S. 387, 392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

[6] The respondent does not challenge the Appellate Court's determination that the habeas court correctly determined that Silverstein's performance was deficient.

[7] As the United States Supreme Court recognized in *Frye*, the procedures that states employ in the area of plea agreements are not uniform. See *Missouri* v. *Frye*, supra, 132 S. Ct. 1411. For example, some states may not require the trial court to obtain a PSI report or a victim impact statement before finally accepting the sentence embodied in the plea agreement. It may be that differences between the Michigan procedures at issue in *Lafler* and the Missouri procedures at issue in *Frye* explain the apparent tension between the decisions. In any event, the court in *Lafler* recognized that states should have some flexibility in crafting procedures to remedy a sixth amendment violation in this context. See *Lafler* v. *Cooper*, supra, 132 S. Ct. 1389 ("[p]rinciples elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance" to trial courts). The procedure that we adopt in the present case provides greater protections to habeas petitioners who have received ineffective assistance of counsel during the plea agreement process than those contemplated in *Lafler*.

[8] We conclude that the phrase "intervening circumstance," as used in this context, means a circumstance that would have occurred between the time that the plea offer was made and the time that the plea offer would have been accepted or rejected by the prosecution and the trial court. In *Frye*, for example, the respondent, Galin E. Frye, was charged with driving with a revoked license in August, 2007. *Missouri* v. *Frye*, supra, 132 S. Ct. 1404. The prosecutor sent Frye's counsel a letter offering two possible plea bargains, which counsel did not convey to Frye. Id. On December 30, 2007, Frye again was arrested for driving with a revoked license. Id. A preliminary hearing on the August, 2007 charge was held on January 4, 2008. See id. Frye subsequently pleaded guilty to the original charge and was sentenced to three years in prison. Id., 1404–1405. The United States Supreme Court concluded that, even if Frye had been informed about the plea offers and had accepted one of them, "there is reason to doubt that the prosecution would have adhered to the [plea] agreement or that the trial court would have accepted it at the January 4 . . . hearing, unless [the prosecution and the court] were required by state law to do so." Id., 1411. Thus, in *Frye*, the intervening circumstance that the habeas court was required to consider in determining whether the trial court would have accepted one of the plea offers—i.e., the second criminal charge—occurred between the time of the plea offers and the time that the trial court would have accepted one of those offers if Frye had accepted it.

[9] Presumably, the court in *Lafler* was not suggesting that a habeas court attempting to fashion a suitable remedy for a lapsed plea violation should be permitted to consider information that never would have come to the trial court's attention if the petitioner and the trial court had accepted the plea offer, such as information that was developed at trial. It would have been inconsistent for the court in *Lafler* to conclude, on the one hand, that the habeas court can consider information that never would have come to light if not for counsel's deficient performance in the interest of fairness while, on the other hand, concluding that the fact that the petitioner received a fair sentence after a fair trial does not obviate any prejudice embodied in the petitioner's failure to accept the plea offer.

[10] Practice Book § 43-10 provides in relevant part: "Before imposing a sentence or making any other disposition after the acceptance of a plea of guilty or nolo contendere or upon a verdict or finding of guilty, the judicial authority shall, upon the date previously determined for sentencing, conduct a sentencing hearing as follows:

"(1) The judicial authority shall afford the parties an opportunity to be heard and, in its discretion . . . to explain or controvert the presentence investigation report . . . .

"(2) The judicial authority shall allow the victim and any other person directly harmed by the commission of the crime a reasonable opportunity to make, orally or in writing, a statement with regard to the sentence to be imposed. . . ."

This court stated in *Thomas* that "[m]odern precepts of penology require that the discretion of a sentencing judge to impose a just and appropriate sentence remain unfettered throughout the sentencing proceedings. [When] a [PSI] report is statutorily mandated, a judge cannot make any promise or determination of the sentence he will impose before he has reviewed the report. . . . Moreover, [*u*]*ntil sentence is pronounced, the trial court maintains power to impose any sentence authorized by law*; *and, though the sentencing judge may be conscience-bound to perform his own prior agreements with counsel and the parties, the court is not in law bound to impose a sentence that once seemed, but no longer seems, just and appropriate*. . . . In those circumstances in which the judge cannot in conscience impose the sentence conditionally promised, it has been uniformly recognized that the only obligation he has is to grant the defendant the opportunity to withdraw his guilty plea. . . . Therefore, once the trial court ordered the [PSI report], the trial court's acceptance of the defendant's plea agreement necessarily became contingent [on] the results of the [PSI] report. Otherwise, the [PSI] report would be little more than a nullity, and our law makes clear that these reports are to play a significant role in [the court's determination of] a fair sentence. Simply put, any plea agreement must be contingent [on] its acceptance by the court after [the court's] review of the [PSI] report." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Thomas*, supra, 296 Conn. 388–89.

