SCARLETT LEWIS, ADMINISTRATRIX (ESTATE OF JESSE LEWIS), ET AL. *v.* TOWN OF NEWTOWN ET AL.
(AC 41697)

Lavine, Elgo and Bishop, Js.

Syllabus

The plaintiffs, the administrators of the estates of two victims of the mass shooting at Sandy Hook Elementary School in 2012, sought to recover damages from the defendants, the town of Newtown and its board of education, pursuant to statute (§ 52-557n [a] [1]), for alleged acts of negligence that the plaintiffs claimed were substantial factors in contributing to the deaths of their decedents. The plaintiffs alleged, inter alia, that the defendants had instituted school safety policies and procedures that left no discretion to teachers and other employees, and were to be followed as mandated by the defendants. The plaintiffs claimed that a school lockdown and evacuation plan was not implemented on the day of the shooting, and that the defendants had created a ministerial duty that required their employees, agents and members to take whatever precautions were necessary and enumerated in the school safety policies and procedures to protect the plaintiffs' decedents on the day of the shooting. The plaintiffs further asserted that the defendants left the school's faculty and staff in a position in which they could not adhere to or failed to adhere to the mandatory school security guidelines. The

defendants filed a motion for summary judgment in which they claimed, inter alia, that they were entitled to governmental immunity pursuant to § 52-557n (a) (2) and that there was no genuine issue of material fact as to their alleged negligence. The trial court granted the motion for summary judgment on the ground of governmental immunity, determining that the plaintiffs' complaint made no specific allegations against any of the faculty or staff in the school at the time of the shooting, and that the school security guidelines imposed discretionary responsibilities, rather than a ministerial duty, on the defendants and faculty and staff. The court also determined that the defendants' allegedly negligent acts and omissions were discretionary. Further, the court concluded that even if the school's faculty and staff had a discretionary duty to implement the school security guidelines and that the shooter had created an imminent risk to those in the school, no reasonable fact finder could conclude that the faculty and staff caused the catastrophic consequences that befell those in the school. On appeal to this court, the plaintiffs claimed, inter alia, that the trial court improperly concluded that their complaint contained only allegations of negligence that were directed at the defendants for actions that occurred before the day of the shooting. The plaintiffs further claimed that the court improperly determined that the defendants' implementation of school security guidelines was discretionary in nature and that the identifiable person-imminent harm exception to governmental immunity did not apply to the defendants' claim of immunity. *Held*:

1. The trial court improperly determined that the complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting and contained only allegations of negligence directed at the acts and omissions of the defendants occurring before that date: the record demonstrated that the complaint contained allegations that both the defendants and the school faculty and staff had a ministerial duty to create and implement the school security guidelines, and that they failed to fulfill that duty, as the complaint set forth claims of negligence that were directed at the defendants' alleged breach of a ministerial duty prior to the shooting, and that related to an alleged breach of a ministerial duty by the school faculty and staff to implement school security guidelines that occurred on the date of the assault, and, therefore, the court improperly concluded that such allegations against the faculty and staff were raised for the first time in opposition to the defendants' motion for summary judgment; nevertheless, because the complaint did not contain any allegations that implementation of the guidelines by either the defendants or the faculty and staff was discretionary, the viability of the complaint could fairly be assessed only on the basis of the plaintiffs' claims, set forth in the complaint, that the defendants' development and implementation of school security protocols was ministerial in nature and not protected by governmental immunity, and, therefore, the plaintiffs' assertion that the identifiable person-imminent harm exception to governmental immunity applied if the acts or omissions of the faculty and staff were discretionary was not applicable, as that exception applies only to discre-

tionary act immunity under § 52-557n (a) (2) (B), which the plaintiffs failed to raise in their complaint.

2. The trial court properly concluded that no genuine issue of material fact existed as to whether the defendants' creation and implementation of school security guidelines was discretionary in nature: the adoption of the school security guidelines was an act of discretion encompassed within the defendants' general duty to manage and supervise their employees and schoolchildren and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B), the statutory scheme (§§ 10-220, 10-220f and 10-21) regarding the duty of boards of education made it plain that the defendant board of education was fulfilling a discretionary duty in developing and implementing policies, and the plaintiffs failed to identify any statutory authority or rule that imposed on the defendants a ministerial duty to create or implement school security guidelines; moreover, the school security guidelines contained no directive that would support a finding that the defendants had a ministerial duty to act in a prescribed manner when responding to the shooting, as the guidelines contained qualifying language such as may or should, which indicated that the school faculty and staff had discretion to exercise judgment, the guidelines did not indicate how school faculty and staff should act in response to a shooting, and although some language in the guidelines could be construed as mandating strict compliance, case law is clear that such language did not necessarily impose on the faculty and staff a ministerial duty.

3. The plaintiffs could not prevail on their claim that the trial court erred in determining that the identifiable person-imminent harm exception to governmental immunity was inapplicable; that court was not required to address that claim in deciding the motion for summary judgment, as the plaintiffs' complaint did not allege that the conduct of the defendants and the school's faculty and staff was discretionary, the plaintiffs alleged only violations of a ministerial duty, which were mirrored in their opposition to the defendants' motion for summary judgment, and although the plaintiffs, in opposition to the motion for summary judgment, raised an argument not contained in the complaint that even if the defendants' actions were discretionary in nature, the decedents were identifiable victims subject to imminent harm, those newly fashioned allegations asserting an alternative basis for recovery in defense of a motion for summary judgment were improper and could not substitute for a timely filed amended complaint.

Argued April 17—officially released July 16, 2019

Procedural History

Action to recover damages for the deaths of the plaintiffs' decedents resulting from the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the

action was withdrawn as against the defendant Sandy Hook Elementary School; thereafter, the court, *Wilson*, *J.*, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Devin W. Janosov, with whom was *Donald A. Papcsy*, for the appellants (plaintiffs).

Charles A. Deluca, with whom were *John W. Cannavino*, *Jr.*, *Thomas S. Lambert* and *Monte E. Frank*, for the appellees (named defendant et al.).

Opinion

BISHOP, J. This case arises from the horrific and tragic events that occurred on December 14, 2012, at the Sandy Hook Elementary School (school) in Newtown.[1] On that day, at approximately 9:35 a.m., Adam Lanza, bearing an arsenal of weaponry, shot his way into the locked school building with a Bushmaster XM15-E2S semiautomatic rifle and, with gruesome resolve, fatally shot twenty first grade children and six staff members, and wounded two other staff members before taking his own life.[2] The plaintiffs, Scarlett Lewis, administratrix of the estate of Jesse Lewis, and Leonard Pozner, administrator of the estate of Noah Pozner, appeal from the summary judgment rendered by the

[1] The school was initially named as a defendant in this case, but the plaintiffs subsequently withdrew their claims against it.

[2] The state attorney's report on the shooting indicates that, in addition to the Bushmaster semiautomatic rifle found in the same classroom as the shooter's body, police recovered from the shooter's person a Sig Sauer P226, nine millimeter semiautomatic pistol and, near his body, a Glock 20, ten millimeter semiautomatic pistol. Substantial quantities of ammunition for these weapons were found on the shooter's person or near his body. In the shooter's car in the parking lot outside the school, the police also found an Izhmash Saiga-12, twelve gauge semiautomatic shotgun. See Division of Criminal Justice, State of Connecticut, Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012.

trial court in favor of the defendants, the town of Newtown and the Board of Education of the Town of Newtown, on the ground of governmental immunity. On appeal, the plaintiffs claim that the trial court erred in rendering summary judgment by concluding that (1) the plaintiffs' third revised complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting on December 14, 2012, but, rather, contained only allegations of negligence directed at the defendants before December 14, 2012; (2) the defendants' creation and implementation of school security guidelines were discretionary acts in nature; and (3) the identifiable person-imminent harm exception did not apply to the defendants' claim of immunity. We affirm the judgment of the trial court.

The record reveals the following tragic facts and procedural history.[3] On December 14, 2012, at approximately 9:30 a.m., the doors to the school were locked as was the norm each morning once the school day began. At the same time, a meeting was taking place in room nine, a conference room adjacent to the principal's office and near an entranceway to the school. Attending this meeting were Principal Dawn Hochsprung, school psychologist Mary Joy Sherlach, a parent, and other staff. At approximately 9:35 a.m., Lanza blasted his way into the school through a plate glass window located next to the school doors. Hochsprung and Sherlach immediately ran from the conference room into the hallway, where they instantly were shot and killed by Lanza. Natalie Hammond, who had also left the conference room to investigate and was trailing Hochsprung and Sherlach, was shot and injured, but was able to crawl back into the conference room. After

[3] See Division of Criminal Justice, State of Connecticut, Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012.

shooting Hochsprung, Sherlach, and Hammond, Lanza proceeded down a hallway while firing his rifle, striking and wounding another staff member. Lanza then apparently entered and exited the main office without shooting anyone, and proceeded down another hallway to classrooms eight and ten. While in these classrooms, Lanza shot and killed four adults and twenty first-grade students. The plaintiffs' children, Jesse and Noah, were two of the students killed. Lanza then took his own life at approximately 9:40 a.m.

By summons and complaint served January 9, 2015,[4] the plaintiffs brought this action alleging acts of negligence on the part of the defendants, pursuant to General Statutes § 52-557n (a) (1),[5] which they claimed were substantial factors in contributing to the deaths of their children. In response, the defendants filed an answer and special defenses, in which they asserted that (1) the plaintiffs' claims were barred by the doctrine of governmental immunity, pursuant to § 52-557n (a) (2);[6] (2) as a matter of undisputed fact, their acts or failures to act were not the proximate cause of the children's deaths; and (3) they could not be held liable for the criminal acts of an individual who was not an agent or employee of either defendant.

On June 30, 2017, following a period of discovery, the defendants filed a motion for summary judgment

[4] The plaintiffs' third revised complaint filed September 1, 2016, which substantially contains the same allegations of negligence against the defendants, is the operative complaint in this appeal.

[5] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . [t]he negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ."

[6] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

on the grounds that (1) there was no genuine issue of material fact regarding the defendants' alleged negligence; (2) the defendants were entitled to the defense of governmental immunity pursuant to § 52-557n (a) (2); (3) Lanza's intervening criminal act destroyed any claim of proximate cause regarding any of the alleged failings of the defendants; and (4) the plaintiffs had failed to produce any expert testimony in support of their claims. In response, the plaintiffs filed a memorandum of law in opposition to the defendants' motion for summary judgment, arguing that (1) the defendants had failed to present evidence adequate to satisfy their burden on a motion for summary judgment; (2) the actions of the school faculty and staff present in the school on December 14, 2012, were not discretionary in nature but, rather, were ministerial duties prescribed by the school security guidelines, in place at that time; (3) if the duties of the faculty and staff present in the school were not ministerial but were, instead, discretionary, the conduct of Lanza in blasting his way into the school presented an imminent danger to all present in the school, and the failure of the faculty and staff in the school to follow the prescriptions set forth in the school security guidelines constituted negligence; (4) Lanza's conduct was not an intervening criminal action because the purpose of the school security guidelines was to respond to outside threats such as those posed by Lanza; and (5) the plaintiffs would address their failure to produce expert testimony by demonstrating that the expert disclosed by the defendants had no knowledge in regard to the issues presented by this case.

On May 7, 2018, after briefing and argument by counsel, the court issued a memorandum of decision granting the defendants' motion for summary judgment on the ground of governmental immunity. Finding that the complaint made no specific allegations against any of the faculty or staff present in the school building, the court nevertheless accorded the parties a substantive

analysis of this claim and determined that the school security guidelines did not impose a ministerial duty on those individuals. Rather, the court determined that the guidelines, by their own language, imposed discretionary responsibilities on the named defendants and faculty and staff. The court concluded, as well, that the acts and omissions alleged in the plaintiffs' complaint concerning the named defendants were discretionary and that no reasonable juror could find that the plaintiffs' children were subject to imminent harm at the time of the named defendants' allegedly negligent conduct in formulating, promulgating, and implementing the school security guidelines. Finally, the court concluded that even if it considered the plaintiffs' newly asserted claim in opposition to the motion for summary judgment, i.e., that the faculty and staff had a discretionary duty to implement the school security guidelines and that Lanza's initial blast into the school created an imminent risk to all present in the school building, no reasonable fact finder could find that the response of the faculty and staff to the chaotic situation that unfolded on that tragic day caused the catastrophic consequences that befell those present in the school. This appeal followed.

Before addressing the plaintiffs' claims, we first set forth our oft-recited standard of review in regard to an appeal from a trial court's rendering of summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law,

entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 471–72, 200 A.3d 202 (2018).

"[T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact." (Internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 651, 943 A.2d 507 (2008).

We next set forth the standard of review and relevant legal principles in regard to the doctrine of governmental immunity. "[T]he determination of whether a governmental or ministerial duty exists gives rise to a question of law . . . ." *Ventura* v. *East Haven*, 330 Conn. 613, 634, 199 A.3d 1 (2019). Municipalities have traditionally been "immune from liability for [their] tortious acts at

common law . . . . Governmental immunity may, however, be abrogated by statute. The state legislature possesses the authority to abrogate any governmental immunity that the common law gives to municipalities. . . . The general rule developed in the case law is that a municipality is immune from liability unless the legislature has enacted a statute abrogating that immunity. . . . Statutes that abrogate or modify governmental immunity are to be strictly construed. . . . This rule of construction stems from the basic principle that when a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of construction." (Citations omitted; internal quotation marks omitted.) *Tryon* v. *North Branford*, 58 Conn. App. 702, 720, 755 A.2d 317 (2000).

"Section 52-557n abrogates the common-law rule of governmental immunity and sets forth the circumstances in which a municipality is liable for damages to person and property. These circumstances include the negligent acts or omissions of the political subdivision or its employees or agents . . . . The section goes on to exclude liability for acts or omissions of any employee or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct and *negligent acts that involve the exercise of judgment or discretion*." (Citation omitted; emphasis added.) Id., 721.

"Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in

their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 614–15, 903 A.2d 191 (2006). With these principles in mind, we turn to the plaintiffs' specific claims.

I

The plaintiffs first claim that the court erred in rendering summary judgment by concluding that their third revised complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting on December 14, 2012, but, rather, contained only allegations of negligence directed at the acts and omissions of the defendants occurring before that date.

