# ROBERT S. BUIE *v.* COMMISSIONER OF CORRECTION (AC 43268)

Bright, C. J., and Lavine and Elgo, Js.*

*Syllabus*

The petitioner, who had been convicted of two counts of the crime of aggravated sexual assault in the first degree as an accessory and one count each of the crimes of attempt to commit aggravated sexual assault in the first degree, conspiracy to commit aggravated sexual assault in the first degree and burglary in the first degree, sought a writ of habeas corpus, claiming that the trial court abused its authority by denying his right to a hearing when it denied his postconviction motion for DNA testing pursuant to the applicable statute (§ 54-102kk). The habeas court rendered judgment dismissing the habeas petition and, thereafter, denied the petition for certification to appeal. On the petitioner's appeal to this court, he claimed that the habeas court improperly determined that it lacked subject matter jurisdiction over the habeas petition and denied certification to appeal. *Held* that the appeal was dismissed as moot; because, during the pendency of this appeal, this court issued its decision in the petitioner's direct appeal of the trial court's denial of his motion for DNA testing and affirmed that judgment in all respects, and because, in that proceeding, the petitioner obtained the very relief he requested in this habeas action, namely, a hearing before the sentencing judge on

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

his motion for DNA testing pursuant to § 54-102kk, there was no practical relief that this court could afford the petitioner.

Argued November 9, 2020—officially released March 16, 2021

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*J. Patten Brown III*, for the appellant (petitioner).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, was *Maureen Platt*, state's attorney, for the appellee (respondent).

*Opinion*

PER CURIAM. The petitioner, Robert S. Buie, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus and from the denial of his petition for certification to appeal. He claims that the court improperly (1) determined that it lacked subject matter jurisdiction over the habeas petition and (2) denied his subsequent petition for certification to appeal. We conclude that the petitioner's appeal is moot and, accordingly, dismiss the appeal.

The petitioner was involved in a sexual assault in 2006, the details of which were recounted by our Supreme Court in the petitioner's direct appeal. See *State* v. *Buie*, 312 Conn. 574, 577–80, 94 A.3d 608 (2014). Following a trial, the jury found the petitioner guilty of two counts of aggravated sexual assault in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-70 (a) (1), and one count each of attempt to commit aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2)

and 53a-70a (a) (1), conspiracy to commit aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-70a (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (1). The trial court, *Alander*, *J.*, rendered judgment in accordance with that verdict and sentenced the petitioner to a total effective sentence of forty years of imprisonment and fifteen years of special parole. Id., 581.

The petitioner thereafter brought a series of unsuccessful habeas actions, in which he alleged ineffective assistance on the part of his trial counsel and first habeas counsel. See *Buie* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-14-4005884-S (May 11, 2017), aff'd, 187 Conn. App. 414, 202 A.3d 453, cert. denied, 331 Conn. 905, 202 A.3d 373 (2019); *Buie* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004375-S (September 28, 2012), appeal dismissed, 151 Conn. App. 901, 93 A.3d 182, cert. denied, 314 Conn. 910, 100 A.3d 402 (2014).

On March 12, 2018, the petitioner filed the present petition for a writ of habeas corpus,[1] in which he sought review of the "court's denial of [his] motion for postconviction DNA testing." More specifically, he alleged that the trial court "abused its authority [by] denying [his] right to a hearing" pursuant to General Statutes § 54-102kk. Nowhere in his petition did the petitioner allege precisely when such a motion for DNA testing was denied or which trial court decided that motion. By way of relief, the petitioner asked the habeas court to order a hearing on his motion for DNA testing.

On June 7, 2019, the habeas court, *Newson*, *J.*, issued an order, in which it stated that the petitioner's failure

[1] The petitioner filed the present habeas action in a self-represented capacity. He is represented by counsel in this appeal.

"to contest the conviction or the conditions of confinement . . . deprives the habeas court of jurisdiction." The court thus rendered a judgment of dismissal pursuant to Practice Book § 23-29.[2] The petitioner filed a petition for certification to appeal from that judgment, which the court denied, and this appeal followed.

On appeal, the petitioner challenges the propriety of both the dismissal of his habeas petition for lack of subject matter jurisdiction and the denial of his petition for certification to appeal. We conclude that the appeal is moot and, therefore, do not address those claims.

In his appellate brief, the petitioner avers that the present habeas action is predicated on the trial court's denial of his June 8, 2018 postconviction motion for DNA testing pursuant to § 54-102kk.[3] That motion was denied on December 3, 2018, in a thorough memorandum of decision issued by Judge Alander, who had presided over the petitioner's criminal trial and sentencing. From that judgment, the petitioner appealed to this court, which affirmed the judgment of the trial court. See *State* v. *Buie*, 201 Conn. App. 903, 240 A.3d 320, cert. denied, 335 Conn. 984, 242 A.3d 106 (2020).

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction." (Internal quotation marks omitted.) *State* v. *Boyle*, 287 Conn. 478, 485,

[2] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction . . . ."

[3] We recognize that the petitioner filed the present habeas action approximately three months *before* that postconviction motion for DNA testing was filed with the trial court. On appeal, the petitioner has provided no explanation for that anomaly.

Although his March 12, 2018 petition for a writ of habeas corpus suggests that the petitioner made an earlier request for DNA testing before a different trial judge, the petitioner has neither identified that request nor provided any record whatsoever of that request or the court's ruling thereon.

949 A.2d 460 (2008). Under our well established mootness jurisprudence, "[a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) Id., 486.

Subsequent to the commencement of this habeas appeal, this court issued its decision in the petitioner's direct appeal of Judge Alander's December 3, 2018 denial of his June 8, 2018 motion for DNA testing and affirmed the propriety of that judgment in all respects. See *State* v. *Buie*, supra, 201 Conn. App. 903. In that proceeding, the petitioner obtained the very relief he requested in this habeas action—namely, a hearing before the sentencing judge on his motion for DNA testing pursuant to § 54-102kk. As a result, the present appeal is moot, as there is no practical relief that this court can afford the petitioner.[4] See *State* v. *Martin*, 211 Conn. 389, 393–94, 559 A.2d 707 (1989). This court, therefore, lacks subject matter jurisdiction over the petitioner's appeal.

The appeal is dismissed.

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## DISCIPLINARY COUNSEL *v.* FRANK CANNATELLI (AC 44091)

Moll, Alexander and Suarez, Js.

*Syllabus*

The petitioner, the Disciplinary Counsel, filed a presentment alleging misconduct by the respondent attorney, after a reviewing committee of the Statewide Grievance Committee found that the respondent had violated

[4] At oral argument before this court, the petitioner's counsel conceded that there was no practical relief available to the petitioner.

various provisions of the Rules of Professional Conduct and the rules of practice. The disciplinary proceeding remained inactive while the respondent pursued his appeal to the Superior Court from the decision of the grievance committee directing the petitioner to file a presentment. After the appeal process was completed, the court scheduled a hearing on the presentment. The trial court rendered judgment for the petitioner, and suspended the respondent from the practice of law for one year. The respondent thereafter filed a postjudgment motion to dismiss for lack of subject matter jurisdiction, arguing for the first time that, pursuant to the applicable rule of practice (§ 2-47 (a)), the court lacked jurisdiction because a hearing on the merits of the presentment was not held within sixty days of its filing with the court. The court denied the respondent's motion, and this appeal followed. *Held*:

1. The respondent could not prevail on his claim that the trial court erred in denying his postjudgment motion to dismiss for lack of subject matter jurisdiction; contrary to the respondent's claim, our Supreme Court has held that the sixty day hearing requirement of Practice Book § 2-47 (a) is directory, not mandatory, and that failure to meet its time requirements does not deprive the court of jurisdiction, and this court was bound by the decision of our Supreme Court.
2. The trial court did not abuse its discretion in suspending the respondent from the practice of law for one year; when stripped of repeated assertions that the court lacked subject matter jurisdiction, the respondent's contentions offered little by way of meaningful analysis, and, therefore, were unavailing.

Submitted on briefs February 4—officially released March 16, 2021

*Procedural History*

Presentment by the petitioner for alleged professional misconduct of the respondent, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment suspending the respondent from the practice of law for one year, from which the respondent appealed. *Affirmed.*

*Frank P. Cannatelli*, self-represented, the appellant (respondent).

*Brian P. Staines*, chief disciplinary counsel, for the appellee (petitioner).

*Opinion*

PER CURIAM. In connection with the presentment filed by the petitioner, the Disciplinary Counsel, alleging

misconduct by the respondent attorney, Frank Cannatelli, the respondent appeals from the judgment of the Superior Court suspending him from the practice of law for one year for numerous violations of the Rules of Professional Conduct and the rules of practice. We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to our resolution of this appeal. On or about November 20, 2015, following an evidentiary hearing, a reviewing committee of the Statewide Grievance Committee (grievance committee) issued a comprehensive decision finding that the respondent had violated various provisions of the Rules of Professional Conduct and the rules of practice. By way of summary only, we recite the following facts, which the reviewing committee found by clear and convincing evidence. Following an initial investigation by the grievance committee into a November, 2013 overdraft from the respondent's IOLTA[1] account, "[a] subsequent investigation of the respondent's IOLTA account revealed that the respondent had made numerous payments directly from his IOLTA account for personal and business expenses. These included payments to Comcast, TransAmerica, the [United States] Treasury, and the Mohegan Sun Casino. The respondent did not maintain proper records of his IOLTA accounts, including failure to maintain accurate ledgers.

"As of December 30, 2013, the balance in the respondent's IOLTA account was $195.24; however, the respondent had deposited $10,591.35 into the account on behalf of a client, Ziemba, during the period of October 21, 2013, to December 3, 2013, and had disbursed $8544.63 on behalf of the client for the same period, leaving [approximately $1850] unaccounted for.

