STATE OF CONNECTICUT *v.* ISMAIL H. ABDUS-SABUR
(AC 41515)

Keller, Prescott and Pellegrino, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court. He claimed, inter alia, that that there was insufficient evidence to support his murder conviction because the state did not establish that he had the specific intent to cause the death of the victim. *Held*:

1. The defendant's claim that there was insufficient evidence to prove the specific intent element necessary to support his murder conviction was unavailing: the jury reasonably could have inferred from the evidence and testimony that the defendant had the requisite intent to kill, as an intent to kill could have been inferred from his use of a deadly weapon when he repeatedly shot a firearm into a group of people who were standing together within a close range, striking and killing the victim, and the shooting followed an altercation earlier in the night between the defendant and the victim's two sons and, thus, the defendant had a motive to seek retribution; moreover, there was evidence of the defendant's conduct after the shooting from which the jury could have inferred an intent to kill, as the defendant threatened the victim's sons the day after the shooting, and the defendant displayed a consciousness of guilt by immediately fleeing the scene following the shooting, travelling out of town the following day, and leaving the state later that week.
2. The defendant could not prevail on his claim that the court improperly denied his request for a third-party culpability instruction, as the defendant did not establish a direct connection between the third party, C, and the offense with which the defendant was charged; the only evidence before the jury suggesting that C was the shooter was the testimony of a witness that another person had told her that C was the shooter, which was admitted as a prior inconsistent statement for the sole purpose of impeaching the witness, and defense counsel conceded at oral argument before this court that there was no evidence regarding C's culpability that was admitted for substantive proposes.
3. The defendant's claim that the trial court abused its discretion in admitting into evidence testimony regarding the defendant's alleged gang affiliation, which he claimed constituted improper uncharged misconduct evidence, was not reviewable; the defendant failed to address in his principal or reply brief to this court how the allegedly improper admission of the uncharged misconduct evidence constituted harmful error, and although he addressed the prejudicial effect of the uncharged misconduct evidence in his principal brief, prejudicial effect and harmful error are not necessarily equivalent and must be briefed separately.

Argued February 11—officially released June 18, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, manslaughter in the first degree with a firearm, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal as to the count of murder; verdict and judgment of guilty of murder and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Jodi Zils Gagné, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Cynthia S. Serafini* and *Don E. Therkildsen, Jr.*, senior assistant state's attorneys, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Ismail H. Abdus-Sabur, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant claims on appeal that (1) there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent to kill, as required for the crime of murder, (2) the trial court improperly denied his request for a third-party culpability instruction, and (3) that the court improperly admitted evidence of his gang affiliation. We disagree and, accordingly, affirm the judgment of the trial court.

The facts, as could have been reasonably found by the jury, and procedural history, are as follows. On the evening of January 17, 2014, the defendant was at an apartment on the third floor of a Waterbury housing complex known as "Brick City." The defendant's

friends, Arvaughn Clemente and Daniel Clinton, were hosting a house party at the apartment. The defendant's brother, Isa Abdus-Sabur (Isa), and Ryan Curry, Sthalron Freeman, and Katrina Montgomery were also in attendance. Clemente was dating Ja-Ki Calloway, who was also in the apartment. Calloway's father, Kareem Morey, Sr. (victim), rented a second floor apartment in the same complex, where he resided with his adult son, Kareem Morey, Jr. (Kareem). On the evening of January 17, 2014, his other son, Kentrell Morey, was also at the housing complex.

That night, Calloway's brother, Kareem learned that Clemente had assaulted Calloway, and became angry. Kareem and Kentrell then presented themselves at the third floor apartment and demanded that Calloway leave the apartment, but she refused. Kareem wanted to fight Clemente for having assaulted his sister. A verbal altercation then ensued between the Morey brothers and the men inside the apartment, which spilled onto the landing outside the apartment. The altercation escalated into a fist fight between a number of the party attendees and the Morey brothers.

After the fight ended, the Morey brothers, upset by the altercation, left and walked to a nearby neighborhood to recruit additional people to renew the fight. They also called the victim, who had not been present at the initial altercation, and he informed them that he would return home. When the Morey brothers left, the partygoers returned to the third floor apartment. At this point, Montgomery overheard the defendant mention a gun to the other men at the party.

At about 10:30 p.m., the Morey brothers returned to Brick City with four additional men. Around this time, the victim also returned and parked his car on the street outside of the housing complex. The Morey brothers then entered the interior courtyard of Brick City through a passage from the street and climbed the

stairs to the landing outside of Clemente and Clinton's third floor apartment. The victim remained standing at ground level in the courtyard near the foot of the stairs. The Morey brothers began kicking Clemente and Clinton's apartment door. Eventually, the door to the apartment opened, but all the lights were off inside the apartment. Shortly thereafter, Kareem heard the "click, click" sound of a gun. The Morey brothers then fled by descending the stairs toward the courtyard.

As the Morey brothers retreated down the stairs, the occupants of Clemente and Clinton's apartment emerged onto the third floor landing overlooking the courtyard. Within the crowd on the third floor porch were the defendant, Isa, Clemente, Clinton, Curry, and Freeman. The defendant then began firing a black handgun from the railing of the landing toward the people in the courtyard below.

By the time the defendant started shooting, the Morey brothers had arrived at the bottom of the stairs, where the victim was standing. When the victim heard the first gunshot, he pushed Kareem out of the way. The victim was then struck in the chest with a .45 caliber bullet. He told his sons that he had been hit and ran out of the courtyard through the passage toward his parked vehicle. The victim was driven to St. Mary's Hospital in Waterbury, where he later died as a result of the gunshot wound to his chest.

Following the shooting, the defendant and Isa ran to the defendant's car and left Brick City. The next day, the defendant and Isa pulled up in a sports utility vehicle alongside Kentrell's girlfriend, Zyaira Cummings, while she was walking on a street near Brick City. The defendant then said to Cummings, "they're next," which she interpreted to be a threat against the Morey brothers, whom she then warned about the interaction. On January 18, 2014, the day after the shooting, the defendant

fled to Southington. On January 21, 2014, the defendant traveled to New York City. That same day, the police obtained a warrant for his arrest. The defendant eventually turned himself in on January 27, 2014.

After a trial by jury, the defendant was convicted of murder and criminal possession of a firearm. The court sentenced the defendant to forty-five years of incarceration for his conviction of murder and two years of concurrent incarceration for his conviction of criminal possession of a firearm, for a total effective sentence of forty-five years of incarceration. This appeal followed.

I

The defendant claims that there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent to cause the death of the victim.[1] We disagree.

The following additional procedural history is relevant to this claim. At the close of the state's evidence, the defendant made a motion for a judgment of acquittal, contending that the evidence was insufficient to prove beyond a reasonable doubt that he intended to cause the death of the victim. Specifically, defense counsel argued that the evidence that the defendant possessed and fired a firearm was insufficient to establish the requisite intent to cause the death of the victim. The court denied the defendant's motion.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict.

[1] For jurisprudential reasons, we address the sufficiency of the evidence claim first, although this differs from the order the claims were presented by the defendant in his principal appellate brief.

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246, 856 A.2d 917 (2004).

"Because [t]he only kind of an inference recognized by the law is a reasonable one [however] . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [T]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it

speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 93, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, supra, 271 Conn. 246–47.

"[I]t is well settled that the specific intent to kill is an essential element of the crime of murder. To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from

conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 780, 59 A.3d 221 (2013).

Finally, "transporting a deadly weapon to the location where that weapon ultimately is used supports an inference of an intent to kill." *State* v. *Otto*, 305 Conn. 51, 71, 43 A.3d 629 (2012). Moreover, "an intent to kill can be inferred *merely* from the use of a deadly weapon on another person." (Emphasis added.) *State* v. *McClam*, 44 Conn. App. 198, 210, 689 A.2d 475, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). "One who uses a deadly weapon upon a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was an intent to kill. . . . A pistol . . . or gun is a deadly weapon per se." (Citations omitted; internal quotation marks omitted.) *State* v. *Rasmussen*, 225 Conn. 55, 72, 621 A.2d 728 (1993).

In the present case, the jury was presented with evidence that the defendant repeatedly shot a firearm into a group of people who were standing together within a close range, striking and killing the victim. Therefore, an intent to kill can be inferred based solely on the defendant's use of a deadly weapon on another person. Moreover, even if Kareem was the intended target, the fact that the defendant struck the victim does not undermine the existence of the necessary specific intent to cause the death of another person. See *State* v. *Gary*, 273 Conn. 393, 411–12, 869 A.2d 1236 (2005) (defendant who, under chaotic circumstances, shot bystander rather than intended target possessed intent to kill).

"The doctrine of transferred intent operates to render a defendant culpable of the murder of a third person when the defendant causes the death of that third person with the intent to cause the death of someone else. . . . The principle, which is reflected in the express language of § 53a–54a (a),[2] represents a policy determination by the legislature that a defendant who engages in such conduct is no less culpable than if he had killed his intended victim." (Citations omitted; footnote added.) *State* v. *Courchesne*, 296 Conn. 622, 719, 998 A.2d 1 (2010).

Furthermore, the events leading to and immediately following the victim's death support a finding that the defendant possessed the intent to kill. The shooting followed an altercation earlier in the night between the partygoers, including the defendant and the Morey brothers. Accordingly, the defendant had a motive to seek retribution. See *State* v. *Gary*, supra, 273 Conn. 407 (evidence that defendant had been involved in altercation with intended victim on night of murder, and intended victim had punched defendant, supported inference that defendant had motive to kill).

Additionally, there was evidence that the defendant fled the scene directly after the shooting, travelled out of town the next day, and travelled out of state later that week. These facts are indicia of an intent to kill. See *State* v. *Melendez*, 74 Conn. App. 215, 223 n.5, 811 A.2d 261 (2002) ("[T]he defendant's fleeing the scene [of the murder] and subsequent flight to Puerto Rico are evidence of his consciousness of guilt. 'We have in the past considered consciousness of guilt evidence as part of the evidence from which a jury may draw an inference of an intent to kill.' "), cert. denied, 262 Conn.

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

951, 817 A.2d 111 (2003). Finally, there was evidence that the defendant threatened the Morey brothers the day after the murder by stating "they're next" to Cummings. This evidence further supports the conclusion that the defendant had the specific intent to kill.

In sum, from the cumulative weight of this evidence, the jury reasonably could have concluded beyond a reasonable doubt that the defendant possessed the specific intent required for murder. Accordingly, we reject the defendant's claim that the trial court improperly denied his motion for a judgment of acquittal.

II

The defendant next claims that the court improperly denied his request for a third-party culpability instruction. We disagree.

The following facts are relevant to this claim. Nunez, who lived in Brick City and was present at the shooting, identified the defendant as the shooter on several occasions during her testimony. Nunez also stated that she did not see anyone other than the defendant with a gun. Nunez was impeached, however, by a prior inconsistent statement that she admitted she had made to her friend, Queyla Martinez, that she did not see the shooter. She also testified that Kareem told her that Clinton was the shooter.

At the conclusion of the evidentiary portion of the trial, the court instructed the jury that the testimony of Nunez, Kareem, and Martinez given on December 7, 2016, that related to whether Clinton was the shooter was not substantive evidence in the case but, instead, could be considered only for impeachment purposes.[3]

Following closing arguments, but before the court charged the jury, defense counsel, contending that Clinton was the actual shooter on the night of the incident,

[3] The court provided the following limiting instruction: "The testimony that you heard today from Ms. Nunez, from [Kareem], and most recently just now from Ms. Martinez, again, that testimony related to alleged prior

requested a jury charge on third-party culpability. Specifically, defense counsel relied on testimony from Nunez that Kareem had told her that Clinton was the shooter.[4]

The court denied the request for a third-party culpability instruction. After the court charged the jury, defense counsel took an exception to the charge and renewed his request for a third-party culpability charge. The state argued that it would be inappropriate to give such a charge because the only evidence before the jury suggesting that Clinton was the shooter was admitted for impeachment purposes only. The court again declined to instruct the jury on third-party culpability, stating that there must be more than a mere suspicion that Clinton was the shooter, and that there was no substantive evidence that Clinton was the shooter in this case.

On appeal, defense counsel conceded during oral argument that there was no evidence regarding Clinton's culpability that was admitted for substantive purposes.[5] Moreover, the defendant does not challenge on appeal the court's decision limiting the testimony to impeachment purposes only.

"In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to

consistent and inconsistent statements made by other individuals. Therefore, the only thing you could use those statements for is for credibility. You cannot use them for substantive purposes to the truth of their content.

"This is the situation under our rules that statements that were or were not made—allegedly were or were not made go to the credibility of that witness, not to the substance of what the person may or may not have said. So it's limited to credibility. It's not for the truth of the matter asserted in the counts."

[4] Witnesses at the trial frequently referred to Daniel Clinton by the nicknames of "Country" and "DaDa."

[5] The panel at oral argument before this court asked defense counsel whether there was "any evidence in this record that you say supports a third-party culpability instruction where the evidence was admitted for something other than impeachment purposes?" Defense counsel replied, "There was none, Your Honor."

supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty *not* to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is 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. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion

that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt. . . .

"[I]f the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 607–10, 935 A.2d 975 (2007).

In the present case, there simply was no evidence that tended to establish a direct connection between Clinton and the charged offense. The defendant cites only to testimony by Nunez that she had told Martinez that she did not know the identity of the shooter, and that she had heard from Kareem that Clinton was the shooter. Importantly, this testimony was not admitted for its truth, but rather only to assess the credibility of the witnesses' testimony. Defense counsel conceded at oral argument before this court that there was no substantive evidence that Clinton was the shooter. See footnote 5 of this opinion. Accordingly, we conclude that the court properly determined that the defendant was not entitled to a jury instruction on third-party culpability.

III

Finally, the defendant claims that the court abused its discretion by permitting Nunez and Kareem to testify

regarding the defendant's gang affiliation. In particular, the defendant argues that this evidence was improperly permitted because it constituted uncharged misconduct and did not fall within one of the exceptions provided by § 4-5 (c) of the Connecticut Code of Evidence.[6] Moreover, the defendant argues that the evidence was unduly prejudicial and that its prejudicial effect outweighed its probative value. We decline to reach this claim because the defendant failed to brief whether the admission of this testimony constituted harmful error. Accordingly, we deem the claim abandoned.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the state filed a notice of uncharged misconduct evidence, indicating that it intended to present evidence of the defendant's gang affiliation. The defendant objected to admission of such evidence, and the court deferred ruling on the evidentiary issue. Thereafter, prior to the start of trial, the court directed that, until it had ruled on an offer of proof outside the jury's presence, witnesses were not to mention the defendant's gang affiliation. The court stated that it would consider each offer of each witness' testimony individually, and would not make a blanket ruling on the issue.

At trial, during Nunez' direct examination, the state asked for the jury to be excused and, outside the jury's presence, notified the court that it anticipated asking Nunez about the defendant's gang affiliation. The state then examined Nunez outside the presence of the jury, where she stated that she had not reported the shooting to the police on the night it occurred because she was afraid "that somebody would do something to [her]."

[6] Section 4-5 (c) of the Connecticut Code of Evidence provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

When asked who she meant by "somebody," she replied, "the Bloods." After hearing this proffer, the court ruled that it would allow the examination, but that it would provide a limiting instruction. The jury returned and the prosecutor elicited the proffered testimony from the witness that implied that the defendant was a member of the Bloods.[7]

Kareem also testified that the defendant was in a gang. There was a proffer of this testimony outside the presence of the jury before it was admitted. At the request of defense counsel, when the prosecutor questioned the witness he specifically used a transcript of the approved questions from the proffer.

We now turn to the relevant law. "Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . [Because] the admission of uncharged misconduct evidence is a decision within

[7] The court provided the following limiting instruction: "There are certain circumstances under which evidence is admitted for a limited purpose only. The testimony that you just heard about any relationship to a gang is admitted solely for purposes of establishing why this witness did not give a statement earlier than the time that she did, that's the only thing that it's admitted for, nothing else, it's limited to that purpose, you can use it for nothing else."

the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only [if] it has abused its discretion or an injustice has occurred. . . .

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling [that] was probably harmful to him. . . . We do not reach the merits of [a] claim [if] the defendant has not briefed how he was harmed by the allegedly improper evidentiary ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 815–17, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017)

"[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id., 817.

Although the defendant in his brief discusses the prejudicial effect of the evidence that he was a member of a gang, he does so in the context of arguing that the evidence was inadmissible because its prejudicial effect outweighed its probative value. What the defendant has failed to do, however, is to analyze whether the allegedly erroneous admission of this evidence deprived him of a fair trial, in other words, that the admission of the evidence constituted harmful error.

As the court noted in *State* v. *Toro*, supra, 172 Conn. App. 819, the concept of the prejudicial effect of evidence and whether its admission constitutes harmful error "may overlap with one another to some extent, [but they] are not necessarily equivalent and must be briefed separately. . . . Indeed, it is not inconsistent for a reviewing court to conclude that, although evidence was unduly prejudicial, and thus improperly admitted at trial, its improper admission nevertheless was harmless." (Citation omitted.)

