CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ABDUL MUKHTAAR
(AC 42490)

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

Syllabus

The defendant, who had been convicted of the crime of murder, appealed to this court from the trial court's dismissal of his motion for a second sentence review hearing. He claimed that the trial court violated his due process rights when it dismissed the motion after finding that it lacked subject matter jurisdiction. *Held* that the trial court properly determined that it lacked subject matter jurisdiction to consider the defendant's motion for a second sentence review; the sentence review committee previously had reviewed the defendant's sentence and issued a final decision, and the defendant had no right to a second sentence review hearing.

Argued September 24—officially released December 24, 2019

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *Gormley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to our Supreme Court, which affirmed the judgment; thereafter, the court, *Devlin*, *J.*, denied the defendant's motion to correct an illegal sentence; subsequently, the court, *Devlin*, *J.*, denied the defendant's motion to allow expert testimony, and

the defendant appealed to this court, which reversed the denial of the motion to correct an illegal sentence and directed the trial court to dismiss the defendant's motion; subsequently, the court, *Devlin*, *J.*, dismissed the defendant's motion to request a sentence review hearing, and the defendant appealed to this court. *Affirmed.*

Abdul Mukhtaar, self-represented, the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Abdul Mukhtaar, appeals from the trial court's dismissal of his motion for a second sentence review hearing. The court dismissed the defendant's motion after finding that it lacked subject matter jurisdiction to consider the motion. We affirm the judgment of the court dismissing the defendant's motion.

The following facts, taken from one of the defendant's prior appeals,[1] and procedural history are relevant to this appeal. "On February 14, 1996, the defendant shot and killed Terri Horeglad . . . . [The defendant] was arrested, charged and, following a jury trial, convicted of murder in violation of General Statutes § 53a-54a. On September 19, 1997, the trial court sentenced the defendant to fifty years imprisonment." *State* v. *Mukhtaar*, 179 Conn. App. 1, 3, 177 A.3d 1185 (2017). Subsequently, the defendant's sentence was reviewed by the

[1] This appeal is the sixth filed by the defendant to an appellate court since being sentenced in 1997 in addition to other challenges to his conviction. See *State* v. *Mukhtaar*, 189 Conn. App. 144, 146 n.3, 207 A.3d 29 (2019) (listing defendant's prior appeals and trial court actions).

sentence review division of the Superior Court, which concluded that the defendant's sentence was "neither inappropriate nor disproportionate" and, thus, affirmed it in 2003.

On or about October 22, 2018, the defendant filed a motion with the Superior Court that was disconnected from any pending action to request a second sentence review hearing. In his motion, the defendant argued that an April, 2015 "psychological evaluation [that] determined that the defendant was not capable to aid and assist in his own defense [at] pretrial, [at] trial, and at sentencing" was "newly discovered evidence" that entitled him to a second sentence review hearing. On November 21, 2018, the court held argument on the defendant's motion. The defendant explained that he first made his request for a second sentence review hearing to the sentence review division, which informed the defendant that it lacked jurisdiction to grant the defendant's request and that he would have to make his request to the trial court. The court issued a memorandum of decision on November 28, 2018, in which it held that it lacked jurisdiction to consider the defendant's motion and, accordingly, dismissed the motion.

In its memorandum of decision, the court succinctly stated: "Under Connecticut law, a trial court is ordinarily without jurisdiction to modify a lawful sentence that a defendant has begun to serve. . . . The legislature, however, may confer jurisdiction to modify executed sentences. . . . The Connecticut legislature has provided two avenues for sentence modification. For total effective sentences of three years or more, review is available through the sentence review division pursuant to General Statutes § 51-195. For definite sentences of three years or less, General Statutes § 53a-39 allows a defendant to seek modification of the sentence from the sentencing court or judge.

"The sentence review division is a creature of statute established in 1957 by Public Act 57-436. The statutory scheme provides a defendant with what is, in effect, a limited opportunity for reconsideration of the sentence imposed. The decision of the review board is final. General Statutes § 51-196 (d).

"The statutory scheme, by its terms does not provide for any reconsideration of sentences that have been reviewed. Moreover, this court is unaware of any authority that this court has to order the sentence review division to conduct such reconsideration.

"Accordingly, this court finds that it lacks jurisdiction to consider the defendant's motion and it is therefore dismissed." (Citations omitted; footnote omitted.) The defendant filed this appeal.

The defendant claims that the trial court violated his due process rights when it dismissed his motion seeking a second sentence review hearing. "It is well settled that [a] determination regarding a trial court's subject matter jurisdiction is a question of law and, therefore, we employ the plenary standard of review and decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 233, 194 A.3d 867 (2018).

"[T]he jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." (Internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 533, 902 A.2d 1058 (2006). "The purpose and effect of the Sentence Review Act is to afford a convicted person a *limited* appeal for reconsideration of his sentence. . . . It thus gives him an optional de novo hearing as to the punishment to be

imposed." (Citations omitted; emphasis added.) *State* v. *Nardini*, 187 Conn. 109, 121–22, 445 A.2d 304 (1982); General Statutes § 51-194 et seq. To receive sentence review, an individual "file[s] with the clerk of the court for the judicial district in which the judgment was rendered an application . . . ." General Statutes § 51-195. After an application is filed, the clerk shall forward the application to the review division and notify the sentencing judge. General Statutes § 51-195. "On review of the original sentence the division is authorized to let the original sentence stand, to increase or decrease it or may order such different sentence to be imposed as could have been imposed at the time of the original sentence." *State* v. *Nardini*, supra, 119–20; General Statutes § 51-196 (a). If a "different sentence or disposition" is ordered by the review division, "the Superior Court shall resentence the defendant or make any other disposition of the case ordered by the review division." General Statutes § 51-196 (d). Section 51-196 (d), however, "makes the decision of the sentence review division final . . . ." *State* v. *Nardini*, supra, 117. Significantly, the Sentence Review Act expresses no right to a second sentence review hearing. See General Statutes § 51-194 et seq.

Because the sentence review division reviewed the defendant's sentence and, after its review, issued a final decision in 2003, and because the defendant has no right to a second sentence review hearing, the trial court determined correctly that it lacked subject matter jurisdiction over the defendant's motion seeking a second sentence review hearing.

The judgment is affirmed.

MICHAEL D. *v.* COMMISSIONER OF CORRECTION*
(AC 41622)

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

Syllabus

The petitioner, who had been convicted of two counts of risk of injury to a child in connection with his alleged conduct in sexually abusing the minor victim on three separate occasions between 2001 and 2003, sought a writ of habeas corpus, claiming that he received ineffective assistance from the counsel who had represented him with respect to his criminal trial. Specifically, he claimed, inter alia, that his trial counsel had rendered ineffective assistance in failing to challenge the admission into evidence of a pornographic magazine in which young females were depicted in sexually suggestive settings and poses by ensuring that the trial court conduct an in camera review of the magazine. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that trial counsel's conduct in attempting to preclude the magazine did not constitute deficient performance; the petitioner's trial counsel testified regarding the numerous steps they took in their attempt to preclude the admission of the magazine, including filing a motion in limine, presenting expert testimony, and making two requests on the record that the magazine be reviewed by the court, which stated that it would review the magazine's contents, and the habeas court found that trial counsel's failure to make an in camera request in writing, or to further press the court on whether it actually had reviewed the magazine, after counsel at least twice had made the specific request on the record that the court do so, did not constitute acts or omissions serious enough to establish that they were not functioning as the counsel guaranteed by the sixth amendment.

2. The petitioner could not prevail on his claim that his trial counsel provided ineffective assistance by failing to request a jury instruction that the jury must unanimously agree on the factual basis for each guilty verdict; although the petitioner claimed that a unanimity instruction should have been provided to the jury given that the three alleged incidents of sexual assault were separate and distinct, and that if counsel had requested a unanimity instruction, there was a reasonable probability that the trial would have resulted in a more favorable verdict, the habeas court properly determined that the petitioner failed to establish prejudice resulting from trial counsel's failure to request a specific unanimity instruction, as the trial court gave a general unanimity charge to the jury prior to

* 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.

its deliberations and instructed the jury to consider each count separately and independently from the others, and the habeas court found that there was no evidence that jurors relied on different incidents and facts to support their verdicts without the specific unanimity instruction.

Argued September 18—officially released December 24, 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.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVERY, J. The petitioner, Michael D., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claims that the habeas court erred in concluding that he did not prove that his trial counsel provided ineffective assistance of counsel by failing (1) to ensure that a pornographic magazine was not admitted into evidence by ensuring that the trial court conduct an in camera review of the magazine and (2) to request a specific unanimity instruction. We disagree and affirm the judgment of the habeas court.

The following facts—as gleaned from the record, by this court in the petitioner's direct appeal from his conviction and by the habeas court in its memorandum of decision—and procedural history are relevant to our disposition of the appeal. "The [petitioner] and Ann P. were married in December, 1999. At the time of their

marriage, Ann P. had a six year old daughter from a previous relationship, the victim. From 1999 until 2005, the [petitioner] lived with [Ann P.] and the victim in Meriden. The state alleged that the [petitioner] sexually assaulted the victim on three separate occasions between 2001 and 2003. The victim testified that the assaults had taken place at intervals of approximately one year . . . .

* * *

"In October, 2004, Ann P. became suspicious that the [petitioner] was having an affair. Believing that she might find evidence of her husband's suspected infidelity, Ann P. searched the vehicle the [petitioner] regularly drove . . . . Secreted in a small storage space behind the rear row of seats in the vehicle she found a plastic bag. Upon examining the contents of the bag, she discovered that it contained several articles of her daughter's outgrown clothing . . . and two pornographic magazines: an unnamed adult fetish magazine and another magazine entitled 'Barely Legal,' in which young females were depicted in sexually suggestive settings and poses. . . . At some point, she went through the bag and discovered that some of her daughter's clothing felt 'stiff' to the touch, which she attributed to the possible presence of semen. Shortly after discovering the bag and its contents, Ann P. filed for divorce. The divorce was finalized in February, 2005.

"In the years following the divorce, Ann P. occasionally asked her daughter 'in a roundabout way' whether 'anybody [had] ever done anything' inappropriate to her. . . . She disclosed at that time that the [petitioner] had sexually assaulted her." *State* v. *Michael D.*, 153 Conn. App. 296, 299–301, 101 A.3d 298, cert. denied, 314 Conn. 951, 103 A.3d 978 (2014).

On October 27, 2009, the petitioner was arrested and charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), risk of injury

to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2). He was represented by public defenders Joseph Lopez and Tejas Bhatt. Prior to trial, in a memorandum of law in support of a motion in limine filed on January 18, 2012, defense counsel moved to preclude from evidence the "Barely Legal" magazine (magazine) and the shorts found in the petitioner's car on the grounds that such items were "immaterial, irrelevant, unreliable and, even if relevant, their admission would be unfairly prejudicial and outweigh whatever minimal probative value they possess." In support of the motion, trial counsel presented the testimony of Dennis Gibeau, a clinical psychologist specializing in the assessment and treatment of sexual offenders.[1] The trial court denied this motion, and counsel orally renewed the motion. The court stood by its prior ruling and admitted the magazine as a full exhibit at trial.

The petitioner was convicted, after a three day jury trial, of both risk of injury to a child charges but was acquitted of the sexual assault charge. He subsequently filed a direct appeal, and this court affirmed the petitioner's conviction. See *State* v. *Michael D.*, supra, 153 Conn. App. 299.

On June 12, 2017, the petitioner filed the operative amended habeas petition, in which he alleged that his criminal trial counsel, attorneys Lopez and Bhatt, had provided ineffective assistance of counsel. Following a trial on December 11, 2017, the habeas court denied the petition in a written memorandum of decision issued

[1] The habeas court stated that Gibeau testified "regarding the distinctions between the physical and sexual characteristics of prepubescent girls and postpubescent girls, and concluded that it would be speculative to link an interest in a Barely Legal magazine depicting postpubescent girls with a pedophilic attraction to young children." Upon cross-examination, however, he conceded that, when considered together with the victim's clothing and the fact that such items were found in the petitioner's car, it could be clinically inferred that the petitioner had a specific sexual interest in this particular victim.

on April 9, 2018. The petitioner then filed a petition for certification to appeal the habeas court's decision on April 17, 2018, which the court granted on April 19, 2018. This appeal followed.

