LISA BRUNO *v.* REED WHIPPLE ET AL.
(AC 40282)

Lavine, Keller and Elgo, Js.

Syllabus

The plaintiff sought to recover damages from the defendant H Co. for, inter alia, breach of contract, in connection with its construction of a new home for the plaintiff and B, her then husband. The plaintiff's breach of contract claim was predicated on H Co.'s failure to provide her with invoices on a biweekly basis and written change orders regarding modifications to the contract, which she claimed caused a diminution of her marital estate, specifically, a certain financial account that had been used as a source of funds for the construction of the new residence. The jury returned a verdict in favor of H Co. on the breach of contract claim, indicating in interrogatories that H Co. had breached its contract with the plaintiff but that the plaintiff had waived that breach. After the trial court denied the plaintiff's motion to set aside the verdict, the plaintiff appealed to this court, which concluded that the trial court improperly denied the motion to set aside the verdict in favor of H Co. on the breach of contract count concerning the jury's verdict as to waiver. This court ordered the case to be remanded for a hearing in

damages on the jury's verdict in favor of the plaintiff on her breach of contract claim. Following a hearing in damages on remand, in which the trial court held that the plaintiff failed to prove that she was entitled to any damages, the plaintiff appealed to this court, claiming that the trial court exceeded the scope of the remand order and improperly concluded that she failed to prove actual damages. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly found that she failed to prove actual damages resulting from H Co.'s breach of the construction contract, which was based on her claim that had H Co. not breached the terms of its contract, the dissipated funds would have remained in the financial account earning interest and would ultimately have been distributed to the plaintiff in the dissolution of her marriage to B, and that she would have received a larger alimony award in her divorce; that court's finding that the plaintiff did not prove that her marital estate was reduced by H Co.'s breach of contract was not clearly erroneous, as the evidence in the record indicated that the funds in question were expended on construction costs of the residence, that the residence retained its value throughout the dissolution proceeding and that, following the dissolution of the plaintiff's marriage, she was awarded an equal share of the net proceeds of the sale of the residence, and the plaintiff's claims were based on conjecture and speculation as to what the dissolution court would have awarded her if the facts had been different.
2. The failure of the trial court to award nominal damages and to render judgment in favor of the plaintiff on her breach of contract count did not constitute reversible error; although the trial court's directive for judgment to be entered in favor of the defendant and against the plaintiff on the plaintiff's breach of contract count was improper in light of the prior jury verdict in favor of the plaintiff on that count, and the plaintiff was entitled to an award of nominal damages despite her failure to establish actual damages at the hearing in damages, the trial court's directive did not constitute reversible error, as the general rule that an appellate court will not reverse a judgment of the trial court for a mere failure to award nominal damages applied, and the case did not warrant an exception to that rule.

Argued September 14—officially released December 4, 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 Danbury, where the court, *Maronich, J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court,

which dismissed the appeal in part, reversed the judgment in part and remanded the case for further proceedings; thereafter, the matter was tried to the jury before *Doherty*, *J.*; subsequently, the court, *Doherty*, *J.*, granted the defendants' motion for permission to file an amended answer and special defense; verdict for the defendants; thereafter, the court, *Doherty*, *J.*, denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court; subsequently, the court, *Doherty*, *J.*, issued an articulation of its decision; thereafter, this court reversed the judgment only as to the jury's verdict on the special defense of waiver and remanded the case for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim against the defendant Heritage Homes Construction Co., LLC; subsequently, following a hearing in damages, the court, *Truglia*, *J.*, rendered judgment for the defendant Heritage Homes Construction Co., LLC, from which the plaintiff appealed to this court. *Affirmed.*

Lisa Bruno, self-represented, the appellant (plaintiff).

Stephen P. Fogerty, for the appellee (defendant Heritage Homes Construction Co., LLC).

Opinion

ELGO, J. This case returns to us following a remand to the trial court for a hearing in damages. See *Bruno* v. *Whipple*, 162 Conn. App. 186, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016). The self-represented plaintiff, Lisa Bruno, appeals from the judgment of the trial court rendered in favor of the defendant Heritage Homes Construction Company,

LLC.[1] On appeal, the plaintiff claims that the trial court (1) improperly concluded that she failed to prove actual damages resulting from the defendant's breach of a residential construction contract and (2) exceeded the scope of the remand order.[2] We affirm the judgment of the trial court.

As this court has previously observed, the present case "arises from dealings between the parties concerning the construction by [the defendant] of a new home in Ridgefield for [the plaintiff] and her former husband, Stephen Bruno (Bruno)." Id., 188–89. In her operative complaint, the plaintiff alleged that the defendant, as a party "to a contract with herself and Bruno to build the new home, had breached the contract . . . by conspiring with Bruno to launder his money through the project, and thus to deprive her of fair, just and reasonable alimony and division of assets in connection with

[1] Reed Whipple, who at all relevant times was the owner of Heritage Homes Construction Company, LLC, also was named as a defendant in the plaintiff's complaint. Prior to trial, the court rendered summary judgment in favor of Whipple on the breach of contract and breach of the implied covenant of good faith and fair dealing counts of the operative complaint, which judgment this court affirmed. See *Bruno* v. *Whipple*, 138 Conn. App. 496, 504–513, 54 A.3d 184 (2012). A jury thereafter returned a verdict in favor of Whipple on the third and final count against him, which alleged a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The trial court subsequently denied the plaintiff's posttrial motion to set aside that verdict, and this court affirmed the propriety of that determination on appeal. See *Bruno* v. *Whipple*, supra, 162 Conn. App. 209–12.

The present appeal does not involve any claim against Whipple. Rather, it pertains only to the breach of contract count against Heritage Homes Construction Company, LLC. For that reason, we refer to Heritage Homes Construction Company, LLC, as the defendant in this appeal.

[2] The plaintiff also alleges that the court improperly denied her request for an award of attorney's fees pursuant to General Statutes § 42-150bb. We decline to review that inadequately briefed claim. See *Brady-Kinsella* v. *Kinsella*, 154 Conn. App. 413, 420 n.6, 106 A.3d 956 (2014), cert. denied, 315 Conn. 929, 110 A.3d 432 (2015). We further conclude that the plaintiff's claims that the court violated her constitutional rights to procedural and substantive due process during the hearing in damages are unfounded and do not merit substantive discussion.

the impending dissolution of her marriage. On that score, the plaintiff alleged, more particularly, that by December, 2005, when Bruno initiated marital dissolution proceedings against her, construction of the new home was nearly complete for what by then was the total sum of approximately $1,800,000. Thereafter, however, from December, 2005, to January, 2006, and from May, 2006, to July, 2006, Bruno paid [the defendant] additional sums totaling approximately $2,600,000, all purportedly for expenditures on the project that she did not authorize." *Bruno* v. *Whipple*, 138 Conn. App. 496, 498–99, 54 A.3d 184 (2012). More specifically, the plaintiff alleged that the defendant breached the construction contract by failing to provide her with (1) invoices on a biweekly basis and (2) written change orders regarding modifications to the contract.

A trial was held in 2013. Following the close of evidence and at the request of the defendant, the court provided the jury with an instruction on the special defense of waiver. The court further instructed the jury to "separately answer jury interrogatories asking whether it 'f[ou]nd in favor of [the plaintiff] on her claim of breach of contract against [the defendant]' and, if so, whether '[the plaintiff] waived the breach of contract by [the defendant] . . . .' " *Bruno* v. *Whipple*, supra, 162 Conn. App. 196. The jury subsequently returned a verdict in favor of the defendant on the breach of contract claim. In so doing, the jury "expressly" based that verdict "on its answers to jury interrogatories that (1) [the defendant] had breached its contract with the plaintiff, but (2) the plaintiff had waived that breach." Id. The trial court denied the plaintiff's subsequent motion to set aside the verdict. Id., 196–97.

On appeal, this court concluded that the trial court improperly denied the motion to set aside the verdict in favor of the defendant on the breach of contract

count. As the court stated, the trial court "abused its discretion by permitting [the defendant] to raise the special defense of waiver for the first time after the close of evidence at trial, as it had not been specially pleaded, the pleadings did not allege any facts supporting an inference of waiver, and the claim that the plaintiff knowingly relinquished her contractual rights was not fully litigated at trial without objection by the plaintiff. Accordingly . . . the court should have set aside the jury's verdict as to waiver." (Footnote omitted.) Id., 207.

In light of that conclusion, this court explained that it "must now address the scope of the remand of this case to the trial court. Specifically, we must determine whether the case should be remanded for a hearing in damages on the plaintiff's breach of contract claim or whether the jury's verdict on her breach of contract claim also must be set aside and remanded for a retrial on that issue." Id., 207–208. The court noted that, "[i]n finding in favor of the plaintiff on her breach of contract claim, the jury essentially has determined liability in her favor against [the defendant] and the remaining determination is damages resulting from that breach." Id., 208. Accordingly, this court concluded that "because the improper verdict on the special defense of waiver is wholly separable from the verdict in favor of the plaintiff on her breach of contract claim . . . limiting the remand to a hearing in damages on the breach of contract verdict does not work injustice in this case." Id. The court thus ordered the case to be "remanded for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim."[3] Id., 216.

[3] The rescript to that decision states in full: "The judgment is reversed only as to the jury's verdict on the special defense of waiver and the case is remanded for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim. The judgment is affirmed in all other respects." *Bruno* v. *Whipple*, supra, 162 Conn. App. 216.

The trial court held a hearing in damages on January 26, 2017, at which the plaintiff submitted testimony from herself and James Bolan, a financial consultant employed by Charles Schwab, as well as certain documentary evidence. In her testimony, the plaintiff confirmed that her breach of contract claim was predicated on the defendant's failure to provide her with invoices on a biweekly basis and written change orders regarding modifications to the contract. The plaintiff maintained that those failures caused a diminution of her marital estate.

In its February 21, 2017 memorandum of decision, the court made a number of factual findings that are not contested in this appeal. The court found that the plaintiff and Bruno entered into the contract at issue on October 28, 2004. The contract did not specify "a final, fixed price for construction of the residence," as the parties had agreed that the defendant would be paid for all services rendered.[4] The construction costs were paid in part from the proceeds of a construction mortgage loan; the remaining construction costs were paid with funds from a Charles Schwab financial account (Schwab account).[5] In December, 2005, Bruno commenced a dissolution action against the plaintiff. As part of that dissolution proceeding, the plaintiff and Bruno on July 10, 2006, entered into a written stipulation to complete the construction of the residence. The residence ultimately was completed and a certificate of occupancy issued on July 28, 2006. The final cost of construction, including land, totaled $7,746,462.[6]

[4] At the hearing in damages, a copy of the construction contract at issue was admitted into evidence. That contract does not specify any price. Instead, it provides in relevant part that the plaintiff and Bruno agree "to pay for all work, labor, and materials" provided by the defendant.

[5] At the hearing in damages, the plaintiff testified that "the bulk of our liquid [marital] assets" had been held in the Schwab account.

[6] It is undisputed that approximately $1.1 million of that total cost was expended on land acquisition.

In its memorandum of decision, the trial court also found that the plaintiff's marriage to Bruno was dissolved on March 17, 2008. As part of that judgment of dissolution, the dissolution court ordered that the net proceeds of the sale of the newly constructed residence shall be "divide[d] equally" between the plaintiff and Bruno. The dissolution court further found that, at the time of dissolution, the residence had a fair market value of $7.9 million. The dissolution court also awarded the plaintiff weekly alimony in the amount of $4000, culminating upon the death of the plaintiff or Bruno, or the remarriage of the plaintiff. With respect to the Schwab account that had been used as a source of funds for the construction of the new residence, the dissolution court found that it had a current balance of $2,451,343.62. As part of its financial orders, the dissolution court awarded the plaintiff $300,000 from that account and ordered that $22,826 be paid from that account to the defendant for an outstanding invoice. The dissolution court then ordered the remainder of the Schwab account "to be divided equally between" the plaintiff and Bruno.

In her complaint, the plaintiff alleged in relevant part that the defendant's breach of contract deprived her "of fair, just and reasonable alimony and division of assets in connection with the dissolution of [her] marriage to Bruno." In ruling on the issue of damages, the court thus stated that "the plaintiff's claim for damages [on the breach of contract count] is measured by the amount that the marital estate was diminished as a direct and proximate result of [the defendant's] failure to provide her with biweekly invoices and change orders." The court found, "after careful review of the evidence introduced at the hearing in damages . . . that the plaintiff has not proven (and cannot prove from the evidence presented) that the marital estate was reduced by [the defendant's] breach of contract. The

'missing' funds [from the Schwab account] were paid to [the defendant] to satisfy invoices for services rendered and materials furnished in constructing the [new residence]. . . . The plaintiff introduced no evidence at the hearing in damages to contradict this finding. The [new residence] retained the value of the cash expended in its construction and remained a significant asset of the marital estate available for distribution to the plaintiff." (Citation omitted.) The court also rejected the plaintiff's ancillary claim that, but for the alleged diminution of the marital estate due to the defendant's breach of contract, she would have received a larger award of alimony and property distribution. In this regard, the court found that the plaintiff's claim was "entirely too speculative," as it was predicated solely on a "projection" of what the court in the dissolution proceeding "*likely would have awarded to her* if facts had been different in her dissolution of marriage action." (Emphasis in original.) The court therefore concluded that the plaintiff had "failed to prove by a preponderance of the evidence that she is entitled to any damages on her breach of contract claims . . . ." For that reason, the court stated that "judgment enters in favor of [the defendant] and against the plaintiff."[7] From that judgment, the plaintiff now appeals.

I

The plaintiff claims that the court improperly found that she failed to prove actual damages resulting from the defendant's breach of the construction contract. We disagree.

It is well established that "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will

[7] The judgment file likewise states in relevant part that "judgment is entered in favor of [the defendant] on [the breach of contract count] of the complaint."

not be overturned unless it is clearly erroneous. . . . [W]hether the decision of the trial court is clearly erroneous . . . involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In 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. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous. . . . A finding is clearly erroneous 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.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012). In addition, we note that the plaintiff bears the burden of proving the extent of the damages suffered in a breach of contract action. *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 224, 990 A.2d 326 (2010).

As the plaintiff acknowledges in her principal appellate brief, her theory of damages pertains to the dissipation of marital funds in the Schwab account. Following a hearing at which it received both documentary and testimonial evidence, the trial court found that the funds withdrawn from that account all were "paid to [the defendant] to satisfy invoices" regarding the construction of the residence. The court further found that "[t]he

plaintiff introduced no evidence . . . to contradict this finding." On our review of the record, we cannot say that those findings are clearly erroneous.

The court further found that the newly constructed residence "retained the value of the cash [from the Schwab account] expended in its construction and remained a significant asset of the marital estate available for distribution to the plaintiff." That finding too is substantiated by the evidence in the record before us. In its March 17, 2008 memorandum of decision, which was admitted into evidence as a full exhibit at the hearing in damages, the dissolution court found that the total cost of construction of the residence was $7,746,462.08 and that the fair market value of that property at the time of dissolution was $7,900,000. The plaintiff provided no evidence that the property lost any value between the time that the funds from the Schwab account were expended on construction costs and the date of dissolution. As the dissolution court noted in its memorandum of decision, the plaintiff, at the time of dissolution, averred that "the value of this property is $7,777,433"—approximately $31,000 *more* than the total cost of construction.

On appeal, the plaintiff claims that, if the defendant had not breached the terms of its contract, (1) "the dissipated funds would have remained safely in the Schwab account earning interest and would ultimately have been required to be distributed in [the] plaintiff's divorce" and (2) she would have received a larger alimony award due to the existence of those additional funds in the Schwab account. (Emphasis omitted.) Those contentions are entirely speculative. See *Leisure Resort Technology, Inc.* v. *Trading Cove Associates*, 277 Conn. 21, 35, 889 A.2d 785 (2006) (award of damages may not be based on conjecture); *Narumanchi* v. *DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005)

("[s]peculation and conjecture have no place in appellate review"). As the trial court aptly noted in its memorandum of decision, the plaintiff's contentions are little more than conjecture as to what the dissolution court would have awarded her "if facts had been different" in her dissolution proceeding.

Moreover, the plaintiff's claim that the dissolution court would have altered its financial orders had funds from the Schwab account not been expended on construction costs without her approval overlooks the fact that the plaintiff raised that very issue in the dissolution proceeding. The record before us indicates that she filed a "Motion for Order—Pendente Lite" on January 17, 2006, in which she alleged in relevant part that "[s]ince the commencement of this [dissolution] action [Bruno] has continued with the construction of the new [residence], unilaterally expending large sums of marital assets . . . without the knowledge and consent of the [plaintiff]." She therefore requested an order prohibiting Bruno from making any further expenditures without her written consent. Months later, the plaintiff entered into a stipulation with Bruno to complete the construction of the new residence. The plaintiff subsequently filed a motion for contempt regarding Bruno's alleged noncompliance with the terms of that stipulation. In its decision, the dissolution court specifically found that "there has been no evidence presented that the amount spent [on construction costs] constituted a dissipation of marital assets."

The record also indicates that the plaintiff filed a second motion for contempt with the dissolution court predicated on an alleged violation of the automatic order prohibiting the sale, transfer, or disposal of marital property. See generally Practice Book § 25-5 (b) (1). In that motion, the plaintiff alleged that Bruno had violated that order since the commencement of the dissolution by refusing "to keep [her] involved in the

construction" of the new residence and by "unilaterally [making] decisions to spend huge sums of money which were *never previously contemplated, discussed or approved by the* [*plaintiff*]."[8] (Emphasis in original.) The dissolution court denied that motion for contempt on March 17, 2008—the very same day that it dissolved the marriage and entered its financial orders. The dissolution court, therefore, was well aware of the plaintiff's allegations regarding the payment of construction costs during the pendency of the divorce. Indeed, that court, in fashioning its financial orders, awarded the plaintiff the lump sum of $300,000 from the Schwab account prior to dividing the remainder equally between her and Bruno. That order may well have been issued in response to the plaintiff's repeated claims regarding the unauthorized payment of construction costs from the Schwab account. On the record before us, we cannot conclude, without resort to conjecture, that the dissolution court would have granted the plaintiff a greater property distribution or alimony award had the funds from the Schwab account not been expended on the construction costs in question.

Furthermore, the plaintiff did not adduce evidence at the hearing in damages that her claimed damages were the foreseeable result of the defendant's failure to provide her with invoices on a biweekly basis and written change orders regarding modifications to the contract. As our Supreme Court has explained, "[i]n an action founded . . . on breach of contract . . . the recovery of the plaintiffs [is] limited to those damages the defendant had reason to foresee as the probable result of the breach at the time when the contract was made." *Neiditz* v. *Morton S. Fine & Associates, Inc.*, 199 Conn. 683, 689 n.3, 508 A.2d 438 (1986); see also

[8] At oral argument before this court, the plaintiff acknowledged that she had raised the issue of Bruno's allegedly improper expenditure of funds from the Schwab account during the dissolution proceeding.

Meadowbrook Center, Inc. v. *Buchman*, 149 Conn. App. 177, 188–89, 90 A.3d 219 (2014) ("under Connecticut law, the causation standard applicable to breach of contract actions asks . . . whether [the plaintiff's damages] were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct").

The evidence in the record does indicate that the funds in question from the Schwab account were expended on construction costs of the new residence, as the trial court found. The evidence further indicates that the new residence retained its value throughout the dissolution proceeding and that, following the dissolution of her marriage to Bruno, the plaintiff was awarded an equal share of the net proceeds of the sale of that residence. We therefore conclude that the court's finding that the plaintiff "has not proven . . . that the marital estate was reduced by [the defendant's] breach of contract" is not clearly erroneous. Accordingly, the court properly determined that the plaintiff had not met her burden in demonstrating entitlement to her claimed damages.

II

The plaintiff also contends that the court committed reversible error by exceeding the scope of the remand order when it directed judgment to enter "in favor of the defendant and against [the] plaintiff" on the breach of contract count of the complaint.[9] We agree that the court's directive was improper in light of the prior jury verdict in favor of the plaintiff on that count. Guided by the precedent of our Supreme Court, we nonetheless

[9] In her appellate brief, the plaintiff also claims that the court (1) "violated public policy," (2) effectively opened and set aside the jury's verdict, (3) violated the doctrines of res judicata and collateral estoppel, and (4) "lacked jurisdiction to hear evidence or argument of [the defendant's] new unplead[ed] theories." Resolution of those intertwined claims is subsumed by our analysis of her principal contention that the court exceeded the scope of the remand order.

conclude that the court's directive does not constitute reversible error under the facts of this case.

"Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion*. . . . This is the guiding principle that the trial court must observe. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Brundage*, 320 Conn. 740, 747–48, 135 A.3d 697 (2016).

In the present case, the jury completed interrogatories indicating that it found that the defendant "had breached its contract" with the plaintiff. *Bruno* v. *Whipple*, supra, 162 Conn. App. 196. Yet those completed interrogatories also demonstrate that the jury never determined the amount of damages sustained by the

plaintiff as a result of that breach. Rather, after finding that the plaintiff had waived her breach of contract claim, the jury proceeded to enter a verdict in favor of the defendant.[10] In light of that procedural history, this court explained that "[i]n finding in favor of the plaintiff on her breach of contract claim, the jury essentially has *determined liability* in her favor against [the defendant] and *the remaining determination is damages resulting from that breach*." (Emphasis added.) Id., 208. Put simply, the plaintiff's damages in this case never were determined by the jury.

Because the jury's verdict in favor of the plaintiff on the breach of contract count was "wholly separable" from the jury's improper verdict on the special defense of waiver, the court concluded that "limiting the remand to a hearing in damages on the breach of contract verdict does not work injustice in this case." Id. The court thus remanded the case "for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim." Id., 216; accord *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 132, 161 A.3d 1227 (2017) ("[w]hen no question of liability remains . . . the appropriate scope of the remand is limited to a hearing in damages").

"[T]he underlying purpose of a hearing in damages is to assist the trial court in determining the amount of damages to be awarded." (Internal quotation marks omitted.) *Catalina* v. *Nicolelli*, 90 Conn. App. 219, 222–

[10] The fourth interrogatory on the jury interrogatory form stated: "We find that [the plaintiff] waived the [b]reach of [c]ontract by [the defendant]." The jury foreperson checked the "Yes" box under that interrogatory. The jury interrogatory form then instructed: "If Yes, go to [the defendant's] Verdict Form." In accordance with that instruction, the jury foreperson signed the defendant's verdict form, which stated: "In this case, we the jury find the issues in favor of [the defendant]."

Had the jury answered the fourth interrogatory in the negative, the form directed it to proceed to a fifth interrogatory, which asked the jury to specify "the amount of [c]ompensatory [d]amages as against [the defendant]."

23, 876 A.2d 588 (2005). When the liability of a defendant has been established, "the plaintiff's burden at a hearing in damages is limited to proving that the amount of damages claimed is derived from the injuries suffered and is properly supported by the evidence." *Murray* v. *Taylor*, 65 Conn. App. 300, 335, 782 A.2d 702, cert. denied, 258 Conn. 928, 783 A.2d 1029 (2001). In addition to the precise quantum of damages, a plaintiff in a breach of contract action must prove that the damages "were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct." *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 188–89.

Accordingly, while a defendant may not challenge the issue of its liability at a hearing in damages, it nevertheless remains free to contest the issues of both the amount of the plaintiff's breach of contract damages and whether those damages derive from the defendant's conduct. It is well established that the "[d]etermination of damages necessarily contemplates a finding that the breach was the cause of the damages claimed." *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 314, 541 A.2d 858 (1988); see also *National Market Share, Inc.* v. *Sterling National Bank*, 392 F.3d 520, 525 (2d Cir. 2004) ("[c]ausation is an essential element of damages in a breach of contract action"); *Calig* v. *Schrank*, 179 Conn. 283, 286, 426 A.2d 276 (1979) ("[i]t is hornbook law that to be entitled to damages in contract a plaintiff must establish a causal relation between the breach and the damages flowing from that breach"); *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 186 ("proof of causation . . . properly is classified as part and parcel of a party's claim for breach of contract damages"); 3 Restatement (Second), Contracts § 346 (1981) (in order to receive anything other than nominal damages, party must prove

both that breach of contract "caused" loss and amount of loss).

For that reason, a trial court does not violate public policy or otherwise undermine the validity of a prior determination of liability by permitting the defendant at a hearing in damages to offer evidence disputing the existence of damages resulting from its breach of contract. As our Supreme Court explained years ago, even when liability on the part of a defendant has been established, "[i]t does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive." *United National Indemnity Co.* v. *Zullo*, 143 Conn. 124, 130, 120 A.2d 73 (1956); see also *Mackin* v. *Mackin*, 186 Conn. 185, 190, 439 A.2d 1086 (1982) ("[t]o sustain an award of substantial damages requires a showing of an actual, as opposed to a mere technical injury").

Following a hearing at which the plaintiff was afforded ample opportunity to present evidence relevant to the issues at hand, the court in the present case found that she had not met her burden in demonstrating that the defendant's conduct, in failing to furnish invoices on a biweekly basis and written change orders, caused the diminution of her marital estate as alleged in the operative complaint. In part I of this opinion, we concluded that this finding was not clearly erroneous. The court, therefore, properly declined to award the actual damages claimed by the plaintiff.

It nevertheless remains that the jury found that the defendant "had breached its contract with the plaintiff"; *Bruno* v. *Whipple*, supra, 162 Conn. App. 196; thereby establishing the liability of the defendant. Id., 208. When a plaintiff can demonstrate a technical breach of contract, but no pecuniary damages resulting therefrom,

the plaintiff "is entitled to nominal damages . . . under its breach of contract claim."[11] *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 254, 919 A.2d 421 (2007). That precept is consistent with the rule that "[w]here the [trier of fact] has found that the plaintiff has suffered a technical legal injury, the plaintiff is entitled to at least nominal damages." *Lyons* v. *Nichols*, 63 Conn. App. 761, 768, 778 A.2d 246, cert. denied, 258 Conn. 906, 782 A.2d 1244 (2001); see also *Wasko* v. *Manella*, 87 Conn. App. 390, 400 n.8, 865 A.2d 1223 (2005) ("[n]ominal damages are recoverable where there is a breach of a legal duty or the invasion of a legal right and no actual damages result or where, as here, such damages are not proven"); *News America Marketing In-Store, Inc.* v. *Marquis*, 86 Conn. App. 527, 535, 862 A.2d 837 (2004) ("[i]f a party has suffered no demonstrable harm . . . that party may be entitled . . . to nominal damages for breach of contract"), aff'd, 276 Conn. 310, 885 A.2d 758 (2005). Because the defendant's liability was established by the jury verdict in favor of the plaintiff on the breach of contract count, the plaintiff was entitled to an award of nominal damages despite her failure to establish actual damages at the hearing in damages. The defendant in this appeal has provided no authority to the contrary. The trial court, therefore, erroneously directed judgment to enter in favor of the defendant in this case.

The remaining question is whether that improper determination constitutes reversible error. In answering that query, we are mindful that our Supreme Court

[11] Nominal damages have been defined as "a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." 4 Restatement (Second), Torts § 907, p.462 (1979). "Nominal damages are usually fixed at one cent, one dollar, or some similar small amount. . . . While no exact standard has been fixed as to what amount should be given as nominal damages, it must be insubstantial, a few cents or dollars." (Internal quotation marks omitted.) *Hartford* v. *International Assn. of Firefighters, Local 760*, 49 Conn. App. 805, 816 n.7, 717 A.2d 258, cert. denied, 247 Conn. 920, 722 A.2d 809 (1998).

repeatedly has applied the general rule that it "will not reverse" a judgment of the trial court "for a mere failure to award nominal damages." (Internal quotation marks omitted.) *Hi-Ho Tower*, *Inc.* v. *Com-Tronics*, *Inc.*, 255 Conn. 20, 37, 761 A.2d 1268 (2000); see also *Riccio* v. *Abate*, 176 Conn. 415, 418–19, 407 A.2d 1005 (1979); *Sessa* v. *Gigliotti*, 165 Conn. 620, 622, 345 A.2d 45 (1973); *Went* v. *Schmidt*, 117 Conn. 257, 259–60, 167 A. 721 (1933). This court has adhered to that precedent. See, e.g., *NPC Offices*, *LLC* v. *Kowaleski*, 152 Conn. App. 445, 458, 100 A.3d 42 (2014), rev'd on other grounds, 320 Conn. 519, 131 A.3d 1144 (2016); *Rossman* v. *Morasco*, 115 Conn. App. 234, 243 n.7, 974 A.2d 1, cert. denied, 293 Conn. 923, 980 A.2d 912 (2009); *Froom Development Corp.* v. *Developers Realty*, *Inc.*, 114 Conn. App. 618, 635 n.10, 972 A.2d 239, cert. denied, 293 Conn. 922, 980 A.2d 909 (2009); *Hughes* v. *Lamay*, 89 Conn. App. 378, 386 n.7, 873 A.2d 1055, cert. denied, 275 Conn. 922, 883 A.2d 1244 (2005); *DeVito* v. *Schwartz*, 66 Conn. App. 228, 237, 784 A.2d 376 (2001).

The rationale for that general rule against reversal is that "[n]ominal damages mean no damages at all. They exist only in name, and not in amount." (Internal quotation marks omitted.) *Beattie* v. *New York*, *N. H. & H. R. Co.*, 84 Conn. 555, 559, 80 A. 709 (1911); accord *DeVito* v. *Schwartz*, supra, 66 Conn. App. 237 ("nominal damages . . . imply the smallest appreciable quantity . . . with one dollar being the amount frequently awarded. The law . . . does not concern itself with trifles . . . and a judgment for [the] plaintiff will not be reversed on appeal for a failure to award nominal damages, even though [the] plaintiff is entitled to recover nominal damages as a matter of law" [internal quotation marks omitted]). Furthermore, the Supreme Court has applied that general rule in cases involving liability for a technical breach of contract. As the court explained in *Waicunas* v. *Macari*, 151 Conn. 134, 139,

193 A.2d 709 (1963), "[e]ven though the failure of the defendants to do the work might be considered a technical breach of the contract, the plaintiff has suffered no actual damage, and no injustice was done to him when he was denied recovery . . . . The failure to award nominal damages would not justify a reversal of the judgment."

Like the present case, *Riccio* v. *Abate*, supra, 176 Conn. 415, involved a hearing in damages following a finding of liability on the part of the defendants. As our Supreme Court noted, "[t]he issue of liability had been previously decided . . . and, therefore, the [finder of fact] had before [it] only a hearing in damages. The defendants were found liable by the [finder of fact] and the effect of their liability was to establish the fact that a technical legal injury had been done by them to the plaintiff, and this entitled the plaintiff to at least nominal damages." Id., 418–19. The court nevertheless recognized the general rule that it will not reverse a judgment of the trial court "for a mere failure to award nominal damages." Id., 419. Because the case did not warrant an exception to that rule, the court concluded that "it was not reversible error that the plaintiff was not awarded nominal damages"; id.; despite the fact that judgment had been rendered in favor of the defendants by the court. Id., 417. That logic applies equally to the present case. We therefore conclude that the failure of the trial court to award nominal damages and render judgment in favor of the plaintiff on her breach of contract count does not constitute reversible error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEAN BARJON (AC 40477)

Keller, Moll and Beach, Js.

Syllabus

Convicted of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, robbery in the second degree and conspiracy to commit robbery in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he and three conspirators, including T, robbed the victim, the owner of a grocery store. During the pretrial criminal proceedings against the defendant, S represented both the defendant and T, who was tried in a separate proceeding. The state and the defendant, who entered a plea of not guilty, were not able to agree upon a disposition, and the case was placed on the trial list. Subsequently, S appeared in court with the defendant, who had communicated his intention to plead guilty under the *Alford* doctrine to the charge of conspiracy to commit robbery in the first degree. During the defendant's plea canvass, the trial court questioned the defendant as to his reasons for pleading guilty, and subsequently declined to accept the defendant's plea. The court then addressed S about a potential issue regarding his continuing to represent both the defendant and T, granted S's motion to withdraw as counsel for the defendant, and continued the defendant's case to enable him to obtain new counsel. The defendant's case proceeded to trial, and the jury found him guilty on all counts. On appeal, the defendant claimed that the trial court violated his right to conflict free representation by not inquiring into a potential conflict prior to the defendant's plea canvass hearing. Specifically, he claimed, inter alia, that once the pretrial discussion concerning his acceptance of a plea broke down and the case was placed on the trial list, the court should have known of the conflict of interest and inquired about it on the record. *Held* that the defendant could not prevail on his claim that the trial court violated his constitutional right to conflict free representation by not timely inquiring about possible conflicts: there was no indication in the record that an actual conflict existed at any point during the pretrial proceedings, as there was no indication that plea negotiations had broken down when the case was placed on the trial list, especially given that the defendant attempted to plead guilty, the court had no affirmative duty to inquire into the possibility of a conflict because no indication of a conflict, other than the mere fact of joint representation, existed, and, contrary to the defendant's claim, the court did not err in assuming that potential conflict issues had been resolved, as the record did not show that the court was specifically apprised of a potential conflict, other than joint representation itself, until S raised the issue at the defendant's plea

canvass; moreover, the defendant's claim that the fact that he was prepared to make a statement to his detriment and to the benefit of T indicated a conflict requiring reversal was unavailing, as any possibility of an actual conflict was averted when the trial court made proper inquiry at the time that the defendant pleaded guilty, declined to accept the defendant's guilty plea, and allowed S to withdraw as counsel, and the defendant's claim that, when S withdrew from representation, subsequent counsel did not have adequate time to interview witnesses and to conduct his own investigation of the case was not properly before this court, as this court's review was limited to allegations that the defendant's constitutional rights had been jeopardized by the actions of the trial court, rather than those of counsel, and there was no ruling of the trial court regarding the performance of subsequent counsel in the record.

Argued September 11—officially released December 4, 2018

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, robbery in the second degree and conspiracy to commit robbery in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Thim, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Stephen A. Lebedevitch, assigned counsel, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Jean Barjon, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes

§§ 53a-48 and 53a-134 (a) (2), robbery in the second degree in violation of General Statutes (Rev. to 2011) § 53a-135 (a) (1), and conspiracy to commit robbery in the second degree in violation of § 53a-48 and General Statutes (Rev. to 2011) § 53a-135 (a) (1).[1] On appeal, the defendant claims that the trial court violated his right to conflict free counsel under the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. We affirm the judgment of the trial court.

The defendant and his codefendant, Jacques Louis, were tried together. In *State* v. *Louis*, 163 Conn. App. 55, 58–60,134 A.3d 648, cert. denied, 320 Conn. 929, 133 A.3d 461 (2016), this court held that a jury reasonably could have found the following facts: "On December 28, 2011, at approximately 8:15 p.m., [Louis], [the defendant], Tinesse Tilus, and Guailletemps Jean-Philippe (conspirators) together entered the Caribbean-American Market (market) on Wood Avenue in Bridgeport. They called for the owner, Rene Adolph, who was in the kitchen cooking, to come out. Adolph recognized Tilus and [the defendant], but not [Louis] and Jean-Philippe, who stood on either side of him. The conspirators demanded money from Adolph, and Jean-Philippe displayed a firearm. Adolph, fearing for his life, ran from the market to the laundry next door and called out for help. [Louis], [the defendant], and Tilus chased Adolph, who held the door to the laundry closed as [Louis] attempted to open it. Margarita Avcolt, a laundry employee, observed the activity, and telephoned the police. She saw one man trying to open the door and two others standing a 'meter' away.

[1] The jury found the defendant guilty of robbery in the first degree (count one), conspiracy to commit robbery in the first degree (count two), robbery in the second degree (count three), and conspiracy to commit robbery in the second degree (count four). At sentencing, count three was merged with count one, and count four was merged with count two. The issue of whether the merged counts should have been vacated is not before us.

"Meanwhile, Jean-Philippe, who had remained in the market, walked into the walled-in area occupied by the cashier, Ramon Tavares. Jean-Philippe displayed his gun and ordered Tavares to give him money. Jean-Philippe took the money Tavares gave him, as well as his phone.

"Back at the laundry, Adolph saw a police cruiser passing by, so he ran out and flagged down Officer Elizabeth Santoro. The three conspirators, who had followed Adolph to the laundry, ran and got into a car. Adolph pointed to the three conspirators in the car, who were getting ready to 'take off.' Adolph told Santoro that the men had tried to rob him. He also pointed to Jean-Philippe, who by that time was running away from the market on Wood Avenue. Adolph saw him 'toss the gun.' Santoro was able to detain Jean-Philippe, and told [the defendant], the driver of the car, not to move. Tilus and [Louis] were passengers in the car. According to Santoro, all of the conspirators were dressed in suits as if they were going somewhere.

"Officer Christopher Martin arrived on the scene as backup for Santoro. Martin seized $635 from Jean-Philippe and found a loaded, operable firearm that Jean-Philippe had discarded near a trash receptacle. A firearms expert, Marshall Robinson, examined the gun that Martin recovered and the casings it ejected when fired. As part of his investigation, Robinson learned that the gun had been used to fire cartridges in an incident in New Jersey. Both [Louis] and Jean-Philippe were from New Jersey.

"[Louis] and [the defendant] were each charged with robbery in the first degree, conspiracy to commit robbery in the first degree, robbery in the second degree, and conspiracy to commit robbery in the second degree, and stood trial together. [Louis'] theory of defense was that he was 'merely present' at the time of the robbery

and that Adolph's testimony was not believable. [The defendant] also claimed that he merely was present at the time of the robbery, that Adolph was not credible, and that Jean-Philippe acted alone in order to collect an unpaid debt from Adolph, who allegedly ran an illegal lottery from the market."

From the outset of the criminal proceedings against the defendant, Attorney Eroll Skyers represented both the defendant and Tilus, who had criminal charges arising from the same events pending against him but was tried in a separate proceeding. On February 7, 2012, the defendant entered a plea of not guilty to the charges. Over the course of the following months, the state and the defendant were not able to agree upon a disposition, and the case was placed on the trial list. On October 2, 2012, Attorney Skyers appeared in court with the defendant, who at that time had communicated through counsel his intention to plead guilty under the *Alford*[2] doctrine to the charge of conspiracy to commit robbery in the first degree. The following colloquy occurred between the trial court, *Devlin, J.*, and the defendant during the plea canvass:

"The Court: Do you believe, Mr. Barjon, that even though you disagree with [the prosecutor's statement of facts], even though you don't agree that it happened the way the prosecutor said, do you think [that] if you went to trial and . . . they put forward their evidence in court, there's at least a risk that the jury might believe their side of the case and convict you on this charge and the other charge pending against you. Do you think there's a chance of that?

[2] Under *North Carolina* v. *Alford*, 40 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant may plead guilty but not admit guilt, so long as he acknowledges that the state has sufficient evidence to convict, and the plea is otherwise voluntarily and intelligently made. *State* v. *Fairchild*, 155 Conn. App. 196, 199 n.2, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015).

"[The Defendant]: No, not so ever. No.

"The Court: All right. So, why are you pleading guilty?

"[The Defendant]: I'm risking . . . losing my job, taking time—I already have a job, I have a good job of making sixty something thousand dollars every year.

"The Court: Right.

"[The Defendant]: So, taking [time] off every day to come to court, to trial every day. And then I take the plea to help my friend that I put in trouble for not doing anything—

"The Court: Right, but you know—

"[The Defendant]: —Tinesse

"The Court: But—

"[The Defendant]: So, I do it in my heart.

"The Court: Yes, but here's the thing, Mr. Barjon, the plea bargain here calls for a potential sentence of up to four years in jail. You know that, right?

"[The Defendant]: Well . . . my lawyer said . . . they're . . . right to argue.

"The Court: Right. But there's no guarantee you're going to get less than that, there's none whatsoever. So, you should not be pleading guilty thinking you're going to go back to work on the day of your sentencing. You should not do that. If you're . . . taking this plea to keep your job or taking this plea to—and really, honestly, Mr. Barjon, while I commend your . . . concern about your friend, this is your decision to make, and you need to make it based on your own interests. Okay. . . .

"The Court: . . . So, I can't take your plea, Mr. Barjon, if you're not going to acknowledge there's at least a risk that you could be convicted."

After the court declined to accept the defendant's plea, it addressed Attorney Skyers about a potential problem regarding his continuing to represent both the defendant and Tilus:

"The Court: . . . Okay. So, what's the situation? So, I've called in Mr. Barjon and Mr. Tilus for trial. From the very first moment they came to our court, they were jointly represented by—by yourself, Attorney Skyers. And now it looks like, as we had before, [we're] unable to resolve the case on any kind of a plea negotiation. We have a judge available. And these cases are going to start trial. But . . . my understanding is that you believe there's some problem . . . at this point . . . [with] your representation of both defendants?

"Attorney Skyers: I— I—

"The Court: Well, I don't know, maybe these further discussions [have] clarified that. I'm not sure. But if there is, this is the time to put [it] on the record, so we can address it directly.

"Attorney Skyers: At the time—that's correct. At the time that Mr. Barjon and Mr. Tilus came to my office, I indicated to both of them that potentially there could be a conflict for my representation of both. Do you agree with that, Mr. Barjon?

"[The Defendant]: Yes, I did.

"Attorney Skyers: And they persisted in their desire to have me represent them. And so, what I represented was that in the event that there could not be a disposition without trial, that at that point the conflict would have come to a real crux, and that I was suggesting to Mr. Barjon that he would have to have his own counsel representing him and he understood that. Is that not so?

"[The Defendant]: Yes.

"Attorney Skyers: And so, that coming here this morning prior to court opening up the session, I indicated that likely that's where we were today, and that Mr. Barjon would probably have to get his own counsel unless we were able to dispose of this by plea.

"The Court: See, that's very unfair to the court because the court goes through a process where we talk about these cases, we work out the discovery, we make a proposal to settle the cases. Sometimes that works, sometimes it doesn't. But then the case moves to being [on] a trial list. And I assume that all [of] these issues about potential conflicts are . . . resolved. I mean . . . to me this is highly inappropriate."

The court subsequently granted Attorney Skyers' motion to withdraw as counsel for the defendant and continued the defendant's case to enable the defendant to obtain new counsel. The defendant's case proceeded to trial in January, 2013, and the jury found the defendant guilty on all counts. The court subsequently sentenced the defendant to a total effective sentence of ten years of incarceration, execution suspended after five years, followed by five years of probation. This appeal followed.

On appeal, the defendant argues that the trial court violated his right to conflict free representation by not inquiring into a potential conflict prior to the colloquy on October 2, 2012. We disagree.

We begin our analysis of the defendant's claim by setting forth the applicable law and standard of review. The defendant's claim that the court violated his right to conflict free representation by not timely inquiring about possible conflicts presents a question of law and, therefore, our review is plenary. See *State* v. *Parrott*, 262 Conn. 276, 285–86, 811 A.2d 705 (2003).

"The 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 to a criminal defendant the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Citations omitted; footnote 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). "This right applies not only to the trial itself, but to any critical stage of a criminal proceeding." *State* v. *Gaines*, 257 Conn. 695, 706–707, 778 A.2d 919 (2001).

"Cases involving conflicts of interest usually arise in the context of representation of multiple codefendants by one attorney where the attorney adduces evidence or advances arguments on behalf of one defendant that are damaging to the interests of the other defendant." (Internal quotation marks omitted.) *State* v. *Tilus*, 157 Conn. App. 453, 466, 117 A.3d 920 (2015), appeal dismissed, 323 Conn. 784, 151 A.3d 382 (2016). Nevertheless, "permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." *Holloway* v. *Arkansas*, 435 U.S. 475, 482, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); see also *State* v. *Navarro*, 172 Conn. App. 472, 481, 160 A.3d 1116, cert. denied, 326 Conn. 910, 164 A.3d 681 (2017). "An attorney has an *actual*, as opposed to a *potential*, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action. . . . An attorney has a potential conflict of

interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." (Citations omitted; emphasis added; internal quotation marks omitted.) *United States* v. *Perez*, 325 F.3d 115, 125 (2d Cir. 2003); see also *State* v. *Tilus*, supra, 466.

"The trial court has a duty to explore the possibility of a conflict when it is alerted to the fact that the defendant's constitutional right to conflict free counsel is in jeopardy." *State* v. *Tilus*, supra, 157 Conn. App. 466. "The purpose of the court's inquiry . . . is to determine whether there is an actual or potential conflict, and, *if there is an actual conflict*, to inquire whether the defendant chooses to waive the conflict or whether the attorney must withdraw." (Emphasis added.) *State* v. *Figueroa*, 143 Conn. App. 216, 226, 67 A.3d 308 (2013). "This obligation arises not only when there has been a timely conflict objection at trial, but also when the trial court knows or reasonably should know that a *particular* conflict exists." (Emphasis added; internal quotation marks omitted.) Id., 224. The trial court is not required "to inquire into the existence of a vague, unspecified possibility of conflict, such as that which inheres in almost every instance of [joint] representation." (Internal quotation marks omitted.) *State* v. *Navarro*, supra, 172 Conn. App. 484.

In the present case, the record does not show that any *actual* conflict existed prior to the colloquy on October 2, 2012. The defendant claims that "[o]nce the pretrial discussion of a plea being accepted by the defendant broke down, the case being placed on the trial list, and the continued representation of both the defendant and . . . Tilus by Attorney Skyers, the court should have known of the conflict of interest and inquired on the record of both parties."

There is no indication in the record that an actual conflict existed at any point during the pretrial proceedings. There is no record that plea negotiations "broke down" when the case was placed on the trial list, as the defendant claims; indeed, the defendant attempted to plead guilty on October 2, 2012. The understanding between Attorney Skyers and the defendant, according to representations on the record on October 2, 2012, was that if the case could not be resolved by a plea bargain, Attorney Skyers would withdraw. The fact that Attorney Skyers did not withdraw prior to that time suggests that plea discussions were continuing and had not, in fact, broken down. The defendant's assertion to the contrary is not supported by the record.[3]

"In the absence of an affirmative duty by the trial court to inquire . . . a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to obtain reversal of his conviction." (Internal quotation marks omitted.) *State* v. *Crespo*, supra, 246 Conn. 686, citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); see also *Festo* v. *Luckart*, 191 Conn. 622, 626–31, 469 A.2d 1181 (1983). As previously noted, on the record of this case, the court had no affirmative duty to inquire into the possibility of a conflict because no indication of a conflict, other than the mere fact of joint representation, existed. See *State* v. *Navarro*, supra, 172 Conn. App. 483–84. The defendant did not press the issue of a conflict at trial, and he also has failed to show that an actual conflict of interest existed. Pursuant to *Crespo*, therefore, there was no violation of his right to conflict-free representation.

[3] The record discloses that no actual conflict existed at any time; when the question of a potential conflict was raised, Attorney Skyers withdrew from representing the defendant.

Additionally, the defendant claims that the court erred in assuming that potential conflict issues had been resolved. This argument is without merit. "It is firmly established that a trial court is entitled to rely on the silence of the defendant and his attorney, even in the absence of inquiry, when evaluating whether a potential conflict of interest exists. . . . [D]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that [the potentially conflicted] representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Gaines*, supra, 257 Conn. 708. There is no indication that an actual conflict existed, and the record does not show that the court was specifically apprised of a potential conflict, other than joint representation itself, until Attorney Skyers raised the issue at the defendant's plea canvass. At that point, Attorney Skyers was permitted to withdraw, and the defendant was given an opportunity to obtain alternate counsel.

The defendant also claims that the fact that he was prepared to make a statement to his detriment and to the benefit of Tilus indicates a conflict requiring reversal. This claim, however, is also without merit. The defendant apparently was under the impression that if he pleaded guilty, he would be able to return to work, but the court informed him that his expectations may not be realized; the court did not accept the defendant's plea.[4] After declining to accept the defendant's plea, the court was apprised of the potential conflict and, as previously discussed, allowed Attorney Skyers to

[4] There is no indication that any of the defendant's statements during the plea canvass were used at trial.

withdraw and continued the case. The court made proper inquiry, and any possibility of an actual conflict was averted. See generally *State* v. *Tilus*, supra, 157 Conn. App. 466.

Finally, the defendant contends that when Attorney Skyers withdrew from representation on October 2, 2012, the defendant's subsequent attorney did not have adequate time to interview witnesses and to conduct his own investigation of the case. Any claim regarding the performance of subsequent counsel is not properly before us. "On the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal, we have limited our review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the *trial court*, rather than by those of his counsel." (Emphasis in original; internal quotation marks omitted.) *State* v. *Parrott*, supra, 262 Conn. 285. On the record in this case, there is no ruling of the trial court regarding the performance of subsequent counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER BORIA *v.* COMMISSIONER OF CORRECTION (AC 39715)

Prescott, Moll and Bishop, Js.

Syllabus

The petitioner, who previously had been convicted, on a guilty plea, of robbery in the first degree and of being a persistent dangerous felony offender, filed a third petition for a writ of habeas corpus, claiming, inter alia, that amendments to the risk reduction earned credits statute (§ 18-98e) violated the ex post facto clause of the federal constitution and that his guilty plea was not knowingly and voluntarily made. The habeas court, sua sponte, dismissed the third petition without a hearing. With respect to the petitioner's ex post facto claim regarding risk reduction earned credits, the court concluded that it lacked jurisdiction

because there was no cognizable liberty interest to such credit. The court also dismissed the petitioner's challenge to the voluntariness of his guilty plea as an improper successive claim. From the judgment rendered thereon, the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The petitioner could not prevail on his claim that the habeas court improperly dismissed the portion of his third habeas petition alleging an ex post facto violation regarding statutory amendments to the risk reduction earned credit program: the petitioner's claim that the habeas court's dismissal of his petition without holding a hearing violated the applicable rule of practice (§ 23-40) was unavailing, as the third petition alleged only the deprivation of risk reduction earned credit, which our Supreme Court and this court previously have held is insufficient to invoke the habeas court's jurisdiction, and, thus, in light of that binding precedent establishing the habeas court's lack of jurisdiction, the habeas court was not obligated to grant the petitioner a hearing before dismissing the habeas petition and acted properly in dismissing this portion of the petitioner's third habeas petition; moreover, the habeas court's dismissal for lack of jurisdiction was proper, as § 18-98e, which provides that an inmate made by eligible to earn risk reduction credit at the discretion of the respondent Commissioner of Correction, does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded, like parole eligibility, there is no cognizable liberty interest in earning risk reduction credits in order to obtain an earlier end of sentence date, and the claim did not implicate the ex post facto clause given that the petitioner committed the underlying robbery in 2009, prior to the enactment of the risk reduction earned credit statutes, and, thus, that the statutory amendment excluding persistent dangerous felony offenders for risk reduction earned credit eligibility simply put the petitioner in the same position that he was in when he committed the offense for which he was sentenced.
2. The habeas court properly dismissed the third habeas petition pursuant to the rule of practice (§ 23-29) that allows for the dismissal of a pending habeas petition without a hearing if a previous petition was brought on the same grounds and the new petition did not state new facts or proffer new evidence not reasonably available at the pervious hearing; although the habeas court incorrectly concluded that the petitioner's claim involving the voluntariness of his plea was an improper successive claim, as it had not been raised in any prior habeas petition, the dismissal was nonetheless proper under the doctrine of collateral estoppel, as the first and third habeas petitions, which alleged different claims, were predicated on the same underlying factual allegation, namely, that the petitioner was not aware of the charges pending against him, that central factual allegation necessary to sustain the petitioner's claim of an involuntary plea was fully and fairly litigated and decided adversely to the

petitioner in the first habeas action, and, therefore, the petitioner was precluded by collateral estoppel from litigating the same issue in regard to his claim of an involuntary plea.

(*One judge concurring separately*)

Argued September 14—officially released December 4, 2018

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver, J.*, rendered judgment dismissing the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Nicholas A. Marolda, assigned counsel, with whom, on the brief, was *Temmy Ann Miller*, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, assistant state's attorney, and *Stephen R. Finucane*, assistant attorney general, with whom, on the brief, was *Maureen Platt*, state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Peter Boria, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus pursuant to Practice Book § 23-29.[1] The petitioner claims that the habeas court improperly dismissed his claim (1) that amendments to the risk reduction earned credits

[1] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

statute in 2013 and 2015 violated the ex post facto clause of the United States constitution[2] and (2) that his right to due process had been violated because his guilty plea in his underlying criminal case was not knowingly and voluntarily made. As to the first claim, we disagree and, accordingly, affirm that aspect of the judgment of the habeas court. As to the second claim, although we agree with the petitioner that the habeas court should not have dismissed that claim as an improper successive petition under Practice Book § 23-29, we affirm that aspect of the judgment on the alternative ground that it was barred by collateral estoppel.[3]

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The petitioner currently is serving a sentence of twenty years of incarceration after pleading guilty on October 6, 2009, to the charges of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and to being a persistent dangerous felony offender in violation of General Statutes § 53a-40.

On July 18, 2011, the petitioner filed a petition for a writ of habeas corpus alleging ineffective assistance of trial counsel in violation of the sixth and fourteenth amendments to the United States constitution (first petition). Among other things, the first petition specifically alleged that, prior to his election to plead guilty, "[d]efense counsel failed to inform the petitioner of the applicable [charges] against him," including that the petitioner was being charged as a persistent dangerous felony offender. On July 13, 2013, the habeas court

[2] The constitution of the United States, article one, § 10, provides in relevant part: "No State shall . . . pass any . . . ex post facto Law . . . ."

[3] "[I]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 140 n.1, 958 A.2d 790 (2008), cert. denied, 290 Conn. 905, 962 A.2d 793 (2009).

issued an oral ruling denying the first petition, and the petitioner did not appeal therefrom.

On February 8, 2016, the petitioner filed two additional habeas petitions. One petition, docketed as TSR-CV-16-4007851-S (second petition), was filed pro se and sought the restoration of good time credits that the petitioner claimed he was eligible for and had been receiving. The habeas court, *Oliver*, *J.*, dismissed the second petition for lack of jurisdiction pursuant to Practice Book § 23-24 (a) (1).[4] The petitioner filed a petition for certification to appeal, which was granted by the habeas court. The petitioner's appeal from the dismissal of the second petition was heard alongside this appeal, and the judgment of the habeas court was summarily affirmed by this court in a memorandum decision (AC 39028).[5]

The other petition was docketed as TSR-CV-16-4008315-S (third petition), and it is that petition that underlies the present appeal. In the third petition, the petitioner raised several claims, including an ex post facto challenge to legislative amendments to the risk

[4] Practice Book § 23-24 (a) provides in relevant part: "The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction . . . ."

The petitioner, through appellate counsel, filed a motion for rectification and articulation asking the habeas court to articulate the legal and factual bases for its dismissal of the second petition, including, "what the [c]ourt understands the petitioner's claim(s) to be." The habeas court denied the motion for articulation and rectification, and the petitioner filed a motion for review of the habeas court's denial of that motion. This court granted the motion for review but denied the relief requested therein.

[5] Although the second petition appears to have significant overlap with the first claim of the underlying petition in the present appeal, the respondent, the Commissioner of Correction, did not move for the habeas court to dismiss the claim under the prior pending action doctrine; see *Gainey* v. *Commissioner of Correction*, 181 Conn. App. 377, 380 n.5, 186 A.3d 784 (2018); or for being an improper successive petition.

reduction earned credit statutes and that his guilty plea was not voluntarily made. The risk reduction earned credit statutes provide that certain prisoners convicted of crimes committed after October 1, 1994, "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction" for certain positive behaviors while incarcerated. General Statutes § 18-98e (a). Number 13-3, § 59, of the 2013 Public Acts, effective July 1, 2013, eliminated statutory language that previously permitted a prisoner's parole eligibility date to be advanced by the application of risk reduction earned credits.[6] Number 15-216, § 9, of the 2015 Public Acts, effective October 1, 2015, amended General Statutes § 18-98e to exclude inmates convicted of being a persistent dangerous felony offender from earning risk reduction credits.

On September 7, 2016, the habeas court, *Oliver, J.*, sua sponte dismissed the third petition pursuant to Practice Book § 23-29. With respect to the petitioner's ex post facto claim regarding risk reduction earned credits, the court dismissed that claim for lack of jurisdiction because it concluded that there was no cognizable liberty interest in such credits. See Practice Book § 23-29 (1).

Additionally, the habeas court dismissed the petitioner's challenge to the voluntariness of his guilty plea as an improper successive claim. See Practice Book § 23-29 (3). Regarding that claim, the court stated in its judgment of dismissal that "the instant petition presents the same ground as a prior petition previously denied (TSR-CV-11-4004269-S) and fails to state new facts or

[6] Public Acts 2013, No. 13-3, § 59, amended subsections (b) (2), (c) and (e) of General Statutes § 54-125a to delete provisions permitting the reduction of time off of a prisoner's parole eligibility date for risk reduction credit earned under § 18-98e.

proof of new evidence reasonably available at the time of the prior petition." The habeas court also concluded that, in a prior habeas proceeding, the habeas court found that the "petitioner was made aware of his persistent felony offender status and the prosecuting authority's filing of a 'part B' information." The court granted certification to appeal, and this appeal followed.

We begin by setting forth our standard of review for a challenge to the dismissal of a petition for a writ of habeas corpus. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 301–302, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016).

I

We first address the petitioner's claim that the habeas court improperly dismissed that portion of the third petition alleging an ex post facto violation regarding statutory amendments to the earned risk reduction credit program. There are two aspects to this claim. The petitioner argues that the court improperly (1) failed to hold a hearing before dismissing the petition, and (2) dismissed the claim for lack of jurisdiction.[7] We are not persuaded by the petitioner's contentions.

[7] For purposes of clarity, we address these claims in a different order than they were presented by the petitioner in his principal appellate brief.

A

The petitioner first argues that the habeas court improperly dismissed the third petition on its own motion without holding a hearing. Specifically, the petitioner argues that the court's failure to hold a hearing on the third petition violated Practice Book § 23-40 and deprived him of his right to such a hearing under *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 644 A.2d 340 (1994), General Statutes § 52-470, and Practice Book § 23-29. We disagree that a hearing was required in this case.

Whether the habeas court was required to hold a hearing prior to dismissing a habeas petition presents a question of law subject to plenary review. *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 82, A.3d , cert. denied, 330 Conn. 933, A.3d (2018). "Pursuant to Practice Book § 23-29, the habeas court may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (1) the court lacks jurisdiction . . . ." (Internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 234, A.3d (2018); see also *Gilchrist* v. *Commissioner of Correction*, 180 Conn. App. 56, 182 A.3d 690 (habeas court had no obligation to conduct hearing before dismissing petition pursuant to Practice Book § 23-29), cert. granted, 329 Conn. 908, 186 A.3d 13 (2018).

In *Holliday*, the petitioner filed a petition for a writ of habeas corpus in which he alleged that legislative changes to the risk reduction earned credit statute violated the ex post facto clause of the United States constitution. *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 232. The habeas court dismissed the petition pursuant to Practice Book § 23-29, and the petitioner appealed from the judgment claiming that the

court erred in dismissing his petition (1) for lack of jurisdiction and (2) without notice or a hearing. Id., 230. This court held that, for purposes of the habeas court's subject matter jurisdiction, which is predicated on the deprivation of a recognized liberty interest, there is no liberty interest in the application of risk reduction earned credit toward an inmate's parole eligibility. Id., 233–34. Additionally, this court held that the habeas court was not required to provide notice or a hearing before dismissing the petition. Id., 236.