[1] "IOLTA stands for 'interest on lawyers' trust accounts.' " *Disciplinary Counsel* v. *Hickey*, 328 Conn. 688, 692 n.2, 182 A.3d 1180 (2018).

"The respondent received a check in the amount of $5487.77 as an asset of the estate of Mark Ziemba, as set forth in the respondent's June 22, 2014 letter to the Wallingford Probate Court, but no inventory was filed with the Probate Court as of September 1, 2014, and the funds were held by the respondent until April of 2015." The reviewing committee further found that the respondent had not promptly returned a retainer in a matter that did not go forward.

Against the backdrop of these facts, the reviewing committee found the following violations by clear and convincing evidence, stating: "It is eminently clear from the record, and the respondent acknowledges, that he was commingling funds in his IOLTA account, paying personal bills and expenses directly from the account, and not maintaining complete records for the account, in violation of [r]ule 1.15 (b) of the Rules of Professional Conduct. Keeping his own funds in the account, beyond the amount necessary to avoid service charges, further constitutes a violation of [r]ule 1.15 (c) of [the] Rule[s] of Professional Conduct and Practice Book § 2-27 (a). In paying a retainer over a period of time, rather than promptly, the respondent was in violation of [r]ule 1.15 (e) of the Rules of Professional Conduct.

"The respondent's failure to maintain required account records, including accurate general and client ledgers, accurate receipt and disbursement journals, copies of disbursements, and copies of billing statements, was in violation of [r]ule 1.15 (i) of the Rules of Professional Conduct and Practice Book § 2-27 (b). The respondent's handling of the Ziemba matters, where [approximately $1850] was not accounted for as of December 30, 2013, and where $5487.77 was held by the respondent until April of 2015, constitute violations of [r]ules 1.3, 1.15 (b) and (e), and 8.4 (3) of the Rules of Professional Conduct.

"The record in this matter reflects that the respondent's mishandling of his IOLTA account has been egregious. There was clear commingling, and the reviewing committee notes that the respondent previously agreed not to use his IOLTA account to pay personal or business related expenses, in a 2008 grievance complaint (*Bowler* v. *Cannatelli*, Grievance Complaint #08-0185)." On the basis of the foregoing, the reviewing committee directed the petitioner, pursuant to Practice Book § 2-35 (i), to file a presentment against the respondent. On February 1, 2016, the respondent appealed from the order of presentment to the Superior Court. *Cannatelli* v. *Statewide Grievance Committee*, Superior Court, judicial district of Hartford, Docket No. CV-16-6065656-S.

Meanwhile, on February 3, 2016, the petitioner filed a one count presentment against the respondent, alleging numerous incidents of attorney misconduct (disciplinary proceeding). Specifically, the petitioner alleged that the respondent violated rules 1.15 (b), 1.15 (c), 1.15 (e), 1.15 (i), 1.3, and 8.4 (3) of the Rules of Professional Conduct, as well as Practice Book § 2-27 (a) and (b), by commingling personal funds in his IOLTA account, paying personal bills and expenses directly from his IOLTA account, failing to maintain complete and accurate IOLTA account records, keeping personal funds in his IOLTA account above the amount necessary to avoid service charges, paying back an unused retainer fee to a client over time and not promptly, and failing to properly handle funds in the Ziemba matter with a specified amount unaccounted for and a separate amount held too long in the account.

In June, 2016, the Superior Court dismissed the respondent's appeal from the grievance committee's decision for lack of an appealable final judgment and subsequently denied his motion to reargue the judgment of dismissal. See *Cannatelli* v. *Statewide Grievance Committee*, 186 Conn. App. 135, 137–38, 198 A.3d 716

(2018), cert. denied, 331 Conn. 903, 202 A.3d 374 (2019). The respondent appealed therefrom to this court, which affirmed the judgment of the Superior Court. Id., 136. Thereafter, our Supreme Court denied the respondent's petition for certification to appeal on February 27, 2019, denied the respondent's motion for reconsideration on April 3, 2019, and denied the respondent's motion for reconsideration en banc on May 22, 2019.

On September 25, 2019, the petitioner notified the Superior Court in the disciplinary proceeding, which had remained inactive while the respondent pursued his appeal from the order of presentment, that the presentment was ready to be scheduled for a hearing. On October 8, 2019, the court scheduled a hearing for December 9, 2019.

On November 22, 2019, pursuant to Practice Book § 2-82 (a) and (b), the parties executed a stipulation and submitted it to the court for approval on November 25, 2019 (stipulation). The stipulation recites the following facts. The respondent was admitted to the Connecticut bar in December, 1988, and has a history of attorney discipline, including a reprimand in February, 1998, a reprimand in March, 1998, a sanction with conditions in August, 2008, a reprimand in March, 2009, and a reprimand with conditions in July, 2012. As of the date of the stipulation, the respondent was in good standing. By grievance complaint dated July 29, 2014, Michael P. Bowler, statewide bar counsel, instituted a grievance complaint against the respondent. In connection therewith, the respondent tendered an affidavit pursuant to Practice Book § 2-82 (d), which was attached to the stipulation, in which he acknowledged that there was sufficient evidence to prove by clear and convincing evidence the material facts constituting a violation of the Rules of Professional Conduct and the rules of practice, as set forth in the November 20, 2015 decision of the reviewing committee, which also was attached to

the stipulation and incorporated therein. Relatedly, the stipulation contained the following provision: "The parties stipulate that the court, when entering judgment on this presentment, may find by clear and convincing evidence the facts as set forth in the reviewing committee's decision of November 20, 2015, as well as the violations of the Rules of Professional Conduct and the Practice Book." The stipulation further stated that, pursuant to Practice Book § 2-82 (c), the parties were unable to agree to a proposed disposition but agreed, while retaining the right to appear at a hearing regarding a disposition and to present argument, that the matter should be submitted to the court "for the imposition of whatever discipline the court deems appropriate."

On December 9, 2019, the court conducted a hearing on the presentment, during which the parties presented argument and the court admitted into evidence several documents offered by the respondent.[2] On January 28, 2020, the court issued a memorandum of decision rendering judgment in favor of the petitioner, finding by clear and convincing evidence that the respondent had violated the Rules of Professional Conduct and the rules of practice as set forth in the presentment, and suspending the respondent from the practice of law for a period of one year. The court explained that, in reaching its decision, it took "into account the respondent's significant history of discipline and the fact that the issues raised in this grievance proceeding, particularly the respondent's use of his IOLTA account to pay personal expenses, involved behavior for which the respondent had been previously sanctioned . . . ."

On January 31, 2020, the respondent filed with the Superior Court a postjudgment motion to dismiss for lack of subject matter jurisdiction, arguing for the first

[2] The petitioner recommended, inter alia, that the court impose a one year suspension.

time that, pursuant to Practice Book § 2-47 (a), the court lacked subject matter jurisdiction because a hearing on the merits of the presentment was not held within sixty days of the filing thereof with the court. On April 21, 2020, the court denied the motion.[3] This appeal followed.

[3] The court stated in relevant part: "As a threshold matter, the court must consider whether it should even consider the respondent's postjudgment motion, even though it raises the issue of subject matter jurisdiction. '[O]nce a judgment [is] rendered it is to be considered final and it should be left undisturbed by [posttrial] motions except for a good and compelling reason. . . . Otherwise, there might never be an end to litigation.' [Citation omitted; internal quotation marks omitted.] *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, [952 A.2d 1] (2008). '[T]he modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly where the parties have had a full opportunity to originally contest the jurisdiction of the adjudicatory tribunal. . . . Under this rationale, at least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if he did have such opportunity, whether there are strong policy reasons for giving him a second opportunity to do so.' (Citations omitted; [internal quotation marks omitted].) *Vogel* v. *Vogel*, 178 Conn. 358, 362–63, [422 A.2d 271] (1979).

"Section 12 of the Restatement (Second) of Judgments provides: 'When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if: (1) [t]he subject matter of the litigation was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or (2) [a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) [t]he judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.' [1 Restatement (Second), Judgments § 12, p. 115 (1982)].

" 'Unless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings [appeal] to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of [subject matter] jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action and, if he did have such an opportunity, whether there are strong policy reasons for giving him a second opportunity to do so.' [Citation

On appeal, the respondent does not challenge any of the underlying facts or findings of violations. Rather, the respondent claims that the court (1) erred in denying his postjudgment motion to dismiss for lack of subject matter jurisdiction and (2) abused its discretion in suspending him from the practice of law for one year. The respondent's claims are without merit and require only brief discussion.

First, the crux of the respondent's primary claim is that the court lacked subject matter jurisdiction at the time it rendered judgment. In support of his claim, the respondent relies on Practice Book § 2-47 (a), which provides in relevant part: "Presentment of attorneys for misconduct, whether or not the misconduct occurred in the actual presence of the court, shall be made by written complaint of the disciplinary counsel. Service of the complaint shall be made as in civil actions. Any interim proceedings to the contrary notwithstanding, *a hearing on the merits of the complaint shall be held within sixty days of the date the complaint was filed with the court*. . . ." (Emphasis added.) According to the respondent, (1) the sixty day hearing requirement in § 2-47 (a) is mandatory, and (2) the fact that the hear-

omitted; internal quotation marks omitted.] *In re Shamika F.*, 256 Conn. [383, 407–408, 773 A.2d 347] (2001).

