JOHN B. *v.* COMMISSIONER OF CORRECTION*
(AC 41640)

Lavine, Prescott and Harper, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, the crimes of attempt to commit kidnapping in the first degree and attempt to commit sexual assault in the first degree, sought a writ of habeas corpus, claiming, inter alia, that under current case law interpreting the kidnapping statutes, including *State* v. *Salamon* (287 Conn. 509), his due process rights under the federal and state constitutions were violated due to the trial court's failure to properly instruct the jury. The petitioner's conviction stemmed from his conduct in bursting through the door of the victim's apartment, choking her and engaging in a physical struggle with her, after which he dragged her out of the apartment and into a nearby hallway. Eventually the struggle moved outdoors, where a bystander heard the victim's

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

screams and restrained the petitioner until the police arrived. While at the police station, the petitioner admitted that he intended to bring the victim back to his apartment to rape and torture her. Although the trial court did not instruct the jury that in order to find the petitioner guilty of attempted kidnapping, it had to find that he intended to restrain the victim to a greater degree than was necessary to commit sexual assault, the habeas court concluded that the trial court was not required to give a *Salamon* instruction and that even if it had been required to do so, the absence of a *Salamon* instruction was completely harmless because there was no reasonable possibility that a jury instructed pursuant to *Salamon* would have reached a different result than it did. Accordingly, the habeas court rendered judgment denying the amended petition, and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The petitioner's claim that the habeas court's failure to give the jury a *Salamon* instruction was not harmless error was unavailing, that court having properly concluded, on the basis of the evidence, that the petitioner was not entitled to a *Salamon* instruction because he intended to abduct and restrain the victim for a longer period of time and to a greater degree than would have been necessary to commit the other charged offenses and was only thwarted by the victim's own efforts to escape and the timely intercession of a third party: the evidence demonstrated that the petitioner intended to render the victim unconscious, bind her and take her to his apartment where he would rape and torture her, and that he engaged in conduct designed to carry out his plan when he burst into her apartment, choked her and chased her when she attempted to get away, and his attempt to bind and move the victim from her apartment to his apartment where he intended to rape and torture her increased the risk of harm, prevented her from seeking help and would have prevented the crime from being detected, which showed that he prevented the victim's liberation for a longer period of time or to a greater degree than that which would have been necessary to commit the other crime; moreover, the state was not required to establish any minimum period of confinement or degree of movement, the petitioner, who was convicted of attempt to commit kidnapping in the first degree, failed to address the law pertaining to the crime of attempt as it related to the facts of this case, and because the trial court was not required to give the jury a *Salamon* instruction, it was not necessary for this court to determine whether the absence of such an instruction was harmless error.
2. The petitioner's claim that his trial counsel was ineffective in conceding his guilt to a burglary charge during closing argument was unavailing; the habeas court properly determined that the petitioner failed to satisfy his burden of overcoming the presumption that trial counsel's remarks reflected a reasonable trial strategy, as the petitioner had pursued an affirmative defense that he should be found not guilty by reason of mental disease or defect, which entails an acknowledgment that he

committed the offenses, counsel explained to him that such an affirmative defense constituted an admission of guilt, and although the petitioner was equivocal as to whether he recalled counsel's advice to him about presenting a mental disease or defect defense involving a concession of guilt and claimed that he misunderstood that he would have to concede his factual guilt to all charges, there was no evidence in the record that the petitioner ever objected to counsel's concession strategy and the habeas court made no such finding, and counsel's presentation of that defense was predicated on the evidence in the record, including testimony from two experts that the petitioner was suffering from a mental disease or defect when he committed the charged crimes.

Argued September 17—officially released December 17, 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, *Kwak*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, John B., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred when it concluded that (1) the trial court's failure to charge the jury pursuant to *Salamon*[1] was harmless beyond a reasonable doubt and (2) trial counsel did not render ineffective assistance of counsel. We affirm the judgment of the habeas court.

[1] *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008).

The following procedural history is relevant to the petitioner's claims. The petitioner is in the custody of the respondent, the Commissioner of Correction, serving consecutive sentences totaling fifty-five years that were imposed by the trial court following two jury trials. On January 28, 2005, the petitioner was sentenced to fifteen years in prison after a jury found him guilty of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) and assault of a peace officer in violation of General Statutes § 53a-167c (a) (1) (assault case). The petitioner's conviction was upheld on direct appeal.

On December 5, 2005, the petitioner was sentenced to forty years in prison after a jury found him guilty of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), attempt to commit kidnapping in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-92 (a) (2) (A), burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and interfering with an officer in violation of General Statutes § 53a-167a (a). *State* v. *John B.*, 102 Conn. App. 453, 455, 925 A.2d 1235, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007) (attempted kidnapping case).[2] The petitioner's conviction was upheld on direct appeal. Id.[3]

[2] The charges in the assault case arose out of an incident that took place in the holding area of the Bristol courthouse while the petitioner was awaiting arraignment on the charges in the attempted kidnapping case. We have omitted a discussion of the facts in the assault case as they are not implicated in the present appeal.

[3] The petitioner filed an application for sentence review with respect to both convictions. He asked the sentence review division to reduce his sentence by ordering that his fifteen year sentence in the assault case and his forty year sentence in the attempted kidnapping case run concurrently, rather than consecutively, for a total effective sentence of forty years. He claimed, pursuant to Practice Book § 43-28, that his fifty-five year sentence was inappropriate and disproportionate because he had no criminal record prior to his convictions in those cases. He also claimed that neither of the victims was seriously injured. The sentence review division determined that the petitioner's sentences fell within the parameters of Practice Book § 43-28.

Following the petitioner's convictions, our Supreme Court rendered a decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), which changed Connecticut law regarding kidnapping in conjunction with another crime. Thereafter, in *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), our Supreme Court held that *Salamon* applied retroactively to collateral attacks on judgments rendered final before *Salamon* was issued. Those two cases are at the heart of the petitioner's *Salamon* or due process claims in this appeal.

On September 11, 2014, the self-represented petitioner initiated the present habeas corpus action. Appointed counsel filed a second amended petition on August 21, 2017, alleging that (1) the petitioner's due process rights under the fifth, sixth, eighth and fourteenth amendments to the federal constitution and article first, § 8, of the constitution of Connecticut were violated by the trial court when it failed to charge the jury pursuant to *State* v. *Salamon*, supra, 287 Conn. 509, and (2) his trial counsel rendered ineffective assistance. The respondent denied the material allegations of the amended petition, and the matter was tried on October 11, 2017. The habeas court denied the petition for a writ of habeas corpus on March 23, 2018, and, thereafter, granted the petitioner certification to appeal.

In its memorandum of decision, the habeas court quoted the facts reasonably found by the jury as stated in this court's opinion in the petitioner's direct appeal in the attempted kidnapping case. See *State* v. *John B.*, supra, 102 Conn. App. 455–48. "[T]he [petitioner] and the female victim were neighbors in an apartment building. The [petitioner] and the victim were acquaintances; they had never spoken to each other on the telephone, but the [petitioner] had once been to the victim's apartment, visiting with her and her granddaughter. At approximately 9:30 p.m. on May 8, 2001, the [petitioner] called the victim on the telephone and invited her to

his apartment to watch a movie with him. The victim declined the invitation, but the [petitioner], in a stern voice, insisted that she come to his apartment. After this initial conversation ended, the [petitioner] called the victim again, but the victim did not answer her telephone.

"A short time later, the [petitioner] appeared at the victim's apartment, knocking on the door and windows. The [petitioner] identified himself and asked the victim to let him into her apartment. The victim became frightened. As she approached the door to her apartment, the [petitioner] burst through the door, wrapped his hands around her throat and began to choke her. A physical struggle between the [petitioner] and the victim ensued. While the victim tried to break free and to protect herself, the [petitioner] dragged her out of her apartment and into a nearby hallway. The [petitioner] told the victim to 'go with it' and to 'let go.' In a hushed voice, the [petitioner] also told the victim that he loved her. At one point during the struggle, the victim pretended to faint, causing the [petitioner] to loosen his grip on her neck. The victim began to flee, but the [petitioner] grabbed her by one of her legs and pulled her back to him. Eventually, the struggle moved outdoors where the victim, experiencing difficulty as a result of the [petitioner's] assault, began screaming for help. The [petitioner] caught up with her and pinned her against a wall.

"A bystander, Myron St. Pierre, heard the victim's cries for help and observed the [petitioner] attempting to pull the victim against her will back inside the apartment building. St. Pierre approached the [petitioner] and the victim, instructing them to break up the melee. The [petitioner] told St. Pierre: '[S]he just got out of a mental institute. She's crazy. We can handle it . . . it's all right.' The victim told St. Pierre that the [petitioner] was lying and was trying to kill her. The victim also asked him to call the police. After the [petitioner] briefly

chased the victim and St. Pierre, St. Pierre physically restrained the [petitioner] on the ground and instructed the victim to run to a nearby police station. The victim took refuge in her apartment and reported the incident to the police. St. Pierre restrained the [petitioner] until the police arrived on the scene.

"When David Posadas, an officer with the local police department arrived at the scene, St. Pierre informed him that the [petitioner] had attacked the victim. Posadas asked the [petitioner] what had occurred, and the [petitioner] replied that he had not attacked the victim. The [petitioner] stated that the victim was suicidal and that he had tried to prevent her from harming herself. Posadas also spoke with the victim, who appeared to be upset and disheveled. The victim related the [petitioner's] actions to Posadas; her account was corroborated in part by the caller identification function on her telephone, which reflected that the [petitioner] had called the victim earlier that evening.

"The [petitioner] was placed under arrest. A search of his person incident to his arrest yielded, among other items, a pair of handcuffs and a 'bondage device.' The [petitioner] consented to a police search of his apartment. Although the [petitioner] was calm and cooperative with the police until and immediately following his arrest, he began mumbling to himself and rocking back and forth during the search of his apartment. During the booking process at the police department, the [petitioner] became combative with the police officers involved; he would not comply with the orders being given to him by the officers and refused to be fingerprinted. . . .

"At approximately 3 a.m. on the morning following his arrest, the [petitioner] indicated that he wanted to discuss the events that culminated in his arrest. After waiving his right to remain silent, the [petitioner] spoke with Sandra Mattucci, an officer with the local police

department. The [petitioner] stated that, on the prior evening, he had intended to help the victim by bringing her 'into a deeper level of consciousness and . . . into a true reality.' He stated that he intended to accomplish this by using the handcuffs and [the] bondage device found on his person and by raping and torturing the victim. The [petitioner] admitted that he entered the victim's apartment and choked the victim to 'make her unconscious so that he could bring her back upstairs to his apartment . . . [and] bring her into this true reality.' He also stated that he previously had used the handcuffs and [the] bondage device on himself and others." Additional facts will be included as necessary.

Before addressing the petitioner's claims, we set forth the standard of review. "Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

The petitioner's first claim on appeal is that the habeas court improperly denied his petition because the trial court's failure to give a jury instruction pursuant to *Salamon* was not harmless beyond a reasonable doubt. We disagree.

We begin with the standard of review applicable to the petitioner's claim. In reviewing the petitioner's *Salamon* claim, we are mindful that mixed questions of law and fact are subject to plenary review. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 65, 135 A.3d 596 (2016). "The applicability of *Salamon* and whether

the trial court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767, cert. denied, 323 Conn. 905, 150 A.3d 685 (2016).

The habeas court determined that the petitioner had alleged that (1) the trial court did not properly instruct the jury with respect to the charge of attempted kidnapping, (2) he was convicted for conduct that the legislature did not intend to criminalize with regard to attempted kidnapping, (3) plea negotiations were unreasonably curtailed in light of the change in the interpretation of the kidnapping statute, (4) he is being unreasonably and cruelly punished for conduct that is, in light of *Salamon*, no longer a crime in Connecticut, and (5) the due process violations prejudiced his case and limited his ability to obtain a lesser sentence or a conviction of a lesser offense.

The habeas court's memorandum of decision discloses that it was cognizant of the controlling law. "[A] defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case." (Footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 547. "[W]hen the evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury." (Emphasis in original.) Id., 547–48. "Connecticut courts ultimately assess the importance of a *Salamon* instruction by scrutinizing how a reasonable jury would per-

ceive the [petitioner's] restraint of the victim, particularly with respect to when, where, and how the [petitioner] confined or moved the victim." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 745, 129 A.3d 796 (2016).

Our Supreme Court summarized the circumstances preceding and following its decision in *Salamon* in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 66. "Under our Penal Code, the hallmark of a kidnapping is an abduction, a term that is defined by incorporating and building upon the definition of restraint. . . . In 1977, this court squarely rejected a claim that, when the abduction and restraint of a victim are merely incidental to some other offense, such as sexual assault, that conduct cannot form the basis of a guilty verdict on a charge of kidnapping. . . . The court pointed to the fact that our legislature had declined to merge the offense of kidnapping with sexual assault or with any other felony, as well as its clearly manifested intent in the kidnapping statutes not to impose any time requirement for the restraint or any distance requirement for the asportation." (Citations omitted; footnote omitted.) Id., 66–67. The court left "open the possibility that there could be a factual situation in which the asportation or restraint was so miniscule that a conviction of kidnapping would constitute an absurd and unconscionable result that would render the statute unconstitutionally vague as applied." Id., 67–68.

In *Salamon*, the court reexamined the broad, literal interpretation of the statute. Id., 68. "In concluding that it must overrule its long-standing interpretation, the court went beyond the language of the kidnapping statute to consider sources that it previously had overlooked." Id. The court explained that "[o]ur legislature, in replacing a single, broadly worded kidnapping provision with a graduated scheme that distinguishes kidnappings from unlawful restraints *by the presence of an intent to prevent a victim's liberation*, intended

to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are *merely incidental to and necessary for* the commission of another crime against that victim. Stated otherwise, to commit kidnapping in conjunction with another crime, a [petitioner] must *intend* to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." (Emphasis in original; internal quotation marks omitted.) Id., 69.

Thereafter, Peter Luurtsema filed a petition for a writ of habeas corpus seeking to have the *Salamon* holding applied retroactively to his case.[4] See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 764. In Luurtsema's habeas appeal, our Supreme Court "concluded as a matter of state common law that policy considerations weighed in favor of retroactive application of *Salamon* to collateral attacks on judgments rendered final before that decision was issued." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 69.

In the present case, the habeas court found that the petitioner's jury trial in the attempted kidnapping case occurred in 2005, three years before the Supreme Court rendered its *Salamon* decision. The trial court, therefore, did *not* give the jury a *Salamon* instruction. The habeas court assumed for the purposes of its analysis of the petitioner's claim that he was entitled to a *Salamon* instruction.[5] The court conducted its analysis pursuant to the following test: "[T]he test for determining whether a constitutional [impropriety] is harmless . . . is whether it appears beyond a reasonable doubt that

[4] Previously, in *State* v. *Luurtsema*, 262 Conn. 179, 203–204, 811 A.2d 223 (2002), our Supreme Court "foreclosed the possibility of an absurd or unconscionable result as a matter of statutory interpretation." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 68.

[5] In footnote 2 of its memorandum of decision, the habeas court also stated that the facts in the attempted kidnapping case did not, in the court's analysis, warrant a *Salamon* instruction.

the [impropriety] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted). *State* v. *Hampton*, 293 Conn. 435, 463, 988 A.2d 167 (2009), quoting *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "The test for determining whether a trial court's constitutionally defective jury charge was harmless . . . is not whether a jury likely would return a guilty verdict if properly instructed; rather, the test is whether there is a reasonable possibility that a properly instructed jury would reach a different result." *State* v. *Flores*, 301 Conn. 77, 87, 17 A.3d 1025 (2011).

The habeas court continued that the petitioner was charged in part with attempted kidnapping[6] and that the trial court instructed the jury that the petitioner was alleged to have taken "a substantial step forward in abducting another person . . . by substantially and unlawfully restraining [the complainant's] movement and restrained [her] by the use of physical force with the intent to inflict physical injury upon her." (Internal quotation marks omitted.) The habeas court determined that the facts reasonably found by the jury included the petitioner's bursting through the door of the victim's apartment, wrapping his hands around her throat and choking her. The petitioner struggled with the victim, who tried to break free of him, but he dragged her outside the apartment into a nearby hallway. When the victim began to flee, the petitioner grabbed her leg and pulled her back toward him. The victim and the petitioner continued to struggle and ended up outdoors, where the victim screamed for help. The petitioner pinned her against a wall. The day after he committed the offenses, the petitioner acknowledged to the police that he intended to torture and rape the victim.

[6] The state alleged in part in count two of the operative information that the petitioner "with the requisite mental state required for the commission of kidnapping in the first degree did take a substantial step forward in abducting another person specifically the [victim] . . . by substantially and unlawfully confining her movement and restrained [the victim] by the use of physical force with the intent to inflict physical injury upon her."

In assessing the petitioner's *Salamon* analysis in his posttrial brief, the habeas court found a critical flaw emanating from the brief's compression of the timeline and the absence of relevant facts. The habeas court found that the petitioner's overly succinct summary of the facts pertaining to the sequence of events omits much of what transpired between the petitioner and the victim.[7] The petitioner's analysis of his *Salamon/Luurtsema* claim omits facts reasonably found by the jury. The habeas court found that as a result of the petitioner's "myopic view" of the facts surrounding the protracted series of incidents that the petitioner contends that his restriction of the victim was merely incidental to the attempted sexual assault.

The habeas court continued by comparing the *Luurtsema* facts with the facts of the present case. In *Luurtsema*, a case in which the defendant was convicted of attempt to commit sexual assault in the first degree and kidnapping in the first degree,[8] the facts surrounding the kidnapping involved the defendant's having moved the victim from the couch to the floor in front of the couch. Any sexual assault could have occurred on the couch or on the floor, or both, but whether the movement or restriction of movement had any distinct criminal significance was for a properly instructed jury to

[7] Our review of the petitioner's posttrial brief supports the habeas court's assessment of the petitioner's *Salamon* analysis. The relevant portion of the petitioner's brief states only the following facts: "Witness Marcia Wynne testified at the criminal trial that she heard someone screaming, called the police from her garage phone, and police arrived within three to five minutes of her call. . . . St. Pierre . . . testified that he was sitting on a porch where his friend lived when he heard a woman screaming. [He] testified that he broke up the physical struggle and restrained the petitioner while they waited for the police. [He] stated that the police arrived within five to seven minutes of the encounter. Officer Posada testified that he responded to a dispatch call around 10 p.m. to 10:30 p.m. on May 8, 2001. [The victim] testified that she received a phone call from the petitioner around 10:30 p.m. on May 8, 2001, and that soon after, the struggle with the petitioner ensued. This testimony, paired with . . . Posadas' testimony demonstrates that the events occurred close in time." The victim "testified that the struggle took place at the door of her apartment building and a wall nearby." (Footnotes omitted.)

[8] See *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 743.

determine. The habeas court found that the present matter involved facts readily distinguishably from cases where a *Salamon* instruction clearly was warranted. It concluded that "[t]he trial court was not required to give a *Salamon* instruction, but even if it had been required to do so . . . the absence of a *Salamon* instruction was completely harmless because there [was] no reasonable possibility that a jury instructed pursuant to *Salamon* would have reached a different result than it did."[9]

In his appellate brief, the petitioner claims that the habeas court erred in concluding that a *Salamon* instruction was not warranted by the facts of the case. He claims that the brief, continuous, and uninterrupted struggle between him and the victim that began at or about the threshold of her apartment and progressed to the exterior of the building lasted mere minutes.[10] He continues that "the additional offenses for which [he] was charged were so inextricably intertwined with the struggle that occurred within such a short time-frame, a *Salamon* instruction was warranted." The sum and substance of the petitioner's claim is that because the time between his entering the victim's apartment and the arrival of the police was mere minutes—five to ten—any restraint he imposed on the victim was incidental to the underlying crimes. He contends that the habeas court incorrectly characterized the struggle between him and victim as a "protracted series of incidents" and that there is no evidence to support the

[9] The habeas court also determined that the petitioner's brief failed to analyze several allegations in count one of his petition, i.e., the petitioner was convicted for conduct that the legislature did not intend to criminalize with regard to the attempted kidnapping conviction; plea negotiations were unreasonably curtailed in light of the change in the interpretation of the kidnapping statute; and that he is being unreasonably and cruelly punished for conduct that is, in light of *Salamon*, no longer a crime in Connecticut. Moreover, the habeas court concluded that the petitioner presented no evidence to support the allegations, and the allegations were without merit and/or were abandoned.

[10] On appeal, the petitioner's description of the events was more inclusive than the description he included in his posttrial brief in the habeas court.

habeas court's characterization of events. The essence of the petitioner's claim is that because his struggle with the victim took place in a short period of time and the distance she was moved was insignificant, the trial court's failure to give a *Salamon* instruction was not harmless as the habeas court had concluded. In analyzing the *Salamon* factors, the petitioner contends that he restrained the victim for mere minutes, the victim was not exposed to an increased risk of harm beyond the charged offenses, and the victim was able to escape and summon assistance. We reject the petitioner's attempt to minimize the significance of his conduct.

The petitioner's reliance on the length of time he restrained the victim and the distance he moved her is misplaced and rests on a misapplication of *Salamon*. Our Supreme Court has stated that "to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement." (Footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 546. Moreover, the petitioner was convicted of *attempt* to commit kidnapping in the first degree, not kidnapping in the first degree. The petitioner failed to address our law regarding the crime of attempt as it pertains to the present case in his brief.[11]

[11] General Statutes § 53a-49 (a) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

General Statutes § 53a-92 (a) provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually."

General Statutes § 53a-91 provides in relevant part: "The following definitions are applicable to this part:

"(1) 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . .

Significantly, the state highlights the fact that the petitioner was charged with *attempt* to commit kidnapping in the first degree, not kidnapping in the first degree. The state notes that the trial court instructed the jury that "the state does not claim that the defendant actually committed the crime of kidnapping first degree. Rather, it claims that the defendant is guilty of attempting to commit that crime." The trial court continued, "[w]ith respect to the first count, our criminal attempt statute insofar as it applies here provides as follows: a person is guilty of an attempt to commit a crime if acting with the kind of mental state required for commission of a crime, in this count kidnapping first degree, he intentionally does anything which under the circumstances as he believes them to be is an act constituting a substantial step in a course of conduct planned to end in his commission of the crime."[12]

The state points to evidence of the indisputably bizarre and disturbing statements the petitioner made to Mattuci that he intended to help the victim by bringing her into a deeper level of consciousness and true reality by using handcuffs and bondage and raping and torturing her, which the prosecutor argued to the jury. The police found handcuffs and a bondage tool on the petitioner's person when he was arrested. During the state's final argument, the prosecutor argued the facts related to the petitioner's intent to render the victim unconscious, bind her, and abduct her from her apartment to his where he intended to rape and torture her. On the basis of the evidence, the state concludes that the habeas court properly determined that the petitioner was not entitled to a *Salamon* instruction because he intended to abduct and restrain the victim

"(2) 'Abduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation. . . ."

[12] During the state's final argument, the prosecutor reminded the jury of the petitioner's statement to the police that he went to the victim's apartment

for a longer period of time and to a greater degree than would have been necessary to commit the other charged offenses and was only thwarted by the victim's own efforts to escape and the timely intercession of a third party. We agree with the state.

The salutary effect of the *Salamon* rule is to prevent "the prosecution of a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, [when] the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape, and there was lacking a genuine kidnapping flavor." (Internal quotation marks omitted.) *State* v. *Salamon*, supra, 287 Conn. 546. *Salamon* does not require an instruction if the restraint or transport of a victim progresses significantly above and beyond the conduct intended and required to commit other charged or uncharged crimes. Id. The evidence in the present case demonstrated that the petitioner intended to render the victim unconscious, bind her and take her to his apartment where he would rape and torture her. The evidence of the petitioner's conduct from the time he burst through the door of the victim's apartment until St. Pierre came to her assistance demonstrates the petitioner's attempt to carry out his intention to bind her, render her unconscious, take her to his apartment, and rape and torture her. Moreover, his conduct and restraint of the victim exceeded that which was necessary to commit the object of his criminal intent. He choked the victim; when she broke free and ran from the apartment he grabbed her leg and pulled her back, and when she was free again, he chased her and pinned her against a wall and kept St. Pierre from coming to her aid. In addition, the petitioner's attempt to bind and move the victim from her apartment to his where he intended to rape and torture her increased the risk of harm, would have

intending to rape and torture her through the use of handcuffs and bondage tools, objects that were found on his person at the time of his arrest.

prevented her from seeking help, and would have prevented the crime from being detected. Clearly, the petitioner attempted "to prevent the victim's liberation for a longer period of time or to a greater degree than that which [would have been] necessary to commit the other crime." (Footnote omitted.) Id., 542.

On the basis of our review of the record, we conclude that the trial court was not required to give the jury a *Salamon* instruction, and therefore, we need not decide whether the absence of the instruction was harmless error because it is not reasonably possible that a properly instructed jury would have reached a different result. See *State* v. *Flores*, supra, 301 Conn. 87.

II

The petitioner's second claim is that the habeas court improperly concluded that his trial counsel did not render ineffective assistance of counsel by conceding the petitioner's guilt during closing argument.[13] We disagree.

[13] On appeal, the petitioner claims that his ineffective assistance of counsel claim is not governed by *Stickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that requires a petitioner to prove by a preponderance of evidence that counsel's performance was so deficient that counsel was not functioning as counsel guaranteed by the constitution and that but for counsel's unprofessional performance there is a reasonable probability that the result of the proceedings would have been different. Rather, the petitioner contends that his claim is controlled by *McCoy* v. *Louisiana*, U.S. , 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). In *McCoy*, the United States Supreme Court held that defense counsel overrode his client's sixth amendment right to autonomy by admitting the client's guilt without the defendant's consent. Violation of a client's autonomy constitutes structural error and is not subject to harmless error analysis. Id.; see also *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

The respondent contends that we should decline to review the petitioner's client autonomy or *McCoy* claim because the petitioner did not raise it in the habeas court, and the habeas court, therefore, did not rule on it. Thus, the record is inadequate for review. We agree. In *Leon*, this court held that a "petitioner's attempt to cast his claim as one of client autonomy, rather than ineffective assistance [as pleaded], is a new invention on appeal which should not be entertained." (Internal quotation marks omitted.) Id., 521. Because the petitioner did not plead client autonomy or analyze it in his posttrial brief in the habeas court, we decline to consider it on appeal. Moreover, we note that the habeas court issued its memorandum of decision on March 23, 2018; the United States Supreme Court issued its decision in

In his amended petition for a writ of habeas corpus, the petitioner alleged in part that his trial counsel's representation fell below the level of reasonable competence required of criminal defense lawyers in Connecticut and that, but for counsel's acts and omissions, it is reasonably probable that the outcome of the proceedings would have been different. More specifically, the petitioner alleged that counsel (1) failed to explain meaningfully to him the potential of continued prosecution in view of the missing victim,[14] (2) failed to explain meaningfully to him the maximum and minimum penalties of the charges against him, (3) failed to engage effectively in plea negotiations, (4) failed to move to stay the imposition of the sentence in the assault case, (5) failed to request that the petitioner receive all available jail credit due him at the time of sentencing in either case, (6) improperly conceded the petitioner's guilt in closing argument in the kidnapping case without his consent, (7) failed to present any mitigating evidence at sentencing, and (8) failed to consult with the petitioner about the consequences of changing his plea during final argument. The habeas court concluded that the petitioner failed to prove that his trial counsel rendered ineffective assistance pursuant to the allegations in (1), (2), (6), (7), and (8).[15] On appeal, the petitioner claims only that the habeas court improperly determined that trial counsel did not provide ineffective assistance when counsel conceded the petitioner's guilt during final argument without his consent.

The following procedural history and facts are relevant to the petitioner's claim of ineffective assistance of counsel. At his criminal trial in the attempted kidnapping case, the petitioner asserted the affirmative

McCoy on May 14, 2018. The petitioner, therefore, could not have raised it in the habeas court.

[14] Initially the state was unable to locate the victim. Shortly before trial, however, her whereabouts were discovered, and she testified.

[15] The habeas court found that the petitioner had failed to address the allegations in (3), (4), and (5) and, therefore, deemed the allegations abandoned.

defense of mental disease or defect pursuant to General Statutes § 53a-13.[16] In support of the affirmative defense, at trial, counsel presented testimony from Andrew W. Meisler, a psychologist, and Kenneth M. Selig, a forensic psychiatrist, both of whom had examined the petitioner.[17] Meisler testified that the petitioner suffered from ''chronic, longstanding, very severe mental illness,'' which had exhibited itself since the petitioner was a child. Meisler also testified that the petitioner's records contained diagnoses including schizophrenia, bipolar disorder, and ''psychiatric disorders that people have a hard time identifying.''[18] Meisler opined that the petitioner's conduct on the night of the attempted kidnapping, as described by the victim and as observed by the police, was consistent with the petitioner's history of mental illness. He further opined that due to the petitioner's mental illness, the petitioner ''lack[ed] the substantial capacity at times to conform his behavior to the expectations of the law and of society.''

Selig testified that the petitioner had a ''serious mental disorder'' of psychotic proportions. On the basis of his review of the petitioner's psychiatric records and his own examination of him, Selig concluded that the petitioner suffered from ''some form of personality dis-

[16] General Statutes § 53a-13 (a) provides: ''In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.''

[17] On June 15, 2001, the trial court, *Wollenberg*, *J.*, found the petitioner incompetent to stand trial but that he ''may be'' restored to competency after treatment. See *State* v. *Jenkins*, 288 Conn. 610, 618–19, 954 A.2d 806 (2008) (person charged with criminal offense ''who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future'' [internal quotation marks omitted]). On July 18, 2003, the trial court, *Handy*, *J.*, found the petitioner competent to stand trial and understand the proceedings against him.

[18] On cross-examination, Meisler conceded that some mental health professionals who previously had evaluated the petitioner opined that he was malingering.

order . . . that renders him so vulnerable to stress that he'll lose touch with reality." Selig opined that the petitioner's conduct, as revealed in the police reports and related by the petitioner himself, was consistent with his mental illness.[19]

In his closing argument, defense counsel argued to the jury, in part, as follows: "You will hear from [the judge] that what the defense raised in this case is called an affirmative defense of mental disease, and the reason why it's an affirmative defense is because there's a burden placed on the defendant to prove to you that he was suffering from a mental disease at the time of the incident and that as a result of that mental disease he didn't appreciate or substantially appreciate the wrongfulness of his act or did not substantially appreciate adjusting his conduct according to the law. . . . [W]hen an affirmative defense is raised . . . the defense has to prove by a preponderance of the evidence.

"[As the judge] goes through what's called the jury charge . . . look . . . carefully because you will be asking yourself whether or not you come up with what was the facts this case or not, and I'm not going to stand here and say nothing happened to [the victim]. You would have to decide whether or not what happened to [the victim] . . . justified charging my client with kidnapping, burglary, attempt to commit sexual assault, attempted kidnaping, assault, and interfering with a police officer, but the judge will instruct you if you find [the petitioner] guilty of any one of [the charges] so then the next thing you'll have to decide is did the defense prove their defense of mental disease. . . . [W]hat we're claiming is the facts and the testimony prove upon a preponderance of the evidence that

[19] Selig also testified that in April, 2001, shortly before the charged offenses, the petitioner had been hospitalized for a brief period for a psychotic disorder. The records indicated that the petitioner had smoked marijuana and "there was some question at that time as to how much of the problem was

[the petitioner] did not substantially understand the wrongfulness of his actions or he did not substantially adjust his conduct to the law. . . .

"It was the evidence that had two expert witnesses here testifying about the history of [the petitioner] up to the incident. . . . Selig brought you up almost to a week before and after. . . . Meisler talked about after, about [the petitioner's] mental disease and he was not in touch with reality.

"Now, an interesting part is assume the doctors weren't even here, assume we rested . . . and said take a look at the facts as they are and make your decision. So what do you have? And of course only your memory counts here, but my client is charged with attempted or attempt to commit sexual assault. Now if [the petitioner] had the intent to commit sexual assault why would he be dragging [the victim] outside of her apartment into the street? That's one point you have to ask yourself.

"It's a horrendous thing that happened to [the victim], but looking at it without sympathy, we'd have to analyze this. *As far as the burglary*, *obviously*, *he pushed the door and went in. So there's burglary there.* As far as attempted kidnapping, nobody knows what he supposedly—well, you heard the testimony of [the victim]. He dragged her out into the street and who knows what he wanted to do. Go to a movie or what? He wasn't saying anything. He wasn't say[ing] get in my car. He didn't have anything on him, no dangerous weapon or anything. . . .

"So I tell you, even without the expert witnesses that we had . . . the uncontroverted testimony of the expert witnesses, looking at it as to what he did, I'm not trying to mitigate it. I'm just trying to show you or have you think about what he did do. What did he do?

related to marijuana and how much was related to just a basic psychotic illness."

Did he act like a, was that a normal person?" (Emphasis added.)

Attorney Robert McKay represented the petitioner in both the assault case and the attempted kidnapping case. The petitioner previously had been represented by Attorney Douglas Pelletier, who had collected the majority of discovery materials, including reports from Meisler and Selig. McKay testified at the habeas trial that when he entered the cases, he advised the petitioner that he was not likely to prevail, but the petitioner was unwilling to pursue a plea deal. As trial approached in the assault case, McKay tried to convince the petitioner to pursue a mental disease or defect defense in that case. The petitioner rejected his advice, and the jury found the petitioner guilty.

Before trial in the attempted kidnapping case, the petitioner decided to present the affirmative defense of mental disease or defect to those charges. McKay could not remember when he discussed with the petitioner that presenting a mental disease or defect defense would involve conceding in closing argument that the petitioner had engaged in the charged conduct. McKay asserted that he would have discussed the matter with the petitioner before trial and testified that "because of the first trial, and then having the argument with him about bringing that affirmative defense, it's my recollection that he clearly understood . . . that we would be saying, 'yes, I did it, but because of my mental illness . . . I wouldn't have been able to adjust my conduct to the law because of my mental illness.' I mean so we had clearly had that conversation for the first one." McKay could not recall if he advised the petitioner specifically that, by presenting a mental disease or defect defense, he automatically would be conceding his guilt, but McKay believed that it was made known to the petitioner that he would have to say, "yes, I did it." McKay's strategy for closing argument was to use the petitioner's aberrant conduct to his benefit. At

the habeas trial, McKay testified that "it was the entire incident that I was . . . probably conceding just to have . . . some sympathy from the jury toward my client, because it was so abnormal for a person who really didn't know his neighbor, to break into her apartment and drag her down the street and do all that."

At the habeas trial, the petitioner testified that it was a "psychotic break" in 2001 that lead to his arrest and subsequent incarceration. He also testified that he had decided not to present a mental disease or defect defense in the assault case because he believed that, even if he was convicted without the defense, he would have received a sentence of only time served, but if he were found not guilty by reason of mental disease or defect, he could have been hospitalized for up to fifteen years. Contrary to his expectation, the petitioner was found guilty and sentenced to fifteen years of incarceration. Thereafter, the petitioner chose to present a mental disease or defect defense in the attempted kidnapping case.[20] The petitioner testified that counsel informed him that by pursuing a not guilty plea by reason of mental disease or defect defense the petitioner was conceding guilt but he did not think that he had to say that he was guilty for everything.[21]

After the parties submitted their posttrial briefs, the habeas court issued its memorandum of decision. The

[20] The petitioner also asked his counsel to seek a plea deal on the charges in the attempted kidnapping case. The state was not willing to negotiate a plea deal at that time.

[21] The petitioner testified as follows on cross-examination by the respondent:

"Q: So [Attorney McKay] did not advise you that you would be conceding guilty by pursuing the defense of not guilty by reason of mental defect?

"A: He—he did, but I was going to say something as concerning something else but—

"Q: So you knew that by pursuing that defense, you would essentially be saying that you were guilty of each of the crimes that you were charged with?

"A: Well, that umm—I—I didn't think I needed—I had to say that I was guilty for everything because—I wasn't so . . . he conveyed that . . . that guilt would be conceded because of the [not guilty by reason of insanity] defense you're not saying that it—it didn't happen, you're saying it happened, but even—but there were things that didn't happen that—that [I] wish not to concede to."

habeas court addressed the five claims of ineffective assistance of counsel that the petitioner had not abandoned; see footnote 15 of this opinion; and determined that counsel had not rendered ineffective assistance. With respect to the only claim raised by the petitioner on appeal, i.e., counsel improperly conceded the petitioner's guilt as to the burglary charge during closing argument, the habeas court stated that an affirmative defense asserted, pursuant to § 53a-13, that the petitioner should not be found guilty by reason of mental disease or defect inherently entails an acknowledgement that he committed the offenses. The object of such a defense is to have the defendant found not criminally liable for unlawful conduct. See, e.g., *Connelly* v. *Commissioner of Correction*, 258 Conn. 374, 387, 780 A.2d 890 (2001). "[B]y maintaining an affirmative defense pursuant to § 53a-13, the petitioner admitted his commission of the crime. . . . Such an admission necessarily implies that the petitioner also concedes that each of the individual elements comprising the offense is satisfied . . . ." (Citation omitted; internal quotation marks omitted.) *Sastrom* v. *Mullaney*, 286 Conn. 655, 663–64, 945 A.2d 442 (2008). The habeas court failed to see how the closing argument of the petitioner's counsel in which he acknowledged the petitioner's actions is indicative of deficient performance. The court concluded that counsel's remarks reflect a reasonable trial strategy and, thus, that the petitioner failed to demonstrate that counsel's performance was ineffective.

At the outset, we set forth the applicable standard of review. "The 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 habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted.) *Duperry* v. *Solnit*, 261 Conn. 309, 335, 803 A.2d 287 (2002).

"It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . Put another way, 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. . . . In assessing the attorney's performance, we indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Sastrom* v. *Mullaney*, supra, 286 Conn. 662.

Pursuant to our plenary review of the petitioner's claim, we conclude that the habeas court properly determined that counsel's performance with respect to his closing argument in which he conceded the petitioner's guilt with respect to burglary was not deficient. The petitioner bears the burden "to prove that his counsel's performance was objectively unreasonable." *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018).

The evidence demonstrates that counsel urged the petitioner to assert a mental disease or defect special defense in the assault case, but the petitioner rejected counsel's advice. Following his conviction in the assault case, the petitioner informed his counsel that he wanted to pursue a mental disease or defect affirmative defense in the attempted kidnapping case. Counsel explained to the petitioner that such an affirmative defense consti-

tuted an admission of guilt. Counsel testified that he advised the petitioner prior to trial that asserting a not guilty plea by reason of mental disease or defect affirmative defense involved a concession of guilt.[22] The petitioner was equivocal as to whether he recalled counsel's advice to him that presenting a mental disease or defect defense involved a concession of his factual guilt. The petitioner claimed that he misunderstood that he would concede his factual guilt to all charges. See footnote 20 of this opinion. There is no evidence in the record, however, that the petitioner ever objected to counsel's concession strategy and the habeas court made no such finding. Moreover, counsel's closing argument was predicated on the evidence in the record. Meisel and Selig both testified that the petitioner was suffering from a mental disease or defect when he committed the charged crimes. Conceding something that is obviously so is not ineffective advocacy. Counsel's closing argument conceding guilt was a reasonable trial strategy to further the petitioner's interest of pleading not guilty by reason of mental disease or defect. The petitioner's claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION
(AC 41930)

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

Syllabus

The petitioner, a Cameroonian citizen who had been convicted, on a guilty plea, of the crime of sexual assault in the third degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective

[22] When counsel was asked whether he discussed conceding guilt with the petitioner, he responded: "I don't recall specifically when I would have discussed it with him, but probably even before the trial. I'd be discussing that with him as far as going forward on that defense. He—first time he didn't want to do it. The second time he wanted that defense, affirmative defense, so then I would have gone over everything with him."

assistance by failing to advise him properly of the immigration consequences of pleading guilty and that his right to due process was violated because his plea was not knowingly, intelligently and voluntarily made due to trial counsel's failure to advise him properly with respect to the immigration consequences. The respondent, the Commissioner of Correction, filed a return raising a special defense that the petitioner's due process claim was procedural defaulted. The habeas court rendered judgment denying the habeas petition, finding that the petitioner failed to establish that trial counsel had rendered ineffective assistance or that he was prejudiced by trial counsel's alleged deficient performance. The court also found that the petitioner's due process claim was procedurally defaulted because he failed to meet his burden as to his ineffective assistance of counsel claim and had not established cause and prejudice sufficient to overcome the procedural default. In reaching its decision, the court credited trial counsel's testimony that he had advised the petitioner, prior to the plea hearing, that he would be deported if he pleaded guilty, and it discredited the petitioner's testimony to the contrary. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly rejected his ineffective assistance of counsel claim, that court having properly determined that the petitioner failed to establish that he was prejudiced by his trial counsel's alleged deficient performance; the petitioner failed to meet his burden of demonstrating that he would have rejected the plea agreement and insisted on going to trial had he known the immigration consequences of his guilty plea because, beyond his own testimony, which the habeas court found to be not credible, the petitioner did not offer any evidence that he would have rejected the plea offer and gone to trial and, in fact, there was significant evidence contradicting his claim, and the petitioner did not raise any claim of improper advice from trial counsel regarding immigration consequences until his habeas counsel filed the operative petition, several years after deportation proceedings had been initiated against him.
2. The petitioner could not prevail on his claim that his due process rights were violated because his guilty plea was not made knowingly, intelligently and voluntarily; the petitioner's due process claim relied solely on his allegation that his trial counsel improperly advised him about the immigration consequences of pleading guilty, and, therefore, because this court agreed with the habeas court that the petitioner had not demonstrated ineffective assistance of trial counsel, the petitioner was unable to establish the cause and prejudice sufficient to overcome the procedural default.

Argued September 11—officially released December 17, 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. Mullar-*

key, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Jennifer B. Smith, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Angela Macchiarulo*, senior assistant state's attorney, and *Michael Proto*, assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Chrysostome Kondjoua, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly rejected his claims that (1) his trial counsel provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty under *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and (2) his guilty plea was not knowingly, intelligently, and voluntarily made. We disagree and, therefore, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. The petitioner is a Cameroonian citizen who has resided in the United States since 2010 as a long-term, permanent resident with a green card. He was arrested on November 29, 2013, and charged with the sexual assault in the first degree of an eighty-three year old woman, for whom he had been working. The petitioner entered a plea of not guilty and elected a jury trial.

On December 16, 2014, after the jury had been picked and evidence was set to begin, the petitioner accepted a plea agreement to the reduced charge of sexual assault in the third degree. Before accepting the petitioner's

guilty plea, the trial court canvassed him.[1] The trial

[1] During the plea canvass, the following colloquy occurred:

"The Court: [Petitioner], I'm going to ask you some questions. Keep your voice up, so the interpreter can understand and hear you. Sir, how far have you gone in school, be it here, or in Cameroon?

"[The Petitioner]: High school diploma.

"The Court: And have you understood all the conversations you've had with your lawyer, leading up to your decision to plead guilty to this felony charge today?

"[The Petitioner]: Yes, Your Honor.

"The Court: Are you satisfied with his advice?

"[The Petitioner]: Yes, Your Honor.

"The Court: Are you under the influence today of any alcohol, drugs, [or] medications of any kind?

"[The Petitioner]: No.

"The Court: Are you currently on probation or parole?

"[The Petitioner]: No.

"The Court: Did you have enough time to go over—

"[Defense Counsel]: Your Honor, just one second.