"Additionally, in accordance with the victims' rights amendment [to] our state constitution, the court must provide an opportunity for the victim to meaningfully participate in the defendant's sentencing. Article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: 'b. In all criminal prosecutions, a victim, as the general assembly may define by law, shall have . . . (7) the right to object or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; [and] (8) the right to make a statement to the court at sentencing . . . .' As is the case with the [PSI report], when the victim chooses to make a statement, acceptance of a guilty plea must be contingent [on] hearing from the victim in order to provide the victim with a meaningful right to participate in the plea bargaining process." Id., 389–91.

[11] We recognize that, under our scheme, the burden of establishing *prejudice* is lower than that contemplated in *Frye* because the petitioner does not have to establish that the trial court would have imposed the sentence embodied in the plea agreement at that stage. Nevertheless, under our scheme, as in *Lafler* and *Frye*, the petitioner ultimately cannot obtain relief unless he establishes that it is reasonably probable both that the trial court would have accepted the plea agreement and that the court ultimately would have imposed the sentence embodied in the plea agreement in light of any information about the crime or the petitioner that would have come to light between the acceptance of the plea offer and sentencing.

[12] The petitioner contends that the respondent abandoned any such claim when she conceded in her brief that "[i]t is true that Judge Alexander *may* have imposed—or even was *likely* to impose—the sentence in accordance with the offer . . . ." (Emphasis in original.) We disagree. It appears to us that the respondent was arguing that, *even if* the trial court would have imposed the sentence embodied in the plea agreement, if the petitioner had accepted it, the petitioner still could not prevail on his ineffective assistance of counsel claim because he was not entitled to a plea offer. Because this claim is no longer viable in light of *Lafler* and *Frye*, the respondent has abandoned it.

We again note that the respondent has not challenged the Appellate Court's determination that the habeas court properly found that Silverstein's performance was deficient.

[13] The petitioner argues that, because Doyle testified unequivocally that Judge Alexander would have imposed the sentence embodied in the plea agreement, it is clear that Doyle believed that Judge Alexander would not have requested a PSI report or a victim impact statement. Because the importance of the distinction between conditional acceptance of the plea offer and the imposition of the sentence in this context was not clear at the time of the habeas trial, we disagree.

[14] As we have indicated, in most cases, the habeas court should remand the case to the trial court so that the trial court can make this determination.

[15] Under § 54-91a, the trial court is *required* to order a PSI report only if the defendant has not previously been convicted of a felony in this state. See footnote 4 of this opinion.

[16] We emphasize that the approach that we outline is specific to this case and is not intended to deprive habeas and trial courts of the flexibility required to exercise their discretion to craft a proper remedy in any given case in light of the principles articulated in *Frye* and *Lafler*.

[17] See *Lafler* v. *Cooper*, supra, 132 S. Ct. 1391 ("[The proper remedy for a lapsed plea violation is] to order the [s]tate to reoffer the plea agreement. Presuming [the petitioner] accepts the offer, the . . . trial court can then exercise its discretion in determining whether to vacate the convictions and resentence [the petitioner] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the petitioner] accordingly, or to leave the convictions and sentence from trial undisturbed."). As we have indicated, the petitioner can establish prejudice in this context only by proving that he would have accepted the plea offer if not for the deficient performance of trial counsel. Accordingly, in our view, the reissuance of a plea offer on remand essentially would be a formality. A rejection of the original offer by the petitioner at the remedy stage would be inconsistent with his claim at the prejudice stage that he would have accepted the offer.

As we discuss in the text of this opinion, under our scheme, the trial court on remand may not leave the original sentence undisturbed unless it concludes that it is reasonably probable that the original sentencing court would have imposed that sentence after considering intervening circumstances, in which case the court must afford the petitioner the opportunity to withdraw his original plea and to stand trial.