Viewed in the light most favorable to the plaintiffs, the operative complaint sets forth the following claims as to the defendants. The plaintiffs allege that the defendants were "under a *legal and ministerial* duty to create, enforce, and abide by" school security guidelines, "and to ensure student safety and well-being" pursuant to General Statutes §§ 10-220,[7] 10-220f,[8] and

[7] General Statutes § 10-220 (a) provides in relevant part: "Each local or regional board of education shall . . . provide an appropriate learning environment for all its students which includes (1) adequate instructional books, supplies, materials, equipment, staffing, facilities and technology, (2) equitable allocation of resources among its schools, (3) proper maintenance of facilities, and (4) a safe school setting . . . and shall perform all acts required of it by the town or necessary to carry into effect the powers and duties imposed by law."

[8] General Statutes § 10-220f provides: "Each local and regional board of education may establish a school district safety committee to increase staff

10-221,[9] and that their failure to do so subjected them to liability pursuant to § 52-557n. (Emphasis added.) In particular, the plaintiffs allege in paragraph 30 of counts one and three, and in paragraph 31 in counts two and four, that, inter alia, the defendants were negligent

and student awareness of safety and health issues and to review the adequacy of emergency response procedures at each school. Parents and high school students shall be included in the membership of such committees."

[9] General Statutes § 10-221 provides in relevant part: "(a) Boards of education shall prescribe rules for the management, studies, classification and discipline of the public schools and, subject to the control of the State Board of Education, the textbooks to be used; shall make rules for the control, within their respective jurisdictions, of school library media centers, including Internet access and content, and approve the selection of books and other educational media therefor, and shall approve plans for public school buildings and superintend any high or graded school in the manner specified in this title.

"(b) . . . [E]ach local and regional board of education shall develop, adopt and implement written policies concerning homework, attendance, promotion and retention. The Department of Education shall make available model policies and guidelines to assist local and regional boards of education in meeting the responsibilities enumerated in this subsection.

"(c) Boards of education may prescribe rules to impose sanctions against pupils who damage or fail to return textbooks, library materials or other educational materials. Said boards may charge pupils for such damaged or lost textbooks, library materials or other educational materials and may withhold grades, transcripts or report cards until the pupil pays for or returns the textbook, library book or other educational material.

"(d) . . . [E]ach local and regional board of education shall develop, adopt and implement policies and procedures . . . for (1) dealing with the use, sale or possession of alcohol or controlled drugs . . . by public school students on school property, including a process for coordination with, and referral of such students to, appropriate agencies, and (2) cooperating with law enforcement officials.

"(e) . . . [E]ach local and regional board of education shall adopt a written policy and procedures for dealing with youth suicide prevention and youth suicide attempts. Each such board of education may establish a student assistance program to identify risk factors for youth suicide, procedures to intervene with such youths, referral services and training for teachers and other school professionals and students who provide assistance in the program.

"(f) . . . [E]ach local and regional board of education shall develop, adopt and implement written policies and procedures to encourage parent-teacher communication. These policies and procedures may include monthly newsletters, required regular contact with all parents, flexible parent-teacher conferences, drop-in hours for parents, home visits and the use of technology such as homework hot lines to allow parents to check on their children's assignments and students to get assistance if needed. . . ."

because they either left school faculty and staff in a position where they either could not adhere or failed to adhere to the *mandatory* school security guidelines by failing (1) to provide school faculty and staff with necessary information, equipment, and training to properly implement the school security guidelines, including training regarding the school lockdown and evacuation plan that faculty and staff were to follow should an intruder enter the school; (2) to provide school faculty and staff with doors that could be locked from the inside; (3) to provide the teachers of classrooms eight and ten with keys to lock the doors to those classrooms; (4) to provide a security guard or other type of law enforcement personnel to assist in the implementation of the school security guidelines; (5) to provide a secure front entrance; and (6) to follow their own school security guidelines.

In addition, the plaintiffs allege in paragraph 7 of all counts that the defendants, "under the requirements of § 10-220, instituted school safety policies and procedures *which left no area for discretion by its staff and/or agents*, concerning the safety of the schools in the Newtown Public School District, including the lockdown and evacuation plan previously practiced, *but never implemented on December 14, 2012, by the Sandy Hook Elementary staff*," and that this failure to implement resulted in the deaths of twenty students, including the plaintiffs' children. (Emphasis added.) The plaintiffs allege, as well, in paragraph 13 in counts one and three, and in paragraph 14 in counts two and three, that the "details and proscriptions of this plan *left no discretion* to the teachers and other employees, and *were to be followed* as outlined for the safety of the children at Sandy Hook Elementary School, *by mandate of*" the [defendants]. (Emphasis added.) The plaintiffs also allege in paragraph 14 of counts one and three, and in paragraph 15 in counts two and four, that the

defendants "*had created a ministerial duty for all employees, agents and members* to take whatever precautions necessary and enumerated in the safety procedures" to protect the plaintiffs' children on December 14, 2012, "due to the creation of their own internal policies . . . and due to their acute knowledge of the imminent and apparent harm the intruder . . . presented to the identifiable victims of the Sandy Hook Elementary School . . . on December 14, 2012; at which time the fact [that] an intruder was present on the school premises, and the fact that the identifiable victims were in an imminent harm became apparent to the staff, agents, employees and members of the Sandy Hook Elementary School." (Emphasis added.)

In its memorandum of decision on the defendants' motion for summary judgment, the court noted that the plaintiffs had attempted to argue for the first time, in their opposition to the defendants' motion, that the defendants were liable not just for their own conduct, but also for the allegedly negligent conduct of the school faculty and staff present in the school building during the shooting on December 14, 2012. In particular, the court referred to the plaintiffs' arguments that school security guidelines imposed a ministerial duty on the faculty and staff as a "new theory of liability" not previously raised in the operative complaint.

"[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e have long eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleadings with reference to the

general theory upon which it proceeded, and to substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . ." (Citation omitted; internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, 173 Conn. App. 463, 479, 164 A.3d 682 (2017).

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

In *White*, the plaintiff sought to establish a malfunction theory as part of his product liability claims against the defendant. Id. The court concluded that the plaintiff failed to allege facts in his amended complaint establishing a claim regarding the malfunction theory and, thus, that the amended complaint was deficient. See id., 626–28; id., 626 ("[a] plaintiff must allege facts to put the trial court and the defendant on notice that the plaintiff intends to pursue his claim under this alternative burden of proof"). The court concluded, as well,

that "the plaintiff could not properly raise an entirely new, alternative theory of liability for the first time in his opposition to the defendants' summary judgment motion when he failed to plead this theory in his complaint or put the defendants on notice that he intended to rely on it by further amending his complaint." Id., 629.

With the foregoing in mind, we turn to the plaintiffs' arguments on appeal. The plaintiffs assert that their third amended complaint did, indeed, include specific allegations of negligence against the school faculty and staff present in the building during the shooting. In particular, the plaintiffs point to the allegations contained in paragraphs 7, 13, 14, 30h and 30j of counts one and three, and in paragraphs 7, 14, 15, 31h and 31j of counts two and four, which, they assert, fairly set forth claims that the defendants had created mandatory policies and procedures for implementation by faculty and staff in the school building, and that adherence to these policies and procedures imposed a ministerial duty, which they allege the faculty and staff had breached during the course of the shooting.

On the basis of our careful review of the pleadings, we conclude that the complaint did contain allegations that both the defendants and the school faculty and staff had a ministerial duty to create and implement the school security guidelines, and that they failed to fulfill that duty. In this regard, we disagree with the trial court that such allegations against the faculty and staff were raised for the first time in opposition to the defendants' motion for summary judgment. We note, however, that nowhere does the complaint contain any allegations that implementation of the guidelines by either the defendants or the faculty and staff was *discretionary*. The plaintiffs, rather, asserted for the first time in their opposition to the motion for summary judgment that the identifiable person-imminent harm exception applied *if the acts or omissions of the faculty and staff*

were discretionary. This assertion is not applicable to the plaintiffs' argument because the identifiable person-imminent harm exception applies only to discretionary act immunity under § 52-557n (a) (2) (B), which the plaintiffs failed to raise in their complaint. See *Doe* v. *Petersen*, supra, 279 Conn. 615–16 (identifiable person-imminent harm exception recognized as one of three exceptions to *discretionary act immunity*). In sum, the viability of the plaintiffs' complaint can fairly be assessed only on the basis of the plaintiffs' claims, set forth in the complaint, that the defendants' development and implementation of school security protocols were ministerial in nature and, therefore, not protected by governmental immunity, and that the faculty and staff present in the school breached ministerial duties regarding implementation of the school security protocols.

Accordingly, we conclude that the plaintiffs' operative complaint only sets forth claims of negligence directed at the defendants' alleged breach of a ministerial duty prior to the December 14, 2012 shooting, and relating to an alleged breach of a ministerial duty by the school faculty and staff occurring on the date of the assault. We, thus, turn next to a consideration of the court's conclusion in regard to whether the duties of the defendants and faculty and staff implicated by the allegations in the operative complaint were ministerial or discretionary.[10]

[10] We agree, also, with the trial court's comment that even if the plaintiffs' operative complaint could be construed as setting forth a claim of negligence against individual members of the school faculty or staff on the day of the shooting, no reasonable juror could find negligence in the instinctive and heroically protective reactions of Hochsprung, Sherlach and Hammond in immediately running to the hallway to investigate the cause of a thunderous crash by the entrance door only to be cut down by a fusillade of bullets, i.e., that it was foreseeable that their conduct could have led to the harm suffered by the plaintiffs. See *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191–92, 74 A.3d 1278 (2013) ("Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. . . . Although it has been said that no universal test for

II

The plaintiffs claim that the court erred in determining that the defendants' creation and implementation of the school security guidelines was discretionary in nature instead of allowing jurors the opportunity to make that decision.

In its memorandum of decision, the trial court concluded that the alleged conduct of the defendants in creating and implementing the school security guidelines was discretionary in nature because no statute, policy, or rule imposed clear ministerial duties on the defendants. In particular, after determining that the supervision of school employees and students is generally considered discretionary, the court looked to §§ 10-220, 10-220f and 10-221, and concluded that "none of these sections limited the defendants' exercise of discretion in their supervision and management of the school or imposed clear, ministerial duties on the defendants with regards to the type of security measures or protocols they were to implement." We agree with the court's conclusion.

[duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . [T]he test for the existence of a legal duty entails [1] a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and [2] a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." [Internal quotation marks omitted.]).

The faculty and staff present at the school during the shooting were confronted with a chaotic and violent situation, made evident by later descriptions of the noise variously as "banging sounds like someone kicking a door"; "gunfire from the lobby area adjacent to the conference room"; "a noise coming from the front of the school sounding like a metal pipe hitting the floor"; and, from Hammond who was in the conference room, "a loud banging noise." Under such unimaginable circumstances, no reasonable juror could have found that the acts or omissions of the individual members of the faculty and staff amounted to negligence.

As previously noted, our determination of whether governmental immunity applies to the allegations of a complaint is generally a question of law subject to plenary review. See *Ventura* v. *East Haven*, supra, 330 Conn. 634–37. In addressing the question of whether the general supervision of public school employees is a discretionary or ministerial function, our Supreme Court has concluded that the administrators' "duty to ensure that school staff members adequately discharged their assignments [is] discretionary because it [is] encompassed within their general responsibility to manage and supervise school employees." *Strycharz* v. *Cady*, 323 Conn. 548, 569, 148 A.3d 1011 (2016), overruled in part on other grounds by *Ventura* v. *East Haven*, 330 Conn. 613, 637 and n.12, 199 A.3d 1 (2019). In addition, our case law has implicitly determined that the supervision of public school children is generally considered a discretionary act. See, e.g., *Martinez* v. *New Haven*, 328 Conn. 1, 8–9, 176 A.3d 531 (2018) (framing general supervision of student at public school as discretionary act subject to identifiable person-imminent harm exception); *McCarroll* v. *East Haven*, 180 Conn. App. 515, 522–23, 183 A.3d 662 (2018) (same). Our case law also has made clear that a plaintiff bringing a cause of action against a municipality or government officials must allege and, thus, demonstrate the existence of a genuine issue of material fact, that the acts or omissions complained of are ministerial, rather than discretionary, in nature. See *Violano* v. *Fernandez*, 280 Conn. 310, 323–24, 907 A.2d 1188 (2006); id., 324 ("plaintiffs . . . failed to allege that there was any rule, policy, or directive that prescribed the manner in which [one of the defendants] was to secure the property" that was under his care); *Colon* v. *New Haven*, 60 Conn. App. 178, 182–83, 758 A.2d 900 (summary judgment properly rendered on ground of governmental immunity where defendant's "poor exercise of judgment" formed basis

of complaint, rather than directive specifically describing manner in which defendant was to act), cert. denied, 255 Conn. 908, 763 A.2d 1034 (2000).

On the basis of the foregoing, it is clear that the adoption of the school security guidelines by the defendants was an act of discretion encompassed within their general duty to manage and supervise their employees and the schoolchildren, and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B). As discussed in part I of this opinion, the plaintiffs' complaint alleged that the defendants were "under a legal and ministerial duty to create, enforce, and abide by" school security guidelines, "and to ensure student safety and well-being" pursuant to §§ 10-220, 10-220f and 10-221, and that their failure to do so subjected them to liability pursuant to § 52-557n. The language of the pertinent statutes and, indeed, the statutory scheme regarding the duty of boards of education, make it plain that in developing and implementing policies, the board is fulfilling a discretionary duty. See *Washburne* v. *Madison*, 175 Conn. App. 613, 623, 167 A.3d 1029 (2017) ("[i]n order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner" [internal quotation marks omitted]), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). Section 10-220 (a) states, generally, that boards of education "shall provide . . . (4) a safe school setting," and § 10-220f states that boards of education may, but are not required to, establish a school safety committee. Furthermore, § 10-221 does not specifically address school safety, but, rather, states that boards of education shall implement policies to regulate several other unrelated areas as part of their general duty to manage and supervise school activity. Accordingly, we agree with the trial court and conclude that, because the plaintiffs failed to identify any statutory authority or rule that imposed upon the defendants

a ministerial duty to create or implement the school security guidelines that the defendants allegedly failed to abide by, no genuine issue of material fact existed as to whether the defendants' acts were discretionary in nature.