"(Aside)

"[Defense Counsel]: Okay. I'm sorry. I apologize.

"The Court: Did you go over with your lawyer the charge, sexual assault in the third degree, as charged, class D felony, carries up to five years, and/or, a $5000 fine, a felony, causing you to give a sample of your DNA to the state of Connecticut, and you're going to have to register as a sex offender in the state of Connecticut. You're going to have to abide by all the rules and regulations of registration. One of those is, if you get to treatment, you'd have to go in and admit whatever your involvement was with this case. If you failed to do that, you could be charged with violation of probation and serve the unexecuted portion of your sentence, which in this case would be the difference between five years and the twenty months you're going to serve, or you'd have forty months hanging over your head. So, you could go back and serve that forty months. This is considered a nonviolent ten year registration. Have you gone over all of those things with [defense counsel]?

"[The Petitioner]: Yes, Your Honor.

"The Court: [Defense Counsel], have you done that?

"[Defense Counsel]: The only thing I didn't go over, Your Honor, was the DNA, but he has already given a DNA sample. So—

"The Court: Why don't you just explain to him why he has to do that?

"(Aside)

"The Court: Okay?

"[Defense Counsel]: Yes. Thank you.

"The Court: Sexual assault in the third degree, as charged, class D felony, a person is guilty of sexual assault in the third degree when such person compels another person to submit to sexual contact by the use of force against such other person, or a third person. You have now given up your

court found that the plea was made knowingly, intelligently, and voluntarily, and ordered a presentence investigation. On March 4, 2015, the court sentenced the petitioner to the agreed disposition of five years of imprisonment, execution suspended after twenty months, with ten years of probation. The petitioner also was required to register as a sex offender for ten years. The petitioner did not file a direct appeal.

While the petitioner was serving his sentence, the United States Department of Homeland Security (department) initiated deportation proceedings against

right to remain silent, to continue to plead not guilty, to a court or a jury trial, with the assistance of your attorney, your right to cross-examine witnesses, to call witnesses on your behalf, testify, if you wanted to, present defenses, and have the state prove you guilty beyond a reasonable doubt. In other words, there will be no trial. The jury was upstairs, evidence was about to begin. This is your decision. Correct?

"[The Petitioner]: Yes.

"The Court: Did you make this decision freely and voluntarily?

"[The Petitioner]: Yes, Your Honor.

"The Court: Did anybody force you, or threaten you, in anyway, to get you to plead guilty?

"[The Petitioner]: No.

"The Court: You've heard the facts recited by the state's attorney. Are those facts, essentially, correct?

"[The Petitioner]: Yes, Your Honor.

"The Court: Do you understand if you are not a citizen of the United States that the plea that you have just entered could result in deportation, or removal from the United States, exclusion from the readmission to the United States, denial of naturalization, pursuant to the laws of the United States?

"[The Petitioner]: Yes, Your Honor.

"The Court: Did you go over that issue with your lawyer?

"[The Petitioner]: Yes.

"The Court: [Defense Counsel], did you go over that issue with your client?

"[Defense Counsel]: We did, Your Honor. I informed my client that, based on the charges, it is highly likely that, at the very least, immigration will begin deportation proceedings against him, and the likelihood that he will get deported. But, I also informed him that I do not practice immigration law and that I will put him in touch with an immigration lawyer to help him fight those proceedings, if necessary.

"The Court: Was he satisfied with that advice?

"[Defense Counsel]: He was, Your Honor."

him. The department cited the petitioner's March, 2015 conviction for sexual assault in the third degree as the ground for removal and stated that the petitioner was subject to removal because he had been convicted of an aggravated felony and a crime of moral turpitude, in violation of § 237 (a) (2) (A) (iii) and § 237 (a) (2) (A) (i) of the Immigration and Nationality Act, respectively. A warrant for the petitioner's arrest was served on July 14, 2015, and the petitioner was taken into the department's custody.[2]

On June 19, 2015, the petitioner, then self-represented, filed a petition for a writ of habeas corpus.[3] Appointed counsel thereafter filed an amended petition.[4] On October 17, 2017, counsel filed a second amended petition, which is the operative petition in this case. It alleged two claims: Ineffective assistance of trial counsel for the improper advice concerning the immigration consequences of a guilty plea and a due

[2] The petitioner filed an application for deferral of removal under the Convention against Torture, which was denied on September 14, 2015. The petitioner appealed to the Board of Immigration Appeals (board). The board found that the immigration judge had properly entered the order for removal, dismissed the petitioner's appeal, and denied his motion to remand for further consideration.

[3] The petitioner's petition alleged a due process violation claiming that his guilty plea was not made knowingly, intelligently, or voluntarily because he was under the influence of medication, trial counsel pressured him to plead guilty, and he had trouble understanding and communicating with trial counsel because English is not his first language and he did not always have the benefit of an interpreter during their conversations.

[4] The petitioner's first amended petition contained two counts, in which he alleged an ineffective assistance of counsel claim and a due process violation in that the petitioner's plea was not entered knowingly, intelligently, or voluntarily. The ineffective assistance claim alleged that trial counsel failed (1) to investigate properly a motion to suppress the petitioner's statements, (2) to advise the petitioner properly about a withdrawal of his guilty plea, (3) to inquire or investigate the medications the petitioner was taking when he pleaded guilty, and (4) to file a motion to withdraw the petitioner's guilty plea when the petitioner expressed to the court at sentencing that he wanted to go to trial. The due process claim alleged that the petitioner was under the influence of medication and did not understand the terms of the plea agreement when he pleaded guilty.

process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. On December 19, 2017, the respondent, the Commissioner of Correction, filed a return alleging that the petitioner's due process claim was in procedural default. The petitioner filed a reply denying the allegations in the respondent's return on December 28, 2017.

On May 16, 2018, the habeas court issued a memorandum of decision in which it denied the petition. The habeas court found that the petitioner failed to establish that trial counsel had rendered ineffective assistance. The court found the testimony of trial counsel credible and the petitioner's testimony not credible, and determined that counsel had advised the petitioner, prior to the plea hearing, that he would be deported if he pleaded guilty. Further, the court found that the totality of counsel's advice demonstrated that he adequately had advised the petitioner of the immigration consequences of pleading guilty. The court further found that, "because the court does not find the petitioner credible, the claim must also fail because the petitioner has not demonstrated that he would have maintained his plea of not guilty and proceeded to trial." Regarding the petitioner's second claim, the court found that the petitioner had not established cause and prejudice sufficient to overcome the procedural default. On June 15, 2018, the habeas court granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner claims that the habeas court erred in rejecting his claim that his trial counsel provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty[5]

[5] The petitioner alternatively claims that the habeas court erroneously determined that trial counsel properly had advised him that he would be deported as a result of pleading guilty. Because we determine that the

pursuant to *Padilla* v. *Kentucky*, supra, 559 U.S. 356. Because we conclude that the habeas court properly determined that the petitioner failed to establish that he was prejudiced by trial counsel's alleged deficient performance, we reject the petitioner's claim.

We begin our analysis with the legal principles that govern our review of the petitioner's claim. The sixth amendment to the United States constitution, applicable to the states through the due process clause of the fourteenth amendment, and article first, § 8, of the constitution of Connecticut provide that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. U.S. Const., amend. VI; Conn. Const., art. I, § 8; see *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.

petitioner failed to demonstrate that he was prejudiced by trial counsel's actions, we do not reach this claim.

. . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier . . . . In its analysis, a reviewing court may look to the performance prong or the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citation omitted; internal quotation marks omitted.) *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 9–10, A.3d (2019).

"[T]he *Hill* [v. *Lockhart*, 474 U.S. 51, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)] prejudice standard provides that [i]n the context of a guilty plea . . . to succeed on the prejudice prong the petitioner must demonstrate that, but for counsel's alleged ineffective performance, the petitioner would not have pleaded guilty and would have proceeded to trial. . . . In evaluating whether the petitioner ha[s] met this burden and . . . the credibility of the petitioner's assertions that he would have gone to trial, it [is] appropriate for the court to consider whether a decision to reject the plea bargain would have been rational under the circumstances." (Citations omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, supra, 171 Conn. App. 663; see also *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 705, 184 A.3d 804 ("[t]o satisfy the prejudice prong [under *Strickland–Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"), cert. denied, 330 Conn. 939, 195 A.3d 692 (2018). Finally, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017).

"The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [its] firsthand observation of [a witness'] conduct, demeanor and attitude." (Citations omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 278–79, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

In regard to the prejudice prong of *Strickland*, the petitioner argues that this case should be remanded to the habeas court for a determination of prejudice under *Strickland*. The petitioner proffers two reasons for remand: (1) "the habeas court failed to consider whether . . . there was a reasonable probability that, but for counsel's deficient performance, the petitioner would not have pleaded guilty and would have insisted on going to trial" and (2) "the habeas court speculated about the strength of evidence against the petitioner."[6] In its memorandum of decision, the habeas court found that the petitioner's testimony was not credible and determined that he had not met his burden of establishing that he would have rejected the state's plea offer and elected to go to trial.

Beyond the petitioner's own testimony, which the habeas court found to be not credible, the petitioner has not offered any evidence that he would have rejected the plea offer and gone to trial. Instead, there

[6] In the petitioner's appellate brief, he also claimed that the "habeas court abused its discretion in declining to admit evidence of prejudice" as another justification for requesting remand. During oral argument before this court, however, the petitioner explicitly stated that he was declining to pursue that claim at this time. Therefore, we do not address it here.

is significant evidence contradicting this claim. The petitioner originally was charged with sexual assault in the first degree. The charge was based on the complaint of an eighty-three year old woman who stated that the petitioner, whom she hired to do some work at her house, assaulted her by penetrating her from behind without her consent. While the petitioner's criminal case was pending, trial counsel engaged in plea negotiations on the petitioner's behalf. During that time, the petitioner made a counter offer of two years to serve, which the state rejected. Despite trial counsel's efforts, the state refused to reduce the charge to a point where the petitioner could avoid immigration consequences. The petitioner filed a motion for a speedy trial, but he did not pursue the motion. After the jury had been picked and on the same day evidence was set to begin with the testimony from the eighty-five year old victim, who was present and ready to testify, the petitioner pleaded guilty to the reduced charge of sexual assault in the third degree. At sentencing, the victim addressed the court and expressed her support for the sentence and stated that she hoped the petitioner would be deported. After the victim spoke, the petitioner addressed the court and did not deny engaging in sexual relations with the victim and stated that the victim had consented. The habeas court found that the "consent" defense proffered by the petitioner was not credible and "seems unlikely to have prevailed" at trial. In addition, the petitioner did not raise any claim of improper advice regarding immigration consequences from his trial counsel until his habeas counsel filed the operative petition, several years after the department initiated deportation proceedings. The petitioner has failed to meet his burden of demonstrating that he would have rejected the plea agreement and insisted on going to trial.

Because we conclude that the trial court properly determined that the petitioner failed to prove the prejudice prong of *Strickland*, we need not reach the issue of deficient performance. See *Strickland* v. *Washington*, supra, 466 U.S. 697 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant"); *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 422, 202 A.3d 453 (deciding ineffective assistance of counsel on basis of failure to demonstrate prejudice prong), cert. denied, 331 Conn. 905, 202 A.3d 373 (2019); *Bova* v. *Commissioner of Correction*, 162 Conn. App. 348, 358, 131 A.3d 268 ("[t]he petitioner has failed to prove that he was prejudiced . . . therefore we decline to reach the first *Strickland* prong"), cert. denied, 320 Conn. 920, 132 A.3d 1094 (2016); *Russell* v. *Commissioner of Correction*, 150 Conn. App. 38, 46, 89 A.3d 1023 (resolving petitioner's claim on basis of prejudice prong), cert. denied, 312 Conn. 921, 94 A.3d 1200 (2014); see also *Ouellette* v. *Commissioner of Correction*, 154 Conn. App. 433, 448 n.9, 107 A.3d 480 (2014) ("[a] court evaluating an ineffective assistance claim need not address both components of the *Strickland* test if the [claimant] makes an insufficient showing on one" [internal quotation marks omitted]). Accordingly, the petitioner's claim of ineffective assistance of counsel fails.

II

Next, the petitioner claims that the habeas court violated his right to due process by rejecting his claim that his guilty plea was not made knowingly, intelligently, and voluntarily. Specifically, he argues that trial counsel misadvised him about the immigration consequences of a guilty plea, and, as a result, the guilty plea he entered was made not knowing that deportation was inevitable. The respondent argues that this claim was in procedural default and, therefore, fails. The habeas court agreed with the respondent, and so do we.

Our review of this claim is plenary. See *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 65, 136 A.3d 596 (2016) ("[q]uestions of law and mixed questions of law and fact receive plenary review" [internal quotation marks omitted]). "When a habeas petitioner has failed to file a motion to withdraw his guilty plea or to challenge the validity of the plea on direct appeal, a challenge to the validity of the plea in a habeas proceeding is subject to procedural default." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 175, 982 A.2d 620 (2009). "In essence, the procedural default doctrine holds that 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 and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). "[T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . . Therefore, attorney error short of ineffective assistance of counsel does not adequately excuse compliance with our rules of [trial and] appellate procedure." (Internal quotation marks omitted.) *Brunetti* v. *Commissioner of Correction*, 134 Conn. App. 160, 168, 37 A.3d 811, cert. denied, 305 Conn. 903, 44 A.3d 180 (2012).

In the operative petition, the petitioner claimed that his guilty plea was not made knowingly, intelligently, and voluntarily because his trial counsel had failed to advise him adequately of the immigration consequences. He also alleged that "the sentencing court . . .

did not specifically advise the petitioner that he would be deported as a result of his plea." In its return, the respondent raised the special defense of procedural default.

The habeas court found that the petitioner's claim was procedurally defaulted because he had failed to meet his burden as to the claimed ineffective assistance of counsel. The court further found that the trial court's "canvass comported with General Statutes § 54-1j." The habeas court concluded that because the petitioner has failed to demonstrate any cause and prejudice sufficient to overcome the procedural default, the due process claim must fail on that basis. Even if it was not procedurally defaulted, the court concluded that the claim would have failed on the merits as the court already had found that there was no ineffective assistance of counsel.

On appeal, the petitioner claims that the habeas court erred in concluding that his claim was procedurally defaulted because he had in fact demonstrated that trial counsel misadvised him of the immigration consequences of pleading guilty.[7] As a result, the petitioner argues, the demonstration of ineffective counsel satisfied the cause and prejudice standard to overcome the procedural default.

The respondent relies on the habeas court's determination of procedural default and argues that if we conclude that the petitioner's ineffective assistance of counsel claim fails, his second claim fails as well, citing

[7] The petitioner attempted to raise two other claims on appeal in relation to this due process claim. We do not consider these claims as they were not alleged in the operative habeas petition. Although both claims were raised in the petitioner's original petition and the first amended petition, the claims were not alleged in the operative petition. We therefore consider these claims abandoned. See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017) ("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.]).

Placide v. *Commissioner of Correction*, 167 Conn. App. 497, 504–505, cert. denied, 323 Conn. 922, 150 A.3d 1150 (2016), for the proposition that "because [the] petitioner's due process claim was [a] reformulation of his ineffective assistance claim, and this Court concluded that the habeas court properly found that [the] petitioner's attorney was not ineffective, this claim fails." We agree with the respondent.

The petitioner's due process claim relies solely on his allegation that trial counsel improperly advised him about the immigration consequences of pleading guilty. Because we agree with the habeas court that the petitioner has not demonstrated ineffective assistance of trial counsel, the petitioner is unable to establish the cause and prejudice sufficient to overcome the procedural default.

The judgment is affirmed.

In this opinion the other judges concurred.

IAN COOKE *v.* COMMISSIONER OF CORRECTION (AC 38272)

Lavine, Devlin and Beach, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. The petitioner subsequently filed an application for a fee waiver and attached thereto an affidavit requesting certification of additional issues on appeal. Although the waiver application was granted, the court did not initially rule on the petitioner's request for certification of additional issues on appeal, and the petitioner subsequently filed a motion for articulation requesting that the court rule on his request, which the court treated as a motion to amend the petition for certification and granted. On appeal, the respondent Commissioner of Correction claimed that the habeas court, having previously denied the petition for certification to appeal, lacked jurisdiction to allow the petitioner to amend his petition for certification to appeal. *Held*:

1. The respondent's claim that the habeas court lacked jurisdiction to allow the petitioner to amend his petition for certification to appeal was unavailing: that court's ruling did not implicate the four month jurisdictional limit of the applicable rule of practice (§ 17-4) because courts have continuing jurisdiction to fashion appropriate remedies pursuant to their inherent powers, and its ruling allowing the petitioner to amend his petition for certification to appeal was merely a clarification of an ambiguity in the record concerning which claims the petitioner had preserved for appeal, and although the petitioner timely raised claims in his petition for certification to appeal and his waiver application, the court had ruled on only the former, and the issues raised in his application went unaddressed by the court, through no fault of the petitioner, until he filed a motion for articulation; accordingly, the court did not open a twenty-two month old judgment but, rather, addressed an overlooked petition for certification to appeal that previously had been filed.
2. The habeas court did not abuse its discretion in denying the habeas petition and concluding that trial counsel's performance was not deficient:

   a. The petitioner could not prevail on his claim that the habeas court erred by not analyzing whether the cumulative effect of his trial counsel's alleged errors constituted prejudice under *Strickland* v. *Washington* (466 U.S. 668); the court considered and rejected multiple claims of ineffective assistance that the petitioner alleged against his trial counsel, noting that the state presented a strong case against the petitioner, our Supreme Court has repeatedly declined to adopt a cumulative error analysis, and it was not within the province of this court to reevaluate the decisions of our Supreme Court.

   b. The petitioner's claim that his trial counsel was ineffective by failing to ensure that he was competent to stand trial was unavailing; although the petitioner claimed the court did not consider evidence that he suffered from amnesia when the crimes were committed and throughout his criminal trial, the petitioner's trial counsel testified at the habeas trial that he had reviewed three competency evaluations, all of which indicated that the petitioner was competent to stand trial and capable of assisting his attorney, the court found that trial counsel's testimony was credible and that the petitioner was intelligent and able to understand the proceeding, and that the petitioner presented no evidence to corroborate his amnesia claim or indicating what an additional investigation would have uncovered had counsel undertaken such steps, and the petitioner failed to demonstrate that that finding of the habeas court was clearly erroneous.
3. The petitioner could not prevail on his claim that the habeas court abused its discretion in denying his petition for a writ of mandamus to obtain legal assistance in preparing his appellate brief and oral argument:

   a. Contrary to the claim of the respondent, the petitioner's claim was not moot because it fell within the capable of repetition, yet evading review exception to the mootness doctrine; the petitioner's claim related

to an inherently limited action that would likely be moot in a substantial majority of cases, the petitioner alleged an ongoing constitutional violation in which our correctional facilities systematically deny inmates meaningful access to the courts and, thus, this issue would be likely to arise any time that an inmate proceeds self-represented, and the petitioner raised a question of public importance because he alleged a serious constitutional violation.

b. The habeas court did not abuse its discretion in denying the petition for a writ of mandamus; the appointment of counsel for habeas petitioners satisfies the requirements of our state constitution and *Bounds* v. *Smith* (430 U.S. 828), which provides that inmates have a constitutional right to access to the courts, the petitioner was not deprived of his rights because he had the option of appointed counsel at his habeas trial and on appeal but elected to proceed self-represented, *Bounds*, which affords the states discretion to determine how to provide access to the courts, and its progeny provide no specific requirement that the states provide law libraries or other means of legal research to inmates, and, therefore, the remedy sought was not a mandatory duty of the state and the petitioner had no clear right to have the duty performed.

Argued September 23—officially released December 17, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Cobb*, *J.*, granted the petition for certification to appeal; thereafter, the court, *Bright*, *J.*, denied the petition for a writ of mandamus filed by the petitioner. *Affirmed.*

Ian Cooke, self-represented, the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom were *Matthew A. Weiner*, assistant state's attorney, and, on the brief, *William Tong*, attorney general, *Michael L. Regan*, state's attorney, and *Lawrence J. Tytla*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. The petitioner, Ian Cooke, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner asserts that (1) his claims were properly certified for appellate review by the habeas court, (2) the cumulative effect of his trial counsel's errors deprived him of effective assistance of counsel, (3) his trial counsel was ineffective in not ensuring that he was competent to stand trial, and (4) the court erred in failing to issue a writ of mandamus directing the Office of the Chief Public Defender to provide him with legal assistance to pursue the present appeal. The respondent, in turn, argues that the habeas court lacked jurisdiction to grant the petition for certification to appeal more than four months after its initial denial of certification to appeal. In response, the petitioner contends that the court had continuing jurisdiction to grant the petition for certification to appeal. We agree that the court had continuing jurisdiction to grant the petition for certification to appeal, but conclude that it did not abuse its discretion in denying both the petition for a writ of habeas corpus and the petition for a writ of mandamus. Accordingly, we affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, capital felony murder in violation of General Statutes § 53a-54b (7), and possession of a sawed-off shotgun in violation of General Statutes § 53a-211 (a). The court sentenced him to a total effective term of life imprisonment without the possibility of parole. The petitioner's conviction was affirmed on direct appeal. *State* v. *Cooke*, 134 Conn. App. 573, 581, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). In its resolution of that appeal, this court set forth the following facts, which are relevant to this appeal.

"Sometime after 3 p.m. on May 27, 2006, the town of Groton dispatch center received a 911 call from 1021 Pleasant Valley Road reporting that one Gregory Giesing had been shot at his residence. Police officers, including Officer Sean Griffin, arrived at the scene, and Gregory Giesing's wife, Laurel Giesing, reported that she had observed in her driveway after she had found her husband shot a 'dark, silver grayish' Jeep with thick piping on the front. After going through the residence to ensure that it was safe, Griffin went to the lower unit of the residence and found Derek Von Winkle, Gregory Giesing's stepbrother, who also had been shot. Shortly thereafter, fire and medical personnel arrived.

"One of the responders from the fire department informed Griffin that there had been a stabbing at the LaTriumphe Apartments, which was near the Giesings' residence. The police, including Griffin, responded to that location, entered an apartment through an open sliding door and found on the living room floor the [petitioner], whose hand and cheek were injured. The police spoke with the [petitioner's] father, who had called 911 and had told the dispatcher that his son may have been stabbed by a drug dealer or drug dealers. Based upon the conversation between the police and the [petitioner's] father, Griffin then went outside to the parking lot to look for the Jeep that Laurel Giesing had described. Griffin located a silver gray Jeep with a 'brush guard,' and observed blood on the exterior driver's side and on the driver's side interior compartment of the vehicle. Laurel Giesing was later shown the vehicle and, after examining it, stated that it looked 'very similar' to and 'the same' as the vehicle she saw at her residence after her husband had been shot. Additionally, a search of the general outside area, including a wooded area, around the [petitioner's] apartment revealed apparently bloodstained duffle bags containing illegal drugs and a disassembled shotgun.

"An associate medical examiner for the state determined that Gregory Giesing died of a gunshot wound to the chest. The medical examiner concluded that Von Winkle died of a shotgun wound to the neck and chest. . . .

"Several items of evidence, including three known samples of DNA from Von Winkle, Gregory Giesing and the [petitioner], were submitted to the state forensic science laboratory for DNA analysis. Nicholas Yang, a forensic science examiner, performed the tests. At trial, he testified as to his findings. Yang determined that the [petitioner's] DNA was consistent with that found on the exterior of a duffle bag found outside the [petitioner's] apartment complex, the doorknob to Von Winkle's apartment, multiple locations on pants retrieved from Gregory Giesing's body, the wooden deck area of Gregory Giesing's residence, a part of the floor mat of the Jeep and on various parts of the disassembled shotgun. The [petitioner] could not be eliminated as a source of DNA on the zipper of a Dudley bag, a reddish-brown stain on a knife found near Gregory Giesing's body, a blood-like substance taken from the interior door of Gregory Giesing's apartment, the steering wheel of the Jeep, a hacksaw from the apartment in which the [petitioner] was found, two swabs from the floor mat of the Jeep and the brake pedal from the Jeep." (Citations omitted; footnote omitted.) Id., 575–77.

On August 4, 2011, the petitioner filed a self-represented petition for a writ of habeas corpus. Subsequently, Attorney John Williams was appointed to represent the petitioner. Williams never filed an amended petition. When asked by the habeas court, *Cobb*, *J.*, to clarify the claims raised in the petition, Williams presented three claims that the petitioner's trial counsel, Attorney John Walkley, was ineffective by: "(1) failing to adequately investigate and prepare the case for trial, (2) failing to adequately challenge the prosecution's case and present the defense's case at trial and

(3) failing to assure that the petitioner was competent to stand trial." In addition, the petitioner's brief to the habeas court raised two more claims that Walkley was ineffective in cross-examining one witness and impeaching another witness.

The habeas court conducted a five day trial between March 20, 2014, and September 10, 2014. On July 8, 2015, the habeas court issued a memorandum of decision denying the petition. The habeas court concluded that, as to each of the petitioner's claims, he had failed to prove either that Walkley's performance was deficient or that the petitioner was prejudiced by Walkley's performance, as required by *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to establish ineffective assistance of counsel. The habeas court also noted that the petitioner had offered little to no evidentiary support for most of his claims.

Shortly thereafter, on July 13, 2015, Williams filed a petition for certification to appeal setting forth two issues: "Did [the habeas] [c]ourt err in [1] requiring petitioner to prove prejudice from trial counsel's failure to have a competency exam, when such retrospective proof is impossible and prejudice is presumed; and [2] in failing to address counsel's failure to visit the crime scene and test . . . both sound and sight?" The court denied the petition for certification to appeal on July 14, 2015.

On July 22, 2015, independently of Williams, the petitioner filed an application for waiver of fees, costs and expenses and appointment of counsel on appeal (waiver application). Attached to the waiver application, the petitioner included a document titled, "Affidavit in Support of Petition for Certification to the Appellate Court." In this affidavit, the petitioner requested certification to appeal on different grounds than those articulated by Williams. The petitioner sought certification to appeal on four other issues: (1) whether the court properly considered the petitioner's argument that he was

not competent to assist Walkley; (2) whether the evidence, in the aggregate, supported the petitioner's theory that Walkley had not conducted a thorough and complete investigation of the blood and DNA evidence; (3) whether there were cumulative deficiencies in Walkley's representation and whether those numerous deficiencies, in the aggregate, prejudiced the petitioner; and (4) whether the court erred in not considering the totality of Walkley's alleged errors in conducting its *Strickland* analysis. While the habeas court did grant the petitioner's waiver application on July 27, 2015, there was no indication in the record at that time that the court had ruled on the petitioner's request for certification of additional issues on appeal.

On August 17, 2015, the petitioner filed his appeal. Subsequently, on November 5, 2015, Attorney Allison Near filed her appearance as appointed appellate counsel for the petitioner. On June 10, 2016, Near filed a motion for leave to withdraw as appointed counsel accompanied with an *Anders* brief.[1] The petitioner later filed, on January 4, 2017, a motion to remove Near as appointed counsel and to proceed self-represented. The court, *Bright, J.*, granted the petitioner's motion on March 6, 2017. Subsequently, the self-represented petitioner filed an appearance with this court on March 17, 2017.

On March 31, 2017, the petitioner filed a motion for articulation, requesting that the habeas court issue a ruling on his affidavit attached to his waiver application, which he had filed on July 22, 2015, that outlined additional issues for appeal. In a handwritten ruling added at the end of the petitioner's motion and dated May 9, 2017, the court, *Cobb, J.*, concluded that "[i]n view of the petitioner's status as a self-represented litigant, the [c]ourt treats this motion for articulation as a motion to

[1] See *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

amend his petition for certification to include additional issues on appeal, and grants it.'' Subsequently, on appeal, the petitioner has challenged the habeas court's judgment denying his petition for a writ of habeas corpus on the grounds raised in his affidavit.

On May 3, 2017, the petitioner filed a petition seeking a writ of mandamus to compel the Office of the Chief Public Defender to assist the petitioner's legal research. In his petition, the petitioner contended that he was incapable of conducting legal research, because the Department of Correction does not provide law libraries or online legal resources to its inmates and, as a result of his decision to proceed as a self-represented petitioner, he did not have access to outside legal assistance. Consequently, the petitioner argued that the lack of legal resources violated his federal and state constitutional right to have meaningful access to the courts and, thus, necessitated an order to compel legal assistance from the Office of the Chief Public Defender. On June 26, 2017, the court, *Bright*, *J.*, issued an oral decision from the bench, denying the petition for mandamus relief. In the present appeal, the petitioner challenges the court's ruling on his petition for a writ of mandamus.

I

Before we may reach the merits of the petitioner's appeal, we must first resolve the respondent's challenge to the subject matter jurisdiction of the habeas court, *Cobb*, *J.* The respondent argues that, by allowing the petitioner to amend his petition for certification to appeal on May 9, 2017, the habeas court effectively modified its July 14, 2015 denial of the petition for certification to appeal. The respondent argues that the habeas court was without jurisdiction to modify this decision because, as this court has stated, General Statutes § 52-212a and Practice Book § 17-4 provide that unless "the court has continuing jurisdiction, a civil

judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed." (Internal quotation marks omitted.) *Gordon* v. *Gordon*, 148 Conn. App. 59, 64, 84 A.3d 923 (2014). Thus, because the habeas court issued its May 9, 2017 decision well beyond this four month limit, the respondent argues that the court was without subject matter jurisdiction to grant certification to appeal.

We disagree with the respondent's contention. As we previously explained, following the habeas court's decision denying the petition for a writ of habeas corpus, Williams filed a petition for certification to appeal that was denied by the habeas court on July 14, 2015. Thereafter, the petitioner filed his waiver application on July 22, 2015. Attached to the waiver application was a document titled "Affidavit in Support of Petition for Certification to the Appellate Court" that requested that four grounds be certified for review. Although the waiver application was granted, no action was taken at that time on the petitioner's request for certification of additional issues on appeal. On March 31, 2017, the petitioner filed a motion for articulation requesting a ruling on the affidavit in support of certification of additional issues on appeal. On May 9, 2017, the habeas court treated the motion for articulation as a motion to amend the petition for certification and granted it.

Contrary to the respondent's claim, we do not interpret the May 9, 2017 ruling by the habeas court as implicating the four month jurisdictional limit of Practice Book § 17-4 because, "[e]ven beyond the four month time frame set forth in . . . § 17-4 . . . courts have continuing jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . ." (Footnote omitted; internal quotation marks omitted.) *Bauer* v. *Bauer*, 308 Conn. 124, 130, 60 A.3d 950 (2013); see also

Practice Book § 66-5 ("[t]he trial court may make such corrections or additions as are necessary for the proper presentation of the issues").

In the present appeal, the habeas court's ruling on May 9, 2017, was merely a clarification of the ambiguous record. Prior to its ruling, there was an ambiguity in the record concerning which claims the petitioner had preserved for his appeal. While the petitioner timely raised claims in both his petition for certification to appeal and his waiver application, the habeas court had ruled on only the former. For twenty-two months, through no fault of the petitioner, the issues raised in his waiver application went unaddressed by the court until he filed a motion for articulation. Therefore, by allowing the petitioner to "amend" his petition for certification to appeal, the habeas court was, in effect, issuing a belated ruling to recognize the additional issues raised in the petitioner's waiver application. In other words, the court was not opening a judgment twenty-two months after the fact; instead, it was addressing an overlooked petition for certification to appeal that was filed twenty-two months previously. Consequently, there is no jurisdictional problem as the respondent contends.[2]

II

The petitioner claims that the habeas court's May 9, 2017 order not only permitted him to expand the number of issues raised on appeal, but also granted the petition for certification to appeal. We agree that the decision was ambiguously written and the respondent concedes that it was "reasonabl[e] . . . [to believe] that the habeas court had *granted* certification to appeal

[2] We acknowledge that, by filing his own petition for certification to appeal, the petitioner arguably violated the prohibition on hybrid representation. See Practice Book § 62-9A ("a . . . habeas petitioner has no right to self-representation while represented by counsel"). Given the fact that the respondent did not object on this ground and the petitioner may, in fact, have been unrepresented when he filed his petition, we will consider his claims.

. . . .'' (Emphasis in original.) Therefore, we interpret the court's ambiguous ruling to have granted the petition for certification to appeal.

The petitioner asserts that the court abused its discretion by denying his petition for a writ of habeas corpus for two reasons: (1) Walkley's representation of him was ineffective due to cumulative deficiencies in Walkley's performance; and (2) Walkley's representation was ineffective because Walkley did not ensure that the petitioner was competent to stand trial.

''As the United States Supreme Court articulated in *Strickland* v. *Washington*, [supra, 468 U.S. 687], [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . Put another way, the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong.'' (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849–50, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

A

In its memorandum of decision, the habeas court carefully considered and rejected multiple claims of ineffective assistance of counsel that the petitioner alleged against Walkley. The habeas court stated, and

we agree, that the state presented a very strong case against the petitioner. The petitioner claims, however, that the court erred by not analyzing whether the cumulative effect of Walkley's alleged errors at trial constituted prejudice under *Strickland*. This claim of error is resolved by our prior decisions. "Our appellate courts . . . have consistently declined to adopt this [cumulative error analysis]. When faced with the assertion that the claims of error, none of which individually constituted error, should be aggregated to form a separate basis for a claim of a constitutional violation of a right to a fair trial, our Supreme Court has repeatedly decline[d] to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts." (Internal quotation marks omitted.) Id., 850–51; see also *State* v. *Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 112 S. Ct. 3000, 120 L. Ed. 2d 876 (1992). "Because it is not within the province of this court to reevaluate decisions of our Supreme Court . . . we lack authority under the current state of our case law to analyze the petitioner's ineffective assistance claims under the cumulative error rule." (Citation omitted; footnote omitted.) *Antwon W.* v. *Commissioner of Correction*, supra, 851. Therefore, because the petitioner is effectively asking this court to overturn our Supreme Court's precedent; see *State* v. *Tillman*, supra, 505; we cannot grant the relief he seeks, and his first claim fails.

B

The petitioner next claims that the habeas court erroneously concluded that Walkley was not deficient and that the petitioner was not prejudiced by Walkley's failure to ensure that the petitioner was competent to stand trial. The petitioner asserts that the habeas court neglected to consider evidence that the petitioner suffered from amnesia from the time that the crimes were committed and continued to suffer from amnesia throughout his trial. The petitioner further claims that

the evidence presented to the court demonstrated that Walkley failed to investigate properly the petitioner's mental state and, if Walkley had done so, he would have discovered that the petitioner was incompetent to stand trial. Accordingly, the petitioner argues that the habeas court erred by overlooking this evidence and determining that Walkley had not rendered ineffective assistance of counsel. We are not persuaded.

The standard of review pertaining to claims of ineffective assistance of counsel is well settled. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

In analyzing the performance prong of *Strickland*, our focus is on "whether counsel's assistance was reasonable considering all the circumstances. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679–80.

The following additional facts are relevant to our resolution of the petitioner's claim of ineffective assistance of counsel. At the habeas trial, Walkley testified that he received two competency evaluations from the petitioner's previous trial counsel. Both evaluations, conducted in 2006 and 2007, indicated that the petitioner was competent to stand trial and capable of assisting his attorney. Despite never having been personally concerned that the petitioner was incompetent, Walkley testified that he sought the advice of a third psychiatric expert. Although the report from this evaluation was not entered into evidence, Walkley testified that nothing contained in the report led him to believe that the petitioner was incompetent.

The habeas court concluded that the petitioner "presented no evidence at trial to corroborate his amnesia claim or to establish that the petitioner was not competent to stand trial . . . [nor any] evidence to prove what any additional investigation or an additional mental health evaluation would have uncovered had such steps been undertaken by counsel." Instead, the court found that Walkley's testimony was credible and similarly concluded that "the petitioner was very intelligent and able to communicate and understand the proceedings." Thus, the court concluded that the petitioner had not shown any error committed by Walkley to satisfy the first prong of *Strickland*. The court also noted that the petitioner failed to prove the prejudice prong of

Strickland because he had neither proven that he suffered from amnesia nor established that his amnesia would have rendered him incompetent for trial. Accordingly, the court determined that the petitioner had not demonstrated that his counsel was ineffective. We agree.

General Statutes § 54-56d (a) provides that "[a] defendant shall not be tried, convicted or sentenced while he is not competent. For the purposes of this section, a defendant is not competent if he is unable to understand the proceedings against him or her or to assist in his or her own defense." Furthermore, "[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." General Statutes § 54-56d (b). "The standard we use to determine whether a defendant is competent . . . is whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (Citations omitted; internal quotation marks omitted.) *State* v. *Dort*, 315 Conn. 151, 170, 106 A.3d 277 (2014).

On appeal, the petitioner contends that the evidence presented to the habeas court supported a finding that Walkley neglected to fully investigate the petitioner's mental state. Despite two prior competency evaluations that deemed the petitioner competent to stand trial and a third evaluation ordered by Walkley that concurred, the petitioner argues that the habeas court should have found that Walkley inadequately examined the petitioner's mental state. According to the petitioner, had Walkley conducted an additional investigation, it would have revealed that the petitioner suffered from amnesia from the time that the crimes were committed and continued to suffer from amnesia throughout his trial. In light of this evidence, the petitioner claims that the

habeas court should have found that the petitioner was incompetent to assist in his own defense. Further, the petitioner argues that, by failing to conduct an additional investigation, Walkley's performance was deficient and per se prejudicial. We disagree.

The petitioner's arguments are without merit. The crux of his arguments is that he presented evidence in support of his claims that was ignored by the habeas court. This claim, however, is directly contradicted by the habeas court's findings of fact. The habeas court found that the petitioner presented no evidence to support his claim of ineffective assistance of counsel nor evidence of his amnesia. The petitioner, in effect, attempts to point to evidence in the record that simply does not exist. It is the sole province of the habeas court to admit evidence into the record and it ''is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous.'' (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 677. The petitioner has asserted no basis for this court to determine that the habeas court's factual finding that the petitioner provided no evidence to support his claim was clearly erroneous. Likewise, we cannot conclude that the habeas court should have ruled in favor of the petitioner when there was no evidence to support the petitioner's position. Therefore, we conclude that the habeas court did not abuse its discretion in finding that Walkley's performance was not deficient, and we need not address the petitioner's arguments concerning prejudice. See *Antwon W.* v. *Commissioner of Correction*, supra, 172 Conn. App. 849–50.

III

The last issue the petitioner raises on appeal is whether the court, *Bright, J.*, erred in denying his petition for a writ of mandamus to obtain legal assistance in preparing his brief and oral argument to this court.

Before reaching this claim, we must address the respondent's argument that the petitioner's third claim is moot. The respondent contends that because the petitioner already has filed his brief and presented his argument, there is no practical relief that this court may grant and, thus, the petitioner's claim is moot. We disagree.

A

Despite the respondent's argument that the petitioner's claim is moot, we are persuaded that the claim falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 60 A.3d 323 (1995). "To qualify under this exception, an otherwise moot question must satisfy the following three requirements: First, the challenged action, or the effect of the challenged action, by its very nature, must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Gainey* v. *Commissioner of Correction*, 181 Conn. App. 377, 383, 186 A.3d 784 (2018).

"The first element in the analysis pertains to the length of the challenged action. . . . If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is sig-

nificantly reduced." (Citations omitted; footnote omitted.) *Loisel* v. *Rowe*, supra, 233 Conn. 383–84.

The present appeal satisfies the first *Loisel* factor. Our rules of appellate practice necessitate that the petitioner file a brief and attend oral argument. Practice Book § 66-8 provides that an appeal may be dismissed for failure to file a brief within the forty-five day time limit imposed by Practice Book § 67-3. Similarly, Practice Book § 70-3 provides that the court may, for nonappearance of a party at oral argument, dismiss an appeal, decide the case solely on the briefs, or further sanction the nonappearing party. Our appellate procedural rules have the effect of creating an inherently limited timeframe in which the petitioner's appeal is prosecuted. The way the petitioner has raised this issue before this court, and enabled us to reach the merits of his claim, was by filing a brief and arguing his case.[3] In other words, it would be impossible for the petitioner, or any other litigant, to seek redress on this matter in a similar manner without mooting his claim. Therefore, the petitioner's claim relates to an inherently limited action that will likely be moot in a substantial majority of cases and satisfies the first *Loisel* factor.

The second factor "entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the present litigation." *Loisel* v. *Rowe*, supra, 233 Conn. 384. "A requirement of the likelihood that a question will recur is an integral component of the 'capable of repetition, yet evading review' doctrine. In the absence of the possibility of such repetition, there would be no justification for reaching the issue, as a decision would neither provide relief in the present

[3] We note that it has not been argued that any alternative vehicle exists to present this issue.

case, nor prospectively resolve cases anticipated in the future." Id. "Commonly referred to as the surrogacy concept, [the] second inquiry requires some nexus between the litigating party and those people who may be affected by the court's ruling in the future." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 96 Conn. App. 496, 500–501, 900 A.2d 572, cert. denied, 280 Conn. 938, 910 A.2d 217 (2006).

In the present appeal, the petitioner alleges an ongoing constitutional violation in which our correctional facilities systematically deny inmates access to legal research. The petitioner argues that the denial of access to legal research effectively has denied his right to meaningful access to the courts. Thus, this issue is likely to arise any time that an inmate decides to proceed self-represented. Furthermore, the *Loisel* court noted that cases brought by inmates represent one of the quintessential examples of an adequate surrogate for the second factor. *Loisel* v. *Rowe*, supra, 233 Conn. 386. We agree that the petitioner can serve as an adequate surrogate for other inmates who similarly decide to pursue their habeas claims self-represented and are met with the burden of conducting their own legal research. Thus, the petitioner's claim satisfies the second *Loisel* factor.

The third factor, "[t]he requirement of public importance is largely self-explanatory. Since judicial resources are scarce, and typically reserved for cases that continue to be contested between the litigants, this court does not review every issue that satisfies the criteria of limited duration and likelihood of recurrence." Id., 387. Typically, cases that raise a constitutional issue satisfy this factor. See, e.g., *In re Emma F.*, 315 Conn. 414, 425, 107 A.3d 947 (2015) (noting that appellant's constitutional claim of violation of free speech rights was matter of public importance); *State* v. *Mordasky*, 84 Conn. App. 436, 442, 853 A.2d 626 (2004)

("[f]inally, because the defendant has raised a constitutional issue with respect to his competence to enter into a plea agreement, he has presented an issue that qualifies as a question of public importance").

Applying these principles to the present case, we are persuaded that the petitioner raises a question of public importance. As noted previously, he has alleged a serious constitutional violation in that he has been deprived of his right to meaningful access to the courts. Recognizing the constitutional magnitude of this claim, we conclude that the petitioner has satisfied the third *Loisel* factor.

We conclude, therefore, that we have subject matter jurisdiction to hear the merits of the petitioner's appeal, because it is not moot under the "capable of repetition, yet evading review" exception to the mootness doctrine. We turn next to the petitioner's substantive claim.

B

"The requirements for the issuance of a writ of mandamus are well settled. Mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear legal right to have done that which he seeks. . . . The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy. . . . Even satisfaction of this demanding [three-pronged] test does not, however, automatically compel issuance of the requested writ of mandamus. . . . In deciding

the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity. . . . We review the trial court's decision, therefore, to determine whether it abused its discretion in denying the writ." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 416–17, 853 A.2d 497 (2004).

"In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; internal quotation marks omitted.) Id., 417. "Nevertheless, this court will overturn a lower court's judgment if it has committed a clear error or misconceived the law." *Morris* v. *Congdon*, 277 Conn. 565, 569, 893 A.2d 413 (2006).

In seeking mandamus relief from the habeas court, the petitioner argued that the state had deprived him of his right to meaningful access to the courts by not providing any means of legal research. It is well established that "prisoners have a constitutional right of access to the courts . . . [and that such access must be] adequate, effective and meaningful." (Citations omitted; internal quotation marks omitted.) *Bounds* v. *Smith*, 430 U.S. 817, 821–22, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). "Decisions of the United States Supreme Court have consistently required [s]tates to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. . . . *Bounds* does not [however] guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment

of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." (Citations omitted; internal quotation marks omitted.) *Washington* v. *Meachum*, 238 Conn. 692, 735–36, 680 A.2d 262 (1996).

"[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds* v. *Smith*, supra, 430 U.S. 828. Such assistance, however, may take many forms and "*Bounds* . . . guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis* v. *Casey*, 518 U.S. 343, 356, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). "Insofar as the right vindicated by *Bounds* is concerned, meaningful access to the courts is the touchstone . . . and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." (Citation omitted; internal quotation marks omitted.) Id., 351.

In the context of a habeas appeal, this court has held that the appointment of counsel for habeas petitioners satisfies the requirements of *Bounds* and our state constitution. *Sadler* v. *Commissioner of Correction*, 100 Conn. App. 659, 662–63, 918 A.2d 1033, cert. denied, 285 Conn. 901, 938 A.2d 593 (2007). Consequently, this court held in *Sadler* that the absence of a law library in our correctional facilities did not deprive a habeas petitioner of his constitutional rights because he had the option of appointed counsel but elected to proceed self-represented. Id., 663. The same situation applies in the present case.

In adjudicating the petition for a writ of mandamus, the court correctly applied the law and concluded that

the petitioner had neither satisfied the first nor second prongs of *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 416–17. The court recognized that *Bounds* affords discretion to the states to determine how best to provide meaningful access to the courts. Moreover, the court noted that our state has exercised its discretion to satisfy the requirements of *Bounds* by providing appointed counsel to habeas petitioners and, as a result, the petitioner has no clear constitutional right to assistance with legal research in this matter. Thus, the court concluded that mandamus relief was improper and denied the petition. We agree.

Bounds and its progeny provide no specific requirement that the states provide law libraries or other means of legal research to inmates. E.g., *Lewis* v. *Casey*, supra, 518 U.S. 356. Further, our state has satisfied the requirements of *Bounds* by providing appointed counsel to habeas petitioners. *Sadler* v. *Commissioner of Correction*, supra, 100 Conn. App. 663. In the present case, the state provided the petitioner with meaningful access to the courts through the appointment of Williams to represent him at the habeas trial and Near to represent him on the habeas appeal. The petitioner has not presented a valid claim that his constitutional rights were violated.[4] Thus, the remedy the petitioner sought was

[4] The petitioner attempts, in his brief, to raise an independent state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). The petitioner argues that article first, § 8, of the constitution of Connecticut guarantees the right to self-representation in criminal proceedings. Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . ." However, the petitioner misunderstands his procedural posture. As a habeas petitioner, he is party to a civil proceeding. Moreover, he is no longer an "accused" but, instead, is a person who has been convicted. Our courts have never applied article first, § 8, of the constitution of Connecticut to habeas petitioners, and we decline to do so now. Therefore, because his analysis of the Connecticut constitution is irrelevant to the present appeal, the petitioner has provided no independent state constitutional claim. Accordingly, we limit our review to the petitioner's federal constitutional claim. See *State* v. *Jarrett*, 82 Conn. App. 489, 498 n.5, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004). As discussed in part III B of this opinion, the petitioner's federal constitutional claim is without merit as well.

not a mandatory duty of the state and he had no "clear legal right to have the duty performed . . . ." See *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 417. Therefore, the court properly exercised its discretion by denying the petition for a writ of mandamus.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RUBEN VASQUEZ (AC 42147)

Bright, Moll and Bishop, Js.

Syllabus

The acquittee, who had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the judgment of the trial court denying his application for discharge from the jurisdiction of the Psychiatric Security Review Board. He claimed that the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission, cannabis use disorder in remission in a controlled environment, and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, do not constitute psychiatric disabilities pursuant to the statutes (§§ 17a-580 through 17a-602) concerning the psychiatric security review board. *Held* that the trial court did not err in denying the acquittee's application for discharge from the jurisdiction of the board and determining that the acquittee's diagnoses constituted psychiatric disabilities under §§ 17a-580 through 17a-602; that court's finding that the acquittee was mentally ill, suffered from a substance induced psychotic disorder and, thus, suffered from more than mere substance abuse was not clearly erroneous, as the court, in making that finding, considered testimony from a treating forensic psychiatrist, as well as the acquittee's history under the supervision of the board, his anxious and impulsive behavior over the past eight years, the nature of and circumstances surrounding his criminal conduct in assaulting and attempting to assault individuals, his need for continued therapy and supervision, his refusal to consider medication as recommended and his lack of compliance and honesty with staff members and treaters, and on the basis of the totality of the evidence, the court determined that if the acquittee were to be released from the board's supervision entirely, he would under those circumstances present a danger to himself or others.

Argued September 24—officially released December 17, 2019

Procedural History

Application for discharge from the jurisdiction of the psychiatric security review board, brought to the Superior Court in the judicial district of Hartford and tried to the court, *D'Addabbo*, *J.*; judgment dismissing the application, from which the acquittee appealed to this court. *Affirmed.*

Monte P. Radler, public defender, with whom was *Richard E. Condon, Jr.*, senior assistant public defender, for the appellant (acquittee).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Vicki Melchiorre*, supervisory assistant state's attorney, and *Adam B. Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The acquittee,[1] Ruben Vasquez, appeals from the judgment of the trial court denying his application for discharge from the jurisdiction of the Psychiatric Security Review Board (board).[2] On appeal, the acquittee claims that the court erred in denying his application for discharge because the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission; cannabis use disorder in remission in a controlled environment; and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, do not constitute psychiatric disabilities under General Statutes §§ 17a-580 through 17a-602 (board statutes). We affirm the judgment of the court.

[1] "[An] '[a]cquittee' [is] any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." General Statutes § 17a-580 (1).

[2] We treat the court's denial of the acquittee's application as a dismissal pursuant to General Statutes § 17a-593 (g).

The following facts and procedural history are relevant to our analysis. "[On July 14, 2009, the acquittee] . . . randomly attack[ed] five young individuals, with a four foot six inch [one by four] hard yellow pine pressure treated board. Two of the young individuals attacked were a three and one year old child. While being taken into custody, [the acquittee] physically attacked a police officer."

The acquittee was charged with four counts of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), four counts of criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-50 (a) (1), and two counts of assault of a peace officer in violation of General Statutes § 53a-167c (a) (1).[3] On June 7, 2011, the acquittee was found not guilty by reason of mental disease or defect pursuant to General Statutes § 53a-13.[4] On August 8, 2011, the court, *Randolph*, *J.*, committed the acquittee to the jurisdiction of the board and ordered that he be confined at Dutcher Service on the campus of the Connecticut Valley Hospital for a period not to exceed fifteen years.

On July 25, 2017, in accordance with § 17a-593 (a), the acquittee filed an application with the court seeking discharge from the jurisdiction of the board. The court forwarded the application to the board, which held a hearing on September 15, 2017, pursuant to General Statutes § 17a-593 (d). On October 26, 2017, the board filed its report with the court recommending that the acquittee not be discharged because "[a]lthough [the

[3] One count of assault of a peace officer subsequently was dismissed.

[4] General Statutes § 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

acquittee's] psychotic symptoms have not been active since his commitment to the [b]oard, he has repeatedly demonstrated poor judgment, impulsivity, deceitfulness and rule breaking behavior. He has disregarded the rules and protocols in a hospital setting, thereby jeopardizing the [t]emporary [l]eave that would have permitted [the acquittee] to transition to the community. [The acquittee's] treatment team has recommended he consider medication to assist with some of his problematic behaviors, but he has declined the recommendation."

In addition, in its report filed with the court, the board discussed the acquittee's risk factors, stating that "[a] significant risk factor for [the acquittee] remains his history of substance use. As testimony indicated, a substance use relapse would increase [the acquittee's] risk for a re-emergence of his psychotic symptoms. Testimony noted that stress has the potential to exacerbate [the acquittee's] risk of relapse. If discharged from the jurisdiction of the [b]oard, [the acquittee] would return to the community without an established support network. Given that [the acquittee's] psychotic symptoms are intimately tied to his substance use, and [that the acquittee] failed to conform his behavior appropriately in a supervised inpatient setting, the [b]oard finds that [the acquittee's] risk for a substance abuse relapse in a nonsupervised setting without an established community support network is significant. Therefore, the [b]oard finds that [the acquittee] cannot reside safely in the community without [b]oard oversight and should remain under the supervision and jurisdiction of the [b]oard."

On May 29, 2018, after receiving the report, the court, *D'Addabbo*, *J.*, held a hearing on the acquittee's application for discharge pursuant to § 17a-593 (f). The court heard testimony from the following individuals: Maya Prabhu, M.D., consultant to the Department of Mental Health & Addiction Services; the acquittee; and Larry

Spencer of the Capitol Region Mental Health Center. The court concluded the evidentiary portion of the hearing on May 29, 2018, and heard arguments from the parties' respective counsel on June 18, 2018.

On July 27, 2018, the court issued a memorandum of decision denying the acquittee's application for discharge, concluding that, on the basis of the evidence presented at the May 29, 2018 hearing, the acquittee has "psychiatric disabilities" and "if . . . released from the [b]oard's supervision entirely . . . would . . . present a danger to himself or others." This appeal followed. Additional facts will be set forth as necessary.

The acquittee claims that the court erred in denying his application for discharge because the diagnoses attributed to him—cannabis induced psychotic episode, an acute intoxication now in full remission; cannabis use disorder in remission in a controlled environment; and alcohol use disorder in remission in a controlled environment—are not considered mental illnesses and, thus, are not psychiatric disabilities under the board statutes. In making this claim, the acquittee invites this court to overlook our Supreme Court's decision in *State* v. *March*, 265 Conn. 697, 830 A.2d 212 (2003), and this court's decision in *State* v. *Kalman*, 88 Conn. App. 125, 868 A.2d 766, cert. denied, 273 Conn. 938, 875 A.2d 44 (2005), and to conclude that, because his diagnoses are based on substance and alcohol abuse, they cannot be considered mental illnesses or psychiatric disabilities under the board statutes. We are not persuaded.

We first review the statutory procedure relevant to an application for discharge by an acquittee from the jurisdiction of the board. When an individual is found not guilty by reason of mental disease or defect, the individual—the acquittee—is committed to the custody of the Commissioner of Mental Health and Addiction Services for examination of the acquittee's mental condition. General Statues § 17a-582 (a). Once the examination is complete, a hearing is held, and the court deter-

mines whether the examinee should be confined,[5] conditionally released,[6] or discharged.[7] General Statutes § 17-582 (e) (1) and (2). If the court finds that the acquittee should be confined, the acquittee is committed to the jurisdiction of the board for a maximum term of commitment, no longer than that which could have been imposed if the acquittee had been convicted of the offense. General Statutes § 17a-582 (e) (1).

After the court has committed the acquittee to the jurisdiction of the board, the board must conduct a hearing within ninety days to review the status of the acquittee. General Statutes § 17a-583 (a). During the hearing, the board must consider whether the acquittee should continue to be confined or whether the acquittee should be conditionally released or discharged. General Statutes § 17a-584. The board is required to conduct these hearings at least once every two years until the acquittee is discharged. General Statutes § 17a-585. The acquittee may apply to the court for discharge no sooner than six months after the board's initial hearing and not more than once every six months thereafter. General Statutes § 17a-593 (a). The court then forwards the application for discharge to the board. Thereafter, the board has ninety days after receiving the application to file a report with the court setting forth findings

[5] General Statutes § 17a-580 (10) defines a "[p]erson who should be confined" as "an acquittee who has psychiatric disabilities or has intellectual disability to the extent that such acquittee's discharge or conditional release would constitute a danger to the acquittee or others and who cannot be adequately controlled with available supervisionand treatment on conditional release . . . ."

[6] General Statutes § 17a-580 (9) defines a "[p]erson who should be conditionally released" as "an acquittee who has psychiatric disabilities or has intellectual disability to the extent that his final discharge would constitute a danger to himself or others but who can be adequately controlled with available supervision and treatment on conditional release . . . ."

[7] General Statutes § 17a-580 (11) defines a "[p]erson who should be discharged" as "an acquittee who does not have psychiatric disabilities or does not have intellectual disability to the extent that such acquittee's discharge would constitute a danger to the acquittee or others . . . ."

and conclusions as to whether the acquittee should be discharged. General Statutes § 17a-593 (d).

Upon receiving the report, the court conducts a hearing on either the recommendation from the board or the acquittee's application for discharge. General Statutes § 17a-593 (f). At the hearing, the acquittee has the burden of proving by a preponderance of the evidence that he or she should be discharged. General Statutes § 17a-593 (g). Thereafter, the court makes a finding regarding the mental condition of the acquittee, "considering that its primary concern is the protection of society . . . ." General Statutes § 17a-593 (g). In its finding, the court may determine either that the application for discharge be dismissed or that the acquittee be discharged from the board's custody. See § 17a-593 (g).

Here, the acquittee claims that the court erred in denying his discharge application on the ground that his diagnoses constituted psychiatric disabilities under the board statutes. More specifically, the acquittee asserts that because General Statutes § 17a-458 (b) differentiates between "persons with psychiatric disabilities"[8] and "persons with substance use disorders,"[9] the acquittee is not considered to have a "psychiatric disability."

Resolution of the acquittee's claim on appeal requires us to interpret the meaning of the terms "psychiatric disability" and "mental illness" under the board statutes, which presents a question of statutory interpretation over which our review is plenary. See *State* v. *March*, supra, 265 Conn. 705. On the basis of our interpretation of the relevant statutory scheme, we then

[8] General Statutes § 17a-458 (a) defines "[p]ersons with psychiatric disorders" as "those persons who are suffering from one or more mental disorders as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders' . . . ."

[9] General Statutes § 17a-458 (b) defines "[p]ersons with substance use disorders" as "alcohol dependent persons, as that term is defined in subdivision (1) of section 17a-680, or drug dependent persons, as that term is defined in subdivision (7) of section 17a-680 . . . ."

assess whether the court's factual determination of the status of the acquittee's mental health was clearly erroneous.

General Statutes § 17a-580 (7) provides: " 'Psychiatric disability' includes any mental illness in a state of remission when the illness may, with reasonable medical probability, become active. 'Psychiatric disability' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct . . . ."

In addition, as our Supreme Court explained in *State* v. *March*, supra, 265 Conn. 697, "[t]he statutes relevant to this appeal, [the board statutes], are contained in part V of chapter 319i [of our General Statutes]. . . . General Statutes § 17a-581 (j) authorizes the board to adopt regulations necessary to carry out the purposes of chapter 319i. Section 17a-581-1 of the Regulations of Connecticut State Agencies provides: These rules and regulations will govern practice and procedure before the [board] as authorized by [§§] 17a-580 through 17a-602 of the General Statutes. Section 17a-581-2 (a) (11) of the Regulations of Connecticut State Agencies corresponds to § 17-580 (11) of the General Statutes. [Section 17-580 (11)] defines a person who should be discharged pursuant to § 17a-593 as an acquittee who does not have psychiatric disabilities . . . to the extent that his discharge would constitute a danger to himself or others . . . whereas [§ 17a-581-2 (a) (11)] provides that '[p]erson who should be discharged means an acquittee who is not mentally ill or mentally retarded to the extent that his discharge would constitute a danger to himself or others. . . . Subsection (a) (5) of [§ 17a-581-2] defines mental illness as follows: Mental illness means any mental illness or mental disease as defined by the current Diagnostic and Statistical Manual of Mental Disorders [(DSM-V)] of the American Psychiatric Association and as may hereafter be amended. . . .

"Thus, it is apparent that the . . . definitions found in § 17a-458 [b] do not apply to part V of chapter 319i because that statute specifically enumerates the sections to which it applies and does not refer to any of the sections in part V." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 706–708.

Furthermore, in *State* v. *Kalman*, supra, 88 Conn. App. 125, as in this case, the acquittee was found not guilty of criminal charges by reason of mental defect or disease and was committed to the jurisdiction of the board. The acquittee in *Kalman* claimed that his mental condition was "characterized by alcohol dependence, in remission in a controlled environment; cocaine dependence, in remission in a controlled environment"; and other substance induced mood disorders. Id., 134–35. Similar to this case, the acquittee in *Kalman* claimed that his diagnoses were not psychiatric disabilities because the statutory scheme for civil commitments applied and excluded alcohol and drug-dependent persons as individuals who have mental or emotional conditions. Id., 135.

This court in *Kalman* concluded that the civil commitment statutes were not relevant to whether the acquittee had a psychiatric disability under General Statutes §§ 17a-580 through 17a-603. Id. Rather, this court concluded that based on our Supreme Court's reasoning in *State* v. *March*, supra, 265 Conn. 708, the definition of "psychiatric disability" found in the board statutes applied. *State* v. *Kalman*, supra, 136.

On review, we are bound not only by the holdings of *Kalman* and *March* but also by the persuasiveness of their reasoning. First, "[i]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it. . . . [W]e are not at liberty to overrule or discard the decisions

of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Bischoff*, 189 Conn. App. 119, 123, 206 A.3d 253, cert. granted, 331 Conn. 926, 207 A.3d 28 (2019). Second, "[t]his court often has stated that this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017).

Because we are bound by our Supreme Court's opinion in *State* v. *March*, supra, 265 Conn. 697, and this court's opinion in *State* v. *Kalman*, supra, 88 Conn. App. 125, we conclude that the court did not err in determining that the acquittee's diagnoses were mental illnesses defined by the DSM-V, which constituted psychiatric disabilities under the board statutes.[10]

In addition to our task of statutory construction, we must also review the court's determination of the acquittee's mental health condition. "The determination as to whether an acquittee is currently mentally ill . . . is a question of fact and, therefore, our review . . . is governed by the clearly erroneous standard. . . . A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. Our authority . . . is circumscribed by the deference we must give

[10] We note that the court relied on General Statutes § 17a-458 (a) for the definition of "persons with psychiatric disability." The court nonetheless applied the correct standard in concluding that the acquittee suffered from mental illnesses as defined by the DSM-V and, consequently, from psychiatric disabilities under the board statutes.

to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Jacob*, 69 Conn. App. 666, 680, 798 A.2d 974 (2002).

In reaching its conclusion that the acquittee was mentally ill and thus suffered from a substance induced psychotic disorder, the court considered testimony from Dr. Maya Prabhu, a treating forensic psychiatrist, who has been involved with the acquittee's psychological treatment since his commitment to the board. During her testimony, Dr. Prabhu explained that the acquittee suffered from an underlying psychosis that was induced by substance abuse. The court found that ''[a]ccording to Dr. Prabhu, [the acquittee] tends to see his 'crime' as being related to substance abuse and [does not] think he needs to be on medication for his mental illness issues. Dr. Prabhu present[ed] the acquittee as an individual that has difficulty with emotional regulation when stressed. . . . During his commitment, [the acquittee] became involved in a relationship with another patient at Whiting Forensic. [The acquittee] was not forthright with [Whiting Forensic staff] about the relationship. . . . The issues related to the . . . relationship . . . caused a stressful situation for [the acquittee] . . . [and the acquittee] engaged in a series of rule infractions. Dr. Prabhu testified that this relationship became tempestuous and volatile. [The acquittee] was observed . . . on the telephone with [the other patient] engaging in volatile conversations. . . . A review of the hospital records indicate[d] that in the month of March 2017 there were approximately 500 telephone calls between [the acquittee] and the [other patient]. Dr. Prabhu indicate[d] that this conduct is a product of the acquittee's reaction to stress. He gets excessive, deeply anxious and frustrated. . . . In the face of this conduct, [the acquittee] lacks acceptance of having a mental illness. Dr. Prabhu opine[d] that

unless he has treatment, this [reaction] to stress and resulting conduct would be a risk for him."

In addition to the testimony of Dr. Prabhu, the court "considered the record which includes the acquittee's history under the supervision of the [b]oard, his past diagnosis, his present diagnosis, his lack of violent behavior, his anxious and impulsive behavior over the past eight years, the nature of and circumstances surrounding his criminal conduct in assault[ing] and attempting to assault individuals, his need [for] continued therapy and supervision, his refusal to consider medication to assist with some problematic behavior, previous [b]oard reports and the likelihood of any supervision upon his release from the [b]oard's jurisdiction. [T]he court also considered . . . his lack of compliance and honesty with the staff and treaters and his surreptitious conduct with prohibited items . . . [and] the conduct with the [other patient] and failure to abide by instructions to cease such conduct, which led to a termination of a temporary leave opportunity [and] cause[d] the [c]ourt pause." On the basis of the totality of this evidence, the court determined "that if the acquittee were to be released from the [b]oard's supervision entirely, he would under those circumstances present a danger to himself or others. In his current commitment under the [b]oard's supervision in his controlled environment . . . the risks of danger to himself or [others] are minimized." On the basis of our analysis of the applicable law and our review of the record, we conclude that the court's finding, consistent with the diagnoses in both the board's report and the doctor's testimony, that the acquittee suffered from more than mere substance abuse was not clearly erroneous, and, accordingly, that the trial court's denial of the acquittee's application was legally and factually correct.

The judgment is affirmed.

In this opinion the other judges concurred.

CHASE HOME FINANCE, LLC *v.* DANIEL J. SCROGGIN
(AC 41929)

Keller, Moll and Bishop, Js.

Syllabus

The plaintiff, C Co., sought to foreclose a mortgage on certain real property owned by the defendant, S, who was defaulted for failure to plead. Thereafter, the trial court granted the motion filed by the substitute plaintiff, A Co., for a judgment of strict foreclosure and rendered judgment thereon, from which S appealed to this court, which reversed in part the trial court's judgment and remanded the case to that court for further proceedings. Following the remand, A Co. filed a motion for summary judgment as to liability only on count one of its operative, six count amended complaint. Subsequently, S filed a motion for an extension of time to respond to A Co.'s motion for summary judgment, which the court denied as untimely. The parties appeared before the court at short calendar on A Co.'s motion for summary judgment, which had been marked ready. The court granted A Co.'s motion for summary judgment, absent opposition. S's counsel then stated that, pursuant to statute (§ 51-183c), the court was required to recuse itself. The court responded by asking whether S's counsel had filed a motion to recuse, to which he indicated that he had not, and the short calendar proceeding concluded. Subsequently, A Co. filed a motion for a judgment of strict foreclosure, which the trial court granted and rendered judgment thereon, from which S appealed to this court. *Held*:

1. S could not prevail on his claim that, pursuant to § 51-183c, the trial court judge should have recused herself from ruling on material issues following this court's reversal of the judgment of strict foreclosure, as § 51-183c did not apply because there was no trial within the meaning of the statute; our appellate courts have repeatedly concluded that § 51-183c does not require recusal where the adversarial proceeding at issue did not constitute a trial, and, thus, § 51-183c did not apply in the present case so as to require the recusal of the trial judge following the reversal of the judgment of strict foreclosure because that judge had not presided over any trial, as the judgment of strict foreclosure was rendered in the context of a short calendar proceeding, to which § 51-183c does not apply.
2. The trial court erred by granting A Co.'s motion for summary judgment without hearing oral argument on that motion pursuant to the applicable rule of practice (§ 11-18): the opportunity for oral argument required by § 11-18 (a) was not provided during the short calendar proceeding, as the trial court, upon confirming that S had not filed a written response to A Co.'s motion for summary judgment, did not inquire as to whether S's counsel wanted to be heard to argue whether A Co. had met its

initial burden, but, instead, the court immediately granted the motion absent opposition; moreover, although A Co. claimed that S did not comply with the procedural requirements of § 11-18 (a) (2) because he failed to file a written notice seeking oral argument, the two conditions for oral argument being a matter of right for motions for summary judgment contained in § 11-18 (a) are disjunctive, and S satisfied the condition contained in § 11-18 (a) (1), as A Co.'s motion for summary judgment had been marked ready; furthermore, although A Co. claimed that S waived oral argument as to its motion for summary judgment under § 11-18 (d), which provides that the "[f]ailure to appear and present argument on the date set by the judicial authority shall constitute a waiver of the right to argue unless the judicial authority orders otherwise," that claim failed because not only did S's counsel appear for oral argument, but the trial court ruled on the motion before either party could argue the merits of the motion, and because S had a right to oral argument, which was not waived, with respect to A Co.'s motion for summary judgment, the court improperly adjudicated that motion without permitting oral argument on the merits.

3. S's claim that the trial court abused its discretion in denying on timeliness grounds his motion for an extension of time to respond to A Co.'s motion for summary judgment was unavailing: the forty-five day period set forth in the applicable rule of practice (§ 17-45 [b]) for the filing of a response to A Co.'s motion for summary judgment passed without S filing a response or a motion for an extension of time, and although S claimed that the trial court abused its discretion by denying his motion for an extension of time as untimely because the applicable rule of practice (§ 17-47), which allows the court to grant a continuance for discovery purposes on the basis of reasons stated in the affidavits of a party opposing a motion for summary judgment, contains no timing requirement, Practice Book § 17-47 imports the forty-five day filing deadline set forth in Practice Book § 17-45 (b); moreover, this court rejected S's claim that an alleged undocumented agreement between counsel, specifically, that A Co. would not claim its motion for summary judgment until S had taken a deposition of A Co.'s corporate designee, can usurp the requirements of the rules of practice, including the need to seek extensions of time in a timely manner.

Argued September 24—officially released December 17, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant was defaulted for failure to plead; thereafter, Bank of America, N.A., was

cited in as a defendant and the plaintiff filed an amended complaint; subsequently, AJX Mortgage Trust I was substituted as the party plaintiff; thereafter, the court, *Aurigemma*, *J.*, granted the substitute plaintiff's motion for judgment as to counts two through six of the amended complaint; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court, which reversed in part the trial court's judgment and remanded the case for further proceedings; thereafter, the substitute plaintiff withdrew counts five and six of the amended complaint; subsequently, the court, *Aurigemma*, *J.*, denied the named defendant's motion for an extension of time to file an opposition to the substitute plaintiff's motion for summary judgment as to liability only on count one of the amended complaint; thereafter, the court, *Aurigemma*, *J.*, granted the substitute plaintiff's motion for summary judgment, denied the named defendant's motion to reargue and for reconsideration, and granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

Thomas P. Willcutts, with whom, on the brief, was *Michael J. Habib*, for the appellant (named defendant).

Benjamin T. Staskiewicz, for the appellee (substitute plaintiff).

Opinion

MOLL, J. The defendant, Daniel J. Scroggin also known as Daniel F. Scroggin also known as Daniel Scroggin, appeals from the judgment of strict foreclosure rendered by the trial court, for the second time, in favor of the substitute plaintiff, AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society,

FSB, Trustee.[1] The defendant makes the following claims on appeal: (1) the trial court improperly failed to recuse itself pursuant to General Statutes § 51-183c following our remand in *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 176 A.3d 1210 (2017) (*Chase I*); (2) the trial court erred by granting the plaintiff's motion for summary judgment as to liability only without hearing oral argument on that motion; and (3) the trial court erred in denying on timeliness grounds the defendant's motion for an extension of time, filed pursuant to Practice Book § 17-47, to respond to the plaintiff's motion for summary judgment. We agree with the defendant's second claim and, accordingly, reverse the judgment of the trial court.[2]

[1] In a prior appeal, this court explained that in September, 2010, after the named plaintiff, Chase Home Finance, LLC (Chase), had commenced this action against the defendant, "Chase filed a motion to cite in Bank of America, N.A. (Bank of America), as a [third-party] defendant. The court granted this motion. Subsequently, [Chase] served Bank of America with an amended complaint that alleged that Bank of America was a lien holder. In March, 2011, Bank of America was defaulted for failure to appear. In January, 2012, Middconn Federal Credit Union sought to be made a party defendant to the action as a postjudgment lis pendens holder. The court granted the request. Later, Middconn Federal Credit Union was defaulted for failure to plead and failure to disclose a defense.

"In June, 2012, Chase moved to substitute JPMorgan Chase Bank, N.A., as [the] plaintiff in the action. The court granted the motion. In June, 2014, JPMorgan Chase Bank, N.A., moved to substitute Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, as [the] plaintiff in the action. The court granted the motion. In July, 2015, Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its trustee, moved to substitute AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as [the] plaintiff in the action. The court granted the motion." *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 729 n.1, 176 A.3d 1210 (2017). As in the prior appeal, we will refer to AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, FSB, Trustee, as the plaintiff. Additionally, because neither Bank of America nor Middconn Federal Credit Union is participating in this appeal, we will refer to Daniel J. Scroggin as the defendant.

[2] Because our resolution of the defendant's second claim, set forth in part II of this opinion, presumes that there was no error with respect to whether the trial court should have recused itself, we find it prudent to explain why, contrary to the defendant's position, recusal was unwarranted under the

We begin with an abbreviated recitation of the factual and procedural background of this dispute, as set forth by this court in *Chase I*. "In December, 2009, Chase commenced the present foreclosure action against the defendant. In its original one count complaint, Chase alleged, in relevant part, that on July 20, 2007, the defendant executed a promissory note in the amount of $217,500 in favor of Chase Bank USA, N.A., and that the loan was secured by a mortgage of the premises located at 25 Church Street in Portland, which was owned by and in the possession of the defendant. Chase alleged that the mortgage was recorded on the Portland land records, that the mortgage was assigned to it, and that it was the holder of the note and mortgage. Chase alleged that beginning on July 1, 2009, the defendant failed to make installment payments of principal and interest required by the note and that it had exercised its option to declare the entire unpaid balance of the note (in the amount of $214,939.97) due and payable to it. . . . By way of relief, Chase sought, among other things, a foreclosure of the mortgage and the immediate possession of the subject premises.

"On June 7, 2010, Chase filed a motion for default for failure to plead. On that same day, Chase filed a motion for judgment of strict foreclosure and a finding that it was entitled to possession of the subject premises. On June 16, 2010, the clerk of the court granted the motion for default but, at that time, the court did not rule on the motion seeking a judgment of strict foreclosure.

"On September 8, 2010, Chase filed a request for leave to amend its complaint and attached a proposed amended complaint. The defendant did not object. The

circumstances here. See part I of this opinion. In addition, although our resolution of the defendant's second claim is dispositive of this appeal, we briefly address his third claim because it is likely to arise on remand. See *Redding* v. *Elfire, LLC*, 74 Conn. App. 491, 492 n.2, 812 A.2d 211 (2003); see also part III of this opinion.

amended complaint consisted of six counts. The first count brought against the defendant sought a foreclosure and generally was consistent with the allegations brought against the defendant in the original one count complaint . . . . The second, third, and fourth counts of the amended complaint were brought against Bank of America. . . . Counts five and six of the amended complaint, both of which were directed at the defendant, [were] related to Chase's allegations with respect to Bank of America's mortgage interest in the subject property. . . .

"At no time did the defendant move to set aside the default for failure to plead entered on June 16, 2010. On November 2, 2015, however, the defendant disclosed a defense, stating that he 'intend[ed] to challenge the plaintiff's alleged right and standing to foreclose upon the subject mortgage.' On the same day, the defendant filed an answer to Chase's original complaint.

"The plaintiff did not file a motion for default for failure to plead against the defendant with respect to the amended complaint. On November 24, 2015, however, the plaintiff filed a motion for judgment against the defendant with respect to counts two, three, four, five, and six of the amended complaint. On the same day, the plaintiff moved that the court enter a judgment of strict foreclosure . . . .

"On April 4, 2016, the defendant filed an answer to the plaintiff's amended complaint. In his answer to the amended complaint, the defendant, among other things, admitted portions of the allegations made in the first count and, with respect to other portions of the first count, left the plaintiff to its proof. Also, on April 4, 2016, the defendant filed an objection to the plaintiff's motion for judgment as to count six of the amended complaint and an objection to the plaintiff's motion for judgment of strict foreclosure. On that date, the court [*Aurigemma, J.*] held a hearing on the plaintiff's motion

for judgment. By order dated April 4, 2016, the court granted the plaintiff's motion for judgment with respect to counts two, three, four, and five of the amended complaint, but did not rule with respect to counts one or six of the amended complaint.

"Following the hearing, the plaintiff replied to the defendant's objection to its motion for judgment of strict foreclosure, and the defendant filed a memorandum of law in which he further articulated the reasons underlying his objection to the motion for judgment of strict foreclosure. At a hearing on April 18, 2016, the parties appeared and presented additional arguments [before Judge Aurigemma]. . . .

"The court granted the plaintiff's motion for judgment of strict foreclosure . . . and rendered judgment on count six of the plaintiff's amended complaint in the plaintiff's favor." (Footnotes omitted.) Id., 730–37.

Thereafter, the defendant appealed from the judgment of strict foreclosure rendered on count one of the amended complaint. Id., 737 n.9. On appeal, this court concluded that "[i]n light of the changes to the plaintiff's case that were reflected in the amended complaint, it was inequitable for the court not to have considered the default entered in 2010 to have been extinguished. Thus, the court should have considered the defendant's answer to the amended complaint as well as his disclosed defense. Although it was appropriate for the court to have considered the lengthy period of time that followed the entry of the default, it nonetheless abused its discretion by failing to consider the effect of the amended complaint upon that default." (Footnote omitted.) Id., 745. Accordingly, this court reversed the judgment of strict foreclosure and remanded the case for additional proceedings. Id., 746.

On March 26, 2018, following our remand, the plaintiff filed a motion for summary judgment as to liability only on count one of its amended complaint. The forty-five

day period set forth in Practice Book § 17-45 (b) for the filing of a response to the motion for summary judgment expired on May 10, 2018. On May 24, 2018, the defendant filed a document captioned "Practice Book § 17-47 Motion for Extension of Time to Respond to the Plaintiff's Motion for Summary Judgment, or Alternatively, Objection to Summary Judgment." The trial court denied that motion as untimely. At no time did the defendant file a substantive response to the plaintiff's motion for summary judgment. See Practice Book § 17-45 (b).

On May 29, 2018, the parties appeared before Judge Aurigemma at short calendar on the plaintiff's motion for summary judgment, which had been marked "ready." Counsel for the defendant acknowledged that he had not filed a response to the motion. Thereupon, the court ruled: "Well, there's no opposition, so the motion's granted, absent opposition." The defendant's counsel then stated that, pursuant to § 51-183c, the trial court was required to recuse itself. The court responded by asking whether the defendant's counsel had filed a motion to recuse, to which he indicated that he had not, and the proceedings concluded. A subsequent motion to reargue filed by the defendant was denied.

On June 21, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, and on July 9, 2018, the court granted the motion. This appeal followed. Additional facts and procedural background will be provided as necessary.

I

The defendant first claims that, pursuant to § 51-183c, Judge Aurigemma should have recused herself from ruling on "material issues" following this court's reversal of the judgment of strict foreclosure in *Chase I*. The plaintiff counters that (1) recusal was unwarranted in the absence of a written motion to disqualify filed pursu-

ant to Practice Book §§ 1-22 (a)[3] and 1-23,[4] and (2) § 51-183c did not apply because there was no "trial" within the meaning of the statute. We agree with the plaintiff's second argument.[5]

We set forth the applicable standard of review. The defendant's claim that § 51-183c required recusal under the circumstances of this case presents a question of statutory interpretation, thereby invoking our plenary review. See *State* v. *Riley*, 190 Conn. App. 1, 8, 209 A.3d 646, cert. denied, 333 Conn. 923, A.3d (2019). "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look

[3] Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter . . . because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal. . . ."

[4] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

[5] In light of our resolution of the second argument, we need not address the plaintiff's first argument.

for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Mickey* v. *Mickey*, 292 Conn. 597, 613–14, 974 A.2d 641 (2009).

Section 51-183c provides: ''No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case.''

Our Supreme Court, as well as this court, have previously held that § 51-183c applies exclusively to ''trials'' and not to other types of adversarial proceedings. See, e.g., *State* v. *Miranda*, 260 Conn. 93, 131, 794 A.2d 506 (''[§] 51-183c applies exclusively to 'trials' ''), cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); *Lafayette Bank & Trust Co.* v. *Szentkuti*, 27 Conn. App. 15, 19–21, 603 A.2d 1215 (''Section 51-183c unambiguously applies exclusively to 'trials,' as distinguished from pretrial or short calendar matters. . . . The term 'trial' was not intended to include either pretrial or short calendar proceedings.'' [Citations omitted.]), cert. denied, 222 Conn. 901, 606 A.2d 1327 (1992). On the basis of the foregoing interpretation, our appellate courts have repeatedly concluded that where the adversarial proceeding at issue did not constitute a ''trial,'' § 51-183c does not require recusal. See, e.g., *State* v. *Miranda*, supra, 131–32 (sentencing hearing); *Board of Education* v. *East Haven Education Assn.*, 66 Conn. App. 202, 215–16, 784 A.2d 958 (2001) (arbitration proceedings); *Lafayette Bank & Trust Co.* v. *Szentkuti*, supra, 16–17, 20–21 (property valuation hearing in foreclosure action).

Given the well settled interpretation of § 51-183c, we conclude that § 51-183c did not apply in the present case so as to require Judge Aurigemma's recusal following the reversal of the judgment of strict foreclosure in *Chase I* because she had not presided over any "trial." Instead, the judgment of strict foreclosure underlying *Chase I* was rendered in the context of a short calendar proceeding, to which § 51-183c does not apply.

In support of his claim that § 51-183c required Judge Aurigemma's recusal following our remand in *Chase I*, the defendant relies on *Higgins* v. *Karp*, 243 Conn. 495, 706 A.2d 1 (1998) (*Higgins II*), and *Gagne* v. *Vaccaro*, 133 Conn. App. 431, 35 A.3d 380 (2012), rev'd on other grounds, 311 Conn. 649, 90 A.3d 196 (2014). Neither of these authorities supports the defendant's position. We address them in turn.

First, *Higgins II* was the product of extensive litigation, culminating in two appeals to our Supreme Court, arising out of a fatal airplane crash. *Higgins II*, supra, 243 Conn. 498–99. Initially, in a consolidated case, the trial court denied the defendant's motions to set aside defaults entered against him for failure to plead, and the case proceeded to a trial on damages, wherein the jury awarded significant damages, with judgments rendered accordingly. *Higgins* v. *Karp*, 239 Conn. 802, 806–807, 687 A.2d 539 (1997) (*Higgins I*). In *Higgins I*, our Supreme Court reversed the judgments, concluding that the trial court abused its discretion by denying the defendant's motions to set aside the defaults. Id., 811. On remand, the trial court again denied the defendant's motions to set aside the defaults. *Higgins II*, supra, 500–502. In *Higgins II*, the defendant appealed from, and our Supreme Court reversed, the judgment of the trial court because, this time, the trial court failed to consider additional relevant evidence. Id., 509–10. In footnote 7 in *Higgins II*, our Supreme Court stated that on remand following *Higgins I*, and "[i]n accordance

with . . . § 51-183c, [it had] ordered that the matter be assigned to a judge other than the judge who originally had decided the motions [to set aside the defaults]." Id., 500 n.7.

In the present case, the defendant particularly relies on that footnote in *Higgins II* for the proposition that our Supreme Court applied § 51-183c, following the reversal of the trial court's refusal to set aside the defaults for failure to plead, to bar the same trial judge from making a subsequent ruling on those motions. Thus, the defendant contends, there is no meaningful difference between the reversal of the judgments in *Higgins I* and the reversal of the judgment in *Chase I*. A close reading of the decisions in *Higgins I* and *Higgins II* belies the defendant's argument, however, because, in *Higgins I*, the trial court, *Hurley*, *J.*, not only ruled on the motions to set aside the defaults in the first instance, but also presided at the trial on damages and rendered judgments in accordance with the jury's verdicts, from which the *Higgins I* appeal was taken. See *Higgins I*, supra, 239 Conn. 807; see also *Karp* v. *Coric*, Superior Court, judicial district of New London, Docket Nos. 530472 and 529975 (June 9, 1995) (14 Conn. L. Rptr. 386) (memorandum of decision by Judge Hurley on defendant's motions to set aside defaults), rev'd sub nom. *Higgins* v. *Karp*, 239 Conn. 802, 687 A.2d 539 (1997). Consequently, when those judgments were reversed in *Higgins I*, § 51-183c applied so as to preclude Judge Hurley from presiding over the matter again because he had already presided over a trial, i.e., the trial on damages. The circumstances in *Higgins I* and *Higgins II* are readily distinguishable from those underlying the present appeal. Although the judgment of strict foreclosure rendered by Judge Aurigemma was reversed by this court in *Chase I*, Judge Aurigemma had not, unlike Judge Hurley in *Higgins I*, presided over a "trial," as required by § 51-183c.

Second, in *Gagne* v. *Vaccaro*, supra, 133 Conn. App. 435–36, this court concluded that the trial court improperly refused to recuse itself pursuant to § 51-183c from hearing the plaintiff's motion for attorney's fees on the basis that we had reversed an earlier ruling on attorney's fees by the same trial judge. However, our Supreme Court subsequently reversed this court's decision on the ground that the recusal issue was moot because the defendant had failed to challenge the trial court's finding that the defendant waived his right to seek disqualification under § 51-183c as a result of noncompliance with the procedural requirements of Practice Book § 1-23 on appeal.[6] *Gagne* v. *Vaccaro*, 311 Conn. 649, 659–60, 90 A.3d 196 (2014). As a result, our Supreme Court reversed the judgment of this court and remanded the case with direction to dismiss the appeal as to the issue of disqualification because this court did not have subject matter jurisdiction over the § 51-183c claim underlying the decision. Id., 659–60, 662. In light of the foregoing, our decision on the merits in *Gagne* is devoid of any precedential value in the absence of subject matter jurisdiction; see *Labarbera* v. *Clestra Hauserman, Inc.*, 369 F.3d 224, 226–27 n.2 (2d Cir. 2004) (explaining that no precedential value exists in lower court decision that was reversed for lack of subject matter jurisdiction); and the defendant's reliance thereon is wholly misplaced.

In sum, we conclude that § 51-183c did not apply following *Chase I* so as to require Judge Aurigemma's recusal because she had not presided over a "trial" in the matter.

II

The defendant next claims that the trial court erred by granting the plaintiff's motion for summary judgment

[6] Rather, on appeal, the defendant challenged the nonrecusal under Practice Book § 1-22 (a) and § 51-183c. *Gagne* v. *Vaccaro*, 311 Conn. 649, 660, 90 A.3d 196 (2014).

without hearing oral argument on that motion pursuant to Practice Book § 11-18.[7] The plaintiff posits that the trial court did not need to hear argument because (1) the defendant did not follow the procedural requirements of § 11-18 (a) (2), and (2) the defendant waived oral argument. We agree with the defendant.

We begin by setting forth the applicable standard of review and legal principles. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Marinos* v. *Poirot*, 308 Conn. 706, 712, 66 A.3d 860 (2013). Practice Book § 11-18 provides in relevant part: "(a) Oral argument is at the discretion of the judicial authority except as to . . . motions for summary judgment . . . and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all other parties . . . a written notice stating the party's intention to argue the motion . . . . Such a notice shall be filed on or before the third day before the date of the short calendar date . . . ." See also *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 236, 4 A.3d 851 (2010) ("[p]arties are entitled to argue a motion for summary judgment as of right").

[7] In his principal appellate brief, the defendant appears to couch an additional argument that he was under no obligation to submit a response to the plaintiff's motion for summary judgment within his overarching contention that the trial court failed to hear oral argument on that motion. The plaintiff counters that the trial court did not need to hear argument because the defendant did not file an opposition to the motion. Although we reverse on the grounds set forth in part II of this opinion, we remind the parties that it is only upon the satisfaction of a summary judgment movant's initial burden that the burden shifts to the nonmovant to demonstrate, on the basis of a timely submission of an evidentiary showing, that there exists a genuine issue of material fact to defeat summary judgment. See *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10–11, 938 A.2d 576 (2008).

Our recent decision in *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, A.3d (2019), involving similar circumstances to those in the present appeal, is controlling. In *Bayview Loan Servicing, LLC*, the defendant appealed from a judgment of foreclosure by sale, arguing, inter alia, that the court erred in granting the plaintiff's motion for summary judgment without holding oral argument. Id., 788, 792. Simply put, this court held that, because Practice Book § 11-18 provided the defendant with the right to oral argument on the merits of the plaintiff's motion for summary judgment, the failure to conduct oral argument constituted reversible error. Id., 796–97.

Applying *Bayview Loan Servicing, LLC*, to the present case, we conclude that the trial court erred by granting the plaintiff's motion for summary judgment without hearing oral argument on the motion. We have carefully reviewed the approximately two page transcript from the short calendar proceeding[8] and conclude that the

[8] The transcript from the four minute May 29, 2018 proceeding provides in its entirety:

"The Court: Your next matter?

"[The Plaintiff's Counsel]: This is position 39, Your Honor.

"The Court: Do I have a 39?

"(Discussion off the record.)

"The Court: Sorry, I have it. And your name for the record?

"[The Defendant's Counsel]: Michael Habib for the defendant, David Scroggin.

"The Court: Okay. And, Mr. Habib, you filed no response?

"[The Defendant's Counsel]: That's correct, Your Honor. I was recently retained in the case.

"The Court: Okay. All right. Well, you've had an appearance since September of 2017.

"[The Defendant's Counsel]: That was in the appellate case, Your Honor. I was not retained for the trial court case until April 21st of this year.

"The Court: Right. Okay. And had you filed your motion for extension then, it would have been timely.

"[The Defendant's Counsel]: Okay.

"The Court: So—

"[The Defendant's Counsel]: I understand, but I noticed the deposition at that time, Your Honor.

"The Court: Okay.

opportunity for oral argument required by Practice Book § 11-18 (a) was not provided. That is, upon confirming that the defendant had not filed a written response to the plaintiff's motion for summary judgment, the court did not inquire whether the defendant's counsel wanted to be heard, namely, to argue whether the plaintiff had met its initial burden. Instead, the court immediately granted the motion "absent opposition."

The plaintiff raises two arguments supporting its assertion that oral argument on its motion for summary judgment was not required—neither of which is persuasive. First, the plaintiff contends that the defendant did not comply with the procedural requirements of Practice Book § 11-18 (a) (2) because he failed to file a written notice seeking oral argument. This argument fails because the plaintiff overlooks the fact that the

"[The Defendant's Counsel]: And I thought I had an agreement with opposing counsel as to when we rescheduled the deposition for when it would be called up or when it would be reclaimed, which we had discussed in court—[coplaintiff's counsel] and I had discussed in court.

"The Court: Okay.

"[The Defendant's Counsel]: And then four days later, they filed the reclaim, Your Honor.

"The Court: Okay. You know anything about that?

"[The Plaintiff's Counsel]: I do not, Your Honor. I spoke with [coplaintiff's counsel] in preparation for this, and he made no mention of any agreement.

"The Court: Okay. [Alright]. Well, there's no opposition, so the motion's granted, absent opposition.

"[The Defendant's Counsel]: And, Your Honor, if I could just place something on the record.

"The Court: Sure.

"[The Defendant's Counsel]: I do believe under § 51-183c, Your Honor, that this court's required to recuse itself in this matter, as well as the previous motion that was denied by the court.

"The Court: Why?

"[The Defendant's Counsel]: Because—

"The Court: Have you filed a motion to recuse?

"[The Defendant's Counsel]: I have not, Your Honor.

"The Court: Okay. Thank you.

"[The Defendant's Counsel]: Thank you, Your Honor.

"[The Plaintiff's Counsel]: Thank you, Your Honor."

conditions for oral argument being a matter of right for motions for summary judgment contained in § 11-18 (a) are disjunctive. That is, either the motion for summary judgment had to be marked ready; Practice Book § 11-18 (a) (1); *or* the defendant, as the nonmovant, had to file and serve a written notice stating his intention to argue the motion. Practice Book § 11-18 (a) (2). Here, the motion for summary judgment had been marked ready, and the parties appeared accordingly for the May 29, 2018 short calendar. Thus, § 11-18 (a) (1) was satisfied, and, as a result, the defendant was entitled to oral argument on the motion for summary judgment as of right.

Second, the plaintiff contends that the defendant waived oral argument as to the plaintiff's motion for summary judgment under Practice Book § 11-18 (d), which provides that the "[f]ailure to appear and present argument on the date set by the judicial authority shall constitute a waiver of the right to argue unless the judicial authority orders otherwise." This argument fails because not only did the defendant's counsel appear for argument, but our review of the summary judgment hearing transcript; see footnote 8 of this opinion; reveals that the trial court ruled on the motion before either party could argue the merits of the motion. Cf. *Marut* v. *IndyMac Bank, FSB*, 132 Conn. App. 763, 771–72, 34 A.3d 439 (2012) (Practice Book § 11-18 [d] applies when party fails to appear for argument). The plaintiff does not cite any relevant authority for its proposition that the waiver rule contained in § 11-18 (d) is applicable here.

In sum, we conclude that the defendant had a right to oral argument, which was not waived, with respect to the plaintiff's motion for summary judgment, and, therefore, the trial court improperly adjudicated the motion without permitting oral argument.

III

Finally, the defendant claims that the trial court abused its discretion in denying on timeliness grounds his motion for an extension of time to respond to the plaintiff's motion for summary judgment. We disagree.

We begin with the applicable standard of review and rules of practice. A trial court's adjudication of a motion for a continuance pursuant to Practice Book § 17-47 is reviewed for an abuse of discretion. See, e.g., *Sheridan* v. *Board of Education*, 20 Conn. App. 231, 237–38, 565 A.2d 882 (1989) (concluding that trial court did not abuse its discretion in denying motion to stay summary judgment proceeding in light of nonmovant's failure to comply with Practice Book [1978–97] § 382, predecessor to Practice Book § 17-47, in timely manner). Practice Book § 17-45, entitled "Proceedings upon Motion for Summary Judgment; Request for Extension of Time To Respond," provides in relevant part: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. (b) Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence. . . ." Relatedly, Practice Book § 17-47, entitled "When Appropriate Documents Are Unavailable," provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

"In *Plouffe* v. *New York, N.H. & H.R. Co.*, 160 Conn. 482, 490, 280 A.2d 359 (1971), our Supreme Court determined that the trial court had abused its discretion when it refused to grant a reasonable continuance to allow the plaintiff to investigate the truth of the facts alleged in the defendant's affidavit and to research the legal issues in a personal injury action. In that case, the court adopted the following principle, derived from summary judgment under the [F]ederal [R]ules of [C]ivil [P]rocedure: Where, however, the party opposing summary judgment *timely* presents his affidavit under [r]ule 56 (f) [of the Federal Rules of Civil Procedure] stating reasons why he is presently unable to proffer evidentiary affidavits he directly and forthrightly invokes the trial court's discretion. Unless dilatory or lacking in merit, the motion should be liberally treated. Exercising a sound discretion, the trial court then determines whether the stated reasons are adequate. And absent abuse of discretion, the trial court's determination will not be interfered with by the appellate court." (Emphasis in original; internal quotation marks omitted.) *Sheridan* v. *Board of Education*, supra, 20 Conn. App. 237–38.

In *Sheridan*, this court applied the principles set forth in *Plouffe* and held that, where the plaintiff, as the summary judgment nonmovant, had failed to comply with Practice Book (1978–97) § 382, the predecessor to Practice Book § 17-47, which permits the trial court to grant a continuance to accommodate discovery to justify opposition to a motion for summary judgment, the plaintiff's "lack of diligence [was] fatal to her claim" that the trial court abused its discretion by not granting a continuance. Id., 236 n.4, 238.

The same analysis applies to the present case and leads to the same result. As previously recited in this opinion, the forty-five day period set forth in Practice Book § 17-45 (b) for the filing of a response to the plaintiff's motion for summary judgment expired on

May 10, 2018. Such deadline passed without the defendant filing a response or a motion for an extension of time. Two weeks later, on May 24, 2018, the defendant filed a motion for an extension of time to respond to the plaintiff's motion for summary judgment, or alternatively, an objection to summary judgment. That motion, citing Practice Book § 17-47, attached the affidavit of the defendant's attorney, Michael J. Habib, in which he (1) explained that he wanted to take the deposition of the plaintiff's corporate designee in order to challenge the plaintiff's standing and (2) detailed efforts made to procure the deposition.[9] The motion did not state any reasons to justify its untimeliness. The trial court denied the motion as untimely, reasoning as follows: "Practice Book [§] 17-45 requires a response to be filed within [forty-five] days. The defendant has not done so, and the request for [an] extension of time has been filed more than [forty-five] days from the date of the filing of the [motion for] summary judgment."

Like the plaintiff in *Sheridan*, the defendant in the present case failed to comply with Practice Book § 17-47 in a timely manner, and such noncompliance is fatal to his third claim on appeal. Because the defendant did not timely comply with the requirements of § 17-47, we conclude that the trial court did not abuse its discretion by denying the defendant's motion for an extension of time to respond to the plaintiff's motion for summary judgment and to conduct discovery relating thereto.

In support of his argument that the trial court abused its discretion by denying his motion for an extension of time as untimely, the defendant contends that Practice Book § 17-47 contains no timing requirement. This con-

[9] We note that, in arguing in his principal appellate brief the merits of his motion for an extension of time, the defendant improperly goes beyond what was stated in the motion and accompanying affidavit.

tention is without merit. By its express terms, § 17-47 allows the trial court to grant a continuance for discovery purposes on the basis of reasons stated in "the affidavits of a party opposing [a] motion" for summary judgment. Although the rule itself does not specify when "the affidavits of a party opposing [a] motion" for summary judgment must be filed, that answer is readily found within the summary judgment section of chapter 17 of the Practice Book, i.e., §§ 17-44 through 17-51. Specifically, Practice Book § 17-45 (b) provides in relevant part that "[u]nless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, *including opposing affidavits* . . . ." (Emphasis added.) Simply put, Practice Book § 17-47 imports the forty-five day filing deadline set forth in Practice Book § 17-45.

Finally, we reject the defendant's suggestion that an alleged undocumented agreement between counsel—specifically, that the plaintiff would not claim its motion for summary judgment until the defendant had taken a deposition of the plaintiff's corporate designee (which the plaintiff denies)—can usurp the requirements of the rules of practice, including the need to seek extensions of time in a timely manner.[10]

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

In this opinion the other judges concurred.

[10] The defendant also cursorily argues that, by ruling on his motion for an extension of time prior to the motion appearing on the short calendar, the court violated Practice Book § 11-13 and deprived him of the opportunity to request oral argument on the motion pursuant to Practice Book § 11-18 (f). We decline to consider this claim because it is inadequately briefed. See *State* v. *Hanisko*, 187 Conn. App. 237, 254–55 n.9, 202 A.3d 375 (2019).

STATE OF CONNECTICUT *v.* JEFFREY VILLAR (AC 41503)

Alvord, Devlin and Norcott, Js.

Syllabus

Convicted, after a jury trial, of the crimes of unlawful discharge of a firearm, carrying a pistol without a permit, risk of injury to a child and reckless endangerment in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he fired a shot from a pistol into B's home after having purchased marijuana from B and fighting with him outside of the home. B's girlfriend and her five year old daughter were in the home at the time of the shooting. At trial, the state called B to testify regarding his account of the incident, including that the defendant had pulled a pistol from his waistband and fired a shot into a first floor window of his home. The defendant's friend M, who was with the defendant when he purchased the marijuana from B and witnessed the incident, also provided testimony for the state, the majority of which corroborated B's account of the incident. In addition, M testified that the defendant handed him the pistol as they fled the scene together following the shooting. The police recovered the pistol from M when they subsequently apprehended him and the defendant. The state also presented testimony from forensic examiners who testified that a bullet and shell casing found at B's home was fired by the pistol that was recovered from M and that a buccal swab of the defendant's DNA linked the defendant to that pistol. *Held* that the defendant could not prevail on his claim that there was insufficient evidence for the jury to find him guilty because the state presented insufficient evidence to prove that he was the shooter: on the basis of compelling circumstantial evidence elicited from B, M's eyewitness testimony and the DNA evidence linking the defendant to the pistol that was used to fire the bullet into B's home, the jury reasonably could have concluded that the defendant was the individual who committed the shooting, and although the defendant challenged the competency of M as a witness and noted the self-serving interest of both M and B in testifying on the state's behalf, those contentions were based on credibility considerations that were the exclusive province of the jury, which could have discounted M's and B's testimonies if it had found those witnesses to be unreliable.

Argued October 16—officially released December 17, 2019

Procedural History

Substitute information charging the defendant with the crimes of unlawful discharge of a firearm, carrying a pistol without a permit and risk of injury to a child,

and with two counts of the crime of reckless endangerment in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Harmon*, *J.*; verdict and judgment of guilty of unlawful discharge of a firearm, carrying a pistol without a permit, risk of injury to a child and reckless endangerment in the first degree, from which the defendant appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Jeffrey Villar, appeals from the judgment of conviction, rendered after a jury trial, of unlawful discharge of a firearm in violation of General Statutes § 53-203, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), reckless endangerment in the first degree in violation of General Statutes § 53a-63 (a), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1). He claims that there was insufficient evidence for the jury to have found him guilty of those crimes because (1) the state did not present sufficient evidence to prove that he fired the gunshot at issue and the complainant had an interest in seeing the defendant convicted, and (2) the only witness who testified to the defendant's firing the shot was a codefendant who had an interest in seeing the defendant convicted. We conclude that there was sufficient evidence for the jury to reasonably find the defendant guilty of the charged crimes and, therefore, affirm the trial court's judgment.

The following facts reasonably could have been found by the jury and are relevant to the resolution of this

appeal. On September 7, 2015, Waterbury police officers responded to a report of shots being fired on a residential street in Waterbury. They were advised that three males were seen leaving the area where the shots were fired. On their way to the scene, the officers had driven past three males but did not approach them. When the officers arrived at the scene, they questioned the complainant, Nathan Burk, who told them that three males—two Hispanic males and one white male—had been at his home, and that he had gotten into a fight with them. Burk told the officers that one of the individuals drew a gun and fired into his home. The officers observed a shell casing in Burk's yard and a small hole in the screen of Burk's window.

Subsequently, two officers went in search of the three males they had passed earlier, who matched Burk's description, and eventually apprehended them. The three males would be later identified as the defendant, Brandon Medina, and Tommy.[1] After the officers apprehended him, Medina disclosed that he had a weapon, and the officers found a firearm in his possession. Burk subsequently identified the defendant as the individual with whom he had fought and who had fired a gun into his home.

At trial, Burk testified to the following facts. On the date of the incident, he lived in Waterbury with his girlfriend and her five year old daughter, C.[2] At approximately noon, the defendant contacted Burk to purchase marijuana. Burk previously had sold marijuana to the defendant approximately ten times. The defendant arrived at Burk's home with two friends, Medina and Tommy, and all three appeared to be intoxicated. Once

[1] Due to his status as a minor, Tommy was referred to only by his first name during the trial court proceedings.

[2] In accordance with our policy of protecting the privacy interests of the victims of 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.

the defendant completed the marijuana transaction, he asked Burk for a ride to buy a new tire because the car the defendant was driving had a flat tire. Burk agreed to give the defendant a ride, but they were ultimately unsuccessful in purchasing the tire. They then returned to Burk's home; while outside, the defendant approached Burk, showed him a silver pistol, and asked him if he wanted to buy it, and Burk declined.

Shortly thereafter, the defendant and Tommy got into an argument, which escalated to the two shoving each other. This altercation worried Burk, who then called his sister to see if he could bring C over to her home; when she agreed, he got C and left the premises. When he and C returned to the home a few hours later, the defendant and his friends were not present. At around 7 p.m., however, Burk noticed that they had returned outside and were even more intoxicated than before. He went outside and told the defendant that he had called a friend, Moses,[3] to assist with the flat tire. Moses arrived, but he left soon thereafter to retrieve a tire. The defendant and his friends then knocked on Burk's door and told him that Moses had left with their money. After a telephone call with Moses, Burk assured the defendant that Moses was returning.

Later that evening, Burk saw that the defendant and his friends remained outside with the unrepaired vehicle. He noticed that Tommy was in a neighbor's yard and asked the defendant if Tommy was urinating. Burk then noticed a shift in the defendant's demeanor. Specifically, the defendant became angry, approached Burk, and stopped about a foot from his face. Feeling threatened, Burk told the defendant that he was going back inside his home. As he walked toward his home, the defendant followed him and attempted to punch him. Burk responded by punching the defendant, causing him to stumble backward.

[3] Moses was referred to only by his first name during the trial court proceedings.

The defendant then reached into his waistband. Believing that he was about to be shot, Burk ran into his home, locked the door, and braced it with his body. Outside Burk's home, the defendant began yelling and banging on the door. This prompted Burk to call 911 on his cell phone. The defendant then stepped off Burk's porch, pulled a pistol from his waistband, and fired a shot into Burk's first floor living room window. Burk heard the shot while he was on the phone with the 911 operator. Burk's girlfriend, who was home at the time of the shooting, saw the defendant and his friends running away from the scene.

In addition to eliciting compelling circumstantial evidence from Burk, the state also called Medina as an eyewitness. Medina testified that on the drive over to Burk's home, he observed the defendant remove a silver pistol from his waistband and place it in the glove compartment of the car the defendant was driving. A majority of his testimony corroborated Burk's account of the incident, particularly his description of the defendant pulling a gun from his waistband and firing a shot at Burk's home. Additionally, Medina testified that once the shot was fired, he, Tommy, and the defendant ran down the street, and the defendant handed him the pistol.

In addition to the testimony of Burk and Medina, the state also presented DNA evidence linking the defendant to the pistol that was used to fire the bullet into Burk's home. A forensic examiner in the firearms unit of the Division of Scientific Services within the Department of Emergency Services and Public Protection testified that the bullet and casing found at Burk's home was fired by the pistol that was recovered from Medina. Further, a forensic examiner from the Connecticut Scientific Forensic Laboratory testified that a buccal swab of the defendant's DNA was compared to three swabs from the trigger, slide, and magazine of the pistol. With

respect to the results of the DNA profile on the slide, the expert testified that it was 100 billion times more likely that the DNA profile originated from the defendant than from an unknown individual.

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 151–52, 976 A.2d 678 (2009). This court "will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient." (Internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 747, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). "Furthermore, [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Morelli*, supra, 152.

The defendant does not contest that the evidence was sufficient to prove that a shooting occurred. Rather, he argues that there was insufficient evidence to prove his identity as the shooter. Among other things, the defendant challenges the competency of Medina as a witness[4] and notes the self-serving interest in Medina's

[4] The defendant notes that Medina "had been drinking heavily throughout the day of the incident. At trial, Medina testified that he did not remember a number of thing[s] that occurred that day because he 'was intoxicated and didn't have a clear mind.' "

and Burk's testimonies.[5] These challenges, however, are based on credibility considerations that rest with the jury. *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" [internal quotation marks omitted]). If the jurors had found the witnesses' testimony unreliable, they could have discounted it. At oral argument before this court, the defendant argued that if the jury had indeed discounted the testimony of both witnesses, finding them not credible, the only remaining evidence on which the jury could have reached a guilty verdict would have been circumstantial, which the defendant contends was not strong enough to "absolutely identify [the defendant] as the shooter." Circumstantial evidence, however, carries the same probative value as direct evidence. *State* v. *Berthiaume*, 171 Conn. App. 436, 444, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017). Further, as our Supreme Court has often noted, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Morelli*, supra, 293 Conn. 152.

The state did not need to produce evidence to prove the defendant's guilt beyond *any* possible doubt. Viewing the cumulative effect of the evidence in this case in the light most favorable to sustaining the verdict, the

[5] The defendant asserts that, as a codefendant, Medina had a self-interest in testifying against the defendant to avoid prosecution himself for the shooting or to receive consideration for his own charge of possession of a firearm. He also suggests that Burk may have been motivated to accuse the defendant due to fear of possible assault charges for hitting the defendant.

jury reasonably could have concluded, on the basis of the eyewitness and circumstantial evidence, that the defendant was the individual who committed the shooting.

The judgment is affirmed.

CYNTHIA CYR *v.* VKB, LLC, ET AL.
(AC 41818)

DiPentima, C. J., and Prescott and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendant property owners for injuries she sustained when she tripped on a public sidewalk that abutted the defendants' property. The plaintiff alleged that an approximately one and one-half inch lip between two segments of the sidewalk constituted a defective condition in the sidewalk. Under the common law, a landowner whose property abuts a public sidewalk is under no duty to keep the sidewalk in front of the property in a reasonably safe condition, except when a municipality confers liability on the abutting landowner through a statute or ordinance, or where the defect was created by a positive act of the landowner. The defendants filed a motion for summary judgment, claiming, inter alia, that under the facts alleged by the plaintiff, they owed no duty to the plaintiff to maintain the sidewalk. The defendants claimed that the applicable city ordinance (§ 21-37) shifted only the duty of repairing an abutting sidewalk from the municipality to an abutting landowner but did not shift liability for injuries resulting from an unsafe condition on the sidewalk. The defendants further asserted that the positive act exception to the general rule absolving landowners of liability for defective sidewalks did not apply because they did not create the unsafe condition on the public sidewalk. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment for the defendants as to counts one and two of the plaintiff's complaint, which alleged that the defendants violated § 21-37, the plaintiff's appellate counsel having conceded to this court that § 21-37 did not shift liability to the defendants and did not play any role in her appeal.
2. The trial court properly rendered summary judgment in favor of the defendants as to counts four and five of the complaint, which alleged that the defect in the sidewalk developed as a result of the settling of one adjacent segment of the sidewalk: there was no allegation in those counts that any positive act on the part of the defendants caused the

settling of the sidewalk segment, as the allegation suggested that the alleged settling resulted from nature and the passage of time, which was insufficient as a matter of law to impose a duty on an abutting landowner, and, thus, the allegations of counts four and five were insufficient as a matter of law to hold the defendants liable for the plaintiff's injuries; moreover, the plaintiff's claim that the defendants owed a duty of care on the theory that a business owner that invites the public to enter and exit its property at a particular location owes a duty to ensure that the location is reasonably safe was unavailing, as the case law relied on by the plaintiff in support of that claim was inapposite in that it did not involve a public sidewalk and, therefore, did not create an additional exception to the general common-law rule.

3. The trial court improperly granted the defendants' motion for summary judgment as to counts three, six and seven of the plaintiff's complaint, which alleged that the defendants had constructed a sidewalk on their property with a resulting approximately one and one-half inch lip between the sidewalk segments and the sidewalk on the adjoining property, as those counts alleged a legally cognizable basis for liability in that they alleged that the defendants constructed the sidewalk with the alleged defect: to prevail on their motion for summary judgment, the defendants bore the initial burden to negate the factual claims as framed by the complaint, and, thus, with respect to counts three, six and seven, it was incumbent on those defendants to whom such counts were directed to proffer evidence that either they did not construct the sidewalk or that they constructed the sidewalk without the alleged defect, and because the defendants did not submit any supporting affidavits or documentary evidence, they failed to satisfy their initial burden as movants for summary judgment with respect to those counts; moreover, the fact that the defendants submitted evidentiary materials with their reply brief did not cure their failure to proffer evidence with their initial motion because the reply materials did not establish the nonexistence of a genuine issue of material fact.

Argued April 11—officially released December 17, 2019

Proceedings

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in judicial district of Hartford, where the court, *Shapiro*, *J.*, granted the plaintiff's motion to cite in Vernon W. Belanger et al. as defendants; thereafter, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Frank C. Bartlett, Jr., for the appellant (plaintiff).

Christopher P. Kriesen, with whom was *Ronald J. Houde, Jr.*, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Cynthia Cyr, appeals from the summary judgment rendered by the trial court in favor of the defendants, VKB, LLC (VKB), Shady Oaks Assisted Living, LLC (Shady Oaks Assisted Living), Shady Oaks Rest Home, Inc. (Shady Oaks Rest Home), Vernon W. Belanger, and Kay F. Belanger. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants on all counts of her amended complaint when it (1) failed to require the defendants, as the movants for summary judgment, first to establish that there was no genuine issue as to any material fact, (2) determined that the defendants' alleged affirmative acts did not create the defect in the sidewalk, and (3) purportedly determined, as a matter of law, that a business owner that invites individuals to enter and exit its property at a particular location owes no duty to ensure that such location is reasonably safe. We affirm in part and reverse in part the judgment of the trial court.

The following procedural history is relevant to our analysis of the plaintiff's claims. On November 29, 2016, the plaintiff commenced this action, sounding in negligence and negligence per se, against the original defendants, VKB, Shady Oaks Assisted Living, and Shady Oaks Rest Home. On February 2, 2017, the original defendants filed an answer and special defenses in response to the plaintiff's original complaint. On February 6, 2017, the original defendants filed a request for leave to amend their answer and special defenses and appended the proposed amendment, which was deemed to have been filed by consent, absent objection.

On February 10, 2017, the plaintiff filed a reply.[1] On December 29, 2017, the plaintiff filed a motion to cite in additional defendants, Vernon W. Belanger and Kay F. Belanger, and to amend the complaint, which was granted by the court on January 17, 2018.

On January 31, 2018, the plaintiff filed her amended complaint and alleged, inter alia, the following. At all relevant times, the defendants owned, and/or were in the possession and control of, real property located at 344 Stevens Street in Bristol (property). On May 28, 2015, at approximately 10:15 a.m., the plaintiff was walking on the sidewalk abutting the property, when she tripped on an approximately one and one-half inch lip between two sidewalk segments (defect) and fell, sustaining physical injuries, principally to her left hand, which necessitated medical treatment and interfered with her employment and enjoyment of life's activities. The parties do not dispute that the sidewalk at issue is a public sidewalk.

On the basis of the foregoing factual allegations, the plaintiff asserted the following claims: (1) negligence as to VKB (count one); (2) negligence per se as to VKB (count two); (3) nuisance as to VKB (count three); (4) negligence as to Shady Oaks Assisted Living (count four); (5) negligence as to Shady Oaks Rest Home (count five); (6) nuisance as to Vernon W. Belanger (count six); and (7) nuisance as to Kay F. Belanger (count seven). The plaintiff alleged alternative theories as to how the alleged defect in the sidewalk was created. On the one hand, in counts one and two (directed to VKB), count four (directed to Shady Oaks Assisted Living), and count five (directed to Shady Oaks Rest Home), the plaintiff alleged that the defect "developed as a result of the settling of one adjacent segment." On

[1] On December 19, 2017, the original defendants filed a motion for summary judgment as to all counts of the plaintiff's original complaint. The defendants later filed an amended motion for summary judgment, the granting of which is the subject of this appeal.

the other hand, in count three (directed to VKB), count six (directed to Vernon W. Belanger), and count seven (directed to Kay F. Belanger), the plaintiff alleged, respectively, that VKB, or its predecessor(s) in interest, Vernon W. Belanger, and/or Kay F. Belanger, through one or more of their agents, servants, and/or employees, constructed the sidewalk with the resulting defect. In each of the respective counts, the plaintiff alleged that the defendants were responsible for keeping the abutting sidewalk in a safe condition for the use of the public.

The defendants did not move to strike any of the plaintiff's claims. On March 12, 2018, however, the defendants filed an amended motion for summary judgment (motion), and a supporting memorandum of law, as to all counts of the plaintiff's amended complaint. The motion was not accompanied by any supporting affidavits or documentary evidence. The defendants argued that they were entitled to judgment as a matter of law because (1) Bristol Code of Ordinances § 21-37[2] (city ordinance) shifts only the duty of repairing an abutting sidewalk from the municipality to an abutting landowner and does not shift liability for injuries resulting from an unsafe condition of the sidewalk, (2) there is no common-law duty owed by abutting landowners to the public for sidewalk defects, and (3) there is no evidence, and the plaintiff cannot prove, that the defendants created the alleged defect so as to fall within

[2] Section 21-37 of the Bristol Code of Ordinances, entitled "Maintenance—Abutting owner's duty generally," provides: "(a) All public sidewalks, whenever installed, shall be maintained, repaired, replaced and kept clear by the abutting property owner and not at the expense of the general city taxpayers whether such public walks are described as school walks or otherwise.

"(b) Every person owning land within the city, upon or adjacent to which is a sidewalk, whether constructed by him or not, shall at all times keep such sidewalk in safe condition for the use of the public, and shall have repaired all defects which may occur in such sidewalk and at all times remove therefrom all obstructions or any substance which would in any way impede or imperil public travel upon such sidewalk."

an exception to the general rule that liability remains with the municipality in cases involving public sidewalk defects.

On April 19, 2018, the plaintiff filed an objection and a memorandum of law in opposition to the motion, as well as the affidavit of Frank C. Bartlett, Jr., Esq., and several exhibits. On May 7, 2018, the defendants filed a reply memorandum of law, as well as the affidavit of Ronald J. Houde, Jr., Esq., and several exhibits. That same day, the court held a hearing on the motion. On June 15, 2018, the court granted the defendants' motion, rendering summary judgment in favor of the defendants on all counts.

The trial court's memorandum of decision reflects the following analysis. Having reviewed the general principles regarding the liability of abutting landowners for injuries sustained on a defective public sidewalk, the court first concluded that, although the city ordinance imposes a duty on the defendants to maintain the sidewalk, it does not shift liability from the municipality to the defendants for the plaintiff's fall. The court then addressed the plaintiff's argument that there existed a genuine issue of material fact as to whether the defendants caused the sidewalk defect by performing a positive act. Specifically, the court stated that "[t]he plaintiff does not allege, and has not presented evidence to show, that the sidewalk was constructed or repaired deficiently . . . ." The court went on to reject the plaintiff's additional arguments, namely, that the defendants owed her a duty of care by (1) voluntarily undertaking to inspect the sidewalks and (2) incurring a higher duty of care to the plaintiff as a business invitee. Thereupon, the court entered judgment in favor of the defendants as to all counts. This appeal followed. Additional facts and procedural history will be provided as necessary.

Before we turn to the plaintiff's claims on appeal, we briefly discuss the standard of review and applicable

legal principles. The standard governing our review of a trial court's decision to grant a motion for summary judgment is well established. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Emphasis omitted; internal quotation marks omitted.) *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016).

We next review the substantive law governing liability for injuries resulting from a defective condition on a public sidewalk. "It has long been established that municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition. *Robinson* v. *Cianfarani*, [314 Conn. 521, 525, 107 A.3d 375 (2014)].

General Statutes § 13a-99 further provides in relevant part that '[t]owns shall, within their respective limits, build and repair all necessary highways and bridges . . . except when such duty belongs to some particular person. . . .' When a sidewalk 'along a public street in a city [has] been constructed and thrown open for public use, and used in connection with the rest of the street, [it] must, as a part of the street,' be maintained by the city, and kept in such repair 'as to be reasonably safe and convenient for . . . travelers . . . .' *Manchester* v. *Hartford*, 30 Conn. 118, 121 (1861). '[This] duty is by law imposed primarily upon the city, and to the city the public and individuals have a right to look for security against accidents, as well as for indemnity for injury occasioned by its neglect.' Id.

"This primary duty cannot ordinarily be delegated to or imposed upon a third party by contract or ordinance. 'An abutting landowner, in the absence of statute or ordinance, ordinarily is under no duty to keep the public sidewalk in front of his property in a reasonably safe condition for travel.' *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989). Abutting landowners, therefore, are generally not liable for injuries caused by defects on public sidewalks adjacent to their property. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 529. The common-law rule is that the abutting landowner is under no duty to keep a public sidewalk in front of his property in a reasonably safe condition for travel. Id. Moreover, shifting liability cannot be accomplished by inference or by alleging alternative theories of common-law negligence. Id., 528. There are two exceptions. First, municipalities, in limited circumstances, can confer liability onto the abutting landowner through a charter provision, statute, or ordinance. Id. Second, landowners may be liable for injuries caused by defects they created by their own actions. Id. . . .

"Therefore, without a statute that confers liability or the creation by the abutting landowner of the cause of the injury to the plaintiff, the landowner owes no duty to members of the public traversing the public sidewalk. See *Wilson* v. *New Haven*, supra, 213 Conn. 280–81." (Citations omitted; footnotes omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 93–95, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

I

We first consider the foregoing principles with respect to counts one and two of the amended complaint (i.e., the plaintiff's claims of negligence and negligence per se as to VKB). In the allegations made in support of such claims, the plaintiff exclusively relied on the city ordinance as creating a duty on the part of VKB to inspect, maintain, and/or repair the abutting sidewalk, and to warn individuals, including the plaintiff, of the allegedly defective condition of the sidewalk. During oral argument before this court, and having stated in the plaintiff's principal appellate brief that "the plaintiff is not claiming that [the city ordinance], in and of itself, shifts liability to an abutting landowner," the plaintiff's counsel expressly acknowledged that the city ordinance does not play any role in the plaintiff's appeal and conceded that summary judgment properly entered in favor of VKB on count two. Count one necessarily suffers the same fate, however, as the plaintiff's theory of negligence alleged therein also is based exclusively on VKB's alleged violation of the city ordinance.[3] See *Robinson* v. *Cianfarani*, supra, 314 Conn. 528 (holding that town ordinance that imposed duty on

[3] Specifically, in count one, the plaintiff alleged in relevant part: "4. At all times relevant, [VKB] was responsible for keeping the abutting sidewalk in safe condition for the use of [the] public, pursuant to the ordinances of the [city of] Bristol. . . . 15. [VKB] has direct liability to the plaintiff for the injuries she sustained via operation of Bristol [Code of] Ordinance[s] § 21-37."

abutting landowner to remediate hazardous conditions created by accumulation of snow and ice on public sidewalk but did not shift civil liability to that landowner for failure to do so could not be used to support alternative negligence theories). Accordingly, the plaintiff's challenge to the trial court's rendering of summary judgment in favor of VKB as to counts one and two is deemed abandoned, and the judgment as to counts one and two is affirmed on that basis.

II

We turn next, in the context of the remaining counts, which do not rely on the city ordinance, to the applicability of the second exception to the general rule. "[O]ur courts have long recognized '[the second] exception to the general rule, in that abutting property owners can be held liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by *positive acts of the defendant*.' *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 358, 660 A.2d 877 (1995). Examples of this exception include a landowner who maintained a gasoline pump inches away from a sidewalk which would spill gasoline onto the sidewalk, rendering it unsafe for travel; *Hanlon* v. *Waterbury*, 108 Conn. 197, 198–99, 142 A. 681 (1928); and a defendant who allowed grease from his restaurant to seep from the front of his building onto the public walk. *Perkins* v. *Weibel*, 132 Conn. 50, 51, 42 A.2d 360 (1945)." (Emphasis added.) *McFarline* v. *Mickens*, supra, 177 Conn. App. 94–95.

Other examples include a landowner and its lessee that allowed ice to form on a public sidewalk as a result of the melting of snow that had accumulated on projections from the defendants' building; *Calway* v. *William Schaal & Son, Inc.*, 113 Conn. 586, 588–90, 155 A. 813 (1931); and landowners and their lessee that allegedly caused sand, sticks, and debris to accumulate

on a public sidewalk; *Gambardella* v. *Kaoud*, supra, 38 Conn. App. 359; accord *Wilson* v. *New Haven*, supra, 213 Conn. 280–81 (abutting landowner not liable for injuries sustained as result of fall caused by raised, broken, and uneven section of public sidewalk where plaintiff did not claim that statute or ordinance created duty owed to plaintiff by abutting landowner and where abutting landowner did not create hazardous condition); *Abramczyk* v. *Abbey*, 64 Conn. App. 442, 446–47, 780 A.2d 957 (analogizing case, which involved public right-of-way located on defendant's property, to public sidewalk cases and concluding that, in absence of any evidence that defendant's positive acts caused city's water pipe to be tripping hazard, defendant was not liable for injuries caused by exposed pipe), cert. denied, 258 Conn. 933, 785 A.2d 229 (2001).

Moreover, an abutting landowner owes no duty to the public to take affirmative steps to remediate a defect on a public sidewalk resulting entirely from the operation of nature. See *Hartford* v. *Talcott*, 48 Conn. 525, 534 (1881) (there is not imposed "upon the individual any liability at common law for injuries resulting from obstructions in [a public sidewalk] wholly the effects of natural causes"); *McFarline* v. *Mickens*, supra, 177 Conn. App. 97–98 (landowner owed no duty to public in connection with naturally growing grass on public sidewalk).

Mindful of the foregoing principles, we address separately (1) those counts in which the plaintiff alleged that the defect in the sidewalk "developed as a result of the settling of one adjacent segment" and (2) those counts in which the plaintiff alleged that the relevant defendant "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property."

A

We begin with counts four and five, directed to Shady Oaks Assisted Living and Shady Oaks Rest Home, respectively, in which the plaintiff alleged that the defect in the sidewalk "developed as a result of the settling of one adjacent segment." As stated previously in this opinion, in construing the plaintiff's claims, the court concluded in part that "[t]he plaintiff [did] not allege . . . that the sidewalk was constructed or repaired deficiently . . . ." Insofar as counts four and five are concerned, we agree. There is no allegation in counts four and five that any positive act on the part of these defendants caused the settling of the sidewalk segment. Rather, the allegation that the defect in the sidewalk "developed as a result of the settling of one adjacent segment" suggests only that the alleged settling resulted from nature and the passage of time, which is insufficient as a matter of law to impose a duty on an abutting landowner. See *Hartford* v. *Talcott*, supra, 48 Conn. 534; *McFarline* v. *Mickens*, supra, 177 Conn. App. 97–98.

In short, it is clear on the face of these counts that they are legally insufficient.[4] They fail to state a legally cognizable basis on which to hold Shady Oaks Assisted Living and/or Shady Oaks Rest Home liable for injuries on the abutting public sidewalk. Thus, in the absence of (1) a charter provision, statute, or ordinance that confers liability, or (2) any allegations in counts four and five, that Shady Oaks Assisted Living and Shady Oaks Rest Home, respectively, *created* a defective condition on the public sidewalk, the settled common-law rule governs. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 528–29, 528 n.7.

[4] "The existence of a duty is a question of law . . . ." (Internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 338, 210 A.3d 469 (2019). "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not

Notwithstanding the well settled principles explained previously in this opinion, the plaintiff claims that the defendants owed her a duty of care on the theory that a business owner that invites the public to enter and exit its property at a particular location owes a duty to ensure that the location is reasonably safe. In support of this claim, the plaintiff largely relies on *Ford* v. *Hotel & Restaurant Employees & Bartenders Union*, 155 Conn. 24, 32–36, 229 A.2d 346 (1967), in which our Supreme Court affirmed the judgment of the trial court holding the defendant lessor liable in negligence for injuries sustained by a business invitee as he exited the lessor's premises. The trial court in the present case concluded, and we agree, that *Ford* is inapposite because, at a minimum, it did not involve a public sidewalk and, therefore, did not create an additional exception to the general common-law rule discussed previously in this opinion.

On the basis of the foregoing, we affirm the trial court's rendering of summary judgment in favor of Shady Oaks Assisted Living and Shady Oaks Rest Home as to counts four and five, respectively.

B

We continue our analysis with counts three, six, and seven, in which the plaintiff alleged that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property." With respect to these allegations, we disagree with the trial court's statement that "[t]he plaintiff [did] not allege . . . that the sidewalk was constructed or repaired deficiently . . . ." These allegations were sufficient to bring the plaintiff's claims in counts three,

be cured by repleading." *Larobina* v. *McDonald*, 274 Conn. 394, 401, 876 A.2d 522 (2005).

six, and seven within the second exception to the common-law rule, namely, that an abutting landowner can be liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by a positive act of the defendant. That is, the allegations of these counts may be reasonably viewed as alleging that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, constructed the sidewalk with the alleged defect (i.e., that the alleged defect resulted from the construction of the sidewalk).

In light of our conclusion that counts three, six, and seven sufficiently allege a legally cognizable basis for liability, we proceed to address the plaintiff's claim that the trial court erred in failing to require the defendants to satisfy their initial burden, as the movants for summary judgment, to establish the nonexistence of any genuine issue of material fact. As stated previously in this opinion, in support of their amended motion for summary judgment, the defendants did not submit any supporting affidavits or documentary evidence. The plaintiff argues that, in light of this failure, the trial court improperly shifted the burden of proof to her when it concluded that "[t]he plaintiff . . . has not presented evidence to show . . . that the sidewalk was constructed or repaired deficiently . . . ." We agree.

Practice Book § 17-45 (a) provides: "A motion for summary judgment *shall be supported by* appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents." (Emphasis added.) "On a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists

justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 626–27, 57 A.3d 391 (2012); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320–21, 77 A.3d 726 (2013); *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 795, A.3d (2019); *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 583–85, 193 A.3d 700 (2018).

To prevail on their motion for summary judgment, the defendants bore the initial burden to negate the factual claims as framed by the complaint. Thus, in response to the allegations in counts three, six, and seven, that VKB, Vernon W. Belanger, and Kay F. Belanger, respectively, "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property," it was incumbent on those defendants to whom such counts were directed to proffer evidence that either they did not construct the sidewalk or that they constructed the sidewalk without the alleged defect. In the absence of any evidentiary submission, such defendants failed to satisfy their initial burden as movants for summary judgment with respect to counts three, six, and seven, and the trial court erred in granting their motion for summary judgment as to those counts.

The fact that the defendants submitted evidentiary materials with their reply brief (reply materials) in support of their summary judgment motion does nothing to cure the failure to proffer evidence with their initial motion because the reply materials do not establish the

nonexistence of a genuine issue of material fact.[5] That is, the reply materials do not contain any affidavits or other supporting documents that demonstrate that the defendants either did not construct the sidewalk or constructed the sidewalk without the alleged defect. Moreover, the reply brief states in part: "[I]t is not clear that the defendant[s] actually constructed the sidewalk in question," which effectively concedes that there exists a genuine issue of material fact as to whether any of the defendants constructed the sidewalk.

The judgment is reversed in part only as to the granting of the defendants' motion for summary judgment as to counts three, six, and seven of the plaintiff's amended complaint and the case is remanded with direction to deny the defendants' motion for summary judgment as to those counts and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[5] The reply materials, which were filed on the same day as the summary judgment hearing, include certificates of use and occupancy, two photographs of the sidewalk, excerpts from the plaintiff's deposition transcript, and the affidavit of Ronald J. Houde, Jr., Esq. attesting that the submitted documents are true and accurate copies. Because the plaintiff's counsel stated to the trial court during the summary judgment hearing that he had no objection to the court considering the defendants' reply, the plaintiff is deemed to have waived any objection to the reply on timeliness grounds. Cf. *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, supra, 183 Conn. App. 583–85 (holding that, in adjudicating defendants' motion for summary judgment, trial court should not have considered defendants' initial affidavit, filed one day before summary judgment hearing, to which plaintiff objected on, inter alia, timeliness grounds).