The petitioner claims that the habeas court erred in concluding that he failed to prove ineffective assistance of counsel by his trial attorneys. He contends that Lopez and Bhatt rendered ineffective assistance by failing (1) to assert a proper challenge to the admission of the magazine into evidence by ensuring that the trial court conducted an in camera review of the magazine and (2) to request a specific unanimity instruction. We are not persuaded.

"In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 720, 789 A.2d 1046 (2002).

"A criminal defendant's right to the effective assistance of counsel . . . is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." (Citations omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

The petitioner has the burden of establishing 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." (Emphasis omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008).

Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, supra, 466 U.S. 686. "A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong . . . ." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 539, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

I

We first address the petitioner's claim that the habeas court erred in concluding that he had failed to prove that trial counsel had rendered ineffective assistance by failing to challenge the admission of the magazine into evidence by ensuring that the trial court conduct an in camera review of the magazine. He contends that the attorneys were aware of the impact the magazine could have on the jury. In particular, the petitioner argues: "They also knew that it needed to be *understood* to appreciate how irrelevant and prejudicial it truly was. They failed to take steps to make [the trial court] understand the magazine . . . ." (Emphasis in original.) Specifically, the habeas court found that the petitioner's amended petition claimed that trial counsel provided ineffective assistance by "failing to (1) file a written request for an in camera review of the 'Barely Legal' magazine found in the petitioner's vehicle, (2) ask the trial court to articulate whether it had made an

in camera review of the magazine, [and] (3) ask the trial court to reconsider its ruling based on an in camera review of the magazine . . . .'' The respondent, the Commissioner of Correction, argues that the habeas court was correct in concluding that the petitioner failed to prove that ''his counsel performed deficiently in their efforts to preclude the magazine, where they filed a motion in limine and presented testimony, evidence, and argument in support of the motion . . . .'' We agree with the respondent.

''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.'' (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), quoting *Strickland* v. *Washington*, supra, 466 U.S. 687. ''It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial.'' *Jones* v. *Commissioner of Correction*, 169 Conn. App. 405, 415–16, 150 A.3d 757 (2016), cert. denied, 324 Conn. 909, 152 A.3d 1246 (2017). When assessing trial counsel's performance, the habeas court is required to ''indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'' *Strickland* v. *Washington*, supra, 689.

Both trial attorneys testified at the habeas trial and conceded that neither conclusively knew whether the trial court ever had reviewed the contents of the magazine. They also testified, however, to the numerous

steps they took in their attempt to preclude the magazine from being admitted into evidence. When Attorney Lopez asked the trial court to reconsider its ruling, he specifically asked the court to review the contents, and not just the cover, of the magazine in balancing its potential prejudicial effect against its probative value. The trial court responded that it would review the magazine's contents and rule on the petitioner's request for reconsideration the next morning.[2] Additionally, Attorney Bhatt orally requested that the trial court articulate the relevancy of the magazine as related to the petitioner's sexual interest.[3] Prior to the trial court's ruling,

[2] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Lopez]: Your Honor, I would ask that you view that Barely Legal magazine and perhaps reconsider. I think that if that magazine is going in with the jury as a full exhibit that that is, in my opinion, so prejudicial as to denying this man a fair trial.

"The Court: All right, I will—I've already made my ruling. You want me to review the magazine? I'm getting my ruling from the testimony I heard yesterday from the witness you called, what he indicated to this Court.

"[Lopez]: But is that magazine going to go into the jurors?

"The Court: I don't know. I don't know if it's going to go into the jury. If you want me to look at it prior to, I will. I don't have a problem with that.

"[Lopez]: I would request that.

"The Court: All right. Gentlemen, we're picking the jury tomorrow, so we have plenty of time on that. . . .

"[Lopez]: We're asking your Honor to look at the magazine, briefly. I mean it's only 4:30.

"The Court: I'll look at the magazine and at 9:30, I'll let you know."

[3] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Bhatt]: Just to clarify for articulation purposes, the court's ruling would be that the magazine, the shorts and the items in the bag are relevant and that their probative value is not outweighed by the prejudicial impact?

"The Court: That's right.

"[Bhatt]: And I guess the other point of clarification, we would ask the court to explain or articulate. The court mentioned or referenced several times the magazine being an indication of the defendant's interest in young girls and we would submit to the court to be considerate of that in light of the testimony that the doctor drew a distinction between young women and young girls and prepubescent and postpubescent is the court's ruling that the magazine is indicative of his interest in prepubescent girls with the age of the complainant or younger women who were teenagers, but older than the complainant. I think it's an important distinction based on the testimony of the doctor and we ask the court to articulate that in its decision.

Attorney Bhatt presented further argument for reconsideration and commented on the court's previous assertion that it would review the contents of the magazine.[4]

The habeas court found that trial counsel's conduct in attempting to preclude the magazine did not constitute

"[The state]: I would object to the court having to articulate that. I think the court has articulated its reasons.

"The Court: I have made my decision."

[4] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Bhatt]: I believe at the end of the day the court indicated that prior to this morning it would review the—the magazine in question. We would ask the court to reconsider and I don't know if the court has done that, but I wanted to add a couple of things to that.

"Again, we are asking the court to reconsider its decision. The court relied—reading from the [Connecticut] Code of Evidence on [*State* v. *Rinaldi*, 220 Conn. 345, 599 A.2d 1 (1991)] and [*State* v. *Miller*, 202 Conn. 463, 522 A.2d 249 (1987)] which talks about a tendency to support a fact relevant to the issues if only in a slight degree.

"Again, we would—our position would be that if it's read in context with the rest of the cases it's not—it doesn't mean that any fact that has a relevance to a slight degree read with the other cases which talk about that make the probability—make the existence of a fact more probable than not and the slight degree is only tipping the scales in favor of. It is more probable than not.

"So, again, our position would be that this evidence, if even relevant to a slight degree, does not [rise] to the level of being more probable than not with cases which we cited in our brief and we would ask that the court, again, reconsider its decision. And, finally, even if it is relevant we would ask the court and I'm not sure if I did this yesterday—but we would ask the court to clarify it is finding that its probative value is outweighed by its prejudicial impact.

"Again, the court is aware that the defense's position is that this has been a prejudicial piece of evidence. And, finally, again, I—thinking about this last night and I don't mean to reargue this and I'm not going to, but I just—it seems to me that the purpose of the State introducing this evidence is to convince the jury that this is somebody who has a disposition to having sex—being sexually aroused by minors.

"That is dangerously close to, if not propensity of the evidence and I understand the State has said it's not offering it as an uncharged misconduct, but I would just like the record to be clear with our position that in our opinion it—it essentially is without calling it so that it is dangerously close to propensity of the evidence and should not be permitted.

"The Court: All right. Well, you've made the argument yesterday. You're supplementing it today. I stand by my ruling and I put the reasons on the record."

deficient performance. In its memorandum of decision, the court highlighted the various actions that counsel undertook, including filing a motion in limine, presenting expert witness testimony, and making two requests to the court, on the record, to review the magazine and reconsider its ruling.

The habeas court found that trial counsel's failure to make an in camera request in writing, or to further press the court on whether it actually had reviewed the magazine, after counsel at least twice had made the specific request on the record that the court do so, did not constitute acts or omissions serious enough to establish that they were not "functioning as the counsel guaranteed by the sixth amendment." The petitioner has presented nothing that persuades us that the habeas court erred in its conclusion. Having found no error in the habeas court's deficient performance analysis on the petitioner's claim that counsel provided ineffective assistance on the ground that they failed to ensure that the pornographic magazine was excluded from evidence, we need not consider the petitioner's prejudice argument.

II

We next address the petitioner's claim that trial counsel provided ineffective assistance by failing to request a jury instruction that the jury must unanimously agree on the factual basis for each guilty verdict. The petitioner contends that a unanimity instruction should have been provided to the jury, given that the three incidents were separate and distinct. The petitioner argues that trial counsel "could, and should, have requested a specific unanimity instruction so as to ensure that the jury unanimously found at least one act had been proven beyond a reasonable doubt. There was no strategic reason not to make this request, and every reasonable strategic reason to do so. Worst of all, [trial

counsel] knew they had to take this step and simply forgot to do so."[5] The petitioner also argues that the habeas court erred in finding that he had not established prejudice from counsel's failure to request such an instruction. We disagree.

"A specific unanimity instruction is required . . . where the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved." (Internal quotation marks omitted.) *State* v. *Bailey*, 82 Conn. App. 1, 6, 842 A.2d 590, cert. denied, 269 Conn. 913, 852 A.2d 744 (2004). "[W]e have not required a specific unanimity charge to be given in every case . . . In *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), we set forth a multipartite test to determine whether a trial court's omission of a specific unanimity charge warrants a new trial. We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we

[5] During the habeas trial, the following colloquy took place during Attorney Bhatt's redirect examination:

"[O'Brien]. Okay. Now, just moving on briefly to the unanimity instruction. Did you think of asking for a specific unanimity instruction prior to the case going to verdict?

"[Bhatt]. Yeah. When we were thinking about the long-form and how to deal with it, I think there was a conversation in which it came up, and we said we should file a specific—a unanimity instruction— . . .

"[O'Brien]. Okay. So is it fair to say that isn't just a thought that you had after the verdict was rendered.

"[Bhatt]. No.

"[O'Brien]. It's fair to say you—that's not just something you thought of later, right?

"[Bhatt]. Correct.

"[O'Brien]. Okay.

"[Bhatt]. Because I mean—and I remember—only because I remember thinking to myself I forgot to do that."

will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged. . . .

"This court is required to conclude, when reviewing a court's instruction to the jury, that [t]he absence of language expressly sanctioning a nonunanimous verdict means that the defendant has not met the first part of the *Famiglietti* test." (Citations omitted; internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 232, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014).

In the present case, the trial court gave a general unanimity charge to the jury prior to its deliberations. It instructed the jury to consider each count separately and independently from the others: "Each count alleges a separate crime. It will be your duty to consider each count separately in deciding the guilt or nonguilt of the defendant. This means that the determination of one count or charge does not automatically make the defendant guilty or not guilty on any other count or charge. Each count must be considered separately by you." As the court went through each of the counts, it instructed the jury that it must unanimously agree that each element of the crimes charged was proven beyond a reasonable doubt.[6]

[6] Regarding count one (violation of §53a-70a [2]), the court instructed the following: "If you unanimously find that the state has proven beyond a reasonable doubt each of the elements of the crime of sexual assault in the first degree then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements you shall then find the defendant not guilty."

Regarding count two (violation of § 53-21 [a] [2]), the court instructed the following: "If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of risk of injury to a minor then you shall find the defendant guilty. On the other hand, if you unanimously find the state has failed to prove beyond a reasonable doubt any of the elements you shall then find the defendant not guilty."

Regarding count three (violation of § 53-21 [a] [1]), the court instructed the following: "If you unanimously find that the state has proven beyond a

The habeas court found that trial counsel "intended to request an additional instruction informing the jurors that they must unanimously agree on the factual basis for their guilty verdicts, but failed to do so." It declined to address whether it was an error on the counsel's part, stating only that it may be "arguable." The habeas court, therefore, did not rule on the deficient performance prong but, instead, analyzed the prejudice prong of the *Strickland* test, and it concluded that the petitioner had failed to prove that he was prejudiced by the "arguable" deficient performance of counsel in failing to request a specific unanimity instruction. We agree with the habeas court's analysis.

The petitioner argues that the habeas court erred in finding that he failed to prove that he was prejudiced by his trial counsel's failure to request a unanimity instruction. According to the petitioner, if such instruction were requested, there was a "reasonable probability" that the trial would have resulted in a more favorable verdict. He argues that such an instruction may have led to a more favorable outcome because he believes the jury did not agree on the factual basis for his conviction based on the mixed verdict. We disagree.