"In this case, it is not obvious in any respect that this court lacked subject matter jurisdiction when it entered judgment beyond the sixty day period contained in Practice Book § 2-47 (a). First, authority exists for the proposition that time limits imposed on disciplinary matters are directive rather than mandatory and that failure to adhere to those deadlines does not deprive the court of subject matter jurisdiction. *Doe* v. *Statewide Grievance Committee*, 240 Conn. 671, 681, [694 A.2d 1218] (1997). In addition, a review of the file reveals that respondent's actions were the major cause of the fact that this matter was not concluded expeditiously. As a matter of public policy, allowing respondents to 'run out the clock' in disciplinary matters would run counter to the administration of an effective attorney disciplinary process. Finally, the respondent did not raise the issue of subject matter jurisdiction when the hearing was held in this matter. In fact, the [respondent] did not dispute liability, but, rather, simply argued for a less severe sanction than that sought by the [petitioner]."

ing on the merits of the complaint in this disciplinary proceeding took place well beyond the sixty day period deprived the Superior Court of subject matter jurisdiction. In *Statewide Grievance Committee* v. *Rozbicki*, 219 Conn. 473, 595 A.2d 819 (1991), cert. denied, 502 U.S. 1094, 112 S. Ct. 1170, 117 L. Ed. 2d 416 (1992), our Supreme Court held that the identical language of Practice Book (1978–97) § 31 (a), the predecessor to § 2-47 (a), is "directory, and not mandatory, and that failure to meet its time requirements does not deprive the court of jurisdiction."[4] Id., 481. "It is axiomatic that, as an intermediate court, we are bound by the decisions of our Supreme Court. [I]t is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [its] precedent." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 633, 161 A.3d 562 (2017). Thus, the respondent's first claim fails.[5]

Second, the respondent claims that the court abused its discretion in suspending him from the practice of law for a period of one year. We disagree.

"A court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession. . . . Inherent in this process is a large degree of judicial discretion. . . . A court is free to

[4] The respondent's only response to the *Rozbicki* decision is to state that "[i]t was talking about [Practice Book §] 31 (a) and not [§] 2-47 (a)," wholly ignoring the fact that the court in *Rozbicki* was addressing the same rule prior to the renumbering of the rules of practice in 1998.

[5] We find no error in the court's treatment of the respondent's postjudgment motion, as set forth in footnote 3 of this opinion, which is only buttressed by our conclusion herein.

determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what that sanction should be. . . . [A]lthough our review of grievance proceedings is restricted, we recognize the seriousness of the interests that we must safeguard. We have a continuing duty to make it entirely clear that the standards of conduct, nonprofessional as well as professional, of the members of the profession of the law in Connecticut have not changed, and that those standards will be applied under our rules of law, in the exercise of a reasonable discretion . . . ." (Citation omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Dixon*, 62 Conn. App. 507, 515–16, 772 A.2d 160 (2001).

When stripped of repeated, rehashed assertions that the court lacked subject matter jurisdiction, the respondent's contentions in support of his second claim reflect a "kitchen sink" approach, offering little by way of any meaningful analysis. Having considered the respondent's contentions, such as they are, we conclude that they are unavailing. In short, on the basis of our review of the record and the briefs, we conclude that the court did not abuse its discretion in suspending the respondent from the practice of law for one year.

The judgment is affirmed.

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## RICHARD HOUGHTALING *v.* COMMISSIONER OF CORRECTION
## (AC 42332)

Bright, C. J., and Prescott and Suarez, Js.

*Syllabus*

The petitioner, who had been convicted, on a plea of nolo contendere, of various crimes related to his involvement in a marijuana grow operation, sought a writ of habeas corpus, claiming that his trial counsel, S, had provided ineffective assistance during the litigation of the petitioner's

motion to suppress evidence in the underlying criminal proceeding. The petitioner, who was the owner of the property where the grow operation was conducted, and his brother-in-law, E, were arrested when they arrived at the property while a narcotics task force was present as part of a marijuana eradication operation. The petitioner leased the property to P, who was also arrested. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner failed to prove that S rendered deficient performance in litigating the motion to suppress:
   a. The petitioner could not prevail on his claim that S rendered deficient performance when he failed to inform the petitioner of his right to testify at the suppression hearing; the court did not credit the petitioner's claim that S advised him not to testify at the hearing and found, to the contrary, that S's testimony that the petitioner had instructed him not to call the petitioner as a witness at the hearing was credible.
   b. The habeas court properly concluded that S's decision not to call P to testify at the hearing did not fall below an objective standard of reasonableness, as S was concerned that evidence connected to P's testimony, although it may have supported the petitioner's claim of standing, could have further implicated the petitioner in criminal activity and S credibly testified that the petitioner had insisted that P not be called as a witness.
   c. The petitioner's claim that S's asserted justifications for his approach to the suppression hearing were not reasonable was unavailing, as the habeas court concluded and the record demonstrated that S's decision to minimize the petitioner's involvement in the property was reasonably based on the information provided to him by the petitioner, S's decision not to involve P in the suppression hearing was reasonably based on information the petitioner had told S, including that P posed significant safety concerns for the petitioner and his wife, and on S's belief that P's testimony could have further implicated the petitioner in the grow operation and affected the terms of a plea bargain, and S's strategy in seeking to avoid implicating E was reasonable given the petitioner's stated desire to S not to implicate E, who faced possible, ongoing exposure under federal drug laws at the time of the suppression hearing.
   d. S's briefing on the issue of the petitioner's standing regarding the suppression of evidence, which relied on *Baker* v. *Carr* (369 U.S. 186), sufficiently supported the argument in favor of the petitioner's standing and was informed by the facts of the case and the information given to him by the petitioner and, thus, the petitioner's claim that S's failure to cite to *Katz* v. *United States* (389 U.S. 347) constituted deficient performance was unavailing.
2. The petitioner could not prevail on his claim that the habeas court deprived him of his state and federal constitutional rights to due process of law when it characterized in its memorandum of decision a full exhibit

admitted at the habeas trial without limitation as one admitted for only a limited purpose, without notice to the petitioner or an opportunity to be heard: although the court erred in stating in its memorandum of decision that the exhibit was admitted for a limited purpose, it had indicated to the petitioner on the first day of a three day trial that spanned three months that it viewed the exhibit as lacking probative value, thereby providing the petitioner with two months to gather and to present additional evidence; moreover, this court declined to review the claim under the plain error doctrine, as the habeas court's limited use of an exhibit it found to have little or no weight did not affect the fairness or integrity of the proceedings or result in manifest injustice to the petitioner.

3. Although the habeas court erred by excluding as an exhibit a letter to the petitioner from the Internal Revenue Service that was addressed to the property searched by law enforcement, the petitioner failed to meet his burden of proof that the exclusion of the exhibit harmed him in a way that made it more probable than not that the outcome of the habeas trial would have been different had the exhibit been admitted; in his principal brief, the petitioner failed to analyze whether the court's error in failing to admit the letter affected its conclusion as to either the deficient performance or the prejudice prong of *Strickland* v. *Washington* (466 U.S. 668), and consequently, failed to identify any cognizable harm from the habeas court's erroneous evidentiary ruling; moreover, this court declined to review the petitioner's argument regarding harm raised for the first time in his reply brief.

Argued October 8, 2020—officially released March 16, 2021

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *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.*

*Temmy Ann Miller*, with whom, on the brief, was *Daniel M. Erwin*, for the appellant (petitioner).

*Nancy L. Walker*, assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

BRIGHT, C. J. The petitioner, Richard Houghtaling, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus challenging his judgment of conviction arising out of a marijuana grow operation. The petitioner claims on appeal that the habeas court improperly (1) denied his claim of ineffective assistance of trial counsel in litigating the petitioner's motion to suppress in the criminal proceeding that resulted in the conviction that is the subject of his habeas petition, (2) deprived him of his state and federal constitutional rights to due process and committed plain error when it changed, without notice or any opportunity to be heard, a full exhibit admitted without limitation to one admitted only for a limited purpose, and (3) excluded from evidence a letter from the Internal Revenue Service (IRS) that was offered by the petitioner.[1] We disagree with the petitioner's first and second claims, but agree with the petitioner's third claim. Nevertheless, we conclude that the habeas court's error as to the petitioner's third claim was harmless and, therefore, we affirm the judgment of the habeas court.

The following facts, as described by our Supreme Court in its decision on the petitioner's direct appeal, are relevant to our disposition of this appeal. "On August 9, 2010, the Statewide Narcotics Task Force (task force)—comprised of federal, state, and local law enforcement officers—was conducting a marijuana eradication operation in the northeast corner of the state. The operation was comprised of two spotters who were patrolling the area in a helicopter and a ground team consisting of several members. The task force had performed marijuana eradication missions earlier in the day, and, shortly after noon, the helicopter team notified

[1] For convenience, we have reordered the petitioner's claims from how they are set forth in his principal brief.

the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in the town of Canterbury (property). From the air, the spotters were able to see dozens of marijuana plants within a fenced-in pool area behind the house, as well as several plants along the outside of the fence. The ground team arrived at the property approximately thirty minutes later in separate, undercover and unmarked vehicles, which bore no resemblance to police vehicles.

"The property consisted of 5.6 acres and was largely surrounded by dense forest. The only means of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees on both sides. There were signs marked No Trespassing posted on trees along the driveway, and, about halfway down the driveway, there was a metal gate that could block the driveway but that was not closed. . . . As the members of the ground team approached the home, they saw no occupant vehicles or persons, smelled nothing, and heard nothing. The officers knocked on the front door but received no answer.

"The ground team then left the front door and proceeded toward the back door. The air team had told the ground team that, if they continued around the side of the house, they would see a whole lot of marijuana right out in the open. Before reaching the back door, the officers saw a pool area with dozens of marijuana plants inside and additional plants surrounding the area. The officers then continued to search the property, including a greenhouse located behind the pool, near the rear of the property. As the police approached the greenhouse, they noticed it was still under construction. The ends of the structure had no side walls, and there were piles of lumber on the ground nearby. Inside the greenhouse, the police were able to see numerous marijuana plants and two men, one of whom was later identified as [Thomas] Phravixay.

