WILLIE A. SAUNDERS *v.* COMMISSIONER OF CORRECTION (AC 41186)

Alvord, Prescott and Moll, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and risk of injury to a child, filed a second petition for a writ of habeas corpus, claiming that his rights to due process were violated because he was tried while he was incompetent and a competency examination had not been requested for him during the criminal proceedings by the trial court or by the state, in violation of statute (§ 54-56d). In his first habeas petition, the petitioner alleged that his trial counsel had rendered ineffective assistance. The habeas court denied that petition, and this court dismissed the petitioner's appeal from that denial. In his two count second habeas petition, the petitioner alleged in the first count that he suffered from severe intellectual disabilities that included an inability to read and write, and that he had been diagnosed at a young age as suffering from mental retardation with brain functioning equivalent to that of a ten year old. He alleged that as a result of those purported deficiencies, he could not comprehend the nature of the criminal proceedings against him, other than the general nature of the charges and that he faced incarceration if he were convicted. In the second count, the petitioner alleged that he had significant physiological and mental health afflictions that rendered him incompetent to be prosecuted and to stand trial. The respondent Commissioner of Correction filed a return, pursuant to the applicable rule of practice (§ 23-30), asserting that the petitioner had procedurally defaulted as to both counts of his petition because his due process claims were not raised during his criminal trial or on direct appeal. The respondent further alleged that the petitioner could not establish sufficient cause and prejudice to excuse the procedural defaults. The petitioner thereafter filed a reply to the respondent's return, pursuant to the applicable rule of practice (§ 23-31 [c]), in which he asserted, inter alia, that he could demonstrate cause to excuse the procedural defaults on the basis of the allegations in his habeas petition. The habeas court granted the respondent's motion to dismiss the second habeas petition, concluding that the petitioner's due process claims were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the procedural defaults. The court thereafter granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner's claim that the procedural default rule did not apply to his due process claims, raised for the first time by way of a petition for a writ of habeas corpus, that he was incompetent to stand trial and that the state and the trial court failed to comply with § 54-56d was unavailing:

a. The petitioner's due process claims, although not distinctly raised before or adjudicated by the habeas court, were reviewable, as the petitioner's reply to the respondent's return contested the assertion of procedural default, and whether the procedural default rule was applicable to the petitioner's claims was a question of law that required no factual findings by the habeas court.

b. The petitioner's procedural and substantive competency claims were subject to procedural default: although principles of federalism and comity do not apply in state habeas proceedings, federal and state habeas proceedings share a principal prudential interest in the application of the procedural default rule, which is vindicating the finality of judgments, and applying the procedural default rule to a procedural and substantive competency claim accords weight to the finality of judgments by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the court is focused on his case, and the rule promotes the systemic interests of conservation of judicial resources and the accuracy and efficiency of judicial decisions; moreover, the risk of an incompetent person being convicted and sentenced without any requested examination of, or other challenge to, his or her competency during the criminal trial proceedings or on direct appeal is so minimal that the systemic interests of finality, accuracy of judicial decisions and conservation of judicial resources vastly outweighed such risk, which is not enhanced by requiring a habeas petitioner to allege legally cognizable cause to overcome the procedural default, and that conclusion struck the right balance in according appropriate weight to those systemic interests; furthermore, this court declined to treat the petitioner's claims of incompetence to stand trial in the same manner as substantial claims of actual innocence, which are not subject to procedural default, as state habeas review jurisprudence has developed in tandem with federal habeas review jurisprudence, which limits the fundamental miscarriage of justice exception to actual innocence claims, and our appellate courts have consistently and broadly applied the cause and prejudice standard to all trial level and appellate level procedural defaults, with certain limited exceptions.

2. The habeas court properly determined that the petitioner's claims were procedurally defaulted because his reply was deficient and he failed to demonstrate cause to excuse his procedural defaults; the petitioner's reply did not satisfy the requirements of Practice Book § 23-31 (c), as the petitioner did not articulate with specificity any facts that demonstrated cause to overcome his procedural defaults but, rather, baldly alleged that he could demonstrate cause to excuse the procedural defaults solely on the basis of the allegations in his habeas petition, and even if the petitioner were permitted to rely on the allegations in his habeas petition to demonstrate cause and prejudice to excuse his procedural defaults, the allegations that he was incompetent to stand trial were not sufficient to overcome the procedural defaults, as his alleged incompetence was an internal, rather than an external, impediment to his defense and, thus, could not serve as cause to overcome a procedural default.

Argued May 23—officially released November 26, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, with whom, on the brief, was *Desmond M. Ryan*, for the appellant (petitioner).

Bruce R. Lockwood, supervisory assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Willie A. Saunders, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus on the ground that his due process claims, predicated on allegations that he was incompetent to stand trial and that the state and the trial court failed to comply with General Statutes § 54-56d,[1] were procedurally defaulted. On appeal,

[1] General Statutes § 54-56d provides in relevant part: "(a) Competency requirement. Definition. A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense.

"(b) Presumption of competency. A defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue. The burden of going forward with the evidence shall be on the state if the court raises the issue. The court may call its own witnesses and conduct its own inquiry.

"(c) Request for examination. If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency. . . ."

the petitioner claims that the court improperly dismissed the petition because (1) his due process claims were not subject to the procedural default rule, or (2) alternatively, he sufficiently pleaded cause and prejudice to overcome the procedural defaults and allow judicial review of his claims. We disagree and, accordingly, affirm the judgment of the habeas court.

The following recitation was set forth by this court in the petitioner's direct appeal from his conviction. "The jury reasonably could have found the following facts. On April 20, 2003, Easter Sunday, the victim,[2] who was ten years old at the time, and several members of her family . . . were staying with the [petitioner's] sister . . . in her apartment. . . . The sleeping arrangements were such that the victim shared a room with her five year old brother, C . . . . On that night, the victim shared a twin bed with [C] . . . . The victim slept on her stomach, still dressed in her Easter dress with her undergarments and shoes on. At some point, the [petitioner] entered the room and shook the victim's arm, telling her that her mother wanted her. The victim feigned sleep and ignored the [petitioner], who then went into the hall outside the room. . . . The [petitioner] reentered the room and approached the victim, who was still feigning sleep, face down on the bed. He pulled down her undergarments and left the room again. He soon returned and removed C from the twin bed he was sharing with the victim and placed him on the floor. C did not awaken. The [petitioner] then inserted his penis into the victim's vagina. The [petitioner] had lubricated his penis with shampoo that burned the victim's vagina. The [petitioner] then tried to insert his penis fully into the victim's vagina for five minutes to no avail.

[2] "In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e." *State* v. *Saunders*, 114 Conn. App. 493, 495 n.3,969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009).

During the assault, the victim continued to feign sleep in fear that had she not, the [petitioner] would have physically assaulted her. After ending his efforts, the [petitioner] pulled the victim's undergarments back up, placed C back on the bed and left the room. . . . The victim did not immediately report the assault.

"On October 29, 2003, the victim was at home with C and her older brother, D, while their mother was at work. She and D were watching the movie 'The Color Purple' on television. In the movie, there is a scene in which a character is raped by her father and becomes pregnant. After viewing the movie, the victim had a violent outburst in which she destroyed several glass figurines and other items she kept in her bedroom. D intervened, asking the victim what was wrong with her. The victim told D that the [petitioner] had raped her. D then called their mother and reported to her what the victim had told him. The victim's mother came home and called the police. . . . Subsequently, the victim picked the [petitioner's] photograph out of a photographic array at the police department." (Footnote in original; footnotes omitted.) *State* v. *Saunders*, 114 Conn. App. 493, 495–96, 969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009).

By way of a substitute long form information, the petitioner was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). In June, 2006, following a jury trial, the petitioner was found guilty of both crimes. The trial court imposed a total effective sentence of ten years of imprisonment followed by fifteen years of special parole. This court affirmed the judgment of conviction.[3] See *State* v. *Saunders*, supra, 114 Conn. App. 509.

[3] On direct appeal, the petitioner made three claims: "(1) the state adduced insufficient evidence to sustain his conviction, (2) the trial court improperly allowed the state to comment on missing witnesses during final argument

In October, 2009, the petitioner filed a petition for a writ of habeas corpus alleging that his trial counsel had rendered ineffective assistance by failing to call additional alibi witnesses at trial (first petition). The habeas court denied the first petition. Following the denial of the petitioner's petition for certification to appeal, the petitioner filed an appeal, which this court dismissed. *Saunders* v. *Commissioner of Correction*, 143 Conn. App. 902, 67 A.3d 316, cert. denied, 310 Conn. 917, 76 A.3d 632 (2013).

On September 28, 2015, more than nine years following the judgment of conviction, the petitioner filed a second petition for a writ of habeas corpus—the petition at issue in this appeal (second petition). The second petition consisted of two counts asserting due process violations under the fifth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution on the grounds that the petitioner was incompetent to be prosecuted and to stand trial and that, in violation of § 54-56d, no competency examination had been requested by his trial counsel, the state, or the trial court during the criminal proceedings. In count one, the petitioner alleged that he suffers from severe intellectual disabilities, including, inter alia, an inability to read or write, a diagnosis of "mental retardation" at a young age, and brain functioning equivalent to that of a ten year old child. The petitioner alleged that, as a result of these purported deficiencies, he could not comprehend the nature of the criminal proceedings against him, other than the general nature of the charges and the fact that he was facing incarceration if convicted. He further alleged that his trial counsel, the state, and the court did not request that he undergo a competency examination during the course of the criminal proceedings.

and (3) the state engaged in prosecutorial impropriety during final argument and, therefore, deprived him of his due process right to a fair trial." *State* v. *Saunders*, supra, 114 Conn. App. 494–95.

In count two of the second petition, the petitioner alleged that he had significant physiological and mental health afflictions that rendered him incompetent to be prosecuted and to stand trial. The petitioner alleged, inter alia, that he had a long history of epileptic seizures, a visibly misshapen head, paranoia, schizophrenia, and depression, and that he had been hospitalized on numerous occasions in North Carolina prior to his arrest for the crimes at issue. The petitioner further alleged that these conditions continued to plague him throughout his period of incarceration. He also alleged, as he had in the first count, that his trial counsel, the state, and the trial court had not requested a competency examination during the course of the criminal proceedings.

On March 31, 2016, pursuant to Practice Book § 23-30,[4] the respondent, the Commissioner of Correction, filed a return denying the material allegations in the second petition and asserting several affirmative defenses, including procedural default as to both counts of the second petition.[5] According to the respondent, the petitioner's due process claims regarding his alleged incompetency were not raised during the petitioner's

[4] Practice Book § 23-30 provides: "(a) The respondent shall file a return to the petition setting forth the facts claimed to justify the detention and attaching any commitment order upon which custody is based.

"(b) The return shall respond to the allegations of the petition and shall allege any facts in support of any claim of procedural default, abuse of the writ, or any other claim that the petitioner is not entitled to relief."

[5] The respondent asserted identical procedural default affirmative defenses with respect to both counts of the second petition. The respondent also asserted that (1) to the extent that the petitioner was raising an ineffective assistance of counsel claim in both counts of the second petition, those claims had been raised in the first petition and resolved in the prior habeas action, and the petitioner had presented no new facts or evidence unavailable at the time of the first petition, and (2) the first count failed to state a claim upon which relief can be granted. In its memorandum of decision dismissing the second petition, the habeas court did not address those additional affirmative defenses, and neither party has raised any claims as to those affirmative defenses on appeal.

criminal trial or pursued on direct appeal from the judgment of conviction and, thus, the claims were barred by the procedural default rule. Furthermore, the respondent alleged that the petitioner could not establish sufficient cause and prejudice to excuse the procedural defaults.

On July 20, 2016, pursuant to Practice Book § 23-31,[6] the petitioner filed a reply. Therein, in response to the respondent's affirmative defenses sounding in procedural default, the petitioner alleged that because his due process rights were violated by virtue of his standing trial while he was incompetent, it would be "circular" and "illogical" to subject his due process claims to a procedural default analysis. The petitioner also alleged that he could not have raised his due process claims at any earlier juncture because he is "significantly developmentally disabled because of his significantly low IQ [intelligence quotient] of 50" and none of his previous attorneys had his IQ tested and/or his competency evaluated. Finally, in the alternative, he alleged that he could establish both cause and prejudice to overcome the procedural defaults.[7]

On October 25, 2017, pursuant to Practice Book § 23-29, the respondent filed a motion to dismiss the second petition, inter alia, on the ground that the petitioner's due process claims raised therein were procedurally

[6] Practice Book § 23-31 provides: "(a) If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petition, the petitioner shall file a reply.

"(b) The reply shall admit or deny any allegations that the petitioner is not entitled to relief.

"(c) The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. The reply shall not restate the claims of the petition."

[7] There is no dispute that the petitioner failed to raise the due process claims in the second petition during his criminal trial proceedings or on direct appeal from the judgment of conviction.

defaulted.[8] Following a hearing held on the same day,[9] the habeas court issued a memorandum of decision granting the motion to dismiss.[10] The court determined that the petitioner's due process claims[11] were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the procedural defaults. The petitioner then filed a petition for certification to appeal, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the petitioner's claims, we begin by setting forth the relevant legal principles and standard of review. "Practice Book § 23-29 (5) permits a habeas court to dismiss a petition for 'any . . . legally

[8] On September 20, 2017, the respondent filed a separate motion to dismiss the second petition, which, with permission from the habeas court, subsequently was amended to be captioned as a motion for summary judgment. Therein, the respondent asserted that (1) the due process claims raised in both counts of the second petition were procedurally defaulted, and (2) the due process claim raised in count one of the second petition failed to state a claim upon which relief could be granted. On October 17, 2017, the court denied the motion for summary judgment, concluding that there were genuine issues of material fact in dispute. That decision is not at issue on appeal.

[9] The respondent's motion to dismiss was dated October 20, 2017, but the motion was not filed until October 25, 2017, when it was submitted to the habeas court during the October 25, 2017 hearing. At the October 25, 2017 hearing, the respondent's counsel represented that she had filed the motion to dismiss on an unspecified date and that opposing counsel had received a copy of the motion, but that the filing did not appear on the Judicial Branch website and, apparently, the habeas court had never received the motion. The respondent's counsel then indicated that she had made a copy of the motion to dismiss for the court and requested permission from the court to proceed with argument on the motion, which the court allowed.

[10] The habeas court issued a written memorandum of decision, which it read into the record during the October 25, 2017 hearing.]

[11] In his reply to the respondent's return, the petitioner asserted that he was not raising a claim of ineffective assistance of counsel in the second petition. In its memorandum of decision, the habeas court determined that "[a] fair and liberal reading of the two counts in the [second] petition supports the conclusion that the petitioner is alleging only a due process violation, and that he is not alleging ineffective assistance of counsel . . . ."

sufficient ground' "; *Fuller* v. *Commissioner of Correction*, 75 Conn. App. 814, 818, 817 A.2d 1274, cert. denied, 263 Conn. 926, 823 A.2d 1217 (2003); which may include procedural default. *Brewer* v. *Commissioner of Correction*, 162 Conn. App. 8, 16–19, 130 A.3d 882 (2015). "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 338, 199 A.3d 1127 (2018).

I

We first address the petitioner's assertion that his due process claims raised in the second petition were not subject to the procedural default rule and, thus, the habeas court erred in determining that the claims were procedurally defaulted. As a preliminary matter, the respondent argues that we should not consider this particular assertion because it was neither distinctly raised by the petitioner before the habeas court nor adjudicated by that court. We conclude that the petitioner's claim is reviewable but unavailing.

Under our rules of practice, we are not bound to consider a claim unless it was distinctly raised at trial or during subsequent proceedings. See Practice Book § 60-5. "A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court. . . . Appellate review of claims not raised before the habeas court would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) *Giattino* v. *Commissioner of Correction*, 169

Conn. App. 566, 580, 152 A.3d 558 (2016); see also *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705 (declining to review petitioner's claim on appeal where record revealed that claim not raised during habeas proceedings and habeas court did not rule on claim), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

We conclude that the petitioner's contention that his due process claims were not subject to the procedural default rule is properly preserved for our review. In his reply to the respondent's return, the petitioner explicitly contested whether his due process claims could be procedurally defaulted, contending that conducting a procedural default analysis with respect to his claims would be "circular" and "illogical." In its memorandum of decision, the habeas court concluded that the petitioner's claims were procedurally defaulted. Furthermore, whether the procedural default rule is applicable to the petitioner's claims is a question of law requiring no factual findings by the habeas court. Therefore, the petitioner's assertion that his claims are not subject to the procedural default rule is properly before us for review.

We now turn to the merits of the petitioner's claim. The petitioner, relying primarily on the decision of the United States Court of Appeals for the Second Circuit in *Silverstein* v. *Henderson*, 706 F.2d 361 (2d Cir.), cert. denied, 464 U.S. 864, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983), contends that his due process claims, predicated on his alleged incompetence to stand trial and the alleged failures of the state and the trial court to request that he undergo a competency examination under § 54-56d,[12] are not subject to the procedural default rule.

[12] In the second petition, the petitioner also alleged that his trial counsel failed to request that he undergo a competency examination. On appeal, however, the petitioner focuses only on the alleged failures of the state and the trial court to request a competency examination.

The respondent argues that the petitioner's due process claims are not immune to procedural default. We agree with the respondent.

In order to resolve the petitioner's claim on appeal, we begin with a review of the procedural default rule and its development. "Under the procedural default doctrine, a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding, unless he can prove that his default by failure to do so should be excused." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 199, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

"Prior to 1991, [our Supreme Court] employed the deliberate bypass rule, as articulated in *Fay* v. *Noia*, [372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963)], in order to determine the reviewability of constitutional claims in habeas corpus proceedings that had not been properly raised at trial or pursued on direct appeal. . . . In *Fay* v. *Noia*, supra, 438–39, the United States Supreme Court held that federal habeas corpus jurisdiction was not affected by the procedural default, specifically a failure to appeal, of a petitioner during state court proceedings resulting in his conviction. The court recognized, however, a limited discretion in the federal habeas judge to deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. . . . This deliberate bypass standard for waiver required an intentional relinquishment or abandonment of a known right or privilege by the petitioner personally and depended on his considered choice. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief." (Citation omitted; internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 130–31, 629 A.2d 413 (1993).

"After *Fay*, the United States Supreme Court took the view that it had failed to accord adequate weight to comity and finality of the state court judgments and, accordingly, steadily increased the power of federal courts to deny habeas corpus claims based on state procedural defaults by determining that such claims should be reviewed under a more stringent cause and prejudice standard. . . . This change was accomplished by applying the cause and prejudice standard in a series of cases in which procedural defaults arose in a variety of circumstances." (Citations omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 180–81, 982 A.2d 620 (2009).

For example, in 1977, in *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), the United States Supreme Court rejected "the sweeping language of *Fay*"; id., 87; which, "going far beyond the facts of the case"; id., 87–88; "would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." Id., 87. Instead, the court applied the rule of *Francis* v. *Henderson*, 425 U.S. 536, 542, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976)—which barred federal habeas review absent a showing of "cause" for the failure to raise the claim previously and "prejudice" resulting from the alleged constitutional violation—to a defaulted "objection to the admission of a confession at trial . . . ." *Wainwright* v. *Sykes*, supra, 87. The court left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard, and note[d] . . . only that it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, [supra, 372 U.S. 391] . . . ." *Wainwright* v. *Sykes*, supra, 87. "Thus was born the *Wainwright* 'cause-and-prejudice' standard for habeas review." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 413, 589 A.2d 1214 (1991).

As our Supreme Court recognized in *McClain* v. *Manson*, 183 Conn. 418, 439 A.2d 430 (1981), however,

because the United States Supreme Court in " '[*Wainwright* v. *Sykes*, supra, 433 U.S. 72] left intact its holding in *Fay* v. *Noia*, [supra, 372 U.S. 391] it remain[ed] undecided which procedural waivers [would] be evaluated under *Fay*'s "deliberate bypass" standard and which under the narrower "cause" and "prejudice" test of *Sykes*.' " *McClain* v. *Manson*, supra, 428–29 n.15, quoting *U.S. ex rel. Carbone* v. *Manson*, 447 F. Supp. 611, 619 (D. Conn. 1978).

In 1991, the United States Supreme Court "unequivocally closed *McClain*'s 'open question' in *Coleman* [v. *Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)]," by expressly rejecting the continued viability of *Fay*'s deliberate bypass standard for federal habeas review. *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 184. That is, "[i]n *Coleman* [v. *Thompson*, supra, 750], the Supreme Court explicitly overruled *Fay*, holding that the cause and prejudice standard applies to '*all cases* in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule . . . .' " (Emphasis in original.) *Crawford* v. *Commissioner of Correction*, supra, 182. "Under this standard, state prisoners who have defaulted federal claims in state court cannot obtain federal habeas corpus review unless they can 'demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'[13] [*Coleman* v. *Thompson*, supra, 750.] In setting out this standard, the Supreme Court emphasized the importance of the uniform application of procedural default standards, regardless of the specific nature of the procedural default. Id., 750–51 ('[b]y applying the

[13] In *Schlup* v. *Delo*, 513 U.S. 298, 322, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), the United States Supreme Court expressly tied the "fundamental miscarriage of justice" exception to actual innocence claims.

cause and prejudice standard uniformly to all independent and adequate state procedural defaults, we eliminate the irrational distinction between *Fay* and the rule of cases like *Francis* [v. *Henderson*, supra, 425 U.S. 536], *Sykes* . . . and [*Murray* v. *Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)]')." (Footnote added.) *Crawford* v. *Commissioner of Correction*, supra, 182.

"Although [our appellate courts are] not compelled to conform state postconviction procedures to federal procedures . . . our jurisprudence has followed the contours of the Supreme Court's adoption and subsequent rejection of the deliberate bypass standard." (Citation omitted.) Id. Our Supreme Court has followed the federal denunciation of *Fay*'s deliberate bypass standard and held that the cause and prejudice standard in *Wainwright* applies to claims that were not pursued at trial or on direct appeal but were later raised in habeas proceedings. See *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 132, 136 (adopting *Wainwright*'s cause and prejudice standard for habeas review of constitutional claims not pursued on direct appeal); *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 417–19 (adopting *Wainwright*'s cause and prejudice standard for habeas review of constitutional claims not properly preserved at trial). "Since *Jackson*, [our Supreme Court] consistently and broadly has applied the cause and prejudice standard to trial level and appellate level procedural defaults in habeas corpus petitions." *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 186. But see *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 61, 136 A.3d 596 (2016) (concluding that "challenges to kidnapping instructions in criminal proceedings rendered final before [*State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)] are not subject to the procedural default rule"); *Summerville* v. *Warden*, 229 Conn. 397, 422, 641 A.2d

1356 (1994) (holding that substantial claim of actual innocence is not subject to procedural default rule).

The precise issue before us is whether the procedural default rule applies to due process claims, raised for the first time by way of a petition for a writ of habeas corpus, that a petitioner was incompetent to stand trial and/or that the state and the trial court failed to comply with § 54-56d. This issue has not been squarely addressed by this court or by our Supreme Court. Although we are not bound by federal postconviction jurisprudence; *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 70; we continue our discussion by turning to cases from the federal courts and our sister states for guidance. See *State* v. *Favoccia*, 306 Conn. 770, 790–91, 51 A.3d 1002 (2012) ("[i]nasmuch as this is an issue of first impression . . . we turn for guidance to cases from the federal courts and our sister states" [footnote omitted]).