In the present case, beyond summarily concluding that the court's decision to allow witness testimony regarding the defendant's gang affiliation prejudiced him, and stating in his reply brief that "[t]his error is not harmless because it painted the defendant in a very negative and violent light," the defendant has failed to address the issue of whether the alleged error was harmful in light of the evidence as a whole and the court's limiting instruction. The defendant has the burden of demonstrating that the court's allegedly improper ruling likely affected the outcome of the trial.

"[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties

must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Because the defendant has failed adequately to brief the question of whether the allegedly erroneous admission of his membership in a gang was harmful, we deem his claim abandoned. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

HECTOR L. CASABLANCA *v.* ANOLAN CASABLANCA (AC 40332)

Alvord, Keller and Beach, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court resolving certain postjudgment motions. The trial court had incorporated into the dissolution judgment the terms of an agreement between the parties, which included a retirement asset provision that required the plaintiff to transfer to the defendant via a qualified domestic relations order, 50 percent of the value of the marital portion of his benefit in a certain retirement fund, minus the amount of the defendant's social security benefit. After the plaintiff submitted a proposed qualified domestic relations order to the defendant, the defendant refused to sign it, and the plaintiff filed a motion to compel, which sought a court order requiring the defendant to execute the proposed qualified domestic relations order. Thereafter, the defendant filed a motion to open the dissolution judgment on the grounds of mutual mistake and unilateral mistake, and on the basis of equitable principles. She claimed that the relevant part of the retirement asset provision that required the amount of her anticipated future social security benefit to be subtracted from the amount of her share of the plaintiff's pension benefit was entered upon mutual mistake, and provided an inequitable and unconscionable windfall to the plaintiff. At a hearing on the parties' motions, the trial court granted a motion in limine filed by the plaintiff, which sought to preclude the defendant from presenting parol evidence in support of

her motion to open the judgment. The court subsequently denied the defendant's motion to open, granted the plaintiff's motion to compel and ordered the defendant to sign the qualified domestic relations order. On the defendant's appeal to this court, *held* that the trial court erroneously determined that the retirement asset provision of the parties' agreement was unambiguous, as the language of the provision was susceptible to more than one reasonable interpretation: in light of the language in the provision, there was more than one possible approach to calculating the amount of the defendant's social security benefit and, therefore, the provision was ambiguous, and because the court's underlying determination that the provision was unambiguous was erroneous, its subsequent conclusion that the evidence regarding the intent of the parties was irrelevant necessarily also was erroneous; accordingly, a remand to the trial court was necessary for the court to hold a new hearing on the parties' motions and to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement.

Argued March 19—officially released June 18, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Suarez*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Nastri*, *J.*, granted the plaintiff's motion in limine, denied the defendant's motion to open the judgment, and granted the plaintiff's motion to compel; subsequently, the court, *Nastri*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; thereafter, the court, *Nastri*, *J.*, granted in part the defendant's motion for articulation; subsequently, this court granted the defendant's motion for review but denied the relief requested therein. *Reversed*; *further proceedings*.

Brandon B. Fontaine, with whom, on the brief, was *C. Michael Budlong*, for the appellant (defendant).

Steven R. Dembo, with whom were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellee (plaintiff).

Opinion

ALVORD, J. In this marital dissolution action brought by the plaintiff, Hector L. Casablanca, the defendant, Anolan Casablanca, appeals from the judgment of the trial court resolving certain postjudgment motions. On appeal, the defendant claims that the court erred by (1) granting the plaintiff's motion to compel the defendant to execute the plaintiff's proposed qualified domestic relations order (QDRO)[1] and (2) granting the plaintiff's motion in limine to preclude the defendant from offering parol evidence in support of her motion to open the dissolution judgment. We conclude, contrary to the decision of the trial court, that the provision of the dissolution settlement agreement at issue in this case is ambiguous. Thus, we determine that the court should have considered extrinsic evidence of, and made additional factual findings regarding, the parties' intent in agreeing to this provision before it denied the defendant's motion to open the judgment and adjudicated the plaintiff's motion to compel the defendant to sign the proposed QDRO. Accordingly, we reverse the judgment of the court and remand this case for further proceedings.

The record reveals the following relevant facts and procedural history. The parties were married on July 23, 2005. The parties' marriage was dissolved on January 21, 2016. On that date, the parties entered into a separation agreement (agreement). Article 11 of the agreement (retirement asset provision), titled "Retirement/Stock Accounts," provided: "The husband shall transfer to the wife, via QDRO, fifty (50%) percent of the value of the marital portion of his benefit under the City of Hartford

[1] "A QDRO is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." (Internal quotation marks omitted.) *Richman* v. *Wallman*, 172 Conn. App. 616, 617 n.1, 161 A.3d 666 (2017).

Municipal Retirement fund, valued as of date of dissolution, minus the amount of the wife's Social Security Benefit. The assigned benefit shall be paid as a separate interest payment over the life of the wife. The husband shall retain his Mass Mutual 457 Plan and wife shall make no claim to same. Attorney Jeffrey Winnick shall prepare said QDRO(s) and the parties shall be equally responsible for the cost of same." The court, *Suarez*, *J.*, found the agreement fair and equitable and incorporated its terms into the dissolution judgment. Attorney Winnick subsequently prepared a proposed QDRO and transmitted it to the parties. The defendant refused to sign it.

On May 23, 2016, the defendant filed the first of a series of motions to open the dissolution judgment.[2] On October 25, 2016, the plaintiff filed a motion captioned "motion to compel," which sought a court order requiring the defendant to execute the proposed QDRO.[3] On February 14, 2017, the defendant filed the operative motion to open the dissolution judgment on grounds of mutual mistake and unilateral mistake, and on the basis of equitable principles. Specifically, she contended that the relevant part of the retirement asset provision, the phrase " 'minus the amount of the wife's Social Security Benefit,' was entered upon mutual mistake of the parties." In her memorandum of law in support of the motion, the defendant maintained that

[2] The May 23, 2016 motion to open was dismissed for lack of personal jurisdiction due to insufficiency of process and insufficiency of service of process. The motion to open the judgment that was adjudicated on its merits and is at issue in this appeal was filed February 14, 2017.

[3] On November 2, 2016, the plaintiff also filed a disclosure of expert witness, stating that Attorney Winnick was expected to testify concerning the QDRO "required by the judgment in this matter, the plaintiff's City of Hartford Municipal Retirement fund, the defendant's social security benefit and the calculation required to comply with the terms of the judgment." The disclosure further stated that Winnick would testify that he drafted the QDRO "in compliance with the terms of the judgment."

the intent of the parties was to equalize the plaintiff's retirement pension benefits and the defendant's social security benefits. According to the defendant, she was to receive 50 percent of the marital portion of the plaintiff's monthly pension benefit until she became eligible to receive social security benefits some thirty years in the future, whereupon her assigned portion of the monthly pension benefit would be reduced by the amount of her monthly social security benefit she was then receiving.

Under the proposed QDRO, however, the defendant's share of the pension benefit was reduced by immediately subtracting her anticipated future social security benefit amount of $1479 a month at her full retirement age (sixty-seven years old), which resulted in a current monthly retirement asset payment to the defendant of $242.75. She argued that because she was not entitled to receive her social security benefit until age sixty-five, approximately thirty years in the future, the proposed QDRO provided the plaintiff with "an inequitable and unconscionable windfall of $1479 per month . . . ."

On February 22, 2017, the parties appeared for a hearing on the defendant's motion to open the judgment and the plaintiff's motion to compel. On the day of the hearing, the plaintiff filed a motion in limine seeking to preclude the defendant from presenting parol evidence, including testimony of the defendant herself, in support of her motion to open the judgment.[4] According to the

[4] Following a motion filed by the plaintiff to disqualify Attorney Frank Romeo from representing the defendant on the basis that he would be a necessary witness in connection with the motion to open the judgment, the court approved the parties' stipulation that Attorney Romeo "shall not provide any testimony or act as a witness of any type." The parties' stipulation, regardless of whether it should have been accepted by the court under the circumstances of this matter, as Attorney Romeo was the defendant's counsel at the time the separation agreement was executed, is no longer in effect on remand.

plaintiff, the agreement was fully integrated and therefore no evidence could be introduced to vary or contradict its terms. The plaintiff also argued that even if the defendant was permitted to testify that she was mistaken as to the language of the retirement asset provision, her claim of mutual mistake would necessarily fail on the basis that the plaintiff would testify in opposition that the provision accurately reflected the parties' intent. After hearing oral argument on the motion in limine, the court, *Nastri*, *J.*, granted the motion in part, stating: "The parol evidence rule prohibits the use of extrinsic evidence to vary [or] to contradict the terms . . . of a fully integrated written contract. The parties' separation agreement is a fully integrated written contract, therefore the motion in limine is granted, the court will not hear parol evidence." As to the second ground challenging the merits of the defendant's mutual mistake claim, the court stated: "I'm not going to grant the motion in limine on that basis." The court then asked whether the defendant's counsel was prepared to proceed, to which counsel replied: "I'm not quite sure then, the court will not accept testimony from my client?" The court responded: "Well the court will not accept testimony that is contrary to the written contract. I don't know what your client is prepared to testify to or what the substantive evidence is, but the court will not hear parol evidence."

The court then held an evidentiary hearing, during which the defendant presented the testimony of the defendant, Attorney Winnick, Attorney Kim Duell (who represented the plaintiff during the dissolution proceedings), and the plaintiff. The attorney who represented the defendant during the dissolution proceedings did not testify. See footnote 4 of this opinion. At the conclusion of the hearing, the court issued an oral ruling denying the motion to open. It stated: "The court finds that there was no mutuality of mistake, there's no

mutual mistake or any unilateral mistake and [it] is not unconscionable or inequitable to enforce the contract. The parties entered the agreement knowingly, voluntarily and intelligently with the assistance of competent counsel. Judge Suarez canvassed the parties and made a finding that the agreement was fair and equitable." Without hearing further evidence, the court thereafter granted the plaintiff's motion to compel and, affording the defendant sufficient time to take an appeal from the decision, ordered the defendant to sign the QDRO on or before March 24, 2017. The court subsequently issued a written order to the same effect.

On March 14, 2017, the defendant filed a motion to reargue the court's February 22, 2017 rulings. In her motion, she argued that the court's granting of the motion in limine improperly precluded her from eliciting testimony as to the intent of the parties, which would have been offered in support of her claims of mutual and unilateral mistake.[5] She further argued that the testimony she sought to introduce in support of her motion to open did not constitute parol evidence because, as evidence of the parties' intent, it was not introduced to vary or contradict the terms of the agreement. The plaintiff filed an objection on March 21, 2017.

[5] Although she did not argue expressly that the evidence she sought to introduce as to intent was admissible to explain an ambiguity in the retirement asset provision, she argued relatedly as follows: "The intent of both parties upon entering into article 11 of the separation agreement was to equalize the value of [the plaintiff's] Hartford retirement pension with [the defendant], by assigning her 50 [percent] of his $5554/month pension, or $2777.02/month, from the date of dissolution, until she was eligible for Social Security benefits. This language fails to include precise language as to exactly when [the defendant] is eligible for social security benefits, [and] the definition of the exact benefit, although it is logically presumed [the defendant] would not be entitled to social security benefits until she reached the age of [sixty-five]. The vague language also does not account for if the [defendant] failed to reach the age of [sixty-five]. Thus, the vague language and omission of exact dates and explanation of the term 'benefit' makes it impossible to decipher the true intent of either party, making [the] plaintiff's assertion that mutual mistake does not exist . . . unfounded." (Emphasis omitted.)

The court denied the motion to reargue on the papers without comment, and this appeal followed.

The defendant sought articulation of the court's decision denying the motion to reargue and its February 22, 2017 orders. The defendant's fifth request asked the court to articulate "whether, when granting the plaintiff's motion in limine . . . to exclude parol evidence and when enforcing that ruling during the February 22, 2017 hearing, the court: (a) considered whether article 11 of the parties' separation agreement contained any relevant ambiguities, particularly regarding its proper application, and (b) determined that article 11 of the separation agreement is clear and unambiguous." The plaintiff objected on the basis that the defendant had not raised the issue of ambiguity during the hearing. Over the plaintiff's objection, the court granted the request for articulation in part. Answering question five in the affirmative, the court stated: "After carefully considering the arguments advanced in the defendant's motion to open, the testimony of the witnesses,[6] the well-articulated arguments of counsel and applicable case law, the court found no ambiguities in Article 11. In the absence of any ambiguity or uncertainty, the evidence the defendant [sought] to introduce regarding the intent of the parties or their object was irrelevant."[7] (Footnote added.) The defendant filed a motion for review of the court's partial denial of articulation. This court granted review but denied the relief requested.

On appeal, the defendant claims that the court erred by granting both the plaintiff's motion to compel the

[6] As noted previously, the attorney who represented the defendant during the dissolution proceedings did not testify. See footnote 4 of this opinion.

[7] As to a separate request for articulation regarding whether the QDRO properly conformed to the judgment, the court stated that the motion to open had not sought the court's determination of this issue, nor was it raised during the hearing.

defendant to execute the proposed QDRO and the plaintiff's motion in limine to preclude parol evidence. We begin by addressing the defendant's claim of error as to the court's ruling on the motion to compel because our resolution of whether the court properly found the retirement asset provision unambiguous will inform our consideration of the defendant's claim that the trial court improperly excluded extrinsic evidence in support of her motion to open the judgment.

In his motion to compel, the plaintiff requested an order requiring the defendant to execute the QDRO. As support, the plaintiff cited to the retirement asset provision and a separate provision of the agreement requiring the parties to "execute such additional documents as may be necessary to carry out the provisions of this agreement." (Internal quotation marks omitted.) Captioned "motion to compel," the motion in substance sought enforcement of the agreement's retirement asset provision, which had been incorporated into the dissolution judgment. In order to grant the motion and order compliance with the judgment in the manner requested by the plaintiff, however, the court necessarily had to determine that the judgment was clear. See *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 847, 100 A.3d 909 (2014) ("[t]he trial court's continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted, is grounded in its inherent powers, and is not limited to cases wherein the noncompliant party is in contempt, family cases, cases involving injunctions, or cases wherein the parties have agreed to continuing jurisdiction" [internal quotation marks omitted]), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015).[8] Likewise, "[a] trial court has the

[8] A threshold determination as to ambiguity likewise would have been required had the plaintiff sought relief by way of a motion for contempt and for order. See *Hansen* v. *Hansen*, 80 Conn. App. 609, 609, 612, 836 A.2d

inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993); see also *Matos* v. *Ortiz*, 166 Conn. App. 775, 777, 144 A.3d 425 (2016) ("[i]t is well established that a court may summarily enforce—within the framework of existing litigation—a clear and unambiguous settlement agreement reached during that litigation").

It is evident from the trial court's articulation that it did consider whether the retirement asset provision was ambiguous and expressly concluded that it was unambiguous. The court articulated as follows: "After carefully considering the arguments advanced in the defendant's motion to open, the testimony of the witnesses, the well-articulated arguments of counsel and applicable case law, the court found no ambiguities in article 11." We disagree with this legal determination.

At the outset, we address the plaintiff's argument that this court should decline to review the defendant's claim of error as to the granting of the motion to compel. He argues that the defendant, in failing to file a written objection or to raise objection at the hearing, induced or invited the granting of the motion to compel. We first note that the plaintiff does not direct this court's attention to any authority requiring that the defendant file a written objection to his motion. Furthermore, the defendant's counsel opposed the motion through his attempt to elicit the defendant's testimony as to why she did not sign the QDRO when it was presented to her. However, counsel was unable to pursue this line

1228 (2003) (affirming finding of contempt on basis that defendant refused to accede to proposed QDRO and holding that court did not abuse its discretion in refusing to hear evidence of parties' intent in formulating portion of marital dissolution agreement, where language was susceptible to only one meaning).

of questioning, as the plaintiff's counsel objected to the questioning of the defendant regarding her defense to the motion. The plaintiff's counsel stated, "I'm going to object in so far as it seeks to vary, contradict, and it would be law of the case in terms of your ruling," and the court sustained the objection.[9] Moreover, the record reflects that the court viewed the motion to compel as contested. In responding to a question from the plaintiff's counsel regarding whether the parties would need to return, the court stated: "[W]ell it depends on what they take an appeal from, they may also appeal . . .

[9] In responding to the argument of the plaintiff's counsel on the motion to compel, the defendant's counsel stated: "I have to talk to my client to see if she's going to appeal this, but certainly the court can order whatever the court wants." He further stated: "I don't know if you want to withhold ruling on [the motion to compel] or if you want to order it and we can file [our] appeal."