Under the prejudice prong, the petitioner must show "that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012). "The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 522, 964 A.2d 1186, cert. denied

reasonable doubt each of the elements of the crime of risk of injury to a minor then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements you shall then find the defendant not guilty."

sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

The habeas court found that "there [was] no evidence that jurors relied on different incidents and facts to support their verdicts without the specific unanimity instruction. There is no evidence that had the jury been forced to identify a unanimous factual basis for their verdicts, there is a reasonable probability that the trial would have had a different outcome in the petitioner's favor."

In *State* v. *Bailey*, supra, 82 Conn. App. 7–8, this court held that because a specific unanimity instruction was not required, "it was not reasonably possible that the absence [of such an] instruction misled the jury." We hold the same to be true in the present case that the jury was not misled by the absence of such an instruction. "[G]iven the court's admonitions concerning unanimity, we must presume that the jury, in the absence of a fair indication to the contrary . . . followed the court's instruction as to the law." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, supra, 148 Conn. App. 233.

Furthermore, on the petitioner's direct appeal, this court specifically addressed and rejected the petitioner's contention that the jury's mixed verdict—finding the petitioner guilty of risk of injury but acquitting him of sexual assault—indicated a likelihood that it was nonunanimous. This court wrote: "The record reflects that the jury deliberated for three days, during which it requested and heard playback testimony of Ann P. and the victim. . . . The [trial] court further cautioned that there is no principle of law for less than a unanimous verdict. It is well settled that [t]he jury is presumed, in the absence of a fair indication to the contrary, to have followed the court's instruction as to the law. . . . The record suggests that the jury considered

the evidence in an assiduous fashion guided by the court's correct instructions on the law. Accordingly, we decline to impute nonunanimity to the jury's verdict because it chose, after careful deliberation, to acquit on the charge of sexual assault.

"[W]e are ever mindful that the defendant is entitled to be protected against the danger that . . . he will be convicted not on the basis of one unanimous verdict on a single set of facts but under juror votes of conviction which, depending on the particular member of the jury, relate to entirely different [occasions] . . . . Here, however, there was no risk that the jury's verdict was not unanimous. The central question for the jury was whether the victim should be believed. The jury considered that question, at length, against the backdrop of the defendant's argument, impugning the victim's credibility, and imploring the jurors to discredit her testimony as to all of the reported incidents, not just some." (Citations omitted; internal quotation marks omitted.) *State* v. *Michael D.*, supra, 153 Conn. App. 326–27. Accordingly, we conclude that the habeas court did not err in finding that the petitioner failed to establish prejudice resulting from trial counsel's failure to request a specific unanimity instruction.

On the basis of our review of the parties' briefs and the record of the criminal and habeas trial, we conclude that the findings of the habeas court are supported by the facts that appear in the record and are not clearly erroneous. Furthermore, we conclude that the habeas court's conclusion that the petitioner was not deprived of his constitutional right to the effective assistance of counsel was correct. The court had before it sufficient evidence to find as it did, and, accordingly, it properly denied the petitioner's habeas petition.

The judgment is affirmed.

In this opinion the other judges concurred.

STARBOARD FAIRFIELD DEVELOPMENT, LLC, ET AL. *v.* WILLIAM C. GREMP ET AL.
(AC 41546)

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

Syllabus

The plaintiffs, S Co. and R Co., sought to recover damages arising out a dispute over real estate investments and the disentanglement of business relationships with the defendants, G and G Co. The plaintiffs brought counts against the defendants sounding in vexatious litigation, breach of a general release benefitting S Co. and its individual members, slander of title, intentional interference with a contract pertaining to certain property, breach of a fiduciary duty, and breach of a promissory note. Following a trial to the court, the trial court rendered judgment in part for the plaintiffs, form which the defendants appealed to this court. *Held*:

1. The defendants' claim that the trial court improperly determined that they breached a general release with S Co. by pursuing a civil action against the plaintiffs was not reviewable; the defendants failed to brief their claim adequately, as their brief was utterly devoid of any citations to or analysis of applicable contract principles or case law that supported their claim, let alone any application of law to the facts of the case.
2. The defendants could not prevail on their claim that the trial court improperly found that they slandered R Co.'s title to certain property by filing a lis pendens and an affidavit of fact pertaining to that property on certain land records; the trial court, as the trier of fact, was free to discredit evidence provided by G at trial that a reasonable and good faith belief existed for his claim of ownership of R Co., which equated to an interest in the property, and having thoroughly reviewed the defendants' arguments on appeal, this court was not persuaded that the trial court's finding of a slander of title was either legally incorrect or factually unsupported.
3. The defendants could not prevail on their claim that the trial court improperly found that they intentionally interfered with R Co.'s contract to sell certain property to a third party: although the defendants baldly stated that the trial court's finding that they acted intentionally and with bad faith to interfere with the property sale was erroneous, they failed to brief that argument beyond mere abstract assertion, and the defendants' claim that there was insufficient evidence for the trial court to find that their interference caused any actual loss lacked merit, as the defendants failed to address the additional attorney's fees and costs incurred, focusing entirely on the escrow funds and arguing only that the escrow could not be a basis for establishing an actual loss, and the loss the court attributed with respect to the escrow funds had nothing to do with the

establishment of the escrow or the original purpose for the funds but, rather, concerned R Co.'s inability to utilize those funds because they remained in the escrow account due to the actions of the defendants; moreover, the defendants' claim that the court improperly awarded R Co. interest on a certain amount that R Co. was forced to hold in escrow due to the defendants' actions also failed.

4. The defendants' claim that the trial court improperly awarded punitive damages without providing them with adequate notice of a hearing in accordance with the rules of practice was unavailing; the defendants failed to demonstrate that their due process rights were violated or that the trial court committed reversible error in calculating the amount of punitive damages, as the record demonstrated that the defendants had ample notice of the hearing on punitive damages, attended the hearing, and were afforded a meaningful opportunity to be heard on the merits, and the trial court record having contained a proper notice of the hearing date, the defendants had notice of the hearing and knew that the purpose of the hearing would be to determine the amount of common-law punitive damages.

Argued October 7—officially released December 24, 2019

Procedural History

Action for, inter alia, the defendants' alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the plaintiffs served the defendants with notice of application for a prejudgment remedy; thereafter, the defendants filed counterclaims against the plaintiffs; subsequently, the matter was tried to the court, *Radcliffe, J.*; judgment in part for the plaintiffs, from which the defendants appealed to this court; thereafter, a hearing in damages was held before the court, *Radcliffe, J.*, which awarded damages to the plaintiffs, and the defendants filed an amended appeal. *Affirmed.*

John I. Bolton, for the appellants (defendants).

Colin B. Connor, with whom, on the brief, was *Robert D. Russo, III*, for the appellee (plaintiffs).

Opinion

PRESCOTT, J. In this action arising out of a dispute over real estate investments and the disentanglement

of business relationships, the defendants William C. Gremp and W C Gremp, LLC (WCG)[1] appeal, following a bench trial, from the judgment of the trial court rendered in favor of the plaintiffs, Starboard Fairfield Development, LLC (Starboard), and RR One, LLC (RR One), on counts alleging breach of a general release, slander of title, intentional interference with a contractual relationship, and breach of a promissory note.[2] On appeal, the defendants claim that the court improperly (1) determined that they breached a general release with Starboard by pursuing a civil action against the plaintiffs, (2) found that they slandered RR One's title to certain property by recording a lis pendens and an affidavit of fact pertaining to that property on the Bridgeport land records, (3) found that they intentionally interfered with RR One's contract to sell the property to a third party, (4) awarded RR One interest on $5000 that RR One was forced to hold in escrow due to the defendants' actions, and (5) awarded punitive damages without providing the defendants with adequate notice of a hearing in accordance with Practice Book §§ 7-5, 14-7, and 14-20. After a careful review of the record and the briefs of the parties, we conclude

[1] In addition to Gremp and WCG, Main Street Property Management, LLC (Main Street), also was named as a defendant in the underlying action. In its memorandum of decision, the trial court expressly stated that it was not awarding damages against Main Street and rendered judgment in its favor on all counts of the complaint. Main Street nevertheless was aggrieved by the court's decision because the court denied counterclaims to which Main Street was a party. Although Main Street is listed as an appellant on the appeal form and is included as a party to the appellants' brief, none of the claims of error raised and briefed on appeal pertains to Main Street or the court's disposition of the counterclaims. We conclude, therefore, that Main Street effectively has abandoned its appeal, and, in our discussion of the claims on appeal, we refer to Gremp and WCG collectively as "the defendants."

[2] The trial court rendered judgment for the defendants on the remaining counts of the complaint alleging vexatious litigation and breach of a fiduciary duty. The court also rendered judgment against the defendants on all counterclaims.

that the defendants' claims are either inadequately briefed or wholly unpersuasive on the basis of the record presented, and, accordingly, we affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to the defendants' claims. In 2010, Gremp organized RR One as a limited liability company with himself as its sole member. As of 2012, RR One was the record owner of two rental properties in Bridgeport. One property is a seven unit, multifamily residence located on a corner lot at 90 Adams Street and 175-77 Newfield Avenue (Newfield property). The other property is composed of three residential units and is located at 188-90 Deacon Street (Deacon property).

In October, 2012, Starboard and WCG, another limited liability company with Gremp as its sole member, executed documents to amend RR One's operating agreement. Pursuant to the amended operating agreement, Starboard, which made a capital contribution of $99,000, owned 99 percent of the newly constituted RR One, and WCG owned the remaining 1 percent on the basis of a capital contribution of $1000. The operating agreement further provided that no member of RR One was entitled to claim any individual interest in any of the property owned by RR One. After the agreement was executed, Gremp served as property manager for the Deacon and Newfield properties.

In 2015, RR One agreed to sell the Deacon property to Gremp for $140,000. RR One signed a sales contract on November 13, 2015, and Gremp signed the contract on November 15, 2015. Gremp planned to obtain a mortgage of $119,000 to help fund the purchase of the Deacon property. In January, 2016, the parties executed an addendum to the sales contract for the Deacon property. The addendum provided in relevant part: "[RR

One] shall provide [Gremp] with title in a form that complies with [Gremp]'s mortgage requirements. Specifically, should lender require title to remain with [RR One], [RR One] agrees to transfer 100 [percent] ownership of [RR One] to [Gremp] provided [RR One] disposes of the Newfield property prior to any such transfer of ownership." The addendum also provided that RR One would pay Gremp for certain outstanding management fees that were in dispute.

Prior to the closing on the Deacon property, Attorney Tyisha Toms, who represented Gremp, and Attorney Bill Gouveia, who represented RR One, discussed the mechanics of the transfer of title. Gouveia drafted a document that, if duly executed, would have assigned Starboard's membership interest in RR One to Gremp in the event that Gremp was unable to obtain financing. Two days before the closing date for the Deacon property, however, Gremp obtained a mortgage.

To obtain his mortgage, Gremp provided the lender with a copy of the 2010 operating agreement that listed Gremp as the sole member of RR One. Gremp, however, failed to inform the lender that the 2010 agreement had been superseded by the 2012 operating agreement. He did not provide the lender with a copy of the sales contract for the Deacon property and failed to disclose to the lender that he intended to purchase and take title to the property individually rather than on behalf of RR One. As the trial court explained, "[t]hrough these machinations, Gremp secured monies based on a mortgage on [the Deacon property] in the name of [RR One], an entity in which his interest was 1 percent under the 2012 agreement. He then used the mortgage proceeds to induce [RR One] to convey title to the [Deacon] property to [himself] individually." In other words, "unbeknownst to [RR One] and [Starboard], which owned 99 percent of [RR One], Gremp financed the purchase of [the Deacon property] with monies

obtained from a mortgage on [the Deacon property] in the name of his grantor, [RR One]." Gremp negotiated the mortgage in RR One's name without any aid from his attorney, Toms, and without her knowledge.

At the closing on January 22, 2016, Gremp took title to the Deacon property in his name individually. Because Gremp had been able to secure financing, the assignment of ownership of RR One that Gouveia had prepared as a contingency plan was not needed and never was delivered to Gremp or his attorney.

In connection with the closing of the Deacon property, Gremp executed a general release on behalf of himself and WCG to the benefit of Starboard and its individual members.[3] Under the terms of that release, Gremp and WCG waived all rights, "past, present or future . . . connected with, related to, or arising from ownership, right to purchase, management or other involvement" in RR One or the Newfield property, which RR One was under contract to sell to a third party, 175 Newfield Avenue, LLC, for $315,000. Gremp further agreed to "cooperate with the sale of [the Newfield property]." The release, which was signed only by Gremp, both individually and in his capacity as manager of WCG, also contained the following language: "The undersigned agree that the transfer of [RR One] takes effect December 31, 2015."[4]

Despite having released any and all claims with respect to the Newfield property, in March, 2016, Gremp and WCG commenced a lawsuit against Starboard and its individual members seeking, inter alia, compensatory damages for an alleged breach of the RR One

[3] Starboard and its individual members executed a separate, reciprocal general release of any and all claims against Gremp.

[4] Although its meaning is not entirely clear from the record, this language presumably pertains to the unexecuted contingency plan to assign ownership of RR One to Gremp in the event a transfer was needed for Gremp to secure a mortgage, which, as the court found, ultimately proved unnecessary.

operating agreement and to temporarily and permanently enjoin the sale of the Newfield property to anyone other than Gremp (March, 2016 action). In conjunction with the March, 2016 action, Gremp and WCG also recorded a lis pendens on the Bridgeport land records. Following an evidentiary hearing on March 30, 2016, the court, *Wenzel, J.*, denied the application for a temporary injunction, finding that Gremp and WCG had failed to demonstrate that they were subject to any irreparable harm or that they had a probability of success on the merits of any of their alleged causes of action. Following the court's refusal to grant a temporary injunction, Gremp and WCG withdrew the March, 2016 action and recorded a release of the lis pendens.

On March 31, 2016, Gremp sent the individual members of Starboard an e-mail indicating that, although he remained interested in purchasing the Newfield property himself and continued to believe that he had a case for monetary damages, he would cooperate in the sale of the Newfield property to a third party. That same day, however, Gremp filed an "Affidavit of Fact" on the Bridgeport land records claiming that he owned 100 percent interest in RR One. Gremp later contacted the attorney for the third party buyer of the Newfield property, to whom he again misrepresented the extent of his ownership of RR One and indicated that he might be able to obtain the Newfield property through litigation.

The sale of the Newfield property from RR One to the third party buyer closed on April 13, 2016. Proceeds in the amount of $5000 were placed in an escrow account pursuant to an indemnity agreement between RR One and the third party that required RR One to remove any encumbrances on the property and to hold the third party harmless for damages arising from any suit or demand related to any encumbrance.

On May 11, 2016, the plaintiffs commenced the action underlying the present appeal. The operative second

revised complaint contained six counts. Counts one and two were brought by Starboard against Gremp and WCG, and alleged, respectively, vexatious litigation and breach of their general release benefitting Starboard and its individual members. Count six was brought by Starboard against Gremp and alleged breach of a promissory note.[5] Counts three and four were brought by RR One against Gremp and WCG and alleged slander of title and intentional interference with a contract pertaining to the Newfield property. Count five was brought by both plaintiffs against WCG and alleged a breach of fiduciary duty. WCG and Gremp asserted numerous special defenses, including fraud, promissory estoppel, waiver, and accord and satisfaction. They also filed counterclaims alleging two counts of breach of contract against Starboard, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and unjust enrichment against both plaintiffs.

On February 23, 2018, following a trial to the court, the court issued a memorandum of decision. The court found in favor of the defendants on counts one and five of the complaint, but in favor of the plaintiffs on the remaining four counts. The court further ruled in favor of the plaintiffs on the defendants' counterclaims, concluding without elaboration that the defendants had "failed utterly to establish any of the four counts [pleaded] . . . ." The court awarded Starboard $10,082.50 in damages on the basis of Gremp and WCG's breach of their general release and $2819.99 plus interest of 10 percent per year for Gremp's breach of the promissory note. The court awarded RR One the $5000

[5] On January 31, 2014, Gremp had received a personal loan from Starboard and executed a promissory note in the principal amount of $2819.99 with interest at a rate of 10 percent per year. According to the complaint, Gremp never made any payments on the note, despite demands, and the debt remained due and owing.

that remained in the escrow account plus 5 percent interest per year running from the closing date of the Newfield property. The court also found that RR One was entitled to recover common-law punitive damages based on it having prevailed on the slander of title and intentional interference counts.

The defendants filed a motion to reargue and for reconsideration, which the court denied on March 22, 2018. On April 10, 2018, the defendants filed the present appeal from the court's February 23, 2018 judgment.[6] A hearing was held on August 13, 2018, to determine the amount of punitive damages. The court awarded $35,000 in punitive damages, and the defendants amended their appeal to challenge that decision.

Before turning to the defendants' claims on appeal, we briefly set forth the applicable standard of review. "In a case tried [to the] court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the [decision] to which it is entitled. . . . Moreover, we do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citation omitted; internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, 176 Conn. App. 461, 484–85, 170 A.3d 682 (2017).

As previously indicated, the defendants have raised five claims of error on appeal. None of these claims,

[6] A judgment awarding common-law punitive damages is a final appealable judgment even if the amount of punitive damages have not yet been determined. See *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014).

which we address in turn, warrants an extensive discussion because they either are inadequately briefed or fail to demonstrate that the court's decision was legally incorrect or factually unsupported.

I

The defendants first claim that the court improperly determined that they breached the general release that they executed in favor of Starboard. This claim fails primarily due to the defendants' inadequate briefing.

The trial court found that Gremp and WCG breached their general release both by commencing the March, 2016 action seeking to enjoin the sale of the Newfield property and by recording a lis pendens and an affidavit of fact on the Bridgeport land records, thereby clouding the title to the Newfield property. The defendants do not dispute that the release they executed constituted a valid, binding contract in which they agreed to cooperate in the sale of the Newfield property and to waive any claims that they had to the property or against Starboard and its members. The defendants' principal argument on appeal focuses on the language in their release that provided that "[t]he undersigned agree that the transfer of [RR One] takes effect December 31, 2015." The defendants describe this as "clear and unambiguous language contained in the general release obligating [the] [p]laintiffs to transfer or assign [RR One] to Gremp . . . ." The defendants contend that they would not have had to initiate the 2016 action or record the lis pendens or affidavit of fact if the plaintiffs had satisfied their own contractual obligations.

If the defendants are claiming that the court was barred as a matter of law from finding them in breach of the general release because the plaintiffs themselves had breached the agreement, the defendants have failed to adequately brief this claim. The defendants' brief is

utterly devoid of any citations to or analysis of applicable contract principles or case law that would support their claim, let alone any application of law to the facts of this case. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 414, 168 A.3d 658, cert. denied, 327 Conn 975, 174 A.3d 195 (2017).

Further, although the court did not discuss the language at issue in this claim in its memorandum of decision, it did deny the defendants' counterclaim alleging a breach of the release by Starboard, expressly finding that the plaintiffs "did not agree to transfer [RR One] to [Gremp] as claimed by the [d]efendants." The defendants do not challenge the court's ruling on their counterclaims in the present appeal nor do they argue that the court's factual finding was clearly erroneous. Because we conclude that the defendants have failed to adequately brief this claim, we decline to review it.[7]

II

Next, the defendants claim that the court improperly determined that they slandered RR One's title to the Newfield property by filing a lis pendens and an affidavit of fact on the land records in which Gremp asserts rights to the property. "Slander of title is a tort whereby

[7] To the extent that the defendants' claim is cognizable, it also appears unavailing on its face. The defendants have failed to explain or to analyze how the language in their general release, which begins, "[t]he undersigned agree," could have been legally binding on Starboard, which never signed the general release. The reciprocal release executed by the plaintiffs in favor of Gremp and WCG did not contain the same or similar language.

the plaintiff's claim of title [to] land or other property is disparaged by a letter, caveat, mortgage, lien or some other written instrument . . . . A cause of action for slander of title consists of any false communication which results in harm to interests of another having pecuniary value . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 202, 931 A.2d 916 (2007). The defendants suggest that, at trial, Gremp "provided colorable evidence that a reasonable and good faith belief existed for his claim of ownership of [RR One], which equated to an interest in [the Newfield property]." The court, however, as the trier of fact, was free to discredit such evidence. See *Langley* v. *Langley*, 137 Conn. App. 588, 598, 49 A.3d 272 (2012). Having thoroughly reviewed the defendants' arguments on appeal, we are not persuaded that the court's finding of a slander of title was either legally incorrect or factually unsupported. Accordingly, this claim fails.

III

The defendants' third claim is that the court improperly determined that they were liable for intentional interference with RR One's contract to sell the Newfield property to a third-party buyer. We are not persuaded.

"A claim for intentional interference with contractual relations requires the plaintiff to establish: (1) the existence of a contractual or beneficial relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's intent to interfere with the relationship; (4) that the interference was tortious; and (5) [that there was] a loss suffered by the plaintiff that was caused by the defendant's tortious conduct." *Rioux* v. *Barry*, 283 Conn. 338, 351, 927 A.2d 304 (2007).

Although the defendants baldly state that the court's finding that they acted intentionally and with bad faith

to interfere with the Newfield property sale was erroneous, the defendants fail to brief this argument beyond mere abstract assertion. Accordingly, we deem this aspect of the claim abandoned. The remaining aspect of the defendants' claim is that there was insufficient evidence for the court to find that their interference caused any actual loss. That assertion, however, is without merit.

The court found that the "element of actual loss is satisfied, in that [RR One] incurred additional attorney's fees and costs, and lost the use of $5000, which remains in escrow." In challenging this finding, the defendants fail to address the additional attorney's fees and costs incurred, focusing entirely on the escrow funds and arguing only that the escrow could not be a basis for establishing an actual loss because "the $5000 escrow was established for reasons wholly unrelated to any acts of the [d]efendants." The loss the court attributed with respect to the escrow funds, however, had nothing to do with the *establishment* of the escrow or the original purpose for the funds; rather, it had to do with RR One's inability to utilize those funds because they *remained* in the escrow account due to the actions of the defendants and, thus, were unavailable to RR One. There simply is no merit to the defendants' claim.

IV

The defendants' fourth claim is that the trial court improperly awarded RR One interest on the $5000 that it was forced to hold in escrow as a result of the defendants' actions. In support of this claim, the defendants simply refer back to the arguments advanced in support of its third claim, which we have rejected. Accordingly, this claim fails for the reasons previously stated.

V

Finally, the defendants claim that the court improperly awarded punitive damages without providing the

defendants with adequate notice, citing Practice Book §§ 7-5, 14-7, and 14-20.[8] We are not persuaded.

The following additional facts are relevant to this claim. On March 27, 2018, the plaintiffs filed an affidavit of attorney's fees, a bill of costs, and a motion requesting the court to schedule a hearing in damages to determine the amount of punitive damages awarded. Subsequently, the defendants filed an objection arguing that the court should not conduct a hearing in damages "until the appeal period in this matter has expired . . . ." The defendants filed the present appeal on April 10, 2018. On April 20, 2018, the plaintiffs filed a caseflow request asking the court to schedule a status conference during the first week of May, 2018, to discuss how the court wanted to proceed with respect to determining the amount of the punitive damages award. When they failed to receive a response from the court, the plaintiffs filed a second caseflow request on July 26, 2018, seeking a status conference on or about August 10, 2018. The court issued notice the next day setting a hearing date of August 6, 2018. The defendants filed a motion for a continuance informing the court that counsel would be unavailable on that date and indicating that the plaintiffs' counsel consented to a continuance provided a hearing was scheduled prior to August 17, 2018. The court issued notice to the parties on August 2, 2018, that the matter would be heard on August 13, 2018. The

[8] Practice Book § 7-5 provides in relevant part: "The clerk shall give notice, by mail or by electronic delivery, to the attorneys of record and self-represented parties unless otherwise provided by statute or these rules, of all judgments, nonsuits, defaults, decisions, orders and rulings unless made in their presence. . . ."