The plaintiffs also claim that the trial court erred in rendering summary judgment because the school security guidelines adopted by the defendants imposed upon the school faculty and staff a ministerial duty to act in a prescribed manner during the shooting. The language in the guidelines referenced by the plaintiffs contradicts this claim.

In conjunction with the defendants' motion for summary judgment, the parties submitted several school security guidelines. The plaintiffs first referenced the "Newtown Public Schools Emergency Lockdown Guidelines for Faculty and Staff," which states that "[u]pon notification of personal observation that an emergency situation exists, it *may* become necessary for school administration to commence a lockdown," and in such event "teachers and support staff *should* promptly gather their students and those in the immediate vicinity, and escort them into a classroom or securable room . . . that can be locked and secured from the inside." (Emphasis added; internal quotation marks omitted.) This guideline additionally states that "[u]pon notification or personal observation that an imminent emergency situation exists, it *may* become necessary for school administration to commence a Lockdown—Code Blue." (Emphasis added; internal quotation marks omitted.) In the event of this type of lockdown, the guideline states that "staff *should* immediately gather students, and if not already, escort them inside a classroom or securable room that can be locked and secured from the inside." (Emphasis added.) Language at the bottom of the first page of this guideline states that "[f]ailure to comply with these rules can ultimately jeop-

ardize the safety of all persons inside the classroom or neighboring classrooms in the immediate proximity." Supplementing this guideline is the "Newtown Public Schools Faculty-Staff Emergency Response Guide," which sets forth emergency terms and command actions that faculty and staff can use in the event of a lockdown.

The plaintiffs next referenced an "Incident Command System Overview," which states that it "is a field management system that has a number of basic system features. Because of these features, [it] has the flexibility and adaptability to be applied to a wide variety of incidents and events both small and large." This guideline provides a structured plan that school faculty and staff can use to manage and respond to a particular incident. Finally, the plaintiffs referenced the "Newtown, Connecticut Emergency Operations Plan Annex L—School Emergency," which provides, inter alia, that "[i]n the event of an emergency, the primary function of all school personnel is to provide maximum protection for students and to reunite students with their parents as soon as it is feasible." This guideline sets forth certain tasks for school faculty and staff in the event of an emergency. In particular, it provides that "[p]rincipals are responsible for . . . [a]ctivating the evacuation or take shelter message or signal to instruct teachers to take protective action(s) for themselves and their students," and "[s]upervising plan implementation." It states, as well, that "[t]eachers are responsible for . . . [e]xercising control and discipline in their supervision of students in the evacuation and take shelter modes," and "[t]aking all necessary precautions to protect the school facility." The guideline also lists how school faculty and staff may respond to various types of emergencies and implement evacuation measures, but does not specifically discuss actions to take in the event of a school shooting.

After a thorough review of the school security guidelines referenced by the plaintiffs, we conclude that they contain "no directive of the type required to support a finding that the [defendants] had a [ministerial] duty" to act in a prescribed manner when responding to the events that unfolded on December 14, 2012. *Ugrin* v. *Cheshire*, 307 Conn. 364, 391, 54 A.3d 532 (2012). In *Ugrin*, our Supreme Court determined that language in a letter by town counsel that described the danger posed by mines that were operated in the vicinity of the plaintiffs' properties and contained legal advice to the town regarding such mines did not constitute "a directive to the town giving rise to a ministerial duty because [the letter] . . . contain[ed] the qualifying words *should* or *could*, which indicate[d] that the town had discretion to exercise its judgment in deciding whether to follow [the town counsel's] advice." (Emphasis added; internal quotation marks omitted.) Id., 392. The court determined, as well, that "the plaintiffs fail[ed] to identify any other comment that could be construed as an actual directive to the town that it had no discretion to ignore." Id.; see also *Colon* v. *New Haven*, supra, 60 Conn. App. 183.

In the present case, the school security guidelines contained qualifying language such as *may* or *should*, which indicated that the school faculty and staff had discretion to exercise judgment in following them, and they set forth broad structures that did not indicate how school faculty and staff should act in response to a shooting. Additionally, they did not contain any language placing upon the school faculty and staff a ministerial duty to act in a specific manner in the event of an emergency such as the one that occurred on December 14, 2012. Although some language, such as the indication of the consequences of a failure to comply with the guidelines during a school lockdown, may be construed as mandating strict compliance, our case law

is clear that such language does not necessarily impose upon the faculty and staff a ministerial duty. See *Coley* v. *Hartford*, 312 Conn. 150, 169, 95 A.3d 480 (2014) ("[c]ontrary to the plaintiff's contention, the word *shall* does not necessarily give rise to a ministerial duty to remain at the scene when the policy language, read in its entirety, clearly relies upon the police officer's discretion" [emphasis added; internal quotation marks omitted]), overruled in part on other grounds by *Ventura* v. *East Haven*, 330 Conn. 613, 637 and n.12, 199 A.3d 1 (2019); *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 51, 50 A.3d 381 ("[a]lthough the word *shall* can connote a mandatory command, the language of the statute, read as a whole, involves discretionary acts" [emphasis added; internal quotation marks omitted]), cert. denied, 307 Conn. 928, 55 A.3d 570 (2012). Accordingly, we agree with the trial court and conclude that no reasonable juror could have found that the school security guidelines imposed a ministerial duty upon the faculty and staff.

III

Finally, the plaintiffs claim that the court erred in determining that if the complaint can fairly be read as asserting that the defendants and school faculty and staff breached a discretionary duty in the creation, promulgation, and implementation of the school security guidelines, the identifiable person-imminent harm exception was inapplicable.[11]

We need not address this claim because, as previously discussed in part I of this opinion, nowhere in the operative complaint do the plaintiffs allege that the conduct

[11] Although our jurisprudence recognizes three exceptions to discretionary act immunity, the plaintiffs claim only that the identifiable person-imminent harm exception applies. See, e.g., *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434, 165 A.3d 148 (2017) (noting that three exceptions to discretionary act immunity are recognized, but only identifiable person-imminent harm exception was relevant).

of the defendants and faculty and staff was discretionary in nature. Paragraphs 7, 13, 14, 30h and 30j of counts one and three, and paragraphs 7, 14, 15, 31h and 31j of counts two and four of the complaint all make clear that the plaintiffs only allege violations of a ministerial duty. This is further supported by assertions in the plaintiffs' opposition to the defendants' motion for summary judgment, which first mirrors the complaint by stating that "the actions of the defendants . . . were not of a discretionary nature," but then raises the argument not contained in the complaint that, "even if they were discretionary in nature, the deceased plaintiffs were identifiable victims . . . and . . . clearly an imminent harm was before them . . . ."

In adjudicating a motion for summary judgment, a court is not required to address allegations that are not made in the complaint. See *DeCorso* v. *Calderaro*, 118 Conn. App. 617, 627–28, 985 A.2d 349 (2009) ("[i]n adjudicating the motions for summary judgment, the [trial] court was not required to address trespass because the operative complaint did not contain counts alleging trespass"), cert. denied, 295 Conn. 919, 991 A.2d 564 (2010). Because the plaintiffs failed to allege the applicability of the identifiable person-imminent harm exception to the discretionary acts of the defendants in the operative complaint, we conclude that the court was not required to address this claim at summary judgment.[12] In sum, newly fashioned allegations asserting an alternative basis for recovery in defense of a motion for summary judgment are improper and may not substitute for a timely filed amended complaint.

In reaching our conclusion in this case, we concur with the trial court and find apt our Supreme Court's

[12] We recognize that the trial court provided substantial analysis in regard to whether the identifiable person-imminent harm exception was applicable to the plaintiffs' claims. Although we believe that such analysis was unnecessary because it involved a claim outside the contours of the complaint, we have no disagreement with the conclusions reached by the trial court.

closing language in *Coley* v. *Hartford*, supra, 312 Conn. 172: "The facts in the present case are undeniably tragic, and, understandably, the parties are left questioning whether anything more could have been done to prevent the realities that unfolded. It is, however, precisely because it can always be alleged, in hindsight, that a public official's actions were deficient that we afford limited governmental liability for acts that necessarily entailed the exercise of discretion."

For the reasons set forth in this opinion, we conclude that the trial court properly rendered summary judgment in the defendants' favor on the ground of governmental immunity pursuant to § 52-557n (a) (2) (B).[13]

The judgment is affirmed.

In this opinion the other judges concurred.

TROY HARRIS *v.* COMMISSIONER OF CORRECTION
(AC 41036)

Lavine, Elgo and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder and assault in the first degree in connection with a shooting incident, filed a third petition for a writ of habeas corpus, claiming that he had received ineffective assistance of counsel from V, who had represented him with respect to his second petition for a writ of habeas corpus. Specifically, the petitioner alleged that V was ineffective for failing to show that his first habeas counsel was ineffective for failing to show that his trial attorney rendered ineffective assistance of counsel for failing to obtain psychiatric records of one of the state's witnesses, J. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal,

[13] Because we agree with the trial court's analysis regarding governmental immunity, we need not reach the defendants' alternative claim for affirmance regarding proximate cause and the superseding criminal conduct of Lanza.

the petitioner having failed to demonstrate that his prior habeas and trial counsel were ineffective; the petitioner produced no evidence that J would have, at the time of trial, consented to a review of her records, especially given that J testified at the habeas trial that she would not sign a release for her records because she was afraid that evidence of her mental health would be used against her in custody disputes, and, therefore, the petitioner had failed to demonstrate that his claim of ineffective assistance of habeas and trial counsel was adequate to deserve encouragement to proceed further.

Argued April 17—officially released July 16, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Sferrazza*, *J.*, denied the petitioner's motion for articulation; thereafter, this court granted the petitioner's motion for review but denied the relief requested therein. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Troy Harris, appeals from the habeas court's denial of his petition for certification to appeal from its judgment denying his third petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly concluded that the petitioner's prior habeas and trial counsel were not ineffective for failing to

obtain the psychiatric records of one of the state's witnesses, Tammy Jamison. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

This is the fourth time that the petitioner has been before this court. The following facts, as this court summarized on direct appeal, and procedural history, as articulated by this court on the petitioner's second habeas appeal, are relevant to our resolution of the issues in the present appeal. "On May 16, 2000, John Simpson drove Howard Dozier and Hector Quinones to Washington Street in Waterbury to pick up Ray Ramos. At that time, the [petitioner] was residing at 39 Washington Street with . . . Jamison, the mother of his child. Simpson stopped the vehicle he was driving on Washington Street in a driveway between the [petitioner's] house and the house where they were picking up Ramos, and all three men exited the car. Dozier walked up the street and encountered the [petitioner] standing on his porch . . . . Dozier and the [petitioner] had a brief conversation. As Dozier turned his back to the [petitioner] in an attempt to return to the vehicle in which he had arrived, the [petitioner] began firing an Uzi machine gun at Dozier. Dozier ran back to the vehicle and he and Simpson drove off. The [petitioner] continued to fire at the vehicle, and Simpson, who was driving, was shot in his neck.

"The [petitioner] was tried to a jury, which found him guilty of attempting to murder Simpson and Dozier, as well as the first degree assault on Simpson. The [petitioner] received a total effective sentence of forty years imprisonment." (Footnotes omitted.) *State* v. *Harris*, 85 Conn. App. 637, 639–40, 858 A.2d 284, cert. denied, 272 Conn. 901, 863 A.2d 695 (2004).

Jamison, Simpson, and Dozier testified at the petitioner's underlying criminal trial. "Jamison testified that she and the [petitioner] lived together at the address

where the shooting took place, and that, on the night of the shooting, she saw the [petitioner] leave their apartment with a machine gun that she had seen in his possession approximately one month earlier. . . . [S]he looked down from the second floor window and saw the tip of the gun, a person across the street and shots fire out of the gun. . . . [A]fter the shooting, the [petitioner] came back upstairs carrying the gun and . . . [Jamison] and the [petitioner] wrapped it in a shirt and placed it inside a book bag. . . . [S]he then left the apartment with the gun and went to her aunt's house, where she hid the gun inside a grill. . . . [A]t the [petitioner's] request, she gave the gun to Dontae Stallings, a friend of the [petitioner] who lived in their building. Jamison also revealed that she was incarcerated after pleading guilty to charges of hindering prosecution for hiding the [gun]. [Moreover], Jamison testified that the [petitioner] told her that he fired the gun from the porch and that there was no question in her mind that . . . [he] fired the gun from her porch." (Footnotes omitted.) Id., 653–54.

"Dozier testified that he knew the [petitioner] from previous encounters . . . . [H]e and the [petitioner] previously had engaged in face-to-face disagreements. . . . [O]n the night of the shooting, he was having a conversation with the [petitioner] when the [petitioner] pulled out a gun from behind his leg. . . . [W]hen he saw the [petitioner] raise the gun, he turned and ran toward the vehicle Simpson was driving, and then shots were fired. . . . [H]e did not see anyone else with a gun besides the [petitioner]. . . .

"Simpson testified that he had a conversation with the [petitioner] immediately before the shots were fired. . . . [H]e saw the [petitioner] on his porch, holding a gun, and was assured by the [petitioner] that he was 'straight' when he asked the [petitioner] if he was going to shoot him. Simpson further testified that he saw the [petitioner] fire the gun at Dozier as he ran down the street." Id., 652–53.

On direct appeal, this court determined that "the state's case was overwhelmingly strong. This was not merely a credibility contest between one defendant and one victim—this was a credibility contest, supported by physical evidence, among the [petitioner] and Simpson, his assault victim and attempted murder victim; Dozier, an eyewitness to the assault and an attempted murder victim; and Jamison, the mother of his child, with whom he was residing at the time of the shooting. The evidence showed no connection between Jamison and the victims, and therefore no reason to suspect that she offered false testimony to corroborate the stories of Simpson and Dozier. The evidence also showed that Simpson and Dozier had no personal animus toward the [petitioner], and therefore no motivation to fabricate a story. The physical evidence showed conclusively that the gun from which the bullets were fired was the same gun that was recovered after Jamison told the police where she disposed of it after it was fired by the [petitioner]. The testimony of the witnesses in this case, who had very different connections and relationships with the [petitioner], and which was supported by the physical evidence, strongly supported the [petitioner's] conviction." Id., 647.