We conclude that the comments of the defendant's counsel do not rise to the level of implicating the doctrine of induced error, as that doctrine has been applied. See *Healey* v. *Haymond Law Firm, P.C.*, 174 Conn. App. 230, 241, 166 A.3d 10 (2017) ("[t]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling" [internal quotation marks omitted]). The cases cited by the plaintiff demonstrate the types of factual scenarios this court has previously found to constitute encouraging or prompting the court to make an erroneous ruling. See id., 242 (defendant induced alleged instructional impropriety by affirmatively requesting language it sought to challenge on appeal); *Gorelick* v. *Montanaro*, 119 Conn. App. 785, 796–97, 990 A.2d 371 (2010) (party could not claim error on appeal that court should not have decided matter without live testimony where party had signed stipulation, orally requested court to decide cases on basis of trial transcripts, exhibits, briefs, and oral argument, and counsel assured trial court that parties wanted to proceed in that fashion); *Moran* v. *Media News Group, Inc.*, 100 Conn. App. 485, 502, 918 A.2d 921 (2007) ("[a] party may not attend an informal hearing, fail to object to an issue being addressed, voluntarily enter into an agreement and later claim that the commissioner should never have entertained the issue that led to an agreement"); *State* v. *Maskiell*, 100 Conn. App. 507, 517, 918 A.2d 293 (under unique circumstances of case, party's failure to object was conduct that implicated the doctrine of induced error, where defense counsel's silence in the face of representation by prosecutor that there was agreement as to admissibility of state's evidence prompted or encouraged court to rely upon report), cert. denied, 282 Conn. 922, 925 A.2d 1104 (2007).

from the order granting the motion to compel." We conclude that the defendant's claim of error as to the granting of the motion to compel is reviewable.[10]

We begin by setting forth relevant law and our standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the

[10] The plaintiff also argues that the defendant did not argue during the hearing that the QDRO was not drafted in conformance with the agreement. The court stated as much in its articulation. Because we disagree with the court's conclusion that the agreement was unambiguous, and we remand the matter for a new hearing during which the court is directed to hear extrinsic evidence and make factual findings as to the parties' intent regarding the provision at issue, we do not reach the issue of whether the QDRO conformed to the agreement. See *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 328, 186 A.3d 771 (court was required to resolve ambiguity by considering extrinsic evidence and making factual findings as to parties' intent), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

It is the plaintiff's position that the defendant's argument that the retirement asset provision is ambiguous should not be reviewed because it was not raised until her motion for articulation. We note that the trial court, in its articulation, answered that it had considered whether the provision was ambiguous, and, therefore, the circumstances do not amount to a trial by ambuscade of the trial judge. Cf. *Musolino* v. *Musolino*, 121 Conn. App. 469, 477, 997 A.2d 599 (2010). Moreover, as discussed further infra, the issue of whether the provision was ambiguous was necessarily subsumed within the plaintiff's motion to compel.

contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341–42, 152 A.3d 1230 (2016). "[T]he construction of a written contract is a question of law for the court. . . . The scope of review in such cases is plenary." (Citations omitted; internal quotation marks omitted.) *Sachs* v. *Sachs*, 60 Conn. App. 337, 342, 759 A.2d 510 (2000).[11]

[11] The plaintiff contends that the proper standard of review is one of abuse of discretion and summarily provides in his brief the general standard of review applicable to factual decisions in family matters. See *Harlow* v. *Stickels*, 151 Conn. App. 204, 208, 94 A.3d 706 (2014) ("[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented" [internal quotation marks

With these principles in mind, we turn to the retirement asset provision of the agreement in the present case, which states: "The husband shall transfer to the wife, via QDRO, fifty (50%) percent of the value of the marital portion of his benefit under the City of Hartford Municipal Retirement fund, valued as of date of dissolution, minus the amount of the wife's Social Security Benefit. The assigned benefit shall be paid as a separate interest payment over the life of the wife. The husband shall retain his Mass Mutual 457 Plan and wife shall make no claim to same. Attorney Jeffrey Winnick shall prepare said QDRO(s) and the parties shall be equally responsible for the cost of same." On the basis of the language in this provision, we conclude that there is more than one possible approach to calculating the amount of the defendant's social security benefit and, therefore, that the provision is ambiguous. The ambiguity of the retirement asset provision is framed by the plaintiff's Exhibit 4, the defendant's social security statement, which states, "Your payment would be about $1479 a month at full retirement age," and also states, on the first line: "You have earned enough credits to qualify for benefits. At your current earnings rate, if you continue working until . . . your full retirement age (67 years), your payment would be about . . . $1479 a month; age 70, your payment would be about . . . $1834 a month; age 62, your payment would be about . . . $1030 a month."

There are at least three possible interpretations of the retirement asset provision. First, that provision could be interpreted as captured in the proposed QDRO, i.e., the defendant's estimated full retirement (age sixty-seven) payment of "about . . . $1479 a month" must be subtracted, as though it were commencing immediately,

omitted]). Because the motion presented issues of law, including the construction of the separation agreement's retirement asset provision, we agree with the defendant that the applicable scope of review is plenary.

from the defendant's 50 percent assigned monthly benefit. Second, the provision could be read to require that the defendant receives her 50 percent assigned benefit until such time as she elects to receive her social security benefit,[12] at which future time her 50 percent assigned benefit would be reduced by the monthly social security benefit she actually elects to receive. A third interpretation of the provision would require calculating the present lump sum equivalent of the defendant's future estimated full retirement (age sixty-seven) payment of "about . . . $1479 a month," which lump sum would then be converted to an immediate stream of payments, each of which would be subtracted from the 50 percent monthly assigned benefit.[13]

Because the language of the provision is susceptible to more than one reasonable interpretation, the court erroneously determined that the provision is unambiguous. See *Thomasi* v. *Thomasi*, 181 Conn. App. 822, 831, 188 A.3d 743 (2018) ("A word is ambiguous when it is capable of being interpreted by reasonably well informed persons in either of two or more senses. . . . Ambiguous can be defined as unclear or uncertain, or that which is susceptible of more than one interpretation, or understood in more ways than one." [Internal quotation marks omitted.]); *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 398, 186 A.3d 739 (2018) ("[b]ecause the phrase 'initiation fee' in the modified judgment could have referred to any one of three available levels of membership in the Innis Arden Country Club, each with its distinct initiation fee, that phrase, as used in the modified judgment, was ambiguous").

On the basis of our conclusion that the court erroneously determined that the provision was unambiguous, we conclude that a remand to the trial court is neces-

[12] As noted previously, the plaintiff's exhibit 4 identified three different approximate social security benefit amounts corresponding with the age of the defendant upon retirement.

[13] We express no opinion as to the feasibility or the validity of any of the three illustrated interpretations of the retirement asset provision.

sary for the court to hold a new hearing on the parties' motions[14] and to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement. See *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 328, 186 A.3d 771 (court was required to resolve ambiguity by considering extrinsic evidence and making factual findings as to parties' intent), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018); see also *Parisi* v. *Parisi*, 315 Conn. 370, 386, 107 A.3d 920 (2015) (remanding case to trial court to resolve ambiguity in parties' separation agreement "through a determination of their intent after consideration of all available extrinsic evidence and the circumstances surrounding the entering of the agreement"); *Fazio* v. *Fazio*, 162 Conn. App. 236, 251, 131 A.3d 1162 (same), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

After stating in its articulation that it found no ambiguities in the retirement asset provision, the court continued: "In the absence of any ambiguity or uncertainty, the evidence the defendant [sought] to introduce regarding the intent of the parties or their object was irrelevant." Because the court's underlying determination that the provision was unambiguous was erroneous, its subsequent conclusion that the evidence regarding the intent of the parties was irrelevant necessarily also is erroneous. Because the issue may arise on remand, we note the general legal principles concerning the parol evidence rule and its exceptions.[15]

[14] The plaintiff argues that the defendant has not claimed error in the denial of her motion to open the dissolution judgment. The defendant responds that she "indirectly challenges the motion to open ruling, by arguing that the court erred by granting the motion in limine and misapplying the parol evidence rule, which prevented the defendant from presenting the evidence necessary to support her motion to open." We agree with the defendant that her claim is adequately raised as a challenge to the denial of her motion to open the judgment.

[15] The plaintiff argues in the alternative that any error in granting the motion in limine was harmless. Because we reverse the decision of the trial court on the basis that it improperly concluded that the provision was unambiguous and we remand for a new hearing during which the court

"Parol evidence offered solely to vary or contradict the written terms of an integrated contract is . . . legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. . . . These recognized exceptions are, of course, only examples of situations where the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated, or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud." (Internal quotation marks omitted.) *Sullo Investments, LLC* v. *Moreau*, 151 Conn. App. 372, 378–79, 95 A.3d 1144 (2014); see *Hirschfeld* v. *Machinist*, supra, 181 Conn. App. 328 ("parol evidence, including conversations of those involved in drafting the contract, may be used as an aid in the determination of the intent of the parties which was expressed by the written words" [internal quotation marks omitted]).

This court cannot find facts in the first instance. See *Fazio* v. *Fazio*, supra, 162 Conn. App. 251. Thus, a remand is necessary for the trial court to hold a new hearing on the parties' motions[16] and to "determine the intent of the parties after consideration of all the

should consider all available extrinsic evidence, we need not address the claim of harmless error.

[16] Because the court erroneously concluded as a matter of law that the retirement asset provision was unambiguous, and thus did not make the necessary factual determination of the intent of the parties in agreeing to the provision, the court could not reasonably have reached a conclusion as to whether the arguments raised by the defendant in her motion to open the judgment had merit.

available extrinsic evidence and the circumstances surrounding the entering of the agreement." Id.; see also *Parisi* v. *Parisi*, supra, 315 Conn. 386.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

MARCELLA WOODBURY-CORREA *v.* REFLEXITE CORPORATION
(AC 39397)

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

Syllabus

Pursuant to statute (§ 31-294c [b]), "an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury . . . ."

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner denying her motion to preclude the defendant employer from contesting the compensability of her injuries pursuant to § 31-294c (b). The commissioner denied the plaintiff's motion to preclude on the ground that it was not possible for the defendant to comply with § 31-294c (b) under the facts of this case. Specifically, the commissioner found that on April 17, 2009, the plaintiff had filed a form 30C notifying the defendant that she was seeking compensation for repetitive trauma injuries she sustained at work, but the defendant did not file a proper and timely form 43 to contest liability for the plaintiff's claim. The commissioner concluded that although the defendant had not filed a proper and timely form 43, it was impossible for the defendant to have complied with § 31-294c (b) because it could not commence payment within the twenty-eight day statutory time period where, as here, it had not received any medical bills or claims for benefits from the plaintiff during that time. The board affirmed the commissioner's decision, agreeing that it had been impossible for the defendant to file a timely form 43 under these circumstances. The board further concluded that although the defendant had failed to file a timely form 43, it had filed a proper form 43 contesting liability with the Workers' Compensation Commission, which was sent to the commission via facsimile transmission on July 24, 2009. On the plaintiff's appeal to this court, *held*:

1. The board exceeded its authority by making a new factual finding, in contradiction to that made by the commissioner, that the defendant had filed a proper, albeit untimely, form 43 contesting liability: the commissioner expressly found that the defendant had not filed a proper and timely form 43 as required by § 31-294c (b), the parties did not request the commissioner to correct that finding or challenge that finding on appeal to the board, the plaintiff specifically argued to the board that the commissioner had found that the defendant had never filed a proper form 43 with the commission as required by § 31-294c (b), and a review of the exhibits relied on by the commissioner in support of that finding demonstrated that it was not clearly erroneous; moreover, although the record revealed that the defendant had faxed a copy of its form 43 to the commission on July 24, 2009, within one year of the plaintiff's notice of claim, both form 43 and the applicable statute (§ 31-321) require notice of service to be made either personally or by registered or certified mail, and the record on appeal contained no properly filed form 43 served on the commission in accordance with § 31-321.
2. The board improperly affirmed the commissioner's decision denying the plaintiff's motion to preclude the defendant from contesting liability on the basis of impossibility: although the defendant was unable to commence payment within the statutory twenty-eight day time period because the plaintiff's medical bills had not been submitted during that time, the defense of impossibility was not applicable in this case, as the defendant contested liability rather than the extent of the plaintiff's disability, and, therefore, it was not impossible for and the defendant was required to file a form 43 notice of intent to contest liability on or before the twenty-eighth day after it had received the plaintiff's form 30C notifying it of her claim pursuant to § 31-294c (b); accordingly, because the defendant failed to file a form 43 to contest liability for the plaintiff's work related repetitive trauma claim within twenty-eight days of the plaintiff's filing of her claim, the plaintiff's motion to preclude the defendant from contesting liability should have been granted.

Argued January 28—officially released June 18, 2019

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Sixth District denying the plaintiff's motion to preclude the defendant from contesting liability as to her claim for certain workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

Colin J. Hoddinott, with whom, on the brief, was *Deborah J. DelBarba*, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Marcella Woodbury-Correa, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), denying the plaintiff's motion to preclude[1] the defendant, her employer, Reflexite Corporation, from contesting liability for the repetitive trauma injuries claimed and noticed on her form 30C.[2] On appeal, the plaintiff claims that the board (1) exceeded its authority by making new factual findings that contradict the findings made by the commissioner, and (2) erred in affirming the commissioner's denial of the motion to preclude the defendant from contesting liability for the plaintiff's repetitive trauma injuries. We agree with both claims and reverse the decision of the board.

We begin with the underlying facts as found by the commissioner, as well as the procedural history and uncontested facts as revealed by the record. On April 17, 2009, the plaintiff had an existing employment relationship with the defendant. On that date, she filled out a form 30C claiming repetitive trauma injuries, the

[1] General Statutes § 31-301b provides: "Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263."

[2] "A form 30C is the name of the form prescribed by the workers' compensation commission of Connecticut for use in filing a notice of claim under the [Workers' Compensation Act, General Statutes § 31-275 et seq.]." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 80 n.5, 144 A.3d 1075 (2016).

symptoms of which, she alleged, began in 2003. She sent the form 30C via certified mail on April 18, 2009, both to the defendant and to the Workers' Compensation Commission (commission). Both the commission and the defendant received the form 30C on April 20, 2009. The defendant did not file a proper and timely form 43 to dispute liability.[3] On February 24, 2014, pursuant to General Statutes § 31-294c (b), the plaintiff filed a motion to preclude the defendant from contesting liability for her repetitive trauma injuries. Nearly one year later, on January 5, 2015, the defendant filed a written objection to the plaintiff's motion on the ground that it had filed a form 43 in a timely manner.[4]

The commissioner found that the commission file reflected that "there were never any claims for indemnity or medical benefits for the [plaintiff]," and that the "first claim for benefits was . . . some five years after the claimed date of injury." The commissioner, thereafter, concluded that it was "impossible for the [defendant] to comply with the statutory requirements to issue any benefit payments during the [twenty-eight] day period following the filing of the [plaintiff's] form 30C as no benefits were claimed," and, on that basis, he denied the plaintiff's motion to preclude the defendant from contesting liability. The plaintiff filed a petition for review of the commissioner's decision with the board.[5]

[3] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim. . . . The form 43 generally must be filed within twenty-eight days of receiving written notice of the claim." (Citation omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 79 n.2, 144 A.3d 1075 (2016); see General Statutes § 31-294c.

[4] The defendant filed a motion to bifurcate the motion to preclude from the other issues pending before the commission. The plaintiff had no objection to bifurcation, and the commissioner granted the motion.

[5] Following her appeal to the board, the plaintiff also filed a motion to correct the commissioner's findings and conclusion, which the commissioner denied.

A hearing was held before the board on March 18, 2016. In a June 22, 2016 written decision, the board affirmed the commissioner's decision denying the plaintiff's motion to preclude the defendant from contesting liability, specifically agreeing, in part, that the defendant was not able to file a timely form 43 due to "impossibility." This appeal followed. Additional facts will be set forth as necessary.

Before reviewing the plaintiff's claims, we set forth the applicable standard of review. "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry facts. . . . The conclusions drawn by [the commissioner] from the facts found [also] must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.], we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers'

compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes. . . .

"Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citations omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 84–86, 144 A.3d 1075 (2016).

"In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b).[6] If the notice of claim is adequate but the employer fails to comply

[6] General Statutes § 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury . . . and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury . . . on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided

with the statute, then the motion to preclude must be granted." (Footnote altered; internal quotation marks omitted.) Id., 86–88.

I

The plaintiff claims that the board exceeded its authority by making a new factual finding concerning the form 43 that contradicts the finding made by the commissioner, despite the fact that the commissioner's finding had not been challenged on appeal to the board. She argues that the board acted improperly "when it liberally construed the unambiguous factual finding of the commissioner that 'a proper and timely form 43 was not filed by the [defendant]' to mean that 'the form 43 that was filed was not "proper" [because] it was not "timely."' The board not only inserted a new factual finding into the commissioner's decision, but [it] deleted the commissioner's original finding that the defendant failed to properly serve the commission with a form 43 in accordance with its statutory mandate." We agree.

the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury . . . unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury . . . on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury . . . ."

In his findings, the commissioner specifically found that "[e]vidence produced at the formal hearing as well as the contents of the commission's file indicate that a proper and timely form 43 was not filed by the [defendant]." The commissioner cited, as support for this finding, several exhibits. The commissioner was not requested to correct this finding, and neither party challenged this finding on appeal to the board. Moreover, although the finding was not preserved for review, an examination of the exhibits cited by the commissioner readily confirms that this finding was not clearly erroneous. The plaintiff properly filed a form 30C claiming repetitive trauma injuries, as found by the commissioner, which was received both by the board and by the defendant on April 20, 2009. On May 5, 2009, the defendant sent its form 43, via certified mail, to the plaintiff's attorney, as evidenced by the return receipt. The defendant did not serve the commission with its form 43 at that time. Instead, on July 24, 2009, despite the requirements of General Statutes § 31-321[7] and form 43,[8] the defendant sent, via *facsimile transmission*, its form 43 to the commission.