"Both of the men were given *Miranda* [v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct 1602, 16 L. Ed. 2d 694 (1966)] warnings and agreed to answer questions. Phravixay told the officers he was renting the home and later gave the officers written consent to search the property. The search ultimately revealed more than 1000 marijuana plants.

"While two members of the ground crew were returning to their vehicles to obtain an evidence kit, they noticed a white van pull into the driveway of the property, where the unmarked police vehicles were parked, and then reverse back into the street and depart [v]ery quickly. The helicopter team also spotted the van enter the driveway and radioed the ground team to alert all of the officers concerning the van's presence. The officers were suspicious of the van, believing that its occupants might be involved in the marijuana grow operation, and decided to pursue the van. By the time the police got into a car, headed up the driveway after the van, and arrived out on the road, the van was already parked at the side of the road, approximately one tenth of one mile away, facing back toward the driveway.

"The officers drove to the location where the van was parked, exited their vehicle, and approached the van. . . . The van was occupied by two males—the [petitioner] was in the driver's seat and another person sat in the passenger seat. Upon determining that the occupants of the van posed no threat, the officers holstered their weapons and asked the [petitioner] for identification. When the officers asked the [petitioner] why he had pulled into the driveway and then left abruptly, he stated that he was going to visit a friend but left when he saw that the driveway was full of cars he did not recognize. As the trial court found, the [petitioner's] answers to the officers' questions were evasive, and, although he claimed to be visiting a friend, he would not name the friend. While the police were questioning

the [petitioner], they were able to observe from outside the van that it contained lumber and irrigation piping similar to that which was used to construct the greenhouse. The officers then handcuffed the [petitioner] and the passenger, and brought them back to the property.

"Upon arriving back at the property, the police advised the [petitioner] of his *Miranda* rights. The [petitioner] at first refused to speak with the police but then agreed to once the officers told him that Phravixay had consented to their search of the property, that they had found mail with the [petitioner's] name on it in the house and in the mailbox, and that Phravixay had identified the [petitioner] as the homeowner and the person who leased the property to him. The [petitioner] told the officers he had purchased the home in the prior year but could not afford the mortgage payments, so, to help cover his expenses, he leased the property to Phravixay, whom he had known for several years. The [petitioner] said Phravixay had paid rent only periodically, and the [petitioner] had been helping Phravixay cultivate marijuana for the previous four or five months to recoup some of [his] money. Although the [petitioner] said he was helping with the cultivation, he stated that, up until [that day, he] didn't realize the extent of the grow operation. I own my own business and didn't really think much of what was going on at the house . . . .

"The [petitioner] initially was charged with numerous drug related offenses, and he moved to suppress (1) all evidence seized by law enforcement officers in connection with the warrantless search and seizure conducted at [the] property on August 9, 2010; (2) all statements made by [the petitioner] and others, including . . . Phravixay, as a result of the illegal search and seizure; and (3) the fruits of any and all other evidence obtained, derived or developed as a result of the illegal search and seizure and illegally obtained statements . . . . The [petitioner] claimed that the court must suppress

this evidence because the police had violated his fourth amendment rights when they failed to obtain a warrant before searching the property and when they detained him in his van, which he claims was done without reasonable suspicion that he had engaged in criminal activity.

"At the hearing on the motion to suppress, the state called three police officers to testify about their actions and observations during the search and seizure. The [petitioner] called one witness, another police officer. After the witnesses testified, the state argued that the [petitioner] had failed to establish his subjective expectation of privacy because all of his personal property was in the city of Danbury, where he lived with his wife and family, and the [petitioner] had failed by any other conduct to demonstrate a subjective expectation of privacy in the property where the search occurred. Defense counsel responded by arguing that the [petitioner's] ownership of the property alone was sufficient to establish standing. He argued that the state was trying to get around this fact by making a hyper-technical argument on standing . . . .

"The trial court agreed with the state and denied the [petitioner's] motion to suppress the evidence seized from the search of the property and the [petitioner's] statements to the police. The trial court concluded that the [petitioner] had failed to establish that he had a subjective expectation of privacy in the property. The court also found that the police possessed a reasonable and articulable suspicion sufficient to justify stopping the [petitioner's] van after he entered and quickly exited the driveway. Lastly, the trial court concluded that the officers had probable cause to arrest the [petitioner]. The [petitioner] then entered a conditional plea of nolo contendere.

"The [petitioner] appealed to the Appellate Court from the judgment of conviction, claiming that the trial court's

denial of his motion to suppress was improper because (1) he had a reasonable expectation of privacy in the area searched, including the home and the area surrounding it, (2) his fourth amendment rights were violated by the warrantless search conducted by the . . . task force, [and] (3) the police lacked a reasonable and articulable suspicion to conduct a motor vehicle stop of the van operated by the [petitioner], and his resulting arrest was unsupported by probable cause . . . . The Appellate Court rejected all of these claims. . . .

"Specifically, the Appellate Court concluded that the [petitioner's] first two claims failed because he lacked a reasonable expectation of privacy. . . . The Appellate Court determined that the [petitioner] failed to establish his subjective expectation of privacy because he did not sufficiently develop his personal relationship with the property at the suppression hearing. . . . The [petitioner] argued that he was a cooccupant of the property and cited three facts to support this contention: (1) he leased the property to Phravixay for less than his monthly mortgage payment; (2) he received and stored items on the premises; and (3) he received some mail at the property. . . .

"The Appellate Court determined that the fact that Phravixay's rent was less than the [petitioner's] mortgage established nothing about the manner in which he retained rights to use the property, or if he retained them at all. . . . Moreover, although the [petitioner] claimed that he received and stored property on the premises, he identified only a single item of his at the property—an aeration system addressed to him at his Danbury residence. . . . The court did not find that the presence of a single piece of property established that the [petitioner] was a cotenant. . . . Finally, the Appellate Court concluded that the presence of some mail . . . did not establish that the [petitioner] lived at the property or otherwise was there frequently. . . .

"The Appellate Court also concluded that the police possessed a reasonable and articulable suspicion that the [petitioner] had engaged in criminal conduct. . . . The Appellate Court determined that, on the basis of the totality of the circumstances, including the spatial and temporal link between the *Terry* [v. *Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] stop and the investigation of the felony in progress (the marijuana grow operation), as well as the [petitioner's] act of entering and quickly leaving the property, the police were justified in stopping the [petitioner]. . . . The Appellate Court also determined that the police had probable cause to arrest the [petitioner] after they observed lumber and irrigation piping in the van similar to the materials being used to construct the greenhouse, demonstrating a probable connection between the [petitioner] and the marijuana operation at the property. . . .

"The [petitioner] appealed to [our Supreme Court] from the judgment of the Appellate Court, and [our Supreme Court] granted certification on the following issues: (1) Did the Appellate Court properly determine that the [petitioner] did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search? . . . (2) If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant's confession—the fruits of one or more preceding illegalities? . . . (3) If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting confession was lawfully obtained? . . . [Our Supreme Court answered] the first question in the affirmative, [did not] reach the second question, and [answered] the third question in the affirmative. [Our

Supreme Court thus affirmed] the judgment of the Appellate Court." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Houghtaling*, 326 Conn. 330, 333–39, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). In concluding that this court properly determined that the petitioner did not have standing, our Supreme Court held that the petitioner failed to establish a subjective expectation of privacy because he did not present sufficient evidence detailing his connection to the property or the marijuana grow operation that took place on the property. See id., 352.

On October 24, 2017, the petitioner filed a petition for a writ of habeas corpus alleging ineffective assistance of trial counsel, Alan Sobol. On September 4, 2018, after a trial that took place over the course of three days, the habeas court denied the petition. The habeas court concluded that the petitioner failed to prove that trial counsel rendered deficient performance as alleged and that, even if the court presumed deficient performance, the petitioner failed to prove that he was prejudiced by counsel's deficient performance. Following the ruling of the habeas court, the petitioner filed a petition for certification to appeal, which was granted by the habeas court. This appeal followed.

I

The petitioner claims that Sobol rendered deficient performance when he litigated the petitioner's motion to suppress by (1) failing to inform the petitioner of his right to testify, (2) limiting the evidence presented regarding the petitioner's standing to challenge the constitutionality of the search, (3) utilizing a three-pronged approach that was not a reasonable strategic basis for his decisions, and (4) relying on *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), in lieu of *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.

2d 576 (1967), in the petitioner's memorandum in support of the motion to suppress. The petitioner also contends that he was prejudiced by trial counsel's alleged deficient performance because, but for Sobol's failure to establish that the petitioner had standing to raise a fourth amendment claim, the petitioner's motion to suppress would have been successful.

We begin our discussion by setting forth guiding principles of law as well as our standard of review, which are well settled. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and 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)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires

the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 829–31, 234 A.3d 78, cert. granted, 335 Conn. 931, 236 A.3d 218 (2020).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . Nevertheless, [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 679, 51 A.3d 948 (2012).

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are

usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Internal quotation marks omitted.) Id., 681.

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019). The United States Supreme Court has cautioned that a reviewing court, in considering whether an attorney's performance fell below a constitutionally acceptable level of competence pursuant to the standards set forth herein, must "properly apply the strong presumption of competence that *Strickland* mandates" and is "required not simply to give [trial counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons [that counsel] may have had for proceeding as they did . . . ." (Citation omitted; internal quotation marks omitted.) *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). This strong presumption of professional competence extends to counsel's investigative efforts; see *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 698, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); as well as to choices made by counsel regarding what defense

strategy to pursue. See *Veal* v. *Warden*, 28 Conn. App. 425, 434, 611 A.2d 911, cert. denied, 224 Conn. 902, 615 A.2d 1046 (1992). With the foregoing legal principles in mind, we turn to the petitioner's arguments in support of his claim of ineffective assistance of counsel.