Although, under Practice Book § 23-40, "[h]abeas petitioners generally have the right to be present at any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case . . . Practice Book § 23-40 speaks only to the petitioner's right to be present at an evidentiary hearing when such a hearing is held. Such hearings are not always required, as Practice Book § 23-29 authorizes the court to dismiss a habeas petition on its own motion. . . .

"[A] petitioner's right to a hearing before a habeas court is not absolute. . . . [T]his court [has] held that the habeas court acted properly in dismissing a habeas petition pursuant to Practice Book § 23-29 without first holding a hearing because it could be determined from a review of the petition [that] the petitioner had not satisfied his obligation to allege sufficient facts in his pleading to establish jurisdiction." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 236–37.[8]

[8] As we indicated in *Holliday*, "we urge the habeas court to exercise [the] authority [to dispose of a petition without a hearing] sparingly and limit its use to those instances in which it is plain and obvious that the court lacks jurisdiction over the habeas petition." (Internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 237.

Here, as in *Holliday*, the habeas court could determine from a review of the third petition that the petitioner had failed to allege sufficient facts to establish jurisdiction. The third petition alleged only the deprivation of risk reduction earned credit, which our Supreme Court and this court have held is insufficient to invoke the habeas court's jurisdiction. See *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 373–74, 163 A.3d 597 (2017); *Holliday* v. *Commissioner of Correction*, supra, 237–38. Therefore, in light of binding precedent establishing the habeas court's lack of subject matter jurisdiction,[9] we find that the habeas court was not obligated to grant the petitioner a hearing before dismissing the petition and acted properly in dismissing this portion of the third petition.

B

The petitioner next argues that the habeas court improperly dismissed for lack of jurisdiction that portion of the third petition alleging an ex post facto violation regarding statutory amendments to the earned risk reduction credit program. Although the petitioner recognizes that ordinarily the habeas court's subject matter jurisdiction is predicated on the deprivation of a recognized liberty interest, the petitioner argues that "no liberty interest is required for the petitioner to raise a cognizable ex post facto claim," and that being excluded from earning risk reduction credits guarantees that the petitioner will be incarcerated longer, violating the ex post facto clause. We disagree.

[9] Although the analysis contained in Judge Bishop's concurrence has some appeal, we note that our Supreme Court has granted the petition for certification to appeal from this court's decision in *Gilchrist* v. *Commissioner of Correction*, supra, 180 Conn. App. 56, in order to decide whether a habeas petition may be disposed of pursuant to Practice Book § 23-29 by the habeas court without a hearing. Under these circumstances, and in light of the fact that we are bound by *Holliday*, we believe it is more prudent not to weigh in further with respect to this issue.

The following additional facts are relevant to this claim. In 2011, while the petitioner was incarcerated, the legislature enacted General Statutes § 18-98e. Section 18-98e authorizes the Commissioner of Correction to award, in his or her discretion, risk reduction earned credits. The risk reduction earned credit program allows an eligible convicted prisoner to earn credit toward a reduction of his or her sentence. In 2015, the General Assembly amended § 18-98e, rendering persistent dangerous felony offenders, such as the petitioner, ineligible to earn risk reduction credits. See Public Acts 2015, No. 15-216, § 9 (a).

We turn to our standard of review and applicable legal principles for this claim. "It is well settled that [a] determination regarding a trial court's subject matter jurisdiction is a question of law and, therefore, we employ the plenary standard of review and decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 731, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017).

"With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Citations omitted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 85. Our Supreme Court and this court have held that there is no liberty interest

in the application of risk reduction eligibility credit toward an inmate's parole eligibility. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 371; *Green* v. *Commissioner of Correction*, supra, 85.

In the present case, the petitioner argues that "[t]he court's basis for concluding that it lacked jurisdiction—that there [is] no recognized liberty interest in parole eligibility . . . cannot support the court's dismissal." (Internal quotation marks omitted.) The petitioner states that "parole eligibility is irrelevant" and that the statutory changes at issue "do not affect when the petitioner will become eligible for parole" but rather, "they affect only his end of sentence date." In other words, the petitioner attempts to draw a distinction between circumstances in which the loss of risk reduction credit affects a prisoner's end of sentence date from those in which it affects a prisoner's parole eligibility date. Specifically, the petitioner argues that "by excluding [him] from the opportunity to earn [risk reduction credits] . . . the probability that his sentence will increase, and that he will be incarcerated longer . . . is guaranteed," and that this is a violation of the ex post facto clause.

"Pursuant to § 18-98e . . . an inmate is not guaranteed a certain amount of risk reduction credits per month—or, in fact, any credits at all." *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 86. As we stated in *Green*, "[t]he fact that the commissioner is vested with such broad discretion in implementing the [risk reduction earned credit] program is significant. Our appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good time credits, risk reduction credits, and early parole consideration—if the statutory scheme pursuant to which the commissioner is authorized to award those benefits is discretionary in nature." Id., 86–87.

"[T]he plain language of § 18-98e (a) . . . provides that an inmate may be eligible to earn risk reduction credit at the discretion of the [respondent] . . . [who] may, in his or her discretion, cause the loss of all or a portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. Although the legislature has provided guidance to the respondent as to how to exercise his discretion, the respondent still has broad discretion to award or revoke risk reduction credit. As such, the statute does not support an expectation that an inmate will automatically earn risk reduction credit or will necessarily retain such credit once it has been awarded." (Citations omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 372.

Like parole eligibility, there is no cognizable liberty interest in earning risk reduction credits in order to obtain an earlier end of sentence date. In *Green*, we held that, although the petitioner argued that the loss of risk reduction credit "[bore] directly on the duration of his sentence," the court did not have jurisdiction over the claim. *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 84. Moreover, the claim fails to implicate the ex post facto clause. The traditional approach in determining whether a colorable ex post facto claim exists requires us to compare the statute that was in effect at the time of the petitioner's offense to the challenged statute. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 378–80. In the present case, the petitioner committed the robbery underlying his conviction in 2009, prior to the enactment of the risk reduction earned credits statutes. Therefore, the statutory amendment excluding persistent dangerous

felony offenders for risk reduction earned credit eligibility simply put the petitioner in the same position that he was in when he committed the offense for which he was sentenced. The fact that the claimed liberty interest in the present matter pertains to the petitioner's maximum release date, rather than his date of parole eligibility, is immaterial because the sentence that the petitioner received based on the statutory scheme in effect at the time he committed the offense has not been changed. No ex post facto violation occurred, and no cognizable liberty interest is implicated by the petitioner's loss of risk reduction earned credits. Accordingly, the habeas court properly dismissed this portion of the third petition.

II

We next address the petitioner's claim that the habeas court improperly dismissed that portion of the third petition alleging that his guilty plea was not voluntary on the ground that the claim constituted an improper successive petition pursuant to Practice Book § 23-29 (3). Specifically, the petitioner argues that the third petition presents new grounds that were neither raised in the first petition nor litigated at the habeas trial in that case. According to the petitioner, because the first petition alleged ineffective assistance of counsel, and not a freestanding due process claim challenging the voluntariness of his plea, the claim raised in the third petition was not improperly successive. Although the respondent, the Commissioner of Correction (commissioner), concedes that the habeas court improperly dismissed the third petition for being improperly successive, it contends that the judgment of dismissal nonetheless should be affirmed because the factual basis for the petitioner's claim was fully and fairly litigated and decided adversely to him in the first habeas action. We agree with the commissioner and, therefore, affirm the habeas court's judgment dismissing this count on the

alternative ground that the claim is barred by collateral estoppel.[10]

We begin our analysis by reviewing the doctrines of res judicata and collateral estoppel in habeas corpus proceedings. Pursuant to Practice Book § 23-29, "[i]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing." (Footnote omitted; internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 277, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Emphasis omitted; internal quotation marks omitted.) Id., 278.

"Our courts have repeatedly applied the doctrine of res judicata to claims duplicated in successive habeas petitions filed by the same petitioner. . . . In fact, the ability to dismiss a petition [if] it presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition is memorialized in Practice Book § 23-29 (3)." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d

[10] "That the court relied on a wrong theory does not render the judgment erroneous. We can sustain a right decision although it may have been placed on a wrong ground." (Internal quotation marks omitted.) *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 105 n.4, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015).

213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

"[T]he application of the doctrine of res judicata is limited in habeas actions to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 310. This court has held that "the principle of claim preclusion applie[s] when identical claims [are] argued on direct appeal and habeas review." (Emphasis omitted.) *Diaz* v. *Commissioner of Correction*, supra, 125 Conn. App. 66.

The first petition and the third petition do not present identical claims. The first petition asserted a claim of ineffective assistance of counsel. The third petition asserts a freestanding due process claim that the petitioner's plea was involuntary. Therefore, the habeas court in the present case, as the commissioner concedes, incorrectly concluded that the petitioner's claim involving the voluntariness of his plea was an improper successive claim because it was precluded by the doctrine of res judicata. Simply put, the petitioner had not raised the instant claim in any of the prior habeas petitions.

We nonetheless agree with the commissioner that we should affirm the habeas court's judgment on the alternative ground of collateral estoppel. "Under [Practice Book § 23-29 (5)], the court may dismiss [a habeas] petition or any count thereof if it determines that any other legally sufficient ground for dismissal of the petition exists." (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 758 n.8, 83 A.3d 1174, cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014).

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of

judicial economy, the stability of former judgments and finality. . . . Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . [C]ollateral estoppel [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 310–11.

We previously have affirmed judgments of the habeas court on the alternative ground of collateral estoppel. In *Johnson*, the petitioner alleged that his third habeas counsel was ineffective because she did not raise the issue of whether trial counsel was ineffective for failing to file a motion for a competency evaluation. Id., 308. The habeas court dismissed the claim as an improper successive claim under the doctrine of res judicata. Id. This court held that the claim was dismissed on improper grounds because the petitioner had not raised the identical claim in any of his prior habeas petitions. Id., 309. This court, however, affirmed the dismissal of the petitioner's claim on the alternative ground of

collateral estoppel under Practice Book § 23-29 (5).[11] Id., 312.

We agree with the commissioner that the central factual allegation necessary to sustain the petitioner's claim of an involuntary plea was fully and fairly litigated and decided adversely to the petitioner in the first habeas action. In the first petition, the petitioner set forth a claim of ineffective assistance of counsel premised on an allegation that his counsel failed to inform him of the applicable charges against him. In adjudicating that claim of ineffective assistance of counsel, the first habeas court was required to decide whether his defense counsel had failed to inform him of all of the charges, including the persistent dangerous felony offender charge. In the third petition, the petitioner claims that his plea was involuntary because he was not aware that he was pleading guilty to being a persistent dangerous felony offender. Therefore, although the first and third petitions present different claims, they are predicated on the same underlying factual allegation, namely, that the petitioner was not aware of the charges pending against him. The claim presented in the third petition depends on this factual allegation, which was fully and fairly litigated in the previous habeas proceeding and was decided adversely to him in that case by the habeas court.

[11] In *Johnson*, we stated that "[t]o establish that third habeas counsel was ineffective for failing to allege a claim that trial counsel was ineffective for failing to move for a competency evaluation, the petitioner would be required to prove that trial counsel was ineffective for failing to move for a competency evaluation. This already was decided, after a full evidentiary hearing, by the fifth habeas court . . . ." *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 311–12. Therefore, the petitioner's claim involving third habeas counsel "[was] barred by collateral estoppel because litigation of that claim necessarily required relitigation of an issue that already [had] been fully and fairly decided in the fifth habeas action, specifically, whether trial counsel was ineffective for failing to move for a competency evaluation;" id., 311; and an earlier habeas proceeding "necessarily resolved an issue that would need relitigation if the claim involving third habeas counsel were to proceed . . . ." Id.

Specifically, in its memorandum of decision denying the first habeas petition, the habeas court, *Newson, J.*, found that counsel credibly testified that the petitioner was informed that he was being charged as a persistent dangerous felony offender. The memorandum of decision stated that the court credited defense counsel's testimony that defense counsel had properly discussed and advised the petitioner of the facts and circumstances of the case. The court found that the petitioner had admitted that he understood the fact that he was facing a part B information as a persistent dangerous felony offender and that he was exposed to a sixty year sentence.

Further, Judge Newson stated, "[a]nd so again, the substance and the length of the visits is not necessarily a correlation to the quality or the information that's delivered in those visits and the court credits counsel's testimony that the petitioner was aware. Additionally, there's a plea canvass which the petitioner appears to have made it through without any significant issues, any questions, any lack of understanding, and the law indicates that the court is allowed to rely on those answers and responses as credible and accurate when given. And when an individual is asked if he or she has any questions or lacks any understanding during the plea canvass and can answer that in the negative, then the court is allowed to accept that as accurate and truthful when given and that again presents issues when a petitioner later comes in a habeas and claims that he did not or does not understand."

Finally, the court stated, "[a]nd again, so the record is clear . . . I found in general that counsel appeared to be competent and knowledgeable . . . *I credit her testimony that she provided the petitioner with all of the information necessary for him to make a knowing, intelligent, and voluntary guilty plea*." (Emphasis added.) Therefore, whether the petitioner entered his

plea knowing that he was pleading guilty to being a persistent dangerous felony offender was a fact that was fairly litigated and actually decided by the habeas court.

Because the habeas court necessarily decided adversely to the petitioner the underlying issue of whether he knew that he was pleading guilty to being a persistent dangerous felony offender in a previous habeas hearing, the petitioner is precluded by collateral estoppel from litigating the same issue in regard to his claim of an involuntary plea. The habeas court thus properly dismissed the third petition pursuant to Practice Book § 23-29.

The judgment is affirmed.

In this opinion MOLL, J., concurred.

BISHOP, J., concurring. The record in the present case reflects that the petitioner filed the underlying petition for a writ of habeas corpus, his third, on August 8, 2016, and that, when the petition was received by the Superior Court, it was assigned a docket number.[1] In his filing, the petitioner claimed, inter alia, that his

[1] The petition was docketed as TSR-CV16-4008315-S. "At common law habeas corpus was a formalistic proceeding. The application played no role in framing the issues, its only purpose being to secure the issuance of the writ. . . . The return, whose truth could not be contested . . . limited the proceeding to the determination of a question of law. Early on the legislature corrected this deficiency by permitting the statements in the return to be contested. . . . At that point and until fairly recently the issues on which a subsequent trial was to be held were framed by the return and the pleadings subsequent thereto. . . . In recent years the application has come to be regarded as a pleading in the nature of a complaint . . . and the return in the nature of an answer." (Citations omitted.) *Arey* v. *Warden*, 187 Conn. 324, 331–32, 445 A.2d 916 (1982); see also *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842 n.7, 878 A.2d 1088 (2005). Translating the old into newer procedure, one can fairly say that once a habeas petition has been docketed, the writ has effectively issued, and once a return has been filed, the issues have been joined for judicial determination. Overlying this procedure are various Practice Book provisions providing for the summary disposition of the petition.

confinement was illegal because (1) his guilty plea to the underlying criminal offense was not voluntary, and (2) the 2013 and 2015 amendments to the earned risk reduction credit statute, General Statutes § 18-98e, which bore on his parole eligibility and were enacted subsequent to his conviction, violated the ex post facto clause of the United States constitution. In conjunction with his petition, the petitioner filed an application for a waiver of fees and payment of costs and a request for the appointment of counsel, which the court clerk granted on August 26, 2016. The record further reflects that, notwithstanding the docketing of the petition and the granting of the petitioner's request for counsel, the court, sua sponte, dismissed the petition pursuant to Practice Book § 23-29 without having actually appointed counsel and without having provided the petitioner notice and an opportunity to be heard on the motion to dismiss.

My colleagues affirm the habeas court's dismissal on the substantive grounds that the petitioner has no liberty interest in the receipt of earned risk reduction credit and that his claim regarding his guilty plea is barred by the doctrine of collateral estoppel. On the basis of this court's recent decision in *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, A.3d (2018), my colleagues also affirm the habeas court's reliance on Practice Book § 23-29 to dispose of the petitioner's claims without affording him or his counsel notice or an opportunity to be heard before the court sua sponte dismissed his petition. Although I am bound by *Holliday* to concur with the outcome of this appeal, I write separately because I am concerned that, through this and prior opinions, this court has eroded the process rights of habeas petitioners contrary to the overarching purpose of habeas corpus, contrary to the

decisional law of our Supreme Court, and contrary to the applicable provisions of the Practice Book.[2]

Specifically, I believe that, before a petition for a writ of habeas corpus can be dismissed pursuant to Practice Book § 23-29, the petitioner should be given notice of the court's inclination to dismiss, sua sponte, his petition and an opportunity to be heard on the question of whether dismissal is warranted. Our recent decisional law, however, including the majority's opinion in the present case, has condoned the growing habit of trial judges to dismiss petitions sua sponte pursuant to § 23-29 without prior notice to the petitioner that the court is considering dismissal and without affording the petitioner an opportunity to be heard on the propriety of such dismissal.[3] Respectfully, I believe this to be a wrong-minded trend that represents the elevation of judicial efficiency over fair process, relevant decisional law, and applicable rules of practice.

The starting point for my analysis is the seminal case of *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 93, 644 A.2d 340 (1994), in which our Supreme Court

[2] As a matter of policy, one panel of this court may not reverse the ruling of a previous panel. See *Consiglio* v. *Transamerica Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999). Indeed, this rule is not merely an axiom of appellate collegiality; a prior ruling by one panel is binding precedent on a subsequent panel. See *Samuel* v. *Hartford*, 154 Conn. App. 138, 144, 105 A.3d 333 (2014) ("[w]e are bound by [our prior] precedent, as it is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding").

[3] See *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 235–38; *Gilchrist* v. *Commissioner of Correction*, 180 Conn. App. 56, 62–63, 182 A.3d 690, cert. granted, 329 Conn. 908, 186 A.3d 13 (2018); *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 787–88, 169 A.3d 851, cert. denied, 327 Conn. 978, 174 A.3d 800 (2017); *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 57–58, 46 A.3d 1050 (2012); but see *Boyd* v. *Commissioner of Correction*, 157 Conn. App. 122, 125–27, 115 A.3d 1123 (2015); see also *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 366,163 A.3d 597 (2017) (habeas court afforded petitioner notice and hearing before dismissing petition).

opined: "Both statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. General Statutes § 52-470 (a) provides that '[t]he court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments [in the case], and [shall] inquire fully into the cause of imprisonment, and . . . thereupon dispose of the case as law and justice require.' In *Negron* v. *Warden*, 180 Conn. 153, 158 n.2, 429 A.2d 841 (1980), we noted that whenever a court is 'legally required' to hear a habeas petition, § 52-470 (a) 'delineate[s] the proper scope of [the] hearing . . . .' The statute explicitly directs the habeas court to 'dispose of the case' only *after* 'hearing the testimony and arguments therein.' " (Emphasis in original.) *Mercer* v. *Commissioner of Correction*, supra, 93.

The *Mercer* court continued: "In our case law, we have recognized only one situation in which a court is not legally required to hear a habeas petition. In *Negron* v. *Warden*, supra, 180 Conn. 158, we observed that, pursuant to Practice Book § 531, [i]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing. We emphasized the narrowness of our construction of Practice Book § 531 by holding that dismissal of a second habeas petition without an evidentiary hearing is improper if the petitioner either raises new claims *or* offers new facts or evidence. Id., 158 and n.2. *Negron* therefore strengthens the presumption that, absent an explicit exception, an evidentiary hearing is always required before a habeas petition may be dismissed."

(Emphasis in original; internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, supra, 230 Conn. 93.[4]

As noted in *Mercer*, at the time that decision was issued, our rules of practice provided only one basis for a habeas petition to be dismissed without an evidentiary hearing. That provision, Practice Book (1995) § 531, provided: "If the petitioner has filed a previous application, it and the action taken thereon shall be summarily described in the pending application. If a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing."

In 1995, the Practice Book provisions regarding habeas corpus were substantially amended. Notably,

[4] The presumption espoused in *Negron* and affirmed in *Mercer*, that a habeas petitioner is entitled to an evidentiary hearing unless a rule explicitly provides to the contrary, was acknowledged by this court in 2009 in *Riddick* v. *Commissioner of Correction*, 113 Conn. App. 456, 966 A.2d 762 (2009), appeal dismissed, 301 Conn. 51, 19 A.3d 174 (2011). *Riddick* concerned the application of Practice Book (2009) § 23-42 (a), which provided in relevant part: "If the judicial authority finds that the case is wholly without merit, it shall allow counsel to withdraw and *shall consider whether the petition shall be dismissed or allowed to proceed*, with the petitioner pro se. . . ." (Emphasis added.) In affirming the habeas court's then-existent authority to dismiss a petition under this rule, the *Riddick* court opined: "[Practice Book (2009) § 23-42] provides an explicit exception to the general rule requiring an evidentiary hearing before a habeas petition may be dismissed. See *Mercer* v. *Commissioner of Correction*, [supra, 230 Conn. 93]." *Riddick* v. *Commissioner of Correction*, supra, 467.

It is noteworthy that, not long after the issuance of the decision in *Riddick*, Practice Book (2009) § 23-42 was amended to eliminate the court's authority to dismiss a petition when granting the motion of the petitioner's counsel for leave to withdraw. Section 23-42 now provides that a petitioner whose counsel has been permitted to withdraw may, nevertheless, proceed on a self-represented basis. Thus, the exception noted in *Negron* for circumstances in which the habeas court need not hold a hearing before dismissing a petition no longer pertains, with the result that Practice Book § 23-24 now provides the sole avenue for summarily disposing of a petition without a hearing of any kind.

Practice Book (1995) § 531 was eliminated, thereby excising from the rules of practice the only explicit circumstance in which a petition for a writ of habeas corpus could be dismissed without an evidentiary hearing on the merits. At the same time, however, three new pertinent sections, Practice Book (1996) §§ 529C, 529H, and 529S (now §§ 23-24, 23-29, and § 23-40, respectively), were adopted, which provide the court with alternative vehicles for summary disposition of habeas matters. Understanding the import of these changes is key to resolving the question of whether a petition may be dismissed under § 23-29 without providing the petitioner notice and an opportunity to be heard.

The 1995 amendments to the Practice Book established two distinct procedural opportunities for the habeas court to summarily dispose of a habeas corpus petition without an evidentiary hearing. Practice Book § 23-24[5] effectively vests the court with a new gatekeeping function, authorizing the court to dispose of a case before it has been docketed by declining to "issue the writ" for certain enumerated grounds. Practice Book § 23-29 provides for the summary disposition of a petition once the writ has already been issued. Respectfully, I believe this court has blurred the important distinctions between the habeas court's gatekeeping function pursuant to § 23-24 and its authority to dismiss a pending matter for the reasons enumerated in § 23-29. Conflation of these two rules by this court has eroded the process rights of petitioners whose writs have been issued and for whom counsel has been appointed.

[5] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

Pursuant to Practice Book § 23-24, when the habeas court exercises its gatekeeping function to decline to issue a writ, the matter is returned to the petitioner with a notation from the court setting forth the basis on which the court has declined to issue the writ.[6] This rule reflects the historical distinction between the issuance of the writ and the adjudication of the petitioner's claims for relief, which this court explained in its opinion in *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, A.3d , cert. denied, 330 Conn. 933, A.3d (2018): "The meaning of [the] phrase [issue the writ] can be ascertained by reference to historical practices regarding the service and issuance of writs of habeas corpus in our state. At one point in time, a habeas petition was filed with the court prior to it being served on the [respondent] Commissioner [of Correction (commissioner)]. General Statutes (1918 Rev.) § 6033. The court would then determine whether to issue the writ. General Statutes (1918 Rev.) § 6033. It was only if the court decided to issue the writ that the petition would be served on the commissioner by an officer of the court and a subsequent habeas trial be held. General Statues (1918 Rev.) § 6033; see also *Adamsen* v. *Adamsen*, 151 Conn. 172, 176, 195 A.2d 418 (1963) (Our statute requires that the application for a writ of habeas corpus shall be verified by the affidavit of the applicant for the writ alleging that he verily believes the person on whose account such writ is sought is illegally confined or deprived of his liberty. . . . The only purpose served by the application is to secure the issuance of the writ in the discretion of the

[6] See, e.g., *Fuller* v. *Commissioner of Correction*, 144 Conn. App. 375, 377, 71 A.3d 689 (when confronted with application for issuance of writ of habeas corpus claiming that parole board had acted unreasonably in denying parole, habeas court, after reviewing petition, sent petitioner letter indicating that "[t]he [h]abeas [c]orpus petition is declined and is being returned because the court lacks jurisdiction per . . . Practice Book § 23-24 [a] [1]"), cert. denied, 310 Conn. 946, 80 A.3d 907 (2013).

court. The issues on which any subsequent trial is held are framed by the return and the pleadings subsequent thereto. . . . Put differently, [t]he issuance of the writ did not determine the validity of the [petition] . . . . On the contrary, it served only to bring the parties before the court in order that the issue of the alleged illegal restraint might be solved. *Adamsen* v. *Adamsen*, supra, 177." (Internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 80–81 n.3.

As noted, Practice Book § 23-29 was adopted in 1995 at the same time Practice § 23-24 was adopted. In my view, these sections, which are still in effect, provide procedurally different bases for the court to summarily dispose of a habeas corpus case. Section 23-24 provides a vehicle for the court to exercise a gatekeeping function to bar entry to the court of those cases in which it is patent that the court lacks jurisdiction over the claim, the petition is wholly frivolous on its face, or the relief requested in the petition is not available. Section 23-29 also provides a basis for the summary disposition of the case, but, in this instance, because § 23-29 is applicable only once the writ has been issued, the petition may not then be dismissed without affording the petitioner notice and a hearing on the motion to dismiss.

Although Practice Book § 23-29 has been characterized as the successor rule to Practice Book (1995) § 531, there is a significant distinction between the two regarding a petitioner's right to a hearing. Section 531 expressly authorized the court to dismiss a successive petition "*without hearing* unless it states new facts or proffers new evidence not reasonably available at the previous hearing"; (emphasis added); the successor rule, § 23-29, however, contains no parallel provision. To be sure, the new rule, § 23-29, did expand the bases on which a court is authorized to summarily dispose of a petition and now includes those in which (1) the

court has no jurisdiction, (2) the petition fails to state a claim upon which habeas corpus relief can be granted, (3) the petition presents the same ground as a previously denied petition and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition, (4) the claims asserted in the petition are moot or premature, and (5) any other legally sufficient ground for dismissal of the petition. See Practice Book § 23-29. Significantly, however, § 23-29 contains no provision authorizing the court to dismiss a pending petition without affording the petitioner a hearing and an opportunity to be heard on the motion to dismiss.[7] Consequently, in my view, the 1995 revision to the Practice Book effectuated two complementary changes. On one hand, it eliminated the one basis on which a writ, once issued, could be dismissed without affording a petitioner notice and the right to be heard, while at the same time creating a vehicle, § 23-24, through which the court, in the exercise of its gatekeeping function, may turn a petition away from the courthouse door by declining to issue the writ.

My understanding of the interplay between Practice Book §§ 23-24 and 23-29 is buttressed by the simultaneous adoption in 1995 of Practice Book § 23-40, which

[7] Respectfully, I believe that the provisions of Practice Book §§ 23-24 and 23-29, authorizing the habeas court to summarily dispose of a writ or petition for certain enumerated grounds, are complementary and not mere duplications of the same judicial authority. To the extent the court mindfully fulfills its gatekeeping function pursuant to § 23-24, it may simply return the writ to the petitioner with a note indicating the basis for its decision to decline to issue the writ. If, however, a writ escapes preliminary review, the court's responsibility is more burdensome. In my view, the resolution of this conundrum does not lie in eroding the process rights of a petitioner whose writ has been issued; rather, it suggests that the court should develop a more mindful process to weed out inappropriate writs as a preliminary matter pursuant to its gatekeeping function. Although this suggestion may entail some administrative changes in the Superior Court regarding the docketing of petitions, I believe that, in the long run, a more fulsome use of the court's authority pursuant to § 23-24 would maximize judicial efficiency without the unnecessary dilution of the petitioner's process rights that attach once the writ has been issued.

newly provided, inter alia, for the right of the petitioner to be present at "any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case . . . ." Although I recognize that this rule does not explicitly require the court to conduct a hearing before dismissing a petition pursuant to § 23-29, its provisions entitling a petitioner to be present at any dispositive hearing would be rendered illusionary if a petitioner had no right to a hearing at all.[8]

My view finds support, as well, in the general Practice Book rules regarding civil actions. At the outset, it is well established that "[h]abeas corpus is a civil proceeding." *Collins* v. *York*, 159 Conn. 150, 153, 267 A.2d 668 (1970). Consequently, "[a] habeas corpus action, as a variant of civil actions, is subject to the ordinary rules of civil procedure, unless superseded by the more specific rules pertaining to habeas actions." (Internal quotation marks omitted.) *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 45, 130 A.3d 268 (2015).[9]

[8] In coming to this view, I am mindful of this court's contrary conclusion in *Holliday*: "[T]he rules of practice were promulgated to create one harmonious and consistent body of law. . . . If courts can by any fair interpretation find a reasonable field of operation for two [rules of practice] without destroying their evident meaning, it is the duty of the courts to do so, thus reconciling them and according to them concurrent effect. . . . To give effect to both Practice Book §§ 23-29 and 23-40, the latter section should be read to give a petitioner the right to be present at an evidentiary hearing if one is held, not to give a petitioner the absolute right to an evidentiary hearing itself." (Citation omitted; internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, supra, 184 Conn. App. 236 n.10. With all respect to my colleagues in the *Holliday* decision, the panel's view, if it endures, would eviscerate any fair process rights that § 23-40 confers on habeas petitioners whose writs have eluded disposition pursuant to Practice Book § 23-24. In my view, the clearer route to harmonizing § 23-29 with § 23-40 is to conclude that the latter rules entitle a habeas petitioner to notice and an opportunity to be heard before dismissal pursuant to § 23-29. Achieving harmony in the habeas rules, a value *Holliday* exhorts, is fully in accord with the presumption of a hearing entitlement embodied in *Mercer*, whereas the view espoused in *Holliday* negates by implication the overarching and enduring admonition of *Mercer*.