The board, in its written decision, attacked the argument of the plaintiff's attorney that the "commissioner

[7] General Statutes § 31-321 requires that "[u]nless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

[8] Form 43 contains the following language, printed across the bottom of the form: "This notice must be served upon the Commissioner and Employer (or representative, if applicable) by personal presentation or by registered or certified mail. When medical care is the issue for contest, send a copy of this form to the medical provider also. For the protection of both parties, the claimant should note the date when this notice was received and the employer/insurer should keep a copy of this notice with the date it was served." (Emphasis omitted.)

found that the [defendant] never filed a form 43 with the . . . commission as required by the act. Therefore, statutory preclusion must lie." (Internal quotation marks omitted.) The board opined that the statement of the plaintiff's attorney was "unequivocally factually incorrect [in that the defendant] did file a form 43 contesting the claim which was received by the commission on July 24, 2009, a date more than [twenty-eight] days after the claimant filed her form 30C seeking benefits but well within the one year safe harbor period to contest the extent of disability . . . . The trial commissioner in [his] findings . . . found that the [defendant] had not filed 'a *proper and timely* form 43.' . . . We suggest that the trial commissioner inartfully expressed . . . in [his] findings . . . that the form 43 that was filed was not 'proper' as it was not 'timely.' To suggest in pleadings before this commission, and indeed again at oral argument before this tribunal, that a form 43 had *never* been filed by the [defendant], or that the evidence presented would support such a factual finding by the trial commissioner, is a distortion of the facts on the record." (Citations omitted; footnote omitted; emphasis in original.) The board thereafter proceeded to review the plaintiff's appeal as though the commissioner had found that the defendant's form 43 had been filed untimely with the commission, but, nonetheless, properly filed. We agree with the plaintiff that this was in error.

The commissioner clearly found that "a proper and timely form 43 *was not filed* by the [defendant]." (Emphasis added.) The plaintiff's attorney had argued to the board that the commissioner had found that the defendant had never filed a form 43 with the commission *as required by the act*. A review of the commissioner's findings reveals that the argument of the plaintiff's attorney was accurate and not "a distortion of the facts on the record." The defendant improperly and untimely

sent its form 43 to the commission in a facsimile transmission. As indicated by the commissioner's decision, a proper form that complied with the act was not filed by the defendant. Form 43 and § 31-321 do not contain any language that permits the filing of a form 43 by facsimile transmission to the commission; rather, both the form and the statute require that it must be filed either in person, by registered mail, or by certified mail. See *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 274, 76 A.3d 657 ("[i]t is well settled that notice provision under the [act] should be strictly construed" [internal quotation marks omitted]), cert. denied, 310 Conn. 935, 78 A.3d 859 (2013). The record provided to us on appeal contains no properly filed form 43.[9]

Accordingly, we agree with the plaintiff that the board improperly changed a finding of the commissioner and relied on that changed finding in its decision.

II

The plaintiff next claims that the board erred in affirming the commissioner's denial of the motion to preclude the defendant from contesting liability on the basis of the defense of "impossibility." Specifically, she argues that the defense of impossibility, as articulated in *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 269–70, is not applicable when an employer contests liability rather than the extent of disability. She contends that if an employer chooses to *contest liability* for the employee's injuries, it must file a proper

[9] We are aware that § 31-294c (c) contains a savings provision for a defect in an employee's notice of claim: "No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice." General Statutes § 31-294c (c). The extent to which this provision may save a form 30C that was not served in accordance with § 31-321 is not before us. We note, however, that § 31-294c (c) contains no language that extends this savings provision to an employer filing a disclaimer.

and timely form 43, regardless of whether the employee submitted medical bills within twenty-eight days of the employee's filing of form 30C. We agree.[10]

The following additional facts aid in our analysis. The commissioner concluded that there was no evidence that the plaintiff had "claimed either medical or indemnity benefits for her alleged injuries during the [twenty-eight] day period following the filing of the form 30C," and that because the plaintiff had not submitted a claim for any benefits during that time, "[i]t was impossible for the respondents to comply with the statutory requirements to issue any benefit payments during [that twenty-eight] day period . . . ."

In her appeal to the board, the plaintiff argued that the commissioner improperly concluded that the defense of impossibility applied in this case and that it improperly denied her motion to preclude the defendant from contesting liability. She contended that the commissioner was required to grant her motion because he found that the defendant had failed to file a proper and timely form 43, as is required by § 31-294c (b), to contest liability.

The board affirmed the commissioner's decision, concluding in relevant part that "[t]he [plaintiff] simply did not proffer a credible argument that subsequent to filing her form 30C, the [defendant] failed in [its] obligation to respond, and, therefore, the 'safe harbor' under

[10] We note that, in the present case, our construction of § 31-294c (b) is guided by appellate case law and our Supreme Court's interpretation of the statute, which it has determined to be ambiguous. See *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 547–49, 970 A.2d 630 (2009) (§ 31-294c [b] is not plain and unambiguous on issue of employer's role once preclusion has been granted); *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 111, 942 A.2d 396 (2008) (§ 31-294c (b) does not yield plain meaning on issue of preclusion). Additionally, the worker's compensation section of the Connecticut Practice Series has indicated that there is confusion regarding § 31-294c (b) and that the chairman of the board repeatedly has called for legislative guidance on the issue of preclusion. See R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation (Supp. 2018–2019) § 18:11, pp. 448–50.

Dubrosky [v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 269–70] was in effect [because] the [defendant] filed a form 43 within the one year period provided . . . under § 31-294c . . . . In the present case, the trial commissioner found that there had been no event subsequent to the [plaintiff] filing the form 30C to which the [defendant] could have reacted and determined [its] 'safe harbor' was in place."[11]

The plaintiff argues that the board improperly found that the defendant properly had filed a form 43; see part I of this opinion; and it improperly concluded that the commissioner correctly determined that the "safe harbor" provision articulated in *Dubrosky* applied to cases in which an employer was attempting to contest *liability* rather than to contest the *extent of disability*. We agree.

In *Dubrosky*, the dispositive issue was whether the employer was precluded from contesting *the extent of a disability* under § 31-294c (b) because it had been impossible for it to have commenced payment of compensation within the statutory twenty-eight day time period because no medical bills had been submitted to it during that time period. *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 263; see generally *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 130, 942 A.2d 396 (2008) (under § 31–294c (b), if employer neither timely pays nor timely contests liability, conclusive presumption of compensability attaches and employer is barred from contesting employee's right to receive compensation on any ground or extent of employee's disability). Unlike the present case, the defendant employer in *Dubrosky* did not contest liability; it contested only the extent of the plaintiff's disability. *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 266.

[11] We assume that the board is referring to the twenty-eight day period after the plaintiff filed her form 30C.

The plaintiff in *Dubrosky* fell during a work related business call on January 9, 2009, and injured his knee. Id., 264. He reported the injury to his supervisor on January 12, 2009, but did not seek immediate medical attention or miss time from work. Id. More than one month later, on February 18, 2009, the plaintiff filed a form 30C seeking compensation for the injury to his knee. Id., 265. Beginning on February 27, 2009, the plaintiff began seeking medical treatment from various providers, but the defendant did not begin receiving bills for the plaintiff's injury until June, 2009, which bills it paid. Id. On October 20, 2009, the defendant employer filed a form 43 contesting the plaintiff's claim. Id. The defendant also filed a motion to dismiss the claim, and the plaintiff filed a motion to preclude the defendant from contesting *liability and the extent of disability*. Id., 266. At a January 31, 2011 hearing, the defendant withdrew its motion to dismiss and *accepted the plaintiff's claim*, but it argued that it should be permitted to contest the extent of the plaintiff's disability and, therefore, that the motion to preclude should be denied. Id. The commissioner granted the motion to preclude the defendant from contesting both liability and the extent of disability because, although the defendant could not have commenced payment within twenty-eight days, it could have filed a form 43 during that period. Id. The board upheld the commissioner's decision. Id., 267.

On appeal to this court, the defendant claimed that the board improperly affirmed the decision of the commissioner. Id. It argued that it could not have complied with § 31-294c (b) to contest its liability because no medical bills had been generated within the twenty-eight statutory time period. Id. This court concluded that "it was not reasonably practical for the board to require the defendant to have complied with § 31-294c (b) . . . ." Id. We reasoned that the defendant could not have commenced payment of medical bills because

no bills had been submitted for payment, and the defendant could not be required to file a form 43 within twenty-eight days of the plaintiff's claim because the defendant was not contesting liability; it was contesting only the extent of disability. Id., 271.

In *Dubrosky*, this court explained that there is an important distinction between an employer who is contesting liability and one who solely is contesting the extent of the employee's disability: "This distinction is not a superficial one, as an employer who is contesting liability is distinguishable from one who solely contests the extent of the disability. For example, in *Adzima* v. *UAC/Norden Division*, 177 Conn. 107, 113, 411 A.2d 924 (1979), our Supreme Court recognized the difference between an employer contesting the extent of the employee's disability instead of its liability: The statute clearly speaks to a threshold failure on the employer's part to contest liability: to claim, for example, that the injury did not arise out of and in the course of employment . . . that the injury fell within an exception to the coverage provided by [workers'] compensation . . . or that the plaintiff was not an employee of the defendant, but an independent contractor . . . . See id., 114 (no question that [employee's] injury was a compensable injury within the terms of the [workers'] compensation statute, i.e., that he had a right to receive compensation; the only contest concerned the extent of his lower back disability)." (Internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 271–72; see also *Adzima* v. *UAC/Norden Division*, supra, 113–14 (conclusive presumption does not bar employer, who has accepted liability and paid benefits on claim, from contesting extent of disability).

This court, in *Dubrosky*, then distinguished how the defendant in that case had been placed in a situation that the act had not contemplated: "The circumstances of this case, however, place the defendant squarely within a situation that the statutory scheme fails to

contemplate, namely, where an employee files a form 30C claim for which *the employer does not contest liability* but fails to generate medical bills within twenty-eight days for the employer to commence payment. To require strict compliance in a case such as this creates an incentive for claimants to deliberately delay seeking medical treatment until the very end of the twenty-eight day period such that the employer cannot file a timely form 43 to avoid being precluded from contesting the extent of the claimant's disability because no medical bills are generated sufficiently within the statutory time period to allow the employer to commence payment. . . .

"Thus, where notice, by filing a form 43 or commencing medical payments is impossible to provide in a timely manner, the failure to comply strictly with § 31-294c (b) will not preclude the employer from contesting *the extent of the employee's disability*. . . . Finally, we note the limited applicability of this excusing of strict compliance because in the vast majority of workers' compensation cases it will be possible for an employer either to file a truthful form 43 because it is actually contesting liability or to pay medical bills generated by the claimant within twenty-eight days. As *neither option* was available to the defendant under the circumstances of this case, it should not be precluded from *contesting the extent of the plaintiff's disability* when it filed its form 43 [seeking to contest only the extent of disability] within one year from the date of the injury." (Citations omitted; emphasis added; internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 273–75.

The *Dubrosky* case is similar to the present case only insofar as the defendant in *Dubrosky* did not file a form 43 within twenty-eight days of the plaintiff's claim, and it was unable to commence payment within twenty-eight days because no medical bills had been submitted during that time and the plaintiff continued to work.

See id. The defendant in *Dubrosky*, however, began paying medical bills upon receipt, and it then filed a form 43 to contest the extent of the plaintiff's disability. See id., 265. This court held that, under such circumstances, when a defendant employer does not challenge the claim of a work related injury, but challenges only the extent of the plaintiff's disability, strict compliance with the twenty-eight day statutory timeframe to begin payment of benefits will be excused when it is impossible for the plaintiff to comply. Id., 273–75. In *Dubrosky*, the defendant complied with the statute insofar as it was able, by commencing payment of medical bills when they were received and then filing a form 43 to challenge the extent of the plaintiff's disability. Although the defendant may have been precluded from challenging that the plaintiff's claim was work related, it was not precluded from challenging the extent of the plaintiff's disability because it began payments as soon as it could and it then filed a form to contest the extent of the plaintiff's disability. Consequently, the "safe harbor" discussed in *Dubrosky* applies only when the employer is contesting the extent of the employee's injury, and does not apply to an employer who is contesting liability.

In the present case, although the defendant could not commence payment within the twenty-eight day statutory time period because the plaintiff's bills were submitted several years later, it certainly could have filed its form 43 contesting liability within twenty-eight days of when it received the plaintiff's form 30C. In fact, although the defendant did not timely file its form 43 with the commission, it did serve the plaintiff with a copy of it within the statutorily prescribed time. In that form 43, which was untimely transmitted by facsimile to the commission, the defendant specifically alleged that the plaintiff's injuries "did not arise out of or in the course of her employment at [the defendant] and cannot be causally traced to such employment in accordance with [§] 31-275." Because the defendant was

not seeking solely to contest the extent of the plaintiff's disability, but, rather, was contesting its liability for the plaintiff's claim, i.e., contesting that her repetitive trauma injuries were work related, it was not impossible for the defendant to file a form 43 disclaiming its liability within the statutory twenty-eight day timeframe. Accordingly, *Dubrosky* is not only distinguishable from the present case, but it actually reinforces the requirement that an employer who is contesting liability must strictly comply with the filing requirements of § 31-294c (b).

Because the defendant failed to file a form 43 to contest its liability for the plaintiff's work related repetitive trauma claim within twenty-eight days of the plaintiff's filing of her claim, we conclude that the plaintiff's motion to preclude the defendant from *contesting liability* should have been granted.

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner denying the plaintiff's motion to preclude and to remand the case to the commissioner for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY CRESPO
(AC 41111)

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

Syllabus

The defendant, who had been on probation as a result of his conviction of charges of sexual assault and risk in injury to a child related to his sexual abuse of a minor child, appealed to this court from the judgment of the trial court finding him in violation of his probation. The defendant's probation had included special conditions imposed by the sentencing court that required, inter alia, that he have no unsupervised contact with minors under the age of sixteen, and that any supervisor be approved

by his treatment provider and supervising probation officer. In preparation for his release from incarceration, the defendant signed a certain standardized form that was prepared by the Office of Adult Probation, pursuant to statute (§ 53a-30 [b]), that prohibited him from being in the presence of or having contact with children under the age of sixteen without probation officer approval. The defendant's probation officer, S, thereafter obtained an arrest warrant after he received an anonymous report that a fourteen year old was living at the apartment that the defendant shared with his wife. At the probation violation hearing, S described a meeting with the anonymous person, and the trial court overruled the defendant's objection to that testimony, which the defendant claimed was hearsay and violated his right to confrontation. The defendant thereafter moved to dismiss the violation of probation charge on the ground that the approval condition on the standardized form was inconsistent with the sentencing court's supervisor requirement. The trial court denied the motion to dismiss and then denied the defendant's motion for judicial disqualification, which was based on his claim that certain of the court's evidentiary rulings and its colloquy with defense counsel about the filing of the motion to dismiss would lead a reasonable defendant to believe that the court would be biased toward the defendant. *Held*:

1. The defendant's claim that the trial court violated his right to confrontation when it overruled his objection to S's testimony on confrontation grounds without making a finding of good cause was not reviewable, as the record was inadequate for review and the defendant failed to distinctly raise that claim at trial; although defense counsel referenced the confrontation clause in his objection, the defendant's claim on appeal was predicated on his fourteenth amendment right to due process, the record reflected that he failed to distinctly raise at trial the inquiry that the trial court was required to conduct, which entailed balancing his interest in confronting the declarant with the state's interest in not producing the declarant and the reliability of the proffered hearsay, and the defendant provided this court with no authority indicating that the sixth amendment right to confrontation applied to probation revocation proceedings.
2. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss: the approval condition and the supervisor condition of his probation complemented each other and were not inherently inconsistent or contradictory, as the supervisor condition ensured that a supervisor was present for any contact between the defendant and a minor under the age of sixteen, and the approval condition ensured that such contact was approved by his probation officer in the first instance; moreover, because the defendant's incarceration stemmed from the sexual and physical assault of a six year old child, it was entirely appropriate for the Office of Adult Probation to impose the approval condition as a prerequisite to any supervised contact between the defendant and minors under the age of sixteen.

3. The defendant's unpreserved claim that the trial court improperly failed to hold an evidentiary hearing on the veracity of certain allegations in S's arrest warrant affidavit was not reviewable; the defendant never requested a hearing during the probation revocation proceeding and did not distinctly raise that claim with the trial court, and, thus, the record lacked the requisite findings as to whether any allegedly false statements were knowingly and intentionally made with reckless disregard for the truth, and whether those statements were necessary to the finding of probable cause.
4. The trial court did not abuse its discretion in denying the defendant's motion for judicial disqualification: adverse rulings do not amount to evidence of bias sufficient to support a claim of judicial disqualification, and the defendant's claim that the court offered no explanation for denying his right to confront the witness against him was unfounded, as the defendant failed to bring that concern distinctly to the court's attention and never requested an explanation or articulation from the court on that ruling, as provided for in our rules of practice; moreover, nothing in the transcript of the hearing reflected bias on the part of the court, as defense counsel clarified in his colloquy with the court that his concern regarding the filing of the motion to dismiss had nothing to do with the court and offered an apology, which the court accepted.
5. The trial court's finding that the defendant violated his probation was not clearly erroneous, as that court reasonably could have found that the defendant did not comply with the approval condition: the record indicated that, prior to the defendant's release from incarceration, he reviewed and signed the terms and conditions of his probation, including the approval condition, and thereby manifested his understanding of the necessity to abide by those conditions, and S testified that the approval condition obligated the defendant to obtain his approval prior to having any contact with a minor child, and that the defendant had admitted to him that the fourteen year old was staying at his residence and that he was having contact with her; moreover, S testified that the defendant had not obtained his approval for any such contact, and that when S and another probation officer visited the defendant's apartment, they encountered a sixteen year old, who had informed them that the fourteen year old was staying there and had done so at several intervals throughout the year, and the court was free to credit S's testimony.

Argued January 28—officially released June 18, 2019

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Suarez*, *J.*; thereafter, the court denied the defendant's motion to dismiss; subsequently, the court, *Diana*, *J.*, denied the defendant's motion to disqualify the judicial authority;

thereafter, the court, *Suarez*, *J.*, rendered judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed*.

Michael S. Hillis, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Peter A. McShane*, former state's attorney, and *Russell Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Anthony Crespo, appeals from the judgment of the trial court finding him in violation of probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that (1) the court improperly overruled an objection predicated on the right to confront adverse witnesses without making the requisite finding of good cause, (2) the court improperly denied his motion to dismiss due to the imposition of allegedly inconsistent conditions of probation, (3) the court improperly failed to conduct an evidentiary hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), (4) the court abused its discretion in denying his motion for judicial disqualification and (5) the evidence was insufficient to sustain the court's finding that the defendant violated a condition of his probation. We affirm the judgment of the trial court.

On April 23, 2007, the defendant pleaded guilty to assault in the second degree in violation of General Statutes § 53a-60 (a) (2), risk of injury to a child involving sexual contact in violation of General Statutes § 53-21 (a) (2), and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A).[1] At sentencing, the court remarked: "This is some of

[1] Evidence presented at the probation revocation hearing indicated that the defendant's plea followed allegations of sexual and physical assault of a six year old child, "including digital penetration, fondling and physical abuse, which included beating her with a wire clothes hanger, and . . . punching her in the face, leaving bruising."

the worst treatment of a minor child that I have ever seen in my years on the bench. In my opinion, Mr. Crespo, you are a sexual deviant, and you are a violent and physical human being, except that you are a violent and physical human being toward those who cannot defend themselves." The court then sentenced the defendant to a total effective term of sixteen years incarceration, execution suspended after nine and one-half years, followed by fifteen years of probation. The special conditions of probation imposed by the court required, inter alia, that the defendant have "no unsupervised contact with minors under the age of sixteen and that any supervisor be approved by both his treatment provider and his supervising [probation] officer" (supervisor condition).

On December 8, 2014, in preparation for his release from incarceration, the defendant signed several standardized forms prepared by the office of adult probation, including one titled "Sex Offender Conditions of Probation." Among the conditions specified therein and marked applicable to the defendant was the following requirement: "You will not be in the presence of minors, nor have contact in any form, direct or indirect . . . with children under the age of sixteen without Probation Officer approval. Any contact must be reported immediately to a Probation Officer" (approval condition).

On March 17, 2015, the defendant's probationary period commenced upon his release from the custody of the Commissioner of Correction. In accordance with the supervisor condition imposed by the court at sentencing, the defendant's wife, Rosa,[2] subsequently was approved as the defendant's supervisor by his probation officer, the treatment provider, and the victim's advocate.

[2] Rosa did not testify at the probation revocation proceeding. Although the record indicates that Rosa was the defendant's wife at all relevant times, her surname is not specified therein. We therefore refer to her in this opinion by her first name.

Approximately nine months into the defendant's probationary period, his probation officer, Michael Sullivan, received a report that a fourteen year old female was living at the apartment that the defendant shared with Rosa. Following an investigation, Sullivan obtained an arrest warrant for the defendant's violation of the terms of his probation. In that application, Sullivan alleged that the defendant had violated both the supervisor condition and the approval condition of his probation. The defendant then was arrested and charged with breaching the terms of his probation in violation of § 53a-32.

A probation revocation hearing commenced on November 8, 2017, at which the court heard testimony from Sullivan and Vanessa Valentin, a probation officer who was involved in the investigation of the defendant's alleged violation of the terms of his probation. When the state rested in the adjudicatory stage of that proceeding, the defendant moved to dismiss the charge on the ground that the approval condition of his probation was inconsistent with the supervisor condition ordered by the trial court. After hearing argument from the parties, the court denied that motion. Defense counsel then asked the trial court to disqualify itself on the ground of bias. In response, the court stated: "Because of the seriousness of the matter before the court, because of the fact that your client is facing incarceration and because of the fact that you've raised the issue now, at this late stage of the proceeding, I am going to ask that another judge hear your motion to disqualify . . . ." Following a recess, Judge Leo V. Diana presided over a hearing on the defendant's motion for judicial disqualification, at the conclusion of which the court denied the motion.

The adjudicatory phase of the probation revocation hearing resumed on November 17, 2017. The defendant presented the testimony of one witness, the fourteen year old female who allegedly resided at the defendant's

apartment for a period of time in December, 2016.[3] When her testimony concluded, the defendant rested, and the court heard argument from the parties. The prosecutor argued that the evidence demonstrated that the defendant had violated the approval condition of his probation. The court agreed and found, by a fair preponderance of the evidence, that the defendant had violated the terms of his probation. During the dispositional phase of the proceeding, the court revoked the defendant's probation and sentenced him to a term of six and one-half years of incarceration, execution suspended after five years, followed by ten years of probation.[4] This appeal followed.

I

The defendant first contends that the court improperly overruled his objection to certain testimony on confrontation grounds without making a specific finding of good cause. The state counters that this claim is unpreserved. We agree with the state.

The following additional facts are relevant to the defendant's claim. During his testimony at the probation revocation hearing, Sullivan stated that he had received an anonymous report regarding the defendant's alleged violation of the terms of his probation. When Sullivan then proceeded to describe a meeting with that anonymous person, defense counsel objected on hearsay grounds. The court summarily overruled that objection. Sullivan then was asked about the substance of his conversation with that anonymous person, to which defense counsel again objected, stating: "Your Honor,

[3] Although she acknowledged that Rosa was her aunt, the fourteen year old female testified that she had never met the defendant. She further testified that she had never visited the residence the defendant shared with Rosa. At the conclusion of the adjudicatory stage of the hearing, the court found that the fourteen year old female's testimony "was completely not credible" and that it contradicted the defendant's admission to the contrary.

[4] On appeal, the defendant raises no claim with respect to the dispositional phase of the probation revocation proceeding.

I move to strike all of that inquiry for two reasons. One, it isn't just that there were relaxed rules of evidence for these procedures, but the confrontation clause is my client's constitutional right. I have no way of doing any of this with this officer because he's not the person that witnessed or saw any of this. So, it's not just an evidentiary violation, it's a violation of my client's constitutional rights to confront. And therefore, again, also, it contained total hearsay, which is hearsay within hearsay within this. And I believe that they should produce the witness so that witness can be properly cross-examined. Failing to do that, this testimony, should be stricken." In response, the court stated, "Overruled." The prosecutor then resumed his questioning of Sullivan, and defense counsel thereafter made no further mention of the confrontation issue.

As a preliminary matter, we note that the defendant has provided this court with no authority indicating that the right to confrontation contained in the sixth amendment to the United States constitution applies to probation revocation proceedings. See, e.g., *State* v. *Esquilin*, 179 Conn. App. 461, 472 n.10, 179 A.3d 238 (2018), and cases cited therein (noting that "an overwhelming majority of federal circuit and state appellate courts that have addressed this issue have concluded that [the confrontation standard articulated in *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)] does not apply to a revocation of probation hearing"). Although defense counsel referenced the "confrontation clause" in his objection before the trial court, his claim on appeal is predicated on the due process rights contained in the fourteenth amendment to the United States constitution, which mandate "certain minimum procedural safeguards before that conditional liberty interest [of probation] may be revoked"; *State* v. *Polanco*, 165 Conn. App. 563, 570, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708

(2016); including the right to question adverse witnesses.[5] Id., 571.

The exercise of the right to confront adverse witnesses in a probation revocation proceeding is not absolute, but rather entails a balancing inquiry conducted by the court, in which the court "must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Citation omitted; internal quotation marks omitted.) Id. To properly preserve for appellate review a confrontation claim in this context, our precedent instructs that a defendant must distinctly raise the balancing issue with the court at the probation revocation proceeding. If the defendant fails to do so, the claim is deemed unpreserved. See *State* v. *Tucker*, 179 Conn. App. 270, 278–79 n.4, 178 A.3d 1103 ("a defendant's due process claim is unpreserved where the defendant never argued to the trial court that it was required to balance his interest in cross-examining the victim against the state's good cause for not calling the victim as a witness"), cert. denied, 328 Conn. 917, 180 A.3d 963 (2018); *State* v. *Esquilin*, supra, 179 Conn.

[5] In *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), a case involving a violation of parole hearing, the United States Supreme Court held that "minimum requirements of due process" mandate, inter alia, that a defendant be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." The United States Supreme Court subsequently held that the due process requirements recognized in *Morrissey* extend to probation revocation proceedings. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

App. 474 (same); *State* v. *Polanco*, supra, 165 Conn. App. 571 (same).

The record plainly reflects that the defendant failed to distinctly raise that claim in the present case. For that reason, resort to the familiar rubric of *Golding* review is unavailing,[6] as the record in such circumstances is inadequate to review the alleged due process violation. See *State* v. *Esquilin*, supra, 179 Conn. App. 477–78. Accordingly, we decline to review the merits of the defendant's unpreserved claim.

II

The defendant next claims that the court improperly denied his motion to dismiss on the ground that the approval condition included on the sex offender conditions of probation form that he signed in preparation for his release from incarceration was inconsistent with the supervisor condition imposed by the court at his sentencing. We disagree.

The proper interpretation of conditions of probation presents a question of law. *State* v. *Faraday*, 268 Conn. 174, 191, 842 A.2d 567 (2004). Our review, therefore, is plenary.

Our analysis begins with General Statutes § 53a-30 (b), which "expressly allows the office of adult probation to impose reasonable conditions on probation." *State* v. *Thorp*, 57 Conn. App. 112, 116, 747 A.2d 537, cert. denied, 253 Conn. 913, 754 A.2d 162 (2000). Such

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

"[p]ostjudgment conditions imposed by adult probation are not a modification or enlargement of some condition already imposed by the court, but are part of an administrative function that [§ 53a-30 (b)] expressly authorizes as long as it is not inconsistent with any previously court-imposed condition." *State* v. *Johnson*, 75 Conn. App. 643, 652, 817 A.2d 708 (2003).

More specifically, § 53a-30 (b) provides: "When a defendant has been sentenced to a period of probation, the Court Support Services Division may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court." Section 53a-30 (b) thus contains two requirements. First, the condition of probation contemplated by the Office of Adult Probation must be one that the trial court could have imposed under § 53a-30 (a). Second, the condition must not be inconsistent with any condition of probation previously imposed by the court.

The state submits, and the defendant concedes, that the approval condition was one which the sentencing court could have imposed. Pursuant to § 53a-30 (a), the sentencing court was authorized to impose any condition "reasonably related to the defendant's rehabilitation." Given the context of the defendant's guilty plea; see footnote 1 of this opinion; we agree that the court could have imposed the approval condition at the time of sentencing.

With respect to the second requirement of § 53a-30 (b), the defendant claims that the approval condition is inconsistent with the supervisor condition that the court imposed at sentencing. This court previously has equated the term "inconsistent," as it is used in § 53a-30 (b), with incompatibility. *State* v. *Johnson*, supra, 75 Conn. App. 653. This court has further explained

that, to run afoul of the mandate of § 53a-30 (b), the condition imposed by the Office of Adult Probation must be "in direct contradiction to [a] condition imposed by the sentencing court . . . ." *State* v. *Armstrong*, 86 Conn. App. 657, 664, 862 A.2d 348 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1081 (2005).

We disagree with the defendant that the approval condition imposed by the Office of Adult Probation prior to his release from incarceration is incompatible with, and in direct contradiction to, the supervisor condition ordered by the court at sentencing. Rather, those two conditions complement each other. Whereas the supervisor condition ensured that a supervisor was present for any contact between the defendant and a minor under the age of sixteen, the approval condition ensured that such contact was approved by his probation officer in the first instance. We perceive nothing inherently inconsistent or contradictory about those two conditions of probation.

The core functions of probation officers are "to guide the [probationer] into constructive development" and to prevent "behavior that is deemed dangerous to the restoration of the individual into normal society." *Morrissey* v. *Brewer*, 408 U.S. 471, 478, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Under Connecticut law, probation officers are obligated to "keep informed of [the probationer's] conduct and condition and use all suitable methods to aid and encourage him and to bring about improvement in his conduct and condition." General Statutes § 54-108 (a). Because the defendant's incarceration in the present case stemmed from the sexual and physical assault of a six year old child, it was entirely appropriate for the Office of Adult Probation, in effectuating that statutory obligation, to impose the approval condition as a prerequisite to any supervised contact between the defendant and minors under the age of sixteen. We therefore reject the defendant's claim that

the approval and supervisor conditions of his probation are incompatible or inconsistent.

III

The defendant claims the court improperly failed to hold an evidentiary hearing pursuant to *Franks* v. *Delaware*, supra, 438 U.S. 154, on the veracity of certain allegations contained in the arrest warrant affidavit prepared by Sullivan. In *Franks*, the United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the [f]ourth [a]mendment requires that a hearing be held at the defendant's request." Id., 155–56. As our Supreme Court has explained, before a defendant is entitled to a *Franks* hearing, the defendant must "(1) make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and (2) show that the allegedly false statement is necessary to a finding of probable cause." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 363, 796 A.2d 1118 (2002).

In *State* v. *Bangulescu*, 80 Conn. App. 26, 832 A.2d 1187, cert. denied, 267 Conn. 907, 840 A.2d 1171 (2003), this court held that a defendant must distinctly raise a request for a *Franks* hearing before the trial court in order to preserve the claim for appellate review. As it stated: "[W]hen confronted with [the objectionable] testimony at trial, the defendant did not seek a *Franks* hearing; therefore, the court was not given the opportunity to determine whether [the witness'] inaccurate statement was made knowingly and intentionally, or with reckless disregard for the truth . . . or whether

it was necessary to the finding of probable cause . . . . As a consequence, the defendant's first claim must fail, as it does not meet the threshold requirement of *Golding* that the record be adequate for appellate review." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 33–34. That conclusion comports with the purpose of the preservation requirement, as "the essence of preservation is fair notice to the trial court . . . ." *State* v. *Miranda*, 327 Conn. 451, 465, 174 A.3d 770 (2018).

The logic of *Bangulescu* compels the same result in the present case, as it is undisputed that the defendant never requested a *Franks* hearing at any time during the probation revocation proceeding. The record further reveals that he did not distinctly raise with the trial court the claim he now pursues on appeal. As such, the claim is unpreserved.

Although unpreserved claims of constitutional dimension nonetheless may qualify for appellate review under *Golding*, such recourse is not available in the present case. Because the claim never was presented to the trial court, the record lacks the requisite findings as to (1) whether any allegedly false statements were knowingly and intentionally made with reckless disregard for the truth, and (2) whether those statements were necessary to the finding of probable cause. The defendant therefore cannot surmount *Golding*'s first prong, as the record is inadequate to review his unpreserved claim.[7]

IV

The defendant also claims that the court abused its discretion in denying his motion for judicial disqualification on the ground of bias. We do not agree.

[7] In light of our conclusion that the record is inadequate for review, we need not consider the state's alternate contention that probation revocation hearings, being akin to a civil proceeding; see *State* v. *Taveras*, 183 Conn. App. 354, 364, 193 A.3d 561 (2018); fall outside the scope of *Franks*.

The following additional facts are relevant to this claim. After the state rested its case-in-chief during the adjudicatory stage of the hearing, defense counsel made an oral motion to dismiss. Counsel then informed the court that he had "a written memorandum in support of my motion to dismiss." In response, the prosecutor stated that he had not seen the defendant's motion. The court then recessed the proceeding to provide the prosecutor with an opportunity to review the motion.

When the hearing resumed, the court noted that the written motion that the defendant submitted was dated October 19, 2017. At that time, the prosecutor indicated that he was "still not prepared . . . to respond adequately. The motion is dated October 19th, and here we are, November 8th, and I just was handed it right after the state rested its case." The prosecutor thus requested an additional ten to fifteen minutes to review the defendant's motion. Defense counsel asked to be heard and stated that he could not have filed that motion until he had heard the state's evidence. The following colloquy then occurred:

"[Defense Counsel]: I've been a trier of federal and state trials my whole adult . . . life. And good prudence is dictated to me that I wait to see all the evidence before I would file a motion that would argue the evidence. And the evidence before this court was that [the sentencing judge] issued a ruling that [the defendant] could have contact with minors as long as there was . . . supervision, the supervision was vetted, therefore there's no violation of [the court's] order. What's been confused here—

"The Court: Well, let's not argue the motion, counsel—

"[Defense Counsel]: Oh, I know. . . . [I]f [the prosecutor] wants more time to argue this, I don't have any problem with it, at all, or the judge to review it. There's

no urgency in this. But I really could only file it. I want to make sure because Your Honor doesn't know me, as a practitioner, but I can tell you that seasoned defense counsel would wait until the evidence came out before they would file anything arguing the evidence.

"The Court: Well, I, too, have been a seasoned judge for some time.

"[Defense Counsel]: Right.

"The Court: And I know how to handle this procedure. I have been sitting in the criminal bench for some period of time. I take a little offense to the lecture from counsel as to whether or not this should have been filed now or otherwise.

"[Defense Counsel]: I certainly apologize to the court . . . it had nothing to do with the court.

"The Court: I think it's fair, then—I accept your apology.

"[Defense Counsel]: Yeah, I do. That was not the intention, the intention was to explain my own behavior, not imply anything against the court.

"The Court: All right, well I think it's fair for everybody to be able to have an opportunity to review this memorandum that's been filed just minutes ago, and it's now eight pages in length with an affidavit also that's attached from a person who has not testified in this court."

With the agreement of both parties, the court then took a midday recess to allow the prosecutor additional time to review the defendant's motion to dismiss. When that recess concluded, the court heard argument on the merits of the motion from both the prosecutor and defense counsel. The court then denied the motion to dismiss and asked defense counsel if he wanted to put on any evidence. In response, defense counsel stated:

"Your Honor, at this time I'm going to ask that the court disqualify itself, and I move for your recusal. A reasonable defendant sitting in this chair . . . would find that this court's ruling on the evidence in the beginning of the case, as well as the discord that Your Honor and I had prior to the break, would find that you would be partial and biased towards him; he felt that way. And I move that you disqualify yourself and recuse yourself from this hearing." After acknowledging the gravity of that request, the court indicated that it would ask another judge to rule on the defendant's motion for judicial disqualification.

Following a recess, Judge Diana presided over a hearing on the defendant's motion, at which the court heard argument from the parties and playback of the foregoing colloquy between defense counsel and the court. In ruling on the motion, the court stated in relevant part: "It's a fundamental principle that to demonstrate bias sufficient to support a claim of judicial disqualification, the due administration of justice requires that such a demonstration be based on more than opinion or conclusion. Vague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse. The reasonable standard . . . is an objective one. The question is not only whether the particular judge is, in fact, impartial, but whether a reasonable person would question a judge's impartiality, based on the basis of all the circumstances. The law presumes that a duly elected or appointed judge, consistent with their oath of office, will perform their duties impartially and that they're able to put aside personal impressions regarding a party, the burden rests upon the party urging disqualification to show that it is warranted. . . . Based upon the evidence . . . my review of the [relevant] Practice Book section[s], the Code of Judicial Conduct, the exchange between counsel and [the trial

court], the apology [by defense counsel] and the acceptance [of that apology by the court, the facts of this case do] not rise to [the level of] a disqualification. The motion, therefore . . . is denied."

As our Supreme Court has observed, "[r]ule 2.11 (a) (1) of the Code of Judicial Conduct provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

Appellate review of the trial court's denial of a defendant's motion for judicial disqualification "is subject to the abuse of discretion standard. . . . That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.) *State* v. *Petaway*,

107 Conn. App. 730, 736, 946 A.2d 906, cert. denied, 289 Conn. 926, 958 A.2d 162 (2008).

In the present case, the defendant claims that a reasonable person would question the trial court's impartiality on the basis of certain adverse rulings that it made during the hearing and the aforementioned colloquy regarding the filing of the defendant's motion to dismiss. With respect to the former, it suffices to note that "adverse rulings by the judge do not amount to evidence of bias sufficient to support a claim of judicial disqualification." *State* v. *Bunker*, 89 Conn. App. 605, 613, 874 A.2d 301 (2005), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006). We further observe that the defendant's complaint that the court "offered no explanation for denying [his] right to confront the witness against him" is unfounded, as the defendant failed to bring that concern distinctly to the court's attention; see part I of this opinion; and he never requested an explanation or articulation from the court on that ruling, as expressly provided for in our rules of practice. See Practice Book §§ 64-1 and 66-5.

We also agree with Judge Diana that the colloquy regarding the filing of the motion to dismiss does not evince any partiality or bias on the part of the court. In that exchange, defense counsel clarified that his concern regarding the filing of the motion to dismiss "had nothing to do with the court" and offered an apology, which the court promptly accepted, stating, "I think it's fair then—I accept your apology." The court proceeded to grant a recess to afford the prosecutor additional time to review the defendant's motion and later heard argument from the parties before ruling on the merits of the motion. In sum, nothing in the transcript of the November 8, 2017 hearing reflects bias on the part of the court.

On our thorough review of the record before us, we cannot conclude that Judge Diana abused his discretion in concluding that a reasonable person would not

question the court's impartiality on the basis of the circumstances present in this case. Accordingly, the defendant's claim fails.

V

As a final matter, the defendant contends that the evidence adduced at the probation revocation hearing was insufficient to sustain the court's finding that he violated the terms of his probation. We disagree.

Under Connecticut law, a challenge to the court's determination during the adjudicatory phase of a violation of probation proceeding that a probationer has violated a condition of probation is governed by the clearly erroneous standard of review. As our Supreme Court has explained, in that adjudicatory phase the "trial court initially makes a factual determination of whether a condition of probation has been violated. In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling."[8] (Internal quotation marks omitted.) *State* v. *Hill*, 256 Conn. 412, 425–26, 773 A.2d 931 (2001).

In the present case, the record indicates that, prior to his release from incarceration, the defendant reviewed and signed the terms and conditions of his probation,

[8] By contrast, review of the court's determination during the dispositional phase of a probation revocation proceeding as to whether revocation is warranted is governed by the abuse of discretion standard. See *State* v. *Preston*, 286 Conn. 367, 377, 944 A.2d 276 (2008).

including the approval condition, and thereby manifested his understanding of the necessity to abide by those conditions. At trial, Sullivan testified that the approval condition obligated the defendant to obtain his approval prior to having any contact with a minor child. Sullivan explained that he received a report that a fourteen year old female had been residing in the defendant's apartment for approximately one week in December, 2016. When Sullivan confronted the defendant about that accusation, the defendant initially denied having any contact with her, but later broke down and started crying. Sullivan testified that he asked the defendant why he was crying, and that the defendant then admitted that the fourteen year old female "was staying at his residence and that he was having contact [with her]."

Sullivan and Valentin also testified that the investigation also included a visit to the defendant's apartment, where they encountered a sixteen year old who informed them that the fourteen year old female currently "was staying at [the defendant's] residence" and had done so at several intervals throughout the year, including holidays and recesses from school. Sullivan testified that the defendant had not obtained his approval for any such contact. The court, as trier of fact, was free to credit that testimony. *State* v. *Dunbar*, 188 Conn. App. 635, 642, 205 A.3d 747, cert. denied, 331 Conn. 926, A.3d (2019).

On the basis of that evidence, the court reasonably could find that the defendant violated his probation by not complying with the approval condition of his probation. The court's determination, therefore, is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EARL V. THOMPSON (AC 41780)

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

Syllabus

The defendant, who had been convicted of the crimes of conspiracy to commit robbery in the first degree, robbery in the first degree and kidnapping in the first degree, appealed to this court from the trial court's dismissal of his motion to correct an illegal sentence. In his operative motion, he alleged that his conviction of conspiracy to commit robbery in the first degree should be vacated because the state failed to present sufficient evidence that a plan existed between the defendant and his codefendant to threaten the victim with a gun after they gained entry into the victim's home, or showing that he intentionally aided his codefendant in the commission of the crime of robbery in the first degree. On appeal, the defendant claimed that the court improperly concluded that it lacked jurisdiction to consider the claim raised in his motion. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; for that court to have jurisdiction over the motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's claim here that the state did not present sufficient evidence to support his conviction of conspiracy to commit robbery in the first degree constituted a collateral attack on the validity of his conviction, via a sufficiency of the evidence claim, and did not challenge the legality of the sentence or the manner in which it was imposed.

Argued April 8—officially released June 18, 2019

Procedural History

Substitute information charging the defendant with the crimes of conspiracy to commit robbery in the first degree, robbery in the first degree, burglary in the first degree and kidnapping in the first degree as an accessory, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of burglary in the first degree; verdict of guilty of conspiracy to commit robbery in the first degree, robbery in the first degree and kidnapping in the first degree; subsequently, the court denied the defendant's motion for a new trial

and rendered judgment in accordance with the verdict, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the court, *Dewey, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Mark Diamond, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and, on the brief, *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Earl V. Thompson, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. In this appeal, the defendant claims that the trial court improperly concluded that it lacked subject matter jurisdiction to consider his motion. We conclude that, in the motion to correct considered by the trial court, the defendant challenged only the validity of his conviction and not his sentence or the sentencing proceeding, and, therefore, the court properly determined that it lacked subject matter jurisdiction. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion. The defendant was convicted, after a jury trial, of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (4) and 53a-48, robbery in the first degree in violation of § 53a-134 (a) (4) and kidnapping in the first degree as an accessory in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-8. See *State* v. *Thompson*, 128 Conn. App. 296, 298, 17 A.3d 488 (2011), cert. denied, 303 Conn. 928, 36 A.3d 241 (2012). Following his conviction, the court sentenced him to a term of twenty years

incarceration on each of the robbery counts, to run concurrently, and a term of twenty-five years incarceration on the kidnapping count, to run consecutively to the other terms, for a total effective sentence of forty-five years of incarceration. Id., 300. This court affirmed the defendant's conviction on direct appeal.[1] Id., 298.

On October 29, 2015, the self-represented defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. He argued that his sentence was internally contradictory and violated his right against double jeopardy. The front page of this motion contains two notations from the court. The first notation, dated March 31, 2016, states that the motion was

[1] In this court's decision, we set forth the following facts: "At approximately 11:30 p.m. on August 10, 2004, Stephan Julian arrived at her home in Bloomfield. At that time, her son, Damien Gardner, resided with her but was not present that night. As Julian entered the house, she was confronted by a man with a gun. A second man, also armed with a gun, quickly emerged. Because the faces of both men were covered, Julian could not recognize them, but she was able to determine that they were both dark skinned with Jamaican accents. The men repeatedly asked Julian where money was located in the house and forced her to lie on the floor in a downstairs bathroom while they searched the house. The men periodically checked on Julian, and she could hear them going up and down the stairs of her home. At one point, she heard an upstairs toilet flush. Eventually, when Julian no longer heard the men in her home, she peeked out of the bathroom and saw that it was light outside. She exited the bathroom and called the police.

"Detective Eric Kovanda was primarily responsible for processing the crime scene. In addition to other forensic evidence, Kovanda collected two urine samples from the rim of the toilet located in one of the upstairs bathrooms. The DNA profile developed from the urine swabs did not match any in the existing offender databases. In 2006, two jailhouse informants identified the defendant as a suspect, and, consequently, on February 11, 2008, the police collected a DNA sample from the defendant for comparison to the DNA profile developed from the urine samples that had been collected from the crime scene.

"On February 28, 2008, Kovanda met with the defendant to discuss the August 11, 2004 incident. The defendant indicated that he knew Julian's son, Gardner, and that he had been at their house a week or a few days prior to August 11, 2004. The defendant was arrested and charged with conspiracy to commit robbery in the first degree, robbery in the first degree, burglary in the first degree and kidnapping in the first degree as an accessory. . . .

"At the close of evidence, the state conceded that it had not presented sufficient evidence to support the burglary charge, and the court granted the defendant's motion for a judgment of acquittal as to that charge. The jury found the defendant guilty of the remaining counts." *State* v. *Thompson*, supra, 128 Conn. App. 298–300.

withdrawn. The second notation, dated August 24, 2016, states that the motion should be placed back on the docket and that a special public defender would review the motion to correct an illegal sentence. The self-represented defendant essentially reasserted the contents of his motion to correct an illegal sentence in a motion dated May 6, 2016,[2] and captioned "Motion to reopen Motion to correct illegal sentence pursuant to Connecticut Practice Book [§] 43-22." This "motion to reopen" included the claims that the defendant's sentence was internally contradictory and violated his right against double jeopardy.

On September 20, 2016, Attorney Robert J. McKay entered an appearance on behalf of the defendant. On April 24, 2017, McKay filed a motion to correct an illegal sentence. In the accompanying memorandum of law, McKay set forth the following: "The defendant now comes and claims that . . . there is a question regarding which statutory provision . . . applied at that time. Within the current case law, the defendant's conviction for conspiracy to commit robbery in the first degree . . . should be vacated as there existed no facts to support that there existed a plan between the defendant and a codefendant to threaten the victim with a gun upon enter[ing] the victim's home and/or intentionally aided the codefendant in committing the offense of robbery in the first degree."[3] McKay did not present a

[2] The court's date stamp on the defendant's motion to reopen is illegible and we cannot discern when this motion was received by the trial court.

[3] Three days later, during a brief hearing, the following colloquy occurred:

"The Court: Counsel, you have filed a substantial memoranda in support of the motion.

"[Defense Counsel]: Yes, Your Honor.

"The Court: And at this point, there is nothing left other than for me to review the allegations—

"[Defense Counsel]: Right.

"The Court: —individually and file my response to that.

"[Defense Counsel]: Yes, Your Honor.

"[The Prosecutor]: Thank you, Your Honor.

"The Court: That is it. So at this point, I have all the papers. I'll be reviewing them. I'll get to the decision as soon as is possible. Thank you.

"[Defense Counsel: Thank you."

double jeopardy argument in his motion to correct. On May 25, 2017, the state filed an objection to the motion to correct an illegal sentenced filed by McKay.

On July 28, 2017, the court dismissed the motion to correct an illegal sentence filed by McKay. It set forth the general legal principles regarding a motion to correct filed pursuant to Practice Book § 43-22. It then concluded: "Insofar as the defendant's motion to correct constituted a collateral attack on his conviction it is outside of this court's jurisdiction. See, e.g., *State* v. *Starks*, 121 Conn. App. 581, 590, 997 A.2d 546 (2010); *State* v. *Wright*, 107 Conn. App. 152, 157–58, 944 A.2d 991, cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008)." Furthermore, the last page of the motion to correct an illegal sentence filed by McKay contains the following handwritten notation, signed by Judge Dewey: "[D]ismissed, see memorandum of decision." This appeal followed.

We begin by setting forth the relevant legal principles and our standard of review. "The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to

correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Mukhtaar*, 189 Conn. App. 144, 148–49, A.3d (2019); see also *State* v. *Walker*, 187 Conn. App. 776, 783–84, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019). The determination of whether a claim may be brought via a motion to correct an illegal sentence presents a question of law over which our review is plenary. *State* v. *Abraham*, 152 Conn. App. 709, 716, 99 A.3d 1258 (2014); *State* v. *Koslik*, 116 Conn. App. 693, 697, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009).

"[A]n illegal sentence is essentially one which . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . Considering these categories . . . this court [has] held . . . that a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal

sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 779, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). Stated differently, "the motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal . . . ." Id., 781.

In the memorandum in support of the motion to correct an illegal sentence filed by McKay, the defendant expressly challenged his conviction for conspiracy to commit robbery in the first degree. Specifically, he argued that his conviction for that offense should be vacated because the state failed to present evidence that (1) a plan existed between the defendant and the codefendant to threaten the victim with a gun after entry into the victim's home and/or (2) the defendant intentionally aided the codefendant in the commission of the crime of robbery in the first degree. Simply stated, the defendant claims that there was insufficient evidence to support his conviction for conspiracy to commit robbery in the first degree.

The motion filed by McKay was the only one considered and decided by the court. Thus, the only claim before the court was whether the state had produced sufficient evidence to support the defendant's conviction for conspiracy to commit robbery in the first degree. In *State* v. *Starks*, supra, 121 Conn. App. 590, this court held that a claim of insufficient evidence "do[es] not concern the legality of [a defendant's sentence] or the manner in which it was imposed" and therefore lies outside the court's jurisdiction in regard to a motion to correct an illegal sentence. Put differently, the defendant's motion constituted a collateral attack on his conviction and, thus, was not within the court's jurisdiction. See, e.g., *State* v. *Koslik*, supra, 116

Conn. App. 699. Accordingly, we conclude that the court properly dismissed the motion to correct an illegal sentence filed by McKay.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ANAISHALY C. ET AL.*

(AC 41830)
(AC 41889)

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

Syllabus

The respondent parents filed separate appeals to this court from the judgments of the trial court terminating their parental rights with respect to their minor children A and K. The trial court had found, inter alia, that the children came into the custody of the petitioner, the Commissioner of Children and Families, because of the respondents' problems with marijuana use, domestic violence and transience. The court considered the respondents' refusal to submit to substance abuse testing, concerns over domestic violence, and the lack of suitable housing when it concluded that the respondents had failed to achieve a sufficient degree of personal rehabilitation since the Department of Children and Families began providing reunification services to them. *Held*:

[4] We have reviewed the record, including the court file and the memorandum of decision, and conclude that the motion to correct and the motion to reopen filed by the self-represented defendant were not before the trial court. Thus, it never considered or acted upon the double jeopardy claim raised in those motions. We note that "[a] violation of a defendant's right against double jeopardy is one of the permissible grounds on which to challenge the legality of a sentence [in a motion to correct an illegal sentence]." *State* v. *Santiago*, 145 Conn. App. 374, 379, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013); see also *State* v. *Wade*, 178 Conn. App. 459, 466, 175 A.3d 1284 (2017) (defendant properly may raise double jeopardy claim in context of motion to correct illegal sentence), cert. denied, 327 Conn. 1002, 176 A.3d 1194 (2018).