A

The petitioner's first contention is that Sobol rendered deficient performance by failing to inform the petitioner of his right to testify at the suppression hearing. The respondent, the Commissioner of Correction, argues, to the contrary, that Sobol discussed the issue of testifying with the petitioner. The respondent contends that Sobol advised the petitioner that the state might respond to his potential testimony by calling Phravixay, which was a result that the petitioner wanted to avoid because he and his wife feared retribution from Phravixay.

"It is the responsibility of trial counsel to advise a defendant of the defendant's right to testify and to ensure that the right is protected. . . . The decision of whether to testify on one's own behalf, however, ultimately is to be made by the criminal defendant." (Citation omitted; internal quotation marks omitted.) *Victor C.* v. *Commissioner of Correction*, 179 Conn. App. 706, 715, 180 A.3d 969 (2018). "A defendant is entitled to decide whether to testify in his or her own case and is further entitled to have advice from counsel concerning that decision. . . . Counsel's duty to advise includes the duty to keep the defendant informed of all developments in the case material to the defendant's decision to testify. . . . Deciding whether to testify on one's own behalf is often among the most difficult choices a criminal defendant must make during trial. Testifying can present a risky and difficult ordeal for a defendant. Defense counsel therefore must keep the defendant apprised of all material information known to counsel

in order to help the defendant in making that decision." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 329 Conn. 726, 740, 189 A.3d 1173 (2018).

The record reveals the following relevant facts. At the habeas trial, Sobol testified that he specifically discussed with the petitioner what could occur at the suppression hearing if the petitioner chose to testify. Sobol testified that he told the petitioner that the state likely would call Phravixay to rebut the petitioner's testimony and also would try to implicate the petitioner along with William Eichen, the petitioner's brother-in-law, in the marijuana grow operation. Later in the hearing, Sobol stated that the petitioner told him that he did not want to testify. Sobol also stated that he had informed the petitioner that he agreed with the petitioner's decision because he believed that it would be more harmful than helpful to the petitioner. Sobol testified that he based his decision on the scant information provided to him by the petitioner, along with the petitioner's communication that he spent all of his time in Danbury.

At the habeas hearing on April 27, 2018, habeas counsel and Sobol engaged in the following colloquy: "[The Petitioner's Habeas Counsel]: Did you advise [the petitioner] that he could testify at the hearing on the motion to suppress and that his testimony could not be used against him by the state at any subsequent criminal trial in their case-in-chief?

"[The Witness]: No.

"[The Petitioner's Habeas Counsel]: Why?

"[The Witness]: Because that conversation would have been premature, that's the right verbiage, because he was quite explicit in instructing us not to call him as a witness, that he did not want to testify for a multitude of reasons, primarily, primarily of which was the

concern that were he to testify, it would in all likelihood have brought Mr. Phravixay into the case as a rebuttal witness, and he was concerned about his fears for him and his family, and also Mr. Phravixay's testimony would have further implicated Mr. Eichen, his brother-in-law, and so I never—I did not get into the hypothetical of you're telling me you don't want to testify, and I'm also telling you that if you do testify, in my opinion, as I testified the last time I was here, that in all likelihood, Mr. Phravixay would testify, and he said I'm not testifying. I don't want to testify. Don't call me. So I did not get into the hypothetical question, well, you're instructing me not to call you. You don't want to testify, but by the way—not by the way—but on the other hand, if you change your mind or down the road you decide to testify, this, that or the other, I did not get into a [*Simmons* v. *United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)] discussion, nor get into the derivative use of his testimony because he was explicit in saying, I don't want to testify. Do not call me. That's why."[2]

In contrast to Sobol's testimony, the petitioner testified that Sobol discussed the use of his testimony on one occasion during which Sobol told him that he never places his clients on the stand to testify. The petitioner's sister, Holly Eichen, also testified that Sobol stated to her that he would never place his clients on the stand.

In its memorandum of decision, the habeas court rejected the petitioner's claim that he was advised not to testify at the hearing on the motion to suppress, finding that Sobol's testimony on this issue was credible, whereas the testimony of the petitioner and his sister was not.

[2] The United States Supreme Court in *Simmons* v. *United States*, supra, 390 U.S. 394, held that "when a defendant testifies in support of a motion to suppress evidence on [f]ourth [a]mendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."

We will not disturb a habeas court's factual finding that turns on its evaluation of the credibility of witnesses. See *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 279, 149 A.3d 185 (2016) ("[a] reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude" (internal quotation marks omitted)), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). Thus, upon review of the record, we conclude that the petitioner has not met his burden of showing that Sobol performed deficiently when advising the petitioner regarding whether he should testify at the suppression hearing.

B

The petitioner's next contention is that Sobol's strategy to limit "standing evidence on the theory that the judge might punish the petitioner for filing a motion to suppress" was unreasonable. Citing to *State* v. *Revelo*, 256 Conn. 494, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001), the petitioner argues that the basis for Sobol's strategic decision previously has been rejected by our Supreme Court, which held that a court may not penalize an accused for exercising a statutory or constitutional right by increasing his or her sentence solely because of that election. Specifically, the petitioner points to evidence that could have been introduced via Phravixay to establish that the petitioner had a sufficient expectation of privacy on the property to give him standing to pursue the motion to suppress.

The record reveals the following relevant facts. At the habeas trial, Sobol testified that presenting evidence to support the petitioner's claim that he had standing to raise a fourth amendment claim via Phravixay's testimony could have resulted in the judge not accepting a

conditional nolo contendere plea and may have negatively impacted the petitioner at sentencing if the judge were to credit Phravixay's testimony. He testified that if the petitioner did not prevail on every single issue on the motion to suppress, he could not, "unring the bell." Sobol also testified that "I did everything I could to preserve the five [years] after four [years served sentence] when [the state's attorney assigned to the petitioner's criminal case, Matthew Crockett] said if you do the motion to suppress, it's seven [years] after six [years] I think." Sobol further testified that the petitioner communicated on multiple occasions that he did not want Phravixay to testify.

Crockett testified at the habeas trial that, if the petitioner had testified to the ownership of the contraband and his involvement in the marijuana grow operation, he may have called witnesses to rebut or to impeach the petitioner. Crockett testified that he would not have sought higher punishment for the petitioner if, in connection with the motion to suppress, the petitioner had taken responsibility for the ownership of the marijuana and his involvement in the grow operation at the time of the motion to suppress.

The habeas court, in its memorandum of decision, concluded that the petitioner had failed to establish that Sobol's performance in failing to call Phravixay as a witness fell below an objective standard of reasonableness or created a reasonable probability that the outcome of the motion to suppress would have been different.[3]

[3] The court also concluded that the petitioner failed to present evidence as to what Phravixay would have testified to had he been called to testify at the suppression hearing. The petitioner argues that there was such evidence in the form of exhibit 13, a draft proffer prepared by Phravixay's attorney, which had been admitted as a full exhibit at the habeas trial. For a number of reasons, the court chose not to give any weight to that exhibit. See part II of this opinion. Consequently, on the basis of our review of the court's decision in its entirety, the court's conclusion that the petitioner had failed to present any persuasive evidence with respect to the potential testimony of Phravixay is not in error.

Our Supreme Court in *State* v. *Revelo*, supra, 256 Conn. 496, addressed the issue of whether the due process rights of a defendant were violated when the trial court (1) offered to sentence the defendant to eight years imprisonment for the defendant's plea of guilty in connection with the defendant's sale of narcotics, (2) withdrew the offer upon learning that the defendant wanted to exercise his right to a judicial determination of his then pending motion to suppress, (3) informed the defendant that he would receive a sentence of nine years of imprisonment if he decided to plead guilty in the event that his motion to suppress was denied, and (4) imposed a nine year sentence following the defendant's conditional plea of nolo contendere, which the defendant had entered as a result of the denial of his motion to suppress.

In *Revelo*, the defendant contended that the trial court improperly penalized him for exercising his right to a judicial determination of his motion to suppress by increasing the terms of the plea bargain from eight to nine years solely because of his decision to exercise that right. Id., 508. The court held that, "[a]lthough a court may deny leniency to an accused who, like the defendant, elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election." Id., 513. The court further held that, "[a]lthough the distinction between refusing to show leniency to an accused who insists on asserting a constitutional right and punishing an accused for asserting that right may, at times, be a fine one, there is no difficulty in discerning what occurred in this case: the trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress." Id., 513–14. The court went on to state: "Moreover, it would not have been improper for the court, upon learn-

ing of the defendant's decision to reject that offer, to inform the defendant of the potential for a greater sentence in the event his motion was denied. In such circumstances, however, it also would be incumbent upon the court to explain why a greater sentence might be appropriate . . . to dispel any suggestion that the court was prepared to punish the defendant merely for exercising his right to a judicial determination of his motion. Indeed, the failure of the trial court in this case to provide such an explanation is a critical factor in our conclusion that the court overstepped its constitutional bounds by adding one year to the defendant's sentence." (Citation omitted.) Id., 516.

In a footnote, however, the court noted that "the *prosecutor* would not have been barred from threatening to *recommend* a greater sentence in the event the defendant refused to plead guilty prior to obtaining a ruling on his motion to suppress. Moreover, if the prosecutor had taken that position, we see no reason why the court would have been prohibited from informing the defendant of the possibility of a greater sentence if he pressed and lost his motion to suppress because, in that event, the prosecutor's hand would be strengthened considerably, and, in addition, the defendant arguably would be entitled to less consideration for his plea than if he had chosen to accept responsibility for the offense at an earlier stage of the proceedings." (Emphasis in original.) Id., 515 n.28.