After the petitioner's conviction was affirmed on direct appeal, he filed his first petition for a writ of habeas corpus. "In that petition, the petitioner challenged his underlying conviction on the ground of ineffective assistance of counsel . . . [and alleged] that his trial counsel, [Robert] Berke, had been ineffective in failing properly to investigate all possible exculpatory and/or alibi witnesses who might have supported his defense at trial. . . . The habeas court [*Schuman*, *J.*] rejected that claim . . . conclud[ing] that Berke did not render ineffective assistance of counsel and that his failure to call several individuals as alibi witnesses at the criminal trial was a valid strategic decision. The

[habeas] court credited Berke's testimony that he tried to discourage the petitioner from testifying at the criminal trial but that the petitioner wanted to testify regardless of whether the alibi witnesses did so. The petitioner's testimony differed from that which would have been offered by the putative alibi witnesses. The [habeas] court noted that as conflicting as the petitioner's own versions of his alibi were, the addition of alibi witnesses would likely have made matters worse for the petitioner. The [habeas] court thereafter denied his petition for certification." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 146 Conn. App. 877, 880–81, 81 A.3d 259 (2013), cert. denied, 322 Conn. 905, 139 A.3d 708 (2016). The petitioner appealed from the denial of his petition for certification and made three arguments to this court.

"First, he claimed that, when deciding his claim of ineffective assistance of counsel, the habeas court improperly had applied the presumption of attorney competence set forth in *Strickland* v. *Washington*, [466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d (1984)]. Second, he claimed that the habeas court improperly had defined the concept of exculpatory evidence, thereby, assertedly, making it futile for him to present evidence regarding the psychiatric history of Jamison, which Berke had failed to elicit during trial. Third, he claimed that the [habeas] court improperly avoided certain ethical issues when determining that Berke's decision not to present alibi witnesses at the trial had been a strategic decision. . . . This court was not persuaded by the petitioner's arguments, and thus ordered that his appeal from the denial of his first habeas petition be dismissed." (Citation omitted.) *Harris* v. *Commissioner of Correction*, supra, 146 Conn. App. 881.

The petitioner filed a second petition for a writ of habeas corpus, and claimed that his first habeas counsel, Justine Miller, had been ineffective because: "(1)

[she] failed to call . . . Jamison who would recant her trial testimony and say that [the petitioner] did not shoot the victims; (2) [she] did not subpoena Jamison's medical records which document[ed] her mental disorder; and (3) [she] did not subpoena alibi witnesses to testify at the habeas trial. . . . [T]he court, *T. Santos*, *J.* . . . dismissed the petition upon finding that the petitioner had failed to meet his burden of proving, under the first prong of *Strickland*, that Miller's performance was ineffective. . . . [T]he petitioner filed a petition for certification to appeal from the dismissal of his amended second petition for a writ of habeas corpus, which [the second habeas court] . . . granted . . . ." (Internal quotation marks omitted.) Id., 882. This court affirmed the judgment of the second habeas court, agreeing that the petitioner had failed to demonstrate that Miller's performance was deficient. Id., 889.

In his third habeas petition, the petitioner alleged, in relevant part, that his second habeas counsel, Joseph Visone, "was ineffective for failing to show that [Miller] was ineffective for failing to show that [Berke] rendered ineffective assistance of counsel . . . for failing to subpoena [Jamison's psychiatric] records . . . ." The habeas court, *Sferrazza*, *J.*, denied the petition, concluding that the petitioner failed to establish that Visone was ineffective or that the petitioner was prejudiced.

The petitioner filed a petition for certification to appeal from the denial of his amended third petition for a writ of habeas corpus on October 19, 2017. The habeas court denied the petition for certification to appeal on October 20, 2017, and the petitioner appealed to this court.

The petitioner claims on appeal that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his third petition for a writ of habeas corpus that alleges ineffective assistance of habeas and trial counsel for failing to obtain

Jamison's psychiatric records. Because the petitioner failed to establish that Jamison would have consented to a review of her records, we conclude that the habeas court did not abuse its discretion when it denied the petition for certification to appeal and agree with the habeas court that the petitioner failed to demonstrate that his prior habeas and trial counsel were ineffective.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Mejia* v. *Commissioner of Correction*, 112 Conn. App. 137, 144, 962 A.2d 148, cert. denied, 291 Conn. 910, 969 A.2d 171 (2009).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 561, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018). We, therefore,

address the petitioner's claim that the habeas court improperly concluded that the petitioner's prior habeas and trial counsel were not ineffective by failing to obtain Jamison's psychiatric records.

We begin by noting our well settled standard of review in a habeas corpus proceeding contesting the effective assistance of habeas counsel. "Although a habeas court's findings of fact are reviewed under the clearly erroneous standard of review . . . [w]hether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 797, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." (Citation omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

As to each claim of ineffectiveness, the petitioner must satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. "First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." (Citation omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, supra, 169 Conn. App. 464.

The performance inquiry centers on "whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." (Citation omitted; internal quotation marks

omitted.) Id., 464–65. "Simply put, a petitioner cannot succeed as a matter of law . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 320, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

The petitioner alleges that Berke was ineffective because he "failed to pursue Jamison's psychiatric history or subpoena [Department of Correction] records for use as impeachment," and that he "could have satisfied the preliminary showing required by *State* v. *Esposito*, 192 Conn. 166, [471 A.2d 949] (1984), such that Jamison's testimony would have been stricken had she not consented to an in camera inspection of the psychiatric records . . . that an in camera inspection of the records would have revealed information relevant to Jamison's testimonial capacity such that her testimony would have been stricken had she not consented to disclosure of the records . . . for use as impeachment [and] that Jamison's testimony would have been severely undercut by the information contained in [her psychiatric] records."[1] Because the petitioner failed to

[1] The petitioner further argues that Miller was ineffective for failing to subpoena the records, to examine Jamison, and to elicit testimony from Berke to support this claim of ineffectiveness against Berke, and that Visone was ineffective for failing to subpoena the records and to elicit testimony to support a claim of ineffectiveness against Miller. Because we conclude that Berke was not ineffective, we need not address these arguments.

Even if we were to reach the petitioner's arguments regarding the performance of his prior habeas counsel, this court already has rejected the petitioner's claim that Miller was ineffective for failing to subpoena Jamison's records and concluded that Miller made a reasonable strategic decision. *Harris* v. *Commissioner of Correction*, supra, 146 Conn. App. 889. Miller indicated that psychiatric records, if disclosed, might undermine the reliability of the retraction she believed Jamison might make of her trial testimony. Id., 885. Miller also stated that she did not believe the psychiatric records

produce evidence that Jamison would have consented to a review of her records at the time of trial, we disagree.[2]

"The psychiatrist-patient privilege, which is codified at [General Statutes] § 52-146e (a), prohibits the disclosure of any communications and records that identify a person who has communicated with a psychiatrist for the purpose of diagnosis or treatment without the express prior consent of the patient or his authorized representative. The privilege applies to all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist . . . . In general, [our Supreme Court has] interpreted the privilege

were pertinent to Jamison's mental state as of the time of the crime and the petitioner's criminal trial. Id., 885–86.

[2] The petitioner additionally argues that Berke could have satisfied the preliminary showing required by *State* v. *Esposito*, supra, 192 Conn. 166, such that Jamison's testimony would have been stricken had she not consented to an in camera inspection of the psychiatric records. The substance of the petitioner's argument, however, fails to meet the standard set forth in *Esposito*.

As our Supreme Court observed in *Esposito*, the mere existence of a psychiatric disorder does not automatically impugn a witness' ability to testify truthfully or to relay events accurately, nor does it automatically subject that witness' psychiatric records to disclosure. See *State* v. *Blake*, 106 Conn. App. 345, 352, 942 A.2d 496 ("[t]he linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the [witness'] ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation" [internal quotation marks omitted]), cert. denied, 287 Conn. 922, 951 A.2d 573 (2008). To make a threshold showing that an in camera review is appropriate, the petitioner must show that the witness had a "substantially diminished" capacity to "observe, recollect and narrate" the event. *State* v. *Esposito*, supra, 192 Conn. 176. The petitioner has produced no evidence that Berke could have made a showing that Jamison may have been experiencing manifestations of a schizophrenic episode or other mental health event that would have substantially diminished her testimonial capacity at any time relevant to her account of the incident or when she was testifying at the criminal trial.

The petitioner, therefore, fails to establish that Berke could have made a threshold showing that at any pertinent time Jamison had a mental health

broadly and its exceptions narrowly . . . [and has] sometimes used language suggesting that, when no statutory exception applies, the privilege is absolute. . . . The broad sweep of the statute covers not only disclosure to a defendant or his counsel, but also disclosure to a court even for the limited purpose of an in camera examination." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Fay*, 326 Conn. 742, 751–52, 167 A.3d 897 (2017).

The petitioner has produced no evidence that Jamison would have, at the time of trial, consented to a review of her records, especially given that Jamison testified to the habeas court that she would not sign a release for her records because she was afraid that evidence of her mental health would be used against her in custody disputes.[3] As the petitioner has not provided evidence that Jamison, during the trial, would have consented to a review of her psychiatric records, the petitioner's claim fails.

We, therefore, conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal because the petitioner has failed to demonstrate that his claim of ineffective assistance of habeas and trial counsel was adequate to deserve encouragement to proceed further. We, accordingly, dismiss the petitioner's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

illness that affected her testimonial capacity in any respect, let alone to a sufficient degree to warrant further inquiry. See id., 180.

[3] Jamison gave the following testimony at the petitioner's third habeas trial when she was questioned by the petitioner's counsel:

"Q. Do you recall not actually signing [a] release . . . for your . . . mental health records for our investigator?

"A. No. Because I don't trust [my daughter's] father.

"Q. Okay.

"A. I think in the future he would try to hold my mental [records] against me when it comes to my daughter and my granddaughter, so I won't sign them.

"Q. Okay. Would you be willing to now?

"A. No."

BRANDON SCOTT *v.* CCMC FACULTY PRACTICE PLAN, INC., ET AL.
(AC 40716)

Alvord, Sheldon and Moll, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant neurosurgeon, K, and the defendant C Co. for medical malpractice in connection with a spinal cord injury that the plaintiff sustained during a surgery that K performed on him to implant a spinal cord stimulator in order to control the plaintiff's severe neuropathic pain. Specifically, the plaintiff alleged that the defendants breached the applicable standard of care when K performed surgery on the plaintiff and that, as a result of the injuries caused by the defendants' negligence, the plaintiff has been permanently deprived of his ability to carry on and enjoy life's activities. The trial court rendered judgment in favor of the defendants in accordance with a jury verdict, from which the plaintiff appealed to this court. On appeal, he claimed that the trial court improperly permitted the defendants to introduce evidence that, after the surgery, the plaintiff's pain substantially resolved due to a syrinx that had developed within his spinal cord to establish a reduction in damages, which the plaintiff maintained had to be categorized as "benefits evidence" under the Restatement (Second) of Torts (§ 920), and that its admission was improper because it was outside the pleadings and contrary to public policy. The plaintiff also claimed that the trial court erred when it failed to give his requested jury instructions regarding the syrinx evidence. *Held* that this court was not required to consider the merits of the plaintiff's claims as to the trial court's rulings with respect to the syrinx evidence because, even if the rulings were improper, they were harmless, as the jury did not reach the issue of damages because, as evidenced by its answers to certain jury interrogatories, it first determined that the defendants had not breached the standard of care: the plaintiff could not prevail on his claim that the rulings were harmful because the syrinx evidence permeated the case, as a review of the trial transcripts revealed that the syrinx evidence did not permeate the case but, rather, the issue of liability was dominant and hotly contested, and although all four neurosurgical experts testified concerning the syrinx theory, the overwhelming majority of expert testimony concerned whether K's actions during the surgery deviated from the standard of care; moreover, the plaintiff's claim that the rulings were harmful because the jury could have considered the syrinx evidence in its determination of liability was

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

unavailing, as the plaintiff did not, at trial, object to the syrinx evidence on the basis that the jury might improperly consider such evidence in its determination of liability and, thus, could not claim on appeal that such a use would have been harmful to him, the record revealed no testimony or argument in which the defendants or their experts had discussed the syrinx evidence in the context of liability, and the issue of damages was not intertwined with the issue of breach of the standard of care; accordingly, it was not reasonably probable that the trial court's rulings on the syrinx evidence likely affected the result of the trial.

Argued February 11—officially released July 16, 2019

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, denied the plaintiff's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict for the defendants; subsequently, the court denied the plaintiff's motion in arrest of judgment, to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Alinor C. Sterling, with whom, on the brief, were *Sean K. McElligott* and *Sarah Steinfeld*, for the appellant (plaintiff).

Michael R. McPherson, with whom was *Joyce A. Lagnese*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Brandon Scott, appeals from the judgment of the trial court, rendered following a jury trial, in favor of the defendants, Paul Kanev, a neurosurgeon, and CCMC Faculty Practice Plan, Inc. On appeal, the plaintiff claims that the trial court (1) improperly permitted the defendants to introduce evidence that the plaintiff's pain substantially resolved due to a syrinx that had developed within his spinal cord to establish a reduction in damages (syrinx evidence), and (2) erred when it failed to instruct the jury with

respect to such evidence. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In December, 2004, the plaintiff began to experience severe and intractable neuropathic pain in his groin area.[1] To treat the pain, the plaintiff was prescribed a "remarkable" amount of various narcotic medications. The plaintiff became bedridden and could not walk more than a few steps at a time. He experienced severe anxiety and was diagnosed with major depressive disorder. In addition, he gained approximately 100 pounds, and his physician described him as morbidly obese. The Social Security Administration classified him as totally and permanently disabled.

The plaintiff first visited Dr. Kanev, a neurosurgeon with CCMC Faculty Practice Plan, Inc., on April 9, 2007. Dr. Kanev recommended that he implant a spinal cord stimulator[2] to control the pain and considered it "the last resort and only option" for the plaintiff. On May 8, 2007, Dr. Kanev performed surgery on the plaintiff to implant the spinal cord stimulator. During the course of the procedure, the plaintiff sustained a spinal cord injury. Dr. Kanev, upon realizing that the plaintiff had lost sensation in the lower portion of his body, made no further attempt to implant the spinal cord stimulator and terminated the procedure. The spinal cord injury left the plaintiff paralyzed from the waist down.