In 1966, the United States Supreme Court observed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate* v. *Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); see also *Drope* v. *Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (recognizing, upon granting of certiorari from direct state court criminal appeal, long accepted principle that person who lacks capacity to understand nature and object of proceedings against him, to consult with counsel, and to assist in preparation of defense may not be subjected to trial).

Against the backdrop of the United States Supreme Court's incremental departure from, and eventual rejection of, the deliberate bypass standard, we observe that the better weight of post-*Coleman* federal Circuit Court authority has rejected the expansion of *Pate* and/or

Drope to preclude the application of the procedural default rule to procedural and substantive competency claims.[14] As we will explain, these courts reason that there is a fundamental distinction between the legal theories of waiver, as applied in *Pate* and *Drope*, and procedural default.

For example, in *Smith* v. *Moore*, 137 F.3d 808, 818 (4th Cir.), cert. denied, 525 U.S. 886, 119 S. Ct. 199, 142 L. Ed. 2d 163 (1998), the petitioner, who claimed in an appeal from the denial of his petition for a writ of habeas corpus that he was incompetent to stand trial, argued that competence to stand trial cannot be waived and, therefore, cannot be procedurally defaulted. The United States Court of Appeals for the Fourth Circuit disagreed, holding that the petitioner was procedurally barred from raising the claim for the first time on habeas review. Id. The court reasoned: "Neither *Drope* nor *Pate* . . . support[s] [the petitioner's] argument that competence to stand trial may be raised at any time. The rather unremarkable premise behind *Drope* and *Pate* is that an incompetent defendant cannot knowingly or intelligently waive his rights. . . . Unlike waiver, which focuses on whether conduct is voluntary and knowing, the procedural default doctrine focuses on comity, federalism, and judicial economy. . . . Put simply, the rationale of *Drope* and *Pate* [is] inapposite in the context of a procedural default." (Citations omitted.) *Smith* v. *Moore*, supra, 818–19; see also *Burket* v. *Angelone*, 208 F.3d 172, 191–95 (4th Cir.) (concluding that petitioner's procedural and substantive competency claims were procedurally defaulted), cert. denied, 530 U.S. 1283, 120 S. Ct. 2761, 147 L. Ed. 2d 1022 (2000); accord *Gonzales* v. *Davis*, 924 F.3d 236, 242–44 (5th

[14] "A procedural competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent." (Internal quotation marks omitted.) *Lay* v. *Royal*, 860 F.3d 1307, 1314 (10th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 1553, 200 L. Ed. 2d 752 (2018).

Cir. 2019) (concluding that petitioner's procedural competency claims were procedurally defaulted).

The United States Court of Appeals for the Sixth Circuit agrees. In *Hodges* v. *Colson*, 727 F.3d 517, 539–40 (6th Cir. 2013), cert. denied sub nom. *Hodges* v. *Carpenter*, U.S. , 135 S. Ct. 1545, 191 L. Ed. 2d 642 (2015), the Sixth Circuit considered whether the petitioner's substantive competency claim was subject to procedural default. The court concluded that it was rejecting the petitioner's reliance on decisions from the United States Courts of Appeals for the Tenth and Eleventh Circuits that distinguished between procedural competency claims (which those courts have held are subject to procedural default) and substantive competency claims (which those courts have held are not subject to procedural default). Id., 540 (citing *Battle* v. *United States*, 419 F.3d 1292, 1298 [11th Cir. 2005], cert. denied, 549 U.S. 1343, 127 S. Ct. 2030, 167 L. Ed. 2d 772 [2007]; *Walker* v. *Gibson*, 228 F.3d 1217, 1229 [10th Cir. 2000], cert. denied, 533 U.S. 933, 121 S. Ct. 2560, 150 L. Ed. 2d 725 [2001]; *Adams* v. *Wainwright*, 764 F.2d 1356, 1359 [11th Cir. 1985], cert. denied, 474 U.S. 1073, 106 S. Ct. 834, 88 L. Ed. 2d 805 [1986]). The Sixth Circuit explained: "[N]either the Supreme Court nor this court has adopted such a rule, and we decline to do so here. As the [United States Court of Appeals for the] Ninth Circuit noted in *LaFlamme* v. *Hubbard*, [Docket No. 97-6973, 2000 WL 757525, *2 (9th Cir. March 16, 2000) (decision without published opinion, 225 F.3d 663 ([9th Cir. 2000])], those courts that have held that substantive competency claims cannot be procedurally defaulted appear to have conflated the distinct concepts of waiver and procedural default. Although it is true that substantive competency claims cannot be waived, *Pate* v. *Robinson*, [supra, 383 U.S. 384] ('it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court

determine his capacity to stand trial'), they can be procedurally defaulted. We agree with the Ninth Circuit that, 'unlike waiver, the procedural default rule does not rely on the petitioner's voluntary abandonment of a known right but only on the fact that the claim was rejected by the state court on independent and adequate state grounds.' [*LaFlamme* v. *Hubbard*, supra, 2000 WL 757525, *2] . . . . We hereby hold that substantive competency claims are subject to the same rules of procedural default as all other claims that may be presented on habeas."[15] *Hodges* v. *Colson*, supra, 540.

In *Martinez-Villareal* v. *Lewis*, 80 F.3d 1301, 1307 (9th Cir.), cert. denied sub nom. *Martinez-Villareal* v. *Stewart*, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996), the Ninth Circuit similarly held that a petitioner's substantive competency claim could be procedurally defaulted, rejecting an expansive application of *Pate* and distinguishing between the defenses of waiver and procedural default. The court explained: "The waiver standard does not apply when the [s]tate urges procedural default as a defense to a state prisoner's claims. In [*Wainwright* v. *Sykes*, supra, 433 U.S. 73], the [United States Supreme] Court specifically rejected the waiver-based 'deliberate by-pass' standard of [*Fay*], as applied to claims of procedural default. In *Coleman*, the [c]ourt made it clear that the cause and prejudice standard applies to all 'independent and adequate state

[15] Although we agree with the Tenth and Eleventh Circuits' view that procedural competency claims are subject to procedural default; *Lay* v. *Royal*, supra, 860 F.3d 1314–15; *Battle* v. *United States*, supra, 419 F.3d 1298; we agree with the Sixth and Ninth Circuits' observation that those courts' adoption of a different rule for substantive competency claims is premised on an expansive application of *Pate* and a conflation of the defenses of waiver and procedural default. See *Lay* v. *Royal*, supra, 1318–19 (Briscoe, J., concurring) (suggesting that Tenth Circuit reconsider precedent holding that substantive competency claims cannot be procedurally defaulted, highlighting that other circuit courts of appeal have rejected reading *Pate* expansively in light of distinction between legal theories of waiver and procedural default).

procedural defaults.' . . . The analytical basis of a defense of waiver differs markedly from that of a defense of procedural default. A claim has been 'waived' if it was not raised and if the standard of 'voluntary relinquishment or abandonment of a known right,' articulated in *Fay*, is met. In contrast, a finding of procedural default requires only that the claim was rejected by the state court on independent and adequate state procedural grounds." (Citation omitted.) *Martinez-Villareal* v. *Lewis*, supra, 1307. The court concluded that, because claims relating to the petitioner's alleged incompetence to stand trial were not raised until his third habeas petition, "the district court erred in holding that the claim was not procedurally defaulted." Id.

We also note that several decisions from our sister states also support the conclusion that competency claims are subject to procedural default. See, e.g., *Perkins* v. *Hall*, 288 Ga. 810, 822, 708 S.E.2d 335 (2011) ("substantive claims of incompetence to stand trial will continue to be subject to procedural default"); *State* v. *Watkins*, 284 Neb. 742, 749–50, 825 N.W.2d 403 (2012) (applying procedural default rule to substantive competency claim).

Persuaded to follow, for purposes of state habeas review, the better weight of authority discussed previously in this opinion, we hold that a petitioner's procedural and substantive competency claims are subject to procedural default. Although principles of federalism and comity do not apply in state habeas proceedings, federal and state habeas proceedings share a principal prudential interest in the application of the procedural default rule, namely, vindicating the finality of judgments. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71–72. In applying the cause and prejudice standard to all procedural defaults, our Supreme Court has consistently affirmed finality as a compelling policy. See, e.g., *Crawford* v. *Commissioner of*

Correction, supra, 294 Conn. 188 (citing *Johnson* and *Jackson*). Applying the procedural default rule to a procedural or substantive competency claim accords adequate weight to the finality of judgments "by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 134. The procedural default rule promotes not only the finality of judgments but also the systemic interests of conservation of judicial resources and "the accuracy and efficiency of judicial decisions," by preserving "the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively [as appropriate] if he prevails in his appeal." (Internal quotation marks omitted.) Id. Stated differently, the passage of time creates a sufficiently harmful risk that the accuracy of judicial decisions will be diminished, as memories fade and records are less likely to be available.

Meanwhile, we are persuaded that the risk of a truly incompetent person being convicted and sentenced without any requested examination of, or other challenge to, his or her competency during the criminal trial proceedings or on direct appeal is so minimal that the systemic interests of finality, accuracy of judicial decisions, and conservation of judicial resources vastly outweighed such risk. Moreover, we do not perceive that such risk is enhanced by requiring a habeas petitioner to allege legally cognizable cause to overcome the procedural default.

As our Supreme Court recently has observed, "habeas relief is designed to address situations in which a miscarriage of justice would exist without such relief, and the cause and prejudice standard is not meant to thwart that interest. Rather, the cause and prejudice standard is meant to balance the need for habeas relief with the

societal costs of habeas relief." *Newland* v. *Commissioner of Correction*, 331 Conn. 546, 559–60, 206 A.3d 176 (2019). Our conclusion herein, which preserves the availability of habeas review of a due process claim predicated on procedural or substantive competency but requires a petitioner making such a claim to allege legally cognizable cause and prejudice in reply to a procedural default defense; see footnote 17 of this opinion; strikes the right balance in according appropriate weight to the systemic interests discussed previously.

In support of his claim that competency claims are not subject to procedural default, the petitioner largely relies on the Second Circuit's decision in *Silverstein* v. *Henderson*, supra, 706 F.2d 361. By way of background, in *Silverstein*, after his two state court petitions seeking to vacate his conviction had been dismissed, the petitioner filed a petition for a writ of habeas corpus in a federal District Court, asserting, inter alia, that he had been deprived of his right to due process by the state trial court's failure to hold a competency hearing under New York law and its acceptance of his guilty plea while he was incompetent to stand trial. Id., 363–64. The federal District Court dismissed the petition on the ground that the petitioner had neglected to raise the issue on direct appeal. Id., 362, 365. On appeal, the state of New York argued that the petitioner had failed to raise a challenge to his competence on direct appeal in state court and, thus, he could not seek relief in federal court. Id., 366. The Second Circuit rejected that argument. The Second Circuit observed that "[t]he question presented here is whether the waiver rule of [*Wainwright* v. *Sykes*, supra, 433 U.S. 72][16] . . . applies to

[16] In addition to *Wainwright*, the Second Circuit in *Silverstein* cited its decision in *Forman* v. *Smith*, 633 F.2d 634 (2d Cir. 1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1710, 68 L. Ed. 2d 204 (1981), in which it concluded, on the basis of its "review of the origins of the cause and prejudice standard and the reasons for its application in [*Wainwright* v.] *Sykes* [supra, 433 U.S. 72] to forfeitures of specific claims at trial," concluded that the cause and prejudice standard "also applies to forfeitures of specific claims on appeal." *Forman* v. *Smith*, supra, 640.

the right recognized by [*Pate*].'' (Footnote added.) Id., 367. The Second Circuit concluded that ''*Wainwright*'s waiver rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial, and thus incompetent to 'waive' his rights. . . . Thus, when the trial court neglects its duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack.'' (Citation omitted.) Id. The Second Circuit stated: ''In sum, under *Wainwright*, [the petitioner's] failure to allege on direct appeal that he was incompetent does not bar federal habeas relief.'' Id., 368.

We decline to follow the Second Circuit's decision in *Silverstein* for two reasons. First, the rationale underpinning the *Silverstein* decision is outdated, and we have significant doubts as to the current viability of the decision. *Silverstein* is a decision issued in 1983, during the pre-*Coleman* period when, because the United States Supreme Court in *Wainwright* ''left intact its holding in *Fay* v. *Noia*, [supra, 372 U.S. 391], it remain[ed] undecided which procedural waivers [would] be evaluated under *Fay*'s deliberate bypass standard and which under the narrower cause and prejudice test of *Sykes*.'' (Internal quotation marks omitted.) *McClain* v. *Manson*, supra, 183 Conn. 428–29 n.15. In reaching its decision in *Silverstein*, the Second Circuit relied on the premise that, under *Pate*, an incompetent petitioner cannot knowingly or intelligently *waive* his or her rights. Like other decisions during that pre-*Coleman* period, *Silverstein* conflates the defenses of waiver and procedural default. Put simply, although competency claims cannot be waived under *Pate*, they may be procedurally defaulted. See *Hodges* v. *Colson*, supra, 727 F.3d 540. For these reasons, we consider *Silverstein* to be unpersuasive.

Second, although we acknowledge that ''it is well settled that decisions of the Second Circuit, while not

binding upon this court, nevertheless carry particularly persuasive weight in the resolution of issues of federal law"; (internal quotation marks omitted) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 210, 177 A.3d 1144 (2018); the present case involves the application of a state procedural default rule raised in the context of the petitioner's federal due process claims concerning his competency and, thus, does not require us to resolve a pure issue of federal law.

The petitioner also thinly asserts that this court should treat claims of incompetence to stand trial in the same manner as substantial claims of actual innocence, which are not subject to procedural default. See *Summerville* v. *Warden*, supra, 229 Conn. 422 (concluding that "[t]he continued imprisonment of one who is actually innocent would constitute a miscarriage of justice" such that, notwithstanding strong interest in finality of judgments, substantial claim of actual innocence cannot be procedurally defaulted). We decline to do so for two reasons. First, mindful that our state habeas review jurisprudence has developed in tandem with federal habeas review jurisprudence, we deem it prudent to follow the United States Supreme Court's limitation of the "fundamental miscarriage of justice" exception to actual innocence claims. See *Schlup* v. *Delo*, 513 U.S. 298, 322, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Second, in light of our appellate courts' consistent and broad application of the cause and prejudice standard to all trial level and appellate level procedural defaults; *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 186; with the exceptions of actual innocence claims and *Salamon* claims, as identified previously in this opinion, we are persuaded that procedural and substantive competency claims are properly subject to the procedural default rule. This is particularly so in light of our Supreme Court's recent decision in *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 548, in which

the court applied the cause and prejudice standard to a procedurally defaulted claim of a complete deprivation of counsel during the petitioner's criminal proceedings.

In sum, the petitioner's due process claims grounded in his alleged incompetence to stand trial and the alleged failures by the state and by the trial court to comply with § 54-56d were subject to procedural default. Thus, the petitioner's first claim fails.

II

Having concluded that the habeas court was correct to apply the cause and prejudice standard of the procedural default rule to the petitioner's due process claims, we next turn to the petitioner's alternative assertion that the court erred in determining that he failed to plead legally cognizable cause and prejudice to overcome the procedural defaults. We conclude that the court properly determined that the petitioner's claims were procedurally defaulted because (1) the petitioner's reply was deficient and (2) the petitioner failed to demonstrate cause to excuse the procedural defaults.[17]

By way of additional procedural background, in his reply to the respondent's return, the petitioner alleged the following with respect to whether he could demonstrate cause and prejudice to overcome the respondent's affirmative defense of procedural default

[17] We need not address whether the petitioner demonstrated prejudice because the cause and prejudice standard is conjunctive. See *Bowers* v. *Commissioner of Correction*, 33 Conn. App. 449, 452, 636 A.2d 388, cert. denied, 228 Conn. 929, 640 A.2d 115 (1994). Moreover, we expressly leave open the question of whether prejudice may be presumed, for purposes of procedural default, where a petitioner has established cause for failing to raise a procedural or substantive competency claim either at trial or on direct appeal. See *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 548 (concluding that "for purposes of procedural default, after the petitioner has established good cause for failing to raise his claim that he was completely deprived of his right to counsel [at his criminal trial], prejudice is presumed").

directed to count one of the second petition: "[The] petitioner can establish cause and prejudice to permit review of the claim in count [one]. [The] petitioner relies on facts alleged in [the second petition] to establish cause and prejudice. [The] petitioner is prejudiced because he stands convicted of sexual assault in [the] first degree and is currently serving ten years of special parole."[18] The petitioner set forth identical allegations in reply to the respondent's affirmative defense of procedural default with respect to count two of the second petition.

In its memorandum of decision dismissing the second petition, in considering whether the petitioner's due process claims were procedurally defaulted, the court determined that the petitioner failed to raise his due process claims during the criminal trial proceedings or on direct appeal from the judgment of conviction. Relying on this court's decision in *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009), the habeas court concluded that the petitioner's reply "fail[ed] to allege any facts or assert any cause and resulting prejudice to permit review of his claims. In fact, he assert[ed] in the reply that he . . . 'relies on facts alleged in [the second petition] to establish cause and prejudice,' which is not permissible, nor sufficient

[18] The petitioner also alleged the following in reply to the respondent's contention that he had procedurally defaulted with respect to his due process claim set forth in count one of the second petition: "[The] petitioner could not have raised this claim at an earlier point in any legal proceeding concerning his prosecution and conviction without the assistance and advice of counsel because the petitioner was and is significantly developmentally disabled because of his significantly low IQ of 50." He set forth an identical allegation in reply to the respondent's contention that he had procedurally defaulted with respect to his due process claim set forth in count two. The petitioner did not expressly assert in his reply that the foregoing allegations constituted cause excusing his procedural defaults; rather, he contended that he was relying on the facts alleged in the second petition to demonstrate cause.

to overcome the respondent's affirmative defense[s] of procedural default. The court finds, therefore, that the petitioner has failed to allege legally cognizable cause and prejudice to rebut his procedural default[s]."

A

We first address the issue of whether the habeas court correctly ruled that the petitioner's reliance on the allegations contained in the second petition to establish cause and prejudice was impermissible. The petitioner contends that incorporating the allegations in the second petition into his reply in order to demonstrate cause and prejudice was neither impermissible nor inappropriate. We conclude that the court did not err in determining that the petitioner's reply was deficient.

" 'The petition [for a writ of habeas corpus] is in the nature of a pleading, and the return is in the nature of an answer.' . . . '[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient to allow recovery.' . . .

" 'When a respondent seeks to raise an affirmative defense of procedural default, the rules of practice require that he or she must file a return to the habeas petition "alleg[ing] any facts in support of any claim of procedural default . . . or any other claim that the petitioner is not entitled to relief." Practice Book § 23-

30 (b). "If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petition, the petitioner shall file a reply." Practice Book § 23-31 (a). "The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default." [The reply shall not restate the claims of the petition.] Practice Book § 23-31 (c). . . .'

" 'The appropriate standard for reviewability of [a procedurally defaulted claim] . . . is the cause and prejudice standard. Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . .

" 'Once the respondent has raised the defense of procedural default in the return, the burden is on the petitioner to prove cause and prejudice.' " (Citations omitted.) *Anderson* v. *Commissioner of Correction*, supra, 114 Conn. App. 786–87.

In ruling that the petitioner's reply was deficient, the habeas court cited *Anderson* v. *Commissioner of Correction*, supra, 114 Conn. App. 778, which we consider to be instructive. In *Anderson*, after the petitioner had filed his first amended petition for a writ of habeas corpus, the respondent filed a return asserting, inter alia, that some of the petitioner's claims were procedurally defaulted. Id., 782. Subsequently, the petitioner filed his operative thirty-seven count petition for a writ of habeas corpus. Id., 783.

In the operative petition, the petitioner alleged that the claims raised therein "met and overcame both the cause and prejudice standard and the respondent's affirmative defense of procedural default, thereby permitting review of his claims. In short, the petitioner

appear[ed] to have claimed that because he stated in his [operative] petition that he should not be procedurally defaulted, that [conclusory] assertion, by itself, was adequate to avoid being procedurally defaulted." Id., 785. The respondent then filed an amended return contending that the petitioner failed to comply with Practice Book § 23-31 (c) because he had not filed a reply setting forth a factual basis to excuse the procedural default. Id. Thereafter, the petitioner filed a reply, inter alia, denying that he had procedurally defaulted on any of his claims and asserting that he was relying on the allegations in his operative petition and his reply to overcome the respondent's affirmative defense of procedural default. Id., 785–86. The habeas court denied the operative petition, concluding in relevant part that twenty-one of the thirty-seven counts were procedurally defaulted because the petitioner's reply to the respondent's amended return did not comply with § 23-31 (c). Id., 783–84, 786.

On appeal to this court, the petitioner claimed that he alleged cause and prejudice in his operative petition to overcome the respondent's affirmative defense of procedural default and that Practice Book § 23-31 (c) prohibited him from repeating those allegations in his reply. Id., 787–88. This court rejected that claim, stating: "The petitioner's claim lacks merit. Practice Book § 23-31 (c) explicitly requires a petitioner to assert facts and any cause and prejudice that would permit review of an issue despite a claim of procedural default. See Practice Book § 23-31 (c). Although that provision states that '[t]he reply shall not restate the claims of the petition,' it does not relieve the petitioner of his obligation with respect to the contents of a reply. . . . The petitioner's reply fails to allege any facts or assert any cause and resulting prejudice to permit review of his claims. He simply relies on the allegations raised in his amended petition, which are equally as vague and fail to articulate

with sufficient specificity what the court, the prosecutor or trial counsel did to prevent him from raising those claims at trial or on direct appeal. We conclude, therefore, that the court properly determined that the petitioner failed to comply with Practice Book § 23-31 (c)." (Citations omitted; footnote omitted.) *Anderson* v. *Commissioner of Correction*, supra, 114 Conn. App. 788–89.[19]

Guided by our decision in *Anderson*, we conclude that the court properly determined that the petitioner's reply was deficient. In his reply, the petitioner baldly alleged that he could demonstrate cause to excuse the procedural defaults solely on the basis of the allegations set forth in the second petition. The petitioner did not articulate with specificity any facts in the reply demonstrating cause to overcome the procedural defaults. Accordingly, the petitioner's reply did not satisfy the requirements of Practice Book § 23-31 (c).

B

Even if we assume that the petitioner were permitted to rely on the allegations set forth in the second petition to demonstrate cause and prejudice to excuse the procedural defaults, we turn to whether the court correctly determined that the petitioner's allegations were insufficient to demonstrate cause and prejudice. The petitioner submits that his allegations that he was incompetent to stand trial establish cause to overcome the

[19] In *Anderson*, this court also observed the following: "We note as well that in the [operative] petition, although the petitioner makes the assertion that he is not procedurally defaulted, he fails, completely, to set forth any facts that would warrant a conclusion that he should not be procedurally defaulted. Thus, we do not confront a case in which a pro se litigant has set forth an adequate basis to elude procedural default, albeit in the wrong format." *Anderson* v. *Commissioner of Correction*, supra, 114 Conn. App. 788 n.4. In the present case, the petitioner, who was represented by counsel before the habeas court, did not set forth any specific allegations regarding cause and prejudice in the second petition.

procedural defaults. The respondent argues that the petitioner failed to demonstrate a "factor external to the defense" explaining the procedural defaults and, thus, the petitioner did not establish cause. We agree with the respondent.[20]

In *Murray* v. *Carrier*, supra, 477 U.S. 478, the United States Supreme Court stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner *can show that some objective factor external to the defense* impeded counsel's efforts to comply with the [s]tate's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that some interference by officials . . . made compliance impracticable, would constitute cause under this standard." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 488. We previously have applied this standard to analyze procedural default claims. See, e.g., *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 515, 193 A.3d 625 (2018); *Streater* v. *Commissioner of Correction*, 143 Conn. App. 88, 99–100, 68 A.3d 155, cert. denied, 310 Conn. 903, 75 A.3d 34 (2013).

Whether alleged incompetence constitutes cause to excuse a procedural default has not been addressed by our appellate courts. Thus, we again turn to cases from other jurisdictions for guidance. See *State* v. *Favoccia*, supra, 306 Conn. 790–91.

In *Harris* v. *McAdory*, 334 F.3d 665, 668–69 (7th Cir. 2003), cert. denied, 541 U.S. 992, 124 S. Ct. 2022, 158 L. Ed. 2d 499 (2004), the United States Court of Appeals for the Seventh Circuit concluded that a petitioner's

[20] The petitioner also claims that his allegations demonstrated prejudice. We need not reach this claim. See footnote 17 of this opinion.

alleged "borderline mental retardation" did not constitute cause excusing the procedural default of his ineffective assistance of counsel claim. The Seventh Circuit observed that the focus of the cause analysis is on the " 'external' nature of the impediment. Something that comes from a source within the petitioner is unlikely to qualify as an external impediment." Id.; see also *Gonzales* v. *Davis*, supra, 924 F.3d 244 (alleged mental incompetency not external to petitioner and, thus, did not satisfy cause requirement); *Johnson* v. *Wilson*, 187 Fed. Appx. 455, 458 (6th Cir. 2006) (petitioner's borderline mental impairment not "external" to defense and, thus, did not constitute cause), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 96 (2007); *Hull* v. *Freeman*, 991 F.2d 86, 91 (3d Cir. 1993) (petitioner's illiteracy and "mental retardation" not " 'external' " to defense and, thus, did not constitute cause).

We agree with the rationale set forth by the Seventh Circuit in *Harris* and the other federal courts that have determined that a petitioner's mental impairment is not an *external* impediment to the petitioner's defense and, thus, cannot serve as cause to overcome a procedural default. Here, the petitioner's alleged incompetency to stand trial is an internal, rather than an external, factor. Accordingly, the petitioner's allegations of incompetency to stand trial were not sufficient to demonstrate cause to excuse the procedural defaults of his due process claims and, thus, the habeas court did not err in ruling that the petitioner's claims were barred under the procedural default rule.

The judgment is affirmed.

In this opinion the other judges concurred.

MERINDA J. SEMPEY *v.* STAMFORD HOSPITAL (AC 42215)

Keller, Bright and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant in connection with the alleged wrongful termination of her employment by the defendant, alleging claims for wrongful discharge in violation of an implied contract, negligent infliction of emotional distress, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). After the trial court granted the defendant's motion to strike all three counts, the plaintiff filed a substitute complaint, recasting the first count as one sounding in racial discrimination in her discharge from employment. Thereafter, the plaintiff filed an amended substitute complaint, amending the allegations in the second and third counts. The defendant filed another motion to strike all three counts, and a motion to dismiss the first count. The trial court granted the motion to strike and rendered a judgment of dismissal as to the entire complaint, from which the plaintiff appealed to this court, which affirmed the dismissal of count one but reversed the judgment of dismissal as to counts two and three because the defendant did not seek a dismissal of those counts. On remand, the plaintiff filed another substitute complaint setting forth four counts, which alleged claims for wrongful discharge in breach of an implied employment contract, defamation, negligent infliction of emotional distress, and a violation of CUTPA. After the trial court granted the defendant's motion to strike each count, the plaintiff filed another substitute complaint incorporating counts one, two, and four from her previously stricken complaint and repleading count three. The trial court, again, granted the defendant's motion to strike the complaint and also granted a motion for judgment filed by the defendant. From the judgment rendered thereon, the plaintiff appealed to this court, claiming that the trial court improperly struck each count of her operative complaint. *Held*:

1. The trial court properly struck the first count of the plaintiff's operative complaint; the factual allegations contained in the plaintiff's complaint for wrongful termination in breach of an implied contract neither set forth the facts essential to the establishment of an implied contract nor specified any particular public policy that was alleged to have been implicated by her discharge from the defendant's employ.
2. The trial court properly struck the second count of the plaintiff's operative complaint alleging defamation, in which the plaintiff alleged that the defendant had made false statements regarding the reason for the plaintiff's termination when it contested the plaintiff's claim for unemployment benefits; there was nothing in the record that indicated that the

plaintiff sought the permission of the court or the agreement of the defendant to amend her complaint by adding a new cause of action after the case was remanded to the trial court by this court, and it was clear that any statements made by representatives of the defendant before the Employment Security Division of the Department of Labor when contesting the plaintiff's eligibility for unemployment benefits were absolutely privileged because such proceedings were quasi-judicial in nature.

3. The plaintiff could not prevail on her claim that the trial court improperly struck the third count of the operative complaint, in which she alleged a claim for negligent infliction of emotional distress based on the defendant's conduct in improperly withholding from her three personal folders that contained various certificates and personal records when it discharged her from employment, and in making false allegations of wrongdoing when it contested her eligibility for unemployment benefits; statements made by representatives of the defendant before the Employment Security Division of the Department of Labor when contesting the plaintiff's eligibility for unemployment benefits were absolutely privileged because such proceedings were quasi-judicial in nature, and with respect to the plaintiff's claim that the defendant improperly withheld from her the three personal folders, the plaintiff made no allegation that the documents in those folders were irreplaceable or of such value that it was patently unreasonable for the defendant to withhold them.

4. The trial court properly struck the fourth count of the plaintiff's operative complaint alleging a violation of CUTPA; the plaintiff did not allege any acts committed by the defendant in the conduct of any trade or commerce, the allegations she did make clearly fell outside of CUTPA, and the only posttermination conduct relied on by the plaintiff were statements made by the defendant to the Employment Security Division of the Department of Labor, which were protected by an absolute privilege, and could not be used as a basis for the CUTPA claim.

Argued September 11—officially released November 26, 2019

Procedural History

Action to recover damages for, inter alia, the plaintiff's alleged wrongful termination, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the defendant's motion to strike; thereafter, the court granted the defendant's motion to dismiss and rendered a judgment of dismissal, from which the plaintiff appealed to this court, which reversed the judgment in part and remanded the case

for further proceedings; subsequently, the court, *Radcliffe, J.*, granted the defendant's motions to strike; thereafter, the court granted the defendant's motion for judgment and rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Laurence V. Parnoff, for the appellant (plaintiff).

Justin E. Theriault, with whom, on the brief, was *Beverly W. Garofalo*, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Merinda J. Sempey, a former employee of the defendant, Stamford Hospital, appeals from the judgment of the trial court, rendered following the court's decision striking all four counts of the plaintiff's operative complaint. On appeal, the plaintiff claims that the court committed error because she sufficiently had pleaded causes of action for wrongful discharge, defamation, negligent infliction of emotional distress, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We affirm the judgment of the trial court.

We begin with the procedural history of this case. The plaintiff commenced this action against the defendant in September, 2014, sounding in three counts: (1) wrongful discharge in violation of an implied contract, (2) negligent infliction of emotional distress, and (3) a violation of CUTPA. On November 26, 2014, the defendant filed a motion to strike each count of the complaint. As to count one, the defendant argued that a cause of action for wrongful discharge could not be maintained because the plaintiff had been an at-will employee. As to count two, the defendant alleged that the plaintiff's complaint failed to set forth any conduct that rose to the level required to maintain a cause of action for negligent infliction of emotional distress. As to count three, the

defendant alleged that CUTPA does not apply in the context of an at-will employment relationship. The court granted the motion to strike on August 6, 2015.

On August 20, 2015, the plaintiff filed a substitute complaint, recasting the first count of her original complaint as one sounding in racial discrimination in her discharge from employment in violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-60 et seq. Counts two and three substantively were similar to the original complaint. On September 10, 2015, the defendant filed a motion to strike each count of the substitute complaint. As to count one, the defendant argued that the plaintiff had failed to assert her claim for racial discrimination within the ninety day limitations period set forth in General Statutes § 46a-101 (e).[1] As to the second and third counts, the defendant alleged that the plaintiff had made no substantive changes from the original complaint, which the court already had stricken as insufficient. The defendant also filed a motion to dismiss count one of the plaintiff's complaint because it was not filed within the ninety day limitations period set forth in § 46a-101 (e).

By agreement of the parties, the defendant withdrew its motions to strike and to dismiss, and, on September 18, 2015, the plaintiff filed an amended substitute complaint; she amended only the allegations in the second and third counts. On September 21, 2015, the defendant

[1] The plaintiff had brought a claim of racial discrimination before the Commission on Human Rights and Opportunities, which, on August 25, 2014, issued a release of jurisdiction pursuant to General Statutes § 46a-100 et seq. That release required the plaintiff to commence an action in the Superior Court, within ninety days, alleging discrimination under the Connecticut Fair Employment Practices Act. Although having commenced the present action on September 3, 2014, within the ninety day timeframe, the plaintiff did not allege a claim of racial discrimination in violation of the Connecticut Fair Employment Practices Act in her original complaint. In fact, it was not until she filed her substitute complaint on August 20, 2015, that she raised such a claim.

filed a motion to strike each count of the plaintiff's amended substitute complaint and a motion to dismiss the first count of the complaint for the same reasons set forth in the previous motions. On January 6, 2016, the court granted the defendant's motion to strike, and it rendered a judgment of dismissal *as to the entire complaint*.[2] The plaintiff appealed from that judgment. This court affirmed the dismissal, on timeliness grounds, of count one of the plaintiff's amended substitute complaint, but reversed the judgment of dismissal as to counts two and three because the defendant had not moved to dismiss those counts and sought only to strike them. See *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 624, 184 A.3d 761 (2018). This court held: "[T]he trial court properly dismissed count one of the amended substitute complaint as untimely. The court, however, in the absence of a motion to dismiss, lacked the authority to dismiss the second and third counts of the amended substitute complaint *without affording the plaintiff the opportunity either to defend herself against a motion to dismiss those counts or to replead the stricken counts*." (Emphasis added.) Id.

On remand, the plaintiff, on April 6, 2018, filed another substitute complaint setting forth *four counts* against the defendant: (1) wrongful discharge in breach of an implied employment contract, (2) defamation, (3) negligent infliction of emotional distress, and (4) a violation of CUTPA.[3] On May 3, 2018, the defendant

[2] Notwithstanding the judgment of dismissal rendered on January 6, 2016, dismissing the case in its entirety, the plaintiff, on May 11, 2016, filed another substitute complaint alleging (1) tortious conduct, (2) racial discrimination and (3) a violation of CUTPA. Because the case already had been dismissed by the trial court, however, there was no action pending in which the plaintiff could file a substitute pleading and the trial court properly ignored it.

[3] The record contains no pleading pursuant to Practice Book § 10-60 requesting permission to add new counts or containing the written consent of the defendant to the addition of new counts. We also note that this court remanded the case for the express purpose of giving the plaintiff "the opportunity either to defend herself against a motion to dismiss *those counts* or to replead *the stricken counts*." (Emphasis added.) *Sempey* v. *Stamford Hospital*, supra, 180 Conn. App. 624.

filed a motion to strike each count of the complaint, *with prejudice*, and a supporting memorandum. As to count one, the defendant alleged that it was substantially similar to count one of the original complaint, which already had been stricken long ago, that the plaintiff had been an at-will employee, and that it failed to set forth a cognizable claim for wrongful discharge. As to count two, the defendant alleged that any statements relied on by the plaintiff were protected by absolute privilege because they occurred in connection with unemployment proceedings before the Employment Security Division of the Department of Labor, which are quasi-judicial proceedings. As to counts three and four, the defendant alleged that the court previously had stricken these causes of action on two occasions, and the plaintiff's repleaded allegations were not materially different from those previously stricken for insufficiency. It also alleged that counts three and four should be stricken on their merits. The defendant further asked the court to strike the complaint in its entirety *with prejudice* due to the plaintiff's repeated failure to plead viable causes of action. The defendant also requested that the court enter sanctions against the plaintiff by awarding it attorney's fees incurred in filing yet another motion to strike. On July 2, 2018, the court granted the motion, striking all four counts of the plaintiff's amended substitute complaint. The court did not award the defendant any attorney's fees.

On July 13, 2018, the plaintiff filed another substitute complaint incorporating counts one, two, and four from

As explained by our Supreme Court in *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 851 n.4, 168 A.3d 479 (2017): "An example of a proper pleading filed pursuant to Practice Book § 10-44 is one that [supplies] the essential allegation lacking in the complaint that was stricken. . . . It may not assert an entirely new cause of action premised on a legal theory not previously asserted in the stricken complaint, which would require permission under Practice Book § 10-60 (a)." (Citation omitted; internal quotation marks omitted.)

the April 6, 2018 complaint, specifically stating that she was doing so in order to preserve her right to appeal, and repleading count three, which alleged negligent infliction of emotional distress (operative complaint). In response, the defendant filed a motion to strike the operative complaint, again, *with prejudice*. The court granted the defendant's motion on September 10, 2018. On September 26, 2018, the defendant filed a motion for judgment, which the court granted on October 9, 2018. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court improperly struck each count of her operative complaint. We disagree.

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117–18, 889 A.2d 810 (2006).

"[A]fter a court has granted a motion to strike, [a party] may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as the] filing of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the [motion to strike] the original pleading. . . . Stated another way: When an amended pleading

is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of appeal." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017).

"If the plaintiff elects to replead following the granting of a motion to strike, the defendant may take advantage of this waiver rule by challenging the amended complaint as not materially different than the [stricken] . . . pleading that the court had determined to be legally insufficient. That is, the issue [on appeal becomes] whether the court properly determined that the plaintiffs had failed to remedy the pleading deficiencies that gave rise to the granting of the motions to strike or, in the alternative, set forth an entirely new cause of action. It is proper for a court to dispose of the substance of a complaint merely repetitive of one to which a demurrer had earlier been sustained. . . . Furthermore, if the allegations in a complaint filed subsequent to one that has been stricken are not materially different than those in the earlier, stricken complaint, the party bringing the subsequent complaint cannot be heard to appeal from the action of the trial court striking the subsequent complaint."[4] (Citation omitted; internal quotation marks omitted.) Id., 850–51.

Having set forth our standard of review and the general principles of law concerning a motion to strike, we next address each count of the plaintiff's complaint. As to the first count of her complaint, which alleges

[4] Despite the fact that this principle arguably could preclude review of the court's decision to strike the first, second, and fourth counts of the plaintiff's operative complaint, the defendant has not made such an argument in its brief. It, instead, has chosen to address the merits of each count. Consequently, we also will address the merits.

wrongful discharge in breach of an implied employment contract, the plaintiff argues that the defendant's employee manual created an implied contract between the parties by imposing "standards of conduct" on her, and the defendant, thereafter, improperly discharged her without good cause and in violation of public policy. The defendant argues that there was no implied contract between the parties and that the plaintiff failed to set forth any language from the employee manual that would create such a contract. Additionally, the defendant argues that the plaintiff also failed to allege any particular public policy that supposedly was violated by the defendant's discharge of her from her at-will employment. We conclude that the court properly struck this count of the plaintiff's complaint.

We have examined thoroughly the plaintiff's claim for wrongful termination in breach of an implied contract, and we conclude that the factual allegations contained in the complaint neither set forth the facts essential to the establishment of an implied contract nor specify any particular public policy that was alleged to have been implicated by her discharge from the defendant's employ. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011) ("[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged" [internal quotation marks omitted]); *Binkowski* v. *Board of Education*, 180 Conn. App. 580, 585, 184 A.3d 279 (2018) ("[a motion to strike] admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings" [internal quotation marks omitted]). Accordingly, the court properly struck this count.[5]

[5] Additionally, it appears that the plaintiff waived her right to replead this cause of action as a matter of right when she filed her first substitute complaint, abandoning her claim of wrongful discharge, after it had been stricken from the original complaint, and, instead, asserting a new claim for racial discrimination. See *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 850 ("[w]hen an amended pleading is filed, it operates as a waiver

As to the second count of the operative complaint, which incorporated for purposes of preservation the cause of action for defamation, newly pleaded in the April 6, 2018 substitute complaint, the plaintiff alleged that the defendant made false statements regarding why the plaintiff was terminated when it contested the plaintiff's claim for unemployment benefits. We conclude that the court properly struck this count.

First, there is nothing in the record that indicates that the plaintiff sought the permission of the court or the agreement of the defendant to amend her complaint by adding a new cause of action after the case was remanded to the trial court by this court. See *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 851 n.4; *Stone*

of the original pleading" [internal quotation marks omitted]). The record contains no indication that the plaintiff sought the permission of the court or the agreement of the defendant to amend her complaint by adding a new cause of action, if one could consider this a new cause of action, after the case had been remanded by this court for the sole purpose of allowing the plaintiff to replead her negligent infliction of emotional distress and CUTPA claims. "The right to file a substituted pleading after the granting of a motion to strike does not give the pleader the right to amend the pleading to add additional causes of action. *Stone* v. *Pattis*, 144 Conn. App. 79, [94,] 72 A.3d 1138 (2013). . . . [S]uch an amendment should be handled under [Practice Book §§] 10-60 [and] 10-59 et seq." W. Horton & K. Knox, 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2018-2019 Ed.) § 10-44, authors' comments, p. 523; see also *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 851 n.4.

In the present case, the plaintiff did not replead this cause of action after it was stricken for insufficiency on August 6, 2015. Instead, she abandoned such a claim, choosing to recast count one to allege employment discrimination. Nearly three years later, on April 6, 2018, after this court affirmed the court's judgment rejecting her discrimination cause of action, the plaintiff filed a substitute complaint repleading the cause of action for wrongful discharge that she had abandoned when she chose not to replead it after it had been stricken from her original complaint. The defendant filed a motion to strike this count, arguing in part that it already had been stricken from the plaintiff's original complaint. Given the procedural history of this case, we conclude that, even if the plaintiff had pleaded sufficient facts in the operative complaint to support a cause of action of wrongful discharge, this count was properly stricken. See *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 851 n.4.; *Stone* v. *Pattis*, supra, 144 Conn. App. 94.

v. *Pattis*, 144 Conn. App. 79, 94, 72 A.3d 1138 (2013); see also W. Horton & K. Knox, supra, § 10-44, authors' comments, p. 523; footnote 5 of this opinion. Additionally, it is clear that any statements made by representatives of the defendant before the Employment Security Division of the Department of Labor when contesting the plaintiff's eligibility for unemployment benefits are absolutely privileged because such proceedings are quasi-judicial in nature. See *Petyan* v. *Ellis*, 200 Conn. 243, 246–49, 510 A.2d 1337 (1986).

In *Petyan*, our Supreme Court cited with approval the reasoning by the court, *Berdon*, *J.*, in *Magnan* v. *Anaconda Industries*, *Inc.*, 37 Conn. Supp. 38, 42, 429 A.2d 492 (1980), rev'd on other grounds, 193 Conn. 558, 479 A.2d 781 (1984), insofar as it opined that "an employer who discharges an employee has an absolute privilege when supplying the information necessary for the unemployment notice required by regulation. The court based its decision on the conclusion that the information is furnished in connection with a quasi-judicial function of an administrative board. That court found that in unemployment compensation proceedings [t]he administrator, the referee and the review board, including witnesses in proceedings before them, are absolutely privileged to publish defamatory matters provided such statements have some relation to the quasi-judicial proceeding." (Footnote omitted; internal quotation marks omitted.) *Petyan* v. *Ellis*, supra, 200 Conn. 247. Our Supreme Court then extended the reasoning in *Magnan*, holding: "In the processing of unemployment compensation claims, the administrator, the referee and the employment security board of review decide the facts and then apply the appropriate law. . . . The employment security division of the labor department, therefore, acts in a quasi-judicial capacity when it acts upon claims for unemployment compensation." (Citation omitted; footnotes omitted.) Id., 248–49.

Accordingly, the court properly struck the plaintiff's cause of action sounding in defamation.

As to the plaintiff's cause of action for negligent infliction of emotional distress, she argues that she provided the necessary allegations in her operative complaint to support this count.[6] The defendant argues that the plaintiff's pleading remained insufficient as a matter of law and that the court, therefore, properly struck this count. Having examined the operative complaint, we agree with the defendant that this count is pleaded insufficiently as a matter of law and, therefore, that the court properly struck it.

The essential allegations of the plaintiff's claim of negligent infliction of emotional distress are that the defendant improperly withheld from her three personal folders that contained various certificates and personal records when it wrongfully discharged her from employment, and that it made up false allegations of wrongdoing when it contested her eligibility for unemployment benefits. As we held previously in this opinion, statements made by representatives of the

[6] The plaintiff, in her appellate brief, devotes only one paragraph to this claim. Specifically, she sets forth the following: "The [negligent infliction of emotional distress] allegations in the [operative] complaint allege all necessary elements of emotional distress. The essence of a cause of action for negligent infliction of emotional distress is that the defendant breached a duty of care owed to [the] plaintiff by [the] defendant negligently acting so as to create an unreasonable risk to [the] plaintiff of emotional distress and his conduct caused such distress. *Montinieri* v. *Southern New England Telephone Co.*, 175 Conn. 337, 398 A.2d 1180 (1978). Applying the standard of the reasonable and prudent person, the test in this case is whether [the] defendant, a medical supplier of many years, should have realized his acts were likely to cause [the] plaintiff such distress. Id., 345; [D. Wright et al., Connecticut Law of Torts (3d Ed. 1991) § 30, p. 46]."

The defendant, in its appellate brief, argued, in part, that the plaintiff's "arguments on appeal do nothing to address the lack of sufficient, well-pleaded factual allegations in support of her claim of negligent infliction of emotional distress. Rather, her arguments merely state in conclusory fashion that this claim was sufficiently alleged and provide no analysis or substantive argument in support of that proposition." The plaintiff did not file a reply brief.

defendant before the Employment Security Division of the Department of Labor when contesting the plaintiff's eligibility for benefits are absolutely privileged because such proceedings are quasi-judicial in nature. See *Petyan* v. *Ellis*, supra, 200 Conn. 246–49. Omitting the statements made by the defendant when contesting the plaintiff's eligibility for such benefits because they are privileged, the plaintiff is left with only the allegation that the defendant improperly withheld her three personal folders when it wrongfully discharged her from employment.[7]

Our Supreme Court has explained that "negligent infliction of emotional distress in the employment context arises only where it is based upon unreasonable conduct of the defendant in the termination process. . . . The mere termination of employment, even where it is wrongful, is therefore not, by itself, enough to sustain a claim for negligent infliction of emotional distress. The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior." (Citation omitted; internal quotation marks omitted.) *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 88–89, 700 A.2d 655 (1997) (holding it was not patently unreasonable for employer to remove employee who had been terminated from its premises under security escort). In this case, the plaintiff alleged that the defendant withheld three personal folders that contained various certificates and personal records when it discharged her. She made no allegations that the documents in these folders were irreplaceable or of such value that it was patently unreasonable for the defendant to withhold them. Accordingly, we agree with the trial court that her claim for negligent infliction of emotional distress was pleaded insufficiently.

[7] The plaintiff did not allege that the defendant made false allegations of wrongdoing outside of the context of contesting her eligibility for unemployment benefits with the Employment Security Division of the Department of Labor.

As for her CUTPA count, the plaintiff argues that she sufficiently pleaded her cause of action because she "alleged false and deceptive claims being made by the defendant to intentionally deprive her of benefits to which she was entitled . . . ." Although the plaintiff concedes that an employer-employee relationship does not give rise to a CUTPA claim; see *Quimby* v. *Kimberly Clark Corp.*, 28 Conn. App. 660, 670, 613 A.2d 838 (1992) (employer-employee relationship does not fall within definition of trade or commerce for purposes of action under CUTPA); she argues in her appellate brief that *Quimby* "would not be applicable to [the] defendant's defamation after [the] plaintiff was discharged, i.e., false statements made to the State of Connecticut Unemployment Commission regarding [the] plaintiff's reliability and integrity." We conclude that the court also properly struck this count. The plaintiff does not allege any acts committed by the defendant in the "conduct of any trade or commerce"; (internal quotation marks omitted) id. ("terms trade and commerce are defined in General Statutes § 42-110a [4] as 'the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state' "); and the allegations she does make clearly fall outside of CUTPA. Furthermore, the only posttermination conduct relied on by the plaintiff are statements made by the defendant to the Employment Security Division of the Department of Labor. Because such statements are protected by an absolute privilege, they cannot be used by the plaintiff as a basis for her CUTPA claim.

The judgment is affirmed.

In this opinion the other judges concurred.

ASSELIN AND VIECELI PARTNERSHIP, LLC *v.* STEVEN T. WASHBURN (AC 41439)

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

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, negligence in connection with the defendant's construction of a bulkhead at a marina operated by M Co. on property owned by the plaintiff. Pursuant to a lease agreement between the plaintiff and M Co., M Co. was obligated to maintain the structural improvements at the marina. When the bulkhead began to deteriorate soon after its construction, the plaintiff commenced this action against the defendant, who then filed a motion to stay the action for arbitration pursuant to an arbitration clause in the construction contract between the defendant and M Co., of which the plaintiff was a third-party beneficiary. The trial court granted the motion and stayed the plaintiff's action pending arbitration. Thereafter, the plaintiff and the defendant entered into an agreement with an arbitrator to arbitrate their dispute. The arbitration agreement provided, inter alia, that the arbitration would proceed on an ad hoc basis, without an administering organization. In her award, the arbitrator found that the bulkhead was a total loss, that the defendant was negligent in constructing it and that his negligence proximately caused its failure. The arbitrator awarded the plaintiff $275,607 in damages. Thereafter, the defendant filed a demand for a trial de novo with the trial court, and the plaintiff filed an objection to that demand and an application to confirm the arbitration award. Following a hearing, the court denied the defendant's demand for a trial de novo and granted the plaintiff's application to confirm the award. On the defendant's appeal to this court, *held*:

1. This court declined to review the defendant's claims that the trial court should have vacated the arbitration award because the arbitrator failed to comply with the mandatory oath requirement of the applicable statute (§ 52-414 [d]) and the plaintiff failed to comply with the statute (§ 52-421 [a]) that requires certain documents to be filed with the court clerk in conjunction with an application to confirm an arbitration award; the defendant failed to preserve his claims of noncompliance with §§ 52-414 (d) and 52-421 (a) for appellate review, as he failed to raise them in his demand for a trial de novo or during the hearing before the trial court.
2. The trial court properly granted the plaintiff's application to confirm the arbitration award, as the defendant failed to demonstrate that the arbitrator exceeded or imperfectly executed her powers in issuing the award in violation of the applicable statute (§ 52-418 [a] [4]): contrary

to the defendant's claim, the arbitrator did not exceed her authority when she did not apply the construction industry rules of the American Arbitration Association when arbitrating the dispute between the parties, as the arbitration agreement lacked any reference to those rules and, instead, provided that the arbitration would proceed on an ad hoc basis, without an administering organization; moreover, the record did not support the defendant's claim that the arbitrator exceeded her authority and manifestly disregarded the law in failing to consider the parties' obligations under the construction contract, as the arbitrator indicated in her decision that she considered the duties and obligations created by the contract, and her award discussed the obligations of the defendant in building the bulkhead and the plaintiff's obligations in acquiring the materials for its construction.

Argued September 19—officially released November 26, 2019

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Vacchelli*, *J.*, granted the defendant's motion to stay the proceedings for arbitration; thereafter, the court, *Cosgrove*, *J.*, denied the defendant's demand for a trial de novo and granted the plaintiff's application to confirm an arbitration award, and the defendant appealed to this court. *Affirmed.*

Steven B. Kaplan, with whom were *Carolyn A. Young* and, on the brief, *Daniel S. DiBartolomeo*, for the appellant (defendant).

Eugene C. Cushman, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Steven T. Washburn, appeals from the judgment of the trial court denying his demand for a trial de novo following an arbitration award in favor of the plaintiff, Asselin & Vieceli Partnership, LLC. The trial court also confirmed the arbitration award upon an application filed by the plaintiff. On appeal, the defendant claims that the court improperly confirmed the arbitration award because

the arbitrator had failed to take an oath required by General Statutes § 52-414 (d), the plaintiff failed to file certain required documents required by General Statutes § 52-421 (a) and the arbitrator exceeded her powers or imperfectly executed them in violation of General Statutes § 52-418 (a) (4). We disagree and, accordingly, affirm the judgment granting the plaintiff's application to confirm the arbitration award.

The following facts, which were found by the arbitrator, and procedural history are relevant to this appeal. In February, 2015, the defendant entered into a contract for the excavation and construction of a new bulkhead at Four Mile River Marina in Old Lyme. Bob Asselin, a member of the plaintiff, signed the contract as the authorized agent for Four Mile River Marina, LLC. (marina). Asselin is also an officer of the marina. The plaintiff owns the property that the marina rents and on which it operates its business. Pursuant to the lease agreement between the plaintiff and the marina, the marina was obligated to maintain the structural improvements at the marina. Accordingly, the marina entered into the contract with the defendant for repair of the bulkhead. The contract was signed on February 2, 2015. Construction of the bulkhead was completed on April 28, 2015. Shortly after the defendant's work crew left the property, the bulkhead began to deteriorate. Over the next few weeks "the sheeting dislodged, the tie rods gave way, the wale broke apart and the vinyl sheeting cracked." As a result, the bulkhead became entirely useless.

On September 12, 2016, the plaintiff initiated this action against the defendant. Its complaint alleged negligence, innocent misrepresentation, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On January 13, 2017, the defendant filed a motion for a stay in order to

arbitrate, pursuant to the arbitration clause in the subject contract.[1] The court granted the motion and stayed the plaintiff's case for arbitration.

The parties signed an agreement with Elaine Gordon to arbitrate the dispute. The "Arbitration Retainer Agreement" (arbitration agreement) signed by the parties included the caption of the underlying civil action as part of its heading.[2] The arbitration agreement provided that the parties would retain Gordon "to serve as the Arbitrator in the above named dispute." The arbitration agreement further provided that the arbitration would "proceed on an ad hoc basis, without an administering organization."

During the arbitration proceedings, which began on December 1, 2017, Gordon accepted all the evidence submitted by the parties. On December 21, 2017, Gordon issued her arbitration award, finding that the bulkhead constructed by the defendant was a total loss, that the defendant was negligent in constructing it, and that his negligence proximately caused its failure. Gordon then awarded $275,607 to the plaintiff, including compensatory damages and attorney's and expert fees.

On December 28, 2017, the defendant filed a "Demand for Trial De Novo,"[3] and the plaintiff filed an objection to the defendant's demand and an application to

[1] The plaintiff objected to the defendant's motion to stay to arbitrate. The plaintiff argued that it was not a party to the contract and, therefore, not bound by the arbitration clause in the contract between the marina and the defendant. The court, *Vacchelli*, *J.*, determined that because the plaintiff was a third-party beneficiary of the contract, it also was bound by the arbitration clause in the contract. The court then stayed the case pending arbitration.

[2] The arbitration agreement's heading is "Asselin v. Washburn, KNL-CV16-6027983."

[3] The defendant incorrectly relied on General Statutes § 52-549z when filing the demand for a trial de novo. General Statutes § 52-549u governs arbitration of certain civil matters and provides that a court, in its discretion, may refer to an arbitrator "any civil action in which in the discretion of the court, the reasonable expectation of a judgment is less than fifty thousand dollars exclusive of legal interest and costs and in which a claim for a trial

confirm the arbitration award. On February 28, 2018, following a hearing, the court denied the defendant's demand for a trial de novo and granted the plaintiff's application to confirm the arbitration award. This appeal followed.

On appeal, the defendant raises three challenges to the judgment of the court confirming the arbitration award. First, he claims that the award should be vacated because the arbitrator failed to undertake or affirm the mandatory oath required by § 52-414 (d). Second, he claims that the award should be vacated because the plaintiff failed to satisfy the requirements of § 52-421 (a) regarding documents that were required to be filed with the court clerk in conjunction with the plaintiff's application to confirm the award. Third, he claims that the award should be vacated because the arbitrator exceeded or imperfectly executed her powers in issuing the award, in derogation of § 52-418 (a) (4). Specifically, the defendant argues that the arbitrator exceeded her powers by failing to conduct the arbitration in accordance with the construction industry rules of the American Arbitration Association and that she exceeded her authority and manifestly disregarded the law by failing to consider the parties' contractual relationship and their obligations thereunder. We are not persuaded by any of the defendant's claims.

by jury and a certificate of closed pleadings have been filed." Pursuant to § 52-549z, the decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d), which provides in relevant part that "[a]n appeal by way of a demand for a trial de novo must be filed with the court clerk within twenty days after the deposit of the arbitrator's decision in the United States mail . . . ." The present case did not involve a matter that was referred to arbitration pursuant to § 52-549u and, thus, § 52-549z was not applicable. The trial court nevertheless treated the demand for a trial de novo as a motion to vacate the arbitration award. Thus, the defendant was permitted to present argument on why the award should be vacated under § 52-418.

I

The record reveals that the first two claims, concerning alleged noncompliance with §§ 52-414 (d) and 52-421 (a), were not preserved. Accordingly, we decline to review those claims on appeal. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

It is the appellant's "responsibility to present . . . a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 265, 828 A.2d 64 (2003). For this court "[t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Internal quotation marks omitted.) Id.

"[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [before the trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim." *State* v. *Jorge P.*, 308 Conn. 740, 754, 66 A.3d 869 (2013). In his demand for a trial de novo, the defendant argued that the arbitrator's decision was arbitrary and capricious because she had failed to consider that the contract was for labor only, considered incorrect information provided by the plaintiff's

experts, and failed to consider evidence submitted by the defendant. The demand for a trial de novo makes no reference to the arbitrator's failure to take the oath before hearing the arbitration as required by § 52-414 (d) or to the plaintiff's failure to file certain documents required by § 52-421 (a). The defendant also failed to raise these two issues before the court, *Cosgrove*, *J.*, during the hearing. Therefore, because the defendant failed to preserve these issues in the proceedings before the trial court, we decline to consider them now for the first time on appeal.[4]

[4] The defendant argues that even if we were to find that the claims were not preserved, this court should still review them because they implicate subject matter jurisdiction, constitute plain error, and require review in the interest of justice and fairness. We disagree.

First, the defendant's argument that the failure of the arbitrator to take an oath constitutes a defect equivalent to a lack of subject matter jurisdiction is misplaced. Our Supreme Court in *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 388–91, 926 A.2d 1035 (2007), clarified the distinction between the authority of the arbitrator and the judicial concept of subject matter jurisdiction. The court stated that "[b]ecause the parties' mutual assent confers power on the arbitrator, a claim that an arbitrator lacks the authority to hear a matter can be waived and, once waived, cannot be reclaimed." Id., 390. Here, the parties together, in an agreement devoid of any reference to an oath, retained the arbitrator to arbitrate the dispute between them. Thus, the parties' mutual assent conveyed authority to her to decide their dispute. The failure of the arbitrator to take an oath does not negate the authority that parties conferred on her through their mutual agreement. The defendant's other argument that the arbitrator's failure to follow the construction industry rules of the American Arbitration Association also implicates her authority fails for the same reason.

The defendant's second argument that the arbitrator's failure to take an oath and the plaintiff's failure to file certain documents in conjunction with its application to confirm the arbitration award constitutes plain error is similarly unfounded. See Practice Book § 60-5; see also *In re Jonathan S.*, 260 Conn. 494, 505, 798 A.2d 963 (2002). "[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. . . . An appellant cannot prevail . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Cane*, 193 Conn. App. 95, 126, A.3d (2019). The claimed error here is not "so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) Id., 130.

II

We next turn to the defendant's claim that the arbitrator exceeded or imperfectly executed her powers by issuing the award in derogation of § 52-418 (a) (4). The plaintiff counters, inter alia, that the defendant did not preserve this challenge in prior proceedings. Upon review of the record, we conclude that the defendant did raise this issue before the trial court. We agree, however, with the court's determination that there was no basis to vacate the arbitrator's decision under § 52-418 (a) (4) and that the award should be confirmed.

We begin by setting forth the well established principles that guide our review of arbitration awards. Because courts "favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005).

The scope of our review of the arbitrator's decision is defined by whether the submission to arbitration was restricted or unrestricted. "The significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what the arbitrators are obligated to do, but to determine the scope of judicial review of what they have done. Put another way, the submission tells the arbitrators what they are obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the arbitrators' decision." (Internal quotation marks omitted.) Id., 81–82.

"The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on

court review. In the absence of any such qualifications, an agreement is unrestricted." *Garrity* v. *McCaskey*, 223 Conn. 1, 5, 612 A.2d 742 (1992). As discussed previously, the arbitration agreement provided that the parties would retain Gordon "to serve as the Arbitrator in the above named dispute" which referred to the underlying tort case initiated by the plaintiff. This broad submission contains no limitations on the issues to be considered, no reservations of rights, nor any language regarding court review. The record is clear that the court and the parties proceeded on the understanding that the submission was unrestricted. We also note that the defendant does not argue on appeal that the submission to arbitration was restricted.[5]

In light of the unrestricted submission, the scope of our review is limited. "Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 80. "[T]he arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 110, 779 A.2d 737 (2001).

[5] At oral argument before this court, the defendant stated that there were no specifications made by either party about what claims were to be adjudicated in the arbitration.

When reviewing an unrestricted submission to arbitration, however, our Supreme Court has recognized a few limited circumstances in which a court can vacate an award: "(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 81. It is the third circumstance that is the focus of our analysis of the defendant's remaining claim. Section 52-418 (a) provides four grounds for vacating an arbitrator's award.[6] Further, our Supreme Court also has recognized that a claim that an arbitrator has manifestly disregarded the law may be asserted under § 52-418 (a) (4). *Garrity* v. *McCaskey*, supra, 223 Conn. 10.

With these principles in mind, we turn to the defendant's specific claims about how the arbitrator allegedly exceeded her powers under § 52-418 (a) (4). The defendant argues first that the arbitrator exceeded her powers in failing to conduct the arbitration under the construction industry rules of the American Arbitration Association. We are not persuaded.

"In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award

[6] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated, or when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

with the submission to determine whether the arbitrators have exceeded their powers." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 81. In the present matter, the arbitration agreement stated: "The Arbitration will proceed on an ad hoc basis, without an administering organization." In the arbitration agreement there is no reference to the construction industry rules of the American Arbitration Association, or any other set of rules. "When the parties have agreed to a procedure and have delineated the authority of the arbitrator, they must be bound by those limits." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 114. Because the arbitration agreement lacks any reference to the construction industry rules of the American Arbitration Association, the arbitrator did not exceed her authority when she did not apply those rules when arbitrating the dispute between the plaintiff and the defendant.[7]

[7] The parties offered conflicting interpretations of the Latin phrase "ad hoc" as used in the arbitration agreement, which the parties and the arbitrator signed. The arbitration clause contained within the original contract between the defendant and the marina stated: "Any claims or disputes between the Contractor and the Owner arising from this agreement shall be resolved by arbitration in accordance with the construction industry Arbitration Rules of the American Arbitration Association unless both parties agree otherwise."

The arbitration agreement, however, contained no reference to any set of rules that the arbitrator was required to use. The arbitration agreement instead stated that the arbitration would "proceed on an ad hoc basis . . . ." The defendant argued that "ad hoc" as used in the agreement meant "formed for a particular purpose"; specifically, that "[t]he selection of the arbitrator on an 'ad hoc basis' simply meant that she was selected for the special purpose of acting as an arbitrator for the specific dispute between the parties . . . ." According to the defendant, this required the use of the construction industry rules of the American Arbitration Association. In contrast, the plaintiff argued that the use of "ad hoc" meant that the "parties agreed 'otherwise' as to the use of the American Arbitration Association and its rules." The plaintiff further argued that the defendant waived this challenge by failing to object during the arbitration proceedings and to raise this issue to the court during the hearing. Because the submission was unrestricted and the agreement submitted to arbitration contained no reference to any rules that the arbitrator was to use, we agree with the plaintiff that the arbitrator was not required to use the construction industry rules of the American Arbitration Association.

The defendant's second claim is that the arbitrator exceeded her authority and manifestly disregarded the law in failing to consider the parties' contractual relationship and the duties and obligations under the contract when determining the arbitration award. We disagree.

As discussed previously in this opinion, it is well established that "[i]t is the province of the parties to set the limits of the authority of the arbitrators, and the parties will be bound by the limits they have fixed." (Internal quotation marks omitted.) *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 386. In the case of an unrestricted submission like the one at issue here, our review is generally limited to determining whether the award conforms to the submission. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 110. Our Supreme Court has also recognized that "an arbitrator's egregious misperformance of duty may warrant rejection of the resulting award." *Garrity* v. *McCaskey*, supra, 223 Conn. 7–8. "[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418 (a) (4) because the arbitrator has exceeded [her] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. We emphasize, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotations marks omitted.) Id., 10. To demonstrate this, the defendant must show that "the award reflects an egregious or patently irrational rejection of clearly controlling legal principles." Id., 11. The defendant has failed to do so here.

The defendant argues that the arbitrator ignored clearly established legal principles by disregarding the contractual relationship between the parties. Specifically, the defendant argues that the arbitrator ignored

established legal principles by not considering the duties and obligations of the parties that arose out of the contract. The arbitrator's decision, however, indicates that she did consider the duties and obligations created by the contract. Her award discusses the obligations of the defendant in building the bulkhead and of the plaintiff in acquiring the materials for the construction of the bulkhead.[8]

The defendant has failed to demonstrate that the arbitrator exceeded or imperfectly executed her powers in issuing the arbitration award. The record does not support the defendant's claim that the arbitrator exceeded her powers in failing to conduct the arbitration in accordance with the construction industry rules of the American Arbitration Association, or that the arbitrator exceeded her authority and manifestly disregarded the law in failing to consider the parties' obligations under the contract. We conclude, therefore, that the court properly granted the plaintiff's application to confirm the arbitration award.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] Furthermore, even if we accepted the defendant's contention that the arbitrator incorrectly determined that the contract was not a "labor only" contract, such error would not mean that the arbitrator manifestly disregarded the law. In *Garrity* v. *McCaskey*, supra, 223 Conn. 11, the defendant argued that the arbitrators misapplied equitable tolling doctrines in determining that the plaintiff's claims were not barred by the statute of limitations. Our Supreme Court rejected this argument, determining that "[e]ven if the arbitrators were to have misapplied the law governing statutes of limitations, such a misconstruction of the law would not demonstrate the arbitrators' egregious or patently irrational rejection of clearly controlling legal principles. The defendant's claim in this case falls far short of an appropriate invocation of § 52-418 (a) (4) for manifest disregard of the law." Id., 11–12. The same reasoning is true in the present case. Here, although we conclude that the arbitrator properly considered the contract, even if she had failed to consider the parties' contractual obligations under the contract adequately, this does not constitute manifest disregard of the law.

T & M BUILDING CO., INC. *v.* WILLIAM HASTINGS (AC 38614)

Alvord, Bright and Eveleigh, Js.

Syllabus

The plaintiff brought this action against the defendant seeking the specific performance of a contract for the sale of certain of the defendant's real property to the plaintiff. In 2010, T, the chief executive officer of the plaintiff, and the defendant created and signed a handwritten document reflecting their intention for the defendant to sell a parcel of certain real property to T for development into residential homes. The plaintiff hired L, an engineer, to develop plans and to obtain permits from the town and other governmental agencies. Thereafter, the defendant informed L that he was concerned with the drainage system in L's plans, which extended the drainage system into a portion of the defendant's property that he was not selling. A revised drainage plan required additional governmental approvals, and without fully approved plans the plaintiff refused to close. The plaintiff subsequently instituted this action seeking specific performance and alleged claims for breach of contract, unjust enrichment and promissory estoppel as a result of the defendant's failure to transfer the property to it. The trial court found in favor of the defendant on all counts of the complaint and rendered judgment thereon, from which the plaintiff appealed to this court. *Held:*

1. The plaintiff could not prevail on its claim that the trial court erred in determining that the document executed by the parties violated the statute of frauds: that court found that the document did not identify the buyer or seller, describe the property with definiteness, or define boundaries for the property or the size of the parcel, nor did it reference maps or other documentation that would define and describe the property, and it found that a phrase indicating a "right to back out" was so lacking in context that it was itself evidence that the document did not satisfy the statute of frauds, and because the document lacked essential terms required to satisfy the statute of frauds, the court did not err in declining to utilize extrinsic evidence where, as here, such evidence was not introduced to aid in the interpretation of a valid contract, but was advanced to provide essential missing terms; moreover, the plaintiff's claim that the court improperly failed to consider its claim that part performance removed the agreement from the statute of frauds was unavailing, as the court, in finding for the defendant on the plaintiff's breach of contract claim on the ground that the document violated the statute of frauds, necessarily rejected that claim, and the court found that the plaintiff's actions could have been attributed to the risk it took in investing in L's services and, thus, did not unmistakably point to the

formation of an enforceable contract, which precluded a conclusion that the plaintiff satisfied the requirements of part performance to defeat the statute of frauds.

2. The trial court did not err in rendering judgment for the defendant on the plaintiff's unjust enrichment claim, and its finding that the plaintiff did not confer any benefit on the defendant was not clearly erroneous; that court found that the defendant was not unjustly enriched by the plaintiff's decisions, including its decision to invest in L's preparation of plans containing a drainage system that the defendant opposed, and that there was no credible evidence to support the claim that the defendant received the benefit of L's plans, and those findings were supported by the record.

3. The plaintiff's claim that the trial court erred in rendering judgment for the defendant on its promissory estoppel claim was unavailing: the court did not err in concluding that the plaintiff did not suffer substantial financial injury even though it had incurred expenses, as the court found that it had incurred expenses not in reliance on a clear and definite promise that the defendant reasonably could have expected to induce reliance, but in furtherance of its choice to invest in L's services, and although the plaintiff claimed that the court erred, in its promissory estoppel analysis, in considering the ambiguity of the document executed by the parties, the court did not invoke the provisions of the document to bar the plaintiff's claim but, rather, considered the document in the context of whether a promise, which a promisor reasonably could have expected would have induced reliance, was made.

Argued September 17—officially released November 26, 2019

Procedural History

Action for specific performance of a contract for the sale of certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the matter was tried to the court, *Elgo*, *J.*; judgment in favor of the defendant, from which the plaintiff appealed to this court. *Affirmed.*

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

Kevin M. Deneen, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, T & M Building Co., Inc., appeals from the judgment of the trial court rendered in favor of the defendant, William Hastings. On appeal,

the plaintiff claims that the court erred in (1) determining that the agreement between the plaintiff and the defendant violated the statute of frauds, (2) rendering judgment for the defendant on the plaintiff's unjust enrichment claim, and (3) rendering judgment for the defendant on the plaintiff's promissory estoppel claim. We affirm the judgment of the trial court.

The following facts, as found by the trial court or as undisputed by the parties, and procedural history are relevant to this appeal. The defendant is the owner of a 196-acre farm, on which he farms tobacco. He, along with his brother, Walter Hastings, and his sister, Marion Jellison, inherited the property in 2007. In 2009, Walter Hastings instituted a partition action. Following negotiations, the defendant purchased his brother's interest in the property, obtaining a mortgage, and also acquired his sister's portion of the property. The defendant engaged Edward Lally, a friend and engineer, to explore a possible subdivision of a portion of the land. Lally obtained a zone change for a portion of the land from agricultural to residential use and submitted a request for pre-application scrutiny. The defendant asked Lally whether he knew of anyone interested in buying a portion of his property, and Lally introduced the defendant to Steven Temkin, chief executive officer of the plaintiff.

Prior to a formal meeting, Temkin drove out to look at the property. The defendant noticed an individual on his property and introduced himself. He then invited Temkin to look over the property. A meeting was held on July 26, 2010, at Lally's office, and Temkin and the defendant created and signed a handwritten document (Exhibit 1); see appendix to this opinion; reflecting their intention for the defendant to sell a parcel of his farmland to Temkin for development into residential homes. Exhibit 1 states: "1) Subject to environmental review—seller to remediate if necessary; 2) Based on forty-six lots 20,500 each Adjust up or down Right to

Back out $943,000; 3) Free & Clear title; 4) No water & Sewer assessment due; 5) Closing Jan. 5 or sixty days after approvals whichever comes first; 5) No mortgage contingency."

The plaintiff hired Lally to begin developing plans for the subdivision and to obtain permits from the town of Windsor and other governmental agencies. On September 7, 2010, shortly after Lally completed an initial draft of the plans, the defendant immediately informed Lally that he had a concern with the plans' drainage system extending into the portion of his property that he was not selling. The defendant made clear that he found drainage extending into such property unacceptable and that he would not agree to drainage rights being extended over his remaining land. Lally immediately informed Temkin of the defendant's concerns. Lally continued to work on addressing the defendant's concerns by seeking permits to have drainage redirected to the Farmington River. Lally recommended to both parties that he continue to seek approval of the version of the plans containing the unacceptable drainage system from the Inland Wetlands and Watercourses Commission of the Town of Windsor and the Planning and Zoning Commission of the Town of Windsor, because if he was unsuccessful in obtaining the special use permits required for an open space subdivision, the drainage issue would be moot. Lally obtained such permits in October, 2010.

A revised drainage plan with drainage flowing into the Farmington River required approval from the Army Corps of Engineers and the Department of Environmental Protection. In January, 2011, the plaintiff paid the defendant a 10 percent deposit, in the amount of $94,300, which funds were held in escrow. The remaining approvals were not in place as of January, July, or December, 2011, the dates corresponding with the defendant's inquiries about closing the deal. Without

fully approved plans, the plaintiff refused to close. The defendant had signed applications for extensions of the existing approval of the subdivision, the last of which he signed in December, 2011. Thereafter, he let the approval lapse and "returned the deposit . . . ."[1]

The plaintiff instituted this action against the defendant in February, 2013. In the operative complaint, it sought specific performance and alleged breach of contract arising out of the defendant's failure to transfer the property to the plaintiff. It also alleged unjust enrichment and promissory estoppel, both premised in part on the allegation that the plaintiff had spent $243,340 in engaging Lally and obtaining the regulatory approvals necessary to develop the property.[2] The matter was tried to the court. Four witnesses testified: the defendant, Lally, Temkin, and Walter Hastings. Both parties filed posttrial briefs and reply briefs.

In a memorandum of decision issued on October 5, 2015, the court found in favor of the defendant on all counts of the plaintiff's complaint. It first found that Exhibit 1 failed to satisfy the statute of frauds, on the basis that it failed to identify the buyer or seller, failed to describe the property with any degree of definiteness, and included the phrase "right to back out." (Internal quotation marks omitted.) With respect to the plaintiff's unjust enrichment claim, the court found that there was no credible evidence to support the plaintiff's claim that the defendant had received the benefit of Lally's plans. It further found that despite the defendant's concerns with respect to drainage, Temkin assumed a business risk when the plaintiff continued to invest in Lally's

[1] The plaintiff states in its appellate brief that any claims regarding the deposit were resolved by the parties shortly after the court rendered judgment and that the deposit is not at issue on appeal.

[2] The plaintiff also alleged that the defendant violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). The court rendered judgment in favor of the defendant on this count, and the plaintiff does not challenge this ruling on appeal.

services. Thus, the court rejected the unjust enrichment claim, finding that the defendant's conduct had not been inequitable or unconscionable such that he had been unjustly enriched by the plaintiff's actions. Turning to the plaintiff's promissory estoppel claim, the court again noted that the "the plaintiff chose to take the risk of investing in Lally's services and other expenses *after* the defendant made clear from the outset that he would not give drainage rights over his property, before any approvals were secured and well before the drawn out process of attempting to get approval for a revised drainage plan." (Emphasis in original.) On the basis of the ambiguity of Exhibit 1's terms, including the "right to back out" and the lack of clarity as to the subject property, the court found that the plaintiff could not recover under a theory of promissory estoppel. (Internal quotation marks omitted.) The plaintiff thereafter filed a motion to reargue, which was denied summarily. This appeal followed.[3]

I

The plaintiff's first claim on appeal is that the court erred in finding Exhibit 1 unenforceable under the statute of frauds without considering both extrinsic evidence to resolve ambiguities contained therein and the doctrine of part performance. The defendant responds that the court correctly determined that Exhibit 1 failed to meet the requirements of the statute of frauds and,

[3] Thereafter, the plaintiff filed a motion for articulation, which was denied, and a motion for review of that denial, which was granted in part. The court issued an articulation on October 31, 2017, in which it stated that it "denies the motion for reargument and reconsideration because it does not find that the plaintiff asserts claims which this court did not sufficiently address in the first instance in its memorandum of decision nor does it find that the plaintiff has raised issues which would have controlling effect on this court's ultimate findings or conclusions of law." The court also addressed one issue regarding the return of the deposit, which is not at issue on appeal. The plaintiff filed a motion for review of the articulation. This court granted review, but denied the relief requested.

in the absence of an underlying agreement, the doctrine of part performance is not applicable. We agree with the defendant.

A

Acknowledging that Exhibit 1 contains ambiguities, the plaintiff asserts that the court "should have considered the substantial extrinsic evidence in the record that could have resolved those ambiguities." We conclude that the court did not err in finding that Exhibit 1 lacked essential terms, such that it was unenforceable under the statute of frauds.

We first set forth applicable principles of law and our standard of review. General Statutes § 52-550 (a) provides in relevant part that "[n]o civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property . . . ." "To comply with the statute of frauds an agreement must state the contract with such certainty that its essentials can be known from the memorandum itself, without the aid of parol proof, or from a reference contained therein to some other writing or thing certain; and these essentials must at least consist of the subject of the sale, the terms of it and the parties to it, so as to furnish evidence of a complete agreement." (Internal quotation marks omitted.) *Breen* v. *Phelps*, 186 Conn. 86, 92, 439 A.2d 1066 (1982).

"Whether a contract exists is a question of fact for the court to determine. . . . It is not within the power of this court to find facts or draw conclusions from primary facts found by the trial court. As an appellate court, we review the trial court's factual findings to ensure that they could have been found legally, logically and reasonably. . . . Thus, the trial court's factual

determination that a contract existed must stand unless we conclude that it was clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Levesque Builders, Inc.* v. *Hoerle*, 49 Conn. App. 751, 754–55, 717 A.2d 252 (1998). The determination of whether a contract is sufficiently definite to satisfy the statute of frauds also is a question of fact, and "the trial court's findings in this regard must stand unless they are clearly erroneous." Id., 757.

"Appellate review under the clearly erroneous standard is a two-pronged inquiry: [W]e first determine whether there is evidence to support the finding. If not, the finding is clearly erroneous. Even if there is evidence to support it, however, a finding is clearly erroneous if in view of the evidence and pleadings in the whole record [this court] is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 755.

In order for a contract for the sale of land to satisfy the statute of frauds, it must set forth the essential terms of the contract—the purchase price, the parties, and the subject matter for sale. *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 294, 977 A.2d 189 (2009). In the present case, the court found that Exhibit 1 "does not identify the buyer or seller; it fails completely to describe the property with any degree of definiteness. It does not even identify the street, town, state or country in which the property is located. It does not define boundaries for the property, the size of the lots, the size of the parcel, nor does it reference maps or other documentation that would define and describe the property." The court further found that the "right to back out" phrase "is so lacking in adequate context that it is itself evidence that the document does not satisfy the statute of frauds." (Internal quotation marks omitted.)

We conclude that the court's findings are not clearly erroneous. Although the court found that Exhibit 1 contains the signatures of both Temkin and the defendant, neither party is identified in the document, nor is Temkin identified in relation to the plaintiff. See *DeLuca* v. *C. W. Blakeslee & Sons, Inc.*, 174 Conn. 535, 543–44, 391 A.2d 170 (1978) (holding that contract that mentioned only limited agent and not seller failed to satisfy statute of frauds). Moreover, evidence supported a finding that Exhibit 1 is deficient with respect to the subject matter for sale. See *Mansour* v. *Clark*, 5 Conn. Cir. Ct. 439, 440 n.1, 442, 256 A.2d 436 (1968) (writing failed to satisfy statute of frauds on basis that precise area of land was not ascertained, where writing described subject of sale as portion of land lying "generally southerly and westerly of your property"). Exhibit 1 alludes to forty-six lots, but wholly fails to identify the location or size of the lots, and it includes the phrases "adjust up or down" and "right to back out." Thus, the court's finding that Exhibit 1 fails to satisfy the statute of frauds is not clearly erroneous.

Moreover, because Exhibit 1 lacks essential terms required to satisfy the statute of frauds, we cannot conclude that the court erred in declining to utilize extrinsic evidence to add to those terms. Our Supreme Court has stated that "[i]n order to be in compliance with the statute of frauds . . . an agreement must state the contract with such certainty *that its essentials can be known from the memorandum itself, without the aid of parol proof* . . . . The statute of frauds is also satisfied [when] the contract or memorandum contains by reference some other writing or thing certain." (Citation omitted; emphasis added; internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, supra, 293 Conn. 294; see also *DeLuca* v. *C. W. Blakeslee & Sons, Inc.*, supra, 174 Conn. 543–44 (written memoranda were "not sufficient in themselves and made no

reference to any other writing or thing certain to provide the missing essentials"); *Gabriele* v. *Brino*, 85 Conn. App. 503, 509, 858 A.2d 273 (2004) ("[a]lthough under certain circumstances, the court may read documents together to satisfy the statute of frauds . . . the multiple writings still must state the essential terms of the contract without the use of parol proof" [citation omitted]); cf. *Lynch* v. *Davis*, 181 Conn. 434, 441 n.5, 435 A.2d 977 (1980) ("[a] memorandum under the Statute of Frauds, because it serves a purpose different than that of an integrated writing invoking the parol evidence rule,[4] does not exclude the introduction of consistent *additional nonessential* parol terms" [emphasis added; footnote added]). The court in the present case found Exhibit 1 deficient as to its essential terms, and found that it lacked reference to any other document. Thus, the court was not required to consider parol evidence to correct deficiencies in the essential terms of the agreement.

On appeal, the plaintiff relies on *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 735, 682 A.2d 1026, cert. denied, 239 Conn. 931, 683 A.2d 397 (1996), in support of its claim that Exhibit 1, when considered in light of extrinsic evidence, is sufficient to satisfy the statute of frauds. In *Foley*, the plaintiff entered into a contract with the defendants for the purchase of a nursing home. Id., 715. Although the nursing home was located on a 10.09 acre tract of land, the contract provided for the sale of 3.74 acres of land, which had been proposed by a surveyor in furtherance of the plaintiff's intention to purchase enough land to operate the nursing home. Id., 715–16. Prior to the closing date, it was discovered that the 3.74 acre tract of land, which the nursing home would

[4] The parol evidence rule "prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated written contract." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 211, 76 A.3d 168 (2013).

occupy after the sale, would violate the town of Fairfield's zoning requirements. Id., 716. The defendants rejected several solutions proposed by the plaintiff to avoid the zoning violation and the defendants ultimately failed to apply for a variance in violation of a court order to do so. Id., 716–17. The plaintiff filed suit alleging, among other causes of action, breach of contract. Id., 718. Following a jury verdict in the plaintiff's favor on his breach of contract claim, the trial court granted the defendants' motion to set aside the jury award. Id., 722–23.

On appeal, the plaintiff in *Foley* argued that the trial court improperly set aside the verdict because there was sufficient evidence to establish that the defendants had breached their promise to convey enough land to operate a nursing home. Id., 726. The parties' arguments concerned whether the defendants were obligated to sell only 3.74 acres and the nursing home building or whether they were obligated to sell additional land to make the nursing home operable. Id., 729. This court concluded that the construction of the contract was a question of fact for the jury and that the jury could have concluded that the contract was "one for the sale of land on which a nursing home business could be conducted." Id. In so concluding, the court looked to various contract terms that supported a jury finding that the parties intended to sell an operable nursing home, including that the contract provided for the sale of certain assets necessary for operating the business, including employee information and certain licenses, and that the seller agreed to "comply with all regulatory agencies' requirements regarding change of ownership to allow the Buyer to obtain all necessary licenses, Medicaid and Medicare rates and other necessary requirements." (Internal quotation marks omitted.) Id., 731–32. This court also looked to extrinsic evidence in

the record of the parties' intent, rejecting the defendants' argument that the introduction of such evidence had violated the parol evidence rule.[5] Id., 732–33. This court concluded that the challenged evidence was not used to vary the terms of the contract, but rather to aid in the interpretation of the contract and to determine the intent of the parties. Id., 734.

The defendant next argued that the additional obligation of "enough land to operate a nursing home" constituted an oral contract that was unenforceable in violation of the statute of frauds. (Internal quotation marks omitted.) Id., 729, 735. This court explained that "[t]he statute of frauds was not violated because a written contract to sell land existed, and the evidence admitted was used properly to discern the intent of the parties." Id., 736. It reasoned that although "the addendum clearly described the sale of 3.74 acres along with the buildings on said acres, the contract language indicates that the sale was of a nursing home, which is more than the sale of a building. Whether the parties intended to contract for the sale of a building on 3.74 acres or the sale of an operable nursing home is a question of fact, which properly was submitted to the jury." Id., 729. Because the extrinsic evidence in *Foley* was admitted to discern the intent of the parties to a valid written contract, we find *Foley* distinguishable. In the present case, the extrinsic evidence advanced by the plaintiff

[5] There was evidence that the defendants had entered into the contract to take advantage of a "soon to change" federal law, but later wanted to avoid the contract because they began negotiating a new sale with a new buyer within one week after signing the contract at issue; had experience in the law of real estate and zoning; hired a surveyor and created a lot in violation of the zoning regulations, which caused the nursing home to be inoperable on the acreage of 3.74 acres; refused to remedy the nonconformity by conveying more land sufficient for an operable nursing home; and had delayed fulfilling their obligations to supply notice to the state of Connecticut Department of Public Health and a list of the current employees to the plaintiff, without which the plaintiff could not receive the necessary license approval. *Foley* v. *Huntington Co.*, supra, 42 Conn. App. 732–33.

was not introduced to aid in the interpretation of a valid contract formed between the parties, but, rather, it was advanced to provide essential terms that were missing from Exhibit 1.[6]

B

The plaintiff next argues that the court failed to consider its claim that part performance removed the contract from the statute of frauds. In the alternative, it argues that "if this court holds that the trial court did conduct that analysis, then the plaintiff asserts that the trial court's silent finding that part performance did not apply was clearly erroneous." The defendant responds that "there was no meeting of the minds in regards to essential contract terms between the parties here, and therefore, part performance cannot apply." We agree with the defendant.

We first set forth general principles of law and our standard of review. "[W]hen estoppel is applied to bar a party from asserting the statute of frauds . . . we . . . require that the party seeking to avoid the statute must demonstrate acts that constitute part performance

[6] The plaintiff also relies on *Levesque Builders, Inc.* v. *Hoerle*, supra, 49 Conn. App. 754–55. In that case, a written contract provided for the sale of a thirty-six acre parcel and referenced a map indicating the location of the property. Id., 752–53. The parties signed a second written contract, which referenced a nonexistent map. Id., 753. The trial court found the contract sufficient to satisfy the statute of frauds and stated that the description of the thirty-six "plus or minus" acres was made sufficiently definite through reference to the two written contracts, the map referenced in the first contract, other maps and descriptions, and the testimony at trial. Id., 757. This court concluded that the trial court's finding that the contract satisfied the statute of frauds was not clearly erroneous. Id.

Levesque Builders, Inc., is distinguishable from the present case. There, the subject of the sale, an essential term, was contained in the two writings and referenced map, such that the description of the land could be made certain through reference to extrinsic evidence. Id. Here, the subject of the sale cannot be known from the writing itself, which does not reference any map, and the court did not err in refusing to consider extraneous evidence to supply the details.

of the contract. . . . Specifically, [t]he acts of part performance . . . must be such as are done by the party seeking to enforce the contract, in pursuance of the contract, and with the design of carrying the same into execution, and must also be done with the assent, express or implied, or knowledge of the other party, and be such acts as alter the relations of the parties. . . . The acts also must be of such a character that they can be naturally and reasonably accounted for in no other way than by the existence of some contract in relation to the subject matter in dispute. . . .

"Thus . . . the elements required for part performance are: (1) statements, acts or omissions that lead a party to act to his detriment in reliance on the contract; (2) knowledge or assent to the party's actions in reliance on the contract; and (3) acts that unmistakably point to the contract. . . . Under this test, two separate but related criteria are met that warrant precluding a party from asserting the statute of frauds. . . . First, part performance satisfies the evidentiary function of the statute of frauds by providing proof of the contract itself. . . . Second, the inducement of reliance on the oral agreement implicates the equitable principle underlying estoppel because repudiation of the contract by the other party would amount to the perpetration of a fraud." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, supra, 293 Conn. 295–96. Our review of a court's determination as to whether a party has demonstrated part performance of a contract is governed by the clearly erroneous standard of review. *Patrowicz* v. *Peloquin*, 190 Conn. App. 124, 139, 209 A.3d 1233, cert. denied, 333 Conn. 915, A.3d (2019); *Harley* v. *Indian Spring Land Co.*, 123 Conn. App. 800, 826, 3 A.3d 992 (2010).

As a preliminary matter, we note that although the court did not expressly reject the plaintiff's part performance argument, it found for the defendant on the

plaintiff's breach of contract claim on the basis that Exhibit 1 failed to satisfy the statute of frauds. Thus, the court necessarily rejected the plaintiff's argument that part performance removed the agreement from the statute of frauds. Moreover, the court found that the plaintiff's actions could have been attributed to its choice to take a risk in investing in Lally's services, and, thus, its actions do not unmistakably point to a contract. This finding precludes a conclusion that the plaintiff satisfied the requirements of part performance to defeat the statute of frauds.

Our Supreme Court has stated the principle that, in the absence of a meeting of the minds, there can be no part performance that removes the agreement from the statute of frauds. *SS-II, LLC* v. *Bridge Street Associates*, supra, 293 Conn. 301; *Montanaro Bros. Builders, Inc.* v. *Snow*, 190 Conn. 481, 487, 460 A.2d 1297 (1983). This is because "the doctrine of part performance requires conduct that is referable to and consistent with [an] oral agreement between the parties. In the absence of an underlying agreement, there is no basis for finding that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, supra, 298.

In *SS-II, LLC*, our Supreme Court concluded that part performance did not apply where there was no meeting of the minds as to the purchase price in an option to purchase, in part because "[a]lthough the option to purchase provides that the purchase price of the property shall be $1.2 million, subject to certain adjustments that are to be calculated by a formula pertaining to when the option is exercised, it also provides that the price will be further adjusted to take into

account environmental conditions existing at the leased premises, which adjustment *shall be mutually determined* by Lessor and Lessee." (Emphasis in original; internal quotation marks omitted.) Id., 299. The court reasoned that "[a] mere statement that the parties will mutually determine the future purchase prices does not mean that the parties will, in fact, agree," and "there is no provision in the statute of frauds protecting the plaintiff in the event that the parties are unable to agree or the defendant refuses to sell . . . ." Id., 300–301. Because "the option to purchase did not guarantee that the plaintiff would be able to purchase the property but simply constituted an agreement to agree," there was no meeting of the minds and could be no part performance that removed the option to purchase from the statute of frauds. Id., 301.

In the present case, the court found the "right to back out" language, among other deficiencies, rendered Exhibit 1 insufficient to satisfy the statute of frauds. (Internal quotation marks omitted.) The court's finding that there was no enforceable contract, based partly on the "right to back out," was supported by the testimony at trial. (Internal quotation marks omitted.) Temkin testified that the right to back out was there "in the event that, you know, we got two lots or something," and he agreed that Exhibit 1 did not indicate that the right to back out was solely his right.[7] The defendant

[7] On direct examination, the following exchange occurred between Attorney Budlong and Temkin:

"Q. So you would pay him more if there were more lots, less if there were less lots. Is that . . . correct?

"A. Yeah. And then in the event that, you know, we got two lots or something there's a clause, you know, they had—there was a right to back out.

"Ed Lally had done quite a bit of preliminary work, I believe, to lead both of us to think forty-six was a pretty good chance of getting close to that figure. You know it wasn't like a pig in a poke. It might be two. It might be six hundred or something like that.

"Q. Right. The right to back out had to do with if he only had two lots or three lots it wouldn't be fair—

* * *

testified that the "right to back out" meant that "at any time either party could cancel this contract . . . for any purpose."[8] As in *SS-II, LLC*, Exhibit 1 did not guarantee that the plaintiff would be able to purchase the property, and, thus, in the absence of a meeting of the

"Q. Explain that to me, the—

"A. Seeing the way the clause is written in the number two paragraph about right to back out, I'm thinking that that was—could have been what we meant. Just listen, Mr. Hastings, we're not looking to, you know, get one building lot from you and pay you [$20,500] and have all this acreage and build one house."

On cross-examination, the following exchange occurred between Attorney Deneen and Temkin:

"Q. And so when you wrote, right to back out, does that indicate that it was solely your right to back out?

"A. I believe if the lot yield was like five lots and he thought—

"Q. Well, again—

"A. —it wasn't—

"Q. —again—

"A. —enough to make it—

"Q. —this is a—

"A. —worth it he could back out.

"Q. Again, let me ask the question. Does it—this piece indicate that the right to back out is solely your right?

"A. No."

[8] On direct examination, the following exchange occurred between Attorney Budlong and the defendant:

"Q. Right. And it says, Adjust up or down. Right?

"A. Yes.

"Q. And—and then it says, Right to back out.

"A. Right.

"Q. That relates to the forty-six lots, in other words, if you could only get ten lots out of there you weren't go[ing] to sell ten lots for [$20,500], were you?

"A. Correct.

"Q. All right. And—so it was a per lot price so that if the forty-six lots couldn't be accomplished either one of you had the right to back out. Right?

"A. Or any other number of lots we had the right to back out at any time.

"Q. Well, tell me how—why it says that—that occurs? I mean it's clear that that right to back out is in provision two—

"A. Yeah.

"Q. —and it has—and you have a $943,000 figure, and that the reason that provision was there, obviously, was if you didn't get—someone didn't get forty-six thousand lots or forty-six lots you, certainly, weren't going to sell it for ten times [$20,000].

minds, the plaintiff could not avoid the statute of frauds under a theory of part performance. See *Montanaro Bros. Builders, Inc.* v. *Snow*, supra, 190 Conn. 487 (plaintiffs could not rely on theory of part performance where trial court found that minds never met on which six acres were to be excluded from sale, "a factual finding negating the presence of either an oral or a written contract").

Moreover, the acts claimed by the plaintiff to constitute part performance are not of such a character that they can be naturally and reasonably accounted for in no other way than by the existence of an enforceable contract. The court found that "the plaintiff chose to take the risk of investing in Lally's services and other expenses *after* the defendant made clear from the outset that he would not give drainage rights over his property, before any approvals were secured and well before the drawn out process of attempting to get approval for a revised drainage plan." (Emphasis in original.)

This finding illustrates the risk that the plaintiff accepted in investing in Lally's services while continuing to seek approval of a drainage plan acceptable to both the governmental agencies and the defendant.[9]

* * *

"A. My—my interpretation would be . . . that as of this right to back out included at any time either party could cancel this contract.

"Q. For any purpose.

"A. For any purpose.

"Q. Okay. The fact that it was in that paragraph doesn't mean anything to you.

"A. No."

[9] The plaintiff claims on appeal that it was clearly erroneous for the court to place emphasis and weight on the defendant's drainage concerns. We disagree that the court was not permitted to consider the drainage concerns because they had been resolved at the time of the defendant's alleged breach. Although Lally's plans had been revised to accommodate the defendant's drainage concerns, as of December, 2011, necessary permits from the Army Corps of Engineers and the Department of Environmental Protection were still outstanding. The defendant testified that he wanted to close the deal

Thus, we conclude that the plaintiff's acts do not "compel the inference that there was some contract by which these acts were required of the plaintiff[s] and therefore explainable upon no other theory"; (internal quotation marks omitted) *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 67, 873 A.2d 929 (2005); and, thus, the court's rejection of the plaintiff's part performance argument was not improper.

Accordingly, the plaintiff failed to prove that it had an enforceable contract.[10]

II

The plaintiff's second claim on appeal is that "[t]he court erred when deciding the plaintiff's unjust enrichment claim by finding that the plaintiff did not confer any benefit on the defendant." Specifically, it argues that the defendant was benefited in that he owns the final set of plans, for which the defendant paid "a small amount," because "they were built upon the foundation of the nearly $250,000 worth of work that the plaintiff paid for beforehand." It further argues that the plans accommodating the defendant's preferred drainage system remain on file with the town of Windsor and that "little effort would be required on the defendant's part

but "[t]he same questions—the—the same idea was then presented that I wanted to close this thing and that [Temkin] did not—[Temkin] told me he did not have the Army Corps of Engineers permits or the [Department of Environmental Protection] permits to do it. . . . At that point I—no other—no other engineering had been done on the site, and I threw up my hands and said this is never going to happen out of just plain frustration of having gone through this for well over a year, and I had to get on with my crops and—and figure out what crop I was going to put here, how I was going to best utilize this plan because at this rate this project was never going to happen."

[10] In light of this conclusion, the plaintiff's argument that "the court's suggestion that the plaintiff could have stopped the project at any time after September 7, 2010, ignores the legal reality that the plaintiff would have been in breach of the deal with the defendant if he did that," is unavailing. (Emphasis omitted.)

to reinitiate the subdivision process." Thus, the plaintiff argues that its work has "removed the risk for future developers and substantially enhanced the land's value and marketability for the defendant." The defendant responds that the plaintiff failed to meet its burden of producing evidence to show an increase in value to the defendant and "has failed to point to any evidence indicating exactly how much it has 'positively impacted the value' of the defendant's property as a result of its actions."

We first set forth general principles of law and our standard of review. "Under well established Connecticut law, [p]laintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment. . . . Furthermore, the determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings for the trial court that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . This limited scope of review is consistent with the general proposition that equitable determinations that depend on the balancing of many factors are committed to the sound discretion of the trial court." (Internal quotation marks omitted.) *Utzler* v. *Braca*, 115 Conn. App. 261, 267–68, 972 A.2d 743 (2009).

The plaintiff relies primarily on *Gardner* v. *Pilato*, 68 Conn. App. 448, 449, 791 A.2d 707, cert. denied, 260 Conn. 908, 795 A.2d 544 (2002), to support its position. In that case, the plaintiff, a surveyor, surveyed the defendants' property and made a topographical map at the direction of an engineer hired by the defendants to advise them on developing a piece of property. Id., 449. The defendants then refused to pay the plaintiff and,

instead, hired another surveyor to do the same work. Id. The second surveyor used the plaintiff's work and an old survey that the defendants had in their possession. Id., 449–50. The trial court accepted the fact finder's[11] finding that the defendants were unjustly enriched for the full amount of the plaintiff's bill. Id., 450–51. On appeal, this court affirmed, rejecting the defendants' argument that the benefit was required to be measured only by an increase in value to the defendants' property as a direct result of the plaintiff's work. Id., 453. The court stated that "[a]lthough the defendants are correct that the damages in an unjust enrichment case are *ordinarily* not the loss to the plaintiff but the benefit to the defendant, a fact finder may rely on the plaintiff's bill when the benefit is too difficult to determine otherwise." (Emphasis in original; internal quotation marks omitted.) Id., 454.

Unlike *Gardner*, the present case does not involve a situation in which the court determined that the defendant received a benefit and that benefit was too difficult to determine. Rather, in this case, the court found that the defendant was not unjustly enriched by the plaintiff's decisions, including the plaintiff's decision to invest in Lally's preparation of plans containing a drainage system that the court found the defendant to have "vociferously and consistently opposed . . . ."[12] More-

[11] The plaintiff's action was heard before an attorney fact finder. *Gardner* v. *Pilato*, supra, 68 Conn. App. 450.

[12] The court found that the defendant's conduct was not inequitable or unconscionable such that he had "been unjustly enriched by the plaintiff's decisions . . . ." Again, the court cited the defendant's concerns with respect to drainage, which it found "reasonable and not insignificant." The court stated: "Notwithstanding these concerns, Temkin, a highly successful and sophisticated businessman, was clearly highly motivated to develop and invest in this potentially lucrative parcel of property by investing in Lally's services. The fact that the plaintiff paid [Lally] to continue efforts to acquire the variety of approvals needed, with no guarantee that those approvals would be secured, was a business risk he willingly undertook."

over, the court found that "[t]here is no credible evidence . . . to support the claim that the defendant has received the benefit of [Lally's] plans." This finding is supported by testimony of the defendant that he has not attempted to sell the land to anyone other than the plaintiff, he does not intend to sell the land, and he has entered into a contract to lease a portion of the land for five years, with four, five-year options, for a total of twenty-five years, for a cell tower. Although Lally testified that the defendant told him in December, 2011, that he was "going to do the subdivision but not now and not with T & M," the defendant testified that he made that statement "[o]ut of frustration." On the basis of this evidence, we cannot conclude that the court's finding that the defendant was not benefited is clearly erroneous.

III

The plaintiff's final claim on appeal is that the court erred in ruling in favor of the defendant on the plaintiff's promissory estoppel claim. We disagree.[13]

The following legal principles govern our analysis of the plaintiff's claim. "[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if

[13] We note that our Supreme Court has not addressed "whether promises that otherwise would be subject to the requirements of the statute of frauds may be enforced on promissory estoppel grounds in the absence of compliance with the statute of frauds; see 1 Restatement (Second), supra, § 139 . . . ." See *Glazer* v. *Dress Barn, Inc.*, supra, 274 Conn. 89–90 n.38 (declining to address issue where neither party had raised or briefed issue); *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 415, 168 A.3d 658 (holding that even if promissory estoppel exception to statute of frauds exists, plaintiff failed to provide evidence of promise claimed to have been made), cert. denied, 327 Conn. 975, 174 A.3d 975 (2017). For purposes of our analysis, we assume without deciding that a promise may be enforced on promissory estoppel grounds in the absence of compliance with the statute of frauds.

injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . .

"Additionally, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. . . . [A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . and, therefore, is not sufficiently promissory. The requirements of clarity and definiteness are the determinative factors in deciding whether the statements are indeed expressions of commitment as opposed to expressions of intention, hope, desire or opinion. . . . Finally, whether a representation rises to the level of a promise is generally a question of fact, to be determined in light of the circumstances under which the representation was made." (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Cendant Mobility Services Corp.*, 267 Conn. 96, 104–106, 837 A.2d 736 (2003). "[A] promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 213, 520 A.2d 217 (1987).

In support of its argument that the court improperly rejected its promissory estoppel claim, the plaintiff argues that the court erred in concluding that the plaintiff did not suffer substantial financial injury, even though it incurred over $250,000 in expenses related to its acquisition of the defendant's property. The court found, however, that the plaintiff did not suffer such

injury "when the defendant allegedly 'subsequently and unexpectedly' reneged on his promises." The court did not ignore the sums expended by the plaintiff. Rather, it found that the plaintiff had spent that money not in reliance on a clear and definite promise that the defendant could reasonably have expected to induce reliance, but in furtherance of its choice to "take the risk of investing in Lally's services . . . ." Specifically, the court stated: "Given the principles of equity underlying promissory estoppel, the ambiguity of the document's terms, including but not limited to the provision that there was a 'right to back out' as well as the indefiniteness of the subject property itself, this court cannot find that the plaintiff is entitled to specific performance and money damages based on the theory of promissory estoppel."[14]

The plaintiff argues that the court erred in considering the ambiguity of Exhibit 1's terms in its promissory

[14] The plaintiff argues that even if the court properly found that the plaintiff's actions following the defendant's raising his drainage concerns were a risk taken by the plaintiff, it "still should be entitled to reimbursement for the expenses incurred *before* the defendant raised the drainage issue . . . . The court only addressed the 'after' period in its decision, even emphasizing the word. Since the court found an initial promise from July 26, 2010, and that initial promise was never in dispute among the parties, the cutoff date for the plaintiff's right of recovery for damages incurred by reliance on [the] promise could not have ceased any earlier than September 7, 2010." (Emphasis in original.)

We disagree that the court "found an initial promise" requiring application of the doctrine of promissory estoppel. The court noted that Exhibit 1 "was produced as a result of an *initial discussion* between the defendant and Temkin on July 27, 2010, reflecting their intention for [William] Hastings to sell a parcel of his farmland to Temkin for development into residential homes." (Emphasis added.) The recognition of an intention for the defendant to sell a parcel of his land does not constitute a finding of a "clear and definite promise" for purposes of the doctrine of promissory estoppel. See *Stewart* v. *Cendant Mobility Services Corp.*, supra, 267 Conn. 105–106 ("[t]he requirements of clarity and definiteness are the determinative factors in deciding whether the statements are indeed expressions of commitment as opposed to expressions of intention, hope, desire or opinion").

estoppel analysis, maintaining that the purpose of the doctrine of promissory estoppel is to permit recovery where a promise is not enforceable under the law of contract. In support of this argument, the plaintiff cites *Montanaro Bros. Builders, Inc.* v. *Snow*, supra, 190 Conn. 483, 489, in which the defendant landowner argued that the plaintiff's claim for restitution was barred by a provision of an unenforceable option contract. Specifically, the defendants argued in *Montanaro Bros. Builders, Inc.*, that because the option contract provided for the defendant to retain payments made by the plaintiff if the option was not exercised, the plaintiff could not recover those payments under a theory of unjust enrichment. Id., 489. The court stated: "Having previously relied upon the unenforceability of the option agreement to defeat the plaintiffs' claim for specific performance, the defendants cannot now invoke the provisions of that unenforceable agreement as an absolute bar to the plaintiffs' claim of unjust enrichment." Id. In the present case, however, the provisions of Exhibit 1 were not invoked to bar the plaintiff's claim. Rather, the court considered the provisions of Exhibit 1 in the context of whether a clear and definite promise, which a promisor reasonably could have expected to induce reliance, was made.

Applying the foregoing principles to the facts reasonably found by the court, we conclude that the court did not err when it rejected the plaintiff's promissory estoppel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

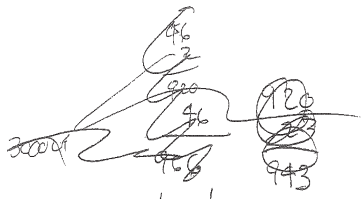
Exhibit 1

July 26 2018

(1) Subject to environmental review – Seller to remediate if necessary

(2) BASED ON 46 lots 20,500 each
Adjust up or down $943,000
Right to BACK out

(3) Free & Clear title



(4) No water & sewer assessments due

(5) closing Jan 5 or 60 days after approvals (whichever comes first.

(5) No mortgage contingency

PLAINTIFF'S EXHIBIT
T&M Building
Hastings
Full
NO. 13603637
TMJ
TAC
1/15/2019

Stan Tuch

Bill Hastings

CHAUNCEY WATTS *v.* COMMISSIONER OF CORRECTION (AC 42049)

Prescott, Devlin and Sullivan, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, manslaughter in the first degree with a firearm and assault in the first degree, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance and that his sentence of ninety-five years of imprisonment violated his state and federal constitutional rights to be free from cruel and unusual punishment. The petitioner had been charged with murder and assault in the first degree in connection with a shooting incident when he was seventeen years old. In a second case, he was charged with assault in the first degree in connection with a different shooting incident. The petitioner opted to go to trial after rejecting a plea offer of thirty-eight years of incarceration to resolve both cases. Prior to trial, he pleaded guilty in the second case, and the jury thereafter found him guilty in the murder case. The habeas court rendered judgment denying the petitioner's ineffective assistance of counsel claim and dismissing without prejudice his cruel and unusual punishment claim, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly rejected the petitioner's claim that his trial counsel rendered ineffective assistance by failing to properly advise him about the plea offer; the petitioner failed to prove that he was prejudiced by counsel's allegedly deficient performance, as the habeas court, after choosing not to credit the petitioner's testimony, concluded that he would not have accepted the plea offer if his lawyer had performed competently and, given this court's well established deference to the habeas court's credibility determinations, the petitioner failed to sustain his burden of persuasion.

2. The petitioner could not prevail on his claim that his sentence violated his state and federal constitutional rights to remain free from cruel and unusual punishment and, thus, that he was entitled to a new sentencing proceeding in which the court must consider the mitigating factors of youth and impose a proportionate sentence:

   a. Contrary to the assertion by the respondent Commissioner of Correction that this court lacked subject matter jurisdiction over the petitioner's cruel and unusual punishment claim because he was not aggrieved by the habeas court's dismissal of the claim without prejudice, the petitioner was aggrieved by the dismissal and, thus, this court had subject matter jurisdiction; although the habeas court's disposition of the petitioner's claim would have allowed him to file a new habeas petition, he was

nonetheless aggrieved, as the dismissal deprived him of his right to have his claim adjudicated on a timely basis because he would have been forced to file a new habeas petition that would have led to a significant delay in his ability to resolve his claim.

b. The petitioner was not entitled to resentencing, as there was no violation of his constitutional rights to be free from cruel and unusual punishment; subsequent to the petitioner's conviction the legislature enacted No. 15-84, § 1, of the 2015 Public Acts, which was later codified (§ 54-125a [f]) and provided parole eligibility for juvenile offenders serving a sentence of greater than ten years of incarceration, our Supreme Court determined in *State* v. *Williams-Bey* (333 Conn. 468), which had been pending during the petitioner's habeas trial, that parole eligibility adequately remedied any violation of the requirement in *Miller* v. *Alabama* (567 U.S. 460) that the mitigating factors of youth be considered before a sentence of life without the possibility of parole, or its functional equivalent, could be imposed on a juvenile offender, and the petitioner's appellate counsel conceded at oral argument before this court that the outcome of *Williams-Bey* would be dispositive of this issue on appeal.

Argued September 9—officially released November 26, 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, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition in part and dismissing the petition in part, from which the petitioner, on the granting of certification, appealed to this court. *Improper form of judgment*; *judgment directed in part.*

Darcy McGraw, assigned counsel, with whom, on the brief, was *Kayla Stephen*, legal intern, for the appellant (petitioner).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Leah Hawley*, supervisory assistant state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

SULLIVAN, J. The petitioner, Chauncey Watts, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court

denying in part and dismissing in part his petition for a writ of habeas corpus. In his two underlying criminal cases, the petitioner rejected a plea offer from the court, *Clifford*, *J.*, to resolve the two cases because he allegedly was not properly advised of the charges, defenses, and best course of action regarding the offer, and, therefore, was unaware of "the consequences of rejecting [the offer]." Following a jury trial, the petitioner was convicted and sentenced to ninety-five years in prison, the functional equivalent of a life sentence.[1] The petitioner filed a petition for a writ of habeas corpus in which he alleged (1) that he received ineffective assistance of trial counsel regarding the plea offer he rejected, and (2) that his sentence violated the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the constitution of Connecticut. The habeas court denied the petitioner's first claim on the grounds that trial counsel's representation was not deficient and that the petitioner failed to prove prejudice. The court dismissed the cruel and unusual punishment claims "without prejudice," reasoning that, if it ruled on the merits of the claim, it would be bound to follow this court's decision in *State* v. *Williams-Bey*, 167 Conn. App. 744, 144 A.3d 467, cert. granted, 326 Conn. 920, 169 A.3d 793 (2017), which, at the time, was under review by our Supreme Court.[2]

On appeal, the petitioner asserts two claims. First, the petitioner claims that the habeas court erred in

[1] General Statutes § 53a-35b provides in relevant part: "A sentence of life imprisonment means a definite sentence of sixty years, unless the sentence is life imprisonment without the possibility of release . . . ."

[2] While the present appeal was pending, our Supreme Court issued its decision in *State* v. *Williams-Bey*, 333 Conn. 468, 215 A.3d 711 (2019), affirming the judgment of the Appellate Court. The defendant in that case filed a motion for reconsideration en banc, which has been denied.

The habeas court, in its memorandum of decision, stated: "The petitioner may, if the Supreme Court's decision in *Williams-Bey* provides support for his claim and any relief he is seeking, whether in the sentencing court or the habeas court, pursue any such relief he may be entitled to as a result of *Williams-Bey*."

concluding that the performance of his trial counsel was not deficient and that, even if it were, he was not prejudiced by the alleged deficient representation. Second, the petitioner claims that the sentencing court violated his rights to remain free from cruel and unusual punishment under the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the constitution of Connecticut when he was sentenced. We conclude that the habeas court properly rejected the petitioner's ineffective assistance of counsel claim because the petitioner failed to prove prejudice. Further, we conclude that the habeas court should not have dismissed the petitioner's second claim but should have concluded on its merits that the petitioner's sentencing did not violate the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution, and that he is not entitled to resentencing. Accordingly, we affirm in part and reverse in part the judgment and remand the case with direction to render judgment in favor of the respondent, the Commissioner of Correction, denying the second count of the petition.

The following facts and procedural history are relevant to this appeal. On the evening of September 29, 1995, the petitioner and a fellow gang member rode their bicycles past a residence in Hartford and fired four rounds of ammunition into a group of people standing by a car. All four individuals were shot. One of those individuals, Javier Mateo, died as a result of his injuries. *State* v. *Watts*, 71 Conn. App. 27, 28–30, 800 A.2d 619 (2002). The petitioner was seventeen years old at the time of the shooting. We refer to this event as the Hartford murder.

The petitioner, after seeing his photograph in the news the next day, fled to Florida. Id., 30. While in Florida, the petitioner joined a magazine sales company located in New Jersey. Coincidentally, he returned to East Hartford for work with the magazine company.

On August 2, 1998, he had an argument with a coworker. The petitioner pulled out a handgun and shot the coworker in the chest and leg. The coworker survived his injuries. The petitioner was twenty-one years old at the time of the shooting. We refer to this event as the East Hartford shooting.

Within hours of the East Hartford shooting, the petitioner surrendered to the police on an outstanding warrant involving the Hartford murder. While in custody, the petitioner gave a statement to the police in which he implicated himself in the Hartford murder. The petitioner also was questioned by the police about the East Hartford shooting that occurred earlier that day. In response, the petitioner "gave a signed statement indicating his involvement in [the East Hartford shooting] and that he shot [the coworker] . . . ."

The petitioner was charged with murder in violation of General Statutes §§ 53a-54 (a) and 53a-8 (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and three counts of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8 (a) in relation to the Hartford murder. The petitioner also was charged with assault in the first degree in violation of § 53a-59 (a) (1) in connection with the East Hartford shooting.

The petitioner pleaded not guilty and elected a jury trial in both cases. Shortly thereafter, the trial court offered the petitioner a plea deal of thirty-eight years of incarceration to resolve the two cases. The petitioner rejected the court's offer. Nine and one-half months after rejecting the court's offer of thirty-eight years and before jury selection in the Hartford murder case, the petitioner accepted a separate plea offer of nine years to resolve the East Hartford shooting.

The jury in the Hartford murder case found the petitioner guilty of manslaughter in the first degree with a

firearm in violation of General Statutes §§ 53a-55a (a) and 53a-8 (a), and three counts of assault in the first degree. *State* v. *Watts*, supra, 71 Conn. App. 28. The petitioner was sentenced to ninety-five years plus a sentence enhancement under General Statutes § 53-202k of five years for a total effective sentence of 100 years of incarceration consecutive to the nine year sentence in the East Hartford shooting. The sentence later was reduced to ninety-five years of incarceration.[3] The petitioner's conviction was affirmed on direct appeal. Id., 40.

The petitioner filed the present habeas corpus action on September 26, 2012. His amended petition, filed on August 18, 2017, contained two counts. In count one, the petitioner alleged a violation of his constitutional right to the effective assistance of counsel. In count two, he alleged a violation of his eighth amendment right to remain free from cruel and unusual punishment. In his return, the respondent alleged, inter alia, that the petitioner cannot obtain habeas corpus review because he failed to raise the eighth amendment claim in a motion to correct an illegal sentence and, thus, the claim was procedurally defaulted. In his reply, the petitioner alleged that his claim was not procedurally defaulted pursuant to *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016), and *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016), because the trial court did not have jurisdiction to hear a claim involving "mitigating factors associated with a juvenile's young age" in a motion to correct an illegal sentence. *State* v. *Delgado*, supra, 812–13.

Following a two day trial, the habeas court issued a memorandum of decision in which it made the following relevant factual findings. In the underlying criminal

[3] The trial court, *Dewey*, *J.*, later vacated the sentence enhancement imposed on the petitioner pursuant to § 53-202k, making the total effective sentence ninety-five years to serve.

case, the petitioner had been represented by Attorney Avery Chapman at trial. Prior to trial, the trial court, offered to resolve the two cases pending against the petitioner if he accepted a thirty-eight year plea deal and pleaded guilty to the charges against him. The petitioner testified that he was aware of the offer, that his trial counsel conveyed the offer to him, and that he and his counsel discussed the offer. The petitioner stated that he was open to the idea of taking a guilty plea because he "knew [he] had to plead guilty" given that he had admitted his guilt previously to the police, and conveyed this desire to trial counsel. Further, the petitioner testified that he rejected the plea offer because "[he] didn't know the consequences of rejecting it." The habeas court denied count one, dismissed count two "without prejudice," and rendered judgment in favor of the respondent. The habeas court granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court improperly denied his ineffective assistance of counsel claim because (1) he was not properly advised regarding the plea offer and (2) he would have accepted the thirty-eight year plea deal had he been adequately advised. We disagree.

We begin our analysis with the standard of review. The sixth amendment to the United States constitution provides a criminal defendant "the assistance of counsel for his defense." U.S. Const., amend. VI. "It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 132, 595 A.2d 1356 (1991). "The legal principles that govern an ineffective assistance claim are well settled. . . . A claim of

ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . The second prong is . . . satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citation omitted; internal quotation marks omitted.) *Betts* v. *Commissioner of Correction*, 188 Conn. App. 397, 405, 204 A.3d 1221, cert. denied, 331 Conn. 919, 206 A.3d 186 (2019), citing *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It is well settled that the two part *Strickland* test applies to challenges of ineffective assistance of counsel claims involving plea negotiations. *Hill* v. *Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

It "is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 278, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). "In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 72, 174 A.3d 206 (2017).

In order to demonstrate prejudice resulting from his trial counsel's alleged deficient performance, the petitioner had the burden of demonstrating "that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

In applying these standards, "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of [the pertinent legal standard to] the habeas court's factual findings . . . however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) Id. 351.

In the present case, the petitioner testified at the habeas trial that, if he had received accurate advice regarding the plea offer he was given, he would have accepted it. Later in his testimony, however, he stated that at the time he was offered the thirty-eight year plea offer, it was his impression that "[i]t was a large sentence." The habeas court, as the trier of fact, found that "the petitioner did not prove that there was a reasonable probability that he would have accepted the offer of thirty-eight years, even if Attorney Chapman had 'recommended' it," and implicitly discredited the petitioner's testimony. It is well established that "[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741, 937 A.2d 656 (2007). Because the habeas court discredited the petitioner's testimony, and there was no other evidence from which the court could have

found that the petitioner would have accepted the plea deal offered, the petitioner failed to meet his burden of demonstrating prejudice.

Ultimately, the habeas court concluded, after choosing not to credit the petitioner's testimony, that he would not have accepted the plea offer if his lawyer had performed competently, and that the petitioner failed to sustain his burden of persuasion of showing that he was prejudiced by his trial counsel's alleged deficient performance. Given our well established deference to the habeas court's credibility determinations, the petitioner cannot prevail on this claim.

II

The petitioner next claims that the trial court violated his eighth amendment right to remain free from cruel and unusual punishment. We disagree.

A

Before we reach the merits of the petitioner's cruel and unusual punishment claim, we must first address a jurisdictional issue raised by the respondent pertaining to this second claim. The respondent argues that this court lacks subject matter jurisdiction to consider the petitioner's second claim because the petitioner is not aggrieved by the habeas court's dismissal of the claim without prejudice. We disagree with the respondent.

The following procedural history and facts are relevant to the resolution of this claim. The second count of the petitioner's amended habeas petition alleged that his eighth amendment right to remain free from cruel and unusual punishment had been violated. After a trial, the habeas court dismissed the petitioner's constitutional claims "without prejudice" because the petitioner would have lost on the merits—pursuant to this court's decision in *State* v. *Williams-Bey*, supra, 167 Conn. App. 744—and acknowledged that, because the appeal in

Williams-Bey was then pending at our Supreme Court, the court's decision would be "dispositive of the petitioner's claim . . . ." The petitioner thereafter filed a petition for certification to appeal from the judgment of the habeas court. After the petition was granted, this appeal followed.

If a jurisdictional question is raised with respect to a claim, the court must resolve it before it may adjudicate that claim. *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 813, 786 A.2d 1091 (2002). It is well settled that "[i]n the appellate context, aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected. . . . We traditionally have applied the following two part test to determine whether aggrievement exists: (1) does the allegedly aggrieved party have a specific, personal and legal interest in the subject matter of a decision; and (2) has this interest been specially and injuriously affected by the decision." (Internal quotation marks omitted.) *Nanni* v. *Dino Corp.*, 117 Conn. App. 61, 70, 978 A.2d 531 (2009). Our Supreme Court, in applying this standard, has asked whether the dismissal without prejudice has placed the petitioner "in an appreciably different position than [he] would have been in if the trial court had not dismissed the" count. *State* v. *Johnson*, 301 Conn. 630, 647, 26 A.3d 59 (2011).

In support of his claim, the respondent relies on *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015), and *State* v. *Johnson*, supra, 301 Conn. 630. *Tyson*, however, provides little analysis on which this court may rely in conducting an aggrievement analysis, and *Johnson* is procedurally distinguishable because much of the court's aggrievement analysis rested on the fact that the statute of limitations period had expired in that case, which is not at issue in the present case.

We conclude that *Mitchell* v. *Commissioner of Correction*, 93 Conn. App. 719, 891 A.2d 25, cert. denied, 278 Conn. 902, 896 A.2d 104 (2006), provides a more instructive aggrievement analysis.

In *Mitchell*, the petitioner filed a habeas petition, a petition for DNA testing of a sex crime kit, and a motion for a continuance of the habeas trial to allow time for the DNA testing to be completed, in order to contest evidence admitted in the underlying criminal trial. Id., 721 and n.1. The habeas court considered the petitioner's petition and his motion and denied both. Id., 721. The court, sua sponte, dismissed the habeas petition without prejudice. Id. The petitioner appealed, claiming that the court improperly denied his petition for DNA testing of evidence. Id., 722.

On appeal, this court held that the habeas court abused its discretion when it denied the petitioner's motion for a continuance and dismissed his petition for a writ of habeas corpus in its entirety. Id., 723–24. In so deciding, this court stated: "Here, when the court denied the motion for a continuance and dismissed the petitioner's case, it reasoned that it would not be appropriate to have the case stay inactive on the docket while the petitioner brought his petition for DNA testing to the sentencing court and awaited the results of that testing, even though the petitioner had a statutory right to a hearing pursuant to P.A. 03-242, § 7. *Although we recognize the importance of docket management, it is not in the interest of judicial economy to require the petitioner to file a separate petition with the sentencing court and then to* [*file*] *a new petition for a writ of habeas corpus.* Furthermore, the respondent commissioner of correction would not have suffered any prejudice by allowing the petitioner's case to remain on the docket until the petition for DNA testing had been decided by the sentencing court. *The petitioner, on the other hand, was prejudiced by the denial because*

any new petition filed would be reached for hearing later than the one he already had filed. There is a substantial due process right in the petitioner's efforts to prove his actual innocence, particularly because he is incarcerated. The petitioner was prejudiced by the denial of his motion for a continuance and the dismissal of his habeas petition." (Emphasis added.) Id., 724–25.

In the present case, although the court's disposition of the claim would have allowed the petitioner to file a new habeas petition, he is nonetheless aggrieved. As in *Mitchell*, the dismissal without prejudice deprived the petitioner of his right to have his claim adjudicated on a timely basis. In the event that the outcome of *Williams-Bey* was favorable to the petitioner, he would have been forced to file a new habeas petition. This process inherently would lead to a significant delay in the petitioner's ability to resolve his claim. For the foregoing reasons, we conclude that the petitioner was aggrieved by the habeas court's dismissal of his eighth amendment claims without prejudice and that this court has subject matter jurisdiction over this claim.

B

With respect to the merits of the petitioner's second claim, the petitioner alleges that his sentence violates the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. Further, he argues that his sentencing process is not remedied by General Statutes § 54-125a. "The petitioner alleges that his sentence was not individualized or proportionate, and does not account for his age and youth related mitigation, because the sentencing court did not consider his age and the mitigating characteristics of youth." On these grounds, the petitioner argues that he must have "a new sentencing proceeding where his youth is given mitigating effect and a proportionate sentence imposed." However, the petitioner's

counsel agreed at oral argument before this court that the outcome of *Williams-Bey* is dispositive of this issue on appeal and conceded that if our Supreme Court affirmed the judgment of the Appellate Court in *Williams-Bey*, the petitioner would no longer have a valid claim. For the reasons that follow, we conclude that there is no federal or state constitutional violation and that the petitioner is not entitled to resentencing.

In *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held that the "[e]ighth [a]mendment [to the federal constitution, which prohibits cruel and unusual punishment] forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Id., 479. Our Supreme Court has interpreted *Miller* to "[prohibit] a trial court from sentencing a juvenile convicted of murder to life imprisonment without parole unless the court has considered youth related mitigating factors . . . ." *State* v. *Delgado*, supra, 323 Conn. 810.

In response to the *Miller* decision, the legislature enacted No. 15-84, § 1, of the 2015 Public Acts (P.A. 15-84, § 1), which was later codified in General Statutes § 54-125a (f)[4] and that provides parole eligibility for juvenile offenders who are serving a sentence of greater than ten years of incarceration.

[4] General Statutes § 54-125a (f) (1) provides in relevant part: "[A] person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. . . ."

Subsequently, our Supreme Court addressed *Miller* and, in a series of cases, first held that a juvenile offender serving a life sentence of imprisonment, or its functional equivalent, without the possibility of parole can no longer make a colorable claim that his or her sentence is illegal under the eighth amendment to the United States constitution and *Miller*—even if the trial court failed to consider the mitigating factors of youth—because juvenile offenders are now eligible for parole under P.A. 15-84. *State* v. *Delgado*, supra, 323 Conn. 809–12.

In *McCleese*, "[t]he defendant was seventeen years old when he and a partner shot and killed one victim and injured another. . . . The defendant received a total effective sentence of eighty-five years of imprisonment without eligibility for parole . . . . Although the sentencing court . . . considered other mitigating evidence and mentioned the defendant's youth several times, there [was] no express reference in the record that it specifically considered youth as a mitigating factor, which, at the time, was not a constitutional requirement. See *Miller* v. *Alabama*, supra, 567 U.S. 460." (Citations omitted.) *State* v. *McCleese*, 333 Conn. 378, 382, A.3d (2019).

Following our Supreme Court's post-*Miller* decisions, the defendant in *McCleese* filed a motion to correct an illegal sentence. He grounded his claims in the eighth amendment and article first, §§ 8 and 9, of the state constitution. Id., 385. These claims required our Supreme Court to consider "whether the legislature may remedy the constitutional violation with parole eligibility." Id., 381. Our Supreme Court held that "parole eligibility under P.A. 15-84, § 1, is an adequate remedy for a *Miller* violation under our state constitution just as it is under the federal constitution." Id., 387.

Williams-Bey, a companion case to *McCleese*, further clarifies this issue. The defendant in *Williams-Bey* was "currently imprisoned for murder. He was sixteen years

old when he and two friends shot and killed the victim. . . . In accordance with the plea agreement, the court imposed a sentence of thirty-five years imprisonment. At the time of sentencing, the crime of which the defendant was convicted made him ineligible for parole." *State* v. *Williams-Bey*, supra, 333 Conn. 471. Pursuant to *Miller* and § 54-125a (f), the defendant in *Williams-Bey* filed a motion to correct an illegal sentence alleging a violation of the eighth amendment. Id., 473. The trial court dismissed the motion for lack of subject matter jurisdiction. The defendant appealed to this court. This court rejected the defendant's claim and upheld the sentence, holding that the trial court had jurisdiction over the defendant's claim and that P.A. 15-84, § 1, remedied any sentencing violation. *State* v. *Williams-Bey*, supra, 167 Conn. App. 749–50. The defendant thereafter petitioned for certification to appeal to our Supreme Court. See *State* v. *Williams-Bey*, 326 Conn. 920, 169 A.3d 793 (2017.)

Our Supreme Court granted the defendant's petition for certification to appeal, limited to the following questions: "1. Under the Connecticut constitution, article first, §§ 8 and 9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States constitution for cases involving juveniles who have been sentenced to life imprisonment without the possibility of release? . . . 2. If the answer to the first question is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut constitution, does parole eligibility under . . . § 54-125a (f) adequately remedy any state constitutional violation?" (Citation omitted; internal quotation marks omitted.) *State* v. *Williams-Bey*, supra, 333 Conn. 474–75. The court concluded that parole eligibility under § 54-125a (f) adequately remedied any *Miller* violation under the Connecticut constitution, noting that because the defendant in *Williams-Bey* was parole eligible, he was not entitled to resentencing under the state

constitution. Id., 476–77, quoting *State* v. *McCleese*, supra, 333 Conn. 387.

Our Supreme Court precedent in *Delgado*, *Williams-Bey* and *McCleese* makes clear that, in light of § 54-125a, a habeas petitioner can no longer prevail on a claim that his sentence was imposed in an illegal manner when a court fails to consider the mitigating factors of youth when imposing the equivalent of a life sentence because § 54-125a currently provides an adequate remedy.

The form of the judgment is improper as to the dismissal of the second count of the habeas petition, the judgment is reversed as to that count and the case is remanded with direction to render judgment denying that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

SCOTT CRAWLEY *v.* COMMISSIONER OF CORRECTION
(AC 41052)

Keller, Elgo and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of possession of narcotics with the intent to sell by a person who is not drug-dependent, sought a writ of habeas corpus. He claimed, inter alia, that his criminal trial counsel rendered ineffective assistance by failing to move to suppress cocaine that the police found during a search of his bedroom in the residence of the home in which he had been staying. The petitioner also claimed, inter alia, that his habeas counsel in a prior habeas action rendered ineffective assistance by failing to raise that claim of ineffective assistance of trial counsel. The police had found the cocaine after they obtained the written consent of the owner of the home to search the petitioner's bedroom. The habeas court dismissed the petitioner's claims that his trial counsel rendered ineffective assistance, concluding that they were barred by the successive petition doctrine codified in the applicable rule of practice (§ 23-29 [3]). The court also determined that the petitioner failed to prove deficient performance by his prior habeas

counsel or prejudice that resulted therefrom. The court thereafter granted the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court properly dismissed the petitioner's claims of ineffective assistance of trial counsel pursuant to the successive petition doctrine in § 23-29 (3); the petitioner's claims were predicated on the same ground that was raised in his prior habeas action, the petitioner did not allege that his claims were based on newly discovered facts or evidence, and he sought the very same relief that he had requested in the first habeas action.
2. The petitioner could not prevail on his assertion that the habeas court improperly denied his claim of ineffective assistance of prior habeas counsel; trial counsel's failure to file a motion to suppress the drugs that were found in the petitioner's bedroom predicated on a theory that the petitioner exclusively possessed the bedroom and, by extension, the cocaine discovered therein, was not objectively unreasonable, as trial counsel necessarily had to weigh the motion's limited probability of success against its potential impact on a contrary theory of defense that was based on the petitioner's nonexclusive use of the bedroom, counsel had to be mindful that any suppression hearing testimony by the petitioner regarding his exclusive possession of the bedroom could be used against him at trial, which made the pursuit of a motion to suppress fraught with risk, and because the petitioner did not demonstrate deficient performance on the part of his trial counsel, his claim of ineffective assistance of prior habeas counsel necessarily failed.

Argued September 16—officially released November 26, 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*.

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

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

Opinion

ELGO, J. The petitioner, Scott Crawley, appeals from the judgment of the habeas court dismissing in part and denying in part his amended petition for a writ of habeas corpus. He contends that the court improperly rejected his claims of ineffective assistance on the part of both his criminal trial counsel and his first habeas counsel. We affirm the judgment of the habeas court.

This appeal concerns the petitioner's convictions on two counts of possession of narcotics with the intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b). The relevant facts underlying those convictions were set forth in this court's decision on the petitioner's direct appeal. "On September 5, 2002, Joseph Amato, a detective with the Manchester police department who was assigned to the federal Drug Enforcement Administration, informed Thomas Dillon, then a detective with the Wethersfield police department, that the [petitioner] possessed a 'large quantity of cocaine.' Amato informed Dillon of the [petitioner's] known address in Wethersfield and related information concerning [the petitioner's] automobile and license plate number. During his subsequent investigation, Dillon learned that the [petitioner's] operator's license was suspended.

"On September 6, 2002, Dillon conducted surveillance at the Wethersfield address given to him by Amato. Dillon observed the [petitioner] get into his automobile and drive away. At Dillon's request, Christopher Morris, a Wethersfield police officer, stopped the [petitioner's] automobile at a gasoline station and arrested the [petitioner] on a charge of driving with a suspended license. Morris searched the [petitioner] incident to the arrest and found a bag containing 120 smaller bags of cocaine, in a powder mixture, in one of the front pockets of the [petitioner's] pants. The cocaine powder weighed 87.32

grams and consisted of between 17 to 60 percent pure cocaine.

"Later that day, Robert Deroehn, a detective with the Wethersfield police department, arrived at the [petitioner's] known residence in Wethersfield, 7 Spring Street [residence]. There, Deroehn encountered Daniel Hardrick, who owned the residence. Hardrick told Deroehn that the [petitioner] did not live at the residence but that the [petitioner] 'stayed there.' Hardrick signed a consent form, thereby permitting the police to enter and search the home without a warrant. Amato searched the [petitioner's] room and discovered a postal mailing tube that contained two bags of cocaine, in a powder mixture, in the closet in the [petitioner's] room. One bag contained 26.73 grams of cocaine powder separated into thirty-eight smaller bags. Another bag contained 62.60 grams of cocaine powder and consisted of 72 percent pure cocaine. On the basis of evidence concerning, inter alia, the quantities of cocaine possessed by the [petitioner], as well as the quantities of cocaine typically possessed by persons who intend to sell cocaine, the jury reasonably found that the [petitioner] possessed both stashes of cocaine with the intent to sell them." *State* v. *Crawley*, 93 Conn. App. 548, 550–51, 889 A.2d 930, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). The jury thus found the petitioner guilty on all counts, and the trial court rendered judgments accordingly, sentencing the petitioner to a total effective term of thirty years of incarceration. Id., 550 n.1. From those judgments, the petitioner unsuccessfully appealed to this court.[1] Id., 569.

The petitioner commenced his first habeas action in 2006, alleging that his criminal trial counsel, Attorney

[1] In his direct appeal, the petitioner alleged instructional error, a double jeopardy violation, and that the evidence adduced at trial was insufficient to establish his possession of the cocaine discovered at the residence. *State* v. *Crawley*, supra, 93 Conn. App. 550.

Donald Freeman, had rendered ineffective assistance by failing (1) to present evidence that the petitioner was a drug-dependent person and (2) to preserve his right to sentence review. The petitioner was represented by Attorney Hilary Carpenter at the habeas trial, at the conclusion of which the court agreed with the petitioner's latter contention and restored his right to sentence review.[2] At the same time, the court rejected his other claim of ineffective assistance of counsel. From that judgment, the petitioner unsuccessfully appealed to this court. See *Crawley* v. *Commissioner of Correction*, 141 Conn. App. 660, 62 A.3d 1138, cert. denied, 308 Conn. 946, 68 A.3d 656 (2013).

In subsequent years, the petitioner filed four successive petitions for a writ of habeas corpus. The habeas court dismissed each of those petitions.

The petitioner commenced the present habeas action in 2014. In his petition, the petitioner alleged ineffective assistance on the part of Freeman due to his failure (1) to move to suppress the cocaine found in the residence and (2) to provide a competent summation to the jury. The petitioner further alleged ineffective assistance on the part of Carpenter due to her failure to raise those two claims of ineffective assistance of trial counsel in his first habeas action. In answering that petition, the respondent, the Commissioner of Correction, alleged a successive petitions defense, claiming that the petitioner's claims were "premised upon the same legal grounds" that he asserted in his first habeas action. Following a trial, the habeas court, relying on the successive petition doctrine, dismissed the two counts alleging ineffective assistance of trial counsel and denied the petition in all other respects. The court subsequently granted certification to appeal from that judgment, and this appeal followed.

[2] The sentence review division thereafter modified the petitioner's total effective sentence, which resulted in a reduction thereto. See *Crawley* v. *Commissioner of Correction*, 141 Conn. App. 660, 663 n.2, 62 A.3d 1138, cert. denied, 308 Conn. 946, 68 A.3d 656 (2013).

I

The petitioner first claims that Freeman rendered ineffective assistance by failing to file a motion to suppress the cocaine found in the residence. In rejecting that claim, the court concluded that it was barred by the successive petition doctrine. We agree.

As our Supreme Court has observed, the successive petition doctrine involves the "one situation in which a court is not 'legally required' to hear a habeas petition." *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 93, 644 A.2d 340 (1994). The doctrine is codified in Practice Book § 23-29, which provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (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 . . . ." That rule comports with the teaching of *Negron* v. *Warden*, 180 Conn. 153, 158, 429 A.2d 841 (1980), in which the Supreme Court held that "trial courts may dismiss a second [habeas] application without a hearing only if that application asserts the same grounds and fails to state new facts or proffer new evidence not reasonably available to the petitioner at the hearing on his previous application."

In the present case, the habeas court dismissed the two counts of ineffective assistance on the part of the petitioner's trial counsel pursuant to Practice Book § 23-29 (3), concluding that they were predicated on the same ground that was raised in the petitioner's first habeas action. On our plenary review of the record; see *Gudino* v. *Commissioner of Correction*, 191 Conn. App. 263, 271, 214 A.3d 383, cert. denied, 333 Conn. 924, A.3d (2019); we agree.

This court previously has held that "[a] claim of ineffective assistance of counsel during trial proceedings constitutes the 'same ground' for purposes of [Practice Book] § 23-29 (3), despite changes in the precise underlying specifications of deficient performance, unless such new specifications are based on facts or evidence not reasonably available when the ground was raised in the earlier petition." *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 318, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018); see also *Alvarado* v. *Commissioner of Correction*, 153 Conn. App. 645, 651, 103 A.3d 169 ("[w]e . . . note that there is no claim that the third habeas petition contains newly discovered facts"), cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). As in the petitioner's first habeas action, the first two counts of the operative petition here allege ineffective assistance on the part of Freeman. The petitioner has not alleged that those counts are based on newly discovered facts or evidence. Moreover, the petitioner seeks the very same relief that he requested in his first habeas action—namely, vacatur of his conviction. In such circumstances, the successive petition doctrine plainly applies. See *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 279, 35 A.3d 337 (applying successive petition doctrine when "the petitioner's second habeas petition was not founded on a new legal ground, nor does it seek different relief"), cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013); *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 231, 888 A.2d 183 ("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"), cert. denied, 277 Conn. 917, 895 A.2d 789 (2006). In light of the foregoing, we conclude that

the habeas court properly dismissed the counts alleging ineffective assistance on the part of Freeman.

II

The petitioner also challenges the court's determination that he had not proven ineffective assistance on the part of Carpenter, his first habeas counsel, for failing to raise an additional claim of ineffectiveness by Freeman.[3] The successive petition doctrine does not operate as a bar to that claim. As our Supreme Court has explained, in such instances, "the second habeas petition is not predicated on the same issues addressed in the first petition. Although the petitioner must, by necessity, repeat his allegations of trial counsel's inadequacy, there may never have been a proper determination of that issue in the first habeas proceeding because of the allegedly incompetent habeas counsel. The claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue." *Lozada* v. *Warden*, 223 Conn. 834, 844, 613 A.2d 818 (1992). Accordingly, we must consider the merits of the petitioner's claim.

To prevail on an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, "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*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance

[3] With respect to the petitioner's claims of ineffective assistance of habeas counsel, the habeas court concluded that the petitioner had failed to prove either deficient performance on the part of counsel or prejudice resulting therefrom.

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 . . . .

"It 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.) *Brewer* v. *Commissioner of Correction*, 189 Conn. App. 556, 561–62, 208 A.3d 314, cert. denied, 332 Conn. 903, 208 A.3d 659 (2019).

On appeal, the petitioner alleges that Carpenter, as habeas counsel, rendered ineffective assistance in failing to pursue an ineffective assistance of trial counsel claim in his first habeas action regarding Freeman's failure to move to suppress the cocaine found in the residence.[4] Specifically, the petitioner alleges that there was a lack of consent for the search due to his exclusive possession of the bedroom in which the cocaine was found. Freeman's failure to file a motion to suppress on that basis underlies the petitioner's claim of ineffective assistance of habeas counsel.

The following additional facts are relevant to that claim. In his operative petition, the petitioner alleged,

[4] Although he also alleged, in counts two and four of the operative petition, ineffective assistance predicated on Freeman's failure to provide a competent summation to the jury, the petitioner has raised no claim in this appeal with respect thereto. We therefore deem any such claims abandoned. See *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 212 n.3, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

inter alia, that the search of the residence was conducted "without valid consent . . . ." At the habeas trial, the court was presented with uncontroverted evidence that the petitioner was thirty-seven years old at the time in question and resided at the two bedroom residence with his mother and Hardrick, his stepfather. The court also was presented with documentary and testimonial evidence that Hardrick, acting in his capacity as an owner of the residence, had signed a written consent form prior to the search of the residence conducted on September 6, 2002. A copy of that consent form, which was admitted into evidence, authorized members of the Wethersfield Police Department "to conduct a complete search" of the residence. The court also received evidence that, prior to the petitioner's criminal trial, Freeman had filed a motion to suppress "any and all items seized on September 6, 2002 by the Wethersfield Police Department," arguing that such items constituted the fruits of an unlawful search and seizure conducted as part of an automobile stop on the previous day, which the trial court denied.[5] At his criminal trial, the petitioner's theory of defense was that he lacked exclusive possession of the bedroom in which the cocaine was found.[6]

[5] A copy of the motion to suppress and accompanying memorandum of law, dated December 4, 2002, was admitted into evidence at the habeas trial. Freeman likewise confirmed at trial that he recalled "arguing repeatedly that once the [automobile] stop is suppressed and found to be bogus, everything else, including that Wethersfield search," must be suppressed. The record before us also includes a copy of the transcript of the August 12, 2003 hearing on the motion to suppress, at which Freeman argued in relevant part that "if that [automobile] stop was bad, then everything that happened in Wethersfield . . . was a direct result of that [automobile] stop and [is the fruit] of a poisonous tree, and everything is suppressed."

[6] As this court noted in the petitioner's direct appeal, the petitioner argued "that the evidence did not demonstrate that he exclusively possessed the premises where the narcotics were found." *State* v. *Crawley*, supra, 93 Conn. App. 562. In his testimony at the habeas trial, the petitioner likewise confirmed that Freeman's argument at trial was that the state could not connect him to the cocaine discovered in the residence.

It is well established that "[a] warrantless search is not unreasonable under either the fourth amendment to the constitution of the United States or article first, § 7, of the constitution of Connecticut if a person with authority to do so has freely consented to the search. . . . The state bears the burden of proving [by a preponderance of the evidence] that the consent was free and voluntary . . . ." *State* v. *Jenkins*, 298 Conn. 209, 249, 3 A.3d 806 (2010). In light of the written consent form signed by Hardrick, as well as Hardrick's testimony that the Wethersfield police officers received his consent to search the residence, the state likely could have established at a suppression hearing that Hardrick's consent was freely and voluntarily provided.

The proper scope of that consent is another question altogether. On appeal, the petitioner maintains that Freeman rendered ineffective assistance by not pursuing a motion to suppress predicated on Hardrick's alleged lack of authority to consent to the search of his stepson's bedroom.

In *State* v. *Azukas*, 278 Conn. 267, 897 A.2d 554 (2006), our Supreme Court articulated the legal principles that govern third-party consent when a parental relationship is present. The court first observed that "the overwhelming majority of the cases hold that a parent may consent to a police search of a home that is effective against a child, if a son or a daughter, whether or not still a minor, is residing in the home with the parents . . . ."[7] (Internal quotation marks omitted.) Id., 278; accord *United States* v. *Romero*, 749 F.3d 900, 905 (10th Cir. 2014) ("when a child lives with a parent, the parent-child relationship establishes a presumption that the parent has control for most purposes over the property

[7] With respect to familial relationships, we note that our Supreme Court has concluded that the consent of a stepmother, as memorialized on a signed consent form, to search her stepson's bedroom was valid. See *State* v. *Jones*, 193 Conn. 70, 77–81, 475 A.2d 1087 (1984).

and therefore actual authority to consent to a search of the entire home"); *State* v. *Crumb*, 307 N.J. Super. 204, 243–44, 704 A.2d 952 (App. Div. 1997) ("[e]ven in cases where the child has reached adulthood, courts have been reluctant to find that the son or daughter had exclusive possession of a room in the parent's home").

To overcome that presumption of parental authority, our Supreme Court explained, "the child must establish sufficiently exclusive possession of the room to render the parent's consent ineffective. . . . Factors [to consider] when evaluating whether a child has established sufficiently exclusive possession of the room include: whether the child is paying rent; who has ownership of the home; whether the door to the bedroom is generally kept closed; whether there is a lock on the door; whether other members of the family use the room; and whether other members of the family had access to the room for any reason." (Citation omitted; internal quotation marks omitted.) *State* v. *Azukas*, supra, 278 Conn. 278. The petitioner claims that Freeman rendered ineffective assistance in failing to pursue such a claim. We do not agree.

At the habeas trial, the petitioner submitted testimonial evidence to support his claim that he possessed exclusive possession over the bedroom in question. Specifically, the petitioner testified that his exclusive occupancy of the residence's second bedroom "was generally known" among family members who shared that residence and that he was the only person who could permit access to that bedroom. The petitioner further testified that the bedroom door had a lock, that he kept the door shut, and that he paid rent. The petitioner also called Hardrick as a witness, who testified that no one was allowed into the bedroom without the petitioner's permission.

At the same time, that evidence of exclusive possession was undercut by testimony at the habeas trial

from Hardrick's grandson, Glenn Miller. Contrary to Hardrick's testimony that Miller never slept at the residence, Miller testified that he had stayed at the residence on "one or two weekends" per month. When he did so, Miller testified, he "stayed upstairs" in what he called the "spare" bedroom "[m]ost of the time . . . ." Miller testified that he never obtained the petitioner's permission to do so; rather, Hardrick had provided such permission. The petitioner's claim of exclusive possession also is contrary to the testimony of Detective Deroehn, who obtained Hardrick's consent to search the residence on September 6, 2002. Deroehn testified at the petitioner's criminal trial that Hardrick "told him that the [petitioner] did not live at the residence" and only " 'stayed there' occasionally." *State* v. *Crawley*, supra, 93 Conn. App. 561. For that reason, the habeas court aptly observed that "suppression of the cocaine found in the bedroom was a mere possibility rather than a probability."

In considering the viability of a motion to suppress that is based on a theory of exclusive possession of the bedroom, Freeman necessarily had to weigh its limited probability of success against its potential impact on a contrary theory of defense predicated on the petitioner's *nonexclusive* use of the bedroom. As both Freeman and the petitioner confirmed at the habeas trial, Freeman's objective was to distance the petitioner from the cocaine found in the bedroom. Freeman also had to be mindful that any suppression hearing testimony provided by the petitioner regarding his exclusive possession of the bedroom in question could be used against him at trial for impeachment purposes. See *United States* v. *Jaswal*, 47 F.3d 539, 543–44 (2d Cir. 1995) (holding that defendant's testimony at suppression hearing can be used to impeach defendant's testimony at trial but not to prove guilt); *State* v. *Vega*, 163 Conn.

304, 307–308, 306 A.2d 855 (1972) (defendant's testimony at suppression hearing admissible at subsequent trial as prior inconsistent statement). For that reason, we agree with the habeas court that the pursuit of a motion to suppress predicated on the petitioner's allegedly exclusive possession of the bedroom was one fraught with risk.

"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." *Brewer* v. *Commissioner of Correction*, supra, 189 Conn. App. 561–62. On our review of the record before us, we conclude that the petitioner has not overcome that presumption. Freeman's failure to file a motion to suppress predicated on a theory that the petitioner exclusively possessed the bedroom in question and, by extension, the cocaine discovered therein, was not objectively unreasonable in light of the particular circumstances of this case. We therefore conclude that the petitioner has not demonstrated deficient performance on the part of his criminal trial counsel.

In light of that conclusion, the petitioner's ineffective assistance of habeas counsel claim necessarily fails. See *Lozada* v. *Warden*, supra, 223 Conn. 842–43; *Denby* v. *Commissioner of Correction*, 66 Conn. App. 809, 814, 786 A.2d 442 (2001), cert. denied, 259 Conn. 908, 789 A.2d 994 (2002). Accordingly, the court properly denied the petition for a writ of habeas corpus with respect to that claim.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID DUBINSKY *v.* JOYCE RICCIO
(AC 41606)

Keller, Moll and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney for, inter alia, legal malpractice in connection with the defendant's representation of the plaintiff in a divorce proceeding. The plaintiff claimed, inter alia, that the defendant had failed to advise him of the rights that he was giving up by entering into a separation agreement that was incorporated into the dissolution judgment. The trial court granted the defendant's motion for summary judgment, concluding that an issue of material fact did not exist. From the judgment rendered thereon in favor of the defendant, the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's legal malpractice claim; this court, applying the well established principles that govern the review of a decision to render summary judgment, adopted the trial court's concise and well reasoned decision as a proper statement of the facts and applicable law on the issues.

Argued October 16—officially released November 26, 2019

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Krumeich*, *J.*, granted the defendant's motion to strike; thereafter, the court, *Truglia*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Jane S. Bietz, with whom, on the brief, was *Carmine Annunziata*, for the appellee (defendant).

Opinion

PER CURIAM. In 2016, the plaintiff, David Dubinsky, brought a civil action against the defendant attorney, Joyce Riccio, in which he set forth claims sounding in

legal malpractice and breach of contract. The plaintiff appeals from the summary judgment rendered in favor of the defendant with respect to the legal malpractice count of his complaint. We affirm the judgment of the trial court.

The record reflects that, in 2016, the plaintiff commenced the underlying action by way of a two count complaint. In relevant part, the plaintiff alleged that, in 2012, he hired the defendant to represent him during divorce proceedings, which culminated in his entering into a separation agreement with his former wife at the time the judgment of dissolution was rendered on August 9, 2013. On that date, a July 10, 2013 custody and access agreement was incorporated by reference into the separation agreement, and the separation agreement, after being found to be fair and equitable by the court, was incorporated by reference into the judgment of dissolution. In the legal malpractice count of his complaint, the plaintiff alleged that the defendant breached in a variety of ways the professional duty that she owed him as his attorney. In general terms, he alleged that she failed to advise him of the rights he was giving up by entering into the agreement, she was not adequately prepared to proceed to trial, and she failed to protect his interests. The plaintiff alleged that, relying on the defendant's inadequate representation, he entered into the agreement to his detriment, resulting in his sustaining a variety of damages. With respect to the breach of contract count, the plaintiff alleged that he entered into a contract with the defendant, thereby requiring her to represent his interests in the divorce proceeding, but that she breached the contract by failing to do so, resulting in his sustaining a variety of damages. The plaintiff sought monetary and punitive damages, costs, and other relief deemed fair and equitable by the court.

In 2017, the court, *Krumeich*, *J.*, granted the defendant's motion to strike the breach of contract count of the complaint and, thereafter, granted the defendant's motion for judgment to enter in her favor with respect to this count. The court's judgment with respect to the breach of contract count is not a subject of the present appeal.

With respect to the legal malpractice count of the complaint, the defendant filed an answer in which she denied the allegations of deficient representation and set forth a special defense that the "claimed losses and damages were caused by [the plaintiff's] own conduct." Thereafter, the defendant filed a motion for summary judgment accompanied by a memorandum of law with respect to the legal malpractice count of the complaint. The defendant submitted to the court a voluminous collection of materials related to her representation of the plaintiff during the divorce proceeding, including highly detailed written correspondence between the plaintiff and the defendant concerning the terms of the separation agreement. In response, the plaintiff filed a written objection and a supporting memorandum of law. Attached to the plaintiff's memorandum of law in opposition to the defendant's motion were excerpts of his deposition testimony in the present action.

On March 19, 2018, the court, *Truglia*, *J.*, heard arguments related to the motion for summary judgment and the plaintiff's objection. At the conclusion of the hearing, the court stated that it was persuaded by the rationale set forth in the defendant's motion, that an issue of material fact did not exist, and that the defendant was entitled as a matter of law to summary judgment in her favor. Thereafter, the court issued an order that more fully explained the legal basis of its ruling. We consider the order to constitute the court's memorandum of decision. The court subsequently denied the plaintiff's motion seeking reargument or reconsideration of its decision. This appeal followed.

We construe the plaintiff's claims on appeal, which are not a model of clarity, as follows: (1) the defendant was unable to demonstrate that she was entitled to judgment in her favor solely because the plaintiff entered into a separation agreement during the dissolution action; (2) the defendant was unable to demonstrate that she was entitled to judgment in her favor on the basis of alleged deficiencies in the manner in which the plaintiff framed the pleadings; and (3) the plaintiff demonstrated that an issue of fact existed with respect to whether the defendant adequately informed him of the terms of the separation agreement and whether the advice she provided to him was reasonable. We observe that, with respect to claims one and two, the plaintiff appears to challenge, as rulings, arguments that were allegedly advanced by the defendant before the trial court, not claimed errors made by the trial court in ruling on the motion for summary judgment that would warrant reversal of the judgment by this court.

We carefully have examined the record of the proceedings before the trial court, in addition to the parties' appellate briefs and oral arguments. Applying the well established principles that govern our review of a court's decision to render summary judgment; see, e.g., *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 598–99, 211 A.3d 976 (2019); we conclude that the judgment of the trial court should be affirmed. We adopt the court's concise and well reasoned decision as a proper statement of the facts and the applicable law on the issues. See *Dubinsky* v. *Riccio*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6059152-S (March 19, 2018) (reprinted at 194 Conn. App. 592, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011); *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, 112, 213 A.3d 542 (2019).

The judgment is affirmed.

APPENDIX
DAVID DUBINSKY *v.* JOYCE RICCIO*

Superior Court, Judicial District of Fairfield
File No. CV-16-6059152-S

Memorandum filed March 19, 2018

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Kenneth A. Votre, for the plaintiff.

Amber J. Hines, for the defendant.

Opinion

TRUGLIA, J. The court has carefully reviewed the defendant's motion for summary judgment and supporting memorandum of law. The court has carefully reviewed all of the exhibits attached to the defendant's memorandum, including the defendant's affidavit, the record of e-mail correspondence between the plaintiff and the defendant, and the transcript of the plaintiff's own sworn testimony before the Honorable Gerard I. Adelman, dated July 10, 2013, and before the Honorable Howard T. Owens, Jr., dated August 9, 2013.

After reviewing the motion and exhibits, the court finds that there are no genuine issues of material fact as to the defendant's liability in this case. The defendant has demonstrated that there is no evidence upon which the trier of fat could find that the defendant breached her duty of care in her representation of the plaintiff in his dissolution of marriage action. The gravamen of the plaintiff's claim is that he entered into a separation agreement to settle his divorce action unaware of certain rights that he was giving up, including certain custody and visitation rights to his son. The plaintiff also alleges that the defendant was negligent in failing to

* Affirmed. *Dubinsky* v. *Riccio*, 194 Conn. App. 588, A.3d (2019).

obtain more favorable terms for him in his divorce action and in failing to be prepared to defend his interests if the matter had proceeded to trial.

Uncontroverted evidence submitted by the defendant in support of her motion shows that the plaintiff was fully aware of all of the terms of his separation agreement before it was approved by the court, including all of the custody and visitation provisions relating to his son. Uncontradicted evidence also shows that the defendant made every effort to communicate with the plaintiff prior to his trial date in order to prepare for trial. The defendant only ceased her efforts to prepare for trial at the plaintiff's repeated, written instructions that he did not wish to go to trial, but instead, wished to settle his case.

The defendant has established that she would be entitled to a directed verdict at trial; *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 294, 977 A.2d 189 (2009); the plaintiff, however, has not demonstrated the existence of a material fact as to the defendant's liability to him for professional negligence. The court agrees with the plaintiff that he is not foreclosed from bringing an action for malpractice against his attorney merely because he settled his divorce case and signed a separation agreement. See *Grayson* v. *Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195 (1994). In such cases, however, a general allegation of negligence is not sufficient. Rather, a plaintiff must specify what negligent actions or omissions by counsel caused the damages he claims he sustained. Id., 177. Here, the plaintiff has not specified what negligent actions or omissions caused the injuries and losses he now claims.

The court also agrees with the defendant that the plaintiff provides no evidence in support of any of his general claims of malpractice other than vague allegations and speculative contentions. In light of the evidence presented by the defendant in support of her

motion, the plaintiff's deposition testimony is insufficient to establish the existence of a genuine issue of material fact. See, e.g., *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014).

As the defendant would be entitled to a directed verdict at trial, the court grants her motion for summary judgment.

Judgment enters in favor of the defendant and against the plaintiff on the first count of the plaintiff's complaint.

Judicial notice (JDNO) was sent regarding this order.

STATE OF CONNECTICUT *v.* JOSE E. RAMOS
(AC 42330)

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

Syllabus

The defendant, who had been convicted of the crime of murder, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. In his motion to correct, the defendant sought to have the court vacate the judgment of conviction on the ground that he was not the defendant named in the charging instrument and, thus, that the court lacked jurisdiction over him. The trial court denied the motion to correct on the ground that the claim raised therein did not challenge the legality of the sentence imposed. *Held* that although the trial court correctly determined that the defendant's motion to correct an illegal sentence was not the proper procedural vehicle to raise his claim concerning the legality of his conviction, the trial court should have dismissed, rather than denied, the motion to correct, as it raised claims that did not challenge the legality of the sentence imposed or the disposition made during the sentencing proceeding, and, therefore, the court lacked jurisdiction over the motion.

Argued October 23—officially released November 26, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London and tried to the jury

before *A. Hadden, J.*; verdict and judgment of guilty; thereafter, the court, *Strackbein, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

Jose E. Ramos, self-represented, the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Lawrence J. Tytla*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Jose E. Ramos, appeals from the judgment of the trial court denying his motion to correct an illegal sentence.[1] In 2016, following a jury trial, the defendant was convicted of murder in violation of General Statutes § 53a-54a.[2] Thereafter, the court, *A. Hadden, J.*, imposed a sentence of sixty years of incarceration. In his motion to correct, filed on September 5, 2018, the defendant asked the court to reverse or vacate the judgment of conviction on the ground that the court lacked jurisdiction over him because he "is not the defendant named in the charging instrument." The defendant also presented the court with a memorandum of law that, in his view, supported his claim. The court, *Strackbein, J.*, heard argument on the motion on October 12, 2018. In its October 16, 2018 memorandum of decision, the court, noting that the defendant's arguments in support of the motion generally were incomprehensible, nonetheless accurately distilled his arguments to be his assertion

[1] The defendant represented himself before the trial court in bringing the motion to correct, and he represents himself before this court in bringing the present appeal.

[2] See *State* v. *Ramos*, 178 Conn. App. 400, 175 A.3d 1265 (2017) (affirming judgment of conviction), cert. denied, 327 Conn. 1003, 176 A.3d 1195, cert. denied, U.S. , 138 S. Ct. 2656, 201 L. Ed. 2d 1056 (2018).

that he is a "sovereign citizen," and, therefore, his conviction was illegal because he was not subject to the jurisdiction of the court. The court reasoned that the arguments raised by the defendant in the motion to correct did not challenge the legality of the sentence imposed, assert a violation of his double jeopardy rights, or implicate any of the established criteria on which it could afford him any relief with respect to the sentence imposed. The court denied the motion to correct, and this appeal followed.[3]

Recently, this court reiterated the settled principles of law that govern motions to correct an illegal sentence as follows: "[Our Supreme Court] has held that the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Practice Book § 43-22, which provides the trial court with such authority, provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . We previously have noted that a defendant may challenge his or her criminal sentence on the ground that it is illegal by raising the issue on direct appeal or by filing a motion pursuant to § 43-22 with the judicial authority, namely, the trial court. . . . Simply stated, a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence

[3] The defendant filed the appeal in our Supreme Court. The Supreme Court transferred the appeal to this court pursuant to Practice Book § 65-4.

after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Citations omitted; internal quotation marks omitted.) *State* v. *Battle*, 192 Conn. App. 128, 134–35, A.3d (2019); see also *State* v. *Lawrence*, 281 Conn. 147, 158–59, 913 A.2d 428 (2007).

On the basis of our review of the record and the arguments advanced by the defendant before this court, we conclude that the trial court correctly determined that the defendant's motion to correct was not the proper procedural vehicle to raise the claim set forth therein because, properly construed, it attacks the validity of the defendant's underlying conviction. We conclude, however, that the court should have dismissed, rather than denied, the motion. As we previously have determined, a trial court lacks subject matter jurisdiction and, therefore, should dismiss claims raised in a motion to correct that do not challenge the legality of the sentence imposed or disposition made during a sentencing proceeding. See, e.g., *State* v. *Brown*, 192 Conn. App. 147, 155, A.3d (2019); *State* v. *Walker*, 187 Conn. App. 776, 794–95, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019); *State* v. *Gemmell*, 155 Conn. App. 789, 791, 110 A.3d 1234, cert. denied, 316 Conn. 913, 111 A.3d 886 (2015); *State* v. *Smith*, 150 Conn. App. 623, 636–37, 92 A.3d 975, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014).

The form of the judgment is improper, the judgment denying the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment dismissing the motion for lack of subject matter jurisdiction.