Practice Book § 14-17 provides: "The judicial authority may, on its own motion or on the motion of a party and upon a showing of extraordinary circumstances, order a case to be assigned for immediate trial."

Practice Book § 14-20 provides: "Parties and counsel shall be present and ready to proceed to trial on the day and time specified by the judicial authority. The day specified shall be during the week certain selected by counsel."

hearing went forward on that date and was attended by counsel for all the parties. Following the hearing, the court awarded $35,000 in punitive damages.

The defendants claim that the court deprived them "of their due process rights to notice and the opportunity to adequately prepare" for the hearing to determine the amount of punitive damages. The defendants assert that notice of the August 13, 2018 hearing in damages was never properly given by the clerk's office, caseflow, or the court. They also assert that they were not provided with adequate notice of the issues the trial court intended to address. That argument is belied by the trial court record, which contains a proper notice of the hearing date. The notice stated in relevant part that the matter had been "set down for *a hearing* . . . ." (Emphasis added.) Further, the hearing was scheduled in response to the plaintiffs' caseflow request, which specifically had asked for a hearing regarding the punitive damages award. Accordingly, the defendants had notice of the hearing and knew that the purpose of the hearing would be to determine the amount of common-law punitive damages, which in Connecticut is limited to reasonable attorney's fees and nontaxable costs. See *Bodner* v. *United Services Automobile Assn.*, 222 Conn. 480, 492, 610 A.2d 1212 (1992). The plaintiffs had filed their affidavit of attorney's fees in March, 2018, so any argument by the defendants that they lacked an opportunity to prepare for the hearing is unfounded and that argument properly was rejected by the trial court when it was raised by the defendants' counsel at the hearing in damages. In short, the record demonstrates that the defendants had ample notice of the hearing on punitive damages, attended the hearing, and were afforded a meaningful opportunity to be heard on the merits. The defendants have failed to demonstrate that their due process rights were violated or that the court committed

reversible error in calculating the amount of punitive damages.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM HYDE BRADLEY
(AC 42061)
(AC 42062)

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

Syllabus

The defendant appealed to this court from the judgments of the trial court rendered in accordance with his conditional pleas of nolo contendere to charges of sale of a controlled substance and violation of probation. The charges stemmed from the discovery by probation officers of approximately thirty ounces of marijuana in the defendant's possession while they were conducting a home visit at his residence. At that time, the defendant was serving a sentence of probation in connection with a prior conviction of possession of marijuana with intent to sell. The defendant filed motions to dismiss the charges, claiming, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated his rights under the equal protection clause of the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent. Following a hearing on the motions, the trial court, relying on *State* v. *Long* (268 Conn. 508), in which our Supreme Court stated that a genuine likelihood of criminal liability is sufficient to confer standing to challenge a statute, determined that although the defendant is Caucasian, he had standing to raise an equal protection challenge to the statutes under which he was charged, concluding that the defendant did not necessarily need to be a member of the class discriminated against by a challenged statute to be personally aggrieved by the statute. The trial court, however, denied the defendant's motions, ruling that he could not prevail on the merits of his equal protection claim. On the defendant's consolidated appeals to this court, *held* that the defendant could not prevail on his claim that the trial court erred in denying his motions to dismiss: although the trial court misapplied the rule set forth in *Long* and thereby incorrectly concluded that the defendant did not necessarily need to be a member of the class discriminated against to be personally aggrieved by a challenged statute,

it nevertheless properly denied the motions to dismiss, as the defendant, who is not a member of the subject minority groups, lacked standing to raise his equal protection claim in his individual capacity because he did not demonstrate that he had a personal interest that had been or could ever be at risk of being injuriously affected by the alleged discrimination in the enactment of the relevant statute (§ 21a-277 [b]), and his claim did not allege a specific injury to himself beyond that of a general interest of all marijuana sellers facing conviction under that statute; moreover, a balancing of the factors set forth in *Powers* v. *Ohio* (499 U.S. 400) pertaining to third-party standing weighed against the defendant having standing to raise an equal protection claim on behalf of the racial and ethnic minorities who possessed the constitutional rights that were allegedly violated, as the relationship between the defendant and those third parties was not close, and there existed no hindrance to the ability of a criminal defendant who is a member of a racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.

Argued September 19—officially released December 24, 2019

Procedural History

Information, in the first case, charging the defendant with the crimes of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school and sale of a controlled substance, and information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Middlesex, where the court *Keegan, J.*, denied the defendant's motions to dismiss; thereafter, the defendant was presented to the court on conditional pleas of nolo contendere to sale of a controlled substance and violation of probation; judgments in accordance with the pleas; subsequently, the state entered a nolle prosequi on the charge of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school, and the defendant filed separate appeals to this court, which consolidated the appeals. *Affirmed.*

Naomi T. Fetterman, with whom was *Aaron J. Romano*, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael Gailor*, state's attorney, and *Russell Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. In this consolidated appeal, the defendant, William Hyde Bradley, appeals from judgments that were rendered against him by the trial court following his entry of conditional pleas of nolo contendere to charges of sale of a controlled substance in violation of General Statutes § 21a-277 (b) and violation of probation in violation of General Statutes § 53a-32. On appeal, the defendant claims that the court erred in denying his motions to dismiss those charges, wherein he argued, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated his rights under the equal protection clause of the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent. We affirm the judgments of the court, concluding that it did not err in denying the defendant's motions to dismiss. We do so, however, on the alternative ground raised by the state that the defendant, as a nonmember of either group of persons against whom he claims that the challenged statutes were enacted to discriminate, lacked standing to bring such an equal protection claim. Accordingly, we do not reach the merits of the defendant's equal protection claim on this appeal.

The following procedural history and facts, as stipulated to by the parties, are relevant to our resolution of this appeal. On January 13, 2017, while the defendant was serving a sentence of probation in connection with a prior conviction of possession of marijuana with intent to sell, probation officers conducting a home visit

at his residence discovered approximately thirty ounces of marijuana in his possession. On the basis of that discovery, the state charged the defendant, in two separate informations, as follows: in docket number M09M-CR17-0210994-S, with one count each of possession of one-half ounce or more of marijuana within 1500 feet of a school in violation of General Statutes § 21a-279 (b) and sale of a controlled substance in violation of § 21a-277 (b); and in docket number MMX-CR14-0204977-T, with violation of probation in violation of § 53a-32.

The defendant moved to dismiss the charges by filing two parallel motions to dismiss, one in each docket number. He argued in those motions, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated (1) his right to equal protection under the fourteenth amendment to the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent; and (2) his right to equal protection under article first, § 20, of the constitution of Connecticut because the enforcement of such statutes had a disparate impact on persons of African-American descent. The state filed a memorandum of law in opposition to the defendant's motions to dismiss, to which the defendant responded by filing a reply. Following a hearing on the motions, the court ordered the parties to file supplemental memoranda addressing whether the defendant, whom the court had found to be Caucasian, had standing to bring an equal protection challenge to statutes on the ground that they had been enacted for the purpose of discriminating against members of racial or ethnic minority groups of which he was not a member. After the parties filed their supplemental memoranda, the court heard oral argument. Thereafter, in a memorandum of decision dated June 1, 2018, the court

agreed with the defendant that, regardless of his race or ethnicity, he had standing to bring an equal protection challenge to the statutes under which he was charged because there was a genuine likelihood that he, as a person so charged, would be convicted under those statutes. The court went on to rule, however, that the defendant could not prevail on the merits of his equal protection claim because even if he could prove that enforcement of the challenged statutes had a disparate impact on persons of African-American or Mexican descent, he could not prove that the legislature's true purpose in enacting those statutes was to discriminate against the members of either such group. Thereafter, upon conducting an analysis under *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992), the court also rejected the defendant's additional claim that his prosecution under the challenged statutes violated his rights under the equal protection clause of the Connecticut constitution, which he had based on the theory that that provision affords greater protection than its federal counterpart because violation of that provision, unlike the federal equal protection clause, can be established by proof of disparate impact alone.[1] Rejecting that argument, the court denied the defendant's motions to dismiss in their entirety.

On August 28, 2018, the defendant entered pleas of nolo contendere to charges of sale of a controlled substance and violation of probation, which were based on his alleged possession of, with intent to sell, the marijuana that the probation officers had found in his residence. The defendant's pleas, which were entered pursuant to General Statutes § 54-94a, were conditioned on preserving his right to appeal from his resulting convictions based on the trial court's prior denial of

[1] The court also rejected the defendant's claim that Connecticut law on the possession and sale of marijuana has been superseded by federal law. The defendant does not appeal from the court's rejection of this claim.

his motions to dismiss. The court thereafter sentenced the defendant as follows: on his conviction of sale of a controlled substance, he was sentenced to an unconditional discharge; and on his violation of probation, his probation was revoked, and he was sentenced to a term of five and one-half years of incarceration, execution suspended, and two years of probation. These appeals, later consolidated by order of this court, followed.[2]

On appeal, the defendant claims that the court improperly denied his motions to dismiss. He argues here, as he did before the trial court, that Connecticut's statutes criminalizing the possession and sale of marijuana were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent, and thus that his prosecution under those statutes violated the equal protection clause of the United States constitution. The defendant does not claim, however, that the court erred in denying his alternative equal protection claim under the Connecticut constitution.

In his brief, the defendant initially traces the history of cannabis cultivation from ancient times through the time of its criminalization in Connecticut in the 1930s. He then describes and documents what he claims to have been the pervasive atmosphere in this country in the 1930s of discrimination against racial and ethnic minority groups whose members were known or believed to use marijuana. Against this background, he argues that the federal marijuana prohibition that was enacted in that time frame, for the illicit purpose of discriminating against African-Americans and Mexicans, influenced several states, including Connecticut, to enact their own state laws criminalizing the possession and sale of marijuana for the same discriminatory purpose. The state disputes the defendant's contention

[2] The defendant filed two separate appeals from the trial court's judgments. The defendant filed a motion to consolidate the appeals, which was granted.

that Connecticut's statutes criminalizing the possession and sale of marijuana were enacted for the purpose of discriminating against racial and ethnic minorities. As a threshold matter, however, it argues, as it did before the trial court, that the court lacked subject matter jurisdiction over the defendant's equal protection claim because, as a Caucasian, he lacked standing to vindicate the equal protection rights of members of racial or ethnic minority groups to which he did not belong. The defendant counters by arguing, as he did successfully before the trial court, that regardless of his race or ethnicity, he had standing to raise his constitutional claim because, as a person charged under such allegedly unconstitutional statutes, he personally faced a genuine risk of being convicted thereunder if he were not permitted to prosecute his motions to dismiss.

Because a party's lack of standing to bring a claim implicates the trial court's subject matter jurisdiction over that claim, we must first address this jurisdictional issue. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). We begin by reviewing some well established principles of standing. "Generally, standing is inherently intertwined with a court's subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *State* v. *Brito*, 170 Conn. App. 269, 285, 154 A.3d 535, cert. denied, 324 Conn. 925, 155 A.3d 755 (2017).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause

of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 531–32, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

To establish his standing to bring an equal protection challenge to the statutes under which he was charged in this case, the defendant does not claim that he was authorized by statute to bring such a challenge or that he had third-party standing to bring the challenge in a representational capacity on behalf of others. Instead, he claims only that he had standing to bring that challenge in his individual capacity, insisting that he is personally aggrieved by the statutes' unconstitutionality because he was charged with violating the statutes, and thus faced a genuine risk of being convicted thereunder. The court's conclusion on the issue of standing, which

the defendant relies on before us, was that "the defendant need not necessarily be a member of the class discriminated against [by a challenged statute] in order to be personally aggrieved by the statute. As our Supreme Court has repeatedly concluded 'a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing [to challenge a statute]'. . . . *State* v. *Long*, supra, 268 Conn. 532 . . . ." (Emphasis omitted.) The state disagrees, arguing that the defendant and the trial court misunderstood and misapplied the rule set forth in *Long*, which was never intended to empower litigants to raise claims in their individual capacity based on alleged violations of others' constitutional rights. For the following reasons, we agree with the state.

In *Long*, the defendant, who had been charged with assault in the second degree, was found not guilty by reason of mental disease or defect after a trial to the court. Id., 511. The court thereafter committed the defendant, on the basis of that finding, to the jurisdiction of the Commissioner of Mental Health and Addiction Services pursuant to General Statutes § 17a-582 (a) for initial confinement and examination. Id., 511–12. Following a mandatory psychiatric examination, the commissioner issued a report concerning the defendant's mental health. Id., 512. Following a hearing, the trial court ordered the defendant committed to the jurisdiction of the Psychiatric Security Review Board (board) for a period of five years, which was the maximum period for such a commitment because it was the maximum period for which he could have been incarcerated had he been convicted of and sentenced for the charged offense.[3] Id. Prior to the expiration of

[3] "The trial court acted pursuant to General Statutes § 17a-582 (e) (1) . . . which provides in relevant part: 'If the court finds that the acquittee is a person who should be confined or conditionally released, the court shall order the acquittee committed to the jurisdiction of the board and . . . confined in a hospital for psychiatric disabilities . . . for custody, care and treatment pending a hearing before the board pursuant to section 17a-583;

the defendant's initial five year commitment, however, the state's attorney filed a petition, pursuant to General Statutes § 17a-593 (c),[4] to have the defendant's commitment extended beyond its initial five year term. Id., 513. The trial court granted the state's petition, and thereafter recommitted him on three more occasions pursuant to § 17a-593 (c). Id.

After the state filed its fifth petition for recommitment in March, 2001, the board filed a report recommending further recommitment. Id., 513. The defendant moved to strike the board's report and to dismiss the state's petition, claiming, inter alia, that once an acquittee reaches the maximum term of his initial commitment, any order granting a state's petition for recommitment pursuant to § 17a-593 (c) is unconstitutional because, inter alia, it deprives the acquittee of his liberty without affording him the same right to mandatory periodic judicial review of his commitment as is afforded convicted prisoners who are civilly committed to psychiatric treatment facilities while they are incarcerated serving criminal sentences. Id. The trial court at first denied the defendant's motion to dismiss and granted the state's petition for recommitment. Id., 514. Later, however, upon reconsidering its ruling sua sponte, the court

provided (A) the court shall fix a maximum term of commitment, not to exceed the maximum sentence that could have been imposed if the acquittee had been convicted of the offense . . . .' General Statutes (Rev. to 1985) § 53a-35a provides in relevant part: 'For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows . . . (6) for a class D felony, a term not less than one year nor more than five years . . . .' " *State* v. *Long*, supra, 268 Conn. 512 n.8.

[4] General Statutes § 17a-593 (c) provides in relevant part: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities . . . to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

vacated its latest order of recommitment and granted the defendant's motion to dismiss the state's petition on the grounds, inter alia, that § 17a-593 (c) violated (1) his right to equal protection under the United States constitution because it treats acquittees, like the defendant, differently from convicted prisoners who are civilly committed at some point after they have been incarcerated, and (2) his right to equal protection under the constitution of Connecticut because it discriminates on the basis of mental disability. Id., 514–15. The court nevertheless found that the state had proven that the defendant "has a mental illness and would be a danger to others were he discharged from confinement," and thus ordered that he be held for sixty days to permit the state, if it chose to, to file a petition for civil commitment. (Internal quotation marks omitted.) Id., 515. The state appealed from the court's judgment of dismissal and challenged all grounds on which the court had found § 17a-593 (c) to be unconstitutional. Id., 516. The appeal was then transferred to our Supreme Court. Id., 516.

On appeal, the state claimed, inter alia, that the defendant lacked standing to bring either a state or a federal equal protection challenge to § 17a-593 (c). Id., 530. The state did not claim that the defendant lacked a specific, personal and legal liberty interest in any recommitment proceedings under § 17a-593 (c) but argued that his liberty interest had not been specially and injuriously affected by his recommitment because, as an acquittee, he had already received more judicial review of his commitment than a civil committee would have been entitled to receive. Id., 532. In concluding that the defendant had standing to raise his due process challenge, our Supreme Court reasoned as follows: "We previously have concluded that a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing. . . . [I]n the present case, the defendant

challenges the acquittee recommitment statute, § 17a-593 (c), which, if applied to him in the future, could subject him to further recommitment that adversely would affect his liberty interest. Moreover, the trial court specifically found at the most recent recommitment hearing that the defendant still suffered from a mental illness and posed a danger to others were he discharged from confinement. These factual findings demonstrate a genuine likelihood that the defendant is susceptible to the deprivation of his liberty interest in the future via recommitment in accordance with § 17a-593 (c). Consequently, because the defendant risks actual prospective deprivation of his liberty interest under the challenged statute, we conclude that he is classically aggrieved, and has standing to challenge the statute." (Citations omitted; internal quotation marks omitted.) Id., 532–33.

Understood against this background, *Long* cannot be read to empower parties to bring constitutional challenges in their individual capacity based on alleged violations of others' constitutional rights. Instead, it clarifies that, although a party has only individual standing to challenge alleged violations of his own constitutional rights, such challenges are not necessarily limited to ongoing violations of those rights, but may be directed to future violations of such rights that are reasonably likely to occur. Had the defendant in *Long* risked no "actual prospective deprivation of his liberty interest under the challenged statute" in the future, he would not have had standing to challenge the statute in his individual capacity on the basis of any risk, however genuine, enforcement of the statute may have posed to the rights of others.

To provide further context for the rule in *Long*, we also examine *Ramos* v. *Vernon*, 254 Conn. 799, 761 A.2d 705 (2000), which was cited in *Long*. The ordinance at issue in *Ramos* placed a nighttime curfew on minors

under the age of eighteen who were unaccompanied by a parent, a guardian or another adult having custody or control over them, and made it unlawful for any adult having custody of or control over a minor under the age of sixteen to allow the minor to violate the curfew ordinance. Id., 802–805. The fourteen year old minor plaintiff alleged that he had engaged in, and was continuing to engage in, conduct considered unlawful under the ordinance. Id., 810. The court concluded on that basis that if the minor's conduct continued in the future as he had pleaded that it would, then both he and his mother could be prosecuted under the statute in the future and thus could be injured by its alleged constitutional infirmity. Id., 810–11. Accordingly, the court ruled that both the mother and the minor had standing, in their individual capacities, to assert that the ordinance violated their constitutional rights because, in language later repeated by the court in *Long*, "a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing." (Internal quotation marks omitted.) Id., 809.

Long and *Ramos* are thus inapposite to the present case. First, the defendant in the present case was charged under § 21a-277 (b) at the time of the motions to dismiss, and thus the likelihood of its *future application* against him is not at issue, as it was in *Long* and *Ramos*. Second, the defendant in *Long* was a member of the class of insanity acquittees whose rights he sought to vindicate, just as the minor and his mother in *Ramos* were members of the classes of persons whose own rights were at genuine risk of being violated if they were prosecuted under the challenged statute. In the present case, by contrast, the defendant is not a member of the class whose rights he seeks to vindicate. The defendant in the present case is not now and will never be a member of either minority group against whom he claims the marijuana statutes were enacted

to discriminate, and, thus, he will never personally be discriminated against on the basis of race or ethnicity by virtue of application of § 21a-277 (b) to him. Simply put, the defendant's equal protection claim seeks to redress rights of racial minorities, a class of which he is not a member. Consequently, the defendant has not demonstrated that he has a personal interest that has been or could ever be at risk of being injuriously affected by the alleged discrimination in the enactment of the statute. The defendant's argument that § 21a-277 (b) was enacted with a racially discriminatory purpose does not allege a specific injury to himself beyond that of a general interest of all marijuana sellers facing conviction under the statute.[5]

[5] In support of the argument that he has standing to raise the equal protection claim on his own behalf, the defendant highlights the following quote from Justice Ginsberg's concurrence in *Bond* v. *United States*, 564 U.S. 211, 227, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011): "Our decisions concerning criminal laws infected with discrimination are illustrative. The Court must entertain the objection—and reverse the conviction—even if the right to equal treatment resides in someone other than the defendant." First, concurring opinions do not establish binding precedent. Second, we are not required to apply federal precedent in determining the issue of aggrievement. See *Burton* v. *Freedom of Information Commission*, 161 Conn. App. 654, 660, 129 A.3d 721 (2015), cert. denied, 321 Conn. 901, 136 A.3d 642 (2016).

The defendant also cites to federal cases in which the parties have been conferred with both standing in their own right and with third-party standing. See *Carey* v. *Population Services International*, 431 U.S. 678, 682–84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (mail order retailer's business of selling contraceptives criminalized); *Craig* v. *Boren*, 429 U.S. 190, 192–97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (beer vendor's act of selling 3.2 percent beer to male patrons under age of twenty-one and females under age of eighteen prohibited); *Carhart* v. *Stenberg*, 972 F. Supp. 507, 520–21 (D. Neb. 1997) (doctor's performance of certain abortion procedure criminalized). Federal cases that analyze standing under article three of the federal constitution are not applicable to the issue of whether the defendant was aggrieved in his own right under Connecticut case law. See *Andross* v. *West Hartford*, 285 Conn. 309, 328–32, 939 A.2d 1146 (2008). We note, however, that these cases are readily distinguishable. Assuming without deciding that the parties in those cases would have been aggrieved under Connecticut law, the statutes at issue in *Carey*, *Craig*, and *Carhart* differ from § 21a-277 (b). The statutes in *Carey*, *Craig* and *Carhart* not only prohibited the conduct of the parties seeking standing, but also intertwined that sanctioned conduct

The trial court's conclusion that "the defendant need not necessarily be a member of the class discriminated against [by a challenged statute] in order to be personally aggrieved by the statute" is simply incorrect. First, although controlling case law on rare occasion has permitted litigants to establish standing by proving classical aggrievement *in a representative capacity* based on alleged violations of others' constitutional rights, it has never expanded the scope of classical aggrievement *in an individual capacity* to eliminate the requirement that the litigant himself be personally aggrieved by the alleged violation. See, e.g., *State* v. *Long*, supra 268 Conn. 531–32 (classical aggrievement includes requirement of "a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest" [internal quotation marks omitted]). Second, although the defendant has not claimed, and the trial court did not find, that he was classically aggrieved in a representative capacity by his prosecution under the challenged statutes, he has not in any event met the exacting requirements for the assertion of such a representational claim. The defendant expressly states in his reply brief that he does not claim to have third-party standing, and appropriately so, because third-party standing applies in limited circumstances that manifestly do not exist here.

Under federal law, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . . This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation. . . . It represents a healthy concern that if the claim is brought by

with the rights of the third parties to access the goods or services at issue. In the present case, § 21a-277 (b) criminalizes the defendant's conduct in selling marijuana, but does not intertwine the criminalization of the defendant's actions in selling marijuana with the rights of a racial minority seller to be free from discrimination.

someone other than one at whom the constitutional protection is aimed . . . the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights . . . . We have not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." (Citations omitted; internal quotation marks omitted.) *Kowalski* v. *Tesmer*, 543 U.S. 125, 129–30, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004).

In cases involving this principle, such as *Powers* v. *Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the United States Supreme Court explained that it has permitted parties to bring actions on behalf of third parties provided that the party makes two additional showings, beyond that of an article three injury: (1) "close relation to the third party" who possesses the right and (2) "some hindrance to the third party's ability to protect his or her own interests." Id., 410–11; see also *Kowalski* v. *Tesmer*, supra, 543 U.S. 130 (describing two additional factors in *Powers*).

With respect to the first factor, the United States Supreme Court explained that "in certain circumstances the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (Internal quotation marks omitted.) *Powers* v. *Ohio*, supra 499 U.S. 413. This factor is more likely to weigh in favor of standing if the relationship between the third party and the litigant seeking standing is "one of special consequence." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989). For example, a doctor-patient relationship and an attorney-client relationship have

qualified as close relationships for this purpose, mainly due to the professionally intimate advice and decisions arising from such relationships. See, e.g., *United States Dept. of Labor* v. *Triplett*, 494 U.S. 715, 719–21, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990) (attorney had standing to raise due process claims to fee restrictions on behalf of clients he represented in black lung benefit cases); *Singleton* v. *Wulff*, 428 U.S. 106, 117–18, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (physician "intimately involved" in women's abortion decision and thus "uniquely qualified" to litigate against statutory interference with that decision); *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (physician and Planned Parenthood official were effective advocates for persons seeking contraceptive advice with whom they had confidential professional relationships).

In the context of market access, sellers who asserted the rights of buyers seeking access to their market have been found to have a sufficiently close relationship with such buyers to give them standing to raise the buyers' claims. The United States Supreme Court in *Craig* v. *Boren*, 429 U.S. 190, 192–97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), held that a licensed vendor of 3.2 percent beer had standing to challenge the constitutionality of a statute that, in a gender discriminatory manner, prohibited the sale of 3.2 percent beer to males under the age of twenty-one and females under the age of eighteen. The court reasoned that the vendor might be deterred by the statutory sanctions thereby causing indirect harm to the rights of third parties and, accordingly, was permitted to act as an advocate for third parties seeking access to the market. Id., 195. Relying primarily on *Craig*, the United States Supreme Court in *Carey* v. *Population Services International*, 431 U.S. 678, 681–84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), held that a corporation engaged in the mail order retail sale of nonmedical contraceptive devices had standing on

its own behalf and on behalf of potential customers who sought access to its market to challenge the constitutionality of a statute criminalizing the distribution of contraceptives to anyone under the age of sixteen, prohibiting their distribution to anyone over the age of sixteen by anyone other than a licensed pharmacist, and banning the advertising and display of contraceptives. The court reasoned that the corporation "is among the vendors and those in like positions (who) have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function. . . . As such, [the corporation] is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should (its) constitutional challenge fail." (Citations omitted; internal quotation marks omitted.) Id., 683–84.

Those who act as advocates for the rights of others have also been held to have third-party standing. Thus, in *Eisenstadt* v. *Baird*, 405 U.S. 438, 440, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the defendant, who had been convicted of providing a contraceptive device to a woman following a lecture on contraception, was held to have standing to challenge the statute that made it a felony for anyone other than a registered physician or registered pharmacist to distribute contraceptives. The court determined that the defendant's relationship with "those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of [the defendant's] giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives." Id., 445.

In *Barrows* v. *Jackson*, 346 U.S. 249, 251–60, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), a Caucasian defendant, who was party to a racially restrictive covenant and

who was being sued for damages by the covenantors because she had conveyed her property to African-Americans, was held to have standing to challenge the enforcement of the covenant on the ground that it violated the equal protection rights of prospective African-American purchasers. The United States Supreme Court, in a later case, explained that "[t]he relationship [in *Barrows*] between the defendant and those whose rights he sought to assert was . . . between one who acted to protect the rights of a minority and the minority itself." *Eisenstadt* v. *Baird*, supra, 405 U.S. 445.

In *Powers*, the United States Supreme Court concluded that the defendant had standing to contest the use of peremptory challenges in a racially discriminatory manner regardless of whether the defendant and the excluded jurors were of the same race. *Powers* v. *Ohio*, supra, 499 U.S. 410–16. The court stated: "For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . . [A defendant] does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." (Citations omitted; internal quotation marks omitted.) Id., 404. After setting forth such principles, the court considered "whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of these principles." Id., 410. The court determined that the defendant and the excluded jurors shared a close relationship that began during voir dire and had a "common interest in eliminating racial discrimination from the courtroom." Id., 413. The court reasoned that the juror excluded on the basis of race suffers humiliation

and "may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror." Id., 414.

The second factor in assessing third-party standing "involves the likelihood and ability of the third parties . . . to assert their own rights." Id., 414. The excluded jurors in *Powers* faced "daunting" obstacles to bringing an action on their own behalf, which included not only "the economic burdens of litigation" but the fact that "[p]otential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges." Id., 414. The facts in *Barrows* v. *Jackson*, supra, 346 U.S. 249, presented "a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Id., 257. The United States Supreme Court further reasoned that the covenantor in *Barrows* had the power under the racially discriminatory restrictive covenant to continue or end discrimination and was the only effective adversary of the restrictive covenant. Id., 258.

In *Singleton* v. *Wulff*, supra, 428 U.S. 117, there were "several obstacles" in a woman's path to challenging an abortion statute, such as privacy and imminent mootness. Although the obstacles were not "insurmountable" due to the ability to bring an action under a pseudonym and exceptions to the mootness doctrine, the court noted that there was little loss in terms of effective advocacy by permitting a physician to raise the claim. Id., 118; see also *Carhart* v. *Stenberg*, 972 F.

Supp. 507, 520–21 (D. Neb. 1997) ("the pregnant women who are the doctor's patients have significant obstacles to bringing suit on their own, such as a desire for privacy and the likelihood that their claims would be mooted by the time-sensitive nature of pregnancy and abortion").

We now examine these principles in the context of the present case. We conclude that a balancing of the factors, while bearing in mind the exceptional nature of third-party standing, weighs against the defendant having standing to raise a claim on behalf of classes of racial and ethnic minorities to which he does not belong. With respect to the factor of a close relationship, the defendant obviously does not have a professional or confidential relationship with the possessors of the right, such as the physician had with his patients in *Singleton* or the lawyer had with his clients in *Triplett*. The defendant does not raise a market access claim seeking to assert the rights of racial and ethnic minority marijuana purchasers similar to the claim of the beer vendor in *Craig* or the retail seller of contraceptives in *Carey*. In contrast to the relationship of trust that existed in *Powers* between the defendant and excluded jurors that began during voir dire, the defendant in the present case seeks to advocate for the rights of hypothetical persons with whom he has no relation. The interests of the defendant and those who possess the right are similar to the extent that we fairly may assume that neither wishes to be convicted under the statute. The defendant, however, has not made a showing that, in being charged with sale of a controlled substance, he sought to advocate on behalf of racial or ethnic minority sellers or purchasers. In fact, he expressly disavows such a purpose. Therefore, his actions in selling marijuana do not create a close relationship with the third parties in any way similar to the advocate in *Barrows*, who conveyed her property to

African-Americans in violation of a racially discriminatory covenant, or the advocate in *Eisenstadt*, who gave away a contraceptive device in order to challenge a statute criminalizing such action. Rather, the defendant in the present case expresses only a general interest in avoiding prosecution, independent of any relationship or connection to the possessors of the right he claims to have been violated. Therefore, it cannot be said that the defendant "is fully, or very nearly, as effective a proponent of the right as the [third party]." *Singleton* v. *Wulff*, supra, 428 U.S. 115.

The relationship between the defendant and the third parties is not close, but even if it were close, the importance of the ability of a minority marijuana seller to raise a claim on his or her own behalf is not diminished. In *Singleton* the plurality opinion stated: "Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." Id., 116. The daunting obstacles the excluded jurors faced in *Powers* to challenging the racially discriminatory use of preemptory challenges on their own behalf, such as the expense of litigation and the fact that they are not parties to the jury selection process, and the barriers discussed in *Singleton* to a women's ability to challenge an abortion statute, do not exist in the present case. See *Caplin & Drysdale, Chartered* v. *United States*, supra, 491 U.S. 624 n.3 ("[t]he second . . . factor [of hindrance] counsels against review . . . a criminal defendant suffers none of the obstacles discussed in [*Singleton* v.] *Wulff*, supra, 428 U.S. [116–117], to advancing his own constitutional claim"). In the criminal context, the state's proper presentment of an information initiates the case. *State* v. *Pompei*, 52 Conn.

App. 303, 307, 726 A.2d 644 (1999). It is axiomatic that criminal defendants are parties to their own criminal proceedings, and *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), made the sixth amendment right to counsel applicable to state prosecutions through the due process clause of the fourteenth amendment. In the present case, the second factor overwhelmingly weighs against third-party standing because there exists no hindrance to the ability of a criminal defendant who is a member of a racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.

Our conclusion that the defendant does not have third-party standing coincides with the purposes of the general rule under Connecticut law against third-party standing. Regarding the general principles of standing, this court has explained that "the requirement that a party have standing ensures that courts and parties are not hindered by suits brought to vindicate nonjusticiable interests, and protects the rights of others from being affected by precedential judicial decisions that do not involve the individuals or entities with the most at stake and may not have been contested with the appropriate diligence and vigor." *Third Taxing District* v. *Lyons*, 35 Conn. App. 795, 798, 647 A.2d 32, cert. denied, 231 Conn. 936, 650 A.2d 173 (1994). "Only members of a class whose constitutional rights are endangered by a statute may ask to have it declared unconstitutional. . . . Courts are instituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties; and a party whose rights have not been invaded cannot be heard to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress." (Citations omitted; internal quotation marks omitted.) *Shaskan* v.

Waltham Industries Corp., 168 Conn. 43, 49–50, 357 A.2d 472 (1975).

For the foregoing reasons, we conclude that the defendant does not have standing to raise his equal protection claim. We therefore uphold the court's denial of the defendant's motions to dismiss on this dispositive alternative ground.

The judgments are affirmed.

In this opinion the other judges concurred.

JEAN-MARC JACQUES *v.* MURIEL JACQUES (AC 41789)

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

Syllabus

The plaintiff sought to recover damages from the defendant for breach of contract. Specifically, the plaintiff's complaint alleged that the defendant breached the parties' marital separation agreement by failing to disclose certain assets. Following a trial, the trial court rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. On appeal, he claimed, inter alia, that the trial court erred by concluding that his action was barred by the applicable statute of limitations (§ 52-576 [a]) and determining that it lacked continuing jurisdiction to enforce the parties' separation agreement. *Held* that the plaintiff's appeal was moot; because the plaintiff failed to challenge an independent ground for the court's adverse ruling, namely, the court's determination that the plaintiff's breach of contract claim failed on the merits due to insufficient evidence that the defendant had breached the separation agreement, even if this court agreed with the plaintiff's claim that his action was not barred by the statute of limitations, there would be no practical relief that could be afforded to the plaintiff because of his failure to challenge the trial court's finding on the merits.

Argued October 21—officially released December 24, 2019

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court,

Hon. Gerard I. Adelman, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Appeal dismissed.*

Keith Yagaloff, for the appellant (plaintiff).

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

Opinion

PER CURIAM. The plaintiff, Jean-Marc Jacques, appeals from the judgment of the trial court rendered in favor of the defendant, Muriel Jacques. On appeal, the plaintiff claims that the trial court erred by (1) concluding that his action was barred by the statute of limitations contained in General Statutes § 52-576 (a), (2) determining that it lacked continuing jurisdiction to enforce the parties' separation agreement, and (3) failing to construe the parties' separation agreement as a contract and to effectuate the intent of the parties to the contract. Because, however, the plaintiff has failed to challenge an independent ground for the trial court's ruling, the plaintiff's appeal is moot. Accordingly, we dismiss the plaintiff's appeal.[1]

The following facts and procedural history are relevant to the disposition of the plaintiff's appeal. In May, 2016, the plaintiff brought a breach of contract action against the defendant, alleging that she had breached the parties' marital separation agreement by failing to disclose assets. Paragraph 10 (h) of the separation agreement provided: "[A]ny assets over ten thousand and 00/100 ($10,000.00) dollars in fair market value that the [defendant] owns or has an equitable interest in at the time of the dissolution which are not shown by the [defendant] on her financial affidavit, shall, upon discovery by the other party, become [the plaintiff's]

[1] Because we dismiss the plaintiff's claims as moot, we do not reach the merits of the plaintiff's claims.

property without any defense interposed by the [defendant] whatsoever as to such claims of the other party." In his complaint, the plaintiff alleged that the defendant liquidated two annuities prior to the divorce. The plaintiff argued that the proceeds from these liquidated annuities, totaling $1,153,444.78, were undisclosed assets under paragraph 10 (h) of the separation agreement. The defendant denied the material allegations of the complaint and raised a number of special defenses, including that the plaintiff's claim was barred by the statute of limitations governing breach of contract actions, as provided in § 52-576 (a).[2] After trial, the court first determined that the plaintiff's action was barred by the statute of limitations. The court then found that there was insufficient evidence that the defendant had breached the separation agreement as alleged by the plaintiff and that there had been no failure to disclose assets by either party. Accordingly, the court rendered judgment in favor of the defendant. This appeal followed.

Before this court, the plaintiff argues that the trial court erred in a number of ways relating to the applicability of the statute of limitations. The plaintiff does not, however, challenge the trial court's determination that there was insufficient evidence to support his claim that the defendant had breached the separation agreement.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent

[2] General Statutes § 52-576 (a) provides in relevant part: "No action . . . on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

bases for that ruling, the appeal is moot." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 166, 204 A.3d 717 (2019).

In the present case, the trial court rendered judgment in favor of the defendant on two grounds. First, it determined that the separation agreement remained a contract beyond the judgment of the court dissolving the marriage and that the plaintiff's breach of contract claim was barred by the statute of limitations. Second, the court found that there was insufficient evidence that the defendant had breached the separation agreement, and, thus, the plaintiff's claim failed on the merits. On appeal, the plaintiff argues that his action was not barred by the statute of limitations because the separation agreement had been incorporated into the judgment by the court dissolving the marriage.[3] Because the plaintiff did not challenge the trial court's determination that he failed to prove a breach of contract, there is no practical relief that this court can grant to him. Thus, even if we agreed with the plaintiff's argument that his action is not barred by the statute of limitations, we would be unable to provide relief because the plaintiff failed to challenge the trial court's finding on the merits. See *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("[u]ndoubtedly, if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal"). Thus, the plaintiff's appeal is moot and we are without subject matter jurisdiction.

The appeal is dismissed.

[3] The plaintiff relies on § 52-576 (c), which provides in relevant part: "The provisions of this section shall not apply to actions upon judgments of any court of the United States or of any court of any state within the United States . . . ."

JAMES CUNNINGHAM, SR. *v.* COMMISSIONER OF CORRECTION
(AC 42058)

Keller, Moll and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, carrying a pistol without a permit and criminal possession of a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel, C, had provided ineffective assistance by failing to conduct an adequate pretrial investigation into the petitioner's theory of self-defense and referring to the petitioner as a bully during closing argument. At the habeas trial, the petitioner testified regarding his version of the shooting, stating, inter alia, that during an altercation with the victim, his previously injured knee buckled when the victim punched him, causing him to fall to the ground, and, being unable to stand, he shot the victim when he reached for the petitioner's pistol. In addition, C testified regarding his extensive pretrial investigation, which included reviewing statements and recordings prior to trial, obtaining information from an investigator who was working on an ancillary matter, personally canvassing the neighborhood where the shooting occurred with an associate, interviewing every witness except for one and visiting the location where the body was found. C also testified that he believed that the petitioner did not have a valid self-defense claim in light of the evidence. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that the petitioner had not proven that C's pretrial investigation was inadequate or that there was a reasonable probability that, but for C's alleged deficient performance, the result of the trial would have been different. In reaching its conclusion, the court discredited the petitioner's testimony, finding it to be phony, and credited C's testimony. 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 claim that C rendered ineffective assistance by failing to conduct an adequate pretrial investigation into his theory of self-defense: the petitioner failed to establish that C's performance was deficient, as the habeas court properly determined that the thorough pretrial investigation conducted by C was not deficient, the petitioner made only a bare allegation in his appellate brief that C failed to investigate the self-defense theory properly and did not specify what benefit additional investigation would have revealed, and, at the habeas trial, the petitioner did not present the testimony of the witness whom C did not interview, nor did he present any medical evidence regarding the

condition of his knee at the time of the shooting; moreover, given the weight of the evidence against the petitioner at his criminal trial, which included his own trial testimony that he shot the victim three times, disposed of the murder weapon and hid the victim's body, the petitioner failed to establish that he was prejudiced as a result of C's alleged deficient performance.

2. The habeas court properly rejected the petitioner's claim that C rendered ineffective assistance by referring to the petitioner as a bully during closing argument: C's use of the term bully during closing argument constituted sound trial strategy, and, therefore, it did not amount to deficient performance or fall below an objective standard of reasonableness, as C, given the evidence before the jury of a litany of oppressive conduct by the petitioner, chose to use that term in an effort to bond with the jury by stating the obvious and using a term that the jury understood; moreover, given the weight of the evidence against the petitioner at his criminal trial, it was not reasonably probable that, but for C's alleged deficient performance, the result of the criminal trial would have been different, and, therefore, the habeas court properly determined that the petitioner had not proven prejudice.

Argued October 16—officially released December 24, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, James Cunningham, Sr., appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court improperly

rejected his claims that his trial counsel rendered ineffective assistance by (1) failing to conduct an adequate pretrial investigation into the petitioner's theory of self-defense, and (2) referring to the petitioner as a "bully" during closing argument.[1] We affirm the judgment of the habeas court.

The following underlying procedural history and facts, which are set forth in more detail on direct appeal, are relevant to our resolution of this appeal. See *State* v. *Cunningham*, 168 Conn. App. 519, 146 A.3d 1029, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016). On the night of August 5, 2012, an altercation arose between the petitioner and the victim, who were friends and who had been living together for several weeks. Id., 522. The petitioner shot the victim three times, with the fatal shot to the chest causing the victim to die within minutes. Id. The petitioner's neighbor helped him wrap the victim's body in a tarp and attach it to a metal rack on the back of the petitioner's Hummer. Id. The petitioner threw the murder weapon in a river and drove the Hummer to his grandmother's house, concealing it in a hedge. Id. At his criminal trial, the petitioner admitted to the events of the shooting and to the subsequent concealing of the body, but testified that he had shot the victim in self-defense. Id., 523. According to the petitioner's version of events, he shot the victim after the victim attacked him and tried to grab his pistol. Id. Two theories of the defense offered at trial were self-defense and that the petitioner had acted at most with the appropriate mens rea for manslaughter, but not murder. Id. Neither the state nor the defense requested an instruction on a lesser included offense. Id. Following a jury trial, the petitioner was found guilty

[1] The petitioner raised additional claims in his appellate brief, but he expressly abandoned those claims at oral argument. Therefore, we do not review these claims. See *Stoner* v. *Stoner*, 163 Conn. 345, 359, 307 A.2d 146 (1972).

of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). Id., 521. The petitioner subsequently pleaded guilty to a charge of criminal possession of a firearm in violation of General Statutes § 53a-217 (a). Id., 527. The court sentenced the petitioner to a term of sixty years of incarceration. Id. The petitioner's conviction was affirmed on direct appeal. Id., 521, 538.

Thereafter, the petitioner filed an amended petition for a writ of habeas corpus alleging ineffective assistance of his trial counsel, Matthew Couloute. The court denied the petition, reasoning, inter alia, that the petitioner had not proven either deficient performance or prejudice on his claims of inadequate pretrial investigation and improper use of the word "bully" during closing argument. The court granted the petitioner's petition for certification to appeal. This appeal followed.

We first set forth our standard of review. "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the underlying] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong." (Citation omitted; internal quotation marks omitted.) *Stephen J. R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 7–8, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

I

The petitioner claims that the court improperly rejected his claim that his trial counsel rendered ineffective assistance by failing to investigate adequately a self-defense theory. We disagree.

The court determined that although the count of the petition alleging inadequate pretrial investigation was "very unspecific," the petitioner had not proven either inadequate pretrial investigation[2] or a reasonable probability that the result of the trial would have been different. At the habeas trial, the petitioner presented only the testimony of himself and Couloute. The court credited Couloute's testimony and found the petitioner's testimony to be "phony."

[2] "Inadequate pretrial investigation can amount to deficient performance, satisfying prong one of *Strickland*, as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation. . . . Although we acknowledge that counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Citations omitted; internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 546–47, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

During the habeas trial, the petitioner explained his version of the relevant events as follows. After the victim punched him, the petitioner's knee, which had been injured previously, buckled, and he fell to the ground. He was unable to stand and believed that he needed to shoot the victim when the victim reached for the petitioner's pistol. After placing the victim on the back of his Hummer with help from a neighbor, the petitioner intended to take the victim to the hospital, but took an "offbeat, weird [route] . . . ." When the victim fell off the Hummer, the petitioner became frightened, returned the victim's body to the Hummer, and drove to his grandmother's house instead of to the hospital because he "was scared that [the victim] passed away."

The court credited Couloute's testimony regarding his extensive pretrial investigation, which included reviewing statements and recordings prior to trial, obtaining information from an investigator who was working on an ancillary matter, personally canvassing the neighborhood with an associate, interviewing every witness except for one, and visiting the location where the body was found. Couloute testified that due to the number of witnesses, he hired an attorney to assist him at trial. The court noted that Couloute testified that he thought there was no valid self-defense claim. He testified that in light of the evidence that the petitioner was able to return the victim's body to the back of the Hummer himself, it seemed "ridiculous" to tell the jury that he could not stand during the altercation with the victim and was forced to shoot the victim in self-defense. The court further concluded that the petitioner failed to prove prejudice because there existed no reasonable probability that the result at trial would have been different.

After an examination of the record, we conclude that the court properly determined that the thorough pretrial investigation conducted by Couloute was not deficient.

In his appellate brief, the petitioner makes only a bare allegation that Couloute failed to investigate the self-defense theory properly and does not specify what benefit additional investigation would have revealed. At the habeas trial, the petitioner did not present the testimony of the one witness whom Couloute did not interview, nor did he present any medical evidence regarding the condition of his knee at the time of the shooting. "The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." *Holley* v. *Commissioner of Correction*, 62 Conn. App. 170, 175, 774 A.2d 148 (2001). We agree with the habeas court that the petitioner has not proven deficient performance.

Additionally, given the weight of the evidence against the petitioner, which included his own trial testimony that he shot the victim three times, disposed of the murder weapon, and hid the body, we agree with the habeas court that the petitioner failed to establish prejudice under *Strickland*.

II

The petitioner also claims that the court improperly rejected his claim that Couloute's description of the petitioner during closing argument as a "bully" constituted ineffective assistance of counsel. We disagree.

The court concluded that Couloute's use of the term "bully" during closing argument constituted sound trial strategy and, therefore, did not amount to deficient performance. The court detailed a list of behaviors exhibited by the petitioner, which were in evidence at the underlying criminal trial, many of which occurred in the weeks leading up to the underlying incident and most of which the petitioner testified to himself at his criminal trial. The court explained that the word bully was "the least offensive" term Couloute could have used "given the litany of oppressive conduct before the jury." The court concluded that in using the term,

Couloute "was attempting to bond with the jury by admitting the obvious. He then wove in the common belief that the way to confront a bully is to punch him in the head. [Couloute] added to this common belief that when knocked to the ground the petitioner was really scared. . . . Given the overwhelming evidence against [the petitioner] . . . Couloute made a very good summation which did not fall below the standard."

We agree with the court that Couloute's closing argument did not fall below an objective standard of reasonableness. The court made clear that Couloute chose to use the word bully in an effort to bond with the jury by stating the obvious, using a term that the jury understood. In light of the evidence, we agree with the court's reasoning in this regard. "[J]udicial scrutiny of counsel's performance must be highly deferential. . . . [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." (Internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 449, 119 A.3d 607 (2015).

The court also concluded that it was not reasonably probable that the result at trial would have been different. The court reasoned: "The petitioner's trial testimony was contradicted by witnesses to the event, his disposal of the gun and the body was strong evidence of consciousness of guilt and his declaration of motive to his cousin shortly after the shooting are what got the petitioner convicted of murder. And if his demeanor and claims appeared as phony as his testimony during the habeas trial, the jurors were fully justified in disregarding it." Given the weight of the evidence against

the petitioner at his criminal trial, we conclude that the court properly determined that the petitioner had not proven the prejudice prong of *Strickland*.

The judgment is affirmed.