Following the surgery, the plaintiff continued to experience severe neuropathic pain. By January, 2008, a

[1] At trial, this condition was also referred to as "pudendal pain." The plaintiff described his pain as "severe horrific pain in the penis, rectum, perineum, testicles and inner thighs," which included "[s]tabbing pains, burning pains, pinpricking pains, twisting pains, pulling pains, and pains of foreign objects in his rectum."

[2] Dr. Kanev testified that "spinal cord stimulation blocks the conduction of the neuropathic pain, preventing it from ever reaching the brain," and "the pain that [the patient] is feeling becomes replaced by the tingling of the stimulation electrode."

syrinx began to form within the plaintiff's spinal cord.[3] In June, 2009, doctors drained the syrinx. That same year, the plaintiff had a morphine pump surgically implanted to control the pain, and he was able to begin reducing the amount of narcotic medications he was taking. By September, 2011, the plaintiff's neuropathic pain substantially resolved.[4]

The plaintiff subsequently brought this medical malpractice action against the defendants.[5] In his operative complaint,[6] the plaintiff alleged that the defendants breached the applicable standard of care when Dr. Kanev performed surgery on the plaintiff by (1) inserting the needle at the tenth and eleventh vertebrae, (2) inserting the needle at the eleventh and twelfth vertebrae, (3) failing to enter the epidural space below the level of the spinal cord, (4) inserting the needle at an improper angle, and (5) attempting a retrograde placement of the electrode. The plaintiff alleged that, as a result of the injuries caused by the defendants' negligence, he "has been permanently deprived of his ability to carry on and enjoy life's activities and his earning capacity has been permanently diminished."

During discovery, in addition to their initial disclosure of expert witnesses, the defendants filed a supplemental expert witness disclosure, in which they

[3] Giancarlo Barolat, a neurosurgeon, testified that a syrinx is a "cavity that is formed within the spinal cord and is filled with fluid."

[4] The plaintiff was able to stop taking all narcotic medications and stopped use of the morphine pump. The plaintiff, at the time of trial, testified that he continues to experience a low level of neuropathic pain that is manageable without medication. He also testified that he is able to work part-time and attend college. In addition, the plaintiff testified that he recently became engaged to be married and plans to attend graduate school.

[5] The plaintiff asserted claims against CCMC Faculty Practice Plan, Inc., in its capacity as Dr. Kanev's employer.

[6] The plaintiff's second amended complaint, which is the operative complaint in this case, was filed on March 22, 2016.

indicated that they planned to call Robert Levy, a neurosurgeon, to testify regarding the syrinx evidence. Specifically, the disclosure stated that Dr. Levy would testify "that following injury to the spinal cord, [the plaintiff] developed what is referred to as a syrinx, which is a fluid filled cyst within the spinal cord. . . . Dr. Levy is expected to testify that the development of [the plaintiff's] syrinx and its subsequent drainage, on a more probable than not basis, explains why [the plaintiff's] pudendal pain has substantially resolved."

On April 14, 2016, the plaintiff filed a motion in limine to preclude the admission of the syrinx evidence. The plaintiff argued that the defendants were attempting to use the evidence to claim "that although they paralyzed [the plaintiff], their actions resulted in an improvement of his condition, which entitles them to a damages credit." The plaintiff argued that this evidence, and any argument related to this evidence, must be precluded because it is "completely outside the pleadings" and "would need to be pleaded as a special defense." The plaintiff also argued that "[t]he theory the defendants are advancing through their experts is . . . completely inconsistent with the goals of Connecticut tort law" with respect to "deterrence and compensation of [an] innocent, injured party." On May 3, 2016, the defendants filed an objection to the plaintiff's motion. They argued that the evidence was admissible, under § 920 of the Restatement (Second) of Torts, to mitigate damages.

On May 9 and 12, 2016, the court held a hearing on the plaintiff's motion in limine. The court concluded that although § 920 of the Restatement (Second) of Torts was not implicated, the defendants' evidence was admissible with respect to the plaintiff's claim of damages for loss of life's enjoyment. The court explained: "It's in the nature of [the plaintiff's] ability to engage in and enjoy life's daily activities from this day forward or from whenever the pain stopped forward. That's

what it's about. It's about [the plaintiff's] damages, one category of [his] damages."

A jury trial commenced on May 12, 2016. During trial, the plaintiff submitted a written request to charge that asked the court to instruct the jury to disregard the syrinx evidence or, in the alternative, to instruct the jury that the defendants had the burden to prove that (1) their negligent acts proximately caused the resolution of the plaintiff's pain in 2011, and (2) in the absence of their negligence, the plaintiff's pain would have continued for the rest of his life and no treatment or procedure would have controlled that pain. The court declined to give the instructions requested by the plaintiff.[7]

When the case was submitted to the jury, the trial court submitted written interrogatories for the jury to answer. The first five interrogatories, in separate subparts, asked the jury whether Dr. Kanev was professionally negligent.[8] The jury answered that Dr. Kanev was not negligent. Finding no liability, the jury returned a verdict for the defendants, thus precluding its consideration of the interrogatories that addressed causation

[7] The court concluded: "To the extent that the filing asked that the court charge the jury to disregard the evidence and argument concerning the beneficial effect of the defendants' negligence, I respectfully decline to charge the jury, and I will allow argument." The court reasoned that the evidence was not, as the plaintiff argued, being admitted under § 920 of the Restatement (Second) of Torts. It reiterated that "[the evidence is] in the case [because] the damages of [the plaintiff's] loss of enjoyment of life has got to include his current state." The court also declined to give the plaintiff's requested instruction regarding the burden of proof because, it noted, the plaintiff has the burden of proof on damages.

[8] Specifically, the breach related interrogatories asked whether Dr. Kanev deviated from the standard of care when he (1) inserted the needle at the tenth and eleventh vertebrae, (2) inserted the needle at the eleventh and twelfth vertebrae, (3) failed to enter the epidural space below the level of the spinal cord, (4) inserted the needle at an improper angle, and (5) attempted a retrograde placement of the electrode. Four of the five interrogatories also asked whether Dr. Kanev's conduct "unnecessarily increased the risk of spinal cord injury."

and damages.[9] The plaintiff moved to set aside the verdict. The court denied the motion and rendered judgment in favor of the defendants in accordance with the jury verdict. This appeal followed.

On appeal, the plaintiff first claims that the court erred in admitting the syrinx evidence,[10] which the plaintiff maintains must be categorized as "benefits evidence" under § 920 of the Restatement (Second) of Torts,[11] despite the court's explanation that the evidence was not admissible as "benefits evidence" but, rather, was admissible insofar as it related to the plaintiff's claim of damages for loss of life's enjoyment. The plaintiff argues that permitting "benefits evidence" in this case was improper because it was outside the pleadings and contrary to public policy. The plaintiff also claims that the trial court erred when it failed to give his requested jury instructions regarding the syrinx evidence.[12] The defendants respond that, because the jury

[9] "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 247 n.3, 842 A.2d 1100 (2004).

[10] Specifically, the plaintiff claims that the syrinx evidence was improperly admitted under § 920 of the Restatement (Second) of Torts in order for the defendants to prove that their negligence had conferred a special benefit to the plaintiff—that they had caused the development of the syrinx, which substantially resolved the plaintiff's pain—and for the value of that benefit to be considered in mitigation of damages.

[11] Section 920 of the Restatement (Second) of Torts provides: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."

[12] Specifically, the plaintiff argues that the court should have instructed the jury to disregard the defendants' evidence that the syrinx caused the plaintiff's pain to substantially resolve, and any argument based on such evidence, because (1) the resolution of the plaintiff's pain was too remote in time from the defendants' actions, (2) there was "a complete absence of medical literature to support [the defendants'] argument," and (3) it was

did not reach the issue of damages, any purported error in admitting the evidence was harmless. We agree with the defendants.

Before a party is entitled to a new trial because of an erroneous evidentiary or instructional ruling, "he or she has the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 400, 933 A.2d 1197 (2007) (involving instructional ruling); *Kalams* v. *Giacchetto*, 268 Conn. 244, 249, 842 A.2d 1100 (2004) (involving evidentiary ruling). "[T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely affected] the result." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010).

"[W]hen a jury does not reach an issue in returning a verdict, alleged improprieties relating to that issue are harmless." Id.; see also *Kalams* v. *Giacchetto*, supra, 268 Conn. 246, 250 (holding that any error in precluding testimony on causation in medical malpractice action was harmless because jury found no breach of standard of care and did not reach causation); *Phaneuf* v. *Berselli*, 119 Conn. App. 330, 335–36, 988 A.2d 344 (2010) (holding that instructional error regarding causation

impermissible "benefits evidence" under § 920 of the Restatement (Second) of Torts.

The plaintiff further argues, as he did before the trial court, that the court should have instructed the jury that the defendants had the burden to prove that (1) their negligent acts proximately caused the resolution of the plaintiff's pain in 2011, and (2) in the absence of their negligence, the plaintiff's pain would have continued for the rest of his life and no treatment or procedure would have controlled that pain. This argument is predicated on the plaintiff's contention that the syrinx evidence was "benefits evidence" under § 920 of the Restatement (Second) of Torts.

Finally, the plaintiff argues that the trial court also erred in failing to provide the defendants' proposed charge on damages because "it would have given the jury some guidance about the nature of their claim," and "an imperfect curative instruction is better than no curative instruction at all."

was harmless because jury found for defendant on liability and did not reach causation).

We conclude that we need not consider the merits of the plaintiff's arguments as to the trial court's rulings with respect to the syrinx evidence because, even if we assume that the rulings were improper, they were harmless. See *Kalams* v. *Giacchetto*, supra, 268 Conn. 250.[13] The jury did not reach the issue of damages because, as evidenced by its answers to the jury interrogatories, it first determined that the defendants had not breached the standard of care.

The plaintiff claims that the rulings were harmful because (1) the syrinx evidence "permeated the case," and (2) the jury could have considered the syrinx evidence in its determination of liability.[14] We are not persuaded.

[13] The plaintiff argues that the present case is distinguishable from *Kalams* v. *Giacchetto*, supra, 268 Conn. 246, because "[t]he record here . . . provides no assurance that the jury considered the elements in sequence." In the present case, when the jury initially delivered its verdict form to the court, it failed to deliver completed interrogatories. When the court inquired where the interrogatories were, the jurors stated that they could not find them. The court thereafter provided the jury with another copy of the interrogatories. The jury, after completing the interrogatories, returned a verdict for the defendants. Based on this sequence of events, the plaintiff argues: "Here, it is not possible to presume that the jury did not reach the [syrinx evidence] before it considered breach." We disagree.

Apart from submitting the interrogatories to the jury, the court instructed the jury in relevant part: "[A] civil trial such as this has two issues: liability and damages. You will reach the issue of damages only if you find liability in favor of the plaintiff. If you find that liability is established, you will have occasion to apply my instructions concerning damages. If you find that liability has not been established, then you will not consider damages." We presume that the jury followed these instructions. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 402 ("[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them" [internal quotation marks omitted]).

[14] The plaintiff, citing *Pin* v. *Kramer*, 119 Conn. App. 33, 45, 986 A.2d 1101 (2010), aff'd, 304 Conn. 674, 41 A.3d 657 (2012), also argues that the defendants' counsel made comments during trial that "explicitly attacked the medical negligence system." We fail to see how any such alleged comments, which are not themselves challenged on appeal, relate to any harm caused by the rulings on the syrinx evidence.

A review of the trial transcripts reveals that the syrinx evidence did not, as the plaintiff argues, "permeate" the case, nor was it a "central theme at trial." Rather, the issue of liability was dominant and hotly contested. Each side presented two expert witnesses to opine on whether Dr. Kanev breached the standard of care. The jury was tasked with determining which of the parties' multiple experts it believed—a battle of the experts. Although the plaintiff is correct that "all four neurosurgical experts testified concerning the [syrinx] theory," the overwhelming majority of expert testimony concerned whether Dr. Kanev's actions during the surgery, with respect to the angle and location at which he inserted the needle and entered the epidural space, as well as his attempt of a retrograde placement of the electrode, deviated from the standard of care.[15]

Next, with respect to the plaintiff's argument that the rulings were harmful because the syrinx evidence "prejudiced [his] ability to prove . . . liability," the plaintiff, on appeal, explains his theory as to how the syrinx evidence could have been considered by the jury in its determination of liability. First, the plaintiff points to the expert testimony that explained the standard of care in terms of avoiding unnecessary risks. The plaintiff argues that the syrinx evidence and related argument, if accepted, "established that paralysis was necessary to the eventual cure of [the plaintiff's] neuropathic pain." He concludes that, if the jury could find that the paralysis was considered a *necessary* risk, it could find that Dr. Kanev had avoided *unnecessary* risks, in conformance with the standard of care.

We first note that the plaintiff did not, at trial, object to the syrinx evidence on the basis that the jury might

[15] The defendants' experts testified at length as to whether Dr. Kanev's conduct fell within the standard of care before being asked to opine about what caused the plaintiff's pain to substantially resolve.

improperly consider such evidence in its determination of liability. Accordingly, the plaintiff cannot now, on appeal, claim that such a use would have been harmful to him.[16]

On June 7, 2016, in addressing his request to charge, the plaintiff argued that submitting the syrinx evidence to the jury "is prejudicial . . . because it affects, essentially, the entire case." The plaintiff argues that this single statement should be viewed as his objection to the use of the syrinx evidence with respect to liability. We are not persuaded. Immediately following this statement, the plaintiff explained: "What it does, is it says to the jury that [it] can compare [the plaintiff's] prepain going away state to his current state *in order to determine what his measure of damages is*." (Emphasis added.)

Moreover, the record reveals no testimony or argument in which the defendants or their experts had discussed the syrinx evidence in the context of liability. The defendants' position that Dr. Kanev had conformed to the standard of care was not based on the fact that the plaintiff's neuropathic pain had substantially resolved or that Dr. Kanev's actions contributed to that resolution. Rather, the defendants' experts testified that Dr. Kanev had not breached the standard of care because (1) with respect to the location where he inserted the needle, Dr. Kanev would have had difficulty entering underneath the plaintiff's spinal cord due to scar tissue at that location, and (2) with respect to the angle at which he inserted the needle, Dr. Kanev would have had difficulty entering at a more shallow angle

[16] For this same reason, we find unpersuasive the plaintiff's argument that the rulings on the syrinx evidence were harmful because, unlike in *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 399–401, "the charge given . . . allows the jury to consider the [syrinx evidence] at any time for any purpose." In the present case, the plaintiff had not requested a limiting instruction such as the one provided in *Hurley*.

due to the plaintiff's obesity. Both of the defendants' experts opined that the plaintiff suffered a spinal cord injury, not because of any negligence on the part of Dr. Kanev, but because of an undiscovered herniated disc located at the plaintiff's eleventh and twelfth vertebrae.

Finally, in support of his argument, the plaintiff cites to our Supreme Court's decision in *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 9 A.3d 364 (2010).[17] *Klein*, however, is distinguishable from the present case. In *Klein*, the jury found that the defendant had not breached the standard of care. Id., 256. On appeal, the defendant argued that, although the trial court had improperly excluded the plaintiff's expert testimony, because that testimony would have been irrelevant to the issue of breach and dealt *only* with the question of causation, the impropriety was harmless. Id. Our Supreme Court disagreed. It concluded that the trial court's error was harmful because, under the circumstances of that case, "breach of the standard of care and causation were intertwined," and, therefore, the excluded testimony involved an issue "central to the question of not only causation, but breach as well."[18] Id., 256–57. In the present case, the issue of damages is not intertwined with the issue of breach of the standard of care. Moreover, what caused the plaintiff's pain to resolve was not central to the question of whether Dr. Kanev breached the standard of care.

[17] The plaintiff also cites to *Barbosa* v. *Osbourne*, 237 Md. App. 1, 183 A.3d 785 (2018). In *Barbosa*, the trial court improperly admitted evidence of contributory negligence. Id., 19–20. Although the jury found that the plaintiff failed to prove breach, which was to be considered separately from contributory negligence, the appellate court, nevertheless, found the evidentiary impropriety harmful because the evidence "pervaded every aspect of the trial below." Id., 20. We are not persuaded by the court's reasoning in *Barbosa* because, as we explain in this opinion, the syrinx evidence did not permeate the trial.

[18] Our Supreme Court explained that breach of the standard of care and causation were "intertwined" because "[t]he determination of whether the defendant had breached the standard of care could be reduced to the question of what caused the plaintiff's alleged injury . . . ." *Klein* v. *Norwalk Hospital*, supra, 299 Conn. 256–57.

Accordingly, we must conclude that it is not reasonably probable that the rulings on the syrinx evidence likely affected the result of the trial—that the defendants were not liable to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

JOAQUIN GUDINO *v.* COMMISSIONER OF CORRECTION
(AC 40696)

Lavine, Sheldon and Prescott, Js.*

Syllabus

The petitioner, who had been convicted, on a guilty plea, of murder in connection with the shooting death of the victim, sought a second petition for a writ of habeas corpus, claiming that his trial counsel and his prior habeas counsel had rendered ineffective assistance. Pursuant to a plea agreement, the petitioner initially had pleaded guilty to manslaughter in the first degree with a firearm in exchange for a recommended sentence of twenty-five years of incarceration. After reviewing the presentence investigation report, however, the trial court informed the petitioner that it was unwilling to impose the recommended sentence and permitted him to withdraw his plea. The case thereafter proceeded to trial but, prior to the close of evidence, the petitioner, pursuant to a new plea agreement, pleaded guilty to murder in exchange for a recommended sentence of forty-five years of incarceration, which the court subsequently imposed. The first habeas court denied the petitioner's first habeas petition, in which he alleged that his trial counsel had rendered ineffective assistance by, inter alia, failing to seek a dismissal of the jury panel on the basis of alleged juror misconduct. In count one of the second habeas petition, the petitioner alleged that his trial counsel rendered ineffective assistance by failing to investigate and present to the trial court certain mitigating evidence regarding his personal history and the events leading up to the shooting, which, he argued, would have persuaded the court to impose the original recommended sentence of twenty-five years. In count two, the petitioner alleged ineffective assistance of his prior habeas counsel. The habeas court dismissed count one of the petition as an improper successive claim, and it denied the

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

petition as to count two. The court thereafter granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly dismissed count one of the habeas petition alleging ineffective assistance of trial counsel on the ground that it was an improper successive claim and, therefore, was barred by the doctrine of res judicata: the petitioner conceded at his habeas trial that there were no newly discovered facts or evidence unavailable to him at the time of his first habeas petition and, although the petitioner raised different factual allegations and legal theories in support of his claims that his trial counsel rendered ineffective assistance, the grounds asserted in count one of the petition were identical to those raised in the prior petition that was denied, in that each alleged ineffective assistance of counsel; moreover, the relief sought here, namely, that the court vacate the petitioner's conviction and remand the case to the trial court so that he could argue to that court that the original twenty-five year sentence should be imposed, was legally indistinct from the relief sought in his prior habeas petition, in which he requested that the case be remanded to the trial court, without specifying any further relief, and the petitioner could not circumvent dismissal of his petition here merely by rewording his request for relief.

2. The habeas court properly determined that the petitioner failed to demonstrate that he was prejudiced by the allegedly deficient performance of his trial counsel and prior habeas counsel and, therefore, properly denied count two of the habeas petition alleging ineffective assistance of prior habeas counsel; that court properly determined that there was not a reasonable probability that, but for trial counsel's alleged failure to investigate and present to the trial court certain mitigating information, the court would have imposed the original recommended sentence of twenty-five years, as the presentence investigation report adequately addressed and apprised the trial court of the mitigating evidence of the petitioner's background and upbringing, including his history involving sexual and domestic abuse, drug use, and mental and intellectual deficits, as well as the circumstances surrounding the shooting of the victim, that report included a statement from members of the victim's family in which they vehemently opposed the twenty-five year sentence, and the trial court evinced a negative reaction to the report, particularly in light of the facts that, while the murder case was pending, the petitioner tampered with witnesses, fled the country, and never expressed any remorse for the offense.

Argued January 28—officially released July 16, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment

dismissing the petition in part and denying the petition in part, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Andrew S. Marcucci, assigned counsel, with whom was *Naomi Fetterman*, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Joaquin Gudino, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims, among other things, that the habeas court improperly (1) dismissed count one of the amended petition alleging ineffective assistance of trial counsel on the ground that it constituted an improperly successive petition, and (2) denied count two alleging ineffective assistance of prior habeas counsel on the ground that the petitioner failed to prove that he was prejudiced by the allegedly deficient performance of both his prior habeas counsel and his trial counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

The relevant procedural history and facts[1] are as follows. In 1996, the petitioner was charged with murder in violation of General Statutes § 53a-54a. The petitioner was represented in the trial court by Attorney Robert A.

[1] The facts include those explicitly found by the habeas court, as well as those stipulated to by the parties and set forth in this court's decision in the petitioner's prior habeas appeal. See *Gudino* v. *Commissioner of Correction*, 123 Conn. App. 719, 3 A.3d 134, cert. denied, 299 Conn. 905, 10 A.3d 522 (2010).

Skovgaard. On January 28, 1998, the petitioner entered a guilty plea to a substitute information charging him with manslaughter in the first degree with a firearm in exchange for a recommended sentence of twenty-five years of incarceration. When the petitioner entered his plea, the court, *Dean*, *J.*, indicated that its willingness to impose the recommended sentence was contingent on its review of a presentence investigation report (PSI). The case was continued for preparation of the PSI and for sentencing.

On April 24, 1998, the court informed the parties that it was unwilling to impose the recommended sentence in light of unfavorable information contained in the petitioner's PSI. Accordingly, the court permitted the petitioner to withdraw his guilty plea and to enter a plea of not guilty. Following the withdrawal of the petitioner's guilty plea, the state amended the information to reinstate the charge of murder.

A jury trial commenced on July 28, 1998. At trial, several witnesses testified that the petitioner had shot the victim. Prior to the close of evidence, the petitioner and the state reached a new plea agreement, and the petitioner pleaded guilty to murder in exchange for a recommended sentence of forty-five years of incarceration. The court, *Nigro*, *J.*, subsequently imposed the recommended sentence.

In 2000, the petitioner filed his first petition for a writ of habeas corpus. See *Gudino* v. *Warden*, Superior Court, judicial district of New Haven, Docket No. CV-00-0435107-S (January 7, 2009). Attorney Paul R. Kraus was appointed by the court to represent the petitioner.

On March 13, 2007, the petitioner filed a three count amended petition. Count one alleged that his trial counsel had provided ineffective assistance of counsel. Specifically, the petitioner asserted in count one that his trial counsel was ineffective because he failed (1) to

seek a dismissal of the jury panel on the ground of alleged juror misconduct, (2) to advise the petitioner that he would lose his right to raise the juror misconduct issue on appeal if he pleaded guilty, and (3) to advise the petitioner about the possibility of pleading guilty conditionally in order to preserve his right to raise the juror misconduct issue on appeal. Count two alleged that the petitioner's decision to plead guilty was not knowingly, voluntarily, and intelligently made. Count three alleged that the trial court violated his due process rights by failing to declare a mistrial due to alleged juror misconduct.

A habeas trial was conducted by the court, *Hon. William L. Hadden*, judge trial referee. The court subsequently denied the petition and the subsequent petition for certification to appeal. This court dismissed the petitioner's appeal from the court's denial of the petition certification to appeal. *Gudino* v. *Commissioner of Correction*, supra, 123 Conn. App. 725.

On August 19, 2014, the petitioner filed his second petition for a writ of habeas corpus. It is this petition that underlies the present appeal. The habeas court, *Sferrazza*, *J.*, appointed a special public defender to represent the petitioner, who, with counsel's assistance, filed a two count amended petition, dated November 28, 2016, in which he raised claims of ineffective assistance both by his trial counsel and by his prior habeas counsel.

The petitioner alleged in count one of his amended petition that the performance of his trial counsel was constitutionally deficient in numerous ways. Many of the allegations of deficient performance centered on trial counsel's alleged failure to investigate and present to Judge Dean information regarding events leading up to the commission of the crime and the petitioner's

substance abuse history, mental health, lack of education, learning disabilities, and upbringing, that, according to the petitioner, would have persuaded the court to impose the original recommended sentence of twenty-five years of incarceration. The petitioner alleged that there is a reasonable probability that, but for the deficient performance of trial counsel, Judge Dean would have imposed the recommended twenty-five year sentence for manslaughter in the first degree with a firearm, and, thus, the petitioner would not currently be serving a forty-five year sentence for murder. In count two of his amended petition, the petitioner alleged that his prior habeas counsel, Kraus, had rendered ineffective assistance by failing to allege that his trial counsel had provided ineffective assistance for the reasons enumerated in count one of the amended petition.

On July 7, 2017, following a trial, the second habeas court dismissed, pursuant to Practice Book § 23-29 (3),[2] count one of the amended petition on the ground that it did not allege any legal grounds different from those raised in his prior petition or rely on any new evidence that was not reasonably available when the prior petition was brought. Accordingly, it dismissed count one as an improper successive claim.

With respect to count two, the court denied the petitioner relief for three reasons. First, citing *State* v. *Madera*, 198 Conn. 92, 97, 503 A.2d 136 (1985), which, in turn, relied on *Tollett* v. *Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973), the court concluded that the petitioner had waived any challenge to the allegedly deficient performance of his trial counsel with respect to the plea proceedings before Judge Dean by

[2] Practice Book § 23-29 provides in relevant part: "The judicial authority may . . . dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

later pleading guilty to murder before Judge Nigro. The habeas court reasoned that because he had waived any claim of ineffective assistance against trial counsel, he could not establish that his prior habeas counsel was ineffective for failing to raise that claim in his prior petition.

Second, the court denied the petitioner relief on count two on the alternative ground that, even if his claims were not waived by his guilty plea to murder, the petitioner had failed to demonstrate that habeas counsel's performance was constitutionally deficient. Finally, the habeas court denied the petitioner relief on the additional alternative ground that he failed to establish that any allegedly deficient performance prejudiced the petitioner. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Specifically, the habeas court concluded that even if trial counsel had presented all of the information that the petitioner alleges should have been presented to Judge Dean about the commission of the crime and the petitioner's background, it was unpersuaded that Judge Dean would have imposed the recommended twenty-five year sentence.

On July 12, 2017, the habeas court granted the petition for certification to appeal. This timely appeal followed.

I

We first address the petitioner's claim that the habeas court improperly dismissed, pursuant to Practice Book § 23-29 (3), count one of his amended petition. The petitioner argues that, contrary to the conclusion of the habeas court, count one of the amended petition does not allege an improperly successive claim because it contains new factual specifications of ineffective assistance of counsel and seeks different forms of relief from those sought in his first habeas petition. According to the petitioner, the claim raised in the first count

of his present petition was not improperly successive because his first habeas petition alleged ineffective assistance of trial counsel on the basis of counsel's failure to secure a dismissal of the jury panel for juror misconduct and his subsequent failure to inform the petitioner that, if he pleaded guilty, he would waive his right to challenge the court's juror misconduct ruling on appeal. The current petition, by contrast, alleges ineffective assistance of trial counsel on the basis of, among other things, counsel's failure to conduct a proper investigation and to present to Judge Dean critical information that would have persuaded the court to impose the recommended twenty-five year sentence. Alternatively, the petitioner argues that the claim in count one is not improperly successive because one of the forms of relief the petitioner seeks in the current petition with respect to count one is different from the relief sought in the prior petition. We are unpersuaded by the petitioner's arguments and, therefore, affirm the habeas court's judgment dismissing count one.

We begin our analysis by reviewing the doctrine of res judicata as it applies to successive petitions in habeas corpus proceedings. "Our courts have repeatedly applied the doctrine of res judicata to claims duplicated in successive habeas petitions filed by the same petitioner. . . . In fact, the ability to dismiss a petition [if] it presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition is memorialized in Practice Book § 23-29 (3)." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

Pursuant to Practice Book § 23-29 (3), "[i]f a previous application brought on the same grounds was denied,

the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing." (Footnote omitted; internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 277, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Emphasis omitted; internal quotation marks omitted.) Id., 278.

Finally, "[t]he conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citation omitted; internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

We first address the petitioner's assertion that, because his allegation of ineffective assistance of trial counsel is premised on factual allegations different from those pleaded in his previous petition, the claim is not improperly successive. In making this assertion, he relies on *Carpenter* v. *Commissioner of Correction*, 81 Conn. App. 203, 210–12, 840 A.2d 1 (2004), rev'd

in part, 274 Conn. 834, 878 A.2d 1088 (2005), for the proposition that a successive claim of ineffective assistance of counsel against the same attorney is not subject to dismissal pursuant to Practice Book § 23-29 (3) provided that it contains different factual specifications of deficient performance from those pleaded in his previous petition. The decision in *Carpenter*, however, was reversed in part by our Supreme Court because it concluded that this court should not have addressed the question of whether the petition was barred by res judicata in light of the fact that the commissioner never sought dismissal of the petition on that ground. See *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 847, 878 A.2d 1088 (2005) ("[t]he portion of the Appellate Court's judgment concluding that the petition was not a successive petition is reversed; the judgment is affirmed in all other respects").

To the contrary, the petitioner's claim is controlled by *Alvarado* v. *Commissioner of Correction*, 153 Conn. App. 645, 103 A.3d 169, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). In *Alvarado*, this court squarely held that, in the absence of allegations and facts not reasonably available to the petitioner at the time of the original petition or a claim for different relief, a subsequent claim of ineffective assistance directed against the same counsel is subject to dismissal as improperly successive. Id., 650–51. As the court in *Alvarado* stated: "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . However they are proved, the grounds that the petitioner asserted are identical in that each alleges ineffective assistance of counsel, and, therefore, the habeas petition was properly dismissed." (Citation omitted; internal quotation marks omitted.) Id., 651; see also *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d

608 (2009) (petitioner was barred, as matter of res judicata, from raising in second petition same claim of ineffective assistance of counsel raised in his first petition); *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 230–32, 888 A.2d 183 (court properly dismissed second habeas petition alleging ineffective assistance of counsel where second petition was premised on same legal grounds as first petition alleging ineffective assistance of counsel and buttressed by no new facts alleged not to have been reasonably available while first habeas petition was pending), cert. denied, 277 Conn. 917, 895 A.2d 789 (2006).

We turn next to the petitioner's assertion that count one should not have been dismissed as improperly successive because it sought different relief from his prior petition. Specifically, the petitioner relies on the fact that in his amended petition, he requests the court to vacate his conviction and remand this case to the trial court to permit him "the opportunity to persuade the trial court that the original plea bargain should be imposed," whereas in his prior petition, he simply had requested that the case be remanded to the trial court without specifying any further relief. This assertion is meritless.

This court previously rejected in *Carter* v. *Commissioner*, supra, 133 Conn. App. 387, the assertion that a petitioner can avoid dismissal of a successive petition by rewording his request for relief. In *Carter*, the petitioner claimed that the court improperly dismissed his insufficiency of the evidence claim as a successive petition barred by res judicata. Id., 394. The petitioner claimed that, by seeking the remedy of a judgment of acquittal, his petition sought different relief from his previous petition in which he requested a new trial. Id. The petitioner, however, also requested in his first petition, " 'such other relief [as] law and justice require.' " Id. Further, "because the petitioner's claim

in that first habeas was the insufficiency of evidence leading to his conviction, if he had been successful the only appropriate remedy would have been an order of acquittal . . . .'' Id. The court ''was not persuaded by [the petitioner's] novel argument,'' stating that, ''[t]he reason of the law is not so thin . . . as to reward a petitioner merely for rewording the relief requested in two separate petitions . . . .'' Id.

We agree with the habeas court that the relief requested in both the first and second habeas actions ''are legally indistinct for purposes of evaluating whether the present action is a successive petition under Practice Book § 23-29 (3).'' Further, we agree with the habeas court that ''[t]he essential purpose of both the former and present claims . . . is to vacate the petitioner's guilty plea to murder and the resulting sentence and return the case to the criminal docket for further adjudication.'' In both petitions, the petitioner requested that his conviction and sentence be vacated and his case be remanded to the trial court. Despite his attempt at reformulation, the petitioner functionally seeks the same relief in both petitions.

Because the petitioner is bringing a claim on the same legal ground and seeking the same relief, he can avoid dismissal only by alleging and demonstrating that evidence necessary to support the newly asserted facts was not reasonably available at the time of the prior petition. See Practice Book § 23-29 (3). The petitioner, however, conceded during his habeas trial that there were no new facts or evidence not reasonably available to Kraus at the time he filed his previous petition. Therefore, the habeas court properly concluded that the petitioner's claim of ineffective assistance of trial counsel was an improperly successive claim and, thus, is barred by the doctrine of res judicata. Accordingly, we affirm the habeas court's judgment dismissing the first count of the amended petition, in which that claim is alleged.

II

We next address the petitioner's claim that the habeas court improperly denied count two of his petition. Specifically, the petitioner argues that the habeas court improperly concluded that (1) he had waived any claims against prior habeas counsel and trial counsel by pleading guilty before Judge Nigro,[3] (2) he failed to demonstrate that the performance of both prior habeas counsel and trial counsel was constitutionally deficient and (3) he failed to demonstrate that there is a reasonable probability that, but for trial counsel's deficient performance, Judge Dean would have imposed the recommended twenty-five year sentence for manslaughter in the first degree with a firearm.

With respect to the petitioner's first argument, the state concedes that the habeas court misapplied *Tollett* v. *Henderson*, supra, 411 U.S. 258, in concluding that the petitioner had waived at least some of the claims alleged in count two of his amended petition. In light of this partial concession, and because the judgment of the habeas court must be affirmed on at least one of the alternative grounds decided by the court, we decline to opine on whether the rule of waiver set forth in *Tollett* applies in this case. Instead, we conclude that the habeas court properly concluded that the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance of his trial and prior habeas counsel.

We begin our analysis with the law governing the petitioner's claim, as well as our standard of review. "The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred

[3] The petitioner also contends that the habeas court improperly raised the issue of waiver sua sponte. It is unnecessary for us to address this assertion in light of our conclusion that the habeas court properly denied this count for at least one alternative reason.

to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . With respect to the prejudice prong, the petitioner

must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .'' (Citations omitted, internal quotations omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–65, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

''A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.'' *Strickland* v. *Washington*, supra, 466 U.S. 670.

Finally, ''[i]t is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary.'' (Internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, supra, 169 Conn. App. 465.

Turning to the present case, we agree with the habeas court that the petitioner failed to prove the prejudice prong of *Strickland* with respect to trial counsel's alleged deficient performance, and, therefore, his claim of ineffective assistance against habeas counsel also fails.[4] Specifically, the petitioner failed to prove that

[4] The habeas court's ability to assess whether Judge Dean would have been persuaded by the presentation of additional mitigating information was made more difficult by the fact that no transcript exists of the April 24, 1998 sentencing proceeding before Judge Dean because the recording of the proceeding is inaudible. In an attempt to reconstruct the substance of the proceeding, the habeas court admitted as a full exhibit a copy of a newspaper article that describes the proceeding in a limited fashion.

a reasonable probability exists that, but for his trial counsel's failure to investigate and present further mitigating evidence to support the initial plea agreement, Judge Dean would have imposed the recommended sentence.

In support of his claim, the petitioner contends that Judge Dean was unaware of certain information about the facts leading up to the commission of the offense and the petitioner's background and upbringing. Specifically, the petitioner argues that Judge Dean was unaware that the petitioner was intoxicated at the time of the shooting; that trial counsel did not provide enough details regarding the petitioner's home life, particularly that the petitioner reported that he was sexually abused as a child and witnessed domestic abuse; and the PSI report did not indicate specific diagnoses and intellectual disabilities with which Leonard Kenowitz, a substance abuse psychologist and counselor called as an expert witness by the petitioner at the second habeas trial, had diagnosed the petitioner.

The habeas court determined, and we agree, that contrary to the petitioner's averments, the PSI explored these topics. The PSI discussed at length the petitioner's home life, trouble at school, depression, and propensity for violence at a young age. Additionally, the PSI report discussed the argument between the petitioner and the victim the day of the shooting, an altercation between the petitioner and the victim the week prior, the petitioner's regular use of phencyclidine (PCP), and his mental and intellectual deficits. Therefore, substantial mitigating evidence was contained in the PSI presented to Judge Dean.

Despite this mitigating information, the PSI report stated: "[The petitioner] is unfortunately the predictable result of a broken home, an overworked school system, and criminally influenced peers. He is, however, not the only child with those burdens, and those others,

for the most part, do not kill in such a cold-blooded manner." The PSI also stated that "[the petitioner's] initial brushes with the law and subsequent consequences in the criminal justice system were not enough to deter him from future criminal activities" and, "[g]iven the circumstances of this cold-blooded killing, [the petitioner's] history, and for the safety of the community, it is respectfully recommended that the maximum sentence be imposed."

The habeas court, in its memorandum of decision, noted Judge Dean's strong negative reaction to the PSI. Indeed, at the sentencing hearing Judge Dean stated: "It is a terrible PSI—not one good thing in the whole PSI. There's nothing in this PSI that would give me a basis for a [twenty-five year] sentence." The habeas court also noted that Judge Dean's negative view of the information contained in the PSI was informed by the substantial aggravating factors relating to the underlying offense and the petitioner's actions while the case was pending, including tampering with witnesses and "evad[ing] detection and punishment." The petitioner had pleaded guilty to a premeditated shooting and, after the commission of the offense, fled the country.

Moreover, the habeas court emphasized that the petitioner failed to show any remorse for his crime. In its memorandum of decision, the habeas court stated, "[t]he petitioner *never expressed remorse for killing the victim* or even recognition that he caused the legal troubles in which he found himself embroiled. His attitude about the homicide consisted of exploring the ways to avoid conviction and punishment." (Emphasis added.) Finally, the family members of the victim made it clear to the court in a written statement, which was incorporated into the PSI, that they vehemently opposed the recommendation of the twenty-five year plea sentence.

In light of these facts and what the habeas court could glean from the limited record about Judge Dean's

view of the petitioner's attitude and suitability for a low sentence, the habeas court simply was unpersuaded that a more fulsome sentencing presentation by the petitioner's trial counsel would have convinced Judge Dean that a twenty-five year sentence was appropriate in these circumstances.[5] The petitioner has failed to demonstrate that the factual findings that underlie Judge Sferrazza's conclusion are clearly erroneous or that his ultimate legal conclusion regarding prejudice was incorrect. Accordingly, we affirm the judgment of the habeas court dismissing count one and denying count two of the amended petition.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN MOSBY ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NORWALK ET AL.
(AC 42007)

Elgo, Bright and Beach, Js.

Syllabus

The plaintiff M, who brought this action seeking damages for breach of contract, appealed to this court from the judgment of the trial court rendered in favor of the defendant Board of Education of the City of Norwalk and the defendant union, after the court granted the board's motion to dismiss and the union's motion for summary judgment. The court had granted the motion to dismiss on the basis of improper service

[5] The petitioner, in his appellate brief, makes a passing reference to certain instances of deficient performance by his trial counsel occurring after Judge Dean had declined to impose the recommended sentence. The petitioner argues that the habeas court failed to consider these issues in deciding that he was not prejudiced by any deficient performance. Because the petitioner did not adequately brief this claim, we decline to address it. See *In re Elijah C.*, 326 Conn. 480, 495, 165 A.3d 1149 (2017) ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Internal quotation marks omitted.]).

of process pursuant to statute (§ 52-57 [b]), and it rendered summary judgment in favor of the union on the ground that M lacked standing to commence his claim against the union. *Held:*

1. The trial court properly granted the board's motion to dismiss: although M claimed that the board properly was served as a school district pursuant to § 52-57 (b) (4), the language of § 52-57 (b) unambiguously distinguishes the particular ways that service is required to be made upon a school district and a municipal board, and this court would not torture the language in § 52-57 (b) to construe a school board of education as being the equivalent of a school district where the plain meaning of the statute makes a clear distinction between the two; accordingly, because process properly is served against a school board of education only when it is made upon the clerk of the town, city or borough, and service in the present case was not made upon the Norwalk city clerk pursuant to § 52-57 (b) (5), service was defective.
2. This court declined to review M's claim that the trial court improperly granted the union's motion for summary judgment for lack of standing, M having failed to brief the claim adequately; M's brief presented no facts or legal analysis in support of this claim but, rather, contained merely conclusory statements that the trial court erred in granting summary judgment, and there was no analysis of the court's decision granting the motion for summary judgment.

Argued April 16—officially released July 16, 2019

Procedural History

Action to recover damages for breach of contract, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, granted the motion to dismiss filed by the defendant Board of Education of the City of Norwalk; thereafter, the court, *Jacobs*, *J.*, granted the motion for summary judgment filed by the defendant United Public Service Employees Union; subsequently, the court, *Jacobs*, *J.*, rendered judgment in favor of the defendants, from which the named plaintiff appealed to this court. *Affirmed.*

John Mosby, self-represented, the appellant (named plaintiff).

M. Jeffry Spahr, deputy corporation counsel, for the appellee (named defendant).

John M. Walsh, *Jr.*, for the appellee (defendant United Public Service Employees Union).

Opinion

BEACH, J. The self-represented plaintiff, John Mosby,[1] appeals from the judgment of the trial court rendered in favor of the defendants, the Board of Education of the City of Norwalk (board), and United Public Services Employees Union (union), following the granting of the board's motion to dismiss and the union's motion for summary judgment. On appeal, Mosby claims that the court erred in (1) granting the motion to dismiss in favor of the board on the ground of improper service of process, and (2) granting the motion for summary judgment in favor of the union on the ground that Mosby lacked standing to commence this action against the union. We affirm the judgment of the court.

