FEDERAL NATIONAL MORTGAGE ASSOCIATION *v.* PAUL BUHL ET AL.
(AC 40627)

Elgo, Bright and Sullivan, Js.

Syllabus

The plaintiff mortgage company sought, by way of summary process, to gain possession of certain premises occupied by the defendants, P and L. The plaintiff had acquired title to the subject property in connection with a foreclosure action commenced by L Co. against the defendants. In paragraph 2 of its summary process complaint, the plaintiff alleged, inter alia, that L Co. had transferred the property to it by a quitclaim deed that was recorded on the East Haddam land records. The defendants denied the material allegations of the complaint and filed a special defense alleging that the deed was invalid because its acknowledgement was undated. Following a three day trial, the trial court defaulted L for failure to appear and rendered judgment of possession in favor of the plaintiff with respect to both defendants. On appeal, the defendants challenged, inter alia, the trial court's interpretation and application of the statute (§ 47-36aa), commonly known as the validating act, which validates certain instruments, including deeds, that contain defective acknowledgements unless an action challenging the validity of the instrument is commenced and a notice of lis pendens is recorded in the land records of the town where the instrument is recorded within two years after the instrument is recorded, as well as those that contain insubstantial defects but are otherwise valid. *Held*:

1. The defendants could not prevail on their claim that the trial court erred in determining that they did not commence an action pursuant to § 47-36aa, which was based on their claim that, by denying the allegation in paragraph 2 of the complaint and asserting their special defense, they commenced an action under the statute; although § 47-36aa is silent as to what constitutes the commencement of an action, the defendants did not engage in the legal process articulated in the statute (§ 52-45a) that governs the commencement of civil actions and, thus, did not commence a civil action pursuant to that provision, and the defendants' contention that their special defense was analogous to a counterclaim and, therefore, commenced an independent action was unavailing, as they failed to claim any entitlement to a judicial remedy or relief in their special defense.
2. The trial court properly determined that the absence of an acknowledgment date and an execution date did not render the deed invalid pursuant to § 47-36aa; because the defendants did not commence an action challenging the validity of the deed, any defect caused by the lack of an acknowledgement date was cured under the statute, and § 47-36aa

clearly provides that notarial defects, such as the absence of an execution date, are insubstantial and will not invalidate a deed.

3. The defendants could not prevail on their unpreserved claim that the trial court abused its discretion by allowing the plaintiff's counsel to give certain unsworn testimony regarding the execution of the deed, the defendants having failed to prove that they were prejudiced by counsel's statements: the defendants failed to demonstrate that the trial court relied on the subject statements, as the court did not mention any of the statements made by the plaintiff's counsel with regard to the execution of the deed in rendering its decision, and it had no reason to rely on the statements because the deed was before the court as a full exhibit; moreover, counsel's statements as to the date of execution were not prejudicial because Connecticut is a recording state, and, therefore, the defendants' claim hinged on the date the deed was recorded, not the date it was executed.

4. The trial court did not abuse its discretion in rendering a default judgment against L for failure to appear at trial; it was uncontested that L failed to appear for all three days of the trial, and the defendants failed to present evidence that there was a proper excuse for her nonappearance.

Argued September 24—officially released December 25, 2018

Procedural History

Summary process action brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Vitale, J.*; thereafter, the defendant Luce Buhl was defaulted for failure to appear; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Paul D. Buhl, self-represented, with whom, on the brief, was *Luce L. Buhl*, self-represented, the appellants (defendants).

Peter A. Ventre, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The present appeal in this summary process action stems from the foreclosure of real property located at 12 Casner Road in East Haddam. The self-represented defendants, Paul Buhl and Luce Buhl,[1]

[1] We refer in this opinion to Paul Buhl and Luce Buhl, collectively, as the defendants, and individually by name where appropriate.

appeal from the judgment of possession rendered in favor of the plaintiff, Federal National Mortgage Association. On appeal, the defendants claim that the trial court (1) improperly determined that they did not commence an action pursuant to General Statutes § 47-36aa (a), (2) improperly determined that the deed to the subject property was valid despite notarial defects, (3) abused its discretion by allowing the plaintiff's counsel to give unsworn testimony, and (4) abused its discretion by rendering a default judgment against Luce Buhl for failure to appear at trial. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In 2016, the plaintiff acquired title to the property through a strict foreclosure action, while the defendants were living on the premises. On March 29, 2017, the plaintiff commenced this summary process action against the defendants. Paragraph 2 of the plaintiff's complaint alleged that "Liberty Bank[2] quitclaimed the property to [the plaintiff] and said deed was recorded September 28, 2016, on the East Haddam land records in volume 1012, pages 207–208." (Footnote added.)

On May 12, 2017, the defendants denied the material allegations of the complaint, including paragraph 2. The defendants also asserted a special defense that they had commenced an action against the plaintiff in federal District Court concerning the ownership of the property and that the federal action needed to be resolved before the underlying summary process action could proceed.[3]

[2] Liberty Bank was the plaintiff's predecessor in interest. Liberty Bank commenced a foreclosure action against the defendants in 2011. See *Liberty Bank* v. *Buhl*, Superior Court, judicial district of Middlesex, Docket No. CV11-6006186-S (November 18, 2016).

[3] The action referenced in the defendants' first special defense was dismissed by the District Court for lack of subject matter jurisdiction; *Buhl* v. *Grady*, United States District Court, Docket No. 3:16CV1808 (VLB) (D. Conn. November 8, 2016); and, subsequently, by the United States Court of Appeals for the Second Circuit as frivolous. *Buhl* v. *Grady*, United States Court of

The summary process action was tried to the court on June 5 and 26, and July 3, 2017. On June 26, 2017, the defendants filed a second special defense alleging that the deed to the property was invalid because its acknowledgment was undated. On July 3, 2017, the court rendered judgment against Paul Buhl on the merits and rendered a default judgment against Luce Buhl for failure to appear at trial. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendants' first two claims are based on their argument that the trial court misinterpreted and misapplied § 47-36aa. We begin with the standard of review for these claims. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The issue of statutory interpretation . . . is a question of law

Appeals, Docket No. 16-4111 (2d Cir. March 23, 2017). On October 2, 2017, the United States Supreme Court denied the defendants' petition for a writ of certiorari. *Buhl* v. *Grady*, U.S. , 138 S. Ct. 200, 199 L. Ed. 2d 117 (2017).

subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 380, 194 A.3d 759(2018).

Section 47-36aa, which is commonly known as the validating act, provides in relevant part: "(a) Conveyancing defects. Any deed, mortgage, lease, power of attorney, release, assignment or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in this state recorded after January 1, 1997, which instrument contains any one or more of the following defects or omissions is as valid as if it had been executed without the defect or omission unless an action challenging the validity of that instrument is commenced and a notice of lis pendens is recorded in the land records of the town or towns where the instrument is recorded within two years after the instrument is recorded: (1) The instrument contains a defective acknowledgment or no acknowledgment . . . . (b) Insubstantial defects. Any deed, mortgage, lease, power of attorney, release, assignment or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in this state recorded after January 1, 1997, which instrument contains any one or more of the following defects or omissions is as valid as if it had been executed without the defect or omission: (1) The instrument contains an incorrect statement of the date of execution or omits the date of execution . . . ."

I

The defendants first claim that the trial court erred in determining that they did not commence an action pursuant to § 47-36aa (a). Specifically, they argue that they commenced an action under § 47-36aa (a) by denying an allegation in the summary process complaint and asserting a special defense. We disagree.

Although § 47-36aa (a) is silent as to what constitutes commencement of an action, General Statutes § 52-45a provides that civil actions are commenced "by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day, the date and place for the filing of an appearance and information required by the Office of the Chief Court Administrator." The defendants did not engage in the legal process articulated in § 52-45a. They did not, therefore, commence a civil action pursuant to that provision.

The defendants also argue that their second special defense is analogous to a counterclaim and, therefore, commences an independent action. We disagree. "[A] counterclaim is an independent cause of action, and a special defense is not." *Sovereign Bank* v. *Harrison*, 184 Conn. App. 436, 444, A.3d (2018). Special defenses "[operate] as a shield, to defeat a cause of action, and not as a sword, to seek judicial remedy for a wrong." (Internal quotation marks omitted.) Id., 444–45, quoting *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 374, 143 A.3d 638 (2016). This court has held that a defendant's special defense did not commence a foreclosure action because the defendant "neither explicitly requested any judicial redress or relief nor alleged any facts from which it could be inferred that she was entitled to such relief." Id., 446–47. In the present case, the defendants similarly failed to claim any relief in their second special defense, which stated: "The deed by which the plaintiff claims to hold title is invalid because its acknowledgment is defective for failure to state a date as required by [General Statutes] § 1-34, and the defendants have caused a lis pendens concerning that issue to be recorded on the East Haddam land records, a certified copy of which is attached hereto, less than two years after the recordation of the deed." The trial court, therefore, properly determined that the defendants failed to commence an action as required by § 47-36aa (a).

II

The defendants' second claim is that the trial court erred in determining that the deed was valid pursuant to § 47-36aa. Specifically, they argue that the deed is void because neither the acknowledgment of the deed nor the deed itself are dated, and that, as a result, the plaintiff does not own the property. We disagree.

As a preliminary matter, because we conclude that the defendants did not commence an action under § 47-36aa (a), any defect caused by the lack of an acknowledgement date has been cured. See, e.g., *Chase Home Finance, LLC* v. *Morneau*, 156 Conn. App. 101, 107 n.7, 113 A.3d 445 (2015) ("§ 47–36aa (a) . . . validates defective conveyances if not challenged within two years"). We, therefore, need not address the merits of the defendants' argument that the deed was void because of a defective acknowledgment.

We next turn to the defendants' argument that the absence of an execution date rendered the deed invalid. It is uncontested that the deed from Liberty Bank to the plaintiff is undated. Section 47-36aa (b) (1), however, clearly states that such notarial defects are insubstantial and that they will not invalidate a deed. See *ARS Investors II 2012-1 HBV, LLC* v. *Crystal, LLC*, 324 Conn. 680, 687–88, 154 A.3d 518 (2017) (holding that, in mortgage foreclosure action, insubstantial defect listed in § 47-36aa (b) did not invalidate deed). We conclude, therefore, that the trial court properly determined that the absence of an execution date, like the absence of an acknowledgment date, does not render the deed invalid.

III

The defendants' third claim is that the trial court abused its discretion by allowing the plaintiff's counsel to give unsworn testimony regarding the deed. The

plaintiff argues that the trial court did not abuse its discretion because it did not rely on counsel's comments. We agree with the plaintiff.

The following additional facts are relevant to the resolution of this claim. On July 3, 2017, the parties appeared before the court to present final arguments, the presentation of evidence having concluded on June 26, 2017. In particular, Paul Buhl argued that the court should dismiss the complaint because of the alleged defect in the acknowledgment. During the plaintiff's argument, the following exchange occurred:

"[The Plaintiff's Counsel]: And additionally, Your Honor, with regard to that quitclaim deed, my office prepared it. My office prepared that deed, sent it over to Liberty Bank on July 19, 2016, and we received the executed deed back from them on July 25, 2016. So even though there's no date on it, our records, in our office, indicate that the deed was executed within that five or six day window and was executed—

"[Paul Buhl]: Objection. Counsel's testifying—

"The Court: Mr. Buhl, please, let him finish. I'll give you an opportunity to say whatever you want to say.

"[Paul Buhl]: All right. I apologize, Your Honor. I want to raise an objection.

"[The Plaintiff's Counsel]: And additionally, Your Honor, as we stated when we were here the last time, Connecticut is a recording state. The deed does not take effect until it is recorded. That deed might have been prepared in April or May. Prior to the conclusion of the litigation, we know, from dealing with these, that in many cases the deed, the property is being deeded from one bank to either . . . the present plaintiff here or Federal Home Loan Mortgage [Corporation] . . . and we prepare the majority of those deeds. When they're prepared and executed it doesn't matter until

it hits the land records. And we know that by the time it hit the land records it is properly witnessed and it does bear an acknowledgment. . . .

"The Court: Okay, Mr. Buhl I know you are anxious to respond.

"[Paul Buhl]: Just three really quick things, Your Honor. I did not intend to interrupt. I intended to object because counsel is, in effect, giving testimony, including hearsay testimony as to records that are back at the office in Hartford. And I don't think that's, you know, bring an affidavit, bring the records, something. Bring a witness."

Without waiting for a ruling on his objection, Paul Buhl proceeded to address the merits of the plaintiff's argument. Thereafter, the court addressed the merits of the defendants' claim regarding the allegedly defective acknowledgment without making any reference to the statements made by the plaintiff's counsel regarding how and when the deed was prepared.

"Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.2.1, p. 331. Unsworn "representations of counsel are not, legally speaking, evidence" upon which courts can rely. (Internal quotation marks omitted.) *Constantine* v. *Schneider*, 49 Conn. App. 378, 395, 715 A.2d 772 (1998); see also *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 154, 496 A.2d 476 (1985) ("[w]e note that, had the trial court relied entirely upon unsworn statements of the plaintiffs' counsel at [the] proceeding, the due process rights guaranteed the defendants . . . may well have been violated").

Because the defendants never requested a ruling by the court, the issue was not preserved. See, e.g., *McCarthy* v. *Chromium Process Co.*, 127 Conn. App. 324, 335, 13 A.3d 715 (2011) (declining to review claim where appellant failed to "move for an articulation . . . or to ask the trial judge to rule on an overlooked matter" [internal quotation marks omitted]). Even if we consider this claim to be properly preserved, it fails because the defendants did not prove that they were prejudiced by the statements made by the plaintiff's counsel during closing argument. Although the trial court did not rule on the defendants' objection to the statements, the defendants have failed to demonstrate that the trial court relied on the statements. In its decision, the trial court did not mention any of the statements made by the plaintiff's counsel with regard to the execution of the deed. Indeed, the court had no reason to rely on these statements because the deed was before the court as a full exhibit. Moreover, the statements by the plaintiff's counsel as to the date of execution were not prejudicial because Connecticut is a recording state, meaning that the defendants' claim hinges on the date the deed was recorded, not the date it was executed. See General Statutes § 47-10 ("[n]o conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies"). Accordingly, we conclude that the defendants' claim is without merit.

IV

Finally, the defendants claim that the trial court erred in rendering a default judgment against Luce Buhl for failure to appear at trial. Specifically, they argue that Luce Buhl had a proper excuse for not attending—there were no facts to be tried or testimony to be offered, and Luce Buhl's position in the case was identical to that of Paul Buhl, who was present. The plaintiff argues that this claim is not reviewable because Luce Buhl did

not raise it at trial, and, alternatively, that the entry of a default against Luce Buhl was not an abuse of discretion. We agree with the plaintiff that the court did not abuse its discretion in rendering a default judgment against Luce Buhl.

The following additional facts are relevant to the resolution of this claim. Luce Buhl received notice that the case would be tried on June 5 and 26, and July 3, 2017. Despite having received notice, Luce Buhl failed to appear for trial, and on July 3, 2017, the trial court entered a default against her for failure to appear. The court stated the following in support of its ruling: "[Luce] Buhl is not here . . . . She didn't appear June 5, didn't appear [July 3] and didn't appear . . . June 26."

At the outset, we must address the plaintiff's argument that this claim was not preserved. Practice Book § 61-10 provides in relevant part: "It is the responsibility of the appellant to provide an adequate record for review. . . ." If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim. Although Luce Buhl did not raise this claim at trial, we determine that it is reviewable because the record is adequate. There is a clear record of the court's decision to enter a default against Luce Buhl. The claim also is reviewable pursuant to Practice Book § 60-5 because the court defaulted Luce Buhl subsequent to trial. Moreover, the defendants are self-represented, and "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . ." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 481, 129 A.3d 716 (2015).

The defendants' claim, however, ultimately fails because it was soundly within the court's discretion to

render a default judgment against Luce Buhl. "It is well established that "[e]ntry of a . . . default for failure to appear for trial is a matter left to the sound discretion of the trial court. . . . Practice Book § 17-19 provides in relevant part: If a party . . . fails without proper excuse to appear in person or by counsel for trial, the party may be nonsuited or defaulted by the judicial authority." (Internal quotation marks omitted.) *Housing Authority* v. *Weitz*, 163 Conn. App. 778, 782, 134 A.2d 749 (2016). It is uncontested that Luce Buhl failed to appear for all three days of trial. Additionally, the defendants failed to present evidence that there was a proper excuse for Luce Buhl's nonappearance.[4] We conclude, therefore, that the trial court did not abuse its discretion in rendering a default judgment against Luce Buhl.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD M. *v.* COMMISSIONER OF CORRECTION* (AC 41405)

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

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and risk of injury to a child, filed an amended second petition for a writ of habeas corpus, claiming that D, the habeas counsel who represented

[4] The defendants argue that the fact that Luce Buhl's position was identical to Paul Buhl's position is a proper excuse for her nonappearance. They fail, however, to point to any authority supporting this assertion. Furthermore, given that the defendants admit that their positions were identical and that we have concluded that the issues raised by Paul Buhl are without merit, Luce Buhl was not impacted by the rendering of the default judgment.

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

him in his first habeas action, had rendered ineffective assistance. Specifically, the petitioner alleged that D rendered ineffective assistance as habeas counsel by neglecting to allege that the petitioner's trial counsel, O, rendered ineffective assistance at the criminal trial by failing to have the petitioner examined by a physician or otherwise present evidence regarding the petitioner's circumcision. The habeas court found, inter alia, that O did present the testimony of the petitioner and A, his girlfriend at the time of the alleged abuse, that the petitioner was circumcised, and that that testimony directly conflicted with the testimony of the victim and her mother, who stated that he was uncircumcised. The court held that the import of medical evidence or photographs was clear because the petitioner could not simultaneously be circumcised and uncircumcised. The habeas court granted the second petition for a writ of habeas corpus and rendered judgment thereon, from which the respondent, the Commissioner of Correction, on the granting of certification, appealed to this court. On appeal, the respondent claimed that the habeas court incorrectly determined that evidence of whether the petitioner was circumcised at the time of trial, which occurred years after the alleged abuse, was relevant and admissible at trial, disregarded O's tactical decision to present evidence of the petitioner's circumcised penis only by means of testimonial evidence, and relied on O's admission that his failure to present physical evidence was a mistake. *Held*:

1. The habeas court properly determined that O's conduct fell below the wide range of reasonable professional assistance: any independent evidence of the petitioner's circumcision, even after the alleged assaults, would have met the low standard for relevance of evidence, as such evidence needs only to slightly support, or make more probable, that the petitioner was circumcised during the time of the alleged assaults, and O's failure to offer additional evidence regarding the petitioner's circumcision could not be justified as a strategic decision to present evidence of the petitioner's circumcised penis only by means of testimonial evidence, as O knew from the onset of the case that a central issue was whether the petitioner was circumcised at the time of the alleged crimes, O admitted that there was no strategic reason for not presenting physical evidence of the circumcision and that he was distracted by other evidence in the case, O's failure to recognize the importance of medical records or other independent evidence of the petitioner's circumcision was objectively unreasonable and clear from the record, and, thus, the need to present such additional evidence beyond the arguably discredited testimony of the petitioner and A should have been obvious; moreover, the habeas court properly concluded that D also rendered ineffective assistance of counsel, as O rendered ineffective assistance, and D failed to raise that as a claim in the petitioner's first habeas trial even though the petitioner had included that claim in his pro se petition and even though O tried to convey to D that he thought the circumcision issue was the most fruitful area for inquiry.

2. The respondent could not prevail on the claim that any alleged prejudice to the petitioner due to O's failure to offer medical records, photographs, or other evidence showing that the petitioner was circumcised was speculative: there was a reasonable probability that further evidence of the petitioner's circumcision would have caused a different result, as the petitioner received a fifty year sentence based, to a significant degree, on the testimony from the victim and her mother that conflicted with the testimony from the petitioner and A over whether the petitioner was circumcised at the time of the alleged crimes, and the prejudicial effect of the absence of that evidence was not merely speculative, as a note from the jury asking why there was no medical evidence of the petitioner's circumcision clearly indicated that the jury was concerned about that issue; accordingly, the petitioner was prejudiced by O's failure to provide independent evidence of the petitioner's circumcision and, thus, was also prejudiced by D's performance in failing to raise this claim during the first habeas appeal.

Argued October 10—officially released December 25, 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, *Graham, J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Affirmed.*

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Angela Macchiarulo*, senior assistant state's attorney, and *Michael Proto*, assistant state's attorney, for the appellant (respondent).

Jennifer B. Smith, assigned counsel, for the appellee (petitioner).

Opinion

LAVINE, J. This appeal arises out of the habeas court's granting of the second petition for a writ of habeas corpus filed by the petitioner, Edward M. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court, claiming that the court improperly (1) used the petitioner's hospital records for a purpose other than for which they were

admitted[1] and (2) concluded that the petitioner's prior habeas counsel was ineffective and caused prejudice to the petitioner by failing to allege the ineffective assistance of the petitioner's criminal trial counsel, who failed to present evidence regarding the petitioner's circumcised penis. We disagree and, therefore, affirm the judgment of the habeas court.

The following facts and procedural history, as set forth in the habeas court's memorandum of decision, are relevant to our resolution of the issues on appeal. The petitioner was arrested in the underlying criminal matter in April, 2007, and charged with five counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2) for crimes he was alleged to have committed in 2004, 2005, and 2006. Attorney John O'Brien represented the petitioner in his 2008 criminal trial.

The habeas court found: "The case arose from sexual abuse allegations that the complainant daughter, J, made against her biological father, [the petitioner]. There was no physical evidence of sexual abuse and, as the state admitted in closing argument at the criminal trial, the case was a contest of credibility between [the petitioner] and his daughter."

In a forensic interview, J described the petitioner's penis as having skin on it and wrinkles. At trial, J and her mother testified that the petitioner was uncircumcised. The petitioner, as well as A, his girlfriend at the

[1] The respondent argues that the hospital records were admitted into evidence solely for the purpose of demonstrating what trial counsel had available in his file and that the habeas court erred in considering the substance of the records. Even if, as the respondent argues, the habeas court erred in finding that the hospital records would have established that the petitioner was circumcised at the time he was admitted to the hospital in 2008, any error is harmless. There was ample admissible evidence that the petitioner was circumcised at the time of his trial in 2008. We, therefore, need not address this claim.

time of the alleged abuse, testified that he was circumcised at the time of the alleged assaults. O'Brien did not offer the petitioner's medical records, testimony from a neutral third party or medical witness, or photographs of the petitioner's penis into evidence.

The habeas court further stated: "During the first day of deliberations, the jury sent out a note, [asking]: 'Why wasn't there medical certification of his [circumcision] . . . obtained for evidence.' The court instructed the jury that they needed to decide the case based on the evidence presented by counsel. On the third day of deliberations . . . the jury [found the petitioner guilty] of all seven counts." The trial court sentenced the petitioner to a total effective term of fifty years incarceration followed by fifteen years of special parole. This court upheld the conviction in *State* v. *Edward M.*, 135 Conn. App. 402, 41 A.3d 1165, cert. denied, 305 Conn. 914, 46 A.3d 172 (2012).

In 2009, the self-represented petitioner filed a petition for a writ of habeas corpus. In that habeas action, the petitioner's appointed counsel, Christopher Duby, filed an amended petition but did not allege that O'Brien rendered ineffective assistance due to his failure to offer evidence that the petitioner was circumcised. The petition was denied. The petitioner filed and then withdrew an appeal of that judgment. In 2014, the petitioner initiated the present habeas proceeding. In 2017, the petitioner filed an amended habeas petition, alleging that Duby rendered ineffective assistance as habeas counsel by neglecting to allege that O'Brien rendered ineffective assistance at the criminal trial by failing to have the petitioner examined by a physician or otherwise present evidence regarding the petitioner's circumcision. The habeas court granted the amended petition, and the respondent, on the granting of certification, appealed. Additional facts will be set forth as necessary.

"Our standard of review in a habeas corpus proceeding challenging the effective assistance of [prior habeas] counsel is well settled. Although a habeas court's findings of fact are reviewed under the clearly erroneous standard of review . . . [w]hether the representation a [petitioner] received at [a prior habeas proceeding] was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 797, 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).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. [Id., 842]. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a

breakdown in the adversary process that renders the result unreliable. *Lozada* v. *Warden*, supra, 842–43. In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts 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. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." (Citations omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–65, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

I

The respondent claims that the habeas court improperly determined that Duby rendered ineffective assistance by failing to allege that the petitioner's criminal

trial counsel was ineffective for failing to present certain evidence regarding the petitioner's circumcision. Specifically, the respondent claims that the habeas court incorrectly (1) determined that evidence of whether the petitioner was circumcised at the time of trial, which occurred years after the alleged abuse, was relevant and admissible at trial,[2] (2) disregarded O'Brien's tactical decision to present evidence of the petitioner's circumcised penis only by means of testimonial evidence, and (3) relied on O'Brien's admission that his failing to present physical evidence was a mistake. We are unpersuaded.

The habeas court found that "O'Brien did present the testimony of the petitioner and [A] that [the petitioner] was circumcised. Their testimony directly conflicted with the testimony of J and her mother that the petitioner was uncircumcised. The import of independent and neutral medical evidence, or of photographs, is clear because the petitioner cannot simultaneously be circumcised and uncircumcised. . . .

"[P]hotographs of [the petitioner's] penis, showing him to be circumcised, were placed into evidence at the second habeas trial . . . after foundation questions established that they fairly and accurately showed his penis both as it looked at the current time and as it looked from 2002 to the present. . . .

"The relevancy of such contemporary photographic and medical record evidence at the criminal trial is readily apparent . . . ." The respondent claims that the habeas court erred in reaching that conclusion, and argues that any contemporaneous photographs and medical records would be irrelevant to the question of whether the petitioner was circumcised during the time in which the assaults occurred. We disagree.

[2] The respondent additionally argues that there was no evidence that the medical records in O'Brien's file would have been admissible under a business record exception, but fails to argue any reason for inadmissibility other than relevance. Therefore, we only address the relevance issue.

The well settled standard for relevance of evidence is extremely low. " 'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Emphasis added.) Conn. Code Evid. § 4-1. "It is axiomatic that, in order to be admissible, evidence must be relevant to an issue in the case in which it is offered. Evidence need not be conclusive to be relevant . . . and [t]he fact that evidence is susceptible of different explanations or would support various inferences does not affect its admissibility, although it obviously bears upon its weight. So long as the evidence may reasonably be construed in such a manner that it would be relevant, it is admissible. . . . Evidence is relevant if it has a logical tendency to aid the trier in the determination of an issue. . . . We have also held that evidence need not exclude all other possibilities [to be relevant]; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Citations omitted; internal quotation marks omitted.) *State* v. *Marra*, 222 Conn. 506, 521, 610 A.2d 1113 (1992). "Although it may be the case that this evidence would not have exonerated the defendant unequivocally, such is not the standard for relevance." *State* v. *Cerreta*, 260 Conn. 251, 263, 796 A.2d 1176 (2002).

The respondent argues that the evidence available to O'Brien through medical records in his file, photographs, or third-party examination would only establish that the petitioner was circumcised in 2008, two years after the abuse ended, and would, thus, be irrelevant. To be relevant, however, the evidence offered need not show definitively that the petitioner was circumcised in 2004, 2005, or 2006. To be relevant, the proffered evidence needs only to *slightly* support, or make more *probable*, that the petitioner was circumcised during

that time period. Any evidence of the petitioner's circumcision, even after the alleged assaults, would meet that low burden. The inference to be drawn from such evidence is a determination that is proper for a jury, and not the court.[3] Likewise, whether to give such evidence no weight, little weight, or much weight, is up to the jury.

O'Brien's failure to offer such evidence was error and not, as the respondent argues, a tactical decision. O'Brien knew from the onset of the case that a central issue was whether the petitioner was circumcised at the time of the alleged crimes, and, thus, he was aware that establishing the fact that the petitioner was circumcised was of paramount importance.[4] Yet, O'Brien relied on the testimony of the petitioner and A alone to establish that the petitioner was circumcised at the time of the alleged crimes, despite the fact that both witnesses arguably had been discredited[5] and O'Brien had at his disposal multiple ways of introducing evidence that the

[3] In response to such evidence at trial, the state could have argued or presented evidence that the petitioner was not circumcised during childhood.

[4] Given that O'Brien testified that he had actually viewed the petitioner's penis, he should have recognized the importance of neutral additional evidence of the petitioner's circumcision.

[5] Notably, O'Brien testified that he did not consider that the jury might not credit the testimony of the petitioner or A even though the petitioner had a perjury conviction and A was impeached with welfare fraud. The following exchange occurred between the petitioner's habeas counsel and O'Brien:

"Q. At the time of the trial, did you consider that the jury might not credit the petitioner's testimony that he was circumcised because of his prior perjury conviction?

"A. That—that thought did not occur to me. . . . I didn't consider the perjury conviction of him once we were able to explain it. I did not expect that it would be a proper basis for anyone to disbelieve or discredit all of his testimony.

"Q. Did you consider that the jury might not credit his girlfriend's testimony because she was impeached on [cross-examination] with welfare fraud?

"A. That thought did not occur to me."

petitioner was circumcised at the time of trial. O'Brien admitted that he did not consider taking a photograph and offering it or having some appropriate person view the petitioner's circumcised penis and testify.

This failure to offer additional evidence regarding the petitioner's circumcision cannot be justified as a strategic decision. O'Brien testified, "in all candor, I was distracted . . . ." He admitted that there was no strategic reason for not presenting physical evidence of the circumcision and conceded that failing to present physical evidence was a "huge mistake" that he "missed." O'Brien testified, "I thought I did not have any other evidence to offer at that point in time . . . . I felt that there was nothing more I could do about the circumcision issue, when now or within days of the verdict, I recognized there were five or six or twenty-seven things I could have done about the circumcision issue, even though I had medical records in my hand." As the habeas court states in its memorandum of decision, "O'Brien offered no tactical justification for not offering the certified medical records or a photograph of [the petitioner's] privates. . . . Indeed, in disarmingly candid testimony, O'Brien admitted that he was distracted from the issue by other evidence in the case and 'missed' the [importance of the medical records]."[6]

The court also stated: "Given that the physical condition in question is circumcision, a permanent surgical

[6] It is noteworthy that the state and the court drew attention to the circumcision issue and the medical records, and O'Brien still failed to offer any additional available evidence of the petitioner's circumcision. During the testimony of A, the state informed the habeas court that it was considering having the petitioner examined, highlighting the importance of whether the petitioner was circumcised. Furthermore, at the time when there were discussions between counsel and the court about a potential examination, the court noted that the petitioner's hospital records were unsealed and that O'Brien was not intending to use them. Rather than recognizing the record's importance with regard to the circumcision issue, O'Brien reaffirmed that he was not going to use the records.

procedure, given that [the petitioner] was thirty-five years old at the time of the criminal trial, at least thirty-one at the time of the charged criminal acts, and that he testified that he was circumcised at a young age, given that his circumcised state was in dispute and important in testing the credibility of J as to serious sexual assault charges and coincidentally, or not, that of her mother as well, and given that there was no physical evidence of the assaults," the importance of offering the certified medical or photographic evidence should have been recognized by competent counsel and "could have been easily offered by competent counsel at that criminal trial with standard foundation questions . . . ." (Footnote omitted.) The failure to recognize the importance of the medical records or other independent evidence of the petitioner's circumcision is one that is objectively unreasonable and clear from the record. The need to present additional evidence beyond the testimony of the petitioner and A should have been obvious, and is not based, as the respondent argues, on O'Brien's regret in hindsight. We, therefore, agree with the habeas court that O'Brien's conduct fell below the wide range of reasonable professional assistance.

Additionally, it is clear that Duby rendered ineffective assistance of counsel, as the habeas court concluded. In the first habeas trial, Duby failed to allege that O'Brien rendered ineffective assistance by neglecting to present additional evidence of the petitioner's circumcision, even though the petitioner had included this claim in his pro se petition. Duby's testimony to the habeas court indicated that he might be confusing the petitioner's case with another similar case, and that he did not "remember if the issue of circumcision came up at the criminal trial such to the point that it would have been that distinctive." Additionally, O'Brien testified that he "effusively" told Duby his thoughts on the circumcision claim and "tried to convey to Attorney Duby that [he]

thought [the circumcision issue] was the most fruitful area for . . . inquiry . . . .'' As was stated in the habeas court's memorandum of decision, ''[r]easonably competent habeas counsel would have investigated the claim identified by the petitioner and presented the available evidence to the first habeas court . . . . That failure, to a reasonable probability, prejudiced [the petitioner] by depriving him of the same successful outcome on the circumcision issue in his first habeas trial as was achieved in this second habeas trial.'' As O'Brien rendered ineffective assistance, and Duby failed to raise that as a claim in the petitioner's first habeas trial, we agree with the habeas court that Duby rendered ineffective assistance as well.

II

The respondent's final claim is that any alleged prejudice to the petitioner due to O'Brien's failure to offer medical records, photographs, or other evidence showing that the petitioner was circumcised was speculative. We disagree.

The petitioner received a fifty year sentence based, to a significant degree, on the testimony from J and her mother that conflicted with the testimony from the petitioner and A over whether the petitioner was circumcised at the time of the alleged crimes. This question was the major point of dispute at trial. We conclude that there is a reasonable probability that further evidence of the petitioner's circumcision would have caused a different result. Notably, ''it is of particular significance that we need not speculate about the prejudicial effect that the [absence of the] evidence could have had on the jury in this case, because the jury's note to the court during deliberations provides insight into the facts that the jury considered when it was reaching its verdict.'' *State* v. *Miguel C.*, 305 Conn. 562, 577, 46 A.3d 126 (2012). In the present case, the jury's note, sent on the

first day of deliberations, asking why there was no medical evidence of the petitioner's circumcision, clearly indicates that the jury was concerned about this issue.

We, therefore, conclude that the petitioner was prejudiced by O'Brien's failure to provide evidence of the petitioner's circumcision and, thus, was also prejudiced by Duby's performance in failing to raise this claim during the first habeas appeal. "Prejudice in this case means that but for habeas counsel's ineffectiveness, there would be a reasonable probability that the habeas court would have found that the petitioner is entitled to a new trial." *Harris* v. *Commissioner of Correction*, 108 Conn. App. 201, 210 n.3, 947 A.2d 435, cert. denied, 288 Conn. 911, 953 A.2d 652 (2008). But for Duby's failure to allege the successful claim of ineffective assistance of trial counsel for neglecting to present evidence regarding the petitioner's circumcised penis, there is a reasonable probability that the first habeas court would have found in favor of the petitioner and granted a new trial. Accordingly, we agree with the habeas court that Duby rendered ineffective assistance.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE GABRIELLA C.-G. ET AL.*
(AC 41742)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her five minor children. On appeal, she claimed, inter alia, that the trial court erred in

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

finding that the Department of Children and Families had made reasonable efforts to reunify the mother with her children and in making certain statements regarding the best interests of the children. *Held* that the findings of the trial court, as set forth in its thoughtful and thorough decision, were sufficiently supported by the evidence and not clearly erroneous; accordingly, the judgments were affirmed.

Argued November 13—officially released December 18, 2018**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll, J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Kirsten F., self-represented, the appellant (respondent mother).

Stephen G. Vitelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Priscilla Hammond, for the minor child Dallas C.

Ryan Ziolkowski, for the minor child Gabriella C.-G. et al.

Peter D. Catania, for the father Brandon M.

Opinion

PER CURIAM. The respondent mother, Kirsten F., appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her five minor children, Gabriella, Mason, Dallas, Lillyana and Zuri.[1] She claims on appeal that the court erred in (1) violating her constitutional rights

** December 18, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The parental rights of T.G., the father of Gabriella, were also terminated, and he has not appealed. The parental rights of J.S., the father of Mason,

by holding her to "unlawful, vague, high standards of care, compared to all the other parties . . . associated with the care and keeping" of the five children, (2) denying "the right to a comparison of the foster parents . . . and [the Department of Children and Families (the department)] provided level of care that she was held to," including not allowing an injury report from the Office of the Child Advocate as to Dallas, (3) finding that the department made "reasonable efforts" to reunify her with any of her five children, (4) making the statement, "this family can't and won't benefit from reunification"; (internal quotation marks omitted); and (5) stating that "it's in the best interest"; (internal quotation marks omitted); of the five minor children for her to lose her parental rights.

On April 13, 2018, after hearing from seventeen witnesses and considering seventy exhibits over six days, the court ordered, inter alia, the termination of the parental rights of the respondent mother, stating: "Wherefore, after due consideration of the children's need for a secure, permanent placement, and the totality of the circumstances, and having considered all statutory criteria, and having found by clear and convincing evidence that reasonable efforts at reunification with [the parents] were made and that each was unwilling or unable to benefit from those efforts, and that grounds exist to terminate [the respondent]'s . . . parental rights for a failure to rehabilitate as alleged . . . it is in the children's best interest to do so . . . ."

Under the applicable standard of review of the adjudicatory ground of failure to rehabilitate, we must determine "whether the trial court could have reasonably

Dallas and Zuri also were terminated, and he has not appealed. The court adjudicated B.M. to be the father of Lillyana, and the petitioner did not seek to terminate his rights. Coguardianship of Lillyana was awarded to her paternal grandmother and B.M.

concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, L. Ed. 2d (2018). "It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous." *In re Athena C.*, 181 Conn. App. 803, 811, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018).

Having reviewed the findings of the court as set forth in its thoughtful and thorough decision, we conclude that under the applicable standards of review, they are sufficiently supported by the evidence and not clearly erroneous.

The judgments are affirmed.