In the present case, the petitioner's reliance on *Revelo* is misplaced. The petitioner misunderstands Sobol's concerns about calling Phravixay to establish the petitioner's involvement with the marijuana grow operation. Although such evidence may have been of assistance in establishing the petitioner's standing to pursue the motion to suppress, it also could have had the effect of further implicating the petitioner in the crime. This

is the bell that Sobol noted could not be unrung. Certainly, the state and the court could have taken into account the petitioner's culpability in the grow operation in fashioning any plea offer. It was reasonable for Sobol to be concerned about the eventual outcome of the case as he decided how to balance proving the petitioner's standing to raise the motion to suppress while, at the same time, limiting the evidence that proved the petitioner's active involvement in the grow operation. In addition, Sobol testified repeatedly, and the habeas court found such testimony credible, that the petitioner was insistent that Phravixay not be called as a witness at the suppression hearing. Under these circumstances, the habeas court properly concluded that the petitioner did not establish that Sobol's performance, in deciding not to present the testimony of Phravixay, fell below an objective standard of reasonableness.

C

The petitioner also argues more generally that Sobol's asserted justifications for his approach to the suppression hearing were not reasonable. Specifically, the petitioner argues that minimizing the petitioner's involvement in the property was antithetical to the motion to suppress, Sobol did not have any reason to fear antagonizing Phravixay, and his concern about potentially implicating Eichen in the crime was unreasonable.

The following additional facts are relevant to the petitioner's arguments. At the habeas trial, Sobol testified that his theory of defense was based on a three-pronged approach. The first prong addressed the facts of the case that suggested the petitioner's presence on the property and involvement with the grow operation was thin. The second prong sought to avoid the involvement of Phravixay in the case. The third prong sought

to avoid the potential criminal implication of Eichen in the case. Sobol testified that the petitioner told him that he was on the property only occasionally, that Phravixay posed significant safety concerns for the petitioner and his wife, and that he desired to avoid implicating Eichen, his brother-in-law, in the case. Sobol also testified that the ultimate strategy was to approach the motion to suppress via direct examination or cross-examination of witnesses whose testimony would not trigger the involvement of Phravixay and Eichen.

We first address the petitioner's contention that minimizing his involvement in the property was not a reasonable strategy as it was antithetical to establishing the petitioner's standing to pursue the motion to suppress. Our review of the record does not support the petitioner's contention. During the habeas trial, Sobol testified that his conclusion that the petitioner had limited involvement with the property was based on what the petitioner told him. Sobol stated that it was undisputed that the petitioner was the owner of the property and, in essence, had yielded dominion and control of the property to Phravixay. In particular, Sobol testified that the petitioner communicated that he did not sleep or live at the property, he rarely was at the property because of his business in Danbury and New Milford, he rented the property to Phravixay, who compensated the petitioner with cocaine and marijuana, and he was not engaged in a joint venture of growing marijuana on a large scale on the property. Additionally, the habeas court concluded that the record contained no persuasive evidence that the petitioner resided at the property, and that Sobol strove to prevail on the standing issue in spite of the information the petitioner gave him.

The record demonstrates that Sobol's decision to minimize the petitioner's involvement in the property was reasonably based on the evidence available to Sobol at the time of the motion to suppress, which included the

petitioner's own statements that he had little to do with the property. Thus, Sobol had to pursue a strategy that was consistent with the petitioner's limited involvement with the property because that was the information the petitioner gave to Sobol. Although that information may have made it more difficult for the petitioner to establish standing to pursue the motion to suppress, any such difficulty is attributable to the petitioner and not to Sobol. See *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681 (counsel entitled to rely on information provided to him by petitioner).

Next, the petitioner contends that Sobol's decision not to call Phravixay as a witness at the suppression hearing, on the basis that the petitioner feared Phravixay, was not a reasonable strategic decision. The respondent contends that Sobol testified that the petitioner was clear about his desire to not have Phravixay testify. The respondent also contends that Phravixay's testimony could have implicated the petitioner in the marijuana grow operation and also could have implicated the assets of the petitioner and his family. We agree with the respondent.

At the habeas trial, Sobol testified that his decision to avoid antagonizing Phravixay was based on the petitioner telling him that Phravixay was a dangerous gang member, who posed significant safety concerns for the petitioner and his wife. Sobol also testified that he was concerned that Phravixay would implicate the petitioner in the marijuana grow operation and would, thus, negatively affect the petitioner's plea negotiations.

The petitioner testified that he lied to Sobol about his belief concerning Phravixay's criminal affiliations and his concerns about the safety of himself and his family. The petitioner also stated that he did not instruct Sobol to avoid involving Phravixay in the matter. The

habeas court, however, did not credit the petitioner's testimony. By contrast, the court found Sobol to be credible.

Considering all of the circumstances from Sobol's perspective at that time, the petitioner has not shown that Sobol's strategy to avoid triggering the involvement of Phravixay was unreasonable. Sobol was concerned that the trial court may have imposed a sentence that was harsher than the terms of the plea bargain on the basis of Phravixay's potentially adverse testimony, and the habeas court credited Sobol's testimony that the petitioner had instructed him not to call Phravixay to testify. As noted previously in this opinion, counsel properly may rely "on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]." *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681. Thus, we conclude that Sobol's decision to avoid involving Phravixay in the case did not fall below an objective standard of reasonableness.

The petitioner's third contention is that the perceived threat that Eichen would be arrested was not a viable consideration because Sobol's duty of loyalty was to the petitioner, and Sobol should have known the timing and effect of a nolle prosequi, which Crockett had entered as to the charges against Eichen. The respondent contends that the habeas court found that Eichen faced possible, ongoing exposure under federal drug laws at the time of the suppression hearing. The respondent also contends that Sobol testified that he was instructed by the petitioner to not implicate Eichen.

In the present case, the petitioner has not met his burden of proving that Sobol's trial strategy in seeking to avoid implicating Eichen constituted deficient performance. As the habeas court noted, at the time of the hearing on the motion to suppress, the federal statutes of limitations relating to Eichen's arrest had not expired.

Moreover, Sobol testified repeatedly about the petitioner's communicated desire to not implicate Eichen in the case. The petitioner, here, has not overcome the presumption that Sobol's strategic decision to avoid implicating Eichen was reasonable given the petitioner's firm conviction not to implicate his brother-in-law.

In sum, we conclude that the petitioner failed to establish that Sobol's approach to the case, and in particular to the suppression hearing, was deficient given the information available to him and the demands made on him by the petitioner.

D

The petitioner also contends that trial counsel's failure to cite to *Katz* v. *United States*, supra, 389 U.S. 347, in his memorandum in support of the petitioner's motion to suppress was objectively unreasonable and constitutes deficient performance. The petitioner argues that Sobol instead incorrectly relied on *Baker* v. *Carr*, supra, 369 U.S. 186, to support the motion to suppress. The petitioner argues that doing so was improper because *Baker* concerned standing to contest the constitutionality of a statute, whereas *Katz* specifically addressed standing to contest a search. In response, the respondent contends that Sobol, in fact, did cite to *Katz* for the proposition that warrantless searches almost always are unreasonable. The respondent further argues that Sobol relied on the standing principles in *Katz*, even though he did not mention *Katz* when doing so.

In its memorandum of decision, the habeas court concluded that *Baker* v. *Carr*, supra, 369 U.S. 186, sufficiently supported Sobol's arguments and that the petitioner failed to show how reliance on *Katz* v. *United States*, supra, 389 U.S. 347, would have resulted in the criminal trial court concluding that he had standing. The habeas court also concluded that the fact that Sobol relied on *Baker*, instead of *Katz*, is not much of a basis

for a claim of deficient performance, when Sobol's strategy was informed by the facts of the case and the information given to him by the petitioner.

We agree with the habeas court that Sobol's briefing of the standing issue was not deficient. The following additional facts from the record are pertinent to the resolution of the petitioner's argument. In the petitioner's memorandum in support of his motion to suppress the evidence before the trial court, the petitioner argued that the warrantless search of his property violated the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution. Specifically, the petitioner argued that the warrantless search of his property violated his constitutional rights because it did not fall under any exceptions to the warrant requirement, and the exclusionary rule mandates the suppression of evidence that was illegally obtained. The petitioner contended that (1) the area searched constituted a curtilage, as opposed to an open field where an individual may not legitimately expect privacy for activities conducted in the open field, (2) warrantless searches of property that are conducted subsequent to a warrantless aerial surveillance are not necessarily reasonable, (3) the plain view doctrine does not apply to warrantless searches, (4) no exigent circumstances were present, (5) the initial stop of the petitioner's vehicle was an invalid *Terry* stop, (6) even if law enforcement conducted a valid stop of the petitioner's vehicle, their conduct exceeded the scope of a proper stop, (7) any consent to search the premises was the result of law enforcement's illegal police conduct, and (8) the petitioner had standing to challenge the statements and the consent to search given by Phravixay.

In contending that he had standing to challenge the consent to search provided by Phravixay, the petitioner,

in his memorandum in support of his motion to suppress, cited to *Baker*, in support of his argument that he had a personal stake in the ruling on the motion to suppress due to his interest in avoiding conviction. See *Baker* v. *Carr*, supra, 369 U.S. 204. The petitioner also cited to *State* v. *Mitchell*, 56 Conn. App. 561, 565, 744 A.2d 927, cert. denied, 253 Conn. 910, 754 A.2d 162 (2000), for this court's reliance on the holding in *United States* v. *Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), namely, that a defendant must first establish a reasonable expectation of privacy in the premises before he may assert that his fourth amendment rights have been violated by improper intrusion into those premises.