The trial court's memorandum of decision granting the union's motion for summary judgment sets forth the following relevant and undisputed facts. "As custodians employed by the [board], the plaintiffs were members of Local 1042 Council #4, which negotiated Collective Bargaining Agreements with the [board] in 1997, 2003, and 2011. At the time of [Mosby's] retirement on November 5, 1999, he received medical benefits as set forth in . . . the 1997 Agreement. . . .

"Five of the plaintiffs, who all retired between February 9, 2009, and June 30, 2011, received retirement benefits pursuant to the 2003 Agreement . . . . One of the plaintiffs, who retired on June 30, 2012, received retirement benefits pursuant to the 2011 Agreement. All of the plaintiffs are currently receiving the coverage and benefits to which they are entitled pursuant to the Agreements which were in effect on the dates of their retirements.

[1] This action was brought by seven self-represented plaintiffs: John Mosby; Marcus Davis; Mace Greene; Winzer Teel; Jim Giordano; Emma Lawrence; and Steve Fulton. John Mosby was the only plaintiff to appeal from the judgment of the trial court.

"Local 1042 Council #4 was decertified by the Connecticut State Board of Labor Relations on August 26, 2015, and the defendant [union] was certified as the exclusive representative of all custodians employed by the board. The defendant [union] was not a party to the negotiations or the resulting Agreements in 1997, 2003, or 2011."

The plaintiffs' complaint alleged that the board and the union had breached a contract between them governing the plaintiffs' retirement health insurance benefits. On November 29, 2016, the board filed a motion to dismiss the action against it for improper service of process. The court granted the motion to dismiss on January 17, 2017.

On August 9, 2017, the union filed a motion for summary judgment claiming that the plaintiffs lacked standing to pursue this claim. On August 21, 2017, Mosby filed an opposition to the union's motion for summary judgment. Following a hearing, the court granted the union's motion for summary judgment by memorandum of decision dated March 27, 2018, concluding that the plaintiffs lacked standing to bring this action and that the union could not have breached the agreement at issue because it did not become involved in the collective bargaining process until August 26, 2015. This appeal followed.

I

Mosby first claims that the trial court erred in granting the board's motion to dismiss by concluding that he had not effected service of process properly. In particular, Mosby argues that the board properly was served as a school district pursuant to General Statutes § 52-57 (b) (4). In response, the board asserts that proper service on it could be accomplished only by following the procedures prescribed in § 52-57 (b) (5).

"The Superior Court has no authority to render a judgment against a person who was not properly served with process." *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 337, 951 A.2d 632 (2008). The issue of whether a court has jurisdiction "presents a question of law. . . . Our review of the court's legal conclusion is, therefore, plenary. . . . Our review of the trial court's factual findings is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) Id., 337–38.

"[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . [S]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of [personal] jurisdiction over that party. . . . Therefore, [p]roper service of process is not some mere technicality. . . .

"[W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. . . . [A]n action commenced by such improper service must be dismissed." (Citations omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 529–530, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014).

The language of subdivisions (4) and (5) of § 52-57 (b), on which the parties rely to support their respective positions, prescribes the methods of service required in order for the court to obtain jurisdiction over particular classes of defendants. Section 52-57 (b) (4) provides that process shall be served "*against a school district, upon its clerk or one of its committee* . . . ." (Emphasis added.) Section 52-57 (b) (5) provides that process

shall be served "*against a board, commission, department or agency of a town, city or borough*, notwithstanding any provision of law, *upon the clerk of the town, city or borough*, provided two copies of such process shall be served upon the clerk and the clerk shall retain one copy and forward the second copy to the board, commission, department or agency . . . ." (Emphasis added.) As such, these subdivisions unambiguously distinguish the particular ways that service is required to be made upon a school district and a municipal board. The issue, thus, is whether the board in the present case properly is categorized as a "school district" or "a board of a town."

Our Supreme Court's decision in *Board of Education* v. *State Employees Retirement Commission*, 210 Conn. 531, 542–43, 556 A.2d 572 (1989), recognized in a different context the distinction between a school district and a school board of education. In that case, our Supreme Court concluded that a municipal board of education is not a school district within the meaning of General Statutes § 7-452 (1). The plaintiffs argued that "a board of education is the equivalent of a school district" and, thus, qualifies as a municipality pursuant to § 7-452 (1).[2] (Internal quotation marks omitted.) Id., 542. In support of their argument, the plaintiffs relied on General Statutes § 10-240, which provides that "[e]ach town shall through its board of education maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts . . . ." Id. In rejecting the plaintiffs' argument, the court reasoned that "[c]learly, § 10-240 provides that [e]ach *town* . . . shall be a school district . . . and that each town's board of education is merely the instrumentality

[2] General Statutes § 7-452 (1) defines a "municipality," in part, as "any town . . . school district . . . ." The statute does not expressly include in the definition a board of education.

through which the *town* maintain[s] the control of all the public schools within its limits. The plain language of [§ 7-452 (1)] provides that *each town*, *not each board of education*, *is a school district* for the purposes recited therein. We will not torture the words or sentence structure of a statute to import an ambiguity where the ordinary meaning of the language leaves no room for it. . . . Thus, we conclude that *a board of education is not a school district*, and, accordingly, the plaintiffs do not fall within the definition of municipality set forth in § 7-452 (1)." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 542–43.[3]

In accordance with our Supreme Court's reasoning in *State Employees Retirement Commission*, we will not torture the language in § 52-57 (b) to construe a school board of education as being the equivalent of a school district where the plain meaning of the statute makes a clear distinction between the two. We, thus, agree with the board that process properly is served against a school board of education only when it is made "upon the clerk of the town, city, or borough" pursuant to § 52-57 (b) (5). See *Board of Education* v. *Local 1282*, 31 Conn. App. 629, 632, 626 A.2d 1314 ("[t]he designation of a particular officer or officers on whom service may be made excludes all others."), cert. granted, 227 Conn. 909, 632 A.2d 688 (1993) (appeal withdrawn January 3, 1994).

In the present case, Mosby asserted in his opposition to the board's motion to dismiss that service was hand delivered to Patricia Rivera, secretary of the board, on

[3] In addition, several Superior Court decisions have held that, in the context of § 52-57 (b), a municipal board of education properly is served pursuant to § 52-57(b) (5) rather than § 52-57 (b) (4). See *Dvorsky* v. *Board of Education*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6004173-S (May 6, 2011); *Saggese* v. *Board of Education*, Superior Court, judicial district of Litchfield, Docket No. CV-06-5000542 (December 12, 2006) (42 Conn. L. Rptr. 481); *Estrella* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-04-0200832-S (October 21, 2005) (40 Conn. L. Rptr. 180).

or about September 14, 2016. Because service was not made upon the Norwalk city clerk, pursuant to § 52-57 (b) (5), service was defective. Accordingly, the trial court properly granted the board's motion to dismiss for improper service of process.

II

Mosby next claims that the court improperly rendered summary judgment in favor of the union for lack of standing. The union asserts, and we agree, that this claim is inadequately briefed.

Mosby's brief presents no facts or legal analysis in support of this claim, but, rather, merely contains conclusory statements that the court erred in "granting summary judgment" and by "not taking into consideration that the court found merit and genuine issues of material fact and the court had set a trial date." There is also no analysis of the court's decision granting the motion for summary judgment. "We repeatedly have stated that [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). Accordingly, we decline to review this claim on the basis that it was inadequately briefed.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LEON MERCER (AC 40875)

Lavine, Prescott and Bright, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and unlawful restraint in the first degree, the defendant appealed to this court. He claimed that he was deprived of his constitutional rights to due process and effective assistance of counsel during the plea bargaining stage of the proceedings because the state initially charged him with a crime predicated on its misunderstanding of the victim's age. *Held* that the record lacked basic information required for a review of the defendant's claim and, thus, was inadequate to conduct a meaningful review of his claim: the defendant did not cite a single specific instance of deficient performance by his trial counsel and, instead, argued that the plea offer to him was probably more severe than what it would have been if the victim's true age had been known to the court and the prosecutor, and that his trial counsel was unable to provide competent legal assistance because he was proceeding on the basis of misinformation about the charges, and there was no evidence showing that, even if a more favorable plea offer had been made, the defendant would have accepted it; moreover, an evidentiary hearing in the proper forum would provide the trier of fact with the evidence that is necessary to evaluate the competency of the assistance of counsel and the harmfulness, if any, to the defendant due to any deficiency in counsel's performance.

Argued May 21—officially released July 16, 2019

Procedural History

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

Richard Emanuel, for the appellant (defendant).

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

Opinion

LAVINE, J. The defendant, Leon Mercer, appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and unlawful restraint in the first degree in violation of General Statutes § 53a-95. On appeal, the defendant claims that he was deprived of his constitutional rights to due process and effective assistance of counsel during the plea bargaining stage of the proceedings because the state initially charged him with a crime predicated on its misunderstanding of the victim's age.[1] We are unable to reach the merits of the defendant's appeal due to an inadequate record. Accordingly, we affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, procedural history, and information relating to the defendant's charges are relevant to our resolution of this appeal. On April 4, 2014, the defendant and his wife, Andrea Mercer (Mercer) were with Tangela S. (Tangela),[2] Mercer's half-sister, and other guests, at Tangela's apartment. They all left the apartment to drink wine at the Ramada Inn, leaving Tangela's six children, including the sixteen year old victim, and the two children of one of the guests in the apartment. The adults returned from the Ramada Inn at approximately 1 a.m. on April 5, 2014. The victim awoke when they entered.

The defendant was drunk, behaving in an obnoxious manner, and insulting Mercer. One of the other guests told him to leave, and the defendant stated that he was

[1] The defendant's due process claim is integrated within his claim of ineffective assistance of counsel and is not raised or briefed separately. We, therefore, construe and address the claim as a claim of ineffective assistance of counsel. See *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 669, 157 A.3d 1169, cert. denied 325 Conn. 923, 159 A.3d 1172 (2017).

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

going to his car. Instead of leaving the apartment and going to his car, however, the defendant entered the bedroom where the victim was located. He and the victim engaged in conversation before the defendant pulled the covers off the victim's legs and started rubbing them. The victim repeatedly tucked the blankets back under her in an effort to stop the defendant from rubbing her legs and told the defendant to leave. The defendant pulled the covers off her, turned her over, put his hand over her nose and mouth, unbuttoned her pants, and forcibly touched her clitoris. Not long after, Tangela and Mercer walked down the hallway toward the bedroom. The defendant jumped up, rushed out of the bedroom, and quickly left the apartment. The victim told her mother what the defendant had done, and Tangela reported it to the police.

On August 27, 2015, the defendant was arrested. Because the state thought that the victim was under the age of sixteen at the time of the incident, the state's September 14, 2015 long form information charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), unlawful restraint in the first degree in violation of § 53a-95, and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The age of the victim is an important factor in determining the severity of the charges. Sexual assault in the first degree, in violation of § 53a-70 (a) (1), is a class A felony, rather than class B, if the victim is under the age of sixteen,[3] and a necessary element for the charge of risk of injury to a child in violation of § 53-21 (a) (2) is that the victim is under sixteen.[4]

[3] General Statutes § 53a-70 (b) (2) provides in relevant part: "Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age . . . ." See also General Statutes § 53a-70 (b) (1) ("[e]xcept as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony").

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65,

On March 11, 2016, the defendant rejected a plea offer of ten years incarceration, execution suspended after four years, in connection with those three charges and proceeded to trial. On April 27, 2017, the first day of jury selection, the state filed a substitute long form information in which it additionally charged the defendant with sexual assault in the fourth degree for "subject[ing] another person, under sixteen (16) years of age, to sexual contact without such person's consent" in violation of General Statutes § 53a-73a (a) (2).[5] It was not until after court adjourned for the day on April 27, 2017, that the state confirmed that the victim was sixteen—not fifteen as it had previously erroneously believed—at the time of the incident.

On April 28, 2017, the second day of jury selection,[6] the state filed a substitute amended information that charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), sexual assault in the fourth degree for in violation of § 53a-73a (a) (2),[7] and unlawful restraint in the first degree in violation of § 53a-95, correcting the charges as to the victim's age.

of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[5] General Statutes § 53a-73a (b) provides: "Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony."

[6] We note that on the first day of jury selection, three venirepersons were asked whether the fact that the victim was under the age of sixteen would create a problem for them. Of the three venirepersons, the state and defense each exercised a preemptory challenge, and one venireperson was accepted as the first juror.

On appeal, the defendant raises an "incidental" claim that the error in the victim's age "*may*" have affected the exercise of peremptory challenges. (Emphasis in original.) Because defense counsel did not raise this issue in the trial court, and the record before us regarding the preemptory challenges is inadequate for review, we do not address it.

[7] The state later withdrew the charge of sexual assault in the fourth degree because the statute of limitations had expired.

Following a trial, the jury found the defendant guilty of sexual assault in the first degree and unlawful restraint in the first degree. The court sentenced the defendant to a total effective term of twelve years of incarceration, execution suspended after five years, two years of which were mandatory, and ten years of probation. The defendant appealed.

The defendant's overarching claim on appeal is that he was deprived of his right to effective assistance of counsel. "Our Supreme Court has held that, [a]lmost without exception . . . a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . *Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. . . . [O]n the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review to situations in which the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development. . . . Our role . . . is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing . . . any decision of ours . . . would be entirely speculative." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Leon*, 159 Conn. App. 526, 531–32, 123 A.3d 136, cert. denied, 319 Conn. 949, 125 A.3d 529 (2015).

The defendant does not cite a single specific instance of deficient performance by his trial counsel. Rather, he argues that the plea offer was "probably more severe

than what would have been offered if the [victim's] true age had been known to the court and [the] prosecutor," and that his counsel was unable to render competent legal assistance during the plea bargaining process because "the attorney [was] proceeding on the basis of misinformation about the charges—and possible penalties."

As previously stated in this opinion, an evidentiary hearing in the proper forum provides a trier of fact with the evidence that is necessary to evaluate the competency of the assistance of counsel and the harmfulness, if any, to the defendant due to any deficiency in counsel's performance. See id. In the present case, the record is lacking basic information required for us to review the defendant's claim—especially as we have no evidence before us that, even if a more favorable plea offer had been made, as the defendant argues and speculates, he would have accepted it.

We, therefore, conclude that the record is inadequate for us to conduct a meaningful review.

The judgment is affirmed.

In this opinion the other judges concurred.