IN RE BRIANA G. ET AL.*
(AC 41106)

Sheldon, Prescott and Bear, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his minor children. *Held*:

1. The respondent father could not prevail on his claim that the petitioner, the Commissioner of Children and Families, failed to prove by clear and convincing evidence that he had failed to achieve a sufficient degree of personal rehabilitation as required by statute (§ 17a-112 [j] [3] [B] [i]), which was based on his claim that the Department of Children and Families did not provide him with sufficient time and resources to demonstrate that, within a reasonable time, considering the age and needs of each child, he could assume a responsible position in their lives; although the father asserted that because there was some evidence

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

of rehabilitation despite the untimely death of the children's mother and his six month period of incarceration, he could have achieved a sufficient level of rehabilitation if he had been given more time and resources, the trial court's determination of his failure to rehabilitate was not premature, that court having found that the department made reasonable efforts at reunification but that the father was unable to benefit from those efforts, as he did not engage in any substance abuse or mental health services offered to him from the time of the case opening until just prior to his incarceration, he failed to provide the department with the requested documentation of his income in order for it to determine if it could pay for his therapy, he refused to submit to random drug testing on several dates, he continuously denied that he had a substance abuse problem or needed therapy, and he had made very little progress with any mental health treatment through the date of trial.

2. The respondent father failed to establish his claim that the trial court abused its discretion in admitting into evidence the transcripts of certain text messages extracted from the cell phone of the children's mother following her death; the father's claim that the commissioner failed to authenticate properly the messages by demonstrating a proper chain of custody for them concerned the weight of the evidence rather than its admissibility, his assertion that the cell phone was possibly tampered with or altered before being given to the police was not supported by any evidence, and testimony from the children's maternal grandmother and a police detective supported the court's determination that a chain of custody was sufficiently established.

Argued May 30—officially released July 25, 2018**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondent father's parental rights in his minor children, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters, and tried to the court, *Ginocchio, J.*; judgments terminating the respondent's parental rights, from which the respondent appealed to this court. *Affirmed.*

David V. DeRosa, for the appellant (respondent).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney

** July 25, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

BEAR, J. The respondent father, Justin G.,[1] appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families (commissioner), terminating his parental rights with respect to his three minor children, B, L and H.[2] On appeal, the respondent claims that the court (1) prematurely determined that the respondent failed to rehabilitate because the Department of Children and Families (department) did not provide him with sufficient time and resources to do so, and (2) improperly admitted into evidence transcripts of text messages obtained by the police, although a proper chain of custody was not proved prior to their admission. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal. On October 2, 2015, the department issued a ninety-six hour administrative hold of newborn baby H after the mother tested positive for use of opiates and marijuana at the time of her birth. On October 6, 2015, the commissioner filed in the Superior Court a neglect petition relating to H, and neglect petitions relating to B and L, who are the two other minor children of the mother and the respondent. In support of her neglect petitions, the commissioner alleged, inter alia, that the parents were using heroin heavily and abusing prescription pills. Additionally, the commissioner filed an ex parte motion for temporary custody of H, which the court granted on that day.

[1] Because the respondent mother is deceased, we refer to the respondent father in this opinion as the respondent and to the mother as the mother.

[2] Although counsel for the three minor children did not file a brief or statement as required pursuant to Practice Book § 67-13, during oral argument before this court, she supported the position of the commissioner.

On February 26, 2016, the commissioner filed ex parte motions for temporary custody of B and L, which the court granted on that day. The department subsequently placed the minor children with their maternal grandparents. The respondent was incarcerated for ninety days, from February 26 through May 13, 2016, after he was found to have violated the terms of his probation and after he was convicted of the offense of evading responsibility involving property damage in violation of General Statutes § 14-224 (b) (3). While he was incarcerated, on March 13, 2016, the mother unexpectedly passed away due to complications from cardiopulmonary arrest and acute heroin and cocaine intoxication. On March 17, 2016, the court adjudicated the minor children neglected pursuant to General Statutes § 46b-120 (6) (C).[3]

On March 7, 2017, the commissioner filed petitions to terminate the parental rights of the respondent with respect to each of his three minor children. The sole ground alleged in each of the petitions was General Statutes § 17a-112 (j) (3) (B) (i), failure to achieve a sufficient degree of personal rehabilitation as would encourage the belief that he could assume a responsible position in their lives within a reasonable time.[4] A trial

[3] General Statutes § 46b-120 (6) provides in relevant part: "A child or youth may be found 'neglected' who, for reasons other than being impoverished . . . (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child or youth."

[4] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court . . . determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129

on each of the petitions occurred on September 12 and 13, 2017. By a memorandum of decision dated November 8, 2017, the court found by clear and convincing evidence that the respondent had failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i) and that termination of his parental rights was in the best interest of each of the children, and it, therefore, terminated his parental rights with respect to each of them. This appeal followed.

Our standard of review is well established. "A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [commissioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child. . . .

"Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove

and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . .

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Lilyana P.*, 169 Conn. App. 708, 717–18, 152 A.3d 99 (2016), cert. denied, 324 Conn. 916, 153 A.3d 1290 (2017).

Reasonable time for rehabilitation within the meaning of the statute is a question of fact. *In re Davon M.*, 16 Conn. App. 693, 695–96, 548 A.2d 1350 (1988). "[I]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 586, 122 A.3d 1247 (2015). Moreover, "we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." Id., 593.

I

On appeal, the respondent claims that the court improperly terminated his parental rights with respect to each of his three children because the commissioner failed to prove, by clear and convincing evidence, that he had failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i), because the department did not provide him with sufficient time or resources to rehabilitate due to his ninety day period of incarceration and the untimely death of the mother. In other words, the respondent asserts that because there was some evidence of rehabilitation, if he were given more time and resources, he could have achieved a sufficient level of rehabilitation; therefore, the court's determination of his failure to rehabilitate was premature. We are not persuaded.

In its memorandum of decision, the court noted the respondent's and the mother's mutual focus on illegal drugs. In light of that focus, the department recommended that each of them engage in substance abuse and mental health services. The court found that the respondent "did not engage in any substance abuse or

mental health services offered to him from the time of the case opening to just prior to his incarceration." The respondent had not attended individual therapy after December 13, 2016, a period of approximately three months prior to the filing of the petitions to terminate parental rights. Although he claimed that he could not afford therapy, he failed to provide requested documentation of his income in order for the department to determine if it could pay for his therapy.

Although the respondent tested negative for drug use on two urine screens and hair tests on August 11, 2016, and September 27, 2016, he refused to submit to random urine screens on January 23, 2017, and February 21, 2017. According to the commissioner's August 10, 2017 case status report, the respondent was "asked to attend substance abuse screenings seven times [between January 23 through June 29, 2017], all of which he declined to attend. He was also asked to not cut his hair on [April 6, 2017], in anticipation of a hair test, and shortly afterwards he cut his hair very short." The court also noted that he had shaved his head after January 23, 2017, and that there was evidence found at the mother's home, where the respondent lived as well, of a device used to avoid positive urine test results. On March 13, 2016, the police seized drugs and drug paraphernalia from the mother's home. Although the respondent reported to his clinical psychologist that he never abused illegal drugs or prescription medication, the court found that there was overwhelming evidence, by his own admission in a letter sent to the mother and from text messages extracted from her cell phone, that he was using and providing drugs to her and others. It is well documented, as noted by the court, that the respondent had continuously denied that he had a substance abuse problem or needed therapy, and that he has made very little progress with any mental health treatment. Lastly, the court noted that the respondent

had failed to provide any documentation of his income or other proof of his ability consistently to provide for his three children.

The court found that all of the services offered to the respondent constituted reasonable efforts at reunification, but that the respondent had been unable to benefit from those reunification efforts.[5] The respondent, therefore, has not established his claim that the court prematurely determined that he failed to rehabilitate because the department did not provide him sufficient time and resources to do so.[6] The court noted that the respondent had not achieved sufficient rehabilitation through the date of the trial although he had been given eighteen months to do so. The evidence at trial amply supported the court's determination by clear and convincing evidence that the respondent failed to achieve an adequate level of rehabilitation within a reasonable time to assume a responsible parenting position in the lives of his children. There is no evidence to suggest that any of the court's subordinate findings were clearly erroneous.

II

The respondent additionally claims that the court improperly admitted into evidence transcripts of text messages extracted from the mother's cell phone

[5] The court found that prior to the date of the filing of the petitions for termination of parental rights, the department made reasonable efforts to reunify the children with the respondent. Alternatively, the court found by clear and convincing evidence that, as of the date of its decision, the respondent had been unable to benefit from reunification efforts. See *In re Jorden R.*, 293 Conn. 539, 554, 979 A.2d 469 (2009) ("although § 17a-112 [j] begins with a presumptive obligation that the department make reasonable reunification efforts, it later excuses this obligation in cases in which a trial court finds, by clear and convincing evidence, that a parent is unable or unwilling to benefit from such reunification efforts").

[6] The court found by the clear and convincing evidence standard that the respondent was "unable to achieve rehabilitation within a reasonable period of time . . . given the age and needs of [his children]."

because the commissioner failed to authenticate properly the messages by demonstrating a proper chain of custody for them, and he hints that the text messages may have been manipulated.

"Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done." (Internal quotation marks omitted.) *Catalano* v. *Falco*, 74 Conn. App. 86, 88, 812 A.2d 63 (2002). "The [party opposing admission] has the obligation of affirmatively showing that the evidence was in some way tampered with, altered, misplaced, mislabeled or otherwise mishandled to establish an abuse of the court's discretion in admitting the evidence." (Internal quotation marks omitted.) *State* v. *Russo*, 89 Conn. App. 296, 301, 873 A.2d 202, cert. denied, 275 Conn. 908, 882 A.2d 679 (2005). Moreover, "[a]ny gap or break in the chain of custody goes to the weight of the evidence rather than its admissibility." *Berkshire Bank* v. *Hartford Club*, 158 Conn. App. 705, 713, 120 A.3d 544, cert. denied, 319 Conn. 925, 125 A.3d 200 (2015); see also *State* v. *Barnes*, 47 Conn. App. 590, 595, 706 A.2d 1000 (1998) ("It is not necessary for every person who handled the item to testify in order to establish the chain of custody. It is sufficient if the chain of custody is established with reasonable certainty to eliminate the likelihood of mistake or alteration." [Internal quotation marks omitted.]).

The respondent asserts in his brief: "There are serious concerns . . . that the [mother's] phone was possibly tampered with or altered before [being] given to the [drug enforcement administration] investigative unit, as there was not a proper chain of custody." The respondent, however, has not provided any evidence supporting this allegation. To the contrary, testimonial evidence

from the maternal grandmother and Detective Peter Trahan, supports the court's determination that the chain of custody was sufficiently established. The maternal grandmother testified that she obtained the cell phone as part of the mother's possessions from the hospital, and within approximately an hour handed it over to the Newtown Police Department. Detective Trahan stated that the Newtown Police Department gave the cell phone to Detective Michael Chaves of the Monroe Police Department, who conducted the extraction process. The respondent has failed to establish that the court abused its discretion in admitting as evidence the transcripts of the text messages extracted from the cell phone, and no injustice appears to have resulted from the admission of that evidence.

The judgments are affirmed.

In this opinion the other judges concurred.

NATIONAL WASTE ASSOCIATES, LLC *v.* DANIELLE SCHARF ET AL.
(AC 39617)

Keller, Elgo and Bear, Js.

Syllabus

The plaintiff brought this action against the defendants, its former employees, S and D, and its business competitors, W Co. and O Co., for, inter alia, breach of contract, unjust enrichment and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Connecticut Uniform Trade Secrets Act (CUTSA) (§ 35-50 et seq.) in connection with their alleged improper use of certain confidential information and breach of contractual obligations. S, who had worked in the plaintiff's sales department, had signed a confidentiality and noncompetition agreement in which he agreed, inter alia, not to disclose confidential information or trade secrets of the plaintiff and not to solicit the plaintiff's customers or prospective customers for two years following the termination of his employment. Upon the termination of his employment, S signed a general release with the plaintiff, under which he agreed to abide by the terms of the agreement, and, in return, the plaintiff paid

S $50,000. Thereafter, S worked briefly for O Co. and then was employed by W Co. During that time, S solicited business from a number of the plaintiff's customers, including G Co., which awarded a contract to W Co. following a reverse auction in which the plaintiff had participated. D also was employed by the plaintiff and thereafter was hired by W Co. Pursuant to his employment with the plaintiff, D had signed a confidentiality and noncompetition agreement. The trial court granted in part the motion for summary judgment filed by S, D and W Co., concluding that there was no genuine issue of material fact that the nonsolicitation provision in the agreements with S and D regarding prospective customers was unreasonable and that the provision was enforceable only as to prospective customers that S and D had solicited on behalf of the plaintiff during the six months prior to their departures from the plaintiff. The court also concluded that, as a matter of law, the plaintiff's CUTPA claims were preempted by CUTSA unless the CUTPA claim was not based on a misappropriation of a trade secret. Following a trial, the court rendered judgment in part in favor of the defendants. The court concluded that S had breached his agreement with the plaintiff by soliciting its customers and by successfully securing the G Co. contract for W Co. It awarded the plaintiff $50,000 in restitution, the amount of consideration that the plaintiff had paid S pursuant to the general release. The court, however, concluded that S was not liable under any other theory alleged by the plaintiff. In addition, the court determined that because S's agreement had expired before he was employed by W Co., it was unreasonable to enforce the agreement against W Co. and that the evidence did not support a finding of liability against D or O Co. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's claim that the trial court improperly concluded that its unjust enrichment claims against W Co. and O Co. were barred by the existence of the agreement between the plaintiff and S was unavailing: the plaintiff mischaracterized that court's holding and confused the court's findings as to S with those it made as to W Co. and O Co., as the plaintiff's claim was predicated on two sentences in the section of the court's memorandum decision in which the court, while analyzing the plaintiff's claims against S, determined that the plaintiff could not recover against S in unjust enrichment for breaching the agreement, which was not a sufficient basis for this court to conclude that the trial court barred the subject claims against W Co. and O Co. due to the existence of the agreement, and the trial court, in addressing the plaintiff's claims against W Co. in a separate section of its decision, characterized W Co. as "innocent" and articulated its reasons for finding that enforcement of the agreement against W Co. would be unreasonable under any theory, and in doing so, the court applied an analysis consistent with the broad equitable principles inherent in the doctrine of unjust enrichment; moreover, there was no indication in the record that the court failed to consider all the facts relevant to an unjust enrichment

claim, nor did the record indicate that the court improperly concluded that the plaintiff's unjust enrichment claim against O Co. was barred by the existence of the agreement, and the broad language employed by the court to address the multiple claims brought against O Co. encompassed an examination of the circumstances and conduct of the parties based on the principles of equity and good conscience on which the doctrine of unjust enrichment is based.

2. The trial court's finding that the nonsolicitation provision in the plaintiff's employment agreements with S and D was unenforceable as to prospective customers was not clearly erroneous: contrary to the plaintiff's contention that the court improperly broadened the scope of its summary judgment ruling regarding prospective customers by erroneously finding in its decision after trial that the nonsolicitation provision was unenforceable as to any of the plaintiff's prospective customers, the record demonstrated that the court did not apply a blanket rule in its decision but, instead, examined whether the plaintiff had proved causation and damages with respect to any improper solicitation of prospective customers and concluded that it had not; moreover, the court mentioned the enforceability of the nonsolicitation provision only in the context of the plaintiff's claims against O Co. as to a certain known prospective customer, S Co., and the record contained evidence that substantiated the court's finding that S was unaware that S Co. was a prospective customer of the plaintiff, and, thus, that the provision was unenforceable as to S Co.

3. The plaintiff could not prevail on its claim that the trial court improperly failed to address its CUTPA claims that arose out of the misappropriation of trade secrets on the basis of its erroneous conclusion that CUTSA bars such claims, the trial court having found that the plaintiff did not lose any customers or prospective customers as a result of any misappropriated trade secret, and the plaintiff having failed to challenge that factual finding; moreover, the plaintiff's claim that the trial court improperly failed to consider its CUTPA claims that were unrelated to the misappropriation of trade secrets was unavailing, as there was nothing in the court's decision to suggest that it failed to consider those claims, the court determined that the plaintiff failed to prove causation in that it suffered no ascertainable loss as a result of S's actions, and the court's finding that the plaintiff could not prevail on its CUTPA claims was supported by the evidence and was not clearly erroneous.

Argued January 31—officially released July 31, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where the court,

Dubay, *J.*, granted the plaintiff's motion to cite in Omega Waste Management, Inc., as a party defendant; thereafter, the defendant Omega Waste Management, Inc., was defaulted for failure to appear; subsequently, the court, *Devine*, *J.*, granted in part the motion for summary judgment filed by the named defendant et al.; thereafter, the matter was tried to the court, *Moukawsher*, *J.*; judgment in part for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Richard F. Wareing, with whom were *Anthony J. Natale* and *Angela M. Vickery*, for the appellant (plaintiff).

Douglas P. Needham, for the appellee (defendant Carl Slusarczyk).

Jeffrey F. Allen, pro hac vice, with whom were *Calvin K. Woo* and, on the brief, *Edward P. Hourihan, Jr.*, pro hac vice, and *Mary P. Moore*, pro hac vice, for the appellees (defendant Danielle Scharf et al.).

Opinion

ELGO, J. The plaintiff, National Waste Associates, LLC, appeals from the judgment of the trial court rendered, in part, in favor of the defendants, Danielle Scharf, Carl Slusarczyk, Waste Harmonics, LLC (Waste Harmonics), and Omega Waste Management, Inc. (Omega).[1] On appeal, the plaintiff claims that the court improperly concluded that (1) the plaintiff could not prevail on its unjust enrichment claims, (2) a nonsolicitation provision in agreements between the plaintiff and its former employees was unenforceable as to its prospective customers, and (3) General Statutes § 35-57 (a) bars its claims under the Connecticut Unfair

[1] Omega was defaulted due to its failure to appear and has not participated in this appeal. The plaintiff, however, is challenging the trial court's decision not to award it damages from Omega.

Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We affirm the judgment of the trial court.

The plaintiff commenced this action in August, 2012. The following facts, as found by the trial court or as stipulated to by the parties in their joint trial management report, are relevant to this appeal. The plaintiff, Waste Harmonics, and Omega are waste management brokers that provide waste removal and recycling services for their customers. Slusarczyk began working in the plaintiff's sales department in January, 2000. In 2004, Slusarczyk signed a confidentiality and noncompetition agreement (2004 agreement) in which he agreed, inter alia, not to disclose confidential information or trade secrets of the plaintiff, not to solicit the plaintiff's customers for two years following the termination of his employment or during the pendency of any violation, and not to disparage the plaintiff. In February, 2010, the plaintiff terminated Slusarczyk's employment. Slusarczyk at that time signed a general release with the plaintiff, under which he agreed to abide by the terms of the 2004 agreement, and in return, the plaintiff paid Slusarczyk $50,000.[2] At the time of Slusarczyk's departure, the plaintiff's client list included Guitar Center, Steak and Shake, Safelite, Daltile, and PetSmart.

In 2011, Slusarczyk worked briefly for Omega. During that time, Slusarczyk solicited Guitar Center on behalf of Omega and repeatedly contacted Guitar Center, Steak and Shake, Safelite, and Daltile. Following the commencement of this action, Slusarczyk deleted

[2] In its October 29, 2015 memorandum of decision on the motion for summary judgment filed by Scharf, Slusarczyk, and Waste Harmonics, the court concluded, as a matter of law, that the 2004 agreement between Slusarczyk and the plaintiff was unenforceable for lack of consideration. The court further concluded that the general release Slusarczyk signed in 2010 included the same terms as the 2004 agreement and was supported by consideration and thus enforceable. Those determinations are not at issue in this appeal.

e-mails and destroyed his computer. The court inferred from those actions that the e-mails contained disparaging comments about the plaintiff. In May, 2012, Slusarczyk began working for Waste Harmonics.

Scharf was employed by the plaintiff from 2007 to 2011. Like Slusarczyk, Scharf signed a confidentiality and noncompetition agreement with the plaintiff. In June, 2012, Scharf was hired by Waste Harmonics.

After its contract with the plaintiff expired on June 30, 2012, Guitar Center conducted a reverse auction to select its next waste broker. In the auction, the plaintiff's bid was the highest cost bid, while Waste Harmonics was the third lowest bid. In its May 9, 2016 memorandum of decision, the court found that Guitar Center ultimately awarded the contract to Waste Harmonics as a result of the professional relationship between Slusarczyk and a Guitar Center employee.

As to the plaintiff's other former customers, the court found no credible evidence that Slusarczyk's solicitations resulted in the nonrenewal of their contracts with the plaintiff. More specifically, the court found that Safelite chose to hire haulers directly rather than use a waste broker. Waste Management, the largest waste broker, offered Daltile a deal on landfilling, which Daltile accepted. PetSmart did not renew its contract with the plaintiff, preferring nontraditional recycling services offered by Waste Management. As to Steak and Shake, the court found that the plaintiff offered no evidence as to why its contract was not renewed.

Following the commencement of this action, the parties entered into a stipulated temporary injunction order on October 12, 2012, with respect to the allegedly improper use of certain confidential information and breach of contractual obligations by the defendants. On July 16, 2015, the plaintiff filed a fourth amended

complaint that alleged breach of contract against Slusarczyk and Scharf; unjust enrichment against Waste Harmonics and Omega; tortious interference against Slusarczyk, Scharf, Waste Harmonics, and Omega; civil conspiracy against Slusarczyk and Omega; civil conspiracy against Slusarczyk, Scharf, and Waste Harmonics; violations of the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., against Slusarczyk, Scharf, and Waste Harmonics; and violations of CUTPA against Slusarczyk, Scharf, Waste Harmonics, and Omega. On August 28, 2015, Scharf, Slusarczyk, Waste Harmonics filed a motion for partial summary judgment, which the court granted in part on October, 29, 2015.

A court trial was held over the course of eleven days in the spring of 2016. On May 9, 2016, the court issued its memorandum of decision. The court concluded that Slusarczyk breached his 2004 agreement with the plaintiff by soliciting its customers and by successfully securing the Guitar Center contract for Waste Harmonics. The court determined that the proper measure of damages for that breach was restitution of $50,000, the amount of consideration that the plaintiff paid Slusarczyk in order to keep his promise under the agreement.[3] The court nonetheless concluded that Slusarczyk was not liable under any other theory alleged by the plaintiff. In addition, the court found that although Slusarczyk solicited Steak and Shake, Safelite, Daltile, and PetSmart, he not only was unsuccessful in those efforts, but played no role in the plaintiff's failure to retain them as customers. The court found that Slusarczyk did not use any of the plaintiff's confidential information to secure Murphy Oil and Pilot Travel as clients for Waste Harmonics, who also were prospective clients of the

[3] In light of that determination, the court also ordered Slusarczyk to pay reasonable attorney's fees.

plaintiff. As the court noted in its memorandum of decision, the plaintiff's profit margins were high and uncompetitive. The court also determined that because the "objectively identifiable period of Slusarczyk's nonsolicitation agreement expired before he went to work for Waste Harmonics," it was unreasonable to enforce the 2004 agreement against Waste Harmonics. The court further found that the evidence did not support a finding of liability against Scharf or Omega on any count. This appeal followed.

I

The plaintiff first claims that the court improperly found that its unjust enrichment claims against Waste Harmonics and Omega were barred by the existence of the 2004 agreement between the plaintiff and Slusarczyk. Specifically, the plaintiff claims that a contract with a third party does not bar a claim of unjust enrichment against another party. Although the defendants do not dispute that legal principle, they contend that the plaintiff mischaracterizes the court's holding and confuses the court's findings made as to Slusarczyk with the findings it made as to Waste Harmonics and Omega. We agree with the defendants.

It is well established that "[u]njust enrichment is a very broad and flexible equitable doctrine that has as its basis the principle that it is contrary to equity and good conscience for a defendant to retain a benefit that has come to him at the expense of the plaintiff. . . . All the facts of each case must be examined to determine whether the circumstances render it just or unjust, equitable or inequitable, conscionable or unconscionable, to apply the doctrine." (Citations omitted.) *Gagne* v. *Vaccaro*, 255 Conn. 390, 409, 766 A.2d 416 (2001). "Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the

benefits, and (3) that the failure of payment was to the plaintiffs' detriment. . . . Our review of the trial court's conclusion that the defendant was unjustly enriched is deferential. The court's determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings . . . that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . This limited scope of review is consistent with the general proposition that equitable determinations that depend on the balancing of many factors are committed to the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 451–52, 970 A.2d 592 (2009).

The plaintiff's assertion that the court improperly barred its unjust enrichment claims as to Waste Harmonics and Omega is predicated on two sentences of the court's memorandum of decision, in which the court was analyzing the plaintiff's claims against Slusarczyk. The court stated: "[The plaintiff's] unjust enrichment claim[s] cannot hand Guitar Center's money to [the plaintiff] either. The misconduct at issue is covered by the contract, and as the Supreme Court affirmed in 2009 in *New Hartford* v. *Connecticut Resources Recovery Authority*, [supra, 291 Conn. 455], an action for unjust enrichment cannot lie in the face of an express contract." (Internal quotation marks omitted.) On the basis of those statements alone, we cannot conclude that the court barred the plaintiff's unjust enrichment claims against Omega and Waste Harmonics due to the existence of Slusarczyk's 2004 agreement with the plaintiff. As we read those statements, the court merely determined that the plaintiff could not recover *against Slusarczyk* in unjust enrichment for breaching the

agreement with the plaintiff as a result of his solicitation of Guitar Center. Indeed, those statements were made in a section of the court's decision entitled "He [Slusarczyk] won Guitar Center for Waste Harmonics by breaking his promise," which section was devoted to determining the amount of damages the plaintiff was entitled to as a result of that breach. In this section, the court found that the plaintiff's contract with Guitar Center expired in 2012 and that Slusarczyk solicited and secured the Guitar Center contract for Waste Harmonics based on his rapport with a Guitar Center employee.

Furthermore, the court addressed all of the plaintiff's claims against Waste Harmonics later in its memorandum of decision in a separate section entitled "Waste Harmonics is Innocent." In that section, the court found that it would be unreasonable to hold Waste Harmonics liable for Slusarczyk's breach of contract when "[t]he objectively identifiable period of Slusarczyk's nonsolicitation agreement expired before he went to work for Waste Harmonics." The court also found that "[i]t is not reasonable to hold an employer responsible for something it did not know, with reference to an agreement it did not sign, about which it would be ill-equipped to judge." Because the court clearly found that it was not reasonable to enforce the 2004 agreement against Waste Harmonics "under any theory—conspiracy, agency or anything else," we will not presume that the court failed to consider the plaintiff's unjust enrichment claim against Waste Harmonics.

By characterizing Waste Harmonics as "innocent" and articulating its reasons for finding that enforcement of the 2004 agreement against Waste Harmonics would not be reasonable, the court applied an analysis consistent with the broad equitable principles inherent in the doctrine of unjust enrichment. "[A] right of recovery under the doctrine of unjust enrichment is essentially

equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard." (Citations omitted; internal quotation marks omitted.) *Gagne* v. *Vaccaro*, supra, 255 Conn. 408–409.

Even if the court addressed the plaintiff's unjust enrichment claim against Waste Harmonics on the merits, the plaintiff alternatively argues that the court committed reversible error by failing to consider all the facts relevant to an unjust enrichment claim and only considered Waste Harmonic's innocence. There is no indication in the record before us, however, that the court did so. In its memorandum of decision, the court specifically stated that it considered all of the disputed evidence. In this regard, we are mindful that "our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Citations omitted; internal quotation marks omitted.) *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013).

In addition, we note that the court addressed the plaintiff's claims against Omega in a section of its memorandum of decision entitled "Omega: Damage cannot be assessed where it does not exist." In that section, the court concluded that "[t]o the extent [the plaintiff] claims Omega profited from Slusarczyk's wrongdoing, no damage from the wrongdoing can be calculated if there was no wrongdoing. . . . [The plaintiff's] claims against Omega derive solely from Slusarczyk's wrongs,

so there can hardly be damages assessed where none was caused." Although unjust enrichment is not rooted on a theory of wrongdoing, the broad language employed by the court to address the multiple claims brought against Omega encompasses an examination of the circumstances and conduct of the parties based on the principles of equity and good conscience on which the doctrine of unjust enrichment is based. See *Gagne* v. *Vaccaro*, supra, 255 Conn. 408–409. There is no indication from the court's decision, either in the section discussing Omega or in the section regarding Slusarczyk that contains the language at issue in this claim, that the court improperly concluded that the plaintiff's unjust enrichment claim against Omega was barred by the existence of the 2004 agreement between the plaintiff and Slusarczyk. Accordingly, the plaintiff's claim fails.

II

The plaintiff next claims that the court erroneously concluded that the nonsolicitation provision in its employment agreements with Slusarczyk and Scharf was unenforceable as to prospective customers (prospects). We disagree.

Connecticut law recognizes that "[b]y definition, covenants by employees not to compete with their employers after termination of their employment restrain trade in a free market. . . . Consequently, these covenants may be against public policy, and, thus, are enforceable only if their imposed restraint is reasonable, an assessment that depends upon the competing needs of the parties as well as the needs of the public." (Citation omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 761, 905 A.2d 623 (2006). Analysis of the validity and enforceability of such covenants entails a fact-specific inquiry. As our Supreme Court has

explained, "[t]he five factors to be considered in evaluating the reasonableness of a restrictive covenant ancillary to an employment agreement are: (1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interests." *Robert S. Weiss & Associates, Inc.* v. *Wiederlight*, 208 Conn. 525, 529 n.2, 546 A.2d 216 (1988).

The parties submit, and we agree, that the clearly erroneous standard of review governs the finding of the trial court as to the enforceability of a restrictive covenant in an employment agreement. Pursuant to that standard, "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 221, 919 A.2d 421 (2007).

The provision in the plaintiff's employment agreements with Slusarczyk and Scharf is entitled "Non-solicitation of Customers/Prospects" and provides that "[f]or a period of two (2) years following the date of separation of employment from [the plaintiff] (for any reason), Employee shall not directly or indirectly solicit or otherwise seek to perform any competitive business with, or engage in any competitive business with, any clients or customers to whom [the plaintiff] has at any time prior to the date of Employee's separation of employment rendered services or sold products, or to whom [the plaintiff] has attempted to sell services or

products during the six (6) months prior to Employee's separation of employment with [the plaintiff]."

In their memorandum of law in support of their motion for summary judgment, Slusarczyk, Scharf, and Waste Harmonics argued that Slusarczyk and Scharf were entitled to judgment as a matter of law on the plaintiff's breach of contract claims because the nonsolicitation provision in Slusarczyk's and Scharf's employment agreements was unreasonably overbroad and provided no clarity as to which of the thousands of the plaintiff's prospects they were prohibited from soliciting. In its October 29, 2015 memorandum of decision on the motion for summary judgment, the court concluded that there was no genuine issue of material fact that the "very broad restriction" on prospects of the plaintiff was unreasonable. It stated: "Six months is not per se unreasonable, but without either defining prospects or applying it only to those the employee knows about, this provision sets itself up to be crushing. How can an employee obey such a restriction without knowing who the prospects are? Nothing about what has happened here changes that the language is subject to the kind of abuse that would result if an ex-employee can be charged for soliciting the recipients of an e-mail blast or other broad sweeping solicitation." In granting the motion for summary judgment in part, the court determined that it "will only enforce the restriction on business prospects to the extent that it relates to employer attempts to sell services or products through the employee covered by the restriction."

Approximately six months later, the court, in in its May 9, 2016 memorandum of decision, made an isolated reference to the unreasonableness of the restriction regarding prospects. In a section of the decision entitled "Omega: Damage cannot be assessed where it does not exist," the court remarked that "[w]here [the plaintiff]

claims Omega won Sonic's business by virtue of Slusarczyk breaching his nonsolicitation agreement, it is fatal to any damage claim that there was no such breach since Sonic was a mere prospect and the agreement is unenforceable as to prospects."

On appeal, the plaintiff argues that the court's finding in its May 9, 2016 decision that the nonsolicitation provision was unenforceable as to prospects was clearly erroneous because the evidence at trial demonstrated that the restriction was reasonable and enforceable. The plaintiff also argues that the court ignored its ruling on the motion for summary judgment in which it held that the nonsolicitation provision was enforceable as to the plaintiff's prospects solicited by Slusarczyk and Scharf on behalf of the plaintiff during the six months prior to their departures from the plaintiff.

In its ruling on the motion for summary judgment, the court limited the enforceability of the nonsolicitation provision to a narrow range of prospects, specifically those to which Slusarczyk and Scharf attempted to sell products or services during their employ with the plaintiff within six months of departure. Relying on this determination, the plaintiff argues that the court improperly broadened the scope of its summary judgment ruling by erroneously finding in its May 9, 2016 decision that the nonsolicitation provision was unenforceable as to any of the plaintiff's prospects.

The plaintiff cannot prevail on its claim that the court abandoned its summary judgment ruling and was precluded from considering any of its claims relating to the wrongful solicitation of prospects. Contrary to the plaintiff's contention, the record demonstrates that the court did not apply a blanket rule in its May 9, 2016 decision that the provision was unenforceable as to prospects. Rather, in its decision, the court examined whether the plaintiff proved causation and damages

with respect to any improper solicitation of the plaintiff's prospects and concluded that it had not. The court found that Murphy Oil and Pilot Travel were "only prospects" and that there was no evidence that Slusarczyk used any secret information about them to win their business for Waste Harmonics. The court determined that it was not a secret that Murphy Oil's contract with the plaintiff had ended and that the plaintiff only had an 8.33 percent chance of winning the accounts. The court also determined that "[t]here is also no evidence that any misappropriated trade secret played any role in Slusarczyk's approaches to Music & Arts and Sonic."

The court further concluded that "[n]ot much changes by looking at [the plaintiff's] claims in tort, trade and trade secret violations. . . . [N]othing changes about any [prospects], because [the plaintiff] has not shown that any misconduct cost it any specific customer." The court also noted that an examination of the plaintiff's "other weakly presented prospects yields nothing further. Just because [the plaintiff] has strewn a variety of additional company names across the record does not mean they all merit individual scrutiny. Suffice it to say that the court has reviewed them against the range of claims [the plaintiff] has brought, but finds no support for the combination of factors that would have to be proved for it to recover under any theory . . . ."

The court mentioned the enforceability of the nonsolicitation provision only in the context of the plaintiff's claims against Omega as to the prospect known as Sonic. The court stated that "it is fatal to any damage claim that there was no such breach since Sonic was a mere prospect and the agreement is unenforceable as to prospects." The court provided no factual background involving Sonic and did not state whether Sonic was a prospect of which Slusarczyk had knowledge and had solicited while he was employed by the plaintiff or whether Sonic was a prospect about which Slusarczyk

was unaware and was merely part of a broad sweeping solicitation. When read in the context of the entire decision, in which the court examined the broad range of claims brought regarding various prospects and ultimately determined that the plaintiff could not prevail under any theory, and mindful that we do not presume error on the part of the trial court; see *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 197, 128 A.3d 901 (2016); it is apparent that the court, albeit unartfully, stated that Slusarczyk was unaware that Sonic was a prospect of the plaintiff, and, therefore, the provision was unenforceable regarding Sonic. Although conflicting evidence was presented at trial, the record contains evidence that substantiates that finding, as Slusarczyk testified that during his employment with the plaintiff, Sonic was not a customer and he had no knowledge of whether Sonic was a prospect. In light of the foregoing, we conclude that the court's finding that the nonsolicitation provision in the plaintiff's employment agreements with Slusarczyk and Scharf was unenforceable as to prospects was not clearly erroneous.

III

As a final matter, the plaintiff claims that the court failed to address its CUTPA claims because it improperly concluded that § 35-57 (a) bars such claims. We are not persuaded.

General Statutes § 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property . . . as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . . The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper." "The ascertainable loss requirement is a threshold barrier [that] limits the class of persons who may bring a CUTPA

action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation." (Internal quotation marks omitted.) *Neighborhood Builders, Inc.* v. *Madison*, 294 Conn. 651, 657, 986 A.2d 278 (2010).

"It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] . . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Citation omitted; internal quotation marks omitted.) *IN Energy Solutions, Inc.* v. *Realgy, LLC*, 114 Conn. App. 262, 273–74, 969 A.2d 807 (2009). "To the extent that [an appellant] is challenging the trial court's interpretation of CUTPA, our review is plenary. . . . [W]e review the trial court's factual findings under a clearly erroneous standard." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 656, 850 A.2d 145 (2004).

In its complaint, the plaintiff claimed that Slusarczyk and Scharf violated CUTPA by misappropriating the plaintiff's trade secrets and using confidential information to solicit its customers and prospects to do business with Omega and/or Waste Harmonics. The plaintiff

also alleged that Waste Harmonics and Omega violated CUTPA by misappropriating the plaintiff's trade secrets and soliciting the plaintiff's actual customers and prospects in furtherance of financial gain and profits. In its October 29, 2015 memorandum of decision on the defendants' motion for summary judgment, the court concluded, as a matter of law, that the plaintiff's CUTPA claims were preempted by CUTSA unless the CUTPA claim was not based on a misappropriation of a trade secret. Following trial, the court, in its May 9, 2016 memorandum of decision, stated that "[a]s previously held, nothing about [trade] secrets can be brought outside the contract and [CUTSA] because . . . § 35-57 (a) . . . preempts everything but the contract claim."

On appeal, the plaintiff argues that the court erred in holding that CUTSA bars its CUTPA claims that arise out of the misuse or misappropriation of trade secrets. The plaintiff contends that § 35-57 (a) does not preempt CUTPA claims arising out of the same facts. It also argues that the court failed to consider its CUTPA claims, even those unrelated to trade secrets, such as its claim that Slusarczyk and Scharf violated their post-termination obligations by systematically soliciting the plaintiff's customers and prospects.

We need not address the issue of whether a CUTPA claim based on misappropriation of a trade secret conflicts with CUTSA[4] and, therefore, is superseded by it. The court addressed the issue of misappropriation of trade secrets and found that the plaintiff did not lose any customers or prospects as a result of any misappro-

[4] General Statutes § 35-57 (a) provides: "Unless otherwise agreed by the parties, the provisions of this chapter supersede any conflicting tort, restitutionary, or other law of this state pertaining to civil liability for misappropriation of a trade secret."

General Statutes § 35-57 (b) provides in relevant part: "This chapter does not affect: (1) Contractual or other civil liability or relief that is not based upon misappropriation of a trade secret . . . ."

priated trade secret.[5] The plaintiff does not challenge that factual finding. Specifically, the court found that Slusarczyk secured the Guitar Center contract for Waste Harmonics but that he did not misappropriate any trade secrets in order to do so. The court determined that, prior to Slusarczyk's departure from the plaintiff, Elena Boone, a Guitar Center employee, knew that the plaintiff was concealing its markup, and thus only that information could have informed Slusarczyk's solicitation of Guitar Center. The court also found that even if Slusarczyk misappropriated a trade secret when it informed Safelite via e-mail that it could obtain a 30 percent savings, the plaintiff did not lose this customer as a result of Slusarczyk, and, in any event, neither Omega nor Waste Harmonics obtained Safelite as a customer. Regarding prospects, the court found that the plaintiff had not shown that "any misconduct cost it any specific customer" nor has it "shown that any trade secret information was used to win any prospect . . . ." The court also found that there was no evidence that Slusarczyk used any misappropriated trade secret in his dealings with Music & Arts, Sonic, Murphy Oil or Pilot Travel.

The plaintiff argues that the court failed to consider its CUTPA claims that Slusarczyk and Scharf violated CUTPA by systematically violating posttermination obligations. There is nothing in the court's decision to suggest that the court failed to consider the plaintiff's CUTPA claims that were unrelated to trade secrets. In broad strokes, the court rejected a multitude of claims raised by the plaintiff and concluded that most of the damages the plaintiff sought were "unreasonable," because the plaintiff had not shown that it had lost any customer or prospect as a result of Slusarczyk's actions. The court found that the only damages that the plaintiff was entitled to was "limited relief" in the form of $50,000

[5] The plaintiff's CUTPA claim was based, in part, on the same basic facts, namely, misappropriation of trade secrets, as its CUTSA claim.

in restitution for Slusarczyk's breach of contract and concluded that "not much changes" when the plaintiff's other claims, sounding in trade secret violations, CUTPA violations, and tort are examined. The court stated: "First, nothing changes about the customers [the plaintiff] lost because it has not proved that, but for any wrong, that it would still have any of these customers. Second, nothing changes about any [prospects], because [the plaintiff] has not shown that any misconduct cost it any specific customer." The court found that the plaintiff "did not lose much of anything to Waste Harmonics other than a valuable salesman." Although the court discussed many claims only in general terms, at its essence, the court found that the plaintiff did not prove damages beyond the $50,000 in restitution and reasonable attorney's fees. Essentially, the court determined that the plaintiff failed to prove causation in that it suffered no ascertainable loss as a result of Slusarczyk's actions.

As our Supreme Court has explained, "in the business context, a plaintiff asserting a CUTPA claim may satisfy the ascertainable loss requirement of § 42-110g by establishing, through a reasonable inference, or otherwise, that the defendant's unfair trade practice has *caused* the plaintiff to lose potential customers." (Emphasis added.) *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 643–44, 698 A.2d 258 (1997). Additionally "in order to prevail in a CUTPA action, a plaintiff must establish . . . that the prohibited act *was the proximate cause of harm* to the plaintiff." (Emphasis added; internal quotation marks omitted.) *Abrahams* v. *Young & Rubicam, Inc.*, 240 Conn. 300, 306, 692 A.2d 709 (1997).

The court's rejection of the plaintiff's claim that Slusarczyk's violations of the 2004 agreement amounted to a CUTPA violation was not clearly erroneous. The court's related findings demonstrate that the plaintiff had not proven a loss as a result of Slusarczyk's actions.

With respect to Guitar Center, the court found that "[the plaintiff] has not offered evidence to show that after coming in last in the auction it had some chance at winning the business. So, Slusarczyk's wrongs did not deprive [the plaintiff] of Guitar Center's business." The court determined that the plaintiff's 46 percent profit margin with Steak and Shake may suggest a reason for Steak and Shake's decision not to renew; that the plaintiff "was not even in the running for Safelite" and Safelite chose to hire its haulers directly; the plaintiff lost Daltile's business because it did not compete for renewal; it was reasonable to infer that the plaintiff's 43 percent profit margin with PetSmart or Waste Management's recycling offer played a role in the plaintiff's loss of PetSmart's business; the plaintiff only had a 8.33 percent chance of winning the Pilot Travel and Murphy Oil accounts; and the plaintiff's profit margins were uncompetitive. The court determined that additional companies mentioned by the plaintiff did not merit individual scrutiny and that the plaintiff had not proven recovery under any theory.

Additionally, the court determined that Slusarczyk's actions constituted "limited wrongs" by him. The court examined the businesses that Slusarczyk solicited and determined that he won Guitar Center's business for Waste Harmonics but that "Slusarczyk's wrongs did not deprive [the plaintiff] of Guitar Center's business." The court reasonably could have concluded that Slusarczyk's actions in soliciting customers amounted to nothing more than a failure to deliver on a promise, which in the absence of aggravating unscrupulous conduct, did not amount to a CUTPA violation. The court concluded that "[g]iven the actual magnitude of the wrong done here, the length and breadth of this lawsuit is more likely explained by commercial rivalry and a bitter break between employer and employee. Courts should respect postemployment agreements when they are

used as shields but not when they are used as swords." "[N]ot every contractual breach rises to the level of a CUTPA violation." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 228, 990 A.2d 326 (2010). "[A]bsent substantial aggravating circumstances, simple breach of contract is insufficient to establish [a] claim under CUTPA." *Lydall, Inc.* v. *Ruschmeyer*, supra, 282 Conn. 248.

The court determined that Waste Harmonics was "innocent" and that it was not reasonable to enforce the terms of Slusarczyk's 2004 agreement againt Waste Harmonics "under any theory." The court found that the "objectively identifiable [two year] period of Slusarczyk's nonsolicitation agreement expired before he went to work for Waste Harmonics. Michael Hess, Waste Harmonic's [chief executive officer], confirmed this before hiring Slusarczyk." The "limited wrongs" the court found Slusarczyk to have committed, which did not include a violation of CUPTA, rested on his violation of the 2004 agreement, but the court found that Waste Harmonics was not responsible for Slusarczyk's violations. The court's finding that Waste Harmonics did not violate CUTPA was not clearly erroneous.

Furthermore, the court rejected the plaintiff's claim against Omega and determined that "no damage from the wrongdoing can be calculated if there was no wrongdoing." The court also determined that the plaintiff's claims for damages against Scharf were discharged in bankruptcy, and the plaintiff does not challenge this finding. We therefore conclude that the court's finding that the plaintiff could not prevail on its CUTPA claims was supported by the evidence and, thus, was not clearly erroneous. Additionally, the court did not err as to the law in its analysis of the plaintiff's CUTPA claims.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JERZY G.*
(AC 36586)

Elgo, Bright and Beach, Js.

Syllabus

The defendant, a Polish national who had been charged with sexual assault in the fourth degree and had been granted permission to participate in the statutory (§ 54-56e) pretrial diversionary program of accelerated rehabilitation, appealed to this court after the trial court terminated the order of accelerated rehabilitation and denied his motion to dismiss the charge against him. At the hearing on the application for the accelerated rehabilitation program, the state brought to the trial court's attention that it had received information from United States Immigration and Customs Enforcement that the defendant had overstayed his visa. The court did not reference the defendant's immigration status when it granted the defendant's application for accelerated rehabilitation in April, 2012, imposed a two year period of supervision with certain conditions, which included mental health and substance abuse evaluation and treatment, and released the defendant from custody. The defendant was deported to Poland in August, 2012, and was prohibited from entering the United States for a period of ten years from his departure date. In November, 2013, after the defendant's deportation was brought to the trial court's attention, it denied the defendant's motion to dismiss the sexual assault charge and terminated his participation in the accelerated rehabilitation program. Subsequently, the defendant appealed to this court, which dismissed the appeal as moot, and the defendant, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and remanded the case to this court to consider the merits of his appeal. On remand, *held*:

1. The trial court did not abuse its discretion in finding that the defendant had not successfully completed probation and, thus, properly denied his motion to dismiss the criminal charge; a defendant who has been granted accelerated rehabilitation is entitled to a dismissal of the criminal charges against him only if the trial court properly finds that he has satisfactorily completed his period of probation, and there was nothing in the record to suggest that the defendant had successfully completed his probation or that he even was evaluated for substance abuse or mental health treatment.

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

2. The trial court did not abuse its discretion in terminating the defendant's probation; the record did not show that the issue was properly preserved, as there was no specific objection to the trial court's order terminating probation, and the defendant, instead, appeared largely focused on having his criminal case terminated, and even if the issue was preserved properly, there was nothing in the record to suggest that the trial court's termination of probation was unreasonable, as the defendant was in Poland during the November, 2013 hearing and remained in Poland at the time that the original two year period of probation expired, there was no evidence in the record tending to show the possibility of successful completion had probation not been terminated, and the court expressly stated that it would consider any evidence of the defendant's compliance with the conditions of participation in the accelerated rehabilitation program that might be offered and that it anticipated the possibility of the reinstatement of probation, which would have vitiated any fear of injustice or the harm emanating from it.

Argued January 18—officially released July 31, 2018

Procedural History

Information charging the defendant with the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Iannotti*, *J.*, granted the defendant's application for accelerated rehabilitation; thereafter, the court, *Arnold*, *J.*, denied the defendant's motion to dismiss and terminated the order of accelerated rehabilitation, and the defendant appealed to this court, which dismissed the appeal; subsequently, the defendant, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Affirmed; further proceedings.*

Kelly Billings, assistant public defender, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Marc R. Durso*, senior assistant state's attorney, and *Tiffany M. Lockshier*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. This case returns to us on remand from our Supreme Court with direction to consider the merits of the appeal of the deported defendant, Jerzy G. He challenges the trial court's rulings terminating his participation in the accelerated rehabilitation program and declining to dismiss the criminal charge against him. This court previously dismissed the appeal as moot under *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006). *State* v. *Jerzy G.*, 162 Conn. App. 156, 130 A.3d 303 (2015), rev'd, 326 Conn. 206, 162 A.3d 692 (2017). Holding that *Aquino* does not control the present case, our Supreme Court reversed this court's judgment and remanded the case to this court for further proceedings. *State* v. *Jerzy G.*, 326 Conn. 206, 208–209, 226, 162 A.3d 692 (2017). The parties then filed supplemental briefs. We affirm the trial court's orders declining to dismiss the charge and terminating of probation.

Our Supreme Court recited the following history. "The record reveals the following undisputed facts [and procedural history]. The defendant is a citizen of Poland. In April, 2006, he entered the United States on a nonimmigrant B-2 visitor's visa, which authorized him to remain in this country for a period not to exceed six months. Approximately six years later, in January, 2012, the defendant was charged with one count of sexual assault in the fourth degree, a class A misdemeanor, in violation of General Statutes § 53a-73a (a) (2). The defendant filed an application for the pretrial diversionary program of accelerated rehabilitation, which vests the court with discretion to suspend criminal prosecution for certain offenses and to release the defendant to the custody of the Court Support Services Division for a specified period, subject to conditions the court deems appropriate. See General Statutes § 54-56e (a), (b) and (d). Upon successful completion of the program for the specified period, the defendant would be entitled

to dismissal of the charge. See General Statutes § 54-56e (f). The state opposed the application.

"At an April, 2012 hearing on the application, the state brought information to the court's attention that it had received from United States Immigration and Customs Enforcement (ICE) regarding the defendant's immigration status. ICE informed the state that the defendant had overstayed his visa. ICE indicated that it would commence removal proceedings if the defendant was convicted of the charge, but was uncertain about what would happen if he was not convicted. The state also informed the court that the complainant, an acquaintance of the defendant, had reported that the defendant has a wife and children who are living in Poland.

"Following argument, the trial court, *Iannotti*, *J.*, granted the defendant's application for accelerated rehabilitation and made no reference to the defendant's immigration status. The court made the requisite statutory findings that the offense was not serious and that the defendant was not likely to reoffend. See General Statutes § 54-56e (a) and (b). The court imposed the maximum statutory period of supervision, two years, and the following conditions: no contact with the complainant; mental health evaluation and treatment as deemed necessary; substance abuse (alcohol) evaluation and treatment as deemed necessary; and seek and maintain full-time employment. The court continued the case until April, 2014, when the two year period of probation would terminate upon successful completion of the program. Thereafter, the defendant was released from custody.

"Between May and August, 2012, ICE took steps to remove the defendant from the United States. In May, the defendant was taken into custody by ICE after he was served with a notice to appear. The notice stated

that he was subject to removal because he had remained in the United States for a period longer than permitted, without authorization. In June, a United States Immigration Court ordered his removal from the United States. Following that order, the United States Department of Homeland Security issued a notice to the defendant, warning him that he was prohibited from entering the United States for a period of ten years from his departure date because he had been found deportable under § 237 of the Immigration and Nationality Act; 8 U.S.C. § 1227 (2012); and ordered him removed from the United States. In August, 2012, the defendant was deported to Poland.

"In November, 2013, the defendant's deportation was brought to the trial court's attention. Upon the request of the Department of Adult Probation, the court, *Arnold*, *J.*, advanced the date for a determination [of] whether the defendant had successfully completed the terms of his accelerated rehabilitation from April, 2014, to November, 2013. At the hearing, the state sought termination of the program and requested an order for the defendant's rearrest. The defendant's public defender asked the court either to continue the case to allow further investigation or to find that the defendant had successfully completed the program and dismiss the criminal charge. Ultimately, following additional hearings, the court found that the defendant had failed to successfully complete the program, ordered his rearrest, and imposed as a condition of his release that he post a $5000 cash or surety bond.

"The court explained its decision in a subsequent memorandum of decision, couching its reasoning in both jurisdictional and substantive terms. It noted that the state had informed the court that the basis for the defendant's deportation was that he had overstayed his visa's term. It thus found that the defendant voluntarily had placed himself in jeopardy for deportation and was

aware of this possibility when accelerated rehabilitation was ordered for the two year period. It found that the defendant had offered no proof that his deportation was solely a consequence of either his arrest, the pendency of the criminal charge, or his entrance into the accelerated rehabilitation program. The court further noted that the defendant had not offered any proof of compliance with the conditions of participation in that program. The trial court cited [our Supreme Court's] decision in *Aquino* and concluded: 'The immigration consequences of the defendant are collateral and beyond the control of [the] court. The court found that the defendant was unsuccessful in his completion of the . . . program and has terminated his participation in said program.' . . .