* 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.

1. The respondents could not prevail on their claim that there was insufficient evidence for the trial court to find by clear and convincing evidence that they had each failed to achieve the degree of personal rehabilitation as would encourage the belief that, within a reasonable time, they could assume a responsible position in the lives of the children: the respondents' claim that there was no evidence that their use of marijuana affected their ability to parent was unavailing, as they offered no authority to support their claim that the movement toward legalization of marijuana was relevant to the law the court was required to apply in evaluating the evidence in this case, the respondents' personal history of substance abuse, which had included the illegal use of marijuana, as well as other substances, had properly informed and determined their specific steps, which, in turn, were prerequisites to their own rehabilitation, the current movement and controversy over the legalization of marijuana in the criminal justice context was irrelevant because there is a vast difference in the purpose and application of criminal laws designed to protect the general public as compared to specific steps tailored to parents whose parenting issues are precisely why they had come to the attention of the department and the child protection court in the first instance, and the court properly found that the evidence showed the respondents' significant lack of insight about the correlation between substance abuse and intimate partner violence, as well as their failure to recognize how their use of illegal substances had harmed the children; moreover, the respondents' claim that there was insufficient evidence for the trial court to conclude that they had failed to rehabilitate on the basis of their problems with domestic violence was also unavailing, because although the court did not find that there were any instances of domestic violence since 2016, it was reasonable for the court to infer that the respondent father had not been able to control his temper or anger, and the record indicated that the court did not base its determination regarding failure to rehabilitate solely on the respondents' problems with domestic violence; furthermore, the respondents could not prevail on their claim that their housing situation did not support the trial court's ultimate conclusion that they had failed to rehabilitate, as the respondents' housing situation was one of multiple factors the court considered when it made its decision, and although the respondents were living with the father's mother, there was evidence, which the court credited, to support its conclusion that such housing was neither suitable nor permissible.
2. The respondents could not prevail on their claim that the trial court improperly determined that the termination of their parental rights was in the best interests of the children, which was based on their claim that the court's conclusion was improper in light of its findings that they had made progress in their rehabilitation and that they had a strong bond with the children: that court found that the respondents, despite receiving many supportive services during the lengthy pendency of this matter, did not resolve the serious and chronic problems that resulted

in the children's commitment to the custody of the commissioner, and that the children required the security of a safe and stable, permanent home, which their current placement in a foster home provided to them, and which the respondents remained unable to provide; moreover, although the court found that the respondents had made some progress in their rehabilitation efforts, it also found that despite successfully completing certain programs, the respondents were unsuccessful or noncompliant with others since the department removed the children from their care, and even when there is a finding of a bond between a parent and a child, as the court found in the present case, it still may be in the child's best interest to terminate parental rights.

Argued January 16—officially released June 10, 2019**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to certain of their minor children, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Dyer*, *J.*; judgments terminating the respondents' parental rights, from which the respondents filed separate appeals with this court. *Affirmed.*

David J. Reich, for the appellant in AC 41830 (respondent father).

Joshua Michtom, assistant public defender, for the appellant in AC 41889 (respondent mother).

Rosemarie T. Weber, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee in both cases (petitioner).

Opinion

ELGO, J. The respondent mother (mother) and the respondent father (father)[1] appeal from the judgments of the trial court terminating their parental rights with

** June 10, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We refer to the mother and the father collectively as the respondents.

respect to their minor children, Anaishaly C. and Khrianalis C.,[2] and appointing the petitioner, the Commissioner of Children and Families (commissioner), as the statutory parent.[3] The respondents contend that the court improperly concluded that (1) they failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112, and (2) termination of their parental rights was in the best interests of the children. We affirm the judgments of the trial court.

The following facts, which the trial court found by clear and convincing evidence, and procedural history are relevant to the resolution of this appeal. On August 28, 2012, the father was arrested on charges of assault in the third degree and disorderly conduct after he punched and kicked the mother during an argument at their residence, leaving a boot shaped imprint on her back. The mother was transported to the hospital by ambulance. Although the father told police officers that he had consumed several drinks, the police report noted his ability to articulate his thoughts clearly and calmly. According to the police report, the mother told officers that Anaishaly, who was born in June, 2011, and was fourteen months old at the time, was living with the respondents and had not witnessed the assault. Thereafter, a no contact protective order was issued by the criminal court. The order barred the father from initiating any contact with the mother and required him to vacate the home that they shared.

On October 21, 2014, the mother met with a Department of Children and Families (department) social worker and its domestic violence consultant. At that time, the mother indicated that she was afraid of the

[2] The mother gave birth to two other children. See footnote 6 of this opinion. We refer to all four children individually by their names, and we refer to Anaishaly and Khrianalis collectively as the children.

[3] We note that pursuant to Practice Book § 67-13, the attorney for the minor children filed a statement adopting the brief of the commissioner in the mother's appeal.

father and informed the department about his ongoing abuse. She told the department personnel about the incident that occurred on August 28, 2012, and about another occasion in which the father had choked and had assaulted her, which left a scar on her forehead. On October 22, 2014, after the mother signed a safety plan in which she agreed to have no contact with the father,[4] the department brought her and Anaishaly to a domestic violence shelter. During October, 2014, the mother received drug treatment because she had rendered a positive urine test during a substance abuse assessment.

On October 27, 2014, the department learned that the mother and Anaishaly were no longer at the shelter after a department worker called the cell phone number provided by the mother and the father answered. He stated that he was at work and that the mother was at home with Anaishaly. Later that day, the mother spoke with a department worker. She reported that she had bipolar disorder, expressed her reluctance to return to the shelter, and recanted the allegations that the father had abused her physically. On that same date, the commissioner assumed temporary custody of Anaishaly, who was then three years old, pursuant to an administrative ninety-six hour hold. On October 30, 2014, the commissioner filed a neglect petition as to Anaishaly and obtained an ex parte order of temporary custody. That order was sustained at a hearing held on November 5, 2014.[5]

[4] According to a department social worker affidavit, pursuant to the safety plan, the mother agreed to go to the domestic violence shelter, follow the shelter's rules, and follow its recommendations, including those related to advocacy and domestic violence education. The mother also agreed to have no contact with the father and to file a restraining order against him. She further agreed to request advocacy regarding her lease. The department agreed to maintain communication with the mother and shelter staff. It also agreed to continue its assessment and to provide case management services.

[5] The file indicates that the respondents were issued specific steps filed on October 30, 2014, and signed by the respondents on November 5, 2014, which provided, inter alia, that they: participate in counseling and make

At 4:11 a.m. on January 1, 2015, police were called to the respondents' address. The police report indicated that the father had kicked in the front door of the apartment and attempted to punch the mother. Responding officers observed the damaged door, overturned furniture, and other vandalism. The father was not at the scene when the police arrived. The police returned to the residence again at approximately 6 a.m., at which time the mother told the police that she had received a telephone call from the father, who had threatened to "kill her" and "burn down" the apartment. (Internal quotation marks omitted.) The police discovered the father on the premises and arrested him on charges of threatening, criminal mischief, disorderly conduct, and possession of a hallucinogenic substance. The police report noted that the father was "acting like he had consumed some kind of drug(s) and alcohol." Tablets, later identified as the illegal drug ecstasy, were found on the father's person. The police report also noted that the father was combative during booking. On January 2, 2015, another full no contact protective order was issued against the father, which prohibited him from having any contact with the mother and required him to stay 100 yards away from her. He subsequently was convicted of threatening and received a six month suspended jail sentence as a result of this incident.

Anaishaly was adjudicated neglected and committed to the commissioner's custody on February 24, 2015. Thereafter, the department referred both respondents to various rehabilitative services in order to facilitate their reunification with Anaishaly. During 2015, the

progress toward the identified treatment goals; not use illegal drugs or abuse alcohol or medicine; submit to random drug testing; cooperate with service providers' recommendations for parenting/individual/family counseling, in-home support services, and/or substance abuse assessment/treatment; get and/or maintain adequate housing and a legal income; and learn about the impact of domestic violence on children.

mother successfully completed an intimate partner violence course, substance abuse treatment, and a parenting education course.

The father's progress reports revealed mixed results. Although a department report received on March 18, 2015, indicated that he had attended all sessions in a parenting education course, he did not appear to gain insight about "how to effectively parent and display an image of a good father to his child." He also received drug treatment, from which he was discharged on September 29, 2015. Although his drug tests were negative on August 3, August 17 and September 28, 2015, he tested positive for opiates on September 8, 2015, and positive for oxycodone on September 14, 2015. The father claimed that the positive urine tests resulted from his use of his mother's prescription pain killers to treat a back injury. Following his completion of a family violence program on November 17, 2015, the department believed that he made progress in that program.

Khrianalis was born in August, 2015. After being discharged from the hospital, she lived with the respondents. Approximately six months after Khrianalis was born, the department referred the respondents to the Village for Children & Families (Village) for reunification services in an effort to reunify Anaishaly with the respondents and Khrianalis. The Village began providing reunification services on March 3, 2016. On the basis of the respondents' satisfactory participation with the Village, the department returned Anaishaly to the respondents' home on a trial basis on May 31, 2016.

Approximately one month later, on June 28, 2016, neighbors overheard the father cursing at the mother, followed by loud noises coming from the respondents' apartment. Several tenants were concerned that it sounded like the father was physically abusing the mother. A department social worker met with the respondents the next day. Both respondents denied that

there had been any physical violence. They told the department social worker that they had not argued but had discussed an accusation that the father had been seen with another woman earlier that day. The department social worker also learned that the mother was pregnant. The department social worker spoke with Anaishaly, who was five years old at the time. Anaishaly reported to the department social worker that she and Khrianalis had stayed the previous night at their paternal grandmother's home. She also reported that she had observed the mother and the father arguing and had observed the father hit the mother. Anaishaly proceeded to describe verbally and physically where and how the father hit the mother, pointing to her left cheek when asked where the mother was hit. She showed an open hand and performed a slapping motion when she was asked how the father hit the mother. In response to Anaishaly's disclosure, "[t]he [respondents] openly blamed Anaishaly for the current situation, saying she has lied about witnessing violence and has lied on a frequent basis."

As a result of this incident, the department returned five year old Anaishaly to foster care on June 29, 2016. On that same date, the commissioner assumed temporary custody of almost ten month old Khrianalis pursuant to an administrative ninety-six hour hold. On July 1, 2016, the commissioner filed a neglect petition as to Khrianalis and obtained an ex parte order of temporary custody. That order was sustained on July 8, 2016. Khrianalis was adjudicated neglected on September 8, 2016. The children have remained in department foster care continuously from June 29, 2016, to the time of trial and have been placed with their paternal stepuncle, Jose Q., and his domestic partner.

On July 1, 2016, the court issued amended specific steps to the respondents. They were "ordered, inter alia, to cooperate with counseling and gain insight about how domestic violence affects their children; abstain

from illegal drugs; submit to random drug testing; submit to substance abuse evaluations and follow treatment recommendations; visit the children as often as permitted; and obtain suitable housing." To facilitate their compliance with the treatment goals and reunification, the department referred the respondents to appropriate services and treatment that focused on their problems with substance abuse, parenting skills, intimate partner violence, and lack of suitable housing.

On November 26, 2016, the mother gave birth to another daughter, Knitzeyalis.[6] Both the mother and the child's meconium tested positive for marijuana. On November 30, 2016, the commissioner obtained an ex parte order granting her temporary custody of Knitzeyalis. That order was sustained by the court at a hearing held on December 9, 2016.[7] Knitzeyalis was adjudicated neglected and committed to the commissioner's custody on January 3, 2017. She has remained in the commissioner's custody and guardianship from the date of her removal through the time of trial and lives with her sisters in the foster home of Jose Q.

As the court indicated in its memorandum of decision, "[e]xtensive evidence was presented during this trial about the [respondents'] varying degrees of cooperation and involvement with services during the past two years." On September 29, 2016, prior to the birth

[6] The respondents' parental rights as to Knitzeyalis are not the subject of this action. The mother also has an older child, Taisha R.G., who was born on December 19, 2007. According to a department social study, from "March 19, 2008, to August, 2009, [the mother] had protective services involvement in Massachusetts due to domestic violence and homelessness/transience." Guardianship of Taisha was transferred from the mother to the child's paternal grandmother in May, 2008. Since that time, Taisha has remained in her paternal grandmother's care.

[7] In its memorandum of decision, the court took judicial notice of the fact that "the court issuing that order of temporary custody made a legal finding that Knitzeyalis was in immediate danger of physical injury from [the] surroundings in the parental home at the time the order was signed."

of Knitzeyalis, the department referred the respondents to the Intimate Partner Violence-Family Assessment Intervention Response (IPV-FAIR) program at Community Health Resources. The service provider informed the department that the respondents were discharged from the program on January 3, 2017, due to poor attendance.

On May 5, 2017, the commissioner filed termination of parental rights petitions as to the respondents on behalf of the children. The department had been providing reunification services since October, 2014, when Anaishaly was first placed into foster care at three years old. At the time the petitions were filed, Anaishaly was nearly six years old, and Khrianalis, who was placed in foster care when she was almost ten months old, was twenty months old.

The respondents subsequently reengaged in the IPV-FAIR program on May 22, 2017, and successfully completed it on November 1, 2017. They attended the IPV-FAIR program "regularly, participated consistently in the sessions, were cooperative, and made progress in the program."[8] In a discharge summary dated November 11, 2017, an outreach therapist at Community Health Resources "recommended that [the father] should undergo a mental health assessment and follow treatment guidelines to deal with [the] underlying trauma issues in his life that appear to cause his reactive behavior." The father had not initiated this treatment as of the conclusion of trial.

On October 24, 2017, while the termination of parental rights petitions were still pending, the department

[8] In addition to the IPV-FAIR program, the mother also successfully completed an "Intimate Partner Violence Group" on September 17, 2016, and a "Positive Parenting & Support Group" on May 20, 2017. (Internal quotation marks omitted.) The mother also completed similar domestic violence programs known as "Integrated Family Violence Services" on dates not specified and "Positive Parenting Education and Support Groups" on July 28, 2015, and September 17, 2016. (Internal quotation marks omitted.)

referred the family to the Village for a reunification readiness assessment to determine if the children could be safely returned to the respondents' care. Chastity Chandler, who holds a master's degree in social work and is employed as a family support specialist at the Village, was assigned to conduct the thirty day evaluation. She met with the family on eight occasions. She observed four visits between the respondents and the children and also visited the family home four times. The court found that Chandler "credibly reported that [the respondents] actively engaged with the children during the visits and that [the respondents] were capable of meeting the children's basic needs. . . . She credibly testified that the respondents displayed love and affection for the children during these contacts and that a strong bond exists between the [respondents] and their children. . . . Chandler testified credibly that Anaishaly articulated her desire to live with [the respondents]." (Citations omitted.)

Chandler, however, did not recommend reunification. Notwithstanding the pendency of the termination of parental rights petitions, both respondents were noncompliant with random drug testing. The father cooperated with only one out of twelve random drug screens. He did not appear for his first random drug test on September 8, 2017. He submitted a sample that was negative for all illicit substances on September 19, 2017, but he then failed to attend all subsequent random testing sessions. Further, the father told Chandler that he would continue smoking marijuana after the children were returned to his care because he did not believe that using it was harmful. The mother refused to give a urine sample when one was requested on October 25, 2017. Both respondents refused to submit to segmented hair tests.

On November 21, 2017, Chandler held a "closing meeting," which was attended by the respondents and department personnel, where she explained the outcome of the Village's reunification assessment to the

respondents. During the meeting, the father became upset, used profanity, made a threat to harm a department social worker, and threatened that he would "blow up" the department office.

After the reunification assessment, in December, 2017, the department asked both respondents to submit to segmented hair drug testing. The mother did not attend scheduled appointments for hair testing on either December 21 or December 26, 2017. A hair sample was collected from the mother on January 2, 2018, which came back negative. The mother admitted, however, that she had used marijuana sometime between Christmas and New Year's Day.[9] The father appeared for testing on December 26, 2017, but because he had cut his hair, he could not provide a testable sample. Between that date and trial, the father had been scheduled for four appointments for hair testing, and he had still not been tested.

The court also found that the respondents failed to secure adequate housing. At the time of the reunification assessment, in the fall of 2017, the respondents were residing in a five bedroom apartment that was leased by the father's mother, who was the recipient of section 8 housing benefits whereby program rules prohibited the respondents from living with her in the apartment. Consequently, the court found that "at the time of the readiness reunification assessment, the [respondents] lacked stable housing for [the children and Knitzeyalis]." In making these findings, the court also found relevant that in February, 2017, the mother was dismissed from a supportive housing assistance program, which provided her with rental assistance, due to noncompliance with program rules. The program

[9] A clinician at the agency where the testing was conducted testified that the mother's use of marijuana would likely not have shown on the hair test because of how recently the hair sample was collected relative to the time frame of the mother's reported use of the drug.

allowed for two warnings of noncompliance, and the mother was issued three warnings due to disturbances at the home and her failure to attend meetings.

Through the date of trial, the children resided with their foster parents, their foster parents' two children, and Knitzeyalis. The court found that the children have bonded well with their foster parents and other family members. Although Jose Q. and his domestic partner initially told the department that they would not serve as long-term placement resources, they have since informed the department that they are willing to adopt the children. The court credited a department social study, which opined that the children "need permanent and stable living arrangements in order to grow and develop in a healthy manner."

A trial on the termination of parental rights was held on January 11, April 12 and May 1, 2018. On May 22, 2018, the court terminated the respondents' parental rights and appointed the commissioner as the children's statutory parent. This appeal followed.

I

The respondents first claim that there was insufficient evidence for the trial court to find by clear and convincing evidence that they have each failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, they could assume a responsible position in the lives of the children.[10] We disagree.

We begin by setting forth the applicable standard of review and general principles. "The trial court is

[10] We note that the father does not argue that the court's findings are clearly erroneous and, in the mother's appellate brief, she explicitly states that she "does not by the present appeal challenge the trial court's factual findings." Instead, both respondents argue that those findings are insufficient to support the court's ultimate conclusion.

required, pursuant to § 17a-112,[11] to analyze the [parents'] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

[11] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"When a child is taken into the commissioner's custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights." (Citations omitted; footnote added; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted.) *In re Elvin G.*, 310 Conn. 485, 507–508, 78 A.3d 797 (2013).

"While . . . clear error review is appropriate for the trial court's subordinate factual findings . . . the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587–88.

"An important corollary to these principles is that the mere existence in the record of evidence that would support a different conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is *enough* evidence in the record to support the finding that the trial court made." (Emphasis altered.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

The court found by clear and convincing evidence that the department's offer and provision of services from 2015 through the end of the trial "constituted reasonable and timely efforts by the department to assist each parent's rehabilitation and to reunify the family."[12] It also found by clear and convincing evidence that the respondents had each "failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering [the] ages and needs of [the children], they could assume a responsible position in the lives of those children." Our review of the record in light of the lengthy recitation of the factual findings made by the court convinces us that the extensive evidence credited by the court supports its determination.

The court found that "[the children] came into [the commissioner's] custody because of [the respondents'] problems with marijuana use, domestic violence and transience. Anaishaly was twice removed from the custody of [the respondents]. She has been committed to the [commissioner's custody] since February 24, 2015. Khrianalis followed her sister into the child protection

[12] We note that the respondents do not argue on appeal that the department did not make reasonable and timely efforts to assist in their rehabilitation and reunification with the children.

system on June 29, 2016. Both children have lived in their current foster home since that date." The court concluded "[b]ased on all of the evidence presented . . . that [the respondents] are unable or unwilling to benefit from the extensive assistance that [the department] and other agencies have offered and provided to them while the children's cases have been pending." As the court explained in its memorandum of decision: "[The department] has offered and provided multiple reunification services to [the respondents] on an ongoing basis since October, 2014. These have included mental health counseling, substance abuse evaluations, counseling and testing, parenting education, intimate partner violence programs, supervised visitation, case management, supportive housing assistance, and reunification readiness assessments and services. The court has found that these services were timely and constituted reasonable efforts to reunify the family. The respondents successfully completed some programs, but they were unsuccessful, or noncompliant, with others. One [department] witness offered an apt analogy during her testimony when she likened the twists and turns of this case to a roller coaster ride. There were high points when [the respondents] appeared to be making progress, followed by low points when the [respondents], who were twice assessed for the return of the children, engaged in negative behavior that stopped reunification in its tracks."

In challenging these findings, both respondents argue that there is no evidence that their use of marijuana affected their ability to parent, and that "because the law concerning [the criminalization of] marijuana has changed, this change must also be reflected in the law concerning child protection . . . ." We are not persuaded.

First, the respondents offer no authority to support their claim that the movement toward legalization of

marijuana is relevant to the law the court was required to apply in evaluating the evidence in this case. Indeed, our Supreme Court has held otherwise. The court in *In re Shane M.*, supra, 318 Conn. 596 n.23, found "unpersuasive the respondent's claim that, even properly drawn, [the] inference [that he had continued to use marijuana based on his proven past marijuana use and his refusal to submit to drug testing] did not prove that he failed to rehabilitate because criminal penalties for possession of marijuana have been reduced and the legislature has approved the use of marijuana for palliative medical purposes." Our Supreme Court reasoned that, "regardless of marijuana's recent limited legalized status, the respondent was ordered to refrain from using it due to his extensive personal history of substance abuse." Id. Similarly, in the present case, the respondents' personal history of substance abuse, which has included the illegal use of marijuana, as well as other substances, has properly informed and determined their specific steps, which, in turn, are prerequisites to their own rehabilitation. See id.; see also *In re Elvin G.*, supra, 310 Conn. 507–508 ("[s]pecific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights").

Second, there is a vast difference in the purpose and application of criminal laws designed to protect the general public as compared to specific steps tailored to parents whose parenting issues are precisely why they have come to the attention of the department and the child protection court in the first instance. In the same way that the general public may legally consume alcohol while those who are alcohol dependent may not enjoy the same freedom, less restrictive laws around marijuana use for the general public[13] have no bearing

[13] In her appellate brief, the mother specifically refers to the permitted palliative use of marijuana; see General Statutes § 21a-408a et seq.; and the decriminalization of possession of less than one-half ounce of marijuana. See General Statutes § 21a-279a.

on respondents whose abuse of substances, including marijuana, has required treatment and abstention. The current movement and controversy over the legalization of marijuana in the criminal justice context is simply irrelevant.

Further, the respondents' focus on the legalization of marijuana operates on the assumption that their admissions of marijuana use are credible evidence of the extent of their rehabilitation. Understood in the context of the respondents' failure to cooperate with drug testing, evidence amounting to the respondents' self-report of marijuana use was simply that—a self-serving assessment of their own rehabilitative status—which the court was free not to credit. In fact, the proper measure of their compliance with the requirement that they refrain from abusing substances is in their ability to provide negative and randomized drug testing results over a sustained period of time, which they failed to do. The respondents knew full well that the failure to submit to drug testing violated their specific steps, which, in turn, would impede reunification with their children. Understanding these consequences, and notwithstanding the pending termination petitions, the respondents nevertheless chose not to comply, which the court properly considered in finding that the respondents failed to rehabilitate. In observing that the mother "was also aware that her fitness to resume custody of [the children and Knitzeyalis] was being evaluated when she refused to submit to drug testing in October, 2017," the court gave appropriate weight to this factor when considering whether the respondents were willing and able to reunify with the children.

We simply do not find fault in the court's finding that "the [respondents'] refusal to comply with drug testing during the assessment period, and the father's attitude about continued marijuana use, [was] particularly disturbing. This evidence reveals each parent's significant lack of insight about the correlation between substance

abuse and intimate partner violence, as well as their failure to recognize how their use of illegal substances has harmed [the children] and Knitzeyalis."

The respondents also argue that there was insufficient evidence for the court to conclude that they had failed to rehabilitate on the basis of their problems with domestic violence, noting that there were no incidents of intimate partner violence since 2016, and that they had each completed domestic violence programs.[14] We

[14] The mother argues that the court cited to a department social study written before she completed the IPV-FAIR program in November, 2017, to support the following findings: "The court finds that the mother lacks understanding about the dynamic of intimate partner violence that exists in her relationship with the father, and how it is harmful to her children. The court finds that there is a substantial likelihood that [the children] would be exposed to acts of domestic violence, or other angry outbursts by [the father] if they were returned to parental custody. The court also finds that [the mother] has not demonstrated that she would be able to shield [the children] from the potential physical and psychological dangers associated with the father's reactive behavior." The mother, however, has not distinctly raised a claim that the court's factual findings were clearly erroneous. To the contrary, she specifically states in her appellate brief that she "does not by the present appeal challenge the trial court's factual findings." Moreover, on the evidence before us, we do not conclude that the court's factual findings were clearly erroneous. "In reviewing the trial court's decision, [b]ecause it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 593 n.20.

We further note that the mother completed the IPV-FAIR program to which she refers in November, 2017, subsequent to the May, 2017 filing of the termination of parental rights petitions. Practice Book § 35a-7 (a) provides: "In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." This court "has expanded that rule to *allow* courts to consider events subsequent to the filing date of the petitions in the adjudicatory phase of termination proceedings. Practice Book § 33-3 (a) [now § 35a-7] limits the time period reviewable by the court in the adjudicatory phase to the events preceding the filing of the petition or the latest amendment. . . . In the adjudicatory phase, the court *may* rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis in original; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 494–95, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003).

reiterate that, on review, we must determine "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that *the cumulative effect of the evidence* was sufficient to justify its [ultimate conclusion]." (Emphasis added; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 588.

The record indicates that the court did not base its determination regarding failure to rehabilitate solely on the respondents' problems with domestic violence. The court expressed its specific concern with the father's history of domestic violence and the link between at least two of those instances and his use "of alcohol and/or illegal controlled substances." Although the court did not find that there were any instances of domestic violence since 2016, it was reasonable for the court to infer that the father has not been able to control his temper or anger. The court specifically noted "the similarity between [the father's] conduct on January 1, 2015, when he threatened to kill [the mother] and burn down her apartment, and his behavior on November 21, 2017, when he threatened to cause physical harm to [a department social worker] and blow up the [department] office." That November 21, 2017 incident occurred after the respondents had completed the IPV-FAIR program.

The respondents also argue that their housing situation did not support the court's ultimate conclusion that they have failed to rehabilitate. We again note that we must look at the cumulative effect of the evidence; *In re Shane M.*, supra, 318 Conn. 588; and that the respondents' housing situation was but one of multiple factors the court considered when it made its decision. The court credited the evidence that the respondents cannot legally stay with the children at the home of the father's mother. It concluded that, "[a]s a result, the mother and the father are still without suitable housing for the children . . . [and] this problem might have

been solved if the mother had not been discharged due to noncompliance last year from the supportive housing assistance program to which she had been referred by [the department]." Neither respondent challenges the court's factual findings. See footnote 10 of this opinion. Although the respondents were living with the father's mother, there was evidence, which the court credited, to support its conclusion that such housing was neither suitable nor permissible.

The court's memorandum of decision plainly indicates that the court considered the respondents' refusal to submit to substance abuse testing, concerns over domestic violence, *and* the lack of suitable housing when it concluded that the respondents have failed to achieve a sufficient degree of personal rehabilitation since the department began providing reunification services to the respondents, beginning in October, 2014. The record before us contains evidence that substantiates these findings. Accordingly, we conclude that the court reasonably could have determined, on the basis of its factual findings and the reasonable inferences drawn therefrom, that the respondents failed to achieve sufficient rehabilitation that would encourage the belief that, within a reasonable time, they could assume a responsible positon in the children's lives.

II

The respondents next claim that the court improperly determined that the termination of their parental rights was in the best interests of the children. Specifically, they argue that the court's conclusion was improper because the court found, among other things, that they have made progress in their rehabilitation and that they have a strong bond with the children.[15] We disagree.

[15] The mother also asserts "that there was absolutely no evidence adduced suggesting that ongoing visits with the [respondents] while the children remained in the sole relative foster placement [that they have] known since removal was having any negative effect on them. . . . Indeed, there was no evidence suggesting that the continuation of the [respondents'] legal rights would affect the children's well-being in any way." (Citation omitted.)

We begin by setting forth the applicable standard of review and general principles. "In the dispositional phase of a termination of parental rights hearing,[16] the

This assertion, however, ignores established case law and the fundamental underlying public policy that recognizes the importance of permanency in a child's life. Anaishaly was removed from the respondents' care when she was three years old. Khrianalis was almost ten months old when she was removed from the respondents' care. The children have been in legal limbo since then. At the time the termination of parental rights petitions were filed, Anaishaly was almost six years old and Khrianalis was almost two years old. When the court rendered its decision, Anaishaly was almost seven years old and Khrianalis was almost three years old.

Our appellate courts have "noted consistently the importance of permanency in children's lives. *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 646, 436 A.2d 290 (1980) (removing child from foster home or further delaying permanency would be inconsistent with his best interest); *In re Victoria B.*, 79 Conn. App. 245, 263, 829 A.2d 855 (2003) (trial court's findings were not clearly erroneous where much of child's short life had been spent in custody of [commissioner] and child needed stability and permanency in her life); *In re Teshea D.*, [9 Conn. App. 490, 493–94, 519 A.2d 1232 (1987)] (child's need for permanency in her life lends added support to the court's finding that her best interest warranted termination of the respondent's parental rights). Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008). "Termination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption. . . . Even if no adoption is forthcoming, termination can aid stability and lessen disruption because a parent whose rights have been terminated no longer may file a motion to revoke the commitment of the child to the custody of the [commissioner] . . . or oppose an annual permanency plan." (Citation omitted; internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 733, 120 A.3d 1177 (2015).

Evidence before the court supported its findings that the children require permanency, and the court properly considered their need for permanency in its consideration of whether termination was in their best interests. Accordingly, we reject the mother's assertion.

[16] "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 582–83 n.12.

emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . 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. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)].[17] . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to

[17] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnotes added and altered; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015).

In the portion of its memorandum of decision where it addressed the dispositional phase, the court reasoned: "The court has given careful consideration to the strong feelings which the [respondents] and the children have for each other. However, the court must examine and weigh this evidence in conjunction with the evidence about the length of time that both children have been in foster care and each parent's lack of progress toward reunification. Anaishaly, who will turn seven in June, [2018], has spent a total of more than three and [one-half] years in the custody of [the commissioner]. Khrianalis, who will be three in August, [2018], has resided for almost [twenty-three] months—or slightly less than two thirds of her life—in a foster home. Based on each parent's inability to sufficiently recognize and remedy the issues that caused the children's removal, and their failure to substantially benefit from services and treatment, it is impossible to predict when in the future [the children] could be safely returned home. The evidence also established that [the children] are both doing well in their present placement, and that their caretakers have committed to adopting them." The court concluded: "Because of the strong bond that exists between the [respondents] and [the children], it is very appropriate that [the mother] and [the father] were afforded much help and many opportunities to achieve reunification. However, despite receiving many supportive services during the lengthy pendency of this matter, the respondents have not resolved the serious and chronic problems that resulted in the children's commitment to [the commissioner's custody]. [The children] require the security of a safe and stable, permanent home. Their current placement provides this to them. Their biological parents remain unable to offer this to them. The

court finds that it would be detrimental to the well-being of these children [to] delay permanency any longer in order to afford the respondents additional time to pursue rehabilitative efforts which have thus far proven unsuccessful." The court also made additional findings as to the seven factors enumerated in § 17a-112 (k) and those findings are supported by the record.

Although the respondents contend that certain positive facts found by the court outweigh the negatives, "we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." *In re Shane M.*, supra, 318 Conn. 593. The respondents point out that the court found that they had made some progress in their rehabilitation efforts. We will not, however, overlook the court's finding that despite "successfully complet[ing] some programs," the respondents were "unsuccessful, or noncompliant, with others" since the department removed Khrianalis and Anaishaly, for the second time, from their care on June 29, 2016.

Moreover, as to the respondents' contention that the court found that they shared a bond with their children, " '[o]ur courts consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights.' *In re Rachel J.*, 97 Conn. App. 748, 761, 905 A.2d 1271, cert. denied, 280 Conn. 941, 912 A.2d 476 (2006); see also *In re Tyqwane V.*, 85 Conn. App. 528, 536, 857 A.2d 963 (2004) ('The Appellate Court has concluded that a termination of parental rights is appropriate in circumstances where the children are bonded with their parent if it is in the best interest of the child to do so. . . . This is such a case.' . . .); *In re Ashley S.*, 61 Conn. App. 658, 667, 769 A.2d 718 ('[A] parent's love and biological connection . . . is simply not enough. [The department] has demonstrated by clear and convincing evidence that [the respondent] cannot be a competent parent to these children because

she cannot provide them a nurturing, safe and structured environment.'), cert. denied, 255 Conn. 950, 769 A.2d 61 (2001)." *In re Melody L.*, 290 Conn. 131, 164, 962 A.2d 81 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014). The existence of a bond, while relevant to the court's analysis, is not dispositive of the best interests determination.

On our careful review of all the evidence, we cannot conclude that the trial court's determination that the termination of the respondents' parental rights was in the best interests of the children was clearly erroneous.

The judgments are affirmed.

In this opinion the other judges concurred.