[9] See, e.g., *Turner* v. *Commissioner of Correction*, 163 Conn. App. 556, 563, 134 A.3d 1253 (applying General Statutes § 52-212a and Practice Book

Chapter 11 of the Practice Book, which relates to civil matters generally, provides for notice and an opportunity to be heard before a matter may be summarily dismissed. Pursuant to Practice Book § 11-1, "[e]very motion . . . directed to pleading or procedure . . . shall be in writing"; Practice Book § 11-1 (a); and "such motion . . . shall be served on all parties as provided in [Practice Book §§] 10-12 through 10-17." Practice Book § 11-1 (c). "The purpose of requiring written motions is not only the orderly administration of justice . . . but the fundamental requirement of due process of law"; (citation omitted) *Connolly* v. *Connolly*, 191 Conn. 468, 475, 464 A.2d 837 (1983); specifically, the requirement of adequate notice. See *Herrmann* v. *Summer Plaza Corp.*, 201 Conn. 263, 273, 513 A.2d 1211 (1986) ("[t]he requirement that parties file their motions in writing is to ensure that the opposing party has written notice of the motion to dismiss"). As will be made clear in the following paragraph, receipt of adequate notice is essential in order for the nonmoving party to exercise its right under the Practice Book to be heard.

Our rules of practice grant the nonmoving party to a motion to dismiss two opportunities to be heard. First, Practice Book § 11-10 (a)[10] provides the adverse party to

§ 17-4, which govern motions to open and set aside civil judgments), cert. denied, 323 Conn. 909, 149 A.3d 980 (2016); *Kendall* v. *Commissioner of Correction*, supra, 162 Conn. 46 (applying Practice Book § 15-6, which allows for opening argument in civil trials before court or jury); *Carmon* v. *Commissioner of Correction*, 148 Conn. App. 780, 785–86, 87 A.3d 595 (2014) (holding that General Statutes § 52-119 and Practice Book § 10-18, which apply generally to civil actions, give habeas court authority to render default judgment or nonsuit against party who fails to comply with pleading requirements); *Fuller* v. *Commissioner of Correction*, 75 Conn. App. 814, 817–19, 817 A.2d 1274 (holding that dismissal for lack of due diligence in prosecuting civil case pursuant to Practice Book § 14-31 was legally sufficient ground for dismissal of habeas corpus action and fell under catchall "other legally sufficient ground" provision of Practice Book § 23-29 [5]), cert. denied, 263 Conn. 926, 823 A.2d 1217 (2003).

[10] Practice Book § 11-10 (a) provides in relevant part: "A memorandum of law briefly outlining the claims of law and authority pertinent thereto shall be filed and served by the movant with the following motions and

a motion to dismiss (as well as certain other specifically enumerated motions) with the opportunity to file a memorandum of law in opposition to the motion. The rules also provide the nonmovant with the right to present oral argument on the motion to dismiss at the court's short calendar.[11] Pursuant to Practice Book § 11-18 (a), "[o]ral argument is at the discretion of the judicial authority *except* as to motions to dismiss" and certain other motions. (Emphasis added.) "For those motions, oral argument shall be *a matter of right*, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all parties . . . a written notice stating the party's intention to argue the motion or present testimony." (Emphasis added.) Practice Book § 11-18 (a).

Application of the foregoing rules in the context of a motion to dismiss under Practice Book § 23-29 is most straightforward when it is the respondent who makes the motion. In such circumstances, it is clear that the respondent must file a written motion and a memorandum of law and serve the same on the petitioner, thus satisfying the requirements of Practice Book § 11-1. The effect of the service of the motion and brief is to provide the petitioner with the notice necessary for the petitioner to be able to (1) exercise his rights to file a memorandum of law in opposition to the motion pursuant to Practice Book § 11-10 and (2) claim the matter for oral argument pursuant to Practice Book § 11-18.[12]

requests . . . (2) motions to dismiss except those filed pursuant to [Practice Book §] 14-3 . . . . Memoranda of law may be filed by other parties on or before the time the matter appears on the short calendar."

[11] Pursuant to Practice Book § 11-13 (a), all motions must be placed on the short calendar list, and, as per Practice Book § 11-15, they are to be assigned automatically by the clerk without written claim.

[12] Moreover, a cursory review of the habeas corpus short calendar of the Superior Court for the judicial district of Tolland, geographical area number nineteen, reveals that motions to dismiss are routinely marked "arguable." See, e.g., TSR – Short Calendar 01 – Civil Arguable Matters, October 29,

Thus, where the respondent properly serves the petitioner with notice of its motion and the grounds therefor, and the petitioner simply fails to exercise his right to file a brief or make oral argument, it is clear that the habeas court may properly decide the motion without having heard from the petitioner.

I recognize, of course, that Practice Book § 23-29, unlike its parallel provision, Practice Book § 10-30,[13] contemplates that a court may dismiss a petition sua sponte even where the ground for dismissal does not implicate subject matter jurisdiction. Nowhere in § 23-29, however, is there a provision for the court to act without providing notice to the petitioner and an opportunity to be heard on the court's sua sponte motion. Thus, I conclude that, because § 23-29 does not explicitly provide for the court to act sua sponte without providing notice and an opportunity for the petitioner to be heard on the motion, it is unreasonable and contrary to the rules pertaining to civil matters generally for the court to import such a provision into § 23-29.

A review of the decisional history of this court regarding Practice Book § 23-29 reveals our inconsistent treatment of this issue.[14] In *Mitchell* v. *Commissioner of*

2018 (TSR SC 01), available at http://civilinquiry.jud.ct.gov/Calendars/SCByLocDetail.aspx?ccid=94517 (last visited November 1, 2018).

[13] Practice Book § 10-30 provides in relevant part: "(a) A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process. . . ."

[14] The issue presented in the present case has been raised in our Supreme Court on multiple occasions, but the court has each time declined to address it. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 133–34, 141 n.13, 135, 7 A.3d 911 (2010) (affirming habeas court's dismissal of petition pursuant to § 23-29 where petitioner failed to state valid claim for relief and declining to address petitioner's claim on appeal that he should have been afforded notice and opportunity to be heard before habeas court dismissed his petition because, "even if [it] were to agree with [that claim], that conclusion still would not lead to the relief that the petitioner requested"); *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 568, 877 A.2d 761 (2005) (declining to address petitioner's claim that Appellate Court improperly affirmed habeas court's dismissal of his habeas petition sua

Correction, 93 Conn. App. 719, 725–26, 891 A.2d 25, cert. denied, 278 Conn. 902, 896 A.2d 104 (2006), a panel of this court held that the habeas court had improperly dismissed a petition pursuant to § 23-29 without providing notice and a hearing to the petitioner. In *Boyd* v. *Commissioner of Correction*, 157 Conn. App. 122, 125–27, 115 A.3d 1123 (2015), this court explicitly relied on *Mitchell* in holding that it was improper for the habeas court to have dismissed a petition pursuant to § 23-29 without affording the petitioner notice and an opportunity for a hearing. The language of *Boyd* is instructive. There, this court stated: "Our Supreme Court has noted that '[b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims.' *Mercer* v. *Commissioner of Correction*, [supra, 230 Conn. 93]. This court previously has held that it is an abuse of discretion by the habeas court to dismiss a habeas petition sua sponte under Practice Book § 23-29 without fair notice to the petitioner and a hearing *on the court's own motion to dismiss. Mitchell* v. *Commissioner of Correction*, [supra, 93 Conn. 725–26]." (Emphasis added.) *Boyd* v. *Commissioner of Correction*, supra, 125. The court further noted: "It is of particular importance that the petitioner had requested the appointment of counsel when filing his second habeas

sponte without notice or a hearing, as claim was outside scope of question certified for review by Supreme Court). This may soon change, however. Our Supreme Court recently granted a habeas petitioner's petition for certification to appeal from this court's decision in *Gilchrist* v. *Commissioner of Correction*, supra, 180 Conn. App. 56, in which this court affirmed the habeas court's sua sponte dismissal of the habeas petition under § 23-29 without affording the petitioner notice and an opportunity to be heard on the motion. The court certified the following question: "Did the Appellate Court properly affirm the habeas court's dismissal of the petition when the habeas court took no action on the petitioner's request for counsel and did not give the petitioner notice and an opportunity to be heard on the court's own motion to dismiss the petition pursuant to Practice Book § 23-29?" *Gilchrist* v. *Commissioner of Correction*, supra, 329 Conn. 908.

petition. By sua sponte dismissing the petition before any counsel was appointed, the habeas court prevented the petitioner from accessing the legal services needed to help clarify the grounds presented and to ensure that they were not duplicative of the petitioner's prior habeas petition.

"The respondent concedes, and we agree, that the petitioner should have been afforded fair notice and a hearing before the court sua sponte dismissed the second habeas petition, and agrees with the petitioner that the proper course of action is to remand this case to the habeas court for a hearing. The respondent argues, however, that the hearing should be limited to whether the new claims of prosecutorial impropriety should be dismissed under Practice Book § 23-29. We agree with the respondent to the extent that the second habeas petition in its current form contains a duplicative claim of ineffective assistance of counsel predicated upon the same facts and evidence as alleged in the first amended petition for a writ of habeas corpus. We caution, however, that nothing in this opinion should be read as foreclosing the opportunity for the petitioner, or his counsel if one is appointed for him, to amend the current petition to articulate any new facts or evidence he wants to proffer or to state new grounds upon which he believes habeas relief should be granted, including the opportunity to clarify whether his claim of ineffective assistance of counsel is founded upon new facts or evidence not reasonable available at the time of his prior petition." Id., 126–27.

Notwithstanding the history of Practice Book §§ 23-24, 23-29, and 23-40, the general Practice Book rules regarding civil actions, and this court's strong admonition in *Boyd*, this court has now issued decisions, including the majority's opinion in the present case, that appear to violate the thrust of *Mercer* and contradict *Boyd*'s admonition that a habeas petitioner is entitled to notice and an opportunity to be heard before

his or her petition is dismissed pursuant to § 23-29. I recognize, of course, that the habeas corpus workload has become burdensome to the judiciary.[15] Respectfully, however, I do not believe that we should participate, for the sake of judicial efficiency, in the erosion of the rights of habeas petitioners established by time-tested jurisprudence and the rules adopted by the Superior Court. Rather, I believe that the proper exercise of the court's gatekeeping function pursuant to § 23-24 offers the greatest pathway to the swift disposal of frivolous, wasteful, and repetitious petitions without sacrificing the very purpose for which this enshrined writ exists.

For the reasons stated, I respectfully concur.

JAMES L. DAVIS III *v.* COMMISSIONER OF CORRECTION (AC 40090)

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

Syllabus

The petitioner, who previously had been convicted of manslaughter in the first degree, assault in the first degree and carrying a pistol without a permit, sought a writ of habeas corpus, claiming that his trial counsel

[15] Indeed, data from the Judicial Branch reveal that the tide of incoming habeas petitions appears to be outpacing the rate at which the habeas court is able to dispose of them. For example, during the fiscal year of 2016–2017, 762 habeas cases were added to the docket of the Superior Court for the judicial district of Tolland, whereas only 678 were disposed of. Civil Case Movement: July 1, 2016 to June 30, 2017, available at https://www.jud.ct.gov/statistics/civil/CaseDoc 1617.pdf (last visited November 1, 2018). This unbalanced flow of habeas cases is reflected in the steadily increasing number of cases pending at the end of each fiscal year. For example, at the end of the 2014–2015 fiscal year, there were 1451 habeas cases then pending, up from 1128 at the beginning of that year. Civil Case Movement: July 1, 2014 to June 30, 2015, available at https://www.jud.ct.gov/statistics/civil/CaseDoc 1415.pdf (last visited November 1, 2018). By the end of the following fiscal year, the number of pending cases had increased to 1562; Civil Case Movement: July 1, 2015 to June 30, 2016, available at https://www.jud.ct.gov/statistics/civil/CaseDoc 1516.pdf (last visited November 1, 2018); and, by the end of the 2016–2017 fiscal year, that figure had risen again, to 1637. Civil Case Movement: July 1, 2016 to June 30, 2017, supra.

provided ineffective assistance. 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, the petitioner having failed to show that the issues raised were debatable among jurists of reason, that a court could have resolved the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further.
2. The habeas court properly determined that the petitioner was not denied his right to effective assistance of counsel:

a. The petitioner's claim that his trial counsel was ineffective by failing to file a motion in limine to preclude certain firearm related evidence found in a room where the petitioner had stayed was unavailing; the petitioner's trial counsel testified that the admission into evidence of the firearm related evidence was part of his third-party culpability defense, and there was a strong presumption that the trial strategy employed by the petitioner's trial counsel was reasonable and a result of the exercise of professional judgment.

b. The petitioner's trial counsel was not ineffective by failing to consult with or to present the testimony of an eyewitness identification expert; trial counsel's performance was not deficient in light of the standards in effect at the time of the petitioner's criminal trial, trial counsel's theory of defense was not misidentification but, rather, was third-party culpability, counsel was not required to call an expert and was entitled to make strategic choices in preparation for trial, and the petitioner made no showing as to how consulting with a memory expert would have assisted trial counsel or that the result would have been different had counsel done so.

c. The petitioner did not demonstrate that his trial counsel rendered ineffective assistance by failing to object to the testimony of a laboratory supervisor on the ground that her testimony violated the petitioner's right to confrontation under the federal constitution, as articulated in *Crawford* v. *Washington* (541 U.S. 36); at the time of the trial that led to the petitioner's conviction, it was evident that the definition of "testimonial" under *Crawford* was evolving, and trial counsel did not render ineffective assistance by maneuvering within the existing law and declining to advance a novel theory.

d. The petitioner's claim that his trial counsel was ineffective by failing to prepare the petitioner for his presentence investigation interview was unavailing; trial counsel was present during the interview, and the petitioner made no showing that his honest comments made during the interview regarding selling drugs or possessing a gun made a difference in the sentence imposed.

Argued September 7—officially released December 4, 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; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Heather Clark, for the appellant (petitioner)

Michael L. Regan, state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, C. J. The petitioner, James L. Davis III, appeals from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) erred in concluding that his trial counsel had not rendered ineffective assistance by failing to (A) file a motion in limine to preclude certain evidence, (B) consult with and present the testimony of an eyewitness identification expert, (C) object to the testimony of a laboratory supervisor on the ground that the testimony violated his right to confrontation under the federal constitution and (D) prepare the petitioner for the presentence investigation interview. We dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. The petitioner was charged with murder by use of a firearm in violation of General Statutes § 53a-54a (a), attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (a), three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The matter

proceeded to trial twice; both ended in mistrials due to the inability of the jury to reach a unanimous verdict. Following the petitioner's third trial, the jury returned a verdict of not guilty on the count of murder, but guilty of the lesser included offense of manslaughter in the first degree in violation of General Statutes § 53a-55a, not guilty of attempt to commit murder, guilty of three counts of assault in the first degree, and guilty of carrying a pistol without a permit. The trial court, *Hadden*, *J.*, accepted the verdict and sentenced the petitioner to a total effective sentence of forty-eight years imprisonment.

On direct appeal, our Supreme Court affirmed the petitioner's conviction. See *State* v. *Davis*, 283 Conn. 280, 929 A.2d 278 (2007). The following facts, which the jury reasonably could have found, were set forth on direct appeal: "The events in question took place in the early morning hours of November 14, 1999, at the Sportsmen's Athletic Club (club) at 40 High Street in Norwich. Joseph Ellis arrived at the club with Susan Gomez at approximately midnight. Ellis had arranged to meet Jermaine Floyd, Timothy McCoy and Xavier Cluff there. The [petitioner], Susan Gomez' estranged husband, and Ricky Gomez, Ron Pires, Clayton Ballinger and Yolanda Pires were in the poolroom of the club when Ellis arrived. Ellis went to the bar area, accompanied by Floyd and McCoy, and saw Ricky Gomez and Ron Pires, both of whom he knew, looking at him through a service window between the bar and the poolroom. Ellis then left the bar area and went to the club's office to make arrangements for a birthday party. When he came out of the office, Ellis saw Ricky Gomez, Ron Pires and a third person whom he could not clearly see walk in and out of the bathroom several times. Ricky Gomez left the club, came back with something concealed under his jacket and again entered the bathroom. Gomez then left the bathroom, and, shortly

thereafter, another person came out and started shooting a gun. The shooter's face was covered with a cloth of some type.

"The shooter first shot Joseph Dubose. He then shot Ellis in the left leg and went to the front door of the club, where he fired two more shots. He returned to Ellis and shot him in the right leg, upper right arm and armpit, and left forearm. At that point, the cloth over the shooter's face slipped, and Ellis recognized him as the [petitioner].

"At approximately 1:16 a.m. on November 14, 1999, members of the Norwich Police Department responded to an alarm at the club. Upon entering the club, they observed Dubose and Ellis lying on the floor with apparent gunshot wounds. One of the officers also observed that Floyd, who was able to stand on his own, had been shot in the buttocks. Emergency medical personnel transported Dubose, Ellis and Floyd to William W. Backus Hospital in Norwich. Cluff, who had been shot in the arm during the incident, arrived at the hospital by other means of transportation. Dubose was declared dead at approximately 2:11 a.m.

"Later on the day of the shooting, members of the Norwich Police Department, assisted by members of the state police eastern district major crime squad, recovered ten spent .40 caliber shell casings and eleven bullet fragments from the scene of the shooting. The Norwich police recovered two additional bullet fragments on November 16, 1999. All of the shell casings had been fired from the same .40 caliber Glock semiautomatic handgun.

"Several months prior to the shooting, in September, 1999, Wilfred Pepin had reported the theft of several guns, including a .40 caliber Glock semiautomatic handgun, from his residence in Lisbon. After the shooting, the Norwich Police Department contacted Pepin and

inquired if Pepin had retained possession of any casings that had been discharged from the Glock handgun. Pepin was able to find three casings that he thought may have been discharged from the gun and provided them to the police. Two of those casings matched the casings that had been recovered at the club.

"On January 5, 2000, Adrianne Cook went to the Norwich police station and informed the police that the [petitioner] was staying at her apartment at 29 Carpenter Street in Norwich and that he had refused to leave. The police went to the apartment and arrested the [petitioner] for criminal trespassing. They also seized a black duffel bag from the room in which the [petitioner] had been staying. The duffel bag contained a number of guns and gun paraphernalia that had been stolen from Pepin. Several of the items, including a gun case, a magazine clip, two screws, an Allen wrench and spare magazine holders, were linked to Pepin's .40 caliber Glock handgun, but the gun itself never was recovered." (Footnote omitted.) Id., 284–86.

In January, 2016, the petitioner filed his second amended petition for a writ of habeas corpus in which he alleged ineffective assistance of trial counsel, Michael Fitzpatrick, on several grounds. The habeas court, *Fuger*, *J.*, denied the petition. The court determined that Fitzpatrick had testified credibly and concluded that the petitioner had proven neither deficient performance nor prejudice. The petitioner filed a petition for certification to appeal, which the court denied. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner claims that the court abused its discretion in denying his petition for certification to appeal because it improperly denied his claims of ineffective assistance of counsel. We do not agree.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] 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. . . .

"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. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

II

We now examine the petitioner's underlying claims of ineffective assistance of counsel to determine

whether the court abused its discretion in denying the petition for certification to appeal.

"It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . The second prong is . . . satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 823. "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.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 449, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

A

The petitioner claims that the court improperly failed to conclude that Fitzpatrick rendered ineffective assistance by failing to file a motion in limine to preclude certain firearm and firearm-related evidence found in a room where the petitioner had stayed, on the grounds that it was not relevant, was more prejudicial than probative and constituted uncharged misconduct. We are not persuaded.

The following additional facts are relevant. Pepin, a gun collector, testified at the criminal trial that, on September 27, 1999, twelve firearms were stolen from his residence, including a .40 caliber Glock semiautomatic, as well as items related to the Glock. A black duffel bag found by the police in the room where the defendant had been staying in Cook's apartment contained a number of firearms and firearm-related items that had been stolen from Pepin: two Smith & Wesson .45 caliber revolvers, as well as items that were related to the Glock: an Allen wrench and two screws; a Glock magazine plate, a spare magazine holder, and a gun case for the Glock. Pepin testified that some items that were recovered in the duffel bag did not belong to him: a .30 caliber magazine, two .30 caliber round magazines taped together end-to-end, a .22 caliber round magazine with eight rounds of ammunition, and a pouch with two .30 caliber round magazines. The duffel bag also contained clothing, and a receipt to Richard Gomez from Bebe and O'Neill, a law firm in Norwich. Pepin's Glock was not recovered.

Edward Jachimowicz, the state's firearm and tool mark identification expert, testified at the criminal trial that all ten spent shell casings found at the scene had been fired from the same .40 caliber Glock semiautomatic pistol. At the request of the Norwich police department, Pepin found three spent shell casings that

he thought may have been discharged from the Glock, and testing revealed that the striations on two of the spent shell casings matched the striations on the casings recovered at the club. Jachimowicz testified that the .45 caliber Smith & Wesson revolvers found in the duffel bag were incapable of firing .40 caliber ammunition.

The petitioner argues that Fitzpatrick should have sought to exclude the two Smith & Wesson revolvers on the ground of relevancy. The petitioner contends that the Smith & Wesson revolvers were not the same caliber as the Glock used to commit the offenses and thus could not have fired the .40 caliber ammunition that struck the victims. He also argues that the state did not offer any evidence that the petitioner had stolen the Smith & Wesson revolvers from Pepin's residence, and that there was no indication as to who possessed the revolvers in the one and one-half months between the date of the offenses and the time when the revolvers were seized on January 5, 2000. The petitioner further argues that, assuming that the Smith & Wesson revolvers were relevant, those revolvers and the firearm-related evidence discovered by police in the duffel bag was more prejudicial than probative. He also contends that the firearms and the firearm-related evidence was inadmissible uncharged misconduct evidence.

We note that "[t]he decision of a trial lawyer not to make an objection is a matter of trial tactics, not evidence of incompetency. . . . [T]here is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment . . . ." (Citation omitted; internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 801, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004). Fitzpatrick testified at the habeas trial that the admission into evidence

of the firearms and firearm-related items in the duffel bag was part of his third-party culpability defense. Fitzpatrick explained at the habeas trial that if Ricky Gomez had possession of the duffel bag and, therefore, had possession of Pepin's Smith & Wesson firearms, "then arguably he was in possession of the Glock." The habeas court determined that Fitzpatrick testified "admirably" and that it took "no issue with the actions to which . . . Fitzpatrick testified."

Fitzpatrick did not render deficient performance when he failed to file a motion in limine to preclude evidence that he thought would assist his theory of defense.[1] The inference that whoever possessed the duffel bag containing Smith & Wesson revolvers along with other items stolen from Pepin also had possessed Pepin's Glock, supported the petitioner's third-party culpability defense that the crimes had been perpetrated by Ricky Gomez, whose receipt from Bebe and O'Neill was in the duffel bag, or by Ballinger. If the jury believed the state's theory, the firearm related evidence would tend to inculpate the petitioner; however, if the jury had believed Fitzpatrick's defense, the evidence would have tended to point a finger at one of the third

[1] We also note that had Fitzpatrick filed a motion in limine, it is highly unlikely that the trial court would have granted the motion as to the Smith & Wesson firearms and the items relating to Pepin's Glock. It is likely that the court would have determined that the Smith & Wesson firearms and the items relating to the Glock that had been stolen from Pepin (1) were highly probative of the identity of the individual who had had possessed Pepin's Glock and, by reasonable inference, had committed the crimes charged and (2) were not evidence of prior misconduct because they directly tend to prove guilt. "[T]he failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation." *Sekou* v. *Warden*, 216 Conn. 678, 690, 583 A.2d 1277 (1990). Although it may be less clear how the court might have ruled regarding the items in the duffel bag that did not belong to Pepin, even if those items were inadmissible, there is no proposition that counsel must always seek to exclude objectionable evidence; rather our jurisprudence "mandates deference to the tactics of trial counsel." See *Toccaline* v. *Commissioner of Correction*, supra, 80 Conn. App. 802.

parties as the perpetrator. "There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. . . . After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." (Citation omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 109–10, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Accordingly, we conclude that the habeas court properly determined that Fitzpatrick's representation was not deficient, under *Strickland*, with respect to his decision not to file a motion in limine with respect to the firearm and firearm related evidence in the duffel bag.

B

The petitioner next claims that the court improperly failed to conclude that Fitzpatrick rendered ineffective assistance (1) for failing to present the testimony of an eyewitness identification expert and (2) for failing to consult an eyewitness identification expert to prepare for witness examinations, closing argument and jury instructions. We disagree.

At the habeas trial, the petitioner presented as an expert witness, Deryn Strange, a cognitive psychologist who specializes in memory and memory distortion. Strange testified that there are three stages of memory: encoding, storage, and retrieval. Strange explained the factors that can impact memory negatively during each of the three stages of memory. At the habeas trial, the petitioner's habeas counsel explained that "Fitzpatrick could have consulted with an expert and could have

used that in requesting a jury instruction . . . and could have used that in closing in focusing the jury on the factors that would affect the witness's memory; particularly . . . Ellis, since his credibility was so focal to the case." The habeas court determined that Strange's testimony bore "little to no relevance to the question of effective representation of the criminal trial defense counsel."

The petitioner cannot prevail on his claim that Fitzpatrick performed deficiently by not presenting the testimony of an eyewitness identification expert. The recent case of *Bennett* v. *Commissioner of Correction*, 182 Conn. App. 541, 190 A.3d 877, cert. denied, 330 Conn. 910, 193 A.3d 50 (2018), is directly on point. In that case, as in the present case, the controlling law at the time of the underlying criminal trial, "on the issue was *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 (1986), overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), in which our Supreme Court observed 'that the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question. . . . Such testimony is also disfavored because . . . it invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony.' " Id., 562. Although *Kemp* was overruled in 2012, we consider Fitzpatrick's performance in light of the standards in effect at the time of the petitioner's criminal trial in 2004, and conclude that the habeas court did not err in concluding that Fitzpatrick's performance was not deficient. See id., 561. "Counsel . . . performs effectively when he elects to maneuver within the existing law . . . ." (Internal quotation marks omitted.) Id.

Moreover, Fitzpatrick testified at the habeas trial that his theory of defense was not misidentification, but rather was third-party culpability, and that Ellis had a

motive to lie and implicate the petitioner. He stated that he did not consult an eyewitness identification expert "because that was not the horse I chose to ride in this case." "[T]here is no requirement that counsel call an expert when he has developed a different trial strategy." *Stephen J.R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 13, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018). "[T]here is no per se rule that requires a trial attorney to seek out an expert witness. . . . Furthermore, trial counsel is entitled to make strategic choices in preparation for trial." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 542, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

The petitioner also claims that the court erred in declining to conclude that Fitzpatrick performed deficiently by failing to consult an eyewitness identification expert in preparation for trial. We disagree. Fitzpatrick's decision not to pursue a misidentification defense and, therefore, not to consult an eyewitness identification expert does not amount to deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012). "[T]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 77–78, 174 A.3d 206 (2017). The petitioner has not shown how consultation with a memory expert would have assisted Fitzpatrick when he chose to pursue a third-party culpability defense rather than a misidentification defense.

Furthermore, the petitioner has not demonstrated that there is a reasonable probability that had Fitzpatrick consulted with an expert and introduced expert testimony, the result would have been different. The petitioner's argument focuses on two of the state's witnesses, Ellis and Bickham. In his brief, the petitioner describes Strange's testimony as it relates to the changes in Ellis and Bickham's testimony over the course of the three trials. The petitioner has not shown how consultation with an eyewitness identification expert would have impacted Fitzpatrick's performance at trial, or altered his cross-examination of Ellis and Bickham. At the third criminal trial, Fitzpatrick thoroughly cross-examined Ellis on his intoxication, motive to lie and inconsistencies in his testimony in the three trials. Fitzpatrick also extensively cross-examined Bickham on the inconsistencies in his testimony at the three trials with respect to his description of the perpetrator. In light of this, we agree with the habeas court that Strange's testimony establishes neither deficient performance nor prejudice. "It is well established that a petitioner in a habeas proceeding cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Lopez* v. *Commissioner of Correction*, 142 Conn. App. 53, 59, 64 A.3d 334 (2013). Accordingly, the petitioner's claim cannot prevail under *Strickland*.

C

The petitioner next claims that Fitzpatrick provided ineffective assistance by failing to object to the testimony of a laboratory supervisor, Debra Messina, on the ground that her testimony violated his right to confrontation under the federal constitution, as articulated in *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), in the absence of testimony

from the criminalist, Fung Kwok, who had performed the physical testing on the items submitted to the laboratory. We are not persuaded.

Messina, the supervising criminalist at the state forensic lab, testified as to the processes used in examining Ballinger's hands and football jersey for gunshot residue. Kwok performed the tests on the submitted items. Messina's role, as Kwok's supervisor, was to ensure that he followed procedure. Messina reviewed Kwok's worksheets and results and signed the laboratory report that Kwok generated. Kwok testified at the first trial regarding his examination of the submitted items and was subject to cross-examination by Fitzpatrick. Kwok did not testify at the petitioner's second or third trial.

Crawford v. *Washington*, supra, 541 U.S. 36, was decided on March 8, 2004, and the petitioner's third trial was held in May and June of 2004. "In *Crawford* v. *Washington*, [supra, 541 U.S. 36], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity [to cross-examine the witness who is otherwise] unavailable to testify at trial. . . . In adopting this categorical approach, the court overturned existing precedent that had applied an open-ended balancing [test] . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore adequate indicia of reliability." (Citations omitted; internal quotation marks omitted.) *State* v. *Buckland*, 313 Conn. 205, 212, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015).

The United States Supreme Court, in *Crawford*, "declined to define the terms testimonial and nontestimonial . . . ." *State v. Kirby*, 280 Conn. 361, 380, 908

A.2d 506 (2006). Five years after the petitioner's third trial, the United States Supreme Court in *Melendez–Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), addressed the meaning of "testimonial" in the context of certificates of analysis setting forth the results of forensic testing. The court held that the certificates stating that the submitted substance was cocaine were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination" and that the "affidavits were testimonial statements, and the analysts were 'witnesses' for the purposes of the Sixth Amendment." (Internal quotation marks omitted.) Id., 310–11.

In 2018, this court determined in *State* v. *Walker*, 180 Conn. App. 291, 183 A.3d 1, cert. granted, 328 Conn. 934, 183 A.3d 634 (2018), that testimony of a forensic science examiner regarding her comparison of two DNA profiles, one of which was generated by another analyst, did not violate the defendant's right to confrontation because "the primary analyst who performed and supervised the generation and analysis of the DNA profiles and resulting findings, testified and was available for cross-examination." Id., 307. The *Walker* court reasoned, citing *Melendez–Diaz* v. *Massachusetts*, supra, 557 U.S. 305, that "it is not the case . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Although [i]t is the obligation of the prosecution to establish the chain of custody . . . this does not mean that everyone who laid hands on the evidence must be called. . . . [G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." (Citation omitted; internal quotation marks omitted.) Id., 303.

Our Supreme Court granted certification in *Walker* on this issue.[2]

Approximately two months prior to the petitioner's third trial, the Supreme Court released *Crawford*. At that time, Fitzpatrick did not have the guidance from *Melendez-Diaz* and its progeny on the definition of "testimonial" or from *State* v. *Walker*. It is evident that the issue was evolving at the time of the petitioner's third trial, and Fitzpatrick did not render ineffective assistance for declining to advance a novel theory. "[W]hile the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will . . . [and] [c]ounsel cannot be faulted for failing to advance a novel legal theory which has never been accepted by the pertinent courts . . . . Counsel instead performs effectively when he elects to maneuver within the existing law, declining to present untested . . . legal theories. . . . [R]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop . . . ." (Citations omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 461–62, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). The petitioner has failed to satisfy *Strickland's* performance prong, and therefore he cannot prevail on this claim.

D

The petitioner last claims that Fitzpatrick rendered ineffective assistance when he failed to prepare the

[2] The certified question is: "Did the Appellate Court properly determine that the defendant's sixth amendment right to confrontation was not violated by testimony from a lab analyst regarding a known DNA profile generated from a swab processed by another analyst who did not testify at trial?" *State* v. *Walker*, 328 Conn. 934, 183 A.3d 634 (2018).

petitioner for the presentence investigation interview. We disagree.

Fitzpatrick testified at the habeas trial that he was present with the petitioner during the presentence interview. He did not recall whether he had met with the petitioner in preparation for the presentence interview. The petitioner testified that he met with Fitzpatrick prior to the presentence interview and that Fitzpatrick told him to be honest in the interview. During the presentence interview, the petitioner admitted that he began selling drugs in 1998, and that he had been suspended from high school for possessing a gun. The presentence investigation report indicates that Fitzpatrick advised the petitioner not to discuss pending charges in that it notes that the petitioner declined to comment on his version of the events "based on an appeal that will take place in the future." At sentencing, the court stated that "it would appear, having reviewed the evidence in this case and reviewing the presentence investigation report, that this is an incident that arises from a subculture of violence, a subculture of drug dealing, a subculture of protection of turf, none of which may be tolerated by society, none of which can be tolerated by this court." The petitioner's total exposure was over 100 years and the petitioner received a sentence of forty-eight years imprisonment.

The petitioner has not satisfied the prejudice prong of *Strickland*. Although the court referenced the presentence investigation report at sentencing, the court gave no indication that the petitioner's comments during the presentence investigation interview regarding selling drugs or possessing a gun had an impact on the sentence imposed. The petitioner's suggestion that the sentencing court relied on those statements in sentencing him is speculative. Because the petitioner has not demonstrated that his honest comments made during

his sentencing interview made a difference in the sentence imposed, we conclude that the court properly rejected the petitioner's claims of ineffective assistance of counsel. See *Ruffin* v. *Commissioner of Correction*, 106 Conn. App. 396, 400, 943 A.2d 1105, cert. denied, 286 Conn. 922, 949 A.2d 481 (2008).

Accordingly, we conclude that the petitioner has not shown that the issues raised in his petition for a writ of habeas corpus as resolved by the court are debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised deserve encouragement to proceed further. Therefore, the petitioner has failed to demonstrate that the court's denial of his petition for certification to appeal reflects an abuse of discretion.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FREDERICK M. DAVIS (AC 40694)

Sheldon, Elgo and Beach, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court revoking his probation and sentencing him to a term of nine years incarceration in connection with his failure to complete required substance abuse and mental health treatment, and after he tested positive for cocaine and marijuana, and was arrested on multiple drug related charges. A hearing was held before the Superior Court in Norwalk during which a public defender indicated to the court that she represented the defendant and that the defendant's case was going to be transferred to the Superior Court in Bridgeport. The prosecutor did not voice any disagreement with the public defender's representation, and the trial court ordered the transfer of the case to the Bridgeport Superior Court. Subsequently, the defendant filed a motion to dismiss the violation of probation action for lack of jurisdiction, claiming that the trial court improperly transferred the matter in contravention of the rule of practice (§ 41-23 [2]) that permits the judicial authority to order that any pending

criminal matter be transferred to any other court location if the defendant and the prosecuting authority consent. After the trial court denied the motion to dismiss, a hearing on the violation of probation charge was held. At the conclusion of the adjudicatory phase of the proceeding, the court found, by a fair preponderance of the evidence, that the defendant had violated the terms of his probation. The defendant thereafter requested a continuance of the dispositional phase of the probation revocation proceeding until all pending criminal matters against him were resolved to protect his right of allocution, and the trial court continued the matter for two weeks, but denied his subsequent request for another continuance. At the conclusion of the dispositional phase of the proceeding, the trial court found that the beneficial aspects of rehabilitation no longer were being served by probation and, accordingly, revoked the defendant's probation. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss for lack of jurisdiction due to the allegedly improper transfer of the case to the Bridgeport Superior Court: the defendant's claim that the Bridgeport Superior Court lacked jurisdiction over his probation revocation proceeding was essentially an objection to venue rather than to jurisdiction, and because a claim of improper venue is procedural in nature, the defendant's claim was untenable; moreover, the trial court did not abuse its discretion in granting the public defender's transfer request, as the transcript of the subject hearing made clear that the state and the defendant had agreed to the transfer, which belied the defendant's claim that the transfer contravened § 41-23.
2. The defendant's unpreserved claim that the trial court violated his constitutional right to be present at a critical stage of the probation revocation proceeding failed under the forth prong of *State* v. *Golding* (213 Conn. 233), the state having demonstrated the harmlessness of any error beyond a reasonable doubt: the defendant's claim that his ability to defend against the violation of probation charge was adversely affected by his absence from the hearing on the change of venue was unavailing, because although the defendant asserted that he could have made a meaningful contribution to the proceedings by stating his objection as to whether to transfer the case to the Bridgeport Superior Court, he did not identify any objection that he would have raised and no such objection was articulated in either the pleadings or the transcripts before this court, and, therefore, the possible basis of his purported objection was speculative; moreover, the defendant did not claim that he was denied a fair and impartial hearing before the Bridgeport Superior Court, and the record indicated that he resided in Bridgeport, that the criminal offenses detailed in the violation of probation arrest warrant application all transpired in Bridgeport, that three members of the Bridgeport Police Department provided detailed testimony at the probation revocation proceeding about the events that gave rise to the defendant's arrest for multiple drug related felonies and that the defendant's probation officer

testified as to the defendant's failure to complete substance abuse and mental health treatment and his failed urinalysis test, and there was nothing to suggest that if the probation revocation proceeding had been conducted in the Norwalk Superior Court, the state would have been incapable of offering the same witnesses and evidence and, consequently, of meeting its burden of proof.

3. The defendant could not prevail on his claim that the trial court improperly denied his request for a continuance of the dispositional phase of the probation revocation proceeding until all pending criminal matters were resolved to protect his right of allocution; in light of the state's stipulation at the probation revocation proceeding that any statements made by the defendant during allocution would not be used against him in his pending criminal proceedings and the trial court's representation to that effect, and that the defendant could enforce the agreement, the defendant's claim was controlled by *State* v. *Blake* (289 Conn. 586), in which our Supreme Court concluded that in light of a similar stipulation made by the state and the trial court's representation, there was nothing to suggest that the defendant was not provided a full and fair opportunity to exercise his right to allocution.

Argued October 17—officially released December 4, 2018

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and transferred to the judicial district of Fairfield, geographical area number two, where the matter was tried to the court, *Holden, J.*; thereafter the court denied the defendant's motion to dismiss; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Robert J. McKay, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Richard Palombo*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Frederick M. Davis, appeals from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction for nine years. On appeal, the defendant claims that the court (1) improperly denied his motion to dismiss predicated on an alleged lack of jurisdiction, (2) violated his constitutional right to be present at a critical stage of the probation revocation proceeding, and (3) improperly denied his request for a continuance. We affirm the judgment of the trial court.

On May 26, 2016, the defendant pleaded guilty to possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a). The court sentenced the defendant to a term of twelve years incarceration, execution suspended, with five years of probation. The conditions of his probation required, inter alia, that the defendant "not violate any criminal law of the United States, this state or any other state or territory," that he submit to random urinalysis, and that he obtain substance abuse and mental health treatment.

Following the commencement of his probationary period, the defendant was referred to Connecticut Renaissance by his probation officer, Matthew A. Maiorano, for a substance abuse and mental health evaluation. When the defendant repeatedly failed to report for scheduled appointments, he was discharged from that treatment center. Maiorano also performed a urinalysis on the defendant in August, 2016, which tested positive for cocaine and marijuana. In addition, the defendant was arrested on August 15, 2016, and charged with multiple drug related felonies, including possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes

§ 21a-278 (b) and sale of narcotics in violation of § 21a-277 (a).[1]

In response, Maiorano filed an arrest warrant application for the defendant's violation of the terms of his probation. In an accompanying affidavit, Maiorano alleged that the defendant's "continued negative behaviors, polysubstance abuse and continued narcotics trafficking indicate that the beneficial purposes for which [he] was initially placed on [p]robation . . . are no longer being served." The state then filed an information alleging that the defendant had breached the terms of his probation in violation of General Statutes § 53a-32.

On January 17, 2017, a hearing was held before the Norwalk Superior Court. When the matter was called, Attorney M. Elizabeth Reid from the Office of the Public Defender first indicated that she represented the defendant. After a brief colloquy with the court, she then stated: "Judge, as much as I'd love to represent [the defendant] here, this matter is actually going to be transferred to [geographical area number two] in Bridgeport for February [14, 2017]." The court at that time transferred the matter to the Bridgeport Superior Court.

On April 19, 2017, the defendant filed a motion to dismiss the violation of probation action for lack of jurisdiction "over the defendant or the subject matter." In that motion, the defendant claimed that the court improperly transferred the matter from the Norwalk Superior Court to the Bridgeport Superior Court, in

[1] At the probation revocation proceeding, the state presented the testimony of Officers Carlos Vazquez, Cody Remy, and Douglas Bepko of the Bridgeport Police Department, who observed the conduct of the defendant on August 15, 2016, that gave rise to those charges. On that date, the officers were surveilling a Sunoco gas station as part of a violent crime initiative in Bridgeport when the defendant engaged in what appeared to be a narcotics transaction. During a search of the motor vehicle operated by the defendant, the officers discovered a purse containing "three bundles of white glassine envelopes" filled with heroin.

contravention of Practice Book § 41-23.[2] He filed a supplement to that motion a week later, in which he argued that a probation revocation proceeding is a criminal matter. The court heard argument from the parties on that motion, in which the defendant's new public defender in Bridgeport maintained that the Bridgeport Superior Court lacked jurisdiction over the probation revocation proceeding due to the allegedly improper transfer. The court thereafter denied the motion to dismiss.

The defendant rejected a plea offer from the state and a hearing on the violation of probation charge commenced on April 27, 2017. At that hearing, Maiorano testified as to the defendant's noncompliance with the terms of his probation. In addition, the state presented the testimony of three members of the Bridgeport Police Department who were involved in the August 15, 2016 arrest of the defendant; see footnote 1 of this opinion; which testimony the court expressly credited. When the adjudicatory phase of that proceeding concluded, the court found, by a fair preponderance of the evidence, that the defendant had violated the terms of his probation in multiple respects.[3]

Defense counsel then requested a continuance of the dispositional phase of the probation revocation proceeding until all pending criminal matters were resolved "due to [the defendant's] right of allocution" as codified in Practice Book § 43-10. After hearing initial arguments

[2] Practice Book § 41-23 provides: "Upon motion of the prosecuting authority or the defendant, or upon its own motion, the judicial authority may order that any pending criminal matter be transferred to any other court location:

"(1) If the judicial authority is satisfied that a fair and impartial trial cannot be had where the case is pending;

"(2) If the defendant and the prosecuting authority consent; or

"(3) Where the joint trial of informations is ordered pursuant to Section 41-19 and the cases are pending in different judicial districts or geographical areas."

[3] The defendant in this appeal does not contest that determination.

from the parties on that request, the court continued the matter approximately two weeks. When the parties again appeared before the court on May 12, 2017, the court heard further arguments on the defendant's continuance request, which it then denied. At the conclusion of the dispositional phase of the proceeding, the court found that the beneficial aspects of rehabilitation no longer were being served by probation. The court, therefore, revoked the defendant's probation and sentenced him to a term of nine years incarceration. This appeal followed.

I

The defendant claims that the court improperly denied his motion to dismiss this violation of probation action for lack of jurisdiction due to the allegedly improper transfer of the matter to the Bridgeport Superior Court. For two distinct reasons, we disagree.

First, the defendant has provided no authority to support his bald assertion that the allegedly improper transfer of his case presents a jurisdictional issue. To paraphrase the observation of our Supreme Court in *Savage* v. *Aronson*, 214 Conn. 256, 263, 571 A.2d 696 (1990), the defendant's claim that his case was not properly before the Bridgeport Superior Court "is essentially an objection to venue rather than to jurisdiction, because it does not implicate the authority of the Superior Court to entertain the case but involves only the question of whether one [geographical area] of that court rather than another properly should have heard" his probation revocation proceeding. "Venue simply concerns the location where the matter may be tried"; *In re Shonna K.*, 77 Conn. App. 246, 256, 822 A.2d 1009 (2003); and "is not a jurisdictional question but a procedural one." (Internal quotation marks omitted.) *Savage* v. *Aronson*, supra, 263; see also *State* v. *Kelley*, 206 Conn. 323, 332, 537 A.2d 483 (1988) (noting that

"venue, unlike subject matter jurisdiction, can be waived by the parties" because "venue is not a jurisdictional but a procedural question"). Because a claim of improper venue is procedural in nature, the defendant's claim that the Bridgeport Superior Court lacked jurisdiction over his probation revocation proceeding is untenable.

Second, the transcript of the January 17, 2017 hearing belies the defendant's claim that the transfer in question contravened Practice Book § 41-23. That one page transcript states:

"[The Prosecutor]: Frederick Davis.

"The Clerk: 105.

"[Defense Counsel]: Liz Reid for [the defendant], Judge. He's present. He was the sleepy person in the courtroom.

"The Court: I excused him to the hallway. I'm sorry I could not keep him awake.

"[Defense Counsel]: It's not—

"The Court: I know that I'm a very boring person.

"[Defense Counsel]: It wasn't for the riveting discussion that was going on here, Judge.

"The Court: Well, the snoring was a tad too much.[4]

"[Defense Counsel]: Judge, as much as I'd love to represent [the defendant] here, this matter is actually going to be transferred to [geographical area number two] in Bridgeport for February [14, 2017].

"The Court: Okay. G.A. two, Bridgeport, for February 14.

"[Defense Counsel]: Thank you." (Footnote added.)

[4] The April 27, 2017 transcript reflects that the defendant also fell asleep during his probation revocation hearing.

The decision to grant a change of venue request is entrusted to the discretion of the trial court. *State* v. *Reynolds*, 264 Conn. 1, 222, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Pursuant to Practice Book § 41-23 (2), the judicial authority "may order that any pending criminal matter be transferred to any other court location . . . [i]f the defendant and the prosecuting authority consent . . . ." At the outset of the January 17, 2017 hearing, the public defender indicated that she represented the defendant. She then apprised the court that "this matter is actually going to be transferred" to the Bridgeport Superior Court. The prosecutor, who was present at that time, voiced no disagreement with that representation, and the court thereafter ordered the transfer of the case in accordance therewith. In denying the defendant's motion to dismiss, the court concluded that the transcript was "clear" that the state and the defendant had agreed to that transfer. We agree. On our review of the record, we conclude that the court did not abuse its discretion in granting the transfer request submitted by defense counsel. For that reason, the trial court properly denied the defendant's subsequent motion to dismiss.

II

The defendant also claims that the court violated his constitutional right to be present at a critical stage of the probation revocation proceeding.[5] Because he did not preserve that claim at trial, the defendant must resort to the familiar rubric of *Golding* review, under which "[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

[5] The defendant in this appeal has not identified any provision of our state constitution nor asserted a claim thereunder. We therefore confine our review to his claim under the federal constitution. See, e.g., *State* v. *Skok*, 318 Conn. 699, 701–702 n.3, 122 A.3d 608 (2015).

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. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original.) *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). We conclude that the defendant's claim fails *Golding*'s fourth prong.

"[A] criminal defendant has a constitutional right to be present at all critical stages of his or her prosecution. . . . Although the constitutional right to be present is rooted to a large extent in the confrontation clause of the sixth amendment, courts have recognized that this right is protected by the due process clause in situations when the defendant is not actually confronting witnesses or evidence against him." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 467, 180 A.3d 882 (2018). Under established law, a critical stage is "a step of a criminal proceeding . . . that [holds] significant consequences for the accused." *Bell* v. *Cone*, 535 U.S. 685, 695–96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

On appeal, the state submits that the January 17, 2017 hearing on the change of venue was not a critical stage of the defendant's probation revocation proceeding. We need not resolve that question of constitutional dimension because we conclude that the state has demonstrated the harmlessness of any constitutional violation beyond a reasonable doubt.

"[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. . . . In evaluating whether a denial of presence [from a critical stage of the proceedings] is harmless, [w]e first determine whether the defendant's presence . . . would have contributed to his ability to defend against the charges. . . . We then consider the evidence presented at trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Ralph B.*, 162 Conn. App. 583, 604, 131 A.3d 1253 (2016).

On the undisputed facts of this case, we fail to perceive how the defendant's ability to defend against the violation of probation charge was adversely affected by his absence from the January 17, 2017 hearing on the change of venue. In his appellate brief, the defendant maintains that he "could have made a meaningful contribution to the proceedings by stating his objection . . . as to whether or not to transfer" the matter to the Bridgeport Superior Court. Yet the defendant in his appellate brief has not identified *any* objection that he would have raised to the transfer proposed on the record by his own legal counsel.[6] Furthermore, no such objection is articulated in either the pleadings or the transcripts before us. We thus are left to speculation and conjecture as to the possible basis of the defendant's purported objection, which "have no place in appellate review." (Internal quotation marks omitted.) *State* v. *Joseph*, 174 Conn. App. 260, 274, 165 A.3d 241, cert. denied, 327 Conn. 912, 170 A.3d 680 (2017).

In addition, the defendant does not claim that he was denied a fair and impartial hearing before the Bridgeport Superior Court. The record before us indicates

[6] The defendant's principal appellate brief contains two sentences of analysis on this claim; he did not file a reply brief.

that the defendant resided in Bridgeport at all relevant times.[7] The criminal offenses detailed in the violation of probation arrest warrant application all transpired in Bridgeport and three members of the Bridgeport Police Department testified as witnesses at the probation revocation proceeding. Those witnesses provided detailed testimony about the events of August 15, 2016, that gave rise to the defendant's arrest for multiple drug related felonies. In addition to offering testimony regarding that arrest, the defendant's probation officer also testified as to the defendant's failure to complete substance abuse and mental health treatment and his failed urinalysis test. In its appellate brief, the state argues that there is "nothing to suggest that had the violation of probation hearing been conducted in Norwalk, that the state would have been incapable of offering the same witnesses and evidence and, consequently, [of] meeting its burden of proof . . . ." We agree and, accordingly, conclude that the state has demonstrated the harmlessness of any error beyond a reasonable doubt.

III

As a final matter, we briefly address the defendant's contention that the court improperly denied his request for a continuance of the dispositional phase of the probation revocation proceeding until all pending criminal matters were resolved to protect his right of allocution. His claim is identical to that raised in *State* v. *Blake*, 289 Conn. 586, 958 A.2d 1236 (2008). In *Blake*, the defendant argued that the trial court violated his right to allocution "when it denied his request for a continuance of the

[7] A Bridgeport address for the defendant is listed on both the arrest warrant application and the information. At the violation of probation hearing, Maiorano testified that the defendant "was initially placed on probation . . . out of [the] Norwalk [Superior] Court. [His probation] was then transferred to [the] Bridgeport [Superior Court] because [the defendant] resided in Bridgeport and that's how supervision would work."

dispositional phase of the violation of probation hearing to wait for a final resolution of the underlying criminal charges." Id., 588–89. The trial court in that case responded to the defendant's continuance request by offering to enter an order that any statements made by the defendant during allocution could not be used against him in a subsequent criminal trial, and the state then stipulated to that order. Id., 596. On appeal, our Supreme Court concluded that, in light of "the state's stipulation and the court's representation, there is nothing to suggest that the defendant was not provided a full and fair opportunity to exercise [his] right [of allocution]." Id., 597–98. The court further emphasized that, under the terms of that stipulation, "the defendant would have had the right to hold the state to its promise not to *use* his statements against him at trial."[8] (Emphasis added.) Id., 597.

In the present case, *Blake* was discussed at length during argument on the defendant's continuance request. After specifically referencing *Blake*, the prosecutor agreed "that anything [the defendant] says [during allocution] which does inadvertently inculpate himself would not—the state would not use that against him" in his pending criminal proceedings. In light of that stipulation by the state, the court at the May 12, 2017 hearing noted "the offer by the state to agree that whatever [the defendant] says, should it touch on any matter pending, [it] would not be used against him should he

[8] In analyzing the defendant's claim, the court in *Blake* recognized that "certain fundamental precepts were in play," including the applicability of "a defendant's right to allocution . . . to the dispositional phase of a violation of probation proceeding." *State* v. *Blake*, supra, 289 Conn. 595. The court further emphasized that because "the right to allocution can be used effectively to influence a judge's discretion . . . the opportunity to allocate must be meaningful." Id., 597. Given those fundamental precepts, we presume that the court was referencing both direct and derivative use of such allocution testimony when it concluded that the trial court resolved the allocation issue "in a manner consistent with [the defendant's] wishes." Id.

go to trial" on the pending criminal matters. The court then indicated that the defendant "has a right of allocution if he so desires. If he says anything that may impact upon [his criminal] trial, the state has agreed not to use it, and you can enforce that agreement." At oral argument before this court, defense counsel was asked, given the state's stipulation and the representation by the trial court, whether he could distinguish *Blake* from the present case; counsel conceded that he could not. We agree that *Blake* controls the present case. The defendant's claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CARGIL NICHOLSON *v.* COMMISSIONER OF CORRECTION
(AC 40101)

Sheldon, Moll and Mihalakos, Js.

Syllabus

The petitioner, who previously had been convicted of manslaughter in the first degree in connection with his conduct in stabbing the victim during an altercation, sought a writ of habeas corpus. He claimed that his trial counsel rendered ineffective assistance by failing to present the testimony of an expert witness, M, a forensic toxicologist, to support his justification defense by offering testimony as to the presence and effects of certain drugs found in the victim's system, which he claimed was necessary to lay a foundation for the admission of the victim's toxicology report into evidence. M testified at the habeas trial as to his qualifications as an expert in the field of toxicology, as well as the general effects of the drugs found in the victim's system, but the court declined to treat M as an expert witness on the ground that the petitioner did not make an express offer to the court to accept M as an expert witness. The court rendered judgment denying the habeas petition in an oral decision in which it stated that it had not reviewed certain transcripts of the criminal trial that had been admitted at the habeas trial. Subsequently, the habeas court 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, the petitioner having failed to show that his claims were debatable among jurists of reason, that a court could have resolved the issues in a different manner, or that the questions were adequate to deserve encouragement to proceed further.
2. The petitioner could not prevail on his claim that his trial counsel rendered ineffective assistance by failing to call an expert witness to testify about the presence and effects of the drugs in the victim's system; trial counsel having testified at the habeas trial that he had consulted with various experts regarding the toxicology report but that none of them offered an opinion favorable to the petitioner's justification defense, trial counsel's decision not to retain an expert constituted a reasonable tactical decision, and the habeas court's finding that trial counsel had contacted various experts, none of whom provided him with an opinion favorable to the petitioner's justification defense, was not clearly erroneous, as the evidence adduced at the habeas trial did not establish that trial counsel was aware of or had ever consulted with M, whom the petitioner claimed would have provided an opinion at the criminal trial favorable to his justification defense.
3. The petitioner's claim that the habeas court abused its discretion in declining to treat M as an expert witness at the habeas trial was unavailing; although that court erred in declining to treat M as an expert witness, as the petitioner disclosed M as an expert prior to trial and elicited sufficient testimony from M establishing his qualifications to testify as an expert witness, without objection, and the applicable provision (§ 7-2) of the Connecticut Code of Evidence did not require an explicit offer and acceptance of M as an expert in order for M to be treated as an expert witness, the petitioner nevertheless failed to demonstrate that the court's error was harmful because even if the court had treated M's testimony regarding the presence and effect of the drugs in the victim's system as expert testimony, that testimony was immaterial to its determination that trial counsel's performance was not deficient.
4. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that the court improperly failed to review certain evidence admitted at the habeas trial prior to denying the habeas petition; that court was not required to review the entire criminal transcript before rendering its oral decision denying the habeas petition, as the petitioner's claim focused solely on trial counsel's failure to call an expert witness to testify as to the presence and effects of the drugs in the victim's system, the excerpts from the criminal trial transcripts identified by the petitioner had no bearing on the court's analysis of whether counsel's performance was deficient, and the petitioner failed to identify any excerpts from the criminal trial transcripts that would have altered the court's determination that counsel's performance was not deficient.

Argued September 11—officially released December 4, 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 denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed*.

Desmond M. Ryan, assigned counsel, for the appellant (petitioner).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Cargil Nicholson, appeals from the denial of his amended petition for a writ of habeas corpus following the denial of his petition for certification to appeal. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal, (2) erroneously concluded that he failed to establish that his state and federal constitutional rights to the effective assistance of counsel were violated,[1] (3) abused its discretion in declining to treat a witness at the habeas trial as an expert witness, and (4) abused its discretion in failing to review certain evidence admitted at the habeas trial prior to denying his amended petition for a writ of habeas corpus. We conclude that the habeas court did not abuse its discretion in denying the petition for

[1] We deem the petitioner's state constitutional claims abandoned because he has failed to provide an independent analysis under our state constitution. See *Gomez* v. *Commissioner of Correction*, 178 Conn. App. 519, 522 n.1, 176 A.3d 559 (2017), cert. granted on other grounds, 328 Conn. 916, 180 A.3d 962 (2018).

certification to appeal and, accordingly, dismiss the appeal.

The following facts, as set forth by this court in the petitioner's direct appeal from his conviction, and procedural history are relevant to our disposition of the petitioner's claims.[2] "On March 13, 2012, at approximately 6 p.m., the victim, James Cleary, was dropped off in front of his apartment building by Michael Vena and Vincent [Faulkner], with whom he had worked cutting down a tree that day. The victim carried his two chain saws with him into the apartment. Vena then drove around to the back of the apartment building, where he and Faulkner put the victim's climbing gear and ropes into the victim's van. The victim greeted his wife and put down his chain saws. The music from the apartment upstairs was quite loud, and the victim's wife complained to him.[3] The victim proceeded to go upstairs, and his wife followed behind him.

"The victim's wife remained down the hallway while the victim knocked on the [petitioner's] door, and the door opened. The victim started yelling at the [petitioner] to turn down the music. The victim was approximately fifty years old, weighed approximately 156 pounds, and was five feet, nine inches tall. The [petitioner], who was approximately five feet, seven inches to five feet, eight inches tall, and weighed approximately 175 pounds, then punched the victim in the face. The

[2] With one limited exception, the habeas court did not make any factual findings in its oral decision denying the petitioner's amended petition for a writ of habeas corpus with respect to the events that gave rise to the petitioner's arrest and conviction. Accordingly, we include the factual recitation set forth in the decision resolving the petitioner's direct appeal from his conviction.

[3] "The victim and his wife previously had complained to the [petitioner] and his girlfriend about their loud music. The [petitioner], at one point, called the victim's wife 'a devil.' The victim and his wife also telephoned the police on several occasions to complain about the noise, and the police went to the [petitioner's] apartment on several occasions."

victim hit him back. The [petitioner] then pulled the victim into the apartment and a scuffle ensued, which was heard by the victim's wife, who had remained down the hallway. The [petitioner] called the victim 'the f-ing white devil.' The [petitioner] then repeatedly hit the victim with an umbrella.

"The [petitioner's] live-in girlfriend, Tracy Wright, had been in the bathroom washing her hair when the scuffle first ensued. Upon exiting the bathroom, Wright saw the [petitioner] and the victim fighting. Wright tried to get between the victim and the [petitioner] to stop the fight, but the victim pushed her back. The [petitioner] then grabbed a stool with both hands and hit the victim in the back with it at least once, but may have hit him as many as four times. The force of the blow to the back was 'pretty hard,' hard enough that the victim would 'feel the pain.' Wright told the [petitioner] to put down the stool, thinking that the [petitioner] could hurt or kill the victim with the stool, and the [petitioner] complied.

"Wright then grabbed the victim by the arm, and, while standing beside him, opened the door, and the victim went out into the hallway, proceeding sideways through the doorway. Although Wright did not notice any blood or witness the victim being stabbed, the [petitioner], after putting down the stool, had picked up a knife from the counter and had stabbed the victim in the back, either before or shortly after Wright had grabbed the victim by the arm. The stab wound in the victim's back was seven and one-quarter inches deep. After getting the victim out of the apartment, Wright called 911, telling the dispatcher that she had pushed the victim out the door. The [petitioner] washed off the knife before the police arrived.

"The altercation inside the apartment took only seconds, and when the victim staggered out of the [petitioner's] apartment, he told his wife that the [petitioner]

had stabbed him in the back. The victim's shirt was pulled up, his woolen cap had been pulled off, and he was bleeding from his back. Panic stricken, the victim's wife ran downstairs, where she grabbed her purse so that she could take the victim to the hospital. She then went into the hallway looking for the victim. When she could not find him in the hallway, she went outside to the front of the house, where she saw the victim fall to his knees. The victim then told his wife that he thought he was dying. The victim's wife realized that she did not have her car keys, so she returned to the apartment to get them.

"Meanwhile, Vena, who had dropped the victim off at the front of the house only five to ten minutes earlier, had finished putting away the victim's gear and was leaving the property when he saw the victim lying on the steps. Vena saw blood and immediately told Faulkner to get out of the truck and to help the victim, which he did. The victim then 'stumbled' into the backseat of the truck, and Faulkner jumped into the front passenger's seat. The victim told Vena, 'He stabbed me.' Vena then called 911 and drove to the Main Street intersection, where he waited for the ambulance to arrive. The victim died as a result of the stab wound." (Footnote in original.) *State* v. *Nicholson*, 155 Conn. App. 499, 500–503, 109 A.3d 1010, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015).

The petitioner was arrested and charged with murder in violation of General Statutes § 53a-54a (a). The case was tried to a jury over the course of several days. During the first day of evidence, the state called the victim's wife to testify.

During cross-examination, the victim's wife testified that the victim had been taking unspecified medications. The petitioner's criminal defense counsel, Jonathan Demirjian, asked her to identify those medications.

The state objected to that inquiry, contending that the court needed to address a pending motion in limine filed by the state, which sought to preclude evidence of the victim's toxicology results. Outside of the jury's presence, Demirjian questioned the victim's wife about the victim's medications. She testified that the victim had been taking Soma for back pain, methadone, and an unidentified antianxiety medication. Demirjian informed the trial court that he intended to elicit testimony from the victim's wife about the victim's medications in front of the jury, asserting that the testimony was relevant to the victim's state of mind and conduct during the altercation with the petitioner. The state objected, arguing that the testimony regarding the medications constituted inadmissible character evidence. Following argument, the court stated: "I think the connection you're trying to draw is that these substances made [the victim] act in a bizarre manner. And I'm not so sure that connection can be drawn on this state of the evidence. Anyways I'll ponder the issue and rule tomorrow." The following day, the court stated: "We left off last – yesterday afternoon talking about the fact that the victim was on a Methadone maintenance program and had used some substance for backaches or muscle aches. At this point in time I've concluded that the [state is] correct in [its] objection that that's not relevant and it would be unduly prejudicial. It would merely invite speculation on the part of the jury so the state's request with respect to its motion in limine is granted."

On the third day of evidence, the state called H. Wayne Carver, the chief state medical examiner, who had performed the victim's autopsy, to testify. Before beginning his cross-examination of Dr. Carver and outside of the jury's presence, Demirjian informed the court that he intended to question Dr. Carver regarding the toxicological results from the victim's autopsy.

Demirjian offered to the court the victim's autopsy report, attached to which was the victim's toxicology report. The document was marked as an exhibit for identification. Demirjian argued that the toxicology report indicated that several drugs were found in the victim's system at the time of his death and that those drugs likely affected the victim's state of mind and conduct during the altercation with the petitioner. The state objected, arguing that the proffered evidence regarding the drugs constituted inadmissible character evidence and was irrelevant. The state further argued that the petitioner had not disclosed an expert to provide testimony explaining the effects of the drugs on the victim's state of mind at the time of the altercation. Following argument, the court stated: "Dr. Carver has testified about the manner and cause of death and I don't see how drugs in a system relate to a stab wound having caused the death, so it's not relevant on that issue. And then Mr. Demirjian you've claimed that the substances and the drugs in the [victim's] body may relate to other issues in the case, that is the [victim's] state of mind. . . . The state has not at this point put [the victim's] state of mind in issue and neither side has. So it's just not relevant to the cross-examination of Dr. [Carver]. And putting that evidence in the case would just leave the groundwork for the jury to speculate in the absence of any evidence as to how such drugs would affect [the victim's] state of mind. So the court's ruling is that it does not relate to the direct examination of Dr. Carver and therefore the state's motion [in limine] is granted."

During the petitioner's case-in-chief in the criminal trial, Demirjian called several witnesses to testify, including the petitioner. Demirjian did not call an expert witness to offer testimony regarding the presence and effects of the drugs found in the victim's system. The petitioner raised defense of premises as a justification

defense at the criminal trial, and the trial court instructed the jury on this defense. *State* v. *Nicholson*, supra, 155 Conn. App. 503. The petitioner was found not guilty on the murder charge, but he was convicted of manslaughter in the first degree in violation of General Statutes § 53a-55. Id. The petitioner appealed from the judgment of conviction, claiming that the state failed to present sufficient evidence to disprove his defense of premises justification defense beyond a reasonable doubt and that the prosecutor engaged in impropriety during closing argument. Id., 500. This court affirmed the judgment. Id., 519.

On March 19, 2014, the petitioner, representing himself, filed a petition for a writ of habeas corpus. On July 12, 2016, after appointed habeas counsel had appeared on his behalf, the petitioner filed an amended one count petition claiming that Demirjian rendered ineffective assistance by failing to call Dr. Carver or another expert witness during the criminal trial to lay foundational testimony to admit the victim's toxicology report into evidence.[4]

On January 10, 2017, the habeas court, *Fuger*, *J.*, held a one day trial. The court heard testimony from Joel Milzoff, a forensic toxicologist, and Demirjian. The petitioner did not testify. Immediately following the parties' respective closing arguments, the court issued an oral decision from the bench denying the amended petition.[5] Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying the amended

[4] The petitioner, representing himself, filed a second petition for a writ of habeas corpus on September 18, 2014, claiming that he had been "denied a lawyer at interrogation after [he] requested counsel be present" in violation of his state and federal constitutional rights to due process. On March 25, 2015, the petitioner, through appointed counsel, filed a motion to consolidate the two pending habeas actions, which the habeas court granted on April 10, 2015.

[5] The habeas court subsequently filed a signed transcript of its oral decision with the clerk of the court. See Practice Book § 64-1 (a).

petition, which the court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal from the judgment denying his amended petition for a writ of habeas corpus. We disagree.

We 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 [amended] 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.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 811–12, A.3d , cert. denied, 330 Conn. 933, A.3d (2018).

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

II

We now turn to the petitioner's substantive claims on appeal. The petitioner's first substantive claim is that the habeas court erroneously concluded that he failed to establish that Demirjian rendered ineffective assistance. Specifically, the petitioner asserts that Demirjian rendered deficient performance by failing to call an expert witness, namely, Dr. Milzoff, during the petitioner's case-in-chief at the criminal trial to support the petitioner's justification defense by offering testimony as to the presence and effects of the drugs found in the victim's system. We disagree.

We begin by setting forth the relevant standard of review and legal principles that govern our review of the petitioner's claim. "The 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 judge, 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. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . As enunciated in *Strickland* v. *Washington*, supra, [687], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [1] a performance prong and [2] a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The [petitioner's] claim will succeed only if both prongs are satisfied. . . . The court, however, can find against a petitioner . . . on either the performance prong or the prejudice prong, whichever is easier." (Citation omitted; internal quotation marks omitted.) *Chance* v. *Commissioner of Correction*, 184 Conn. App. 524, 533–34, A.3d , cert. denied, 330 Conn. 934, A.3d (2018).

The following additional facts and procedural history are relevant to the petitioner's claim. At the habeas trial, the petitioner called Dr. Milzoff as his first witness. Dr. Milzoff testified that the victim's toxicology report

indicated that several drugs, including methadone, morphine, and Prozac, were found in the victim's system at the time of his death. He further provided testimony explaining the general effects of those drugs. He did not offer any testimony concerning whether Demirjian had contacted him around the time of the criminal trial to discuss the victim's toxicology report.

The petitioner next called Demirjian as a witness, who testified as follows. He reviewed the victim's toxicology report before the criminal trial. He intended to cross-examine Dr. Carver about the drugs found in the victim's system, but the trial court precluded him from questioning Dr. Carver on that subject. In addition, Demirjian contacted two or three unidentified experts (whom he referred to as "drug people") to review the victim's toxicology report, but none of those individuals offered opinions supporting his argument that the drugs found in the victim's system increased the victim's aggression, which would have bolstered the petitioner's justification defense. Such experts informed him that methadone, one of the drugs found in the victim's system, had a calming effect. On the basis of the experts' unfavorable opinions, Demirjian decided not to retain an expert to testify during the petitioner's case-in-chief about the presence and effects of the drugs found in the victim's system.

During redirect examination, the petitioner asked Demirjian whether he had contacted Dr. Milzoff to review the victim's toxicology report. The petitioner directed Demirjian to an excerpt from the criminal trial transcripts, which had been admitted into evidence at the habeas trial. The excerpt reflected that the state, in objecting to Demirjian's attempt to question Dr. Carver about the victim's toxicology report during cross-examination, argued that Demirjian had not represented that he had retained an expert to testify about the effects of the drugs found in the victim's system, although the

state noted that "we heard mention of Dr. [Milzoff] some time ago, [but] we've heard nothing else, we've got no report from him." After reviewing the excerpt and his personal file, Demirjian testified that Dr. Milzoff may have been mentioned during the criminal trial, but he could not recall whether he had contacted Dr. Milzoff.

In denying the petitioner's amended petition for a writ of habeas corpus, the habeas court determined that the petitioner failed to establish that Demirjian's performance was deficient. The court stated in relevant part: "Demirjian's testimony is that he explored the question of whether the toxicology report would lend credence to [the petitioner's] argument that this manslaughter was committed as self-defense. . . . Demirjian's testimony, stated in conclusory terms, was that none of the persons with whom he consulted were able to give him any information that would have been helpful in supporting the defense of self-defense. If anything, according to . . . Demirjian, the drugs contained within the tox report – toxicology report would have had a calming effect upon the victim rather than an agitating effect. . . . In this case it is clear that, number one, . . . Demirjian had the toxicology report. Number two, he investigated as to whether it would be of value in assisting [the petitioner] in his self-defense defense. Number three, he concluded, based upon his research and consultation with various people – various experts – that it would be of no value. Consequently, he didn't feel that it was worthwhile pursuing. And even if he had, the state had filed a motion in limine to prevent the admission of the tox report. I simply don't see any deficient performance on the part of Attorney Demirjian in this case." The court further determined that, even if Demirjian's performance had been deficient, the petitioner failed to demonstrate that he had been prejudiced by Demirjian's deficient performance.

On appeal, the petitioner claims that Demirjian's failure to call Dr. Milzoff, of whom, the petitioner contends, Demirjian was aware and with whom Demirjian had consulted around the time of the criminal trial, constituted deficient performance.[6] The petitioner further asserts that, had Demirjian retained Dr. Milzoff as an expert witness, Dr. Milzoff would have aided the petitioner's justification defense by testifying that the drugs found in the victim's system could have increased the victim's pain threshold, irritability, and agitation during the altercation with the petitioner. In response, the respondent, the Commissioner of Correction, argues, inter alia, that Demirjian made a reasonable strategic decision not to call an expert witness because Demirjian received opinions from several experts that were not favorable to the petitioner's justification defense. We agree with the respondent.

"To prove his or her entitlement to relief pursuant to *Strickland*, a petitioner must first satisfy what the courts refer to as the performance prong; this requires that the petitioner demonstrate that his or her counsel's assistance was, in fact, ineffective in that counsel's performance was deficient. To establish that there was deficient performance by the petitioner's counsel, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . . The range of competence demanded is reasonably competent, or

[6] The petitioner also asserts that he was prejudiced by Demirjian's alleged deficient performance. Because we conclude that the habeas court did not err in determining that Demirjian's performance was not deficient, we need not reach the petitioner's claim regarding prejudice. See, e.g., *Rosa* v. *Commissioner of Correction*, 171 Conn. App. 428, 435 n.6, 157 A.3d 654 ("the failure to prove either prong of the *Strickland* standard is determinative of the petitioner's ineffective assistance of counsel claim"), cert. denied, 326 Conn. 905, 164 A.3d 680 (2017).

within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . .

"[J]udicial 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 counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Citations omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 538–39, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

"As this court previously has observed, '[a] trial attorney is entitled to rely reasonably on the opinion of an expert witness . . . and is not required to continue searching for a different expert.' . . . *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 816, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Moreover, it is well established that when a criminal defense attorney consults with 'an expert in a

relevant field' who thereafter apprises counsel that he or she cannot provide favorable testimony, counsel is 'entitled to rely reasonably on [that] opinion . . . and [is] not required to continue searching for a different expert.' Id., 817; see also *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 544, 160 A.3d 1110 ('[t]he fact that the petitioner later was able to present testimony at his habeas trial from . . . a different expert, perhaps more specialized than [the expert originally consulted by his criminal trial counsel] . . . did not establish that counsel's performance was deficient for relying on [the original] expert opinion in preparation for the petitioner's criminal trial'), cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

"As the United States Supreme Court has explained in the context of ineffective assistance of counsel claims, '[t]he selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable."' [*Hinton* v. *Alabama*, 571 U.S. 263, 275, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014)]; accord *Brian S.* v. *Commissioner of Correction*, supra, 172 Conn. App. 543–44 (rejecting claim of deficient performance when trial counsel consulted with expert, made strategic decision not to present his testimony at trial or to seek another opinion, and 'strategized that the best course of action' was alternate theory of defense); *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 170, 143 A.3d 1106 (rejecting claim of deficient performance when trial counsel consulted with expert but ultimately 'made the reasonable, strategic decision not to call an expert witness at the underlying criminal trial'), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); *Stephen S.* v. *Commissioner of Correction*, supra, 134 Conn. App. 817 (emphasizing that 'trial counsel is entitled to make strategic choices in preparation for trial')." *Weaving* v. *Commissioner*

of Correction, 178 Conn. App. 658, 668–70, 179 A.3d 1272 (2017).

In the present case, the habeas court found that Demirjian, after having consulted with various experts, concluded that the victim's toxicology report would be of no value to the petitioner's justification defense at the criminal trial. Under those circumstances, Demirjian's decision not to retain an expert constituted a reasonable tactical decision. See *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 468, 160 A.3d 425 (counsel's decision not to retain expert was reasonable tactical decision where counsel had consulted with multiple experts, none of whom provided favorable opinions), cert. denied, 326 Conn. 921, 169 A.3d 235 (2017).

Nevertheless, the petitioner appears to claim that the habeas court's finding that Demirjian had contacted various experts, none of whom provided him with opinions that supported the petitioner's justification defense, was clearly erroneous. According to the petitioner, the record reflects that Demirjian was aware of and had consulted with Dr. Milzoff around the time of the criminal trial. We disagree. Demirjian testified that Dr. Milzoff may have been mentioned during the criminal trial, but he could not recall whether he had contacted Dr. Milzoff. Demirjian's testimony does not reflect that Dr. Milzoff was known to him as a potential expert or that he had consulted with Dr. Milzoff around the time of the criminal trial.[7] Further, Dr. Milzoff's

[7] The petitioner also relies on the excerpt from the criminal trial transcripts reflecting that the state had noted during the criminal trial that there had been "mention" of "Dr. [Milzoff] some time ago . . . ." The petitioner contends that the excerpt supports his proposition that Demirjian was aware of and had consulted with Dr. Milzoff around the time of the criminal trial. We are not persuaded. In the excerpt, the state did not represent that Demirjian had disclosed Dr. Milzoff as a potential witness or otherwise indicate how it had become aware of Dr. Milzoff. The excerpt does not demonstrate that Demirjian was familiar with and had contacted Dr. Milzoff; rather, the excerpt is merely cumulative of Demirjian's testimony that Dr. Milzoff may have been mentioned during the criminal trial.

testimony is silent as to whether he had communicated with Demirjian. Thus, we cannot conclude that the court's finding was clearly erroneous.

In sum, we conclude that the habeas court properly determined that the petitioner failed to establish that Demirjian's performance was deficient and, therefore, the court did not abuse its discretion in denying the petitioner's petition for certification to appeal as to the ineffective assistance of counsel claim.

III

The petitioner's next substantive claim is that the habeas court abused its discretion in declining to treat Dr. Milzoff as an expert witness at the habeas trial. Specifically, the petitioner asserts that the court erroneously concluded that he was required to offer, and the court was required to accept, Dr. Milzoff as an expert witness as a prerequisite to the court treating Dr. Milzoff as an expert witness. The petitioner further asserts that the court's error was harmful. We agree with the petitioner that the court committed error, but we conclude that the petitioner has failed to demonstrate that the error was harmful.

The following standard of review and legal principles govern our review of the petitioner's claim. "[T]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the

opinion. . . . It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Rivera*, 169 Conn. App. 343, 368–69, 150 A.3d 244 (2016), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017).

The following additional facts and procedural history are relevant to our resolution of this claim. On November 29, 2016, the petitioner filed with the habeas court a disclosure indicating that he intended to call Dr. Milzoff as an expert witness at the habeas trial. During the habeas trial, Dr. Milzoff offered testimony regarding his qualifications as an expert in the field of toxicology.[8] He then testified as follows. On the basis of his review of the victim's toxicology report, he discovered that certain drugs, including methadone, morphine, and Prozac, were in the victim's system at the time of the victim's death. He explained that morphine either is administered directly as a pain reliever analgesic or is a metabolite of heroin, that some individuals exhibit aggressive tendencies when exposed to morphine, that side effects of Prozac include irritability, agitation, and panic attacks, and that methadone and morphine increase an individual's pain threshold. Although he

[8] Specifically, Dr. Milzoff testified that he had been a forensic toxicologist since 1972, that he had a bachelor's degree in pharmacy, a master's degree in toxicology and a doctorate in toxicology, that he was board certified, a diplomat of the American Board of Forensic Toxicologists, a charter member of the Society of Forensic Toxicologists and a member of the American Academy of Forensic Sciences, and that he had testified as an expert toxicologist "hundreds of times."

could explain the general effects of those drugs, he could not provide an opinion as to how those drugs affected the victim individually.

In denying the petitioner's amended petition for a writ of habeas corpus, the habeas court stated in relevant part: "First, this court is singularly unimpressed with the testimony of Dr. Milzoff. He did come in and testify as to some qualifications and alluded to the fact that he had been used as an expert witness numerous times in the past. But I will note that at no time did the petitioner move to have this court accept Dr. Milzoff as an expert witness." Citing § 7-2 of the Connecticut Code of Evidence and its accompanying commentary, the court then concluded that "it does seem implied that in order to be accepted as an expert witness – or treated as an expert witness – such a witness must be offered and accepted by the court as an expert. Well, that wasn't done here. That doesn't mean that the evidence presented by Dr. Milzoff is not in the record of this court. But this court does not have to recognize Dr. Milzoff as any sort of expert. So, with that comment, Dr. Milzoff's testimony was not persuasive."

Notwithstanding the foregoing observations, the habeas court proceeded to address the substance of Dr. Milzoff's testimony. With respect to Dr. Milzoff's testimony that morphine was a metabolite of heroin, the court stated that the victim's autopsy report indicated that the victim had received emergency medical treatment and that, as an alternative explanation for the presence of morphine in his system, the victim may have been administered morphine in conjunction with the treatment.

The court then commented that the record before it was "weak to the point of being nonexistent." Proceeding to address Dr. Milzoff's testimony that Prozac produced irritability and violent behavior, the court stated

that it was "more or less common knowledge" that Prozac is commonly prescribed, particularly to treat depression, and that the court would have "found it to be far more beneficial to have a little more expert – a little more – I shouldn't say more – a little expert testimony as to the effects of Prozac." The court later stated that there was "little basis" for it to determine whether the levels of methadone, Prozac, and the other substances in the victim's system were abnormally high.

On appeal, the petitioner claims that the habeas court erroneously declined to treat Dr. Milzoff as an expert witness on the sole ground that the petitioner did not make an express offer to the court to accept Dr. Milzoff as an expert witness. The petitioner asserts that Dr. Milzoff provided adequate testimony establishing his qualifications to testify as an expert witness, to which the respondent did not object, and that the court's refusal to qualify Dr. Milzoff as an expert witness had no nexus to Dr. Milzoff's knowledge or experience. The petitioner further asserts that the court's error was harmful because Dr. Milzoff's testimony at the habeas trial, if treated as expert testimony, would have established that an expert could have testified at the criminal trial in support of the petitioner's justification defense. Although we agree with the petitioner that the court erred in declining to treat Dr. Milzoff as an expert witness in this case, we conclude that the petitioner has failed to demonstrate that the court's error was harmful.[9]

[9] The respondent concedes that the petitioner was not required to offer Dr. Milzoff expressly to be accepted by the habeas court as an expert witness; however, the respondent argues that the petitioner suffered no harm by the court's error because the court considered, and ultimately rejected, the substance of Dr. Milzoff's testimony. We disagree with the respondent's argument. Although the court addressed the substance of Dr. Milzoff's testimony, the court found that the testimony was not persuasive because the court did not consider it to be expert testimony.

The habeas court concluded that § 7-2 of the Connecticut Code of Evidence required the petitioner to offer, and the court to accept, Dr. Milzoff as an expert witness as a prerequisite to the court treating Dr. Milzoff as an expert witness. Section 7-2 provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." The court also relied on the commentary to § 7-2 (2009), which was in effect at the time of its judgment and provided in relevant part: "Section 7-2 imposes two conditions on the admissibility of expert testimony. First, the witness must be qualified as an expert. . . . Whether a witness is sufficiently qualified to testify as an expert depends on whether, by virtue of the witness' knowledge, skill, experience, etc., his or her testimony will 'assist' the trier of fact. . . . The sufficiency of an expert witness' qualifications is a preliminary question for the court. . . . Second, the expert witness' testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. . . . Crucial to this inquiry is a determination that the scientific, technical or specialized knowledge upon which the expert's testimony is based goes beyond the common knowledge and comprehension, i.e., 'beyond the average ken' of the average juror." (Citations omitted.)[10]

[10] The commentary to § 7-2 of the Connecticut Code of Evidence was amended effective February 1, 2018. The commentary to § 7-2 currently provides in relevant part: "Section 7-2 requires a party offering expert testimony, in any form, to show that the witness is qualified and that the testimony will be of assistance to the trier of fact. A three part test is used to determine whether these requirements are met. . . . First, the expert must possess knowledge, skill, experience, training, education or some other source of learning directly applicable to a matter in issue. . . . Second, the witness' skill or knowledge must not be common to the average person. . . . Third, the testimony must be helpful to the fact finder in considering the issues. . . . The inquiry is often summarized in the following terms: 'The true test

We do not construe § 7-2 of the Connecticut Code of Evidence and its accompanying commentary, either in effect at the time of the habeas court's judgment or presently, to require an explicit offer and acceptance of a witness as an expert in order for the witness to be treated as an expert witness. To qualify a witness as an expert, a party is "required to demonstrate that [the witness] ha[s] the special skill or knowledge directly applicable to a matter in issue . . . that [the witness'] skill or knowledge is not common to the average person, and [that the witness'] testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Forte* v. *Citicorp Mortgage, Inc.*, 90 Conn. App. 727, 735–36, 881 A.2d 386 (2005). "Although a court may decide to [declare a witness to be an expert] after an expert's qualifications are put on record, it is not required to do so by our rules of practice or case law. If [an opposing party] has an objection to the testimony or expression of opinion by such a witness, he has the opportunity to make it and have the court rule on it." (Footnote omitted.) *State* v. *Heriberto M.*, 116 Conn. App. 635, 645, 976 A.2d 804, cert. denied, 293 Conn. 936, 981 A.2d 1080 (2009). In the present case, the petitioner disclosed Dr. Milzoff as an expert prior to trial and elicited testimony from Dr. Milzoff establishing Dr. Milzoff's qualifications to testify as an expert witness. The respondent did not object to Dr. Milzoff's testimony. Under these circumstances, the court's refusal to treat Dr. Milzoff as an expert witness constituted error.

Notwithstanding the foregoing, we conclude that the petitioner has failed to demonstrate that the error was

of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.' " (Citations omitted.) The amendment does not affect our analysis.

harmful. "[T]he harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . Generally, a trial court's ruling will result in a new trial only if the ruling was both wrong *and* harmful. . . . A petition for a writ of habeas corpus is a civil action . . . therefore, in order to prevail, the petitioner must be able to satisfy the harmless error standard." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 127 Conn. App. 454, 460, 14 A.3d 1053, cert. denied, 302 Conn. 933, 28 A.3d 991 (2011). In the present case, the court determined that the petitioner failed to establish that Demirjian rendered deficient performance where Demirjian, after having consulted with several experts, concluded that the victim's toxicology report was of no value to the petitioner's justification defense at the criminal trial. Even if the court had treated Dr. Milzoff's testimony regarding the presence and effects of the drugs in the victim's system as expert testimony, that testimony was immaterial to the court's determination that Demirjian's performance was not deficient. Accordingly, the court's error was harmless.

In sum, although we agree with the petitioner that the habeas court erred by declining to treat Dr. Milzoff as an expert witness at the habeas trial, we conclude that the petitioner has failed to demonstrate that the court's error was harmful and, therefore, the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

IV

The petitioner's final substantive claim is that the habeas court abused its discretion in failing to review certain evidence admitted at the habeas trial prior to denying his amended petition for a writ of habeas corpus. Specifically, the petitioner asserts that the court

erroneously failed to review specific excerpts from the criminal trial transcripts.[11] We disagree.

"[T]he trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [W]e are not justified in finding error upon pure assumptions as to what the court may have done. . . . We cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found. . . . Unless the contrary appears, this court will assume that the court acted properly. . . . [I]f . . . [a] statement [by the court may] suggest that the court did not consider [certain] testimony, we . . . are entitled to presume that the trial court acted properly and considered all the evidence. . . . There is, of course, no presumption of error." (Citations omitted; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 229–30, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

The following additional facts and procedural history are relevant to this claim. During the petitioner's direct examination of Dr. Milzoff, the habeas court admitted into evidence, without objection from the respondent, a disc containing, inter alia, electronic copies of the criminal trial transcripts in their entirety. The petitioner explicitly referenced the transcripts on one occasion during the remainder of the evidentiary portion of the habeas trial. Specifically, during the petitioner's redirect examination of Demirjian, the petitioner directed Demirjian to the excerpt reflecting the state's comment

[11] In his principal appellate brief, the petitioner appeared to claim that the habeas court abused its discretion in failing to review all of the criminal trial transcripts. In his reply brief and during oral argument before this court, however, the petitioner limited his claim by arguing that the habeas court's failure to review specific excerpts from the transcripts constituted an abuse of discretion.

during the criminal trial that there had been "mention" of Dr. Milzoff at some point.[12]

At the outset of its decision denying the petitioner's amended petition for a writ of habeas corpus, issued immediately following closing arguments, the habeas court stated: "Now, obviously, since you have introduced the transcript[s] of the [criminal] trial, I have not had an opportunity to review the transcript[s] of the trial. I don't believe such review is necessary to a resolution of the issue in front of this court." The petitioner did not contest those statements.[13]

On appeal, the petitioner claims that the habeas court erroneously failed to review specific excerpts from the criminal trial transcripts. Specifically, the petitioner asserts that the court should have reviewed the excerpt reflecting the state's comment during the criminal trial that there had been "mention" of "Dr. [Milzoff] some time ago . . . ." The petitioner argues that this excerpt was critical for the court to review in assessing Demirjian's credibility. Further, the petitioner asserts that the court should have reviewed excerpts reflecting Demirjian's attempts to elicit testimony from the state's witnesses about the drugs found in the victim's system and containing the petitioner's testimony explaining his justification for the actions he took against the victim. The petitioner argues that those excerpts were crucial

[12] During its cross-examination of Demirjian, the respondent directed Demirjian to a different excerpt to refresh Demirjian's recollection regarding a ruling issued during the criminal trial. In addition, during his closing argument, the petitioner argued that it was his "understanding from reading the [criminal trial] transcripts" that the trial court had precluded the admission of the victim's toxicology report into evidence prior to Demirjian's cross-examination of Dr. Carver because it was not relevant to Dr. Carver's testimony.

[13] The petitioner was not required to object to the statements at issue in order to preserve his claim on appeal that the court abused its discretion in failing to review specific excerpts from the criminal trial transcripts. See *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 225–27.

for the court to review in order to understand how Dr. Milzoff's testimony regarding the drugs found in the victim's system would have aided the petitioner's justification defense at the criminal trial. In response, the respondent argues, inter alia, that the transcripts were immaterial to the court's determination that Demirjian did not render deficient performance by failing to call an expert witness at the criminal trial. We agree with the respondent.

"The issue of whether the habeas court must read every word of the underlying criminal trial transcript has been addressed previously by this court. In *Evans* v. *Warden*, 29 Conn. App. 274, 276–77, 613 A.2d 327 (1992), the petitioner alleged that his criminal appellate counsel rendered ineffective assistance by failing to raise a sufficiency of the evidence claim on direct appeal. At the habeas trial, the habeas court stated that 'I really don't think that I have any cause whatsoever to review the transcripts [of the underlying criminal trial],' and then denied the petition for a writ of habeas corpus. . . . On appeal, this court held that the habeas court abused its discretion by failing to read the trial transcript because [a] full and fair review of the petitioner's claim that . . . appellate counsel provided ineffective assistance in failing to include a sufficiency of the evidence claim in his direct appeal required the habeas court to read the trial transcript. . . .

"Since *Evans*, this court has clarified that *Evans* does not stand for the proposition that a new hearing is [always] warranted [if] the habeas court does not review all of the evidence. . . . Although we recognize that the habeas court must consider all of the evidence admitted for all the purposes it is offered and claimed . . . we also recognize that the court is not obligated to review evidence that is not relevant to any issue under consideration. . . . Additionally, [a]lthough a habeas court is obligated to give careful *consideration*

to all the evidence . . . it does not have to read the full text of every exhibit. . . .

"In *Hull* [v. *Warden*, 32 Conn. App. 170, 177, 628 A.2d 32, cert. denied, 227 Conn. 920, 632 A.2d 691 (1993)], this court emphasized that the extent that the criminal trial transcript must be reviewed by the habeas court depends upon the nature and scope of the particular claim of ineffective assistance of counsel. The petitioner in *Hull* had alleged that his criminal trial counsel rendered ineffective assistance by failing to object to certain testimony. . . . The habeas court determined that trial counsel's conduct was not deficient, and, thus, did not reach the prejudice prong of *Strickland*. . . . The habeas court further stated that it did not review certain exhibits admitted at the habeas trial because it did not consider them necessary to its decision. . . .

"On appeal, this court, in reaching its decision, distinguished between the claim at issue in *Hull* and the claim at issue in *Evans*. In *Evans*, the petitioner's habeas claim had implicated the sufficiency of the evidence presented at the criminal trial, which require[s] the reviewing court to construe all of the evidence presented at trial. . . . Thus, the habeas court's refusal to review any, let alone all, of the criminal trial transcript required a new hearing. By contrast, in *Hull*, the petitioner's claims [were] exceedingly narrow in scope and concerned solely with the testimony of [certain witnesses]. This [was] particularly true because the habeas court . . . concluded that . . . the petitioner's counsel was not ineffective for failing to object to [certain testimony, and, thus], had no need to proceed to the second prong of the *Strickland* test concerning the potentially broader issue of prejudice. . . . Accordingly, this court concluded that the habeas court did not abuse its discretion by not reviewing the entire trial transcript because the habeas court reviewed the parties' pretrial briefs, heard substantial testimony and

argument at the hearing, read the transcripts of [the testimony of the witness at issue], and was properly satisfied that . . . a review of the entire trial transcript . . . would [not] have been of any additional benefit. . . .

"Likewise, in *Rivera* v. *Commissioner of Correction*, 51 Conn. App. 336, 338, 721 A.2d 918 (1998), this court held that the habeas court, in determining whether trial counsel rendered ineffective assistance, did not abuse its discretion by reading only the portions of the criminal trial transcript that counsel specifically referenced, although the entire criminal trial transcript had been admitted into evidence. In so doing, this court emphasized that the habeas court had reviewed the portions of the criminal trial transcript that the petitioner identified at the habeas trial as relevant to his claims, and, on appeal, the petitioner was unable to articulate in his brief or at oral argument any reason why the habeas court was required to read the entire transcript in light of his discrete, particularized claims of ineffective assistance of counsel [none of which implicated the sufficiency of the evidence admitted at the criminal trial]." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 230–32.

In *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 233, this court reiterated that, pursuant to *Hull* and *Rivera*, the extent to which a habeas court is required to review criminal trial transcripts admitted into evidence at a habeas trial is "dependent upon the particular claim made and on which prong of *Strickland* the court based its determination." This court also pronounced that, absent the petitioner identifying on appeal the portions of the transcripts that "(1) would have altered the [habeas] court's determination and (2) the [habeas] court failed to read, this court is guided by the presumption that the habeas court acted properly

and considered all the relevant evidence." Id., 234. In *Moye*, the petitioner alleged in relevant part that his criminal defense counsel rendered ineffective assistance by failing to request a sequestration order. Id., 212 n.3, 227. The petitioner filed a pretrial brief with portions of the criminal trial transcripts attached thereto. Id., 227. At the habeas trial, several additional portions of the transcripts that had not been attached to the petitioner's pretrial brief were admitted into evidence. Id., 227–28. In denying the petitioner's petition for a writ of habeas corpus, the habeas court stated: "I've read the petitioner's pretrial brief. I have *not read all of the transcripts* that have been provided. I don't know that it is necessary to do so. There have been references to those—to what has taken place." (Emphasis in original.) Id., 228. The habeas court proceeded to determine that counsel's performance was not deficient and further that, even assuming that counsel's performance was deficient, the petitioner had not suffered any prejudice. Id., 229.

On appeal, the petitioner claimed that the habeas court could not have determined whether he was prejudiced by his criminal defense counsel's alleged deficient performance without reviewing all of the criminal trial transcripts. Id., 225.

In rejecting that claim, this court determined that, unlike *Evans*, the petitioner's claim was narrowly focused, and, like *Hull*, the habeas court found that the petitioner had failed to prove that counsel's performance was deficient such that it did not have to address the prejudice prong of *Strickland*, and therefore the habeas court did not have to review all of the criminal trial transcripts. Id., 233. In addition, this court emphasized that the habeas court read some, but not all, of the transcripts. Id. This court presumed that the habeas court acted properly and reviewed all of the relevant transcripts, as the habeas court did not identify which

portions of the transcripts it had read. Id., 233–34. Moreover, the habeas court read the petitioner's pretrial brief, to which the petitioner had attached specific portions of the criminal trial transcripts. Id., 234. Although additional portions of the transcript were admitted into evidence at the habeas trial, the petitioner failed to articulate the significance of those additional portions to his ineffective assistance of counsel claim. Id.

In the present case, the petitioner raised a discrete, particularized claim at the habeas trial that Demirjian rendered ineffective assistance by failing to call an expert witness at the criminal trial to lay foundational testimony to admit the victim's toxicology report into evidence. In rejecting that claim, the habeas court determined, inter alia, that Demirjian's performance was not deficient where, following his consultation with several experts, Demirjian had concluded that the victim's toxicology report was of no value to the petitioner's justification defense.[14] The excerpts from the criminal trial transcripts reflecting Demirjian's attempts to elicit testimony from the state's witnesses regarding the drugs found in the victim's system and containing the petitioner's testimony explaining his justification for his actions against the victim had no bearing on the court's analysis of whether Demirjian's performance was deficient. The remaining excerpt reflecting the state's comment during the criminal trial that there had been "mention" of Dr. Milzoff at some point was cumulative of Demirjian's testimony that Dr. Milzoff may have been mentioned during the criminal trial. Thus, the court's review of

[14] Although the habeas court also determined that the petitioner failed to establish that he was prejudiced by Demirjian's alleged deficient performance, the court was not required to reach that inquiry following its determination that the petitioner failed to demonstrate that Demirjian's performance was deficient and, thus, the court was not required to consider the entirety of the criminal trial transcripts. *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 233.

that excerpt would not have altered its determination that Demirjian's performance was not deficient.

Therefore, the petitioner has failed to identify any excerpts from the criminal trial transcripts that would have altered the court's determination that Demirjian's performance was not deficient. Accordingly, "this court is guided by the presumption that the habeas court acted properly and considered all the relevant evidence."[15] *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 234.

In sum, we conclude that the petitioner has failed to demonstrate that the habeas court abused its discretion in failing to review the excerpts from the criminal trial transcripts identified by the petitioner and, therefore, the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

[15] Although we reject the petitioner's claim, we reiterate the cautionary note that this court in *Moye* directed to habeas courts: "A [trier of fact] is bound to *consider* all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [This principle is] fully applicable in habeas corpus trials. . . . Just as a jury should give careful consideration to all the evidence in a case, so too should a habeas court give careful consideration to all the evidence. . . . If a habeas court concludes that it is not necessary to review certain exhibits in light of the manner in which it has disposed of the claims, it should endeavor to explain what it has not reviewed and why it is not necessary to do so. A court should strive to avoid leaving litigants with the impression that it has failed to discharge its duty or somehow acted unlawfully. Public confidence in our justice system is undermined if parties perceive that a court has not met its obligation to provide them with a full and fair review of their claims. We caution courts not to abrogate their duty to review the evidence admitted at trial or to give litigants the erroneous impression that they have done so." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 234–35.

JANINE LESUEUR *v.* ANDREW LESUEUR (AC 39759)

Lavine, Prescott and Eveleigh, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion for a modification of custody and child support, and denying her motion for a modification of unallocated alimony and child support. *Held*:

1. The trial court improperly granted the defendant's motion to modify child support, as the court's factual findings regarding the plaintiff's income were clearly erroneous: there was no legally proper evidentiary basis before the court to support its determination of the plaintiff's gross or net weekly income at the time it considered the motions for modification, as the court calculated the plaintiff's child support share on the basis of her income that included alimony, which is not permitted by our child support statutes or regulations, and although the defendant claimed that any error was harmless and had a de minimis impact on the court's order that the plaintiff pay him weekly child support in that the difference between the child support the court ordered the plaintiff to pay and what an accurate determination of her weekly income required her to pay may not have been great, the evidentiary basis of the court's order was unclear and the error was harmful, as the plaintiff's presumptive share of support may have been less than the court's order had the court not included alimony in its calculation of the parties' combined weekly income.
2. The trial court did not abuse its discretion by terminating the defendant's child support obligation retroactively to September 2, 2015: contrary to the plaintiff's claim, that court did not lack sufficient information to calculate the parties' financial circumstances as of September 2, 2015, as it had information pertaining to the parties' financial circumstances in June, 2015, there was no evidence in the record indicating that the plaintiff's financial circumstances had changed during the summer or fall of 2015, except that she no longer had custody of the parties' son since August, 2015, and the plaintiff admitted that her full-time employment did not change and her salary was not reduced until she filed the motion for modification of unallocated alimony and child support in February, 2016; moreover, the plaintiff failed to demonstrate that she required child support in order to provide for the necessary expenses of the parties' son, as she presented no evidence that the defendant, who was the primary custodial parent, was not providing for their son's necessary expenses for food, shelter and clothing, and certain of the expenses incurred by the plaintiff were typical of those incurred by any

noncustodial parent during visitation or were voluntary, and not the necessary expenses contemplated by case law and statute.

3. The trial court did not misconstrue the parties' separation agreement; that court properly determined that the provision of the agreement regarding a cap and the tuition limit of a four year college degree from within the Connecticut state university system did not apply because the parties and their children had mutually agreed on the postsecondary institutions the children would attend, and the plaintiff's construction of the agreement that after the family mutually agreed on the appropriate educational institutions for their children, the parties would not pay the cost of tuition that exceeded that of the cap would undermine the purpose of the agreement to have the parties and their children mutually agree on the appropriate postsecondary educational institutions the children should attend.
4. The trial court did not abuse its discretion in denying the plaintiff's motion to modify unallocated alimony and child support: although the plaintiff claimed that the trial court, which had determined that a reduction in her salary constituted a substantial change in circumstances, was obligated to consider all of the statutory (§ 46b-82) factors in ordering alimony in accordance with the needs and financial resources of the parties, the plaintiff failed to consider that the trial court stated that in ruling on the motion to modify unallocated alimony and child support it had considered the relevant statutes and case law and did not need to make explicit reference to the statutory criteria that it considered in making its decision; moreover, because the fundamental purpose of child support is to provide for the care and well-being of minor children, and child support follows the child, the plaintiff's claim that the amount of money she received from the defendant was reduced due to the fact that she no longer was receiving child support for the parties' daughter was unavailing, as the court found that the unallocated support the plaintiff was receiving continued to be sufficient to fulfill its intended purpose to equalize the income of the parties and support the children.

Argued March 23—officially released December 4, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Tindill, J.*, granted the defendant's motion for modification of custody and child support; subsequently, the court, *Tindill, J.*, denied the plaintiff's motions for modification of unallocated alimony and

child support, and the plaintiff appealed to this court; thereafter, the court, *Tindill, J.*, denied the plaintiff's motion for an articulation; subsequently, this court granted the plaintiff's motion for review, and the court, *Tindill, J.*, issued an order. *Reversed in part; further proceedings.*

Janet A. Battey, with whom were *Olivia M. Hebenstreit* and, on the brief, *Gaetano Ferro*, for the appellant (plaintiff).

Harold R. Burke, for the appellee (defendant).

Opinion

LAVINE, J. In this postmarital dissolution appeal, the plaintiff, Janine LeSueur, appeals from the postjudgment orders of the trial court granting the motion for modification of custody and child support filed by the defendant, Andrew LeSueur, and denying her motion for modification of unallocated alimony and child support. Specifically, the plaintiff claims that the court, *Tindill, J.*, (1) abused its discretion by granting the defendant's motion to modify custody and child support because the child support order is predicated on clearly erroneous factual findings and because it terminated the defendant's child support obligation retroactively without sufficient information to evaluate the parties' financial circumstances, and without considering that she continued to incur and pay expenses for the parties' son from September 2, 2015, until the date of the hearing; (2) misconstrued the parties' separation agreement (agreement) regarding the parties' obligations to pay for their children's postsecondary education; and (3) abused its discretion by denying her motion to modify unallocated alimony and support. We affirm in part and reverse in part the judgment of the trial court.

The parties' marital history previously was set forth in *LeSueur* v. *LeSueur*, 172 Conn. App. 767, 162 A.3d

32 (2017), which concerned an appeal by the defendant from certain postjudgment motions (defendant's appeal). The parties were married on November 28, 1992, and divorced on January 27, 2011. Id., 770. At the time of dissolution, "the parties had two minor children: a daughter, born in July, 1997; and a son, born in January, 1999. The judgment of dissolution incorporated the parties' separation agreement that provided that the plaintiff and the defendant would have joint legal custody and the plaintiff primary physical custody of the two children. The separation agreement also provided . . . that the defendant . . . pay the plaintiff unallocated alimony and child support from March 1, 2011 until June 30, 2020." Id. Subsequently, the defendant assumed primary physical custody, first of the parties' daughter; id., 770–71; and then their son. The defendant's appeal concerned issues related to child support for the parties' daughter. The present appeal concerns child support related to their son, among other things, and is factually and procedurally distinct from the defendant's appeal.

The record in the present appeal reveals the following procedural history. On August 14, 2015, the defendant filed a motion to modify custody and child support, alleging in part that circumstances regarding custody of the parties' son had changed substantially. The defendant represented that the parties had agreed that, as of July 31, 2015, their son would live with the defendant and have liberal visitation with the plaintiff.[1] The defendant, therefore, asked the court to terminate his child support obligation to the plaintiff and to order the plaintiff to pay him child support.[2] On February 8, 2016, the

[1] The son's move to the defendant's home coincided with the judgment modifying the child support obligations of the parties with respect to the daughter's residing with the defendant.

[2] The motion to modify custody and child support was served on the plaintiff on September 10, 2015.

court accepted the parties' stipulation regarding the son's custody change and scheduled a hearing on the issue of child support.

On February 10, 2016, the plaintiff filed two motions for modification of certain provisions of the separation agreement. In one motion, she claimed that there had been a substantial change in her financial circumstances due to a reduction in her employment and salary. She, therefore, asked the court to increase the amount of unallocated alimony and child support she received from the defendant.[3] In her second motion, titled "Motion for Modification of Children's Expenses and Tuition, Postjudgment," the plaintiff claimed that there had been a substantial change in her financial circumstances, and therefore, she asked the court to order the defendant to pay 100 percent of the educational "add-on" expenses for their son and all costs associated with his private school tuition.[4] (Internal quotation marks omitted.)

[3] Pursuant to the agreement, the amount of unallocated alimony and child support the defendant has to pay to the plaintiff annually is calculated as a percentage of his pretax income from employment. The term of unallocated alimony and child support is from March 11, 2011, until June 30, 2020. The percentage is calculated pursuant to an agreed upon stepdown formula that reduces the percentage of the defendant's pretax income payable to the plaintiff. The amount of the defendant's pretax income from employment on which the plaintiff's alimony is calculated is capped at $1 million annually.

From August 1, 2015, until January 31, 2017, the unallocated alimony and child support the defendant was to pay the plaintiff was to be calculated on the basis of the following formula.

Pretax Income Received by the defendant from Employment	Percentage to be Paid to the plaintiff
$0 to $316,000	40 percent
$316,001 to $660,000	26.5 percent
$661,000 to $1,000,000	19 percent

[4] Paragraph 13 of the separation agreement, titled "Miscellaneous Child Support Matters," provides in relevant part:

"A. Based on the parties combined parental income the [defendant] shall be responsible for [50] percent of child support 'add-ons' and the [plaintiff] shall be responsible for [50] percent of the child support add-ons. [Add-ons] for purposes of this Agreement include the following: reasonable child care expenses (incurred when a party is working); mutually agreed upon educa-

The court heard argument on the parties' motions on three days in the spring of 2016,[5] and requested that the parties submit posthearing briefs. The court issued orders on the defendant's motion to modify child support on October 11, 2016. The court found that the parties' son had been living with the defendant since the date he filed his motion to modify child support and that he had continued to pay the plaintiff child support in the amount of $996.27 per week since September 1, 2015. The court granted the defendant's motion to modify child support, thereby terminating his child support obligation to the plaintiff retroactive to September 2, 2015, and ordered the plaintiff to reimburse the defendant for the child support that he had paid her while their son was living with him.

On October 13, 2016, the court issued orders on the plaintiff's motion for modification of alimony and support and motion for modification of children's expenses and private school tuition. The court found that the plaintiff's salary had decreased since the time of dissolution and that the decrease constituted a substantial change of circumstances. The court also found that the plaintiff's monthly expenses had decreased since January 27, 2011. In addition, the court found that the pretax income from employment formulae used to calculate the amount of unallocated support the defendant was to pay the plaintiff continued to be sufficient to fulfill the intended purpose of equalizing the incomes of the parties and supporting the children. See footnote

tion expenses other than those addressed in C below, including but not limited to tutoring; extracurricular school activities and lessons including sports and music; and summer camp."

[5] During the portion of the hearing held on May 17, 2016, counsel for the parties asked the court to consider an additional matter regarding the parties' obligation to pay for their children's postsecondary education. The court agreed to consider the matter. See part II of this opinion.

3 of this opinion. The court, therefore, denied the plaintiff's motion to modify unallocated alimony and child support.[6]

Pursuant to the oral request of the parties' counsel; see footnote 5 of this opinion; the court found that, had the family stayed intact, the parties more likely than not would have provided support for their children's postsecondary education. It also found that the parties are well educated and have the income and assets to assist their children with the cost of higher education. The court found ample evidence of the children's academic commitment, preparedness, and athletic prowess. The parties mutually had agreed that their daughter should attend Princeton University and that their son should attend Dartmouth College.[7] The court also concluded that, pursuant to the agreement, neither the "UConn cap" nor the cost of a four year degree within the Connecticut state university system was applicable.[8] The court, therefore, ordered the parties to "timely pay education support . . . to Princeton University and Dartmouth College" as required by paragraphs 7 (f) and 13 (B) (iv) of the separation agreement. The plaintiff appealed.

We begin with the well settled standard of review in family matters. "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

[6] The court also denied the plaintiff's motion to modify the allocation of expenses, "add-ons," and private school tuition between the parties. On appeal, the plaintiff has not claimed that the court abused its discretion in that regard. (Internal quotation marks omitted.)

[7] The parties' daughter was recruited to play field hockey at Princeton University and their son was recruited to play ice hockey at Dartmouth College.

[8] See General Statutes § 46b-56c (f). The "UConn cap" refers to the amount of tuition paid by a "full-time in-state student" to attend the University of Connecticut.

facts 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." (Internal quotation marks omitted.) *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 727, 147 A.3d 188 (2016).

I

The plaintiff's first claim is that the court abused its discretion by granting the defendant's motion to modify custody and child support because (1) its child support order is predicated on a clearly erroneous factual finding, and (2) it terminated the defendant's child support obligation retroactively without sufficient information to calculate the parties' financial circumstances as of September 2, 2015, and without considering that she continued to incur and pay expenses related to the son.[9] We agree that the court's order that the plaintiff pay child support is predicated on a clearly erroneous factual finding. We do not agree, however, that the court lacked sufficient information regarding the parties' financial circumstances as of September 2, 2015, or that the voluntary expenses the plaintiff incurred overcame the presumption that child support follows the child.

The following additional facts are relevant to our resolution of this claim. As previously stated, as of July 31, 2015, pursuant to the parties' informal agreement, their son began to reside with the defendant. On August 14, 2015, the defendant filed a motion for modification of custody and child support. He represented that there had been a substantial change in circumstances due to the fact that the parties' son was living with him and requested that, because he had become financially responsible for their son, his child support obligation

[9] The plaintiff does not claim that the court improperly accepted the parties' stipulation that their son would live with the defendant. Her claim pertains only to the court's child support orders.

to the plaintiff be terminated and that the plaintiff be ordered to pay him child support. On February 8, 2016, the court accepted the parties' stipulation that their son reside with the defendant and ordered a hearing to be held on the issue of child support.

The parties appeared before the court for an evidentiary hearing on March 28, May 17, and June 1, 2016. At that time, the defendant argued that the change in the primary physical custody of the parties' son required a modification of the child support portion of the unallocated support order because child support follows the child. He also argued that he had been paying the plaintiff child support pursuant to the court's July, 2015 order that modified his child support obligation when he assumed custody of the daughter. The defendant contended that, as a matter of law and equity, he was entitled to be reimbursed by the plaintiff for the child support he had paid her since September 10, 2015, the date he served the plaintiff with the motion to modify child support.

The plaintiff argued that the court should not modify the defendant's child support obligation because the agreement called for unallocated alimony and child support calculated on the basis of the defendant's pretax income from employment and that alimony and child support should not be broken into separate amounts.[10] The plaintiff requested that, if the court granted modification of child support and did so retroactively, to order retroactivity from February 8, 2016, the date the transfer

[10] Paragraph 12.8 (c) of the agreement provides in relevant part: "In no event shall the percentage formulae set forth in paragraph 12.1 (a), (b) and (c) of this Agreement or in any decree incorporating its provisions, in whole or in part, be changed or amended by the parties or the court; except that either party shall be entitled to seek a modification of the percentage formulae set forth in paragraph 12.1 (a), (b) and (c) in the event of a substantial change of circumstances of either party or in the event it is agreed by the parties or ordered by a Court that one or more of the children shall reside with the [defendant] as his or her primary residence."

of custody was accepted by the court, not the date the defendant's motion to modify was served. In addition, the plaintiff claimed she continued to incur expenses for their son after the motion was served.

In its order, the court found, contrary to the plaintiff's argument, that the defendant was not seeking to modify the term, duration, or the percentage of the unallocated support formulae set forth in paragraph 12 of the agreement, but was seeking a determination of the plaintiff's child support obligation for the parties' son who resided with him. The court also found that the defendant had demonstrated a substantial change in circumstances that justified a modification of child support, i.e., the son was living full-time with him as of the date of the motion for modification was filed. The defendant had paid the plaintiff child support in the amount of $996.27 per week since September 1, 2015. The court, therefore, granted the defendant's motion to modify child support and terminated his child support obligation retroactively to September 2, 2015. The court found that the defendant was entitled to reimbursement from the plaintiff in the amount of $57,783.66.

The court found on the basis of the parties combined weekly income of $12,980 that the plaintiff's presumptive child support obligation for the parties' son pursuant to the guidelines was $137 per week. The court, therefore, ordered the plaintiff to pay the defendant $137 per week in child support, commencing November 1, 2016.

A

The plaintiff claims that the court improperly granted the defendant's motion to modify child support and ordered her to pay the defendant child support on the ground that the court's factual finding regarding her

annual income is clearly erroneous because it improperly includes alimony and child support income. We agree.

"Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's 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. . . . Therefore, to 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." (Citation omitted; internal quotation marks omitted.) *Mensah* v. *Mensah*, 145 Conn. App. 644, 651–52, 75 A.3d 92 (2013).

"The [plaintiff] is entitled to relief from the trial court's improper rulings only if one or more of those rulings were harmful. . . . It is well settled that the burden of establishing harm rests on the appellant. . . . To meet this burden in a civil case, the appellant must show that the ruling would likely affect the result." (Citations omitted; internal quotation marks omitted.) *Tevolini* v. *Tevolini*, 66 Conn. App. 16, 30–31, 783 A.2d 1157 (2001).

The following additional facts are relevant to our resolution of this claim. On March 29, 2017, after she had appealed, the plaintiff filed a motion for articulation; see Practice Book § 66-5; requesting, among other things, that the trial court articulate the basis of its calculation of the court's child support guidelines worksheet docket number 150.[11] The court denied the motion

[11] The subject worksheet is identified as number 150 on the trial court docket list.

for articulation, and the plaintiff filed a motion for review in this court. See Practice Book § 66-7. This court granted the motion for review and ordered the trial court to articulate, in relevant part, the following: (1) the factual basis for stating on worksheet number 150 that the plaintiff's gross weekly income was $5820 and that her net weekly income was $3680; (2) whether the alimony received by the plaintiff was included in the calculation that determined the plaintiff's gross income as stated on worksheet number 150; and (3) the factual basis for stating on worksheet number 150 that the defendant's net weekly income was $9301.

In its articulation, the trial court stated that the factual basis for using $5280 as the plaintiff's gross weekly income and $3680 as her net weekly income was the plaintiff's May 17 and May 20, 2016 financial affidavits and her May 17, 2016 testimony. The court further stated that the alimony received by the plaintiff was not included in her gross income amount on worksheet number 150. Additionally, the court articulated that the factual basis for using $9301 as the defendant's net weekly income was his May 17, 2016 financial affidavit and his testimony on May 17, 2016.

On appeal, the plaintiff claims that in determining her annual income, the court erred by utilizing the information on the financial affidavit she submitted on May 20, 2016, which included income in the form of alimony,[12] and not the worksheets submitted by the parties at the hearing on May 17, 2016. The worksheet that the plaintiff submitted states that her gross weekly income is $1827 and her net weekly income is $1332. The worksheet that the defendant submitted states that the plaintiff's gross weekly income is $2697 and her net weekly

[12] The plaintiff's May 17, 2016 financial affidavit shows the plaintiff's gross weekly income to be $5339.56, which includes alimony and child support. The plaintiff reported $7916.66 in gross monthly salary from her employer, $4317.20 of child support, $7134.24 in monthly alimony, and $3770 in monthly dividend and interest income.

income is $2141. Neither of the worksheets submitted by the parties included alimony income to the plaintiff. In October, 2016, when the court issued its decisions on the motions for modification submitted by the parties, it appended worksheet number 150 to its orders. Worksheet number 150 states the court's findings that the plaintiff's gross weekly income was $5820 and her net weekly income was $3680. In its articulation, the court stated that it used the plaintiff's financial affidavit, not her worksheet, to make its calculations, and that it did not include the plaintiff's income from alimony when it determined her annual income.

On the basis of our review of the exhibits in the record and the discrepancies between the parties' worksheets regarding the plaintiff's income and the court's determination, we are left with the firm conviction that a mistake has been made. There is no legally proper evidentiary basis before the court to support its determination of the plaintiff's gross or net weekly income at the time it considered the motions for modification. In addition to using the incorrect documents to calculate the plaintiff's income, the plaintiff contends that the court improperly included alimony in its calculations. The plaintiff included the alimony she received on her financial affidavit, and therefore, because the court used the plaintiff's financial affidavit, it necessarily must have included the plaintiff's alimony when it performed its calculations. We agree with the plaintiff that, pursuant to our child support statutes and regulations, the court may not include income from alimony when it calculates the income of an alimony recipient for purposes of determining child support.

"Our review of the court's interpretation of . . . § 46b-215a-1 (11) . . . of the Regulations of Connecticut State Agencies is plenary. . . . Section 46b-215a-1 (11) of the Regulations of Connecticut State Agencies defines gross income as the average weekly earned and

unearned income from all sources before deductions . . . . That section includes a nonexhaustive list of twenty-two inclusions. In that list of inclusions is: alimony being paid by an individual who is not a party to the support determination. . . . Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (xix). The specific wording of this inclusion makes clear that only alimony received from a nonparty to the support determination is included in gross income." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Robinson* v. *Robinson*, 172 Conn. App. 393, 397–98, 160 A.3d 376, cert. denied, 326 Conn. 921, 169 A.3d 233 (2017); see also General Statutes § 46b-84.[13]

The defendant agrees that the court's finding of the plaintiff's weekly income is erroneous, but he argues that the error is harmless and had a de minimis impact on the court's order that the plaintiff pay him $137 per week in child support. The defendant, however, provides no legal support for his de minimis argument, and we are aware of none.

The defendant's argument is predicated on his calculation of the presumptive minimum child support pursuant to the child support guidelines. "[W]hen a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in [General Statutes] § 46b-84 (d)." *Maturo* v. *Maturo*, 296

[13] General Statutes § 46b-84 (a) provides in relevant part: "Upon or subsequent to the . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of child support."

Conn. 80, 106, 995 A.2d 1 (2010). "The guidelines provide in relevant part that, [w]hen the parents' combined net weekly income exceeds [$4000], child support awards shall be determined on a case-by-case basis, and the current support prescribed at the [$4000] net weekly income level shall be the minimum presumptive amount." (Internal quotation marks omitted.) Id., 91. The guidelines establish a child support award as "the entire payment obligation of the noncustodial parent, as determined under the . . . guidelines . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 117.

On the basis of his weekly income alone, the defendant argues that the parties' combined weekly income exceeds $4000, and therefore the child support for their son should not exceed the presumptive maximum of 12.04 percent of that income. Given the disparity in the plaintiff's annual income reported on the defendant's worksheet and the court's worksheets, the defendant calculates that the range of the parties' combined weekly income is between $10,815.38 and $11,261.63, which results in a presumptive maximum child support award of between $1302.17 and $1355.90 per week.

Although we may agree that there is a permissible range between the presumptive minimum and maximum child support when the parties' combined income exceeds $4000 per week; see *Dowling* v. *Szymczak*, 309 Conn. 390, 402, 72 A.3d 1 (2013) ("as long as the child support award is derived from a total support obligation within this range—between the presumptive minimum dollar amount and the presumptive maximum percentage of net income—a finding in support of a deviation is not necessary"); there is no corresponding permissible range of child support owed by the noncustodial parent. A noncustodial parent's child support obligation is to be based on his or her proportionate share of the parties' combined net income. Id., 404.

In the present case, the trial court had two sets of worksheets filed by the parties and two sets of financial affidavits. The plaintiff's stated income is different on each page and consequently each figure constitutes a different percentage of the parties' combined net weekly income, which affects the amount of the plaintiff's child support obligation regardless of the presumptive amount. Moreover, the trial court calculated the plaintiff's child support share on the basis of her income that included alimony, which is not permitted by our child support statutes or regulations. Although, as the defendant argues, the difference between the child support the court ordered the plaintiff to pay and what an accurate determination of her weekly income requires her to pay may not be great, the evidentiary basis of the court's order is unclear. See *Ferraro* v. *Ferraro*, supra, 168 Conn. App. 731 (figures on worksheets and affidavits did not match, court must provide basis for support determinations it makes). Moreover, the error is harmful. The plaintiff's presumptive share of support may have been less than $137 if the court had not included alimony in its calculation of the parties' combined weekly income.

The court's finding with respect to the plaintiff's income is clearly erroneous and for that reason, the court improperly granted the defendant's motion to modify child support with respect to the child support it ordered the plaintiff to pay. We, therefore, reverse the judgment in part and remand the case for a new hearing with regard to the parties' respective child support obligations.

B

The plaintiff's second claim regarding the court's child support order is that the court abused its discretion by terminating the defendant's child support obligation retroactively because (1) the court lacked sufficient

information to calculate the parties' financial circumstances as of September 2, 2015, and (2) she continued to pay for some of the expenses of the parties' son from September 2, 2105, until the time of the hearing. We disagree.

"Where the legal conclusions of the trial court are challenged, on appeal those conclusions are subject only to the test of abuse of discretion. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Hayward* v. *Hayward*, 53 Conn. App. 1, 8, 752 A.2d 1087 (1999). Trial courts have "broad discretion in deciding motions for modification." *Noce* v. *Noce*, 181 Conn. 145, 149, 434 A.2d 345 (1980).

General Statutes § 46b-86 (a) "governs the availability of retroactive modification of unallocated alimony and child support orders." *Cannon* v. *Cannon*, 109 Conn. App. 844, 849, 953 A.2d 694 (2008). Section 46b-86 (a) provides, in relevant part: "No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court *may* order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party . . . ." (Emphasis added.)

"Although there is no bright line test for determining the date of retroactivity of child support payments, this court has set forth factors that may be considered. Specificcally, in [*Hane* v. *Hane* 158 Conn. App. 167,

176, 118 A.3d 685 (2015), this court] expressly noted that a retroactive award may take into account the long time period between the date of filing a motion to modify, or . . . the contractual retroactive date, and the date that motion is heard . . . . The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes. . . . Moreover, § 46b-86 (a) accords deference to the trial court by permitting it to make a modification to a party's child support obligation retroactive to *any* period during which there is a pending motion for modification." (Citation omitted; emphasis in original; internal quotation marks omitted.) *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 780.

The following facts are relevant to the plaintiff's claim. The defendant previously had filed a motion for modification of unallocated child support and custody on June 3, 2014, due to the fact that he had assumed physical custody of the parties' daughter. In that motion, the defendant did not request modification retroactive to the date the motion was served on the plaintiff. Id., 782. The parties' agreement that their daughter live with the defendant was accepted by the court, *Hon. Stanley Novack*, judge trial referee, in December, 2014, and the matter was continued several times thereafter. Id. The defendant did not request retroactive modification until February 25, 2015. Id.

The issue of child support for the parties' daughter was not addressed until May 7, 2015, when Judge Tindill held a hearing on the defendant's motion for modification of unallocated alimony and child support. Id., 773. The court issued a memorandum of decision regarding child support on July 31, 2015.[14] Id. Almost immediately

[14] The trial court "modified the defendant's child support obligation retroactive to December 9, 2014, rather than the date that the motion was served on June 30, 2014, because it found that December 9, 2014, was the date when his primary physical custody of the daughter was no longer temporary." *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 783.

thereafter, the parties' son took up residence in the defendant's home, and the defendant filed the present motion for modification of custody and child support on August 14, 2015. The motion was served on the plaintiff on September 10, 2015. On the first day of the hearing on the present motions, the court stated that it was taking judicial notice of its July 31, 2015 order and its order accepting the parties' stipulation that the defendant assumed physical custody of the parties' son.

1

On appeal, the plaintiff argues that the court lacked sufficient information to calculate the parties' financial situation on September 2, 2015, and relies on the procedural history and dicta in this court's decision with respect to the defendant's appeal. In that appeal, this court stated that the trial court "did not have the information necessary to make its child support orders retroactive . . . because the parties did not submit financial affidavits at or close to that date [of service]." *LeSueur* v. *LeSueur*, 172 Conn. App. 782. This court continued quoting from Judge Tindill's July 31, 2015 memorandum of decision that the defendant had not submitted "a signed, sworn financial affidavit until ordered to do so by the court on May 22, 2015. Prior to June 8, 2015, the most recent financial affidavits filed were those filed on January 27, 2011." (Internal quotation marks omitted.) Id., 783. We infer from the trial court's July 31, 2015 memorandum of decision that it had current information regarding the parties' financial circumstances as of June 8, 2015, which is approximately three months prior to September 2, 2015.

The defendant argues, in part, that the court had sufficient evidence by which it could make its child support orders retroactive. Namely, that on September 10, 2015, the date the plaintiff was served with the motion for modification, the defendant was the son's

custodial parent pursuant to the parties' agreement. He continued to pay child support to the plaintiff notwithstanding that he was their son's custodial parent and he had costs attributable to the son. The plaintiff contributed no financial support to the defendant for their son's care. Significantly, the court had issued orders relative to the parties' daughter on July 31, 2015, pursuant to the financial data available to the court at that time. Moreover, although the defendant had assumed custody of the son in early August, 2015, the court ordered the plaintiff to pay the defendant child support from November 1, 2016, until the son completed high school in May, 2017.

The record supports the defendant's argument. The motion to modify unallocated alimony and child support was served on the plaintiff on September 10, 2015, the defendant had assumed primary physical custody of the son in August, 2015, and the son was living full-time in the defendant's home while the defendant continued to pay the plaintiff pursuant to the July 31, 2015 child support order. We conclude on the basis of the court's memorandum of decision that it had information pertaining to the parties' financial circumstances in June, 2015, which was at or near the time when the defendant served the motion for modification of unallocated alimony and child support on the plaintiff. There is no evidence in the record indicating that the plaintiff's financial circumstances had changed during the summer and fall of 2015, except that she no longer had custody of the parties' son. The record discloses, and the plaintiff admitted during the hearing on the present motions, that her full-time employment did not change and her salary was not reduced until she filed the motion for modification of unallocated alimony and child support in February, 2016.

2

The plaintiff also claims that the court improperly modified the child support order retroactive to September 2, 2015, because she continued to pay expenses of the parties' son from September 2, 2015, to the date of the hearing even though the son was not primarily living in her home. She claims that if the court granted the defendant's motion to modify retroactively, the retroactivity should only be to February 8, 2016, which is when the court accepted the parties' agreement that their son live with the defendant, and the date on which the defendant first requested that the motion be granted retroactively.

In her brief on appeal, the plaintiff argues that she testified as to the expenses she incurred for the son. Although the court made no findings with respect to the expenses the plaintiff claims that she paid; see *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 739–40, 66 A.3d 848 (2013) (recitation of testimony without more does not constitute finding); the court found that the plaintiff's expenses with respect to her children had declined. The court also found that the son was living full time with the defendant "as of the date of the instant motion." It is undisputed that the son moved to the defendant's home in August, 2015.

General Statutes § 46b-224 specifically "addresses the question of how a change in custody affects the payment of child support . . . ." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 549, 46 A.3d 112 (2012). "Child support . . . furnishes the custodian with the resources to maintain a household to provide for the care and welfare of the children; in essence, the custodian holds the payments for the benefits of the child. Consequently, once custody changes, there is no immediately apparent reason for the former custodian to

continue to receive the payments because the presumption is that the former custodian is no longer primarily responsible for providing the children's *necessary living expenses, including food, shelter and clothing*. In turn, permitting the diversion of funds away from the parent providing for the care and well-being of minor children when custody changes, pursuant to the parents' contractual agreement, would contravene the purpose of child support." (Emphasis added.) Id., 555.

"Modification, including retroactive modification, of a child support order upon a change of custody under § 46b-224, comports with the default rule that child support follows the children, unless the trial court has made a finding that another arrangement is appropriate. This statute indicates that the legislature viewed the provision of custody as the premise underlying the receipt of child support payments; the legislature did not envision that the custodian would be required to pay child support to a person who does not have custody, as well as (in cases in which the obligor obtains custody) expend resources to provide directly for the care and welfare of the child. In fact, under the Child Support and Arrearage Guidelines . . . child support award is defined as the entire payment obligation of the *noncustodial* parent. . . . Once custody is transferred, however, there is no longer any basis for the presumption that the former custodian is spending his or her share of the support on the children." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Coury* v. *Coury*, 161 Conn. App. 271, 299, 128 A.3d 517 (2015).

In *Tomlinson*,[15] our Supreme Court stated that "if the obligor becomes the new primary custodial parent,

[15] The question in *Tomlinson* was whether a provision in the parties' separation agreement that expressly prohibited modification of child support pursuant to the nonmodification clause of § 46b-86 (a) precluded a trial court from modifying the child support portion of an unallocated support order. Our Supreme Court noted that "while § 46b-86 (a) addresses the

the obligor is no longer required to pay child support to the former custodian. . . . The immediate result . . . is . . . the originally designated payee who no longer has custody of the child does not continue to receive support payments following the change in custody, and the payments are retained by . . . the party who does have custody." *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 549–50.

In the defendant's appeal, this court stated on the basis of the plaintiff's testimony that she had rebutted the presumption that "the former custodian is no longer primarily responsible for providing the children's necessary living expenses" because she continued to have expenses associated with the care of the parties' daughter. (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 779. We have reviewed the transcript of the hearing with respect to the parties' son and agree that the plaintiff testified that she paid certain of the son's expenses.[16] The court, however, made no finding that the expenses were necessary expenses. With regard to those expenses, her payments were voluntary and not for necessary expenses contemplated by the child support scheme.

modification of child support in general, § 46b-224 covers the particular effect of a change in custody on preexisting child support orders." *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 550.

[16] With respect to the defendant's appeal in *LeSueur* v. *LeSueur*, supra, 172 Conn. App. 767, it is unclear whether the trial court made a factual finding as to whether the expenses paid by the plaintiff on behalf of the parties' daughter when she was in the defendant's custody were necessary expenses. This court concluded, however, on the basis of the plaintiff's testimony in the record that the plaintiff had incurred necessary expenses for the daughter after she had moved to the defendant's home. Id., 778–79. In the present appeal, the plaintiff again testified that she incurred expenses for the parties' son after he moved into the defendant's home. The trial court made no finding that those expenses were necessary expenses. We are constrained by the factual findings of the trial court, as it is well known that appellate courts do not make findings of fact on the basis of the record. See *In re Carissa K.*, 55 Conn. App. 768, 778, 740 A.2d 896 (1999) (appellate courts do not examine record to determine whether trier of fact could have reached conclusion other than one reached and do not retry case).

In the present appeal, the plaintiff presented no evidence, and our review disclosed none, that the defendant, who was the primary custodial parent, was not providing for their son's necessary expenses for food, shelter, and clothing. Although the plaintiff testified that she incurred expenses on behalf of the son, some of them were typical of those incurred by any noncustodial parent during visitation. The plaintiff presented no evidence that she was not able to pay for those expenses with her salary or income from investments or unallocated alimony and child support she was receiving. She also presented no evidence that she incurred expenses for the parties' son because the defendant failed to meet the son's necessary needs. The record contains evidence that many of the expenses the plaintiff incurred were the result of her voluntary decision to provide the son with the unlimited use of a credit card. The plaintiff voluntarily incurred those expenses, and they are not the necessary expenses contemplated by our case law and statutes.[17]

The court found that the parties had agreed that their son could move to the defendant's home soon after the court issued its July 31, 2015 child support orders regarding their daughter. It also found that the son had been living with the defendant since the time the motion to modify custody and child support was filed and that the defendant continued to pay the plaintiff child support pursuant to the court's July 31, 2015 orders. There is no explanation in the record as to why the motion to modify, filed in August, 2015, was not heard until February 8, 2016, which is when the court accepted the parties' agreement that the defendant would assume custody of their son.

[17] The plaintiff testified that the parties' son used the credit card when he ate at restaurants with his friends, to purchase concert tickets, and to pay for Uber rides from the airport, among other things. The son also let the parties' daughter use his credit card when she misplaced the credit card the plaintiff had provided to her.

On the basis of our review of the record, the court's orders, and the briefs of the parties, we conclude that the court did not abuse its discretion by granting the defendant's motion for modification and terminating the defendant's child support obligation to pay the plaintiff retroactively, as the plaintiff failed to demonstrate that she required child support in order to provide for the son's necessary expenses. However, in her reply brief, the plaintiff noted that the court terminated the defendant's child support obligation as of September 2, 2015, which predates the time his motion to modify custody and child support was served on the plaintiff on September 10, 2015. On remand, the court is ordered to set the retroactive date to a time subsequent to September 10, 2015.

II

The plaintiff's second claim is that the court misconstrued the separation agreement and consequently ordered the parties to timely pay the postsecondary tuition expenses of their children. We disagree that the court misconstrued the separation agreement.

During the hearing on their motions for modification, the parties asked the court to determine their respective obligations, if any, to pay the college tuitions of their children. Article 13 of the separation agreement, titled Miscellaneous Child Support Matters, is at the center of the plaintiff's claim. Paragraph 13 (B) (iv) of the separation agreement concerns the children's postsecondary education and provides as follows: "In the event that a child, upon graduating high school, attends a fully accredited college or university and matriculates in a course of study leading to an undergraduate degree, the parties shall each contribute their proportionate share to the cost thereof, in accordance with their income at that time (including any [pretax income from

employment] being paid by [the defendant] to [the plaintiff]), after the child has made application for all available financial aid, grants and scholarships. The [defendant] and [the plaintiff] shall consult with each other and with the child concerned with respect to the education of any or all of the children and with respect to the selection of schools or colleges which they shall attend. The selection of said schools and/or colleges shall be by mutual agreement. In the event that the parties are unable to agree on a school and/or their respective obligations therefore, it is understood and agreed that the Court shall retain jurisdiction pursuant to the . . . General Statutes to determine the amount of each [party's] required contribution, up to the cost of in state tuition at a school which is part of the Connecticut state university system and either party may submit the dispute to a court of competent jurisdiction for determination thereof. The parties' obligations pursuant to this [Article 13 (B) (iv)] shall continue with respect to each child despite a child having attained the age of majority, but in no event beyond a child's twenty-third . . . birthday."

During the hearing, the defendant testified that paragraph 13 (B) (iv) of the separation agreement meant that there was no limit, or so-called UConn cap, on their respective tuition contributions if the parties agreed on the respective school or college their children would attend. The plaintiff testified that she believed that the UConn cap applied if the parties could not agree on their respective financial obligations. The court found that the parties mutually agreed that their daughter would attend Princeton University and their son Dartmouth College and that neither the UConn cap nor the cost of a four year degree within the Connecticut state university system applied as contended by the plaintiff.

On appeal, the plaintiff claims that the court improperly ordered the parties to pay their children's tuition

at their respective colleges because the court did not find that the parties had agreed to exceed the limit imposed by General Statutes § 46b-56c (f).[18] The plaintiff, therefore, asserts that the court erred in finding that the UConn cap and the cost of instate tuition at a school that is part of the Connecticut state university system do not apply and improperly ordered the parties to pay timely educational support to Princeton University and Dartmouth College as required by paragraphs 7 (F) and 13 (B) (iv) of the separation agreement.

"It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is to be regarded and construed as a contract. . . . Accordingly, our review of a trial court's interpretation of a separation agreement is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 354–55, 999 A.2d 713 (2010).

On the basis of our review of Article 13 (B) (iv) of the agreement, we conclude that the language is clear and unambiguous. The first clause of the subject article addresses the circumstances under which the parties

[18] General Statutes § 46b-56c (f) is not mentioned in the separation agreement.

will pay postsecondary tuition for their children. The child must have been graduated from high school, desires to attend a fully accredited college or school, and matriculated in a course of study leading to an undergraduate degree. The next clause states that each party shall pay his or her proportionate share in accordance with his or her income at the time after the child has applied for financial assistance. The next sentence addresses the manner in which the decision as to the postsecondary educational institution the child is to attend is to be made, i.e., the parties shall consult with each other and with the child concerned with respect to the education of any or all of the children and with respect to the selection of schools or colleges which they shall attend. The selection of said schools and/or colleges shall be by *mutual agreement*.

In the present case, there is no dispute that the parties and their children mutually agreed that their daughter would attend Princeton University and their son would attend Dartmouth College. Because the parties *mutually agreed*, it is unnecessary to consider the next sentence of the article, which only applies when the parties are unable to agree on the *educational institution* and/or their respective obligations *therefore*. The word *therefore* refers back to the educational institution about which there is no agreement. Consequently, the court properly determined that the UConn cap and tuition limit on a four year degree from a Connecticut state university system did not apply under the present circumstances where the parties and their children mutually agreed that their daughter should attend Princeton University and their son should attend Dartmouth College.

Moreover, we will not construe an agreement to reach a patently absurd result. The separation agreement clearly is intended to have the parties and their children mutually contemplate, investigate, and agree on the

appropriate postsecondary educational institutions the children shall attend. Common sense dictates that tuition and related costs would be taken into consideration during that process. The plaintiff's construction of the agreement that after the family mutually agrees on the appropriate educational institutions for their children the parties will not pay the cost of tuition that exceeds that of the UConn cap would undermine the very purpose of the agreement. We can only imagine how family harmony would be disrupted and the disappointment, frustration, and perhaps anger, the child may feel after the family agrees to the postsecondary educational institution the child would attend but that she or he alone must bear any tuition burden that exceeds the UConn cap.[19] We decline to sanction the plaintiff's construction of the unambiguous language of the separation agreement. We, therefore, conclude that the court properly determined that the provision of the separation agreement regarding the UConn cap and the tuition limit of a four year college degree from the Connecticut state university system do not apply because the parties and their children mutually agreed on the postsecondary institutions the children would attend, i.e., Princeton University and Dartmouth College.

III

The plaintiff's final claim is that the court improperly denied her motion to modify unallocated alimony and child support. We do not agree.

[19] Both in the trial court and at oral argument before us, the plaintiff, who is herself a graduate of Princeton University, had no plan for how her children's tuition would be paid if not pursuant to the separation agreement. She expected the court to fashion a remedy. The court will not fashion a remedy in the face of the unambiguous plan in the parties' separation agreement.

The following facts are pertinent to this claim. On February 10, 2016, the plaintiff filed a motion for modification of unallocated alimony and support, postjudgment, asking the court to increase the amount of unallocated alimony and support she received from the defendant on the basis of his pretax income from employment. In the motion, the plaintiff quoted that portion of the agreement regarding the amount of alimony and support she was to receive from the defendant as of August 1, 2015. She also quoted paragraph 12.8 (c) of the agreement, which states in relevant part: "In no event shall the percentage formulae set forth in paragraph 12.1 (a), (b) and (c) of this Agreement or in any decree incorporating its provisions . . . be changed or amended by the parties or the court; except that either party shall be entitled to seek modification of the percentage formulae . . . in the event of a substantial change of circumstances of either party . . . or ordered by a [c]ourt that one or more of the children shall reside with the [defendant] as his or her primary residence. At the time that this agreement was executed the [plaintiff] had a salary . . . of $125,000 per year and for the preceding year her income was $75,000 per year. At the time that this agreement was executed, the [defendant] had [pretax income from employment] totaling $647,000 and for 2009 he had [pretax income from employment] for 2010 totaling $477,459." The plaintiff argued that since the dissolution judgment was rendered, her financial circumstances had changed substantially in that her salary had decreased from $125,000 per year to $95,000. She asked the court to increase the defendant's alimony obligation retroactive to the date the motion was served on the defendant.

Following a hearing on the motion, the court found that the plaintiff alleged several substantial changes in circumstances since January 27, 2011, namely that her earnings from employment had decreased significantly,

the defendant no longer paid child support for the parties' daughter, the amount of alimony she received from the defendant had decreased on August 1, 2015, pursuant to the dissolution agreement, and the defendant had filed a motion to terminate child support for the parties' son.

In issuing its order, the court stated that it had reviewed the motions of the parties and considered their testimony and all the evidence they had submitted. In addition, the court stated that it had considered the relevant rules, case law and statutory provisions, as well as the arguments of counsel.[20] The court found that the plaintiff has been employed by Shumway Capital, a private family foundation, for the past five years. At the time of dissolution, she was employed full-time at an annual salary of $125,000. The court found that at approximately the time she filed the motion to modify unallocated alimony and child support on February 10, 2016, the plaintiff became a part-time employee earning a salary of approximately $95,000 and that the decrease in the plaintiff's salary constituted a substantial change in circumstances. The court *also* found that the plaintiff's monthly expenses for shelter, transportation, the children and her liabilities had decreased since January 27, 2011.

In addition, the court found that following the change of custody with respect to the parties' daughter, the defendant has paid support to the plaintiff in accordance with the agreement and the court's orders. It also found that the agreement's original percentage formulae using the defendant's pretax income from employment to calculate and determine the plaintiff's unallocated support continues to be sufficient to fulfill its intended purpose to equalize the income of the parties and support the children. The court, therefore,

[20] Our review of the transcript of the hearing discloses that the court took judicial notice of prior proceedings in the file.

denied the plaintiff's motion to modify the percentage formulae of paragraph 12 of the agreement.

On appeal, the plaintiff claims that the court abused its discretion by denying her motion to increase her unallocated alimony and support. She argues that because the court determined that the reduction in her salary constituted a substantial change in circumstances; see General Statutes § 46b-86;[21] the court was obligated to consider all of the factors in General Statutes § 46b-82[22] to order alimony in accordance with the needs and financial resources of the parties, and she cites *Schwarz* v. *Schwarz*, 124 Conn. App. 472, 478, 5 A.3d 548 (once court determines a substantial change in circumstances exists, it must consider all factors in § 46b-82 to order alimony in accord with needs and financial resources of each party), cert. denied, 299 Conn. 909, 10 A.3d 525 (2010). In making this argument, the plaintiff fails to consider that the court stated that in ruling on the motion to modify unallocated alimony and child support, it had considered the relevant statutes and case law. A court need not "make explicit reference to the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." *Caffe* v. *Caffe*, 240 Conn. 79, 82–83, 689 A.2d 468 (1997); see also *Brown* v. *Brown*, 148 Conn. App. 13, 22, 84 A.3d 905 (court expressly stated

[21] General Statutes § 46b-86 (b) provides in relevant part: "In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

[22] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded . . . the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

it had considered all relevant statutes before rendering judgment), cert. denied, 311 Con. 933, 88 A.3d 549 (2014).

Moreover, "[a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in awarding alimony and dividing property as long as it considers all relevant statutory criteria. . . . No single criterion is preferred over others, and the trial court has broad discretion in varying the weight placed on each criterion under the circumstances of each case." (Internal quotation marks omitted.) *Brown* v. *Brown*, supra, 148 Conn. App. 22. "Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony . . . are relevant to the question of modification." (Internal quotation marks omitted.) *Borkowski* v. *Borkowski*, 228 Conn. 729, 737, 638 A.2d 1060 (1994).

Paragraph 12.8 (c) of the agreement states: "In no event shall the percentage formulae set forth in paragraph 12.1 (a), (b) and (c) of this Agreement or in any decree incorporating its provisions, in whole or in part, be changed or amended by the parties or the court; except that either party shall be entitled to seek a modification of the percentage formulae set forth in paragraphs 12.1 (a), (b) and (c) in the event of a substantial change of circumstances of either party . . . ." By the agreement's plain terms, the plaintiff was entitled to seek a modification of the formulae used to determine her unallocated alimony and child support on the basis of the defendant's pretax income from employment, but the agreement did not require that the formulae be modified on the basis of the substantial change of circumstances.

In the present case, the plaintiff's employment was reduced from full-time to part-time and her salary was

reduced from $125,000 to $95,000, which the court found to be a substantial change of circumstances. The court also found that there had been a significant reduction in the plaintiff's expenses for housing, transportation, and her children. Both of the children were then in the custody of the defendant and residing with him.

"Appellate courts look at the record, and determine whether the [trial] court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Caffe* v. *Caffe*, supra, 240 Conn. 83. We have reviewed the transcripts of the hearing on the parties' motions and the exhibits. The record discloses evidence that supports the court's finding that there has been a decrease in the plaintiff's expenses, most particularly with respect to housing. She had been living in an apartment paying $4700 a month in rent, but purchased a condominium that was in foreclosure and was then paying $2500.86 per month for the mortgage. She acknowledged that the interest payments on the mortgage and property taxes were tax deductible. She was able to purchase a Lexus "demo" automobile and continued to make contributions to her 401k plan. She works thirty hours a week and is partially covered by her employer's health insurance. The plaintiff presented no evidence that she has issues related to poor health or that she is unable to work. She holds a master of business administration degree. Moreover, the defendant has pointed out that the plaintiff's financial affidavit discloses that she has investments that yield significant dividends and interest.

As to the plaintiff's argument that the amount of money she received from the defendant was reduced due to the fact that she no longer was receiving child support for the parties' daughter, child support follows the child. The fundamental purpose of child support is to provide for the care and well-being of minor children.

Tomlinson v. *Tomlinson*, supra 305 Conn. 555. Moreover, the agreement contemplated that the children might live with the defendant, which constituted a substantial change of circumstances, warranting a change of unallocated alimony and child support. The court stated that the unallocated support the plaintiff was receiving continued to be sufficient to fulfill its intended purpose to equalize the income of the parties and support the children. The court, therefore, denied the plaintiff's motion to modify the percentage formulae of paragraph 12 of the agreement.

Both of the parties agree that the formulae used to calculate the amount of support the plaintiff is to receive from the defendant's pretax income from employment were not intended to equalize their incomes. According to the defendant, the parties agreed that the plaintiff would receive a greater amount of alimony as the defendant's income increased, but the amount of alimony as a percentage of that income would decline. The defendant notes that their incomes, even after he paid the plaintiff pursuant to the formulae, were never equal, even at the time of dissolution. He argues that "equalize" means that the parties' incomes could be balanced. The parties did not ask the court to articulate what it meant that the unallocated support provided under paragraph 12 of the agreement equalized their incomes, and we will not speculate as to its meaning. That finding, however, is not relevant to our determination of whether the court abused its discretion by denying the plaintiff's motion for modification of unallocated alimony and child support.

When these highly educated and sophisticated parties signed the agreement at the time their marriage was dissolved, they had negotiated its provisions with the assistance of counsel. They bargained for a change of unallocated support if one or both of their children decided to live with the defendant, and they bargained

for the percentage of support the plaintiff would receive from the defendant's pretax income from employment and that the percentages stepped down over time. There is no evidence in the record that the plaintiff has brought to our attention that the amount of unallocated alimony and support she receives is insufficient to meet her needs. See *Dombrowski* v. *Noyes-Dombrowski*, 273 Conn. 127, 132, 869 A.2d 164 (2005) (purpose of periodic alimony to provide continuing support). The court, therefore, did not abuse its discretion by denying the plaintiff's motion to modify unallocated alimony and child support.

The judgment is reversed with respect to the trial court's determination regarding the plaintiff's child support obligation and the date on which the defendant's child support obligation terminated, and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.