"[This court] did not reach the merits of [the defendant's] claims, concluding that the appeal should be dismissed as moot. . . . The court cited *Aquino* and its Appellate Court progeny as prescribing a rule under which the court cannot grant practical relief unless there is evidence that the challenged decision is the exclusive basis for the deportation. . . . The defendant's certified appeal to [our Supreme Court] followed." (Citations omitted.) *State* v. *Jerzy G.*, supra, 326 Conn. 209–12.

On appeal, our Supreme Court narrowed its holding in *Aquino* and concluded that *Aquino* did not apply to the present case. Rather, the mootness issue was properly determined by application of the "traditional collateral consequences standard," as articulated in *State* v. *McElveen*, 261 Conn. 198, 802 A.2d 74 (2002), and *Housing Authority* v. *Lamothe*, 225 Conn. 757, 627 A.2d 367 (1993). *State* v. *Jerzy G.*, supra, 326 Conn. 213–26. Applying that standard, our Supreme Court held that the defendant's appeal was not moot and remanded to this court to consider the merits of his appeal. Id., 226.

In doing so, we first set out our standards of review. To the extent that we are called upon to interpret the provisions of § 54-56e, our review is plenary. See *State* v. *Kevalis*, 313 Conn. 590, 599, 99 A.3d 196 (2014). We review the court's rulings regarding a defendant's participation in the accelerated rehabilitation program for an abuse of discretion. See *State* v. *Callahan*, 108 Conn. App. 605, 611, 949 A.2d 513, cert. denied, 289 Conn. 916, 957 A.2d 879 (2008). "Our review of the trial court's exercise of its discretion is limited to the questions of whether the court correctly applied the law and whether it could reasonably conclude as it did. . . . It is only where an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion. . . . Every reasonable presumption will be given in favor of the trial court's ruling. . . . The trial court's findings of fact [underlying a termination] are entitled to great deference and will be overturned only upon a showing that they were clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id.

"[Section] 54-56e . . . provides for a pretrial program for accelerated rehabilitation when the accused: is charged with crimes or violations that are not of a serious nature but are punishable by a term of imprisonment; has no previous record of conviction of a crime or of certain motor vehicle offenses . . . and states under oath that she never has invoked the use of such program. General Statutes § 54-56e (a) and (b). The trial court may, in its discretion, invoke such program upon application of the accused or the state's attorney, provided the court believes that the person probably will not offend in the future. General Statutes § 54-56e (b). Any defendant who enters such program: must pay to the court a participation fee of $100; agree to the tolling of any statute of limitations with respect to such crime and to a waiver of the right to a speedy trial; appear in

court and, under such conditions as the court shall order, be placed on probation and released to the custody of the [C]ourt [S]upport [S]ervices [D]ivision of the [J]udicial [B]ranch. General Statutes § 54-56e (d). If the defendant satisfactorily completes the period of probation, the court, on finding such satisfactory completion, shall dismiss the charges. General Statutes § 54-56e (f). Upon dismissal, all records of the charges against the defendant shall be erased. General Statutes § 54-56e (f)." (Footnote omitted.) *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 838–41, 6 A.3d 1142 (2010).

"Accelerated rehabilitation is not a right at all. It is a statutory alternative to the traditional course of prosecution available for some defendants and totally dependent upon the trial court's discretion. . . . In essence, the legislature has declared [an accused] a worthy candidate for a second chance. . . . The purpose of probation is to afford a period during which a penitent offender may be assisted in rehabilitation. . . . Probation is designed to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." (Citations omitted; internal quotation marks omitted.) *State* v. *Fanning*, 98 Conn. App. 111, 116, 908 A.2d 573 (2006), cert. denied, 281 Conn. 904, 916 A.2d 46 (2007).

Our analysis is complicated somewhat by a trial court record that does not precisely identify the specific sequence and timing of motions. As noted in the prior history, the court, *Iannotti*, *J.*, granted accelerated rehabilitation. Noting that the defendant had already been incarcerated for four months on a misdemeanor charge, the court prescribed a period of probation for two years, with special conditions of no contact with the complainant, mental health evaluation and treatment as may be determined, substance abuse evaluation and

treatment, and seeking and maintaining full-time employment.

Although there were no court proceedings for one and one-half years, the defendant reportedly was detained by ICE in May, 2012, and deported in August, 2012. His deportation was brought to the attention of the court, *Arnold*, *J.*, in November, 2013, and the date for the defendant to appear in court regarding his probation status was "advanced" to November 22, 2013. On that date, the defendant, having been deported, did not appear. His attorney initially requested a continuance to enable her to investigate the circumstances. The state requested that the probation be terminated, whereupon the defendant requested that the case be dismissed because of successful completion of the probationary period; the court summarily denied the motion that the case be dismissed. The court issued a rearrest warrant, which it later vacated. It is not clear from the court's discussion with counsel whether there was a distinct ruling on the state's motion to terminate probation:

"[The Prosecutor]: According to probation . . . the report states that the [defendant] has been deported to Poland as of [August 16, 2012] and . . . this has been confirmed by immigration. Please terminate this [accelerated rehabilitation].

"The Court: All right. Well, we can terminate the [accelerated rehabilitation], that's not the problem. The problem is we still have a case to dispose of. . . .

"[Defense Counsel]: Would Your Honor consider a dismissal?"

As of November 22, 2013, then, there was no specific objection to the termination of the probation and the court never specifically ruled on the request for a continuance, though a termination of probation may be tantamount to a denial of a motion for a continuance.

The concern was how or whether to proceed further with the case.

On January 28, 2014, the court held a hearing at the request of the defendant's attorney for a waiver of fees and appointment of counsel to appeal from the termination of probation. After again denying the motion to dismiss the criminal case, the court continued the matter until such time as it could be determined that the defendant himself actually wanted to appeal.

On February 11, 2014, the court vacated the rearrest order. The court and counsel further discussed the unresolved issues presented by the case; at that point, the parties did not know the basis for the defendant's deportation. The court expressed a willingness to revisit the issue of termination of probation: "Probation didn't say he was unsuccessful because he didn't do the counseling . . . or didn't fulfill the conditions. His deportation has . . . made that impossible, more likely than not. There might [be] need [for] further exploration from probation as to whether or not he was in the process of successfully completing those conditions . . . . So I would hear other argument on that on another day if anybody was moving to reinstate the [accelerated rehabilitation]. . . . So I see no reason, lacking any evidence presented that he was deported solely because of the [accelerated rehabilitation], to reinstate the [accelerated rehabilitation] program. It remains terminated. . . . By the next court date, the court can always take remedial action and reinstate it if somebody could show that he was successful and he's back here and wants to complete the program but, until that time, it remains terminated."

The defendant's attorney reported that she had spoken with the defendant, who was in Poland. He reportedly confirmed that he did want to pursue the appeal and that he had been detained by ICE agents when he

reported for his intake processing at the Office of Adult Probation. The court granted the request for appointment of counsel and waiver of fees and costs for appeal.

The final court proceeding occurred on April 21, 2014, the original continuation date after the granting of accelerated rehabilitation.[1] At that appearance, the parties reported that the defendant had been deported because he had overstayed his visa; the present case apparently had no effect on the decision to deport. A rearrest was ordered. There was no indication that the defendant was anywhere other than Poland.

We first consider the defendant's claim that the court improperly denied his motion to dismiss the criminal charge. We conclude from our review of the proceedings that the court clearly denied the defendant's efforts to have the criminal charge dismissed and that the defendant's claim on appeal regarding the motion to dismiss was presented to the trial court and, thus, was preserved. We also can ascertain the basis for the court's ruling: there was no evidence before the court that the defendant had successfully completed the probationary period.

A defendant who has been granted accelerated rehabilitation is entitled to a dismissal of the criminal charges against him only if the court properly finds that he has satisfactorily completed his period of probation. General Statutes § 54-56e (f); *State* v. *Fanning*, supra, 98 Conn. App. 115, 119. There is nothing in the record before us to suggest that the defendant successfully completed his probation or, for that matter, that he even was evaluated for substance abuse or mental health treatment. The defendant's principal claim is that his

[1] As is typical, the continuation date was set to coincide with the end of the defendant's probation so that the court could determine if the defendant had successfully completed the conditions of his probation. If so, the court would dismiss the case against the defendant.

deportation was not wilful on his part,[2] and he, therefore, did not wilfully violate a term of probation. In the context of accelerated rehabilitation, however, the sole criterion is successful completion. See, e.g., *State* v. *Fanning*, supra, 120; see *State* v. *Kevalis*, supra, 313 Conn. 600–601; see also *State* v. *Trahan*, 45 Conn. App. 722, 732, 697 A.2d 1153 ("[i]f the trial court determines that the defendant did not fulfill the conditions of probation, the charges will not be dismissed and the defendant may be required to go to trial" [internal quotation marks omitted]), cert. denied, 243 Conn. 924, 701 A.2d 660 (1997). The court did not abuse its discretion in finding that the defendant had not successfully completed probation and, thus, properly denied the motion to dismiss the criminal charge.

We likewise find no abuse of discretion in the trial court's decision to terminate the defendant's probation. First, the record does not show that the issue was properly preserved. As noted previously in this opinion, there was no specific objection to the order terminating probation on November 22, 2013; the defendant appeared largely focused on having the criminal case terminated as well. "[B]ecause the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 500, 122 A.3d 542 (2015).

[2] Contrary to the defendant's position, in the pretrial context, pursuant to § 54-56e, the state does not have the burden of proving that probation was not successfully completed. For an extended discussion of the differences between pretrial probation and postconviction probation, see generally *State* v. *Kevalis*, supra, 313 Conn. 598–609; see also *State* v. *Fanning*, supra, 98 Conn. App. 117–20.

Assuming proper preservation, however, there also is nothing in the record to suggest that the trial court's termination of probation in November, 2013, was unreasonable. At that point, the defendant was in Poland; indeed, the reason for terminating probation was an apparent inability to comply with the conditions.[3] The two year probation was to expire on April 21, 2014, and the record shows that the defendant was still in Poland: there is nothing to suggest that the defendant would have satisfactorily completed the probationary period had it not been terminated. The two year period of probation has expired, in any event, and there is no evidence in the record tending to show the possibility of successful completion had probation not been terminated.

After vacating the rearrest at the February 11, 2014 hearing, the court indicated that at the next court date, it would consider "tak[ing] remedial action and reinstat-[ing] [the accelerated rehabilitation program] if somebody could show that [the defendant] was successful and he's back here and wants to complete the program, but, until that time, it remains terminated." At the April 21, 2014 hearing, there was no evidence that the defendant had successfully completed the program. In its memorandum of decision, the court also noted that "[t]he defendant's counsel offered no evidence that the defendant was participating in mental health evaluation and treatment and substance abuse evaluation and treatment . . . in his native Poland; nor was there any proof that he was maintaining or seeking full-time employment." Although there was no evidence regarding the defendant's compliance, the court expressly stated that it would consider any evidence that might be offered, and the court anticipated the possibility of the "reinstatement" of probation, which would vitiate

[3] There has been no suggestion that the defendant's probation was transferred to Poland or in any way executed in Poland.

any fear of injustice or the harm emanating from it. There is, of course, potential harm in the pendency of the criminal charge, but we have already determined that the court properly declined to dismiss the case.[4]

Given these circumstances, we hold that the trial court's decision to terminate probation was a reasonable application of our law and did not result in injustice to the defendant.[5] See *State* v. *Callahan*, supra, 108 Conn. App. 611. Therefore, the trial court did not abuse its discretion in terminating the defendant's probation.

The judgment is affirmed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

MATTHEW M. MARTOWSKA *v.* KATHRYN R. WHITE (AC 39970)

Alvord, Sheldon and Bear, Js.

Syllabus

The plaintiff filed an application seeking joint custody of the parties' minor child. After the trial court rendered judgment granting joint legal custody to the parties and visitation rights to the plaintiff, the plaintiff filed a motion seeking enforcement of certain visitation orders contained in the court's decision. As part of an agreement to resolve that motion, the parties agreed to undergo a psychological evaluation, which was filed with the court. Thereafter, the plaintiff sought a copy of the evaluation to use in an unrelated proceeding in Massachusetts. Subsequently, the court issued an order permitting the plaintiff to review the evaluation in the clerk's office but did not allow the plaintiff to have a copy of the evaluation or use its information in any other action. The plaintiff then

[4] We note as well that the defendant's motion for a continuance was requested in November, 2013, in order to give counsel time to investigate the situation. As stated previously, the court did not expressly rule on that motion. The court, however, held several additional hearings and, by April 21, 2014, the expiration date of the original two year period of probation, counsel had been given an opportunity to investigate.

[5] Indeed, if the defendant were to return to court, he presumably would have the opportunity to present evidence regarding successful completion.

appealed to this court, claiming, inter alia, that the court erred in restricting his ability to review the psychological evaluation and that the restriction violated his due process and equal protection rights. *Held* that this court lacked jurisdiction over the plaintiff's appeal, as the postjudgment discovery order from which the plaintiff appealed was not a final judgment; it is well established that interlocutory rulings on motions related to discovery generally are not immediately appealable, and the trial court's order did not satisfy either of the prongs of the test set forth in *State* v. *Curcio* (191 Conn. 27) that governs when an interlocutory order is appealable, as the plaintiff sought the release of a copy of a document prepared in the context of a custody action that no longer was pending and, thus, the resolution of the issue did not constitute a separate and distinct proceeding, and no presently existing right of the plaintiff had been concluded by the court's order prohibiting release of a copy of the psychological evaluation.

Argued May 23—officially released July 31, 2018

Procedural History

Application for joint custody of the parties' minor child, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Epstein*, *J.*; judgment granting, inter alia, joint legal custody to the parties and visitation rights to the plaintiff; thereafter, the parties filed a psychological evaluation with the court; subsequently, the court, *Suarez*, *J.*, ordered, inter alia, that the plaintiff could review but not obtain a copy of the psychological evaluation, and the plaintiff appealed to this court. *Appeal dismissed.*

Matthew M. Martowska, self-represented, the appellant (plaintiff).

Kerry A. Tarpey, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Matthew M. Martowska, appeals from the 2016 postjudgment order of the trial court that, although allowing the plaintiff to inspect a psychological evaluation performed in 2012 as part of a then pending proceeding regarding the parties' custody/visitation matter, prevented the plaintiff from obtaining

a copy of the evaluation. On appeal, the plaintiff raises a number of claims regarding the court's order prohibiting the release of a copy of the 2012 evaluation.[1] We conclude that the postjudgment order at issue is not a final judgment. Accordingly, we dismiss this appeal for lack of subject matter jurisdiction.

Many of the underlying facts and lengthy procedural history of this case are not relevant to the issues on appeal. Accordingly, we provide only the facts and history pertinent to our discussion, some of which are set forth in this court's decision in *Martowska* v. *White*, 149 Conn. App. 314, 87 A.3d 1201 (2014). The plaintiff and the defendant, Kathryn R. White, are the parents of one minor child. The plaintiff filed a custody/visitation application in October, 2005. Id., 316. In 2007, the parties sought final custody and visitation orders, and the court issued a memorandum of decision on October 9, 2007. Id. On January 13, 2012, the plaintiff filed a motion seeking enforcement of visitation orders contained in the court's October, 2007 decision. Id., 317. As part of a February 7, 2012 agreement resolving that motion, the parties agreed to undergo a psychological evaluation "for custodial/parenting plan purposes." Id., 317–18. Both parties submitted to a psychological evaluation, and the evaluation was filed with the court. Id., 318 n.6. The defendant filed a motion to release the psychological evaluation, which the court granted over the plaintiff's objection on January 16, 2013. Id., 319. The court order was stayed pending an appeal to this court. Id. In a decision released April 8, 2014, this court

[1] Specifically, the plaintiff claims that: (1) the court erred in restricting his ability to review the psychological evaluation, (2) such restriction violated his constitutional rights to due process and equal protection, (3) he was improperly denied access to the evaluation on the basis of an "informal notation on file", (4) the court improperly called a status conference in the absence of any pending motions in the case, and (5) the plaintiff's letters to the judges of the Superior Court did not constitute ex parte communications.

affirmed the trial court's order releasing the psychological evaluation, and stated, in a footnote, that "[a]fter today, the evaluation can be released." Id., 324 n.14.

Between May, 2014, and December, 2016, no motions were filed in this custody/visitation matter in the trial court. The plaintiff and his family members did, however, engage in a series of communications with judges and staff of the Superior Court. In November and December, 2014, the plaintiff sent two letters to Delinda Walden of the Hartford Superior Court, seeking confirmation of the following: the plaintiff's mother was denied a copy of the psychological evaluation, neither party may obtain a copy of the evaluation, no third parties may access the evaluation, and Walden is unable to provide a copy of the evaluation for use in a different case pending in Massachusetts. On September 11, 2015, the plaintiff again wrote to Walden inquiring whether he could obtain a copy of the psychological evaluation, and whether he could share the copy with Dr. Denise Mumley in connection with an order of a Massachusetts court. The plaintiff wrote that the psychological evaluation would *"be used in a different case unrelated to [the defendant]"* and further stated that the evaluation "will be shared initially with Dr. Mumley (as part of my evaluation) and thereafter with others." (Emphasis added.) Also on September 11, 2015, the plaintiff's mother sent an e-mail to Walden, inquiring whether the plaintiff would be permitted to obtain a copy of the evaluation. Walden responded in part that Judge Suarez had informed her that "we can only release the evaluation for purposes involving the case here – it is not available for any other purpose. Otherwise [the plaintiff] will need to file a motion."

On October 12, 2016, the plaintiff appeared at the Superior Court to review the 2012 psychological evaluation. According to the plaintiff, he was denied access to the evaluation. The following day, the plaintiff sent

an e-mail to Kevin Diadomo of the Hartford Superior Court, in which he represented that his inquiry was "for the purpose of potentially bringing forward a motion involving the case here in CT, but I needed to review the [evaluation] before I could decide my plan of action." He requested that Diadomo share the e-mail with Judge Suarez. The plaintiff also sent letters to a number of judges of the Superior Court, including Judge Suarez.

The court, *Suarez*, *J.*, then scheduled a status conference in the matter for December 6, 2016. Following the status conference, the court issued an order providing that "[t]he plaintiff may review the psychological evaluation dated November 23, 2012, in the clerk's office. The plaintiff is reminded that the information cannot be used in any other action. He was reminded that he cannot have copies of any of the information."[2] It is from this order that the plaintiff appeals.

"Before examining the plaintiff's claims on appeal, we must first determine whether we have jurisdiction. It is axiomatic that the jurisdiction of this court is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § 61-1 . . . . Thus, as a general matter, an interlocutory ruling may not be appealed pending the final disposition of a case." (Citations omitted; internal quotation marks omitted.) *Parrotta* v. *Parrotta*, 119 Conn. App. 472, 475–76, 988 A.2d 383 (2010).

The plaintiff appeals from a discovery order prohibiting release of a copy of the psychological evaluation. "It is well established in our case law that interlocutory rulings on motions related to discovery generally are not immediately appealable." *Cunniffe* v. *Cunniffe*, 150

[2] The plaintiff filed a motion for articulation dated February 3, 2017, which was denied. The plaintiff thereafter filed a motion for review of the denial of the motion for articulation. This court granted review but denied the relief requested.

Conn. App. 419, 433, 91 A.3d 497, cert. denied, 314 Conn. 935, 102 A.3d 1112 (2014). As an interlocutory order, this order would be immediately appealable only if it met at least one prong of the two prong test articulated by our Supreme Court in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). Under *Curcio*, "[a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id.; see also *Radzik* v. *Connecticut Children's Medical Center*, 317 Conn. 313, 318, 118 A.3d 526 (2015) ("Discovery orders generally do not satisfy either *Curcio* exception, absent extraordinary circumstances. See, e.g., *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 757–58, 48 A.3d 16 (2012); *Abreu* v. *Leone*, 291 Conn. 332, 344, 968 A.2d 385 (2009).").

Our Supreme Court has elaborated on the application of the final judgment doctrine in the context of discovery disputes, recognizing the fact specific nature of such disputes. *Incardona* v. *Roer*, 309 Conn. 754, 760, 73 A.3d 686 (2013). "First, the court's focus in determining whether there is a final judgment is on the order immediately appealed, not [on] the underlying action that prompted the discovery dispute. . . . Second, determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly. . . . Third, although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 760–61.

With these considerations in mind, we conclude that the trial court's order in the present case does not satisfy either of the exceptions set forth in *Curcio*. The first prong of *Curcio* "requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding. . . . If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy the first prong of *Curcio*." (Internal quotation marks omitted.) *McGuinness* v. *McGuinness*, 155 Conn. App. 273, 276–77, 108 A.3d 1181 (2015).

In the present case, the record reflects that the issue at hand involved the plaintiff seeking release of a copy of a document prepared in the context of a custody/visitation action, which no longer was pending. The resolution of that issue does not constitute a separate and distinct proceeding. In fact, the order arose not out of a separate motion regarding the psychological evaluation but rather out of multiple communications from the plaintiff to the court and its staff, years after the end of the proceeding for which the evaluation had been ordered. No motions were pending in the case at the time of the multiple communications. The plaintiff represented during oral argument before this court that he sought release of a copy of the evaluation in order to determine what motions, if any, he should file. This court, however, has previously recognized in the discovery context that "[a] party to a pending case does not institute a separate and distinct proceeding merely by filing a petition for discovery or other relief that will be helpful in the preparation and prosecution of that case." (Internal quotation marks omitted.) *Radzik* v. *Connecticut Children's Medical Center*, 145 Conn. App. 668, 680, 77 A.3d 823 (2013) (concluding that defendants' appeal from order granting plaintiff's motion to compel electronic discovery did not satisfy first prong of *Curcio*), aff'd, 317 Conn. 313, 118 A.3d 526 (2015).

"Satisfaction of the second prong of the *Curcio* test requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal. . . . An essential predicate to the applicability of this prong is the identification of jeopardy to [either] a statutory or constitutional right that the interlocutory appeal seeks to vindicate." (Citation omitted; internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, supra, 150 Conn. App. 431–32. No presently existing right of the plaintiff has been concluded by the court's order prohibiting release of a copy of the 2012 psychological evaluation. Thus, under *Curcio*, there is no final judgment and no basis on which to appeal the court's ruling. As a result, we lack jurisdiction over this appeal.

The appeal is dismissed.

MARC ABRAMS *v.* PH ARCHITECTS, LLC, ET AL. (AC 40164)

Prescott, Elgo and Blawie, Js.

Syllabus

The plaintiff homeowner sought to recover damages from the defendants, P Co., an architectural firm, and V Co., a general contractor, which he had hired to design and perform substantial renovations to his home and surrounding property. The plaintiff's complaint alleged, as to P Co., breach of the architectural contract, breach of warranty, and professional negligence, and, as to V Co., breach of the home construction contract and breach of a separate contract to construct a stone wall. The defendants each filed counterclaims alleging that the plaintiff breached the contracts by failing to pay invoices for services rendered and sought, inter alia, the sums that the plaintiff had withheld in retainage. Following a trial, the court rendered judgment permitting the plaintiff to keep a small portion of the retainage for certain work by V Co. that was defective or incomplete, but otherwise rendered judgment in favor of the defendants on the complaint and on their counterclaims and awarded them damages. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly failed to enforce provisions of his contracts with V Co. and P Co. pertaining to how change orders and payment requisitions were to be initiated and processed:

   a. The plaintiff's claim that V Co. breached the construction contract by failing to follow change order procedures was unavailing; the plaintiff failed to allege that ground in his complaint as a basis for V Co.'s breach of contract, the trial court did not address the claim in rejecting that count of the complaint, as the court was limited to the allegations in the complaint and had no duty to scrutinize the parties' agreement looking for potential additional breaches, and, therefore, the issue could not form the basis of a claim on appeal that the trial court improperly rejected the plaintiff's claim that V Co. breached the construction contract.

   b. The trial court properly rejected the plaintiff's claim that P Co.'s actions in handling change orders and billing procedures amounted to a material breach of its contract with the plaintiff; that court found no material breach of contract with respect to P Co. while it was still on the project and that any failure of V Co. to follow strict contract procedures after P Co. was terminated from the project could not be attributed to P Co., and the plaintiff did not demonstrate that the court's factual findings were unsupported by the record or that the court failed to give due consideration to the terms of the contract in determining that P Co. had not breached its contract with the plaintiff regarding its handling of change orders.

2. The plaintiff's claim that V Co. failed to construct the wall and fence in a particular location and with certain specifications required by the wall contract was unavailing, the trial court having found that the specifications and location of the wall were modified by subsequent agreement of the parties; that court found that the repositioning of the wall was done at the plaintiff's request when he was confronted with the potential extra cost of building the wall at a location involving significant ledge rock and tree removal, that any deviation from the terms of the contract was authorized and approved by the plaintiff, and that the parties had agreed to modify the terms of the contract by moving the location of the wall to avoid increasing the contract price, which was an expressed concern of the plaintiff, who failed to demonstrate that the court's finding regarding the modification of the contract was clearly erroneous.

3. The plaintiff could not prevail on his claim that the trial court failed to enforce provisions of his architectural contract with P Co. that required P Co. to provide contract administration services and to represent his best interests with respect to the project; although the architectural contract required P Co. to monitor the construction process and review the final work, it also stated that the scope of P Co.'s services during the actual construction would be finalized at a future meeting once the scope of the project was better understood, which the court determined

left some uncertainty, no evidence was presented that a meeting to determine the final scope of the work ever occurred, and there was no evidentiary foundation for the plaintiff's claim that P Co. breached its contract prior to P Co. departing the project, as the court found that, prior to the plaintiff terminating P Co. from the project, P Co. effectively had complied with its contract administration duties by monitoring the progress of the project, engaging in discussions on-site regarding the construction of the rock wall, and reviewing and discussing with the plaintiff a proposed change order submitted by V Co.

4. The plaintiff failed to demonstrate his claim that P Co. had breached the professional standard of care applicable to architects: although the plaintiff presented expert testimony from a practicing architect who had prepared a list of purportedly incomplete or defective work, which indicated that P Co. had failed to adequately advise the plaintiff regarding a radiant heat system under the flooring, to design a code-compliant pool enclosure, and to design a code-compliant cover or enclosure for the hot tub, P Co.'s expert contradicted much of that expert's testimony and, as the trier of fact, the trial court had the authority to resolve that conflict as it saw fit and was not required to credit any part of the testimony by the plaintiff's expert; moreover, there was an evidentiary basis for the court's decision to reject the testimony of the plaintiff's expert, as the court found that the plaintiff made a final decision regarding radiant heat after P Co. was no longer involved with the project, that although P Co. had told the plaintiff at their first meeting that the pool would need to have fencing around it in order to comply with the town's pool code, the plaintiff insisted otherwise and that a proper pool enclosure fence was specifically not included in the scope of work that the plaintiff set out for P Co., and that hot tub manufacturers provide code-compliant covers for hot tubs and that such a cover was on the tub when it was installed.

5. The trial court's findings regarding the plaintiff's "punch list" that identified certain items of work that V Co. allegedly had left incomplete or in need of repair were not clearly erroneous; the plaintiff's claim called into doubt the trial court's calculation of the portion of the retainage that the plaintiff was permitted to keep for incomplete or defective work, which the plaintiff maintained exceeded $500,000, the trial court determined that the punch list and its associated pricing were rife with errors and exaggerations and included, for example, the costs associated with removing and reconstructing the stone wall and removing the entire interior hardwood floor, and that court previously had determined there was no credible evidence or economic rationale that supported taking those the corrective actions.

Argued April 9—officially released July 31, 2018

Procedural History

Action seeking to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant V.A.S. Construction, Inc., filed a counterclaim; thereafter, the named defendant filed a counterclaim; subsequently, the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment for the defendants on the complaint and counterclaims, from which the plaintiff appealed to this court. *Affirmed.*

Jane I. Milas, for the appellant (plaintiff).

Jared Cohane, with whom was *Alexa T. Millinger*, for the appellee (named defendant).

Gregory J. Williams, for the appellee (defendant V.A.S. Construction, Inc.).

Opinion

PRESCOTT, J. This appeal arises out of a dispute between a homeowner and the architectural firm and general contractor that he hired to design and perform substantial renovations to his home and surrounding property in Greenwich. The plaintiff, Marc Abrams, appeals, following a trial to the court, from the judgment rendered against him on his complaint and on the counterclaims of the defendants, PH Architects, LLC (PH), and V.A.S. Construction, Inc. (VAS). The plaintiff claims on appeal that the court improperly (1) failed to enforce provisions in his contracts with VAS and PH related to the processing of change orders and invoices; (2) failed to find that VAS had breached a separate contract governing the construction of a stone wall and fence on the property; (3) failed to enforce provisions in his

contract with PH pursuant to which PH agreed to provide contract administration services; (4) failed to conclude that PH was liable for professional negligence because it had breached the professional standard of care for architects; and (5) made clearly erroneous factual findings with respect to a "punch list" that was prepared on behalf of the plaintiff by a third party.[1] We are not persuaded by the plaintiff's claims and, accordingly, affirm the judgment of the court.[2]

The following facts, which either were found by the court or are undisputed in the record, and procedural history are relevant to our discussion of the plaintiff's claims on appeal. The plaintiff is a New York attorney employed by a firm that oversees union elections. In 2010, he purchased an existing, single-family home located in Greenwich at 39 Hunting Ridge Road (property). The property consists of an approximately four acre lot that, in addition to a split-level home, features an outdoor swimming pool, a pond, a barn, and a tennis court.

On May 14, 2010, the plaintiff entered into a contract with PH, an architectural firm, for services related to the design of renovations and additions that the plaintiff sought to make to the interior of the home and to the surrounding property (architectural contract). He was introduced to the principals of PH, Peter Paulos and Philip Hubbard, by his realtor, and met with them at the property on May 11, 2010, to discuss the renovation project. At that meeting, the plaintiff conveyed to the

[1] A "punch list" generally refers to a list of items that a contractor must complete or repair before final payment on a project will become due. See *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 783, 17 A.3d 40 (2011).

[2] We note that the statement of issues in the plaintiff's brief differs significantly and substantively from how the issues are briefed. To the extent that the statement of issues raises additional claims that have not been briefed, those claims are deemed abandoned. See *Stamatopoulos* v. *ECS North America, LLC*, 172 Conn. App. 92, 96 n.3, 159 A.3d 233 (2017).

architects his desire to contain the overall cost of the project, indicating to them that, in designing and quoting the project, they should contemplate using only the highest quality materials and labor in order to help guard against the possibility of the project later running over budget. He believed that by getting quotes for high end materials and workmanship, any subsequent changes that occurred likely would involve a reduction, rather than an increase, in the overall price of the project.

PH drafted a proposal dated May 12, 2010, that listed all of the proposed work items and set forth the hourly rates that PH would charge for various aspects of its work, including taking detailed measurements of the property and preparing a schematic design of the planned house alterations. The proposal also provided that, after completing the schematic design, PH would prepare outline specifications to use in soliciting preliminary bids from contractors. PH would next make any necessary changes to the schematic design, following which it would establish a lump sum fee for preparing complete drawings and negotiating and administrating construction contracts. The proposal expressly left open the cost for PH's services during the actual construction period. The parties signed the proposal on May 14, 2010, which all parties agree constitutes the entirety of the architectural contract between the plaintiff and PH.

A schematic design limited to the house renovations was completed in June, 2010. The plaintiff approved the design, but wanted additional information regarding potential construction costs. With the consent of the plaintiff, PH also obtained additional landscape architectural plans from a third party. The plaintiff, however, rejected those landscape plans. He also rejected the initial bid that PH had obtained for the housing renovations, believing it was too high. He then authorized PH

to complete a more detailed set of structural drawings and specifications for the residence in order to solicit additional construction bids.

After receiving bids, PH prepared a bid comparison sheet for the plaintiff that showed bids ranging from $1.2 million to over $1.5 million. The plaintiff was unhappy and wanted the overall cost of the project reduced significantly, indicating to Hubbard that he wanted the total cost to be closer to $600,000. In October, 2010, PH prepared a list of possible changes that could help to reduce costs, including eliminating a proposed office and a closet addition. The plaintiff approved many of PH's cost saving proposals. He also suggested, however, additional changes not in the original plan, including adding a side deck, an outdoor fireplace, and a larger master bedroom. After incorporating the changes approved by the plaintiff, PH obtained new bids.

VAS, a general contracting business owned by Vincent Sciarretta, consistently was the low bidder throughout the bidding process. VAS constructs new homes and additions to existing homes. It submitted a bid of between $860,000 and $912,000.

On December 6, 2010, the plaintiff entered into a contract with VAS for construction services involving the additions and renovations to the home contained in the architectural plans (construction contract). The contract was a standard form American Institute of Architects (AIA) agreement that included a total contract price for the renovations and additions of $921,557.34.

The plaintiff later entered into an additional AIA contract with VAS on December 16, 2010, for the construction of a stone wall on the property (wall contract). The stone wall was intended to run along the front of the house, connect with perimeter fencing around the

remainder of the property, and include two operating gates. The contract called for a concrete footing to be placed three and one-half feet below grade to secure the fencing. The total additional cost for the wall contract was $229,985.80.

Due to significant conflicts that arose between the plaintiff and PH,[3] PH left the project prior to its completion. The plaintiff never engaged a replacement architect to oversee the project. Serious conflicts also arose

[3] According to the court, the plaintiff "seemed eager to express himself as strongly as possible throughout this project," which included "some particularly aggressive, bellicose and unpleasant e-mails authored by the plaintiff." The court set forth the following facts underlying the conflict between the plaintiff and PH: "Serious conflicts in connection with the home renovation project arose with change order requests submitted by VAS in May, 2011. . . . VAS submitted suggested change orders which included proposed pricing for the addition of radiant heating in the house. . . . A revised request by VAS included a 'log starter' for indoor and outdoor fireplaces . . . and one concerning the stone wall. The largest item was the addition of radiant heating, about $28,000. PH e-mailed all this information to [the plaintiff] with the comment that PH had reviewed it and was prepared to discuss the issues with [the plaintiff] at an upcoming meeting. . . . After receiving a negative response from [the plaintiff], Paulos replied that PH did not approve or recommend the change order request from VAS and suggested a 'private discussion' with [the plaintiff]. . . . At that point, on May 26, 2011, at 11:39 p.m., [the] plaintiff sent a message to Paulos, demeaning Paulos' father-in-law, calling him a 'scumbag fraud,' attacking VAS' pricing, and stating, '[t]he price is going to be what I want or we settle in court and lawsuits will be in millions. Game over. Fight back? Ask Maria [Claudio, the plaintiff's assistant] what will happen. I do not lose EVER.' . . ."

"Hubbard and Paulos testified they were both shocked when they read [the plaintiff's] vituperative and obscene middle of the night e-mail. . . . Paulos, who read the message the next morning while preparing his children for school, was also nervous about his family. . . . Hubbard and Paulos decided to contact their insurance company and attorney, and Paulos had no further contact with [the plaintiff]; Paulos testified that from that point 'I was not working for [the plaintiff].' . . . Subsequently, a letter was prepared by PH terminating its services for [the plaintiff], but it was not sent, because on June 2, 2011, [the plaintiff] e-mailed Hubbard that Hubbard's services were terminated, and incongruously adding that '[Paulos] was who I hired and prefer to have solely involved.' . . . With Hubbard fired and Paulos avoiding all contact with [the plaintiff], a formal letter of PH's withdrawal was sent to [the plaintiff's] attorney on June 3, [2011]."

between VAS and the plaintiff regarding, inter alia, certain change orders submitted by VAS. Nevertheless, despite the plaintiff failing to make all requested progress payments, VAS continued working on the construction project, substantially completing its work by late November or early December, 2011.

The plaintiff, who was unhappy with the results and overall cost of the project, initiated the present action in September, 2012. The operative amended complaint was filed on September 20, 2013, and contained five counts, the first three directed against PH and the remaining two against VAS.

With respect to PH, count one alleged that PH breached the architectural contract with the plaintiff by "failing to provide complete and accurate plans and specifications for the construction of the project, failing to provide construction administration services, failing to monitor the cost and the quality of construction of the project, failing to correct the errors, omissions, and deficiencies in the services and work product provided by PH, failing to address [the plaintiff's] reasonable questions and concerns, and instead abandoning the project when problems were becoming apparent to [the plaintiff]." Count two alleged that PH had breached an express warranty that guaranteed it was qualified to perform the services undertaken in the architectural contract and that it would do so with the care, diligence, and skill exercised by professional architects. Count three sounded in professional negligence, alleging that PH breached its duty to perform with "that degree of skill, care, and diligence [that] professional architects normally exhibit under like and/or similar circumstances."

With respect to the remaining counts against VAS, count four alleged that VAS breached both the home construction contract and the wall contract in a variety

of ways. More particularly, the plaintiff alleged that VAS breached the contracts by failing to complete the work, using lesser quality materials than specified, and performing defective work that would require repair or replacement. The plaintiff provided the following additional examples of VAS' alleged breach of the home construction contract: "[T]he master bedroom deck is poorly constructed; stairs are not adequately secured and shake significantly when walked on; plumbing fixtures in various locations are loose and not properly centered or installed; the electrical system is incomplete and many switches do nothing; the supply ductwork in the basement has not been insulated; tile in areas such as the laundry room is cracked; interior trim is defective and there are many instances of miters opening up; bilco door is not installed properly or weatherstripped; trim boards at exterior of dining nook are warping and delaminating below and around windows; material for front gates and fence is not what was specified and is of lower quality; cabinets are incorrectly installed; flooring is cupping and will have to be removed; many items of work remain incomplete." Count five sounded in negligence. The plaintiff alleged that VAS, as a general contractor, owed him a duty to perform its work pursuant to the contract and free from defects, and that it breached that duty, citing again the defects set forth in the breach of contract count.

In addition to filing an answer and special defenses denying any liability, the defendants each filed a breach of contract counterclaim against the plaintiff. In its counterclaim, PH alleged that the plaintiff had breached the architectural contract by wrongfully terminating it from the project and by failing to pay PH in full for the engineering and architectural services rendered prior to its termination. VAS alleged in its counterclaim that, with the exception of certain obligations that the plaintiff wrongfully prevented or precluded it from performing, it had performed or substantially performed

all of its obligations under its contracts with the plaintiff and, yet, the plaintiff had failed to pay invoices totaling $132,996.18 and to release an additional $85,613.46 being held in retainer.[4] The plaintiff denied the defendants' special defenses and counterclaims.

A trial to the court, *Hon. Taggart D. Adams*, judge trial referee, was conducted between April 26 and May 6, 2016. The parties each submitted a posttrial memorandum on October 12, 2016.

On February 7, 2017, the court issued its memorandum of decision, disposing of all counts of the complaint and the counterclaims. With respect to PH, the court concluded that the plaintiff had failed to prove any of his causes of action, rendering judgment against him on counts one through three of the complaint. The court also rendered judgment against the plaintiff on PH's counterclaim, awarding damages of $3991.56.

With respect to VAS, the court found that the plaintiff had failed to prove that VAS breached either the home construction contract or the wall contract. The court nevertheless found that the plaintiff was entitled to keep $8450 of the retainage as a result of certain incomplete or defective work. The court rendered judgment in favor of VAS on its counterclaim, and awarded it damages of $132,966.18 plus 6 percent prejudgment interest of $24,092.34, as well as $77,162.46, the net balance of the retainage. This appeal followed.

Before turning to our discussion of the plaintiff's claims, we first address the appropriate standard of review, which is disputed by the parties. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony.

[4] VAS later amended its counterclaim to add additional counts seeking to recover damages under alternative theories of unjust enrichment and quantum meruit.

. . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . We afford great weight to the trial court's findings because of its function to weigh the evidence and determine credibility. . . . Thus, those findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 431–32, 849 A.2d 382 (2004).

The plaintiff seeks to frame his claims on appeal as implicating our plenary review, arguing that his claims involve questions of contract interpretation or challenge legal conclusions of the court. It is axiomatic that matters of law are entitled to plenary review on appeal. See *Crews* v. *Crews*, 295 Conn. 153, 162, 989 A.2d 1060 (2010). It is similarly well settled that, if definitive contract language exists, "the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000); see also 11 S. Williston, Contracts (4th Ed.1999) § 30:6, pp. 77–83 ("[t]he interpretation and construction of a written contract present only questions of law, within the province of the court . . . so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face" [internal quotation marks omitted]). Moreover, whether contractual language is plain and unambiguous is itself a question of law subject to plenary review. See *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, 259 Conn. 665, 669–70, 791 A.2d 546 (2002).

The defendants, by contrast, maintain that the plaintiff's claims on appeal do not truly raise any substantive questions of law or involve construction of relevant contract provisions but, rather, only seek to have this court reassess the credibility of witnesses and retry the court's factual findings underlying its determination that the plaintiff failed to demonstrate that either defendant materially breached its contract with the plaintiff or is otherwise liable for damages. "The determination of whether a contract has been materially breached is a question of fact that is subject to the clearly erroneous standard of review." *Efthimiou* v. *Smith*, 268 Conn. 487, 493, 846 A.2d 216 (2004). We agree with the defendants that the plaintiff's claims on appeal primarily are factual in nature. Accordingly, although we review de novo any questions of law that arise, to the extent that the plaintiff merely challenges the factual underpinnings for the court's legal conclusions, we will not engage in a wholesale reweighing of the evidence, but will review such claims under our clearly erroneous standard of review. With these principles in mind, we turn to a discussion of the specific claims raised by the plaintiff.

I

The plaintiff first claims that the court improperly failed to enforce provisions of his contracts with VAS and PH, specifically, provisions pertaining to how change orders and payment requisitions were to be initiated and processed.[5] According to the plaintiff, VAS failed to follow the procedures set forth in the construction contract, which required it to obtain the plaintiff's approval for any changes prior to performing the associated work. Further, he argues that, pursuant to his contract with PH, PH was required to review and approve

[5] As the court aptly explained in its memorandum of decision, "[a] change order is a means to increase or decrease the contracted price for construction work caused by a change in the scope of work, in materials, the time required, or otherwise."

payment requisitions and change orders submitted by VAS, but PH failed to insure that VAS followed the procedures in the construction contract.

In response, VAS argues that, to the extent the plaintiff's claim is directed at it, we should reject that claim for three reasons. First, VAS argues that the plaintiff's claim falls outside the scope of the pleadings because the plaintiff never alleged in his complaint that VAS breached the construction contract by failing to adhere to provisions governing change orders and payments, nor was that issue decided by the court. Second, VAS argues that the plaintiff has failed adequately to brief this claim. Third, VAS argues that the claim fails on its merits.

PH argues that the claim also fails with respect to it because the trial court properly rejected the plaintiff's allegation that PH had breached its contract with the plaintiff by failing to adhere precisely to requirements in the change order provisions of the construction contract. PH notes that, prior to leaving the project, it was only involved with the processing of a single change order and that the court found that PH's omission of that change order on a certified payment requisition was "not of serious moment," or, in other words, not a material breach of contract.[6]

The following additional facts are relevant to this claim. Pursuant to the architectural contract, PH agreed to provide "contract administration" services during the construction phase of the project. Contract administration was defined in the architectural contract as follows: "monitoring the construction process, making

[6] This claim with respect to PH is closely related to the plaintiff's additional claim, addressed in part III of this opinion, that PH breached its agreement to provide contract administration services, which the plaintiff argues placed a duty on PH to oversee the project and to protect the plaintiff's fiduciary interests.

periodic site visits, representing [the plaintiff] during the construction process, reviewing and approving applications for payment to the contractor, review of the final work, preparation of a punch list to complete the work and issuing final acceptance of the work." The architectural contract contains no express provision about PH's responsibilities regarding the processing and handling of change orders; such provisions are found in the construction contract. In particular, article 7 of the general conditions of the construction contract contains a number of provisions that governed the process by which the parties were permitted to make changes to the work.

In its memorandum of decision, the court addressed the plaintiff's arguments regarding improper change orders and invoicing procedures in addressing the plaintiff's assertions of breach of contract against PH. In that context, the court stated as follows: "[I]t is true that PH did approve an application for payment to VAS on April 29, 2011 . . . in which VAS had not included the fact that a change order in the amount of $5141.80 had been previously approved by [the plaintiff] in writing on March 31, 2011. . . . This oversight is not of serious moment, because [the plaintiff] had already paid for the change order on April 26, [2011] . . . and subsequent change orders signed by [the plaintiff] clearly showed all the additions to the original contract price that had been approved. . . . More importantly, [the plaintiff's] claim that PH never submitted or reviewed with him any proposed change orders is without evidentiary support. Indeed, it was PH's submission to [the plaintiff] of the VAS proposed change orders, including the addition of radiant heat to the project, that precipitated the previously discussed virulent e-mail by [the plaintiff] to PH on May 24, 2011. . . . In addition, on May 13, 2011, there was a meeting at the construction site during which a number of proposals, changes, new

architectural sketches and costs were discussed. . . . After PH left the project there was no architect with whom [the plaintiff] could discuss the proposed changes." (Citations omitted.)

A

We turn first to the plaintiff's claim that VAS breached its construction contracts with the plaintiff by failing to comply with change order procedures. We agree with VAS that the breach of contract claim as set forth in the operative complaint did not include or rely upon any allegation that VAS had failed to adhere to provisions in the construction contract pertaining to change orders. Accordingly, this aspect of the plaintiff's claim fails.

"The pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial. . . . The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in] his complaint. . . . A complaint must fairly put the defendant on notice of the claims . . . against him. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . Only those issues raised by the [plaintiff] in the latest complaint can be tried [by the trier of fact]." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014).

In its breach of contract count against VAS, the plaintiff's allegations specifying the manner in which VAS allegedly breached its contracts with the plaintiff were limited to assertions that VAS had not satisfactorily completed aspects of the construction project, had used inferior and unspecified materials, or had performed defective work that would require repair or replacement. Although there was testimony at trial discussing

how change orders were handled, the plaintiff never sought to amend his complaint to include additional specifications of breach of contract to its count against VAS. If the plaintiff had provided notice of this aspect of its claim through proper pleading, VAS may have produced additional evidence or tailored its presentation of evidence differently.

In considering a breach of contract claim, the trial court is limited to the allegations in the complaint and has no duty to scrutinize the parties' agreement looking for potential additional breaches. The court's silence in its memorandum of decision with respect to VAS' alleged noncompliance with the contract's change order procedures is further evidence that this issue was not properly raised to the court.

In sum, we conclude that the failure to follow change order procedures was not raised in the operative complaint as a basis for the plaintiff's count alleging breach of the construction contract by VAS, nor was the issue addressed by the trial court in rejecting that count of the complaint. Accordingly, that issue cannot form the basis of a claim on appeal that the court improperly rejected the plaintiff's allegation that VAS breached the construction contract.

B

We next turn to the plaintiff's claim that PH breached its contract with the plaintiff by failing to ensure that VAS adhered to change order and billing procedures set forth in the construction contract. According to the plaintiff, the trial court failed to give effect to those contract requirements. We are not persuaded.

As a preliminary matter, we note that the plaintiff has not claimed that the court misconstrued any particular language in the contract that would invoke our plenary

review. The plaintiff also has failed to direct our attention to any part of the record that would support his assertion that the trial court committed legal error by failing to consider or give effect to any particular contract provision. To the contrary, in discussing the parties' disputes over the procedures followed with respect to changes to the project and the resulting change in the contract price, the trial court specifically cited to article seven of the contract, which, as we have indicated, contains all the relevant provisions governing change order procedures.

We therefore construe the plaintiff's claim as challenging the court's rejection of his argument that PH's actions in handling change orders and billing procedures amounted to a material breach of its contract with the plaintiff. It is important to reiterate that "[w]hether there was a breach of contract is ordinarily a question of fact. . . . We review the court's findings of fact under the clearly erroneous standard." (Internal quotation marks omitted.) *Neubig* v. *Luanci Construction, LLC*, 124 Conn. App. 425, 433, 4 A.3d 1273 (2010). The court found no material breach of contract with respect to PH while it was still on the project. Specifically, the court found that the plaintiff had not produced an evidentiary foundation for his claim that PH had not consulted with him or sought his approval on change orders. To the contrary, the court found that the evidence presented showed that such consultation in fact had occurred. The court also determined that the plaintiff had failed to demonstrate that he was harmed by technical problems with paperwork. Further, any failure of VAS to follow strict contract procedures after PH left the project could not be attributed to PH because the court found that the plaintiff "terminated Hubbard's services and constructively terminated Paulos' services by his conduct," a finding that is not challenged on appeal.

The plaintiff has not demonstrated that the court's factual findings are unsupported by the record nor are we left on the basis of our review with a conviction that a mistake has been made. We accordingly reject his claim that the court failed to give due consideration to the terms of the contract in determining that PH had not breached its contract with the plaintiff regarding its handling of change orders.

II

Next, the plaintiff claims that, in concluding that he failed to prove that VAS breached the wall contract, the court failed to enforce provisions of that contract requiring VAS to construct the wall and fence combination in a particular location with certain specifications. In response, VAS argues that we should uphold the court's conclusion either because the plaintiff failed to establish proof of damages, which is a required element of a breach of contract cause of action, or because the court determined that the parties had modified the contract provisions relied on by the plaintiff. We agree with VAS that the specifications and location of the wall were modified by subsequent agreement of the parties, as found by the court, and that the court properly ruled in favor of VAS on that aspect of the plaintiff's claim of breach of contract.

The following additional facts are relevant to this claim. VAS began work on the stone wall and fence combination in March, 2011. Issues began to arise regarding the construction and location of the stone wall, which prompted an on-site meeting at the end of March between the plaintiff, VAS, and PH. At that time, Hubbard spray painted along the ground where he believed the center line of the wall should run according to the plans. Sciarretta explained to the plaintiff that if VAS constructed the wall using Hubbard's line, it would involve the cutting of trees and, more importantly,

require the removal of ledge rock, each of which would result in extra costs being added to the wall contract. The plaintiff "eventually directed that the wall be placed nearer the house to avoid ledge . . . and tree removal."

In its memorandum of decision, the court rejected the plaintiff's claim that VAS breached the wall contract because the wall was not constructed on or near the perimeter of his property along Hunting Ridge Road as set forth in the contract and accompanying architectural drawings. The court found that VAS had constructed the wall as the plaintiff directed. Specifically, the court found that "the repositioning of the wall was done at [the plaintiff's] request when he was confronted with the potential extra cost of building the wall at a location involving significant ledge rock and tree removal." Accordingly, any deviation from the terms of the contract was authorized and approved by the plaintiff.[7]

If parties have modified the terms of a contract, they are contractually bound by those modified terms and, consequently, cannot be found in breach of the original terms. "Modification of a contract may be inferred from the attendant circumstances and conduct of the parties." *Herbert S. Newman & Partners, P.C.* v. *CFC Construction Ltd. Partnership*, 236 Conn. 750, 762, 674 A.2d 1313 (1996). "Whether the parties to a contract intended to modify the contract is a question of fact. . . . The resolution of conflicting factual claims falls within the province of the trial court. . . . The trial court's findings are binding upon this court unless they

[7] The court also rejected the plaintiff's claim that the repositioning of the wall resulted in $305,000 in damages, which his expert had estimated to be the cost of removing and replacing the stone wall and fence. The court indicated: "There is no evidence or economic rationale to support incurring the costs of removing and rebuilding the stone wall, *even if the court had not found its location to be the result of* [*the plaintiff's*] *decisions*." (Emphasis added.)

are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witness." (Citations omitted; internal quotation marks omitted.) Id.

Here, rather than failing to enforce provisions of the wall contract requiring VAS to construct the wall and fence in a particular location with certain specifications, the court found that the parties had agreed to modify the terms of the contract by moving the location of the wall to avoid increasing the contract price, which was an expressed concern of the plaintiff. On the basis of our review of the record, the plaintiff has failed to persuade us that the trial court's finding that he agreed to the modification of the contract and directed VAS to build the wall where it currently stands is clearly erroneous. We accordingly reject his claim.

III

The plaintiff next claims that, with respect to the architectural contract between him and PH, the court failed to enforce provisions that required PH to provide contract administration services and to represent his best interests with respect to the project. We disagree.

Pursuant to the architectural contract, after the design and planning phase of the project was finished and actual construction work had begun, PH agreed to continue to provide services to the plaintiff for the balance of the project. In addition to other services, the contract provided that PH would provide "contract administration," which, as previously indicated, was described in the agreement as "monitoring the construction process, reviewing and approving applications for payment to the contractor, review of the final work, preparation of a punch list to complete the work and issuing final acceptance of the work."

Significantly, the contract also stated that "[t]he scope of [PH's] services during the actual construction can be finalized at a future meeting once the scope is better understood." The court indicated in its decision that this language "left some uncertainty" as to PH's contractual responsibilities during the construction phase, particularly because no evidence was presented that a meeting to determine the final scope of the work ever occurred.

The plaintiff does not dispute the court's finding that there was no evidence of a meeting to finalize the scope of PH's work during construction. Nevertheless, the plaintiff argues that the language regarding contract administration is clear and unambiguous, and that the court failed to give effect to that language in considering whether PH had breached its duties to the plaintiff to provide contract administration services.

As already discussed in part I B of this opinion, however, the court determined that there was no evidentiary foundation for the plaintiff's breach of contract claim against PH, and that, prior to the plaintiff terminating PH from the project, PH effectively had complied with its contract administration duties by monitoring the progress of the project, engaging in discussions on-site regarding the construction of the rock wall, and by reviewing and discussing with the plaintiff a proposed change order submitted by VAS. Because the plaintiff has not demonstrated that the court rejected his claim on the basis of clearly erroneous factual findings, we reject his claim.

IV

We turn next to the plaintiff's claim that the court improperly concluded that he had failed to demonstrate that PH had breached the professional standard of care applicable to architects. We do not agree.

In order to prevail on a claim of professional negligence or malpractice, a plaintiff has the burden to show the following: "(1) a duty to conform to a professional standard of care for the plaintiff's protection; (2) a deviation from that standard of care; (3) injury; and (4) a causal connection between the deviation and the claimed injury." *Stuart* v. *Freiberg*, 316 Conn. 809, 833, 116 A.3d 1195 (2015). Ordinarily, whether a professional's conduct met the required standard of care or deviated from that standard are questions of fact to be decided by the trier of fact. See *Campbell* v. *Palmer*, 20 Conn. App. 544, 548, 568 A.2d 1064 (1990).

To meet his burden of establishing the standard of care applicable to architects and to show a deviation from that standard, the plaintiff presented expert testimony from Jonathan Hodosh, a practicing architect. His firm, George Hodosh Associates, concentrates on residential additions and alterations. Hodosh visited the property in March and April, 2012, and prepared a "punch list" of purportedly incomplete or defective items. Hodosh's punch list was admitted into evidence at trial. Hodosh testified that, in his opinion, PH breached the standard of care in three ways, by failing (1) to advise the plaintiff adequately about installing a radiant heat system under the flooring, (2) to design a code-compliant pool enclosure, and (3) to design a code-compliant cover or enclosure for the hot tub.

We agree with the court's assessment in its memorandum of decision that the main thrust of Hodosh's expert testimony regarding the radiant heat system was that PH should have brought in a mechanical engineer to design the system and to evaluate the interactions between it and the existing hot air system. He opined that PH should have reconsidered use of the cherry and oak flooring included in the initial architectural plans in light of the decision to introduce a radiant heat system. He also was critical of the fact that PH had made

no provisions in its original plans for a protective enclosure for the hot tub and the swimming pool.

In response, PH presented its own expert, James Lawler, also a licensed architect. Lawler contradicted much of Hodosh's testimony. Lawler testified that PH's construction drawings and specifications were both thorough and well prepared for use by a contractor in executing the design plan. Lawler's professional opinion was that PH had provided the plaintiff with a high level of service. Accordingly, the evidence before the court regarding PH's exercise of its professional responsibilities under the contract was conflicting. As the trier of fact, the court had the authority to resolve this conflict as it saw fit, and was not required to credit any part of Hodosh's testimony. See *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 518, 167 A.3d 1112 ("[if] expert testimony conflicts, it becomes the function of the trier of fact to determine credibility and, in doing so, it could believe all, some or none of the testimony of either expert" [internal quotation marks omitted]), cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

In fact, the court ultimately rejected Hodosh's testimony, finding it unpersuasive for several reasons. First, the court found that at the time the plaintiff made a final decision to have radiant heat installed in the home, PH was no longer involved with the project. The court found that installing radiant heating was proposed in a "VAS change order in May, 2011, [which] contain[ed] the first cost data related to radiant heat that was forwarded by PH to [the plaintiff] for discussion and precipitated the departure of PH from the project. Prior to that time, PH did not do any design work or coordinate with any mechanical engineer relating to radiant heat because it was entirely uncertain from PH's standpoint whether [the plaintiff] had a real interest in installing such a system since he had shown a strong interest in cutting costs."

The court further found that Hodosh's criticism of PH regarding a code-compliant pool enclosure and hot tub cover were unsupported by the evidence. The court found that, at their very first meeting, PH had told the plaintiff that the pool would need to have fencing around it in order to comply with the pool code in Greenwich. The plaintiff indicated to PH, however, that he believed fencing around the perimeter of the property would enclose both the pool and the pond and that the fencing needed to be in compliance with code. The court credited Hubbard's testimony that PH would never have advised the plaintiff that a perimeter fence would suffice for purposes of a pool enclosure. The court ultimately found on the basis of the evidence presented that "a proper pool enclosure fence was specifically not included in the scope of work [the plaintiff] set out for PH. . . . In fact, at the end of the project, it was VAS that apparently convinced [the plaintiff] a proper pool enclosure was needed and had it installed." With respect to the hot tub cover, the court credited the testimony of Lawler and Sciarretta that hot tub manufacturers provide code-compliant covers for hot tubs, that such a cover was on the tub when it was installed, and a code-compliant cover was on the tub when Lawler visited the property in April, 2016.

It is clear in the present case that the court rejected the testimony of the plaintiff's expert and credited the testimony of PH's expert in finding that PH had not breached the professional standard of care required of architects. Our review of the record shows that there is an evidentiary basis for the court's decision and we will not engage in a reweighing of the evidence or revisit the court's credibility determinations. Because the plaintiff has failed to demonstrate either a legal or factual basis for disturbing the court's decision rejecting his claim of professional negligence by PH, we reject his claim.

V

Finally, the plaintiff claims that the trial court made erroneous factual findings with respect to a "punch list" that identified certain items of work that VAS allegedly had left incomplete or in need of repair. Principally, the plaintiff takes issue with the court's references to the monetary figures associated with the items on the punch list as "estimates." The plaintiff argues that "the process of estimating the cost of punch list items is well recognized in the case law as a means of putting a dollar value to the items on a punch list" and that the court based its decision "on a belief that 'estimating' is not an accepted methodology for pricing a punch list." We note that the plaintiff's brief lacks clarity in placing this claim into context; however, we construe the claim as intended to call into doubt the court's calculation of damages, in particular the amount of the retainage that the court permitted the plaintiff to keep for incomplete or defective work. Regardless, although the plaintiff is correct that the court rejected the costs associated with the items on the punch list, a review of the relevant portion of the court's decision reveals that it did so, not because it rejected any particular methodology for determining damages or the use of reasonable estimates, but because it concluded that the punch list and the associated pricing were "rife with errors, lack of knowledge and exaggerations." Accordingly, the very premise of the plaintiff's claim on appeal lacks merit.

The following additional facts are relevant to the plaintiff's claim. The plaintiff sought to prove the amount of his alleged damages against VAS through the admission of a punch list that contained various items identified by his architect expert, Hodosh, as either being incomplete or in need of repair. In addition to the punch list, the plaintiff entered as an exhibit at trial the deposition transcript of an experienced contractor,

Todd Lukas. Attached as part of the transcript was Lukas' written report detailing his cost estimates for completing the Hodosh punch list items. The total cost estimated by Lukas was $563,539. Included in his calculations were costs associated with the removal of the existing stone wall and its reconstruction at a different location, and the removal of the entire interior hardwood floor.

The court rejected Lukas' deposition testimony and his estimate of costs associated with the Hodosh punch list as unpersuasive. The court did so not because Lukas' costs were merely estimates and, thus, somehow unreliable, as the plaintiff claims, but because the court determined there was no credible evidence or economic rationale that supported taking the corrective actions upon which those estimates were based. For example, because the court already had determined that the existing wall was built at a location and in a manner approved by the plaintiff, it naturally rejected the estimated cost of completely removing and rebuilding it. Similarly, the court found that the plaintiff had failed to prove that problems with portions of the existing flooring required the complete removal of all flooring in the home, instead crediting the testimony given by a flooring expert that the defects complained of by the plaintiff could be remedied by sanding and refinishing only the affected portions of the floor. The court never stated that estimating the cost of punch list items was an inherently flawed methodology.[8]

As we have already indicated in this opinion, it was well within the authority of the court as the trier of fact to reject as unpersuasive Lukas' opinion and instead to credit the contrary testimony of other expert witnesses.

[8] The court did indicate that it believed the plaintiff had utilized "a makeshift method *of proving damages*"; (emphasis added); however, we do not agree with the plaintiff that this was intended to suggest that it generally was impermissible to use estimates to assign value to punch list items.

See *Ferri* v. *Pyramid Construction Co.*, 186 Conn. 682, 690, 443 A.2d 478 (1982) (credibility of expert witnesses and weight to accord their testimony within province of trier of fact, "who is privileged to adopt whatever testimony he reasonably believes to be credible" [internal quotation marks omitted]). As previously explained, it is outside the role of this court to second-guess the credibility determinations of the trier of fact. See, e.g., *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 48, 145 A.3d 266 (2016). Because the plaintiff has failed to demonstrate that the court's decisions were premised upon any clearly erroneous factual findings, we reject his claim.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN GROVER *v.* COMMISSIONER OF CORRECTION (AC 39879)

DiPentima, C. J., and Keller and Prescott, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea of the crime of risk of injury to a child, sought a writ of habeas corpus, claiming that he was denied his constitutional right to counsel free from conflicts of interest and that his trial counsel provided ineffective assistance. Specifically, the petitioner claimed that his trial counsel had a financial incentive to convince the petitioner to accept a plea because the petitioner was unable to pay his trial counsel's trial retainer in full, and that his trial counsel failed to retain or request funding to retain a forensic mental health professional and to identify innocent alternative explanations for the allegations against the petitioner. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the claim that the petitioner was denied his constitutional right to counsel free from conflicts of interest: the trial fee arrangement was not a flat fee, there were no findings to suggest that trial counsel abandoned his obligations to the petitioner

to focus on other more lucrative endeavors, especially given that trial counsel was successful in securing a favorable plea arrangement that dramatically reduced the petitioner's potential prison sentence and his time on the sex offender registry, and the mere fact that trial counsel faced the possibility of not being paid fully in the event the case went to trial did not compel the inference that his advice was not consonant with the petitioner's interests; moreover, the petitioner's reliance on certain case law holding that indigent, self-represented defendants have a constitutional right to expert or investigative assistance reasonably necessary to their defense, which was not decided until after the petitioner pleaded guilty and was sentenced, was unavailing, as trial counsel did not act unreasonably by failing to request an expert witness in accordance with precedent that did not exist at the time of the representation, and there having been a reasonable, strategic basis for trial counsel's decision not to seek court funding for an expert, his failure to do so was not necessarily representative of a conflict of interest.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's ineffective assistance of counsel claim: the record showed that trial counsel's decision not to retain or request funding to retain an expert was based on a number of appropriate factors, including his experience defending cases involving sexual assault of young children, his view that the forensic interview of the victim had been conducted properly and that the victim appeared comfortable throughout the forensic interview, which made her statements less susceptible to impeachment, and, thus, his determination that the retention of a forensic psychologist would not have been a worthwhile strategy under the circumstances; moreover, there were no findings of fact in the record to support the petitioner's claim that the victim's foster father was the possible culprit, and trial counsel testified that he had considered and investigated the alternate theory that the petitioner simply was treating the victim's skin condition, and decided it was not worth pursuing because of contradictory facts in the case, and his failure to pursue that theory of innocence did not constitute deficient performance.

Argued April 17—officially released July 31, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court, *Fuger*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Bright*, *J.*, denied the petitioner's motion for

articulation; thereafter, the court, *Bright*, *J.*, granted in part the petitioner's motion for rectification; subsequently, the court, *Kwak*, *J.*, denied the petitioner's motion for order. *Appeal dismissed.*

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

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, John Grover, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) erroneously determined that he was not denied his constitutional rights to counsel free from conflicts of interest and to the effective assistance of counsel.[1]

[1] The petitioner also claims that the habeas court failed to address or make findings of fact with respect to several claims that were presented in his amended petition. Although the petitioner acknowledges that the appellant bears the burden of providing this court with an adequate record to review, he argues that circumstances beyond his control have prevented him from doing so.

As noted in this opinion, the petitioner is appealing from the judgment of the habeas court rendered by *Fuger*, *J.* on November 2, 2016. Following the decision to deny the petition for a writ of habeas corpus, the petitioner filed a motion for articulation on May 15, 2017, regarding the court's purported failure (1) to address the merits of each of the petitioner's claims and (2) to provide final rulings on certain evidentiary issues. Pursuant to General Statutes § 52-470 (g) and Practice Book § 80-1, because Judge Fuger retired effective February 7, 2017, the motion was directed to *Bright*, *J.*, who denied the motion after finding that it could not be addressed on its merits. Accordingly, in light of these facts, the petitioner requests that we remand this case for a new trial consistent with our decision in *Claude* v. *Claude*, 143 Conn. App. 307, 68 A.3d 1204 (2013). We believe that such extraordinary relief is unwarranted.

The record reveals the following relevant facts and procedural history. On October 25, 2013, the petitioner entered a plea of guilty under the *Alford* doctrine[2] to one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and, on January 7, 2014, the court sentenced him to seven years imprisonment followed by ten years special parole; he also was required to register as a sex offender for ten years. At the petitioner's plea hearing, the prosecutor recited the following narrative.

In February 2011, the petitioner was in a relationship with the victim's mother and lived with her and the female victim in Scotland, Connecticut. At that time, the victim was ten years old.

"On [February 15, 2011] the victim went to school at Scotland Elementary School and she made a disclosure

In *Claude*, we faced the unique situation in which the trial court failed to provide this court with any articulation of its decision, even after being ordered to do so. Id., 310–11. As it was impossible to divine the basis for the court's decision from its "postcard order," and because the plaintiff could not be faulted for the inadequate record, we remanded the case for a new hearing. Id., 312. While this case is similar to *Claude* insofar as the retirement of the presiding trial judge has prevented the petitioner from seeking articulation with respect to several of his claims, we do not agree that the unavailability of Judge Fuger prevents us from properly addressing the merits of this appeal.

The petitioner also argues that the habeas court's memorandum of decision includes factual inaccuracies that call into question its reliability. We acknowledge that there appear to be two places in the decision in which the court suggests that the petitioner's case went to trial; although any such suggestion is clearly erroneous, we do not conclude that such mistakes affect the soundness of the court's other findings.

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 167 Conn. App. 233, 234 n.1, 143 A.3d 630, cert. denied, 323 Conn. 929, 150 A.3d 231 (2016).

[that the petitioner] had touched her private areas and [had] also used lotion [on her]. Subsequently, the victim was interviewed the following day at a child-friendly location forensically.

"During that interview the victim disclosed [that the petitioner] and herself were alone in the master bedroom of the residence. The [petitioner] pulled down the pants of the victim and lifted up her shirt and began rubbing lotion on her stomach and on her legs to include also her inner thighs and also her vaginal area.

"At some point the [petitioner] took a vibrator that he had in his dresser and then also used that to have contact with [the victim's] intimate parts . . . . An investigation was conducted and ultimately an arrest warrant was applied for and granted charging [the petitioner] with the crime of risk of injury [to a child] and sexual assault in the first degree."

On April 6, 2011, the petitioner was arraigned and bond was set at $75,000 cash or surety; the petitioner posted bond the same day. The petitioner originally was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of § 53-21 (a) (2).[3]

Prior to his arrest, the petitioner hired Attorney Jerome Paun to represent him during the criminal investigation. Following his arrest, the petitioner and Paun entered into a fee agreement for the purposes of pretrial representation. The agreement provided for a fixed fee of $7500 and covered all work leading up to trial. Under the terms of this same agreement, once the case was placed on the trial list, Paun was to be paid $250 an hour with a $5000 retainer to be paid in full within thirty

[3] The petitioner later was charged with violation of a protective order when the victim's mother brought the victim to see him during the pendency of the criminal case. This charge later was dropped as part of the petitioner's plea agreement.

days of the case being placed on the trial list. The petitioner was employed when he hired Paun and was able to pay the $7500 pretrial fee and to post bond for his release. While the petitioner did not pay the trial retainer in full, Paun estimated that he was able to pay $2000 of the $5000 owed.

After jury selection, but before trial, the petitioner reached a plea agreement with the prosecutor pursuant to which he pleaded guilty to one count of risk of injury to a child in violation of § 53-21 (a) (2). He was sentenced on January 7, 2014.

On March 4, 2015, the petitioner filed an amended petition for writ of habeas corpus. Relevant to this appeal, the petitioner alleged that he was denied his constitutional right to counsel free from conflicts of interest because Paun had an actual conflict with respect to his representation of the petitioner. Specifically, he argued that Paun had a financial incentive to convince the petitioner to accept a plea rather than proceed to trial due to the fact that the petitioner was unable to pay Paun's trial retainer in full. The petitioner additionally claimed that he was denied his constitutional right to effective assistance of counsel because Paun failed (1) to retain or request funding from the trial court in order to retain a forensic mental health professional with expertise in investigating and assessing child sexual abuse allegations and (2) to identify innocent alternative explanations for the allegations against the petitioner.

The petitioner's habeas trial was held on two separate dates in October and December, 2015. At trial, the petitioner presented evidence from Dr. Nancy Eiswirth, an expert witness in forensic psychology, and Attorney Michael Sheehan, who testified as a legal expert in the area of criminal defense. Eiswirth testified that she had reviewed the victim's forensic interview and had

identified several issues with respect to the manner in which it had been conducted. Specifically, Eiswirth opined that the interview was not tailored properly to accommodate the victim's age and mental development; she also was critical of the interviewer's failure to rectify contradictions and ambiguities in the victim's statement. Following this testimony, Sheehan testified that based on his experience, if it seemed likely that the forensic interview would be admitted into evidence, a reasonably competent defense attorney would have retained a forensic psychologist like Eiswirth to attack the credibility of the victim's statements made during the interview.

When asked whether he considered hiring an expert forensic psychologist, Paun testified that "it's always a consideration" and depended on the "terms of each particular case." Paun stated that based on his review of the forensic interview and his own interview of the victim,[4] hiring an expert witness did not seem like a "terribly fruitful" strategy. Paun, whom the habeas court credited as conducting a full investigation of this case, did not consider the structure of the forensic interview to be improper nor did he find the interviewer's questions to be leading or coercive. Moreover, following his own interview of the victim, Paun concluded that her story remained largely consistent with her earlier statements. He consulted with the petitioner about the prospect of hiring an expert witness but cautioned that, given the strength of the state's case, there was a substantial possibility he would be found guilty at trial. Paun testified that the petitioner ultimately instructed him to negotiate a plea agreement.

On November 2, 2016, the habeas court denied the petition for writ of habeas corpus. The court found that

[4] Prior to trial, Paun received permission from the victim's guardian ad litem to interview the victim in person.

Paun had not labored under a conflict of interest and had provided effective representation to the petitioner. The court rejected the petitioner's argument that Paun rendered deficient performance in failing to request funding for an expert witness because the petitioner was not indigent and would not have qualified for such assistance had it been requested. The habeas court also found that, irrespective of whether performance was deficient, the petitioner was not prejudiced by Paun's conduct and that even if Paun had obtained an expert opinion, he would have still advised the petitioner to plead guilty rather than proceed to trial. Thereafter, the petitioner filed a petition for certification to appeal. After the court denied the petition for certification to appeal, this appeal followed. Additional facts will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly denied his petition for certification to appeal. We disagree and "begin by setting forth the procedural hurdles that the petitioner must surmount to obtain appellate review of the merits of a habeas court's denial of the habeas petition following denial of 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. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to

appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis in original; internal quotation marks omitted.) *Haughey* v. *Commissioner of Correction*, 173 Conn. App. 559, 562–63, 164 A.3d 849, cert. denied, 327 Conn. 906, 170 A.3d 1 (2017).

For the reasons set forth in this opinion, we conclude that the petitioner has failed to show that his claims are debatable among jurists of reason; that a court *could* resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. Therefore, we further conclude the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

The petitioner claims that he was denied his constitutional right to counsel free from conflicts of interest. Specifically, he argues that Paun "had a financial incentive to (1) convince [him] to accept the plea agreement due to [his] inability to pay the trial fee, (2) withhold information . . . about his constitutional right to reasonably necessary expenses to formulate and present a defense, and (3) forego filing a motion in the trial court requesting funding for expert witnesses." The petitioner

further contends that he was affected adversely by counsel's conflicting interests. We disagree.

Our courts have recognized that "[t]he sixth amendment to the United States constitution as applied to the states through the fourteenth amendment, and article first, § 8, of the Connecticut constitution, guarantee[s] to a criminal defendant the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Crespo*, 246 Conn. 665, 685, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

"In a case of a claimed conflict of interest . . . in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an *actual conflict of interest* adversely affected his lawyer's performance. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . Accordingly, an ineffectiveness claim predicated on an actual conflict of interest is unlike other ineffectiveness claims in that the petitioner need not establish actual prejudice. . . .

"*An actual conflict of interest is more than a theoretical conflict.* The United States Supreme Court has cautioned that the possibility of conflict is insufficient to impugn a criminal conviction. . . . A conflict is merely a potential conflict of interest if the interests of the defendant may place the attorney under inconsistent

duties at some time in the future. . . . To demonstrate an actual conflict of interest, the petitioner must be able to *point to specific instances in the record which suggest impairment or compromise of his interests for the benefit of another party.*"[5] (Emphasis in original; internal quotation marks omitted.) *Tilus* v. *Commissioner of Correction*, 175 Conn. App. 336, 349–50, 167 A.3d 1136, cert. denied, 327 Conn. 962, 172 A.3d 800 (2017).

In resolving the petitioner's claim, we apply well established standards of review. "On appellate review, the historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous . . . ." (Internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 131 Conn. App. 336, 343, 27 A.3d 404 (2011), aff'd, 312 Conn. 345, 92 A.3d 944 (2014). "Whether the circumstances of pretrial counsel's representation, as found by the habeas court, amount to an actual conflict of interest is a question of law [over] which our review is plenary." *Shefelbine* v. *Commissioner of Correction*, 150 Conn. App. 182, 193, 90 A.3d 987 (2014).

The petitioner first argues that an actual conflict of interest existed because Paun had a financial incentive to convince him to plead guilty. We do not agree that the petitioner's inability to pay the outstanding balance of the trial retainer created such a conflict. According to the testimony of Paun, which the habeas court credited in its entirety, although he was disappointed that the trial retainer had not been paid in full, Paun valued his professional reputation above any single fee. He testified that his advice throughout the pendency of the

[5] We note that the petitioner has made no argument that a potential or theoretical conflict of interest existed in this circumstance. His only contention with respect to this claim is that his inability to pay Paun's trial fee in full gave rise to an actual conflict of interest.

criminal case was based on his overall assessment of the facts and not the financial situation of the petitioner.

As the lone authority for his position that an actual conflict of interest arises from an unpaid trial retainer, the petitioner cites *State* v. *Cheatham*, 296 Kan. 417, 292 P.3d 318 (2013). This decision is inapposite. In *Cheatham*, the Kansas Supreme Court addressed the propriety of a flat fee arrangement in a death penalty case. Id., 452–53. There, the court concluded that such an arrangement was highly disfavored because an attorney was incentivized to do no more than necessary to secure the fee rather than seek an acquittal for his or her client. Id., 453. Moreover, the attorney in *Cheatham* admitted that he had invested minimal time in his client's case because he needed "to earn a living." Id., 454.

Here, not only was the trial fee arrangement between Paun and the petitioner not a flat fee, but there are no findings that suggest Paun abandoned his obligations to the petitioner to focus on more lucrative endeavors. Indeed, he was successful in securing a favorable plea arrangement for his client that, given the original charges, dramatically reduced the petitioner's potential prison sentence and his time on the sex offender registry. The mere fact that counsel faced the possibility of not being paid fully in the event the case went to trial does not compel the inference that his advice was not consonant with his client's interests.

The petitioner next argues that because Paun had a financial incentive to avoid trial, he withheld information from the petitioner concerning his constitutional right to reasonably necessary expenses to formulate and present a defense and, concomitantly, failed to file a motion for the funding of an expert witness. In support of this contention, the petitioner principally relies on two cases: First, our Supreme Court's holding in *State* v. *Wang*, 312 Conn. 222, 92 A.3d 220 (2014) and, second,

the United States Supreme Court's decision in *Ake* v. *Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In *Wang*, our Supreme Court held that indigent, self-represented defendants have a constitutional right to expert or investigative assistance that is reasonably necessary to their defense. *State* v. *Wang*, supra, 245. In *Ake*, the United States Supreme Court recognized that the state must assure an indigent defendant's access to a psychiatric evaluation when the sanity of the defendant is likely to be a significant factor at trial. *Ake* v. *Oklahoma*, supra, 82–83.

Although we acknowledge the habeas court's finding that the petitioner in this case would not have qualified for such assistance had it been requested, we resolve this issue on different grounds. See *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 63 n.6, 6 A.3d 213 (2010) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" [internal quotation marks omitted]), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). Even if the petitioner was indigent, *Wang* had not been decided until after the petitioner pleaded guilty and was sentenced.[6] We will not conclude that Paun acted unreasonably by failing to request an expert witness in accordance with court precedent that did not exist at the time of representation. See *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 513, 964 A.2d 1186 ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" [internal quotation marks omitted]), cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

[6] *State* v. *Wang*, supra, 312 Conn. 222, was decided on June 17, 2014. The petitioner pleaded guilty on October 25, 2013, and was sentenced on January 7, 2014.

Further, to the extent that Paun could have fashioned an argument for the funding of an expert pursuant to the Supreme Court's holding in *Ake* v. *Oklahoma*, supra, 470 U.S. 68, we do not believe that his failure to do so suggests impairment or compromise of the petitioner's interests. As our Supreme Court acknowledged in *Wang*, the holding of *Ake* left many questions unanswered concerning "the scope of the due process right to expert assistance at public expense." *State* v. *Wang*, supra, 312 Conn. 235. Indeed, only four years prior to *Wang*, our Supreme Court in *State* v. *Martinez*, 295 Conn. 758, 991 A.2d 1086 (2010), declined to answer whether the due process clause of the fourteenth amendment to the United States constitution guarantees an indigent defendant the right to an expert witness when reasonably necessary. Id., 778. Moreover, apart from the unsettled legal precedent for such a request, Paun explained that there were also factual reasons that militated against seeking court funding for an expert witness. Specifically, in this instance, the petitioner had hired private counsel, he had posted a substantial bond, and the case was in a judicial district where, in Paun's opinion, funding for an expert was unlikely to be considered a reasonably necessary case expenditure. Inasmuch as to perform effectively, counsel need not raise every constitutional claim conceivable, similarly, we conclude that such omissions are not necessarily representative of a conflict of interest, especially when there is a reasonable, strategic basis for counsel's choice of conduct. See *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 460–61, 880 A.2d 160 (2005).

We therefore conclude the petitioner has failed to show that this issue is debatable amongst jurists of reason, that a court could resolve the issue in a different manner, or that the issue is adequate to deserve encouragement to proceed further. We further conclude the habeas court did not abuse its discretion in denying

the petition for certification to appeal with respect to this claim.

III

The petitioner next claims that the habeas court improperly concluded that he received effective assistance of counsel. Specifically, the petitioner argues that Paun failed (1) to retain an expert forensic psychologist and (2) to identify and pursue alternative innocent explanations for the victim's claims against him. We do not agree.

We begin by acknowledging the established standard for reviewing a constitutional claim of ineffective assistance of counsel. "A habeas petitioner can prevail on a constitutional claim of ineffective assistance of counsel [only if he can] establish both (1) deficient performance, and (2) actual prejudice.[7] . . . For ineffectiveness claims resulting from guilty verdicts, we apply the two-pronged standard set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Levine* v. *Manson*, 195 Conn. 636, 639–40, 490 A.2d 82 (1985). For ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), which modified *Strickland*'s prejudice prong. . . .

"To satisfy the performance prong, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that

[7] When a "petitioner has failed to meet the performance prong of *Strickland*, we need not reach the issue of prejudice under *Hill* v. *Lockhart*, [474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Placide* v. *Commissioner of Correction*, 167 Conn. App. 497, 504 n.2, 143 A.3d 1174, cert. denied, 323 Conn. 922, 150 A.3d 1150 (2016).

the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance." (Footnote added; internal quotation marks omitted.) *Shelton* v. *Commissioner of Correction*, 116 Conn. App. 867, 874, 977 A.2d 714, cert. denied, 293 Conn. 936, 981 A.2d 1080 (2009).

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. 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." (Internal quotation marks omitted.) *Bigelow* v. *Commissioner of Correction*, 175 Conn. App. 206, 212, 167 A.3d 1054, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017). For the reasons provided herein, we conclude that the petitioner has not met his burden of demonstrating deficient performance and, therefore, do not reach the issue of prejudice. "With respect to the performance prong of *Strickland*, we are mindful that judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption* that [Paun's] conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Emphasis in original; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015).

First, the petitioner argues that Paun's performance was deficient because he failed to retain, or request funding to retain, an expert witness. We are not persuaded. It is evident from the record that Paun's decision not to retain, or request funding to retain, an expert was based on a number of appropriate factors. Paun, whose testimony the habeas court credited in its entirety, had experience defending cases involving sexual assault of young children. He was aware that forensic psychologists were available and could be helpful in certain situations. He determined, however, that such a strategy was probably not worthwhile in this case. Here, the victim appeared comfortable throughout the forensic interview and offered information freely and at times in an unsolicited manner. He viewed the interview as having been conducted properly given his general understanding of the applicable procedures for conducting such interviews. From his experience, Paun testified that these facts made the victim's statements less susceptible to impeachment by a forensic psychologist.

Our courts have held in similar circumstances that failing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy. See, e.g., id., 638 (finding that trial counsel's decision not to call expert was reasonable given possible evidentiary repercussions); see also *Victor C.* v. *Commissioner of Correction*, 179 Conn. App. 706, 719–720, 180 A.3d 969 (2018) (decision not to retain expert witness was not deficient in light of counsel's experience and training with regard to defending child sexual assault cases). Mindful of these cases and the findings of the habeas court, we are not persuaded that Paun's decision not to retain or consult an expert witness constitutes deficient performance.

In addition to failing to retain an expert witness, the petitioner also claims that Paun's performance was deficient because he failed to identify alternative innocent explanations for the victim's allegations against the petitioner. In support of this claim, the petitioner first contends that Paun failed to consider the fact that the victim spent the weekend preceding the February 14, 2011, incident with her foster father and that she may have confused him with the petitioner as the perpetrator of the abuse. Second, he contends that Paun failed to consider evidence to support the theory that the victim simply misreported an innocent touch. Specifically, the petitioner asserts that he had applied lotion to treat the victim's eczema consistent with a physician's recommendation, evidence of which could supposedly be found in the victim's pediatric records.

With respect to the petitioner's first argument that Paun purportedly failed to investigate the victim's foster father as the possible culprit, we can ascertain no findings of fact in the record to support this contention. Although the habeas court heard testimony from the victim's mother on this point, there is no indication that the court credited this evidence in any respect. Absent

a finding from the habeas court that supports the petitioner's claim, we cannot conclude that Paun's decision not to investigate this alternative theory was constitutionally deficient.

Furthermore, contrary to the petitioner's argument, Paun testified that he had considered and, in fact, did investigate the alternate theory that the petitioner simply was treating the victim's eczema. He decided that this theory was not worth pursuing because of contradictory facts in the case. In particular, this theory did not explain the victim's allegations concerning the vibrator nor was it consistent with the mother's initial statement to the police. In that statement, the mother told investigators that the victim's eczema was on her arms and that the petitioner never had applied lotion to the victim in the past. Given these surrounding facts, and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 840, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017); we cannot conclude that failing to pursue this theory of innocence constituted deficient performance.

We thus conclude the petitioner has failed to show that his claim of ineffective assistance of counsel involves issues that are debatable amongst jurists of reason, that a court could resolve the issues in a different manner, or that the issues are adequate to deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

JAMES RICCIO *v.* LISA RICCIO
(AC 40540)

Sheldon, Bright and Bear, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant and making certain financial orders. He claimed, inter alia, that the trial court improperly valued and distributed the parties' defined benefit plans and abused its discretion in making certain of its financial awards. *Held* that the trial court properly considered the appropriate statutory (§§ 46b-81 and 46b-82) factors in making its financial orders, which were supported by the court's findings and were within its discretion; that court's distribution of the parties' assets was not inequitable simply because it was not equal in monetary terms, the plaintiff failed to demonstrate that the court abused its discretion in applying the present division method, instead of the present value method, in distributing the parties' defined benefit plans, and the court's order requiring the defendant to pay to the plaintiff rehabilitative alimony did not constitute impermissible double dipping, as the court considered the plaintiff's income from his pension, rather than the value of the pension asset, and his other income to determine how much additional support he would need from the defendant.

Argued April 19—officially released July 31, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Nastri*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellant (plaintiff).

Fatima T. Lobo, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, James Riccio, appeals from the judgment of the trial court dissolving his marriage to the defendant, Lisa Riccio. On appeal, the plaintiff claims that the court (1) abused its discretion in

making its financial orders because, in their entirety, they favored the defendant; (2) erred in applying the present division method of valuation to the distribution of the parties' defined benefit plans; and (3) erred in its treatment of the plaintiff's pay-status pension and the defendant's nonpay-status pension. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the plaintiff's claims. The plaintiff and the defendant were married on October 20, 1978. The plaintiff brought the underlying action for dissolution of marriage by complaint dated March 8, 2016. Following a five day trial, on May 24, 2017, the court dissolved the parties' marriage on the ground of irretrievable breakdown,[1] and entered various financial and property division orders. The court ordered, in relevant part, that the defendant pay to the plaintiff $125 per week for a period of eighteen months as rehabilitative alimony,[2] and that the plaintiff pay to the defendant $1 per week as alimony for a period of eighteen months because the defendant's employment future was uncertain. The court also ordered that "[t]he defendant shall transfer $48,750 to the plaintiff from her Fidelity 401 (k) plan . . . . This distribution takes into account the disparity in the parties' defined benefit plans. . . . The parties

[1] The court assigned primary fault for the breakdown of the marriage to the plaintiff. On appeal, the plaintiff challenges the court's finding that his "single-minded devotion to his sobriety, his obsession with bowling, his infidelity and his deceptions are the primary reasons for the failure of the marriage." On the basis of our review of the record, we conclude that the court's finding is amply supported by the evidence and, therefore, not clearly erroneous. See *Greco* v. *Greco*, 70 Conn. App. 735, 736–37, 799 A.2d 331 (2002) (court's finding of fact regarding breakdown of marriage will be reversed only if it is clearly erroneous).

[2] "[R]ehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-sufficiency." (Internal quotation marks omitted.) *Fritz* v. *Fritz*, 127 Conn. App. 788, 795, 21 A.3d 466 (2011).

shall retain, free and clear of any claim by the other, their defined benefit plans. . . . The defendant shall retain . . . any interest she has in [her] Computershare MetLife policy. The plaintiff shall retain the Minnesota Life Insurance Policy, and its cash value . . . ."[3] (Footnote omitted.) This appeal followed.

We begin by setting forth our general standard of review in family matters. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

[3] The parties each had their own retirement funds—the defendant had a Fidelity 401 (k) account, and the plaintiff had a Thrift Savings account, each of which is a defined benefit plan. Because of the discrepancy in the value of the parties' defined benefit plans, the court distributed $240,819 of the defendant's 401 (k) account to her and ordered that the plaintiff receive the remaining $48,750 in the defendant's 401 (k) account. The plaintiff retained the full amount of his $138,000 Thrift Savings account.

The plaintiff first claims that the court abused its discretion because its "financial orders . . . are inequitably favorable to the defendant [because the] orders assign to the defendant the large majority of the marital assets and income." Specifically, the plaintiff challenges the court's orders regarding the alimony award, the division of the parties' pensions and retirement funds, unknown future debt, the requirement that the parties pay their own health insurance, the defendant's MetLife account, and attorney's fees.

"In dissolution proceedings, the court must fashion its financial orders in accordance with the criteria set forth in [General Statutes] § 46b-81 (division of marital property) and [General Statutes] § 46b-82 (alimony)." (Internal quotation marks omitted.) *Rozsa* v. *Rozsa*, 117 Conn. App. 1, 9, 977 A.2d 722 (2009); see also *Loughlin* v. *Loughlin*, 280 Conn. 632, 640, 910 A.2d 963 (2006). "Under these statutes, the court shall consider, inter alia: the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate . . . and needs of each of the parties . . . ."[4] (Internal quotation marks omitted.) *Loughlin* v. *Loughlin*, supra, 640. "While the trial court must consider the delineated statutory criteria . . . no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . A trial court . . . need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Internal quotation marks omitted.) *Kent* v.

[4] The court stated in its memorandum of decision that it considered all of the evidence before it, as well as the factors set forth in §§ 46b-81 (c) and 46b-82, in making its orders.

DiPaola, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

Importantly, "§ 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other. . . . On the basis of the plain language of § 46b-81, there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria." (Internal quotation marks omitted.) *Kaczynski* v. *Kaczynski*, 124 Conn. App. 204, 213, 3 A.3d 1034 (2010). Additionally, "[i]ndividual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

We have considered carefully the plaintiff's various arguments in support of his claim regarding the court's financial orders, and we conclude that he has not established that the court has misapplied the law, abused its discretion or committed clear error. The court's distribution of the parties' assets, although not equal in monetary terms, is not inequitable solely on the basis of that disparity.[5] See, e.g., *O'Brien* v. *O'Brien*, 326 Conn. 81, 122, 161 A.3d 1236 (2017) ("[A] distribution ratio of 78 percent to 22 percent is not, on its face, excessive, as the

[5] The court noted in its memorandum of decision that it "has divided the parties' marital assets fairly and equitably, albeit not necessarily equally." The majority of the assets, however, were divided equally. Additionally, although the court's allocation of the parties' retirement funds was 56 percent to the defendant and 44 percent to the plaintiff, the court properly could, in its discretion, divide the parties' assets in this manner in the specific circumstances of this case, given its findings.

plaintiff contends. Indeed, we have upheld distributions awarding as much as 90 percent of the marital estate to one party.'"). Our thorough review of the record leads us to conclude that the court properly considered the appropriate statutory factors, and that its orders were both supported by its findings and within its broad discretion.

The plaintiff next claims that the court applied the incorrect valuation standard for the distribution of the parties' defined benefit plans because it should have applied the present value method instead of the present division method.

"There are three widely approved methods of valuing and distributing pension benefits"—the present value method, the present division method, and the reserved jurisdiction method.[6] *Krafick* v. *Krafick*, 234 Conn. 783, 800, 663 A.2d 365 (1995). "[I]t is within the trial court's discretion . . . to choose, on a case-by-case basis . . . [the] valuation method that it deems appropriate . . . ." (Citation omitted.) *Bender* v. *Bender*, 258 Conn. 733, 760, 785 A.2d 197 (2001). In the present case, the plaintiff claims that, "[b]ecause [his] pension was already in pay status, the present value method was likely the preferable valuation and distribution method," and not the present division method. The plaintiff, however, has failed to demonstrate that the

[6] "[T]he present value or offset method . . . requires the court to determine the present value of the pension benefits, decide the portion to which the nonemployee spouse is entitled, and award other property to the nonemployee spouse as an offset to the pension benefits to which he or she is otherwise entitled." (Internal quotation marks omitted.) *Krafick* v. *Krafick*, supra, 234 Conn. 800. "Under the 'present division' method, the trial court determines at the time of trial, the percentage share of the pension benefits to which the nonemployee spouse is entitled." Id., 803. "[U]nder the 'reserved jurisdiction' method, the trial court reserves jurisdiction to distribute the pension until benefits have matured." Id. In this case, however, each of the spouses had been or was employed and each had earned a pension, so there was no "nonemployee" spouse.

court abused its broad discretion in applying the present division method.

Finally, the plaintiff claims that the court erred in its treatment of his pay-status pension and the defendant's nonpay-status pension. Specifically, the plaintiff claims that the court's order constituted impermissible "double dipping" because the court considered his income from his pension in making the alimony award and also in dividing the parties' assets.

Trial courts are vested with broad discretion to award alimony, and, when a court determines whether to award alimony and the amount of any such award, § 46b-82 expressly authorizes the court to consider the marital assets distributed to each party in connection with the dissolution proceeding. See General Statutes § 46b-82; *Krafick* v. *Krafick*, supra, 234 Conn. 805 n.26; see also *O'Brien* v. *O'Brien*, supra, 326 Conn. 120 ("[t]he retroactive alimony award was not improper because trial courts are free to consider the marital assets distributed to the party paying alimony as a potential source of alimony payments" [emphasis omitted]). "A trial court's alimony award constitutes impermissible double dipping only if the court considers, as a source of the alimony payments, assets distributed to the party receiving the alimony. . . . That is, if a trial court assigns a certain asset—a bank account, for example—to the party receiving alimony, it cannot consider that same bank account as a source of future alimony payments because the account has not been distributed to the party paying the alimony." (Citations omitted; emphasis omitted.) *O'Brien* v. *O'Brien*, supra, 120–21; see also *Krafick* v. *Krafick*, supra, 804–805 n.26 (double dipping occurs when court relies "on the pension benefits allocated to the employee spouse under § 46b-81 as a source of alimony . . . [and] only to the extent that any portion of the pension assigned to the nonemployee spouse was counted in determining the employee

spouse's resources for purposes of alimony"). In the present case, in ordering the defendant to pay to the plaintiff rehabilitative alimony, the court considered the plaintiff's income from his pension, rather than the value of the pension asset, and his other income, to determine how much additional support he would need from the defendant for rehabilitative alimony. This does not constitute double dipping.

The judgment is affirmed.

JAMES TAYLOR *v.* TANYA TAYLOR
(AC 38711)

Sheldon, Prescott and Elgo, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court denying his petition for visitation with the minor child of his niece, the defendant. In his petition, the plaintiff alleged that he had a parent-like relationship with the minor child because he had lived with the minor child for approximately nine years until 2012. Since then, the minor child has resided with the defendant and has not had a relationship with the plaintiff. On appeal, the plaintiff claimed, inter alia, that the court improperly determined that he had not satisfied his burden of proving, by clear and convincing evidence, that the denial of visitation would cause real and substantial harm to the minor child. *Held* that the trial court properly denied the plaintiff's petition for visitation; that court properly concluded that irrespective of whether the plaintiff had a parent-like relationship with the minor child, he had not established that the denial of visitation would cause real and significant harm to the minor child, and that finding was not clearly erroneous in light of the evidence in the record, which included the uncontroverted testimony of the guardian ad litem that the minor child was happy, was doing well in school and did not want any contact with the plaintiff, and a 2013 report that indicated that the prospect of visitation with the plaintiff previously caused considerable anxiety for the minor child, both of which were credited by the court.

Argued April 23—officially released July 31, 2018

Procedural History

Petition for visitation of the defendant's minor child, brought to the Superior Court in the judicial district of

New Haven, and tried to the court, *Klatt*, *J.*; judgment denying the petition, from which the plaintiff appealed to this court. *Affirmed.*

Jeffrey D. Brownstein, for the appellant (plaintiff).

Laura N. Zullo, guardian ad litem for the minor child.

Opinion

ELGO, J. The plaintiff, James Taylor, appeals from the judgment of the trial court denying his petition for visitation filed pursuant to General Statutes § 46b-59. Although the plaintiff raises multiple claims on appeal, only one merits discussion—namely, his contention that the court improperly determined that he had not satisfied his burden of proving, by clear and convincing evidence, that the denial of visitation would cause real and substantial harm to the minor child.[1] We affirm the judgment of the trial court.

The relevant facts are not disputed. In 2012, the plaintiff filed a petition for visitation with the minor child of his niece, Tanya Taylor. While that matter was pending, a family services mediation report was prepared in May, 2013 (2013 report). That report was "an issue focused evaluation" based, inter alia, on interviews with the minor child's therapist and school officials. The plaintiff subsequently withdrew that petition for visitation.

On June 3, 2015, the plaintiff commenced the present action by filing a verified petition for visitation with the minor child.[2] In that petition, the plaintiff alleged that

[1] The plaintiff also contends that the court abused its discretion in denying (1) his request for a continuance of the hearing on the merits of his petition and (2) his postjudgment motion for reargument and reconsideration. On our review of the record, we conclude that those claims are without merit.

[2] The petition named Tanya Taylor, the mother of the minor child, as the defendant. Although she was represented by counsel throughout the proceedings before the trial court, she has not filed a brief in this appeal. Accordingly, on December 7, 2017, this court issued an order indicating that the appeal would be heard solely on the basis of the appellant's brief, appendices and record as defined by Practice Book § 60-4.

he had a parent-like relationship with the minor child, stating: "From 2002 [when the minor child was born, he] lived with me for around [nine] years [until] January 20, 2012, when [the defendant] came to visit and never returned [the minor child]. Have not seen nor talked to him since that time. I cared for him like a son. I scheduled and brought him to his [doctor's] appointments and was [the] contact person regarding his schooling and education." With respect to the harm that would result from the denial of visitation, the plaintiff alleged that the minor child "was emotionally attached to the plaintiff and [the] denial of visitation has resulted and/or will continue to result in the child doing poorly in school and have behavior issues which will continue if custody and/or visitation is denied. The minor child has no contact whatsoever with [his] biological father and needs a father like figure in his life. Child is neglected. The plaintiff requests custody and/or visitation with the minor child. The plaintiff seeks specific but only liberal visitation with the minor child. In addition to the above, as to real and significant harm, the plaintiff alleges that the minor child is being denied proper care and attention physically, educationally, emotionally and/or morally. . . . [T]he plaintiff alleges that during [the] time periods when the minor child was living with him, the [defendant] received and continued to receive welfare checks from the state of [Connecticut]. The plaintiff seeks custody and alleges that it would be detrimental to the child's best interest if it is not granted." On July 6, 2015, the plaintiff filed an "amended verified petition/affidavit for custody/visitation," which reiterated the salient allegations of his June 3, 2015 petition. That amended petition further detailed the plaintiff's allegedly parent-like relationship with the minor child from 2002 to 2012.

On August 5, 2015, the defendant filed a motion to dismiss the petition for lack of subject matter jurisdiction, claiming that it lacked the requisite allegations of

a parent-like relationship and substantial harm to the minor child pursuant to *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002). The court disagreed and denied that motion on August 24, 2015.

The court thereafter entered an order, with the agreement of the parties, appointing Attorney Laura Zullo as guardian ad litem for the minor child. The court then held a hearing on the merits of the plaintiff's petition on October 13, 2015. At that hearing, Zullo testified that she recently had visited the minor child at his home. The child at that time was thirteen years old and in eighth grade. As Zullo stated, "[h]e tells me he's doing well in school, he tells me his favorite subject is science. And [his home] . . . it's appropriate. You know, his bedroom was fine. He's got all his Legos. It was very appropriate. I didn't see any sort of problem there." Significantly, Zullo testified that the minor child told her that "he didn't want to have any contact" with the plaintiff. As she explained, the minor child indicated that "his life is happy, he's fine, there's no reason for him to have contact with [the plaintiff]. He remembers a time where it was Christmas Eve and [the plaintiff] wouldn't let him see his mother, and he remembers that in his mind. And he wants no contact with [the plaintiff]. That's what he told me." Zullo also testified that, on the basis of her investigation, she did not believe that the minor child would suffer any real and substantial harm if visitation with the plaintiff was denied.

When Zullo's testimony concluded, the plaintiff submitted no further documentary or testimonial evidence. The defendant offered a copy of the 2013 report, to which the plaintiff objected but was overruled by the court.[3] The court then issued its ruling from the bench, stating in relevant part: "[E]ven if the first prong of plaintiff's complaint [alleging a parent-like relationship]

[3] The propriety of that evidentiary ruling is not challenged in this appeal.

was met, the second prong [alleging real and substantial harm] clearly is not. . . . I've heard testimony that the child is happy, that he's healthy, and that's a present day observation of the child. There's no need to look beyond that. The guardian ad litem is an experienced attorney [who has] done this particular type of evaluation many times over the years. And clearly she noted no indication of any problems within the child. I don't see the need to look beyond that.

"Furthermore, I reviewed the [2013 report]. And I'll indicate that, quite frankly . . . I believe . . . [that] if I allowed visitation . . . it could harm the child. The [2013] report, in particular, noted an inappropriate relationship that had existed between the child and [the plaintiff] that caused enormous levels of anxiety with the child. And, in fact, the school even noted the anxiety level was rising in the child [at] the thought of having contact with [the plaintiff]. . . . So [the plaintiff's petition] for visitation is denied." The plaintiff thereafter filed a motion for reargument and reconsideration, which the court denied.

Following the commencement of this appeal, the plaintiff filed a motion for articulation, which was denied by the trial court. The plaintiff then filed a motion for review of that ruling, which this court granted. This court then ordered the trial court to articulate "(1) whether or not it found that a parent-like relationship existed between the plaintiff and the minor child prior to January of 2012, and the factual basis therefor and (2) if the court [so found], whether it determined that the defendant's refusal to permit the child to see the plaintiff was the sole reason that there was currently no parent-like relationship." In its subsequent articulation, the court stated in relevant part that it "found that there was no current parent-child relationship between the plaintiff and the minor child. . . . There was evidence, through the testimony of [Zullo]

and [the 2013 report] that the child had lived with the plaintiff for a period of time, but there had been no contact between [them] for several years. Testimony further indicated that [the] plaintiff was also estranged from his extended family. [The] plaintiff did not elicit sufficient testimony regarding the circumstances of why the minor child lived with him prior to 2012 for the court to make any factual determinations in that regard."[4]

The court then clarified that its decision to deny the plaintiff's petition was predicated on his failure to satisfy the substantial harm prong of the applicable legal standard. As the court stated: "The evidence clearly established that [the] plaintiff did not meet the second . . . factor of the *Roth* analysis, which was dispositive of his claim. . . . This court's denial of [the] plaintiff's application for visitation was based on the determination that the plaintiff did not meet the second prong of [the] *Roth* analysis. . . . [Zullo] testified that the child wanted no contact with the plaintiff, in fact was quite anxious over the possibility of being required to see him. The testimony and the [2013 report] indicated that there had been an inappropriate relationship between the plaintiff and the minor child. . . . [T]he relationship between the plaintiff and all related family members appears to be nonexistent." For that reason, the court concluded that the plaintiff had not established that the denial of visitation would cause real and substantial harm to the minor child. On appeal, the plaintiff challenges the propriety of that determination.

In *Roth* v. *Weston*, supra, 259 Conn. 234–35, our Supreme Court held that "there are two requirements

[4] The plaintiff filed a second motion for review with this court on February 3, 2017, claiming that the trial court had not adequately articulated whether it had found that a parent-like relationship existed with the minor child prior to January, 2012. By order dated April 26, 2017, this court granted review but denied the relief requested.

that must be satisfied in order for a court: (1) to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent; and (2) to grant such a petition. First, the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child." With respect to the latter prong, the court explained that "[t]he family entity is the core foundation of modern civilization. The constitutionally protected interest of parents to raise their children without interference undeniably warrants deference and, absent a powerful countervailing interest, protection of the greatest possible magnitude. . . . Consequently, interference is justified only when it can be demonstrated that there is a compelling need to protect the child from harm. In the absence of a threshold requirement of a finding of real and substantial harm to the child as a result of the denial of visitation, forced intervention by a third party seeking visitation is an unwarranted intrusion into family autonomy." (Citations omitted.) Id., 228–29.

Our review of the court's finding as to whether the denial of visitation will result in real and substantial harm to the minor child is governed by the clearly erroneous standard. See *DiGiovanna* v. *St. George*, 300 Conn. 59, 69, 12 A.3d 900 (2011). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

In the present case, the court concluded that, irrespective of whether the plaintiff had a parent-like relationship with the minor child, he had not established that the denial of visitation would cause real and significant harm to the minor child. In so doing, the court credited the uncontroverted testimony of Zullo that the child currently was happy, was doing well in school, and did not want to have "any contact" with the plaintiff. See *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002) (in case tried before court, trial judge is sole arbiter of credibility of witnesses and weight to be afforded to specific testimony). The court also credited the 2013 report, which indicated that the prospect of visitation with the plaintiff previously caused considerable anxiety for the minor child.

Connecticut law recognizes that "parents should not be faced with unjustified intrusions into their decision-making in the absence of specific allegations and proof . . . ." *Roth* v. *Weston*, supra, 259 Conn. 221. For that reason, our law requires, as a prerequisite to such interference with parental rights, proof by clear and convincing evidence that the denial of visitation with a third party will cause the child to suffer real and substantial harm. Id., 226. In the present case, the court found that the plaintiff had not satisfied that "admittedly high" burden. Id., 229. In light of the evidence adduced at the October 13, 2015 hearing, we cannot conclude that the court's finding was clearly erroneous. The court, therefore, properly denied the plaintiff's petition for visitation.

The judgment is affirmed.

In this opinion the other judges concurred.

MARCELLO EDWARDS *v.* COMMISSIONER OF CORRECTION (AC 39632)

Sheldon, Bright and Bear, Js.

Syllabus

The petitioner, who had been convicted of assault in the first degree and of violation of probation in connection with the stabbing of the victim, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance. The petitioner claimed, inter alia, that because his counsel failed to subject the state's case to any meaningful adversarial testing, the habeas court should have presumed, pursuant to *United States* v. *Cronic* (466 U.S. 648), that the petitioner was prejudiced and, thus, granted his habeas petition. The petitioner's trial counsel had declined to cross-examine the victim, who had initially told the police that she did not know who had assaulted her, and declined to cross-examine the victim's children, who were present at the time of the assault. Counsel also failed to meaningfully cross-examine any of the state's witnesses and did not investigate the petitioner's alibi claim or introduce any alibi evidence, despite having reviewed certain witness statements that supported the alibi, and counsel did not interview any of the petitioner's witnesses, all of whom were available at the time of trial. The habeas court determined that counsel's decision not to cross-examine the state's witnesses was a strategic decision, as to which he could not have been found to have rendered deficient performance, and that the petitioner failed to point out how cross-examination would have benefited the defense. The court further concluded that the petitioner failed to prove that the outcome of the criminal trial would have been different if his counsel had investigated the alibi and interviewed the alibi witnesses. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court improperly denied the petition for a writ of habeas corpus; that court should have presumed, pursuant to *Cronic*, that the petitioner was prejudiced as a result of his trial counsel's failure to subject the state's case to any meaningful adversarial testing, as it was clear that counsel had determined that the petitioner was the perpetrator and would be convicted, and counsel's utter lack of advocacy on the petitioner's behalf in declining to cross-examine the victim and her children, and in failing to investigate his alibi, could not reasonably be construed as strategic, which was apparent from counsel's opinion that the evidence against the petitioner was overwhelming and that the petitioner's case was one in which there was no defense.

Argued April 19—officially released July 31, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; thereafter, the petition was withdrawn in part; judgment denying the petition; subsequently, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Reversed; judgment directed; further proceedings*.

Pamela S. Nagy, assistant public defender, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. The petitioner, Marcello Edwards, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus claiming ineffective assistance of counsel during his criminal trial, which resulted in his conviction of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and the revocation of his probation as a result of his violation of General Statutes § 53a-32. On appeal, the petitioner claims that because his trial counsel, Raul Davila, failed to subject the state's case against him to any meaningful adversarial testing, his claim is controlled by *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and prejudice should be presumed.[1] On that basis, he claims that the habeas

[1] The petitioner also argues that the habeas court erred in concluding that he was not denied the effective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because we agree with the petitioner's *Cronic* claim, we need not address his claim for relief under *Strickland*.

court should have granted his petition for a writ of habeas corpus, set aside his conviction and the revocation of his probation, and remanded his case for a new trial. We agree, and therefore reverse the judgment of the habeas court.[2]

On December 11, 2012, the petitioner was convicted of assault in the first degree in violation of § 53a-59 (a) (1). On December 12, 2012, he was found in violation of his probation. In affirming the petitioner's conviction and the revocation of his probation, this court set forth the following relevant factual and procedural history. "The victim[3] . . . met the [petitioner] when she was fifteen and he was twenty or twenty-one years old. They began dating at that time and eventually had two children together, [J] and [S]. The [petitioner] physically abused the victim during their relationship. On one occasion, the [petitioner] attacked the victim while she was at work, forcing her to lock herself in the office of a coworker to escape physical harm. On another occasion, when the [petitioner] and the victim argued, he punched her in the head, splitting her lip and rupturing her eardrum. In August, 2009, the relationship ended, and the [petitioner] moved out of the victim's home.

"On November 16, 2011, the [petitioner] took [S] to McDonald's after school and later brought her back to his mother's house, where he then lived. Shortly thereafter, the victim arrived to pick up [S] and take her home. Upon returning home, the victim called [J], who was home alone, and asked him to unlock the door

[2] The revocation of the petitioner's probation was based on his conviction of the assault of the victim in this case, which we are ordering to be vacated. Consequently, the revocation of his probation also must be vacated and the case remanded for a new trial.

[3] In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

to let them in the house. As the victim approached the house, however, the [petitioner] accosted her and stabbed her repeatedly in the head, chest, arm, and thigh. When the victim cried out for help, the [petitioner] fled. [J] ran to the entry of the house, where he saw the victim, lying on the ground, bleeding. He dragged his mother into the house and called 911. After the victim was taken to a hospital, [J] texted the [petitioner], 'You're not gonna get away with it. You're going to jail.' The [petitioner] responded by text, 'Fuck you.'

"Thereafter, the [petitioner] was arrested and charged with assault in the first degree and violation of probation. The [petitioner] pleaded not guilty to both charges and elected a jury trial on the assault charge." (Footnote added.) *State* v. *Edwards*, 158 Conn. App. 119, 121–22, 118 A.3d 615, cert. denied, 318 Conn. 906, 122 A.3d 634 (2015).

"On the charge of assault in the first degree, the court sentenced the [petitioner] to a term of twenty years of incarceration, of which five years was a mandatory minimum sentence that could not be suspended or reduced. On the charge of violation of probation, the court sentenced the [petitioner] to a term of thirty-seven months incarceration, to be served consecutively to his sentence for first degree assault." Id., 130–31.

On August 9, 2013, the petitioner filed his petition for a writ of habeas corpus in this matter. At his trial before the habeas court, the petitioner made three specific claims as to ways in which Davila was ineffective, namely, that Davila failed to request an additional competency evaluation; that Davila failed to cross-examine the state's witnesses; and that Davila failed to investigate his claimed alibi.

By way of memorandum of decision filed July 13, 2016, the habeas court rejected the petitioner's claims of ineffective assistance, and thus denied the petitioner's

petition for a writ of habeas corpus. The habeas court determined that the petitioner failed to prove that an additional competency evaluation "would have yielded a result favorable to the petitioner," and thus that the petitioner failed to prove that he was prejudiced by Davila's alleged failure to seek an additional competency evaluation. The court determined that Davila's decision not to cross-examine the state's witnesses was a strategic decision as to which he could not have been found to be deficient. The court further found that the petitioner failed "to point out a line of inquiry on cross-examination of these witnesses that would have been beneficial to the defense . . . ." Finally, the court found the petitioner's claimed alibi "unavailing," and that the petitioner failed to prove that if Davila had further investigated the petitioner's alibi and interviewed his alibi witnesses himself, the outcome of the criminal trial would have been different. The court thereafter granted the petitioner's petition for certification to appeal, and this appeal followed.

On appeal, the petitioner claims that Davila's representation of him was so ineffective that he failed to subject the state's case against him to any meaningful adversarial testing, and thus that prejudice should be presumed under *Cronic*.[4] On that basis, the petitioner

[4] Although the petitioner did not specifically invoke *Cronic* in his habeas petition, and the habeas court did not explicitly rule on his *Cronic* claim, he did argue, in both his trial brief and oral argument to the habeas court, that Davila's performance was so deficient that prejudice should be presumed under *Cronic*. The respondent, the Commissioner of Correction, has not claimed on appeal that the petitioner's *Cronic* claim is unpreserved. Although our Supreme Court has declined to address ineffective assistance claims "unless they arise out of the actions or omissions of the habeas court itself . . . the petitioner in the present case did not raise any *new claim* on appeal, he merely refined his argument as to the same alleged deficiency. . . . *Strickland* [v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] introduces the concept of presumption of prejudice, which *Cronic* later refines. . . . Thus, the petitioner did not introduce an entirely new theory on appeal, obviating our concerns about fairness to the trial court and opposing party." (Citations omitted; emphasis in original.) *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 553 n.4, 126 A.3d 538 (2015).

argues that his petition for a writ of habeas corpus should have been granted. We agree.

"The issue of whether the representation that a [petitioner] received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, the question requires plenary review unfettered by the clearly erroneous standard. . . .

"The sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. . . . This right is incorporated to the states through the due process clause of the fourteenth amendment. . . . *Strickland* [v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Cronic* set forth the framework for analyzing ineffective assistance of counsel claims. Under the two-pronged *Strickland* test, a [petitioner] can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient, and (2) the deficient performance resulted in actual prejudice. . . . To demonstrate deficient performance, a [petitioner] must show that counsel's conduct fell below an objective standard of reasonableness for competent attorneys. . . . To demonstrate actual prejudice, a [petitioner] must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. . . .

"*Strickland* recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . *Cronic* . . . which was decided on the

Here, although the petitioner argued to the habeas court that Davila's representation of him was so deficient that prejudice should be presumed under *Cronic*, the habeas court addressed prejudice only under *Strickland*. Because, as noted in *Davis*, *Strickland* introduces the concept of presumption of prejudice, later refined by *Cronic*, we follow the *Davis* court's lead—particularly in light of the fact that the state has fully briefed and argued the petitioner's *Cronic* claim—and review the petitioner's claim that Davila's representation of him was so deficient that prejudice should be presumed.

same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554–55, 126 A.3d 538 (2015). "This is an irrebuttable presumption. See *State* v. *Frye*, 224 Conn. 253, 262, 617 A.2d 1382 (1992) (right to counsel is so basic that its violation mandates reversal even if no particular prejudice is shown and even if there is overwhelming evidence of guilt) . . . ." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 699–700, 142 A.3d 1095 (2016).

To assess the petitioner's claim that Davila failed to subject the state's case against him to meaningful adversarial testing, and thus that Davila's representation of him requires reversal under *Cronic*, we begin by reviewing the record of the petitioner's criminal trial. Prior to the petitioner's trial, the court held two hearings to determine the petitioner's competence to stand trial. At the first hearing, the court found that the petitioner was not competent, but that his competency could be restored. The court thus ordered that the petitioner be committed for treatment at the Whiting Forensic Division of Connecticut Valley Hospital for a period of sixty days. At the conclusion of that commitment, a second competency hearing was held, at which the court, on the unanimous recommendation of the forensic team that had treated the petitioner, found that he had been restored to competency, and thus that he could stand trial. Davila attended both hearings but did not cross-examine any witnesses at either hearing.

During voir dire, the petitioner was removed from the courtroom due to his disruptive behavior.[5] The petitioner continued that behavior and was therefore absent from the courtroom for the majority of his trial. On the first day of trial, the state called the victim to the witness stand. The victim testified regarding her abusive past with the petitioner, the assault that she suffered on November 16, 2011, and her identification of the petitioner as the individual who had assaulted her. Davila did not cross-examine her.

The state then called S to the witness stand. S testified that she saw her father leave her grandmother's house about five or ten minutes before her mother picked her up on the day of the assault. Davila did not cross-examine her.

The state then called J to the witness stand. J described the events of November 11, 2016, from his perspective. He had been home when his mother called to ask him to unlock the door so that she and his sister could come in after returning from a supermarket. After S entered, he went to the kitchen with her, and then he heard his mother crying out for help. He ran back to the back door, where he "saw [his mother] on the floor and . . . a person with a black coat running away." He testified that he could "[n]ot really" see the perpetrator's face and thus did not recognize him at first. He observed the individual running away, and the back of the perpetrator's body "remind[ed]" him of his father, the petitioner. He picked up his mother off the ground and dragged her into the house, and called the police. After his mother was taken to a hospital, he sent a text message to the petitioner, telling him that he was not going to get away with assaulting his mother, to which the petitioner replied, " '[f]uck you.' " J later

[5] The petitioner had also been removed from the courtroom for similar disruptive behavior during his second competency hearing.

showed those text messages to the police. Davila did not cross-examine him.

The state then called Detective Luis Poma to the witness stand. He testified as to the investigation of the assault of the victim, ultimately leading to his arrest of the petitioner. He testified that, upon arriving at the crime scene, he spoke with the officers who were already there, and learned that the petitioner was a potential suspect. He stated that the victim's house was approximately one mile away from the petitioner's mother's house, and that it took him approximately five minutes to drive that mile. Poma was unable to speak to the petitioner when he arrived at the petitioner's mother's house. He then proceeded to Saint Francis Hospital and Medical Center in Hartford to check on the condition of and to speak to the victim. Due to her medical condition, he was unable to speak to the victim on that day. He did, however, speak to J regarding the text messages between J and the petitioner. Poma telephoned the petitioner and had a brief conversation with him during which the petitioner referred to the victim as "a bitch." Poma was able to speak to the victim on November 21, 2011, at which time he showed her a photographic array, from which she identified the petitioner as her assailant. Davila cross-examined Poma only as to the difference between "on-site arrests" and arrests by warrant. Davila did not ask Poma any questions about his investigation of the assault of the victim or the arrest of the petitioner.

The state then called Dr. Scheuster Christie to the witness stand. Christie testified regarding his treatment of the victim on the night of the assault. Davila did not cross-examine him.

The state then called Officer Valentine Olabisi to the witness stand. Olabisi testified that he had responded to the scene of the assault and then proceeded to the

home of the petitioner's mother and spoke to the petitioner. Olabisi asked the petitioner where he had been between the hours of 3 p.m. and 6 p.m. on the day of the assault. The petitioner told him that "he had been home all day with his mother, and just started to become very angry and uncooperative at that time." Olabisi also testified that it had taken him less than five minutes to drive from the victim's house to the petitioner's mother's house. Davila did not cross-examine him.

After the state rested, Davila addressed the court: "I make a motion, Your Honor, that the state hasn't proved its case beyond a reasonable doubt as it presented—presents its evidence for the case to go to the jury, so I'd ask the court for a directed verdict." The court denied Davila's motion with no further argument or elaboration from Davila.

Davila presented no witnesses or evidence on behalf of the petitioner.

By way of closing argument, Davila argued to the jury that the state had presented no evidence of what "triggered" the assault of the victim, and asked the jury to "focus on . . . the fact that [S], [J] and [the victim] . . . all disliked [the petitioner]. And that was clear from the testimony." He told the jury that all three of them "had a motive and had a bias to testify against [the petitioner]."

At the habeas trial, Davila testified that, in preparation for the petitioner's criminal trial, he read the file provided to him by the petitioner's prior attorney, Aaron J. Romano, which included reports from an investigator hired by Romano. Davila stated that after reading Romano's file, he developed a theory of the case, namely, that the petitioner was not the individual who had assaulted the victim. When asked how he supported

that theory to the jury, Davila explained that the petitioner had been removed from the courtroom, and, consequently, Davila had "nobody next to [him] to sort of help me trying to defend [the petitioner]." Davila testified at the habeas trial that it was difficult to defend the petitioner because he had stabbed the victim "upward of thirty-four times in front of her two children . . . ." Davila stated that the evidence against the petitioner was overwhelming, and that "[t]here are cases where you have no defense" and that he "argued as best as [he] could during [his] closing [argument] that [the petitioner] did not commit this crime." He agreed with counsel for the respondent, the Commissioner of Correction, that "given the uncooperative nature [of the petitioner] at that point and the overwhelming evidence against him, [that his] best bet was to argue for mitigation at sentencing."[6]

As to the petitioner's specific claim that Davila should have cross-examined the state's witnesses, he explained that he did not cross-examine the victim or her children because he had the statements that they had given to the police and it is a "cardinal [rule] of cross-examination [that] you don't ask a question unless you know what the answer's going to be . . . ." Davila then testified that he did not want to garner more sympathy for the victim by cross-examining her or the children and that he could not do so anyway because the petitioner was not at the counsel table with him. Davila acknowledged that the police report indicated that the victim initially had told the police that she did not see who stabbed her, and that even though this could have been

[6] Although the petitioner did not allege that Davila ineffectively represented him at the sentencing hearing, we note that Davila argued only that the way the petitioner "was portrayed during the course of the trial is completely different from how his family and his pastor perceive him to be. . . . So, in any event, I know that the court is going to be fair with him. The court was fair throughout the trial, and I just leave it to Your Honor to impose a fair and equitable sentence in this case."

used for cross-examination, he did not do so. He stated that part of his strategy in not cross-examining the victim or her children was to avoid repeated identifications by them of the petitioner as the individual who had stabbed the victim. Davila testified that "if there was any basis for cross-examination that would actually elicit any testimony that in my opinion would have furthered [the petitioner's] defense and best interest . . . I certainly would have cross-examined the witnesses."

As to the petitioner's claim that Davila failed to investigate his alibi, Davila acknowledged that he did not interview any witnesses or hire an investigator. Davila testified that he would have interviewed the petitioner's alibi witnesses if he "thought that there was any merit to them." Davila read the alibi statements, but decided that they were not credible because they conflicted with certain testimony by S and J. As for potential alibi witnesses, Davila testified that he "relied on the statements provided to [him] by the state where [the petitioner's] common law wife or wife and his kids all identified [the petitioner] as the person who committed this crime." Davila spoke with the petitioner's sister "at least two times" regarding her concern for the petitioner, but he never discussed with her a possible alibi for him.

At the habeas trial, the petitioner's mother, Olga Kellier, and sister, Delmarie Robinson, testified on his behalf. Their testimony at the habeas trial was consistent with the statements they had given to the investigator hired by Romano, all of which were included in the file that Romano had given to Davila. Kellier testified that the petitioner was at home all day on the day of the assault, except when he picked S up from school. She testified that she had received a telephone call from the victim's neighbor, Sylvia Neufville, at about 6 p.m.

on the evening of November 16, 2011. Neufville told Kellier that the victim had been stabbed and that the petitioner was the suspected perpetrator. Kellier called up the stairs to the petitioner's bedroom, but the petitioner did not reply. Kellier then proceeded up the stairs where she found the petitioner sleeping in his bedroom. Robinson, who had arrived home from work just before Neufville called, corroborated Kellier's testimony.[7] S testified that she saw her father leave Kellier's house about ten minutes before the victim picked her up. That testimony went uncontested when Davila declined to cross-examine her and failed to introduce testimony from Kellier or Robinson.

Although Davila claimed to have formed a "theory of the case"—that the petitioner did not attack the victim—he did nothing at the petitioner's criminal trial to advance that theory. The petitioner consistently has claimed that he did not assault the victim. Despite the petitioner's adamance, Davila declined to cross-examine any of the three people who were present at the time of the assault. As noted previously, Davila failed to meaningfully cross-examine any of the state's witnesses except for a police officer, whom he asked irrelevant questions. See *United States* v. *Cronic*, supra, 466 U.S. 659 (denial of right of effective cross-examination would be constitutional error of first magnitude and no amount of showing of want of prejudice would cure it). Davila declined to cross-examine the victim even though she told police initially that she did not know who had assaulted her. Even though the petitioner

[7] In her statement to the investigator hired by Romano, which was contained in the file that was forwarded to and reviewed by Davila, Neufville corroborated Kellier's statement that the petitioner had been upstairs sleeping when she called Kellier. Neufville also told the investigator that the petitioner could not have assaulted the victim and returned home quickly enough to be found upstairs sleeping by Kellier.

steadfastly maintained that he never left his mother's house, Davila declined to cross-examine S, who stated that she had seen him leave just before her mother picked her up. Of course, cross-examination of S would have been more effective if Davila had introduced evidence of the petitioner's alibi. Davila, however, did not introduce any such evidence. The file given to and reviewed by Davila contained witness statements supporting the petitioner's claim that he was at his mother's house when the assault occurred. Nevertheless, Davila did not investigate the petitioner's claim of alibi or interview any of his witnesses, all of whom were available at the time of trial. It is clear from Davila's testimony at the habeas trial that he had already determined that the petitioner was the perpetrator and that he would be convicted of the assault of the victim. Davila's utter lack of advocacy on the petitioner's behalf—in declining to cross-examine the victim and her children and failing to investigate his alibi—cannot reasonably be construed as strategic. This is apparent from Davila's stated opinion that the evidence against the petitioner was overwhelming and his implication that the petitioner's case was one in which there was no defense. Davila failed to subject the state's case against the petitioner to any meaningful adversarial testing, and, pursuant to *Cronic*, prejudice to the petitioner must therefore be presumed.

The judgment is reversed and the case is remanded with direction to grant the petitioner's petition for a writ of habeas corpus, to vacate the petitioner's conviction of assault in the first degree and the revocation of his probation, and to order a new trial.

In this opinion the other judges concurred.

JOHNNY DUPIGNEY *v.* COMMISSIONER OF CORRECTION (AC 39519)

DiPentima, C. J., and Elgo and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, carrying a pistol without a permit and criminal possession of a pistol or revolver in connection with the shooting death of the victim, sought a writ of habeas corpus. He claimed, inter alia, that his trial counsel had provided ineffective assistance by failing to prepare adequately for trial by not visiting the crime scene in person and not preparing O, an investigator for the defense, for trial, and that had counsel prepared adequately, the credibility of an eyewitness, D, could have been undermined. At the petitioner's criminal trial, the state had presented the testimony of three eyewitnesses, D, W and P, who all identified the petitioner as the shooter. The habeas court rendered judgment denying the habeas petition, concluding that the petitioner was not prejudice by his trial counsel's alleged deficient performance because he failed to prove, by a preponderance of the evidence, that there existed a reasonable probability that, but for his trial counsel's alleged unprofessional errors, the result of the trial would have been different. In reaching its decision, the court emphasized the importance of P's testimony at the criminal trial, stating that none of the petitioner's allegations of deficient performance diminished the devastating impact of P's recitation of the events and largely untarnished identification of the petitioner as the victim's shooter. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held* that the habeas court properly concluded that the petitioner was not prejudiced by his trial counsel's performance, as there was not a reasonable probability that the alleged inadequate preparation by trial counsel would have altered the jury's verdict; the petitioner failed to satisfy his burden of showing that the result of the trial would have been different if his trial counsel had prepared for trial by visiting the crime scene and instructing O to take certain photographs of the scene that could have called into question D's version of events, thereby undermining his credibility, as the petitioner failed to demonstrate how doing so would have created a substantial likelihood that the result would have been different, particularly in light of the fact that state's evidence against the petitioner was strong and the jury heard testimony from two corroborating witness, P and W, which was unaffected by the petitioner's appeal.

Argued May 24—officially released July 31, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Megan L. Wade, assigned counsel, with whom were *Emily Graner Sexton*, assigned counsel, and, on the brief, *James P. Sexton*, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Johnny Dupigney, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. In this certified appeal, the petitioner claims that the habeas court improperly rejected his claim of ineffective assistance of counsel. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. "Morris Lewis, the victim, and Herbert Dupigney, the [petitioner's] brother, were partners in an illegal drug selling enterprise in New Haven. The drug sales were conducted primarily at 304 Winthrop Avenue. Other members of the operation included Nick Padmore, an individual known to the [witnesses] in the trial only as 'Ebony' and Eric Raven. In December, 1994, following the victim's incarceration, the [petitioner] moved from Boston to New Haven to assist his brother in the drug

operation. The [petitioner] also enlisted an acquaintance from Boston, Derrick D'Abreau, to help with the drug sales. D'Abreau moved to New Haven in the beginning of January, 1995.

"The victim was released from jail on January 23, 1995. That day, the victim telephoned Herbert Dupigney at the home of Carlotta [Grinnan]. [Grinnan] overheard the [petitioner] tell his brother that the victim 'was not going to get a . . . thing.'

"On January 24, 1995, at about 9:30 p.m., the victim met with the [petitioner], the [petitioner's] brother, Herbert Dupigney, D'Abreau, Padmore, Raven and 'Ebony' at 304 Winthrop Avenue. Upon his arrival at the building, the victim told everybody to leave because that was his location to sell drugs. As the argument escalated, the victim slapped the [petitioner] and threw a chair at him. The victim then broke a bottle and attempted to attack the [petitioner]. D'Abreau and Raven retreated to a turquoise Dodge Neon. The victim then started swiping the bottle at the occupants of the vehicle through one of its open windows. While Herbert Dupigney attempted to calm the victim and get him away from the car, the [petitioner] inquired if anybody had a gun. In response, D'Abreau gave the [petitioner] a .380 caliber pistol. The [petitioner] then pointed the gun at the victim and told him to back off.

"Herbert Dupigney and the [petitioner] then entered the turquoise Dodge Neon and left the scene. The group proceeded to [Raven's] apartment at 202 Sherman Avenue. The [petitioner] was visibly upset, and stated that the victim was getting on his nerves and that he was going to kill him. After a few minutes, the [petitioner] and his brother left.

"The [petitioner] and his brother rejoined [Raven] and D'Abreau at 202 Sherman Avenue approximately one hour later. Between 11:15 p.m. and 11:30 p.m., all

four individuals proceeded to 300 Winthrop Avenue, where the drug operation had rented a fourth floor room facing Winthrop Avenue. At that time, the victim was playing dice with Padmore and 'Ebony' in front of 304 Winthrop Avenue. Herbert Dupigney went down to the street to try to smooth things over with the victim. It was understood that if the attempt at reconciliation was unsuccessful, then the victim would be shot. The [petitioner], [Raven] and D'Abreau observed the scene from the apartment's window. After a few minutes of conversation between the parties and with no overt indication that an accord had been reached, the victim, Padmore and 'Ebony' walked off in the direction of Edgewood Avenue. Herbert Dupigney called out to 'Ebony.' After 'Ebony' started to return, the [petitioner] and [Raven] abruptly left the apartment.

"As the victim and Padmore approached the corner of Winthrop Avenue and Edgewood Avenue, the turquoise Dodge Neon approached them. The [petitioner] exited the vehicle and fired several shots at the victim. A brief struggle ensued, after which the [petitioner] fired more shots at the victim. The victim died of his wounds shortly thereafter." *State* v. *Dupigney*, 78 Conn. App. 111, 112–14, 826 A.2d 241, cert. denied, 266 Conn. 919, 837 A.2d 801 (2003).

At the petitioner's criminal trial, the state presented the testimony of three eyewitnesses: D'Abreau, Aisha Wilson, and Padmore. "D'Abreau testified that he was an eyewitness to the murder. He observed the shooting from the fourth floor windows of the apartment building at 300 Winthrop [Avenue] and was able to identify the [petitioner] as the assailant on the basis of the clothing that the [petitioner] was wearing at the time of the murder. In addition to his personal observation, D'Abreau testified that the dispute over drug dealing

had been discussed previously and that if the disagreements could not be resolved, the [petitioner] was going to shoot the victim." Id., 121.

In her testimony, "Wilson identified the [petitioner] as the one who had argued with and later shot the victim. On direct examination, Wilson testified that at approximately 9:30 on the evening of January 24, 1995, she witnessed the victim and three other people engaged in an argument outside her building. Wilson was able to identify two of these people as Herbert Dupigney and an individual known to her only as 'Ebony.' . . . Her aunt told her that the third individual was Herbert Dupigney's brother.

"The victim was yelling at the [petitioner], 'Just shoot me, just shoot me.' As the argument progressed, the victim broke a bottle and kicked over a chair. The victim then went after the [petitioner] with the broken bottle. Thereafter, the [petitioner] and his brother entered a turquoise colored car, while 'Ebony' remained behind trying to calm the victim.

"Later that same evening, at approximately 11:15 p.m., Wilson heard someone outside her apartment yelling, 'Help, help. Fire, fire.' When she looked out of the window, she saw the victim bleeding and walking in the middle of the street. That same turquoise colored car in which the [petitioner] and his brother previously had departed then returned. The individual that had been identified as Herbert Dupigney's brother, and whom she identified as the [petitioner], exited the car and shot the victim." Id., 115–16.

"Padmore contacted the New Haven police shortly after the murder, claiming to have information regarding the crime. The police interviewed him on February 1, 1995. At that time, he provided the police with a taped statement identifying the [petitioner] as the assailant. He also identified the [petitioner] as the shooter

from a photographic array and signed the [petitioner's] photograph. Both the taped statement and the photograph were admitted into evidence under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986)." (Footnote omitted.) Id., 120–21.

"The [petitioner] was charged with one count of murder in violation of [General Statutes] § 53a-54a, one count of carrying a pistol without a permit in violation of [General Statutes] § 29-35 and one count of criminal possession of a pistol or revolver in violation of [General Statutes] § 53a-217c. . . . All of the counts were tried concurrently.[1] On March 31, 2000, the [petitioner] was found guilty on all three counts and later was sentenced to a total effective sentence of seventy years incarceration." (Footnote added.) Id., 114–15. The petitioner's conviction was affirmed on direct appeal. Id., 125.

Following two unsuccessful actions that concerned DNA evidence; see *State* v. *Dupigney*, 309 Conn. 567, 586, 72 A.3d 1009 (2013); *State* v. *Dupigney*, 295 Conn. 50, 74, 988 A.2d 851 (2010); the petitioner commenced the present habeas action. His February 8, 2016 amended petition for a writ of habeas corpus contained eight counts alleging, in relevant part, ineffective assistance of trial counsel.

Following a trial, the habeas court denied the amended petition for a writ of habeas corpus. In its memorandum of decision, the court disposed of the ineffective assistance of trial counsel claim relevant to this appeal under the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), concluding that the petitioner had "failed

[1] "The [petitioner] pleaded not guilty to all three counts and elected to be tried to the jury on the charges of murder and carrying a pistol without a permit, and to the court on the remaining charge." *State* v. *Dupigney*, supra, 78 Conn. App. 114.

to prove, by a preponderance of the evidence, that there exists a reasonable likelihood that, but for the professional representation alleged, the outcome of the petitioner's criminal trial would have been different." The court subsequently granted the petition for certification to appeal, and this appeal followed.[2] In this appeal, the sole issue is whether the petitioner was denied his constitutional right to the effective assistance of trial counsel.[3]

As a preliminary matter, we set forth the standard of review and relevant principles of law that govern our analysis of the petitioner's appeal. "It is well established that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas [court], as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 40–41, A.3d (2018).

[2] On June 2, 2017, the petitioner filed a motion for articulation with the habeas court, in which he asked the court "to articulate the factual and legal grounds for denying the petitioner's claims in [various subsections of the ineffective assistance of trial counsel claim] of the petition." By order dated June 7, 2017, the habeas court granted the request in part and further articulated one subsection of the ineffective assistance of trial counsel claim not relevant on appeal. On June 22, 2017, the petitioner filed a motion for review with this court, in which he sought further articulation. By order dated July 26, 2017, this court granted review but denied the relief requested.

[3] In his amended petition for a writ of habeas corpus, the petitioner raised sixteen subsections to his ineffective assistance of trial counsel claim. On appeal, the petitioner raises only one such claim, which relates to his trial counsel's investigation of the case and preparation of defense investigator Michael O'Donnell.

"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, we apply the familiar two part test adopted by the court in *Strickland*. A [petitioner's] claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the [petitioner] 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 [petitioner] by the [s]ixth [a]mendment. Second, the [petitioner] must show that the deficient performance prejudiced [him]. This requires [a] showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) Id., 30.

"When defense counsel's performance fails the [first prong of *Strickland*], a new trial is required if there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . 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." (Citations omitted; internal quotation marks omitted.) Id., 38.

"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. . . . The likelihood of a different result must be substantial, not just conceivable." (Internal quotation marks omitted.) Id., 40.

We do not address the performance prong of *Strickland* on appeal because the habeas court did not address the performance of the petitioner's counsel, nor was the habeas court required to do so. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 247–48 n.1, 116 A.3d 331, cert. denied, 317 Conn. 917, 117 A.3d 855 (2015).

On appeal, the petitioner contends that the habeas court improperly concluded that his trial counsel's performance did not prejudice him. He claims that his trial counsel was ineffective in failing to prepare adequately for trial by (1) not visiting the crime scene or investigating the crime scene in person[4] and (2) not preparing the defense's investigator, Michael O'Donnell, for trial. Specifically, the petitioner argues that, had his trial counsel visited the crime scene, he would have been able to instruct O'Donnell to take photographs to demonstrate "that D'Abreau could not possibly have seen the murder from the fourth floor apartment as he claimed . . . ."[5] He also argues that had trial counsel properly examined O'Donnell, he would have further

[4] On appeal, the respondent, the Commissioner of Correction, argues that the petitioner cannot prevail in his claim based on his trial counsel's failure to visit the crime scene because it was not properly pleaded before the habeas court and the habeas court did not rule on the issue, making it unreviewable by this court. We need not address the merits of this contention in light of our conclusion that the petitioner fails to satisfy the prejudice prong of *Strickland*.

[5] At trial, O'Donnell testified that he was not able to see the location of the first shooting from any window within the fourth floor apartment. O'Donnell, however, did not present any photographs of the view from the apartment windows in addition to his testimony.

Furthermore, as we discuss subsequently in this opinion, although the petitioner argues that D'Abreau could not have observed the first shooting, he does not contend that D'Abreau could not have possibly observed the second shooting.

undermined D'Abreau's credibility "by challenging D'Abreau's version of events." Finally, the petitioner argues that had trial counsel properly prepared O'Donnell for cross-examination, O'Donnell "would have come across as a more credible witness."

The crux of the petitioner's argument is that he was prejudiced by his trial counsel's performance because, had his trial counsel adequately prepared for trial, D'Abreau's credibility "could have been diminished, and had the jury not credited D'Abreau's testimony, the state's case would have been exceedingly weak." The respondent, the Commissioner of Correction, argues that the habeas court correctly concluded that trial counsel's alleged errors "were inconsequential to the verdict because the state's case against the petitioner was overwhelming." We agree with the respondent.

In its memorandum of decision, the habeas court emphasized the importance of Padmore's testimony at the underlying criminal trial. It stated: "Because of Padmore's largely untarnished identification of the petitioner as the victim's assailant and the blue Neon as the vehicle from which that assailant exited and the antagonism between the victim and the Dupigneys over drug turf, there is no reasonable probability that the alleged deficiencies by [trial counsel] affected the jury's verdict in this case. The conjunction of that evidence with the confirmatory testimony of Wilson and D'Abreau was helpful to proving the petitioner's guilt beyond a reasonable doubt but not essential to that end. Instead, it was Padmore's statement that endowed the testimony of Wilson and D'Abreau with credence." The court concluded that "[n]one of the petitioner's allegations of poor representation by [trial counsel] diminish the devastating impact of Padmore's recitation of events."

We conclude that the petitioner has not satisfied his burden of showing a reasonable probability that had trial counsel prepared for trial by visiting the crime

scene or preparing O'Donnell, the jury would have had a reasonable doubt with respect to the petitioner's guilt. The petitioner fails to show how undermining the credibility of one particular witness, D'Abreau, would have made it reasonably likely that the result would have been different.

"[T]he strength of the state's case is a significant factor in determining whether an alleged error caused prejudice to the petitioner." *Griffin* v. *Commissioner of Correction*, 98 Conn. App. 361, 367, 909 A.2d 60 (2006). Our Supreme Court, in its decision denying a prior action brought by the petitioner regarding DNA evidence, noted that there was "strong evidence . . . identifying the petitioner as the shooter." *State* v. *Dupigney*, supra, 295 Conn. 72. Further, in its decision denying the petitioner's second action regarding DNA evidence, our Supreme Court stated that its previous characterization of the state's evidence against the petitioner as " 'strong' . . . may have been an understatement." (Citation omitted.) *State* v. *Dupigney*, supra, 309 Conn. 584.

The petitioner relies on *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 51 A.3d 948 (2012), and *Dieudonne* v. *Commissioner of Correction*, 141 Conn. App. 151, 60 A.3d 385 (2013), appeal dismissed, 316 Conn. 474, 112 A.3d 157 (2015), to support the proposition that a failure to investigate that results in the state's evidence being left *largely uncontested* is prejudicial when it leaves the jury without a plausible alternative to the state's witnesses' descriptions of the events. The petitioner's reliance on these cases is misplaced. In *Gaines*, trial counsel's failure to investigate deprived the petitioner of an alibi witness. *Gaines* v. *Commissioner of Correction*, supra, 692. In *Dieudonne*, trial counsel failed to investigate and call an eyewitness who corroborated the petitioner's version of events. *Dieudonne* v. *Commissioner of Correction*, supra, 162. In

the present case, however, the petitioner is contending that his trial counsel's failure to investigate led to the deficient preparation of O'Donnell, who was not a witness to the events. He argues that proper investigation and preparation of O'Donnell would not have left D'Abreau's eyewitness testimony largely unchallenged. We disagree.

First, D'Abreau's testimony was not left uncontested at trial. Trial counsel elicited evidence that D'Abreau had received a grant of immunity from the state in exchange for his testimony, that he was a convicted felon, and that he had initially lied to the police about his whereabouts during the murder. D'Abreau testified that he witnessed both the first shooting and the second shooting. Although the petitioner argues that D'Abreau could not have physically observed the first shooting, it is not contested that D'Abreau physically could have witnessed the second shooting. Furthermore, trial counsel did bring evidence before the jury that it was physically impossible for D'Abreau to have witnessed the first shooting.[6]

Second, the petitioner fails to show how the jury would have had a plausible alternative to D'Abreau's description of the events but for trial counsel's performance. Even if trial counsel had been able to undermine the credibility of D'Abreau's testimony regarding his observance of the first shooting, and even if that led the jury to put less weight on D'Abreau's testimony regarding his observance of the second shooting, the jury also heard the testimony of two corroborating witnesses that together accounted for both shootings.[7] As

[6] The petitioner, through O'Donnell's testimony, did present evidence to contradict D'Abreau's testimony regarding his observance of the first shooting. See footnote 5 of this opinion.

[7] The petitioner argues that there were "significant flaws" in Wilson's testimony, but these issues were properly before the jury. As this court noted in the petitioner's direct appeal: "Wilson . . . testified on cross-examination that she could not see the shooter's face from the apartment. She stated, however, that the shooter was wearing the same clothing as she had seen 'Herbie's brother' wearing and that he arrived in the same car in which

the habeas court succinctly concluded: "D'Abreau supplemented Padmore's recollection by testifying that the Dupigneys coordinated the killing of the victim beforehand and confirmed Padmore's version of the initial attack by the petitioner [where the petitioner fired the first series of gunshots at the victim]. . . . Wilson, a neutral witness, corroborated D'Abreau's statements regarding the second series of shots fired by the petitioner at the victim."

We reiterate that, under the prejudice prong of *Strickland*, "[t]he likelihood of a different result must be *substantial*, not just conceivable." (Emphasis added; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 40. Calling into question D'Abreau's version of events does not create a substantial likelihood that the result would have been different. It is unlikely that any additional preparation by trial counsel would have swayed the jury to disbelieve the whole of D'Abreau's testimony, *in addition to* the testimony of Wilson and Padmore, which is unaffected by the petitioner's appeal.

We conclude that there is not a reasonable probability that the claimed inadequate preparation by trial counsel would have altered the jury's verdict; the petitioner has

the [petitioner] had departed earlier that evening. On redirect examination, Wilson then testified that she and her aunt had witnessed the shooting and the events leading to it from the window of that apartment in which they lived. Wilson testified that her aunt identified the shooter as Herbie's brother." *State* v. *Dupigney*, supra, 78 Conn. App. 116.

The petitioner also argues that there were "glaring deficiencies" to Padmore's testimony, but these too were properly before the jury. As noted previously in this opinion, Padmore's taped statement and the photograph he signed identifying the petitioner as the assailant were admitted as evidence at trial. *State* v. *Dupigney*, supra, 78 Conn. App. 120–21. As this court noted in the petitioner's direct appeal: "At trial, Padmore claimed to have been under the influence of illegal drugs while at the New Haven police station and denied any memory of either providing the statement to the police or choosing the [petitioner's] photograph from the array. The police detective who interviewed Padmore at the station testified that he appeared clearheaded and sober while at the station." Id., 121 n.3.

failed to undermine our confidence in the outcome. Accordingly, the habeas court properly concluded that the petitioner was not prejudiced by his trial counsel's performance.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JERMAINE HARRIS (AC 39432)

DiPentima, C. J., and Elgo and Beach, Js.

Syllabus

Convicted of the crime of criminal possession of a firearm after a trial to the court, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction. The defendant had been charged with murder and several other crimes in connection with the shooting death of the victim. He elected a jury trial as to all of the charges except for the charge of criminal possession of a firearm, for which he elected a trial to the court. After the jury was unable to reach a verdict, the court declared a mistrial with respect to the other charges and found the defendant guilty of criminal possession of a firearm. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional rights to trial by jury, to a fair trial and to the presumption of innocence, which was based on his assertion that the court's finding of guilt and its sentence on the charge of criminal possession of a firearm were impermissibly based on its finding that he had committed the murder; the court's finding and sentence were founded on reliable evidence, which included trial testimony and certified records that pertained to the violent circumstances under which the defendant criminally possessed a firearm, and the court, in finding facts that happened to be relevant to the charges before the jury, was free to consider all of the evidence and to come to a conclusion about it that was different from that of the jury, and to consider the facts and circumstances appurtenant to the charge of criminal possession of a firearm in sentencing the defendant.
2. The defendant's claim that the evidence was insufficient to support his conviction of criminal possession of a firearm was unavailing; there was sufficient evidence for the trial court to conclude that the defendant had physical possession or control of, or exercised dominion over, a firearm, including testimony from a coconspirator, which was supported by video and other physical evidence, that the defendant had wielded not one, but two guns during the incident at issue.

Argued March 15—officially released July 31, 2018

Procedural History

Information charging the defendant with the crimes of murder, conspiracy to commit murder, felony murder, robbery in the first degree, carrying a pistol without a permit and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the charges of murder, conspiracy to commit murder, felony murder, robbery in the first degree and carrying a pistol without a permit were tried to the jury before *Alander*, *J.*; thereafter, the court declared a mistrial; subsequently, the charge of criminal possession of a firearm was tried to the court; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Stacey M. Miranda*, senior assistant state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Jermaine Harris, was charged with murder, conspiracy to commit murder, felony murder, robbery in the first degree, carrying a pistol without a permit and criminal possession of a firearm. He elected a jury trial except as to the latter most charge, which was tried to the court. The jury was unable to reach a verdict.[1] The court, however, found the defendant guilty of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and sentenced him to five years incarceration. He

[1] The court, *Alander*, *J.*, declared a mistrial. The defendant was retried and found guilty by a jury of murder, robbery and carrying a pistol without a permit. His appeal from those convictions is pending before our Supreme Court. See *State* v. *Harris*, SC 20022.

now appeals,[2] claiming that (1) the court's finding of guilt and its sentence deprived him of his constitutional rights under the sixth and fourteenth amendments to the United States constitution, and (2) there was insufficient evidence to support the conviction. We affirm the judgment of the court.

I

We first[3] address the defendant's claims that the court's finding of guilt and its sentence deprived him of his constitutional right to trial by jury as well as the due process rights to a fair trial and to the presumption of innocence. The defendant concedes that his constitutional claims are unpreserved and, therefore, requests review of them or reversal of the judgment pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[4] or the plain error doctrine,[5] or our supervisory authority over the administration of justice.[6]

[2] The defendant's conviction is an appealable final judgment pursuant to Practice Book § 61-6 (a) (1). See *State* v. *Gupta*, 105 Conn. App. 237, 240–41 n.4, 937 A.2d 746, rev'd in part on other grounds, 297 Conn. 211, 998 A.2d 1085 (2010).

[3] Ordinarily, we would address sufficiency of the evidence claims first due to the nature of the remedy. See *State* v. *Lavigne*, 121 Conn. App. 190, 195, 995 A.2d 94 (2010), aff'd, 307 Conn. 592, 57 A.3d 332 (2012). In this case, however, because the defendant's insufficiency claim is founded on his constitutional claims, we will address those claims first.

[4] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

[5] "[T]he plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Soyini*, 180 Conn. App. 205, 235, 183 A.3d 42, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018).

[6] "[Supervisory powers] are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the

The defendant's claims are premised on the notions that (1) "the trial court's [finding of guilt] on the criminal possession of a firearm charge was impermissibly based on its finding that [the defendant] had committed the underlying murder" and (2) "[t]he sentence imposed . . . was predicated upon the court's determination that [the defendant] was in fact the shooter."[7] We reject these arguments outright, and, therefore, decline to review the defendant's unpreserved claims.

During trial on the charge before it, the trial court was entitled to consider all the evidence presented and to come to a conclusion different from that of the jury about what that evidence proved. That much is clear from *State* v. *Knight*, 266 Conn. 658, 663–74, 835 A.2d 47 (2003), wherein our Supreme Court held that (1) a trial court sitting as concurrent fact finder with a jury is not collaterally estopped from finding facts that conflict with factual findings of a jury; id., 663–66; and (2) a court's finding of guilt is not impermissibly inconsistent with a jury's verdict of not guilty where "there were

level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015).

[7] Specifically, the defendant directs our attention to the court's statement at sentencing as follows: "[T]he significant factor [here] is the circumstances surrounding . . . your possession of the firearm. I know the jury . . . could not reach a unanimous conclusion as it relates to . . . the murder charge . . . that you were facing, but I did find beyond a reasonable doubt . . . that you were in possession . . . of [a] handgun . . . based on the evidence presented. I also find that you used that gun to shoot [the victim], that you used that gun to shoot him multiple times. . . . [The victim] shot Jason Roman, you then shot and killed [the victim, Daryl McIver] in retaliation for his shooting of Mr. Roman, and all of it was gang related." The defendant ignores, however, the court's statement earlier that "I don't take into consideration in sentencing pending charges because . . . I don't know the validity . . . of those charges."

multiple triers of fact deciding separate counts, and each fact finder was consistent with itself." Id., 672. The defendant here seeks to distinguish *Knight* on the grounds that the jury failed to reach a verdict and that "it is not that the trial court's [finding of guilt] is 'inconsistent' with the jury's inability to reach a verdict but, rather, that the trial court's [finding of guilt] is premised upon a determination that the defendant has elected to be made by the jury, not the court. . . . The court cannot independently render a determination of guilt that conflicts with the jury's findings, here the failure of the jury to reach a verdict at all." (Citation omitted.)

These are distinctions without a difference. First, despite the defendant's protestations to the contrary, the court did not convict the defendant of any crime other than criminal possession of a firearm. Rather, the court, in considering the charge before it, merely found *facts* that happened *also* to be relevant to the charges before the jury. Asking whether the court may do this is asking whether collateral estoppel applies. The answer is no. *State* v. *Knight*, supra, 266 Conn. 664 ("the doctrine of collateral estoppel does not apply to the procedurally unique situation in which several criminal charges against the same defendant have been allocated between two triers for concurrent adjudication upon virtually identical evidence" [internal quotation marks omitted]).

Second, the finder of fact "is free to consider *all* of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Sabato*, 321 Conn. 729, 742, 138 A.3d 895 (2005). Thus, we are unable to discern any error, constitutional or otherwise, with the court's consideration of, and conclusions about, the evidence presented: That some evidence may have been relevant to elements of other

crimes does not mean the court cannot independently find facts that pertain to the charges before it.

Similarly, the court did not err in sentencing the defendant to the statutory maximum term of imprisonment[8] for criminal possession of a firearm. "[A] sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come. . . . As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability. . . . As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which [the judge] uses to fashion [the] ultimate sentence, an appellate court should not interfere with [the judge's] discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 681–82, 22 A.3d 611 (2011).

Put simply, the court's finding of guilt and its sentence did not flow from a latent murder conviction, but rather were founded upon reliable evidence, i.e., sworn trial testimony and certified records, pertaining to the violent circumstances under which the defendant criminally possessed a firearm. Just as the court, sitting as a concurrent fact finder, was not estopped from finding facts in reaching its determination of guilt, so, too, was it free to consider the facts and circumstances appurtenant to the commission of criminal possession of a firearm in sentencing the defendant.

We therefore conclude that the defendant's claims do not satisfy the third prong of *Golding* because there was no constitutional violation and the defendant was not deprived of a fair trial. See footnote 4 of this opinion.

[8] See General Statutes § 53a-217 (b). Despite the defendant's claims to the contrary, this case does not in any way implicate *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny.

For the same reasons, we conclude that there is no error that is "patent [or] readily discernible"; (internal quotation marks omitted) *State* v. *Soyini*, 180 Conn. App. 205, 236, 183 A.3d 42, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018); or "of such monumental proportion that [it] threaten[s] to erode our system of justice and work a serious and manifest injustice" against the defendant so as to "warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id., 235. Similarly, this case does not present a "rare circumstance in which [constitutional, statutory and procedural] protections are inadequate to ensure the fair and just administration of the courts" that would warrant the "extraordinary" exercise of our supervisory powers. (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 392, 119 A.3d 589 (2015). Accordingly, we decline to review the claims or to reverse the defendant's conviction under any of the extraordinary means invoked by the defendant.

II

We turn now to the defendant's claim that the evidence was insufficient to support his conviction by the court of criminal possession of a firearm in violation of § 53a-217 (a) (1).[9] Specifically, the defendant claims that "[e]xcising that judicial determination [that the defendant was the shooter] there is *no* independent evidence that [the defendant] possessed a firearm." (Emphasis in original.) This claim fails for the same reasons as the first: The court, as a separate and distinct fact finder, was free to consider all the evidence before it.

Among that evidence was the testimony of Tevin Williams, a coconspirator. Williams testified that on the

[9] General Statutes § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of a felony . . . ."

evening of July 30, 2011, and into the following morning, he, the victim, Daryl McIver, and the defendant were hanging out in "the Hill" section of New Haven. Although the victim was a member of the "Crips" gang and Williams and the defendant were members of the rival "Bloods" gang, they all believed that they were free to associate with one another because the defendant's cousin was one of the victim's best friends.

They spent part of the evening committing armed robberies, during which the victim and the defendant both brandished guns while Williams searched their targets' pockets for loot. Williams testified that the victim "had something to prove" and bragged about assassinating another member of the Bloods. After the defendant heard that, he told Williams that he planned to shoot the victim in retaliation and that, after doing so, he would leave his firearm next to the victim's body for Williams to recover.[10]

Williams testified that the defendant shot the victim several times and put the gun on the ground next to the victim's body as forewarned. While the defendant searched the body for the victim's gun, Williams retrieved the defendant's gun and turned to flee the scene. Williams heard at least two additional gunshots.[11] Later, Williams returned the defendant's gun to him.

Among other evidence, the state presented a surveillance video showing the shooting and surrounding events. Williams identified the three individuals in the video as himself, the victim and the defendant.

[10] According to the Bloods' hierarchy, the defendant outranked Williams, who therefore was obliged to obey the defendant's orders.

[11] Although he heard gunshots ring out while he was in possession of the defendant's gun, Williams testified that he did not see the defendant possess the victim's gun. The victim suffered six gunshot wounds; the state presented evidence that at least eight shots were fired. Ballistics evidence established that two guns were used to fire those eight shots.

"A defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Reed*, 176 Conn. App. 537, 545–46, 169 A.3d 326, cert. denied, 327 Conn. 974, 174 A.3d 194 (2017).

The challenged element of criminal possession of a firearm; see footnote 9 of this opinion; is actual possession.[12] " 'Possess' means to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." General Statutes § 53a-3 (2). There was sufficient evidence presented at trial for the court to conclude that the defendant had physical possession or control of, or exercise of dominion over, a firearm, not least of which was Williams' testimony that the defendant had wielded not one, but two guns, which was supported by the video and other physical evidence.[13] See, e.g., *State* v. *Williams*, 172 Conn. App.

[12] The defendant does not dispute that there was sufficient evidence to prove beyond a reasonable doubt that he previously had been convicted of a felony.

[13] The court specifically stated: "I do credit Tevin Williams' testimony that . . . [the defendant] was in possession of a handgun . . . on July 31 . . . . I believe that testimony is supported by ballistics evidence as well." See footnote 11 of this opinion.

820, 829, 162 A.3d 84 ("the [fact finder] may find a defendant guilty based solely on the testimony of one witness" [internal quotation marks omitted]), cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

The judgment is affirmed.