The memorandum also addressed specifically why the petitioner had a legitimate expectation of privacy in the property. In particular, Sobol relied on the principles set forth in *Katz* v. *United States*, supra, 389 U.S. 347, in contending that the area searched constitutes a curtilage and that the petitioner had an expectation of privacy in that area. See *State* v. *Davis*, 283 Conn. 280, 324, 929 A.2d 278 (2007) ("the [reasonable expectation of privacy] test offers no exact template that can be mechanically imposed upon a set of facts to determine whether . . . standing is warranted" (internal quotation marks omitted)). In *Katz*, the Supreme Court set forth the following test to establish standing: "(1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Jacques*, 332 Conn. 271, 279, 210 A.3d 533 (2019). Consistent with this test, Sobol argued that the area

searched constituted a curtilage because it was located immediately behind the residence and was enclosed by a fence, the area was enclosed by dense trees and foliage, the area lent itself to use for intimate activities such as swimming and gardening, and the area was fully protected from public view. Sobol also argued that the petitioner had an expectation of privacy with respect to the area, despite having Phravixay on the property as a tenant, because the petitioner owned and had a possessory interest in the property that he had not relinquished.

Moreover, the record shows that Sobol testified that his options for addressing the standing issue were limited by the lack of credible evidence of the petitioner's presence on the property. In line with his testimony, and the information the petitioner had provided to him, Sobol, in the memorandum in support of the petitioner's motion to suppress, needed to find an alternative to relying on specific evidence of the petitioner's use of the property to show the existence of a reasonable expectation of privacy in the area searched. Consequently, he argued that the petitioner had a legitimate expectation of privacy in the area searched because the property was a curtilage and because the petitioner owned and had a possessory interest in the property. See id., 287 ("We recognize that property law concepts do not necessarily control our fourth amendment inquiry. They are, however, clearly a factor to be considered." (Internal quotation marks omitted.)).

In the present case, the habeas court concluded, and the record supports, that Sobol's strategy was informed by the facts of the case and the information given to him by the petitioner. "Indeed, we recognize that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give

[the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [they] did . . . .'' (Internal quotation marks omitted.) *Robert S.* v. *Commissioner of Correction*, 194 Conn. App. 382, 393, 221 A.3d 493 (2019), cert. denied, 334 Conn. 913, 221 A.3d 446 (2020). Therefore, in considering the record, we agree with the habeas court that Sobol's failure to discuss *Katz* v. *United States*, supra, 389 U.S. 347, in detail, in support of the petitioner's motion to suppress, did not constitute deficient performance.

For the reasons set forth herein, we conclude that the habeas court properly concluded that the petitioner failed to prove that Sobol rendered deficient performance in litigating the petitioner's motion to suppress.[4]

[4] In his principal brief, the petitioner argues that he was prejudiced by Sobol's deficient performance because there was evidence in the form of mail delivered to the petitioner at the property and an agreement he entered into when purchasing the property for the purchase of the furnishings located at the property, that would have established that the petitioner had a reasonable expectation of privacy at the property. None of the documents to which the petitioner refers was offered at the suppression hearing, although they were admitted into evidence at the habeas trial. Nevertheless, the petitioner made no argument in his principal brief that Sobol performed deficiently by not offering this mail or the furnishings agreement into evidence at the suppression hearing. In his reply brief, the petitioner for the first time argues that Sobol performed deficiently by failing to conduct an adequate investigation, including asking the petitioner about "the volume and character of mail he received" at the property.

At oral argument before this court, the petitioner's appellate counsel argued that the petitioner, in the appeal, properly raised a claim of failure to investigate. The petitioner's appellate counsel cited to the petitioner's petition for a writ of habeas corpus and also argued that the principal brief raises the claim, despite not directly identifying the claim as one involving a failure to investigate. We disagree. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal

II

Next, the petitioner claims that the habeas court deprived him of his state and federal constitutional rights to due process of law[5] and committed plain error when, without notice or opportunity to be heard, the habeas court changed a full exhibit admitted at the habeas trial without limitation to one admitted only for a limited purpose. We disagree.

The following additional facts are necessary to the resolution of this claim. At the February 26, 2018 habeas trial, petitioner's exhibit 13 was marked as a full exhibit without objection. The exhibit consists of a fax cover sheet, attached to which is a document entitled "Second Draft of Proffer by Thomas Phravixay for Discussion Purposes Only." The document, drafted by Phravixay's attorney before the petitioner pleaded guilty, set forth a proposed statement that Phravixay might be willing to make regarding, inter alia, the petitioner's involvement in the marijuana grow operation. At the habeas trial, Sobol testified that exhibit 13 was given to him upon request from Attorney Christian Sarantopoulos, who had been the petitioner's previous criminal trial

quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("[c]laims are also inadequately briefed when they are raised for the first time in a reply brief . . . or consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record" (citation omitted; internal quotation marks omitted)). Accordingly, this court will not review the claims that the petitioner raises for the first time in his reply brief and that were not presented properly to this court in his principal brief.

[5] "The defendant has not specifically identified his claim as falling under either the federal or state constitution. Because he does not claim that the state constitution provides greater protection in this regard than does the federal constitution, and because he has not presented a separate and adequate analysis under the state constitution . . . we regard his claim as being presented under the federal due process clause as applied to the state through the due process clause of the fourteenth amendment." (Citation omitted.) *State* v. *Rizzo*, 266 Conn. 171, 243 n.40, 833 A.2d 363 (2003).

attorney. Sobol testified that the draft proffer stated the opposite of what the petitioner had communicated to counsel with regard to his presence on the property, his role in the marijuana grow operation, and his fear of Phravixay.[6] Sobol further testified that the draft proffer was unsigned, and he was unable to testify as to whether the draft proffer was sworn to under oath.

At the trial before the habeas court, Attorney Brian Woolf, who represented Phravixay in relation to the criminal charges arising out of his arrest at the property, testified that he had drafted the proffer to provide information to the assistant state's attorney, Crockett, in anticipation that, if the draft proffer was accepted, Phravixay might testify at a trial of the petitioner. Asserting the attorney-client privilege, Woolf declined to testify as to whether the draft proffer was a rendition of the information that Phravixay had provided to him. Habeas counsel, asserting that Phravixay's attorney-client privilege had been waived, requested that the habeas court order Woolf to answer whether the draft proffer was a rendition of the information that Phravixay had provided to him. Habeas counsel sought to utilize Woolf's testimony, among additional purposes, to show the effect of the draft proffer's statements on the listener, in particular, Sobol. The habeas court sustained the objection to habeas counsel's inquiry, stating: "You're lucky you got this in as a full exhibit. Objection sustained. Move on." Woolf later testified that he did not independently verify anything with respect to the draft proffer, but that it was his general practice to verify the information of a proffer prior to finalizing the document.

[6] During closing arguments at the habeas trial, the petitioner's counsel argued that the information in the proffer showed that the petitioner had more significant ties to the property than what Sobol presented during the suppression hearing. Thus, the petitioner argued, the proffer supported the petitioner's claim that Sobol performed deficiently by not calling Phravixay to testify at the suppression hearing.

The habeas court made several remarks as to the weight of the draft proffer. The habeas court noted that the draft proffer was not signed, stamped or sworn to. The habeas court also stated that "[exhibit 13] may be a full exhibit, but it's the emptiest full exhibit I think I've ever seen." In response to habeas counsel's inquiry to Sobol about the information contained in the proffer, the habeas court stated: "Have I made myself unclear? To paraphrase the late John Nance Garner, it's not worth a warm bucket of spit. It has no provenance."

In its memorandum of decision, the habeas court stated the following regarding the draft proffer: "Attorney Brian Woolf testified on April 27, 2018, that he had represented Mr. Phravixay in the drug case. He prepared a proffer for the purposes of negotiations with the state's attorney. Petitioner's exhibit 13. The proffer was unsigned and unsworn. It was not in Mr. Phravixay's own words and the contents were not verified by Woolf. This proffer, premarked by both parties, was only allowed to remain in this trial as an exhibit to show its effect upon Sobol, not for the truth of its contents. If Mr. Phravixay had waived his fifth amendment rights and if he had testified according to the proffer's contents, then it would have been helpful to the petitioner's claim of standing. Those are two big 'ifs.' Sobol testified that in the proffer Phravixay did not claim that the petitioner had exclusive control of the property. Although his federal fifth amendment rights had expired, Phravixay was not produced at the habeas trial and the petitioner has failed completely to prove whathe would have said at the motion to suppress [hearing]. Here, if anything, petitioner's exhibit 13 may explain why the petitioner was so anxious to keep Mr. Phravixay off the stand at the motion to suppress hearing since the proffer describes an extensive marijuana cultivation business ongoing since 2003 involving the petitioner's legitimate business location, his sister's house, and even

his mother's property in New Milford. And one never knows what an incarcerated coconspirator will choose to say about his free coconspirator after that person had asked him to take 'the weight.' "

The petitioner, here, argues that exhibit 13 was admitted as a full exhibit without any objection, the petitioner was not given proper notice or opportunity to object prior to the habeas court's characterization of the exhibit in its memorandum of decision as a limited purpose exhibit, the habeas court's characterization of the exhibit as a limited purpose exhibit was a violation of due process, and it constitutes plain error.

A review of the record reflects that the habeas court erroneously stated in its memorandum of decision that exhibit 13 was admitted for the limited purpose of showing its effect upon Sobol. At the February 26, 2018 hearing before the habeas court, exhibit 13 was marked as a full exhibit without objection and, therefore, exhibit 13 was evidence in the case for all purposes. See *Hoffkins* v. *Hart-D'Amato*, 187 Conn. App. 227, 237, 201 A.3d 1053 (2019) ("[w]hen [a]n exhibit [is] offered and received as a full exhibit [it] is in the case for all purposes . . . and is usable as proof to the extent of the rational persuasive power it may have" (internal quotation marks omitted)). Nevertheless, it is the function of the habeas court, as the trier of fact, "to consider, sift, and weigh all the evidence . . . ." (Internal quotation marks omitted.) *State* v. *Campbell*, 169 Conn. App. 156, 165, 149 A.3d 1007, cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016).

"Whether a party was deprived of his due process rights is a question of law to which appellate courts grant plenary review. . . . The core interests protected by procedural due process concern the opportunity to be heard at a meaningful time and in a meaningful manner." (Citation omitted.) *McFarline* v. *Mickens*, 177

Conn. App. 83, 100, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

"Fundamental tenets of due process require that all persons directly concerned in the result of an adjudication be given reasonable notice and opportunity to present their claims or defenses. . . . It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard. . . . It is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." (Citations omitted; internal quotation marks omitted.) *Urich* v. *Fish*, 58 Conn. App. 176, 181, 753 A.2d 372 (2000).

The petitioner argues that his right to due process was violated by the court's having limited, sua sponte, the use of exhibit 13 because it may have affected the petitioner's decision to not present additional evidence due to exhibit 13 being admitted as a full exhibit. The petitioner also contends that exhibit 13 was sufficient to establish that he had standing to challenge the search. We are not persuaded.

The petitioner's argument elevates form over substance. Having reviewed the record in this case, we conclude that it is clear that the habeas court gave the petitioner reasonable notice that, in its view, exhibit 13 lacked any probative value, and that it considered the weight of the exhibit as not being worth "a warm bucket of spit." Thus, the petitioner was on notice that he should not rely on exhibit 13 to prove any fact important to

his case. In fact, we find it significant that the court's comments about exhibit 13 having little or no evidentiary value took place during the first day of the habeas trial, February 26, 2018. The second and third days of the trial did not take place until April 27, 2018, and May 8, 2018. Consequently, the petitioner had more than two months to gather and present additional evidence after the court informed him that exhibit 13 "has no provenance." Thus, his claim on appeal that, had he known that the court was going to treat exhibit 13 as admitted for a limited purpose, he would have submitted additional evidence simply is not persuasive.

In addition, because the habeas court, as the trier of fact in this instance, is responsible for assessing the credibility and weight of the evidence; see *State* v. *Campbell*, supra, 169 Conn. App. 165; we conclude that the petitioner is unable to demonstrate that the habeas court's action deprived the petitioner of due process essentially by disagreeing with the petitioner as to exhibit 13's evidentiary value. The record reflects that the habeas court, in its memorandum of decision, made clear that it did not share the petitioner's view that exhibit 13 established the petitioner's standing to challenge the search of the property. The court, in its memorandum of decision, fully explained the many reasons that it found exhibit 13 to have little or no weight. The court's reasoning in this regard should have come as no surprise to the petitioner because it was consistent with the comments the court made about exhibit 13 during the trial. Therefore, we conclude that the habeas court did not violate the petitioner's due process rights by stating in its memorandum of decision that exhibit 13 was a limited purpose exhibit.

The petitioner also claims that the habeas court's characterization of exhibit 13 as a limited purpose exhibit constitutes plain error. "[T]he plain error doctrine . . . has been codified at Practice Book § 60-5,

which provides in relevant part that [t]he court may reverse or modify the decision of the trial court if it determines . . . that the decision is . . . erroneous in law. . . . The plain error doctrine is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . The plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Footnote omitted; internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 526, 911 A.2d 712 (2006).

We decline to invoke the plain error doctrine because we conclude that the habeas court's limited use of an exhibit that it found to be of little value, which was within its discretion as the trier of fact, did not affect the fairness or integrity of the proceedings, nor did it result in manifest injustice to the petitioner.

III

Finally, the petitioner claims that the habeas court erred when it sustained an objection to the admission of exhibit 7 for identification (exhibit 7) on hearsay grounds. The petitioner argues that the purpose of exhibit 7, which is a letter from the IRS to the petitioner that was addressed to the property searched by law enforcement, was to demonstrate that the petitioner believed that he was receiving sensitive financial documents at the property in a manner consistent with demonstrating that the petitioner had a reasonable expectation of privacy. The petitioner argues that the habeas

court's ruling was premised on an incorrect interpretation of the Connecticut Code of Evidence because the exhibit was offered to show that the petitioner exhibited a subjective expectation of privacy that society also recognizes as reasonable. The respondent argues that exhibit 7 is an out-of-court statement offered for the truth of the matter asserted because its significance lay in the truth of its contents and that the court properly exercised its discretion in not admitting it into evidence. In the alternative, the respondent argues that any error in excluding the exhibit was harmless. We agree with the petitioner that the habeas court erroneously excluded exhibit 7; however, we conclude that the error was harmless.

Before turning to the specific evidentiary claim raised by the petitioner, we first set forth our standard of review and other applicable law. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Milford Bank* v. *Phoenix Contracting Group, Inc.*, 143 Conn. App. 519, 532–33, 72 A.3d 55 (2013).

Because the petitioner claims that the trial court's decision to exclude the evidence was based on an incorrect interpretation of the Connecticut Code of Evidence, our standard of review is plenary.

"An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule." (Internal quotation marks omitted.) *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 478, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

"The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Citation omitted; internal quotation marks omitted.) *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989). "Because, however, the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial . . . courts have an obligation to ensure that a party's purported non-hearsay purpose is indeed a legitimate one. . . . Evidence is only admissible when it tends to establish a fact in issue or to corroborate other direct evidence in the case. . . . Accordingly, an out-of-court statement is admissible to prove the effect on the hearer only when it is relevant *for the specific, permissible purpose for which it is offered*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 574, 46 A.3d 126 (2012). "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010).

During the habeas trial, the petitioner offered exhibit 7 to show the type of mail that he had been receiving at the property. The petitioner argued to the court that he was not offering exhibit 7 for the truth of the matters contained in the letter from the IRS. The respondent objected on hearsay grounds. The court did not rule on the respondent's objection. The petitioner then offered exhibit 7 for a second time. On this occasion, the respondent objected on the grounds of hearsay and authenticity. The court sustained the hearsay objection and also ruled that exhibit 7 did not fall under the business records exception to the hearsay rule.

The record is clear that the petitioner offered exhibit 7 to demonstrate the type of mail that he received at the property, regardless of the truth of the matter asserted in the letter. The petitioner was not offering the exhibit to prove the facts asserted within the letter and, thus, the exhibit did not constitute hearsay. Accordingly, we conclude that the habeas court erroneously excluded exhibit 7 on hearsay grounds.[7]

Having concluded that the habeas court improperly excluded exhibit 7 on hearsay grounds, we turn to the question of whether the habeas court's decision constituted harmful error. "Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Internal quotation marks omitted.) *State* v. *Kelsey*, 93 Conn. App. 408, 415, 889 A.2d 855, cert. denied, 277 Conn. 928, 895 A.2d 800 (2006). "Under the current and long-standing state of the law in Connecticut, the burden to prove the harmfulness of [a nonconstitutional] improper evidentiary ruling is borne by the

[7] Because we conclude that the letter from the IRS constituted nonhearsay, we need not decide whether the habeas court erroneously ruled that the letter does not fall under the business records exception.

[petitioner]. The [petitioner] must show that it is more probable than not that the erroneous action of the court affected the result." (Internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 485, 797 A.2d 1101 (2002).

The petitioner, here, argued in his principal brief only that the habeas court's evidentiary ruling warrants reversal because the exclusion of exhibit 7 deprived the petitioner of the ability to demonstrate that he was receiving mail on a subject for which most people wish to exercise their right to privacy, which was the petitioner's inability to pay his taxes and his potential insolvency. In particular, the petitioner argued in that brief that exhibit 7 would have shown the character of the mail he received at the property in a compelling way that demonstrated his expectation of privacy at the property and, hence, his standing to pursue the motion to suppress. The petitioner made a much different argument regarding harm in his reply brief. In that brief, he argued for the first time that the "exclusion of [exhibit 7] impaired the petitioner's ability to prove that his trial attorney provided deficient representation and that the petitioner was harmed by it. . . . Exhibit 7 . . . was pertinent to the arguments that trial counsel did not properly research, investigate and prepare for the suppression [hearing]."

The respondent, in contrast, argues that the petitioner was not harmed by the habeas court's exclusion of exhibit 7 for the following three reasons. First, the respondent contends that the letter was cumulative of both the petitioner's testimony as to the volume and type of mail he received and of other exhibits admitted at the habeas trial. Second, the respondent argues that the petitioner testified without objection at the habeas trial that exhibit 7 was a letter he received at the property from the IRS concerning back taxes. Third, the respondent argues that it is unlikely that exhibit 7, if

admitted, would have convinced the habeas court that Sobol had rendered ineffective assistance in litigating the motion to suppress. We are not persuaded by either of the petitioner's arguments.

With respect to his argument in his principal brief, the petitioner's harm analysis is misguided. The question is not, as the petitioner posits, whether the admission of exhibit 7 at the suppression hearing would have established his standing to pursue the motion to suppress. The proper question is whether the habeas court's error in sustaining the objection to the admission of exhibit 7 likely affected the outcome of the *habeas trial*. Put another way, had exhibit 7 been admitted into evidence at the habeas trial would it likely have affected the court's conclusion as to either the *Strickland* deficient performance or prejudice prong? The petitioner's principal brief engages in no such analysis. Consequently, the petitioner, in his principal brief failed to identify any cognizable harm arising from the habeas court's erroneous evidentiary ruling.

The petitioner attempted to remedy this deficiency in his reply brief by arguing that the exclusion of exhibit 7 was harmful because it impaired his ability to prove that Sobol performed deficiently. As noted previously in this opinion though, the petitioner's principal brief in no way argued that Sobol's performance was deficient because he failed to conduct a sufficient investigation as to the type of mail the petitioner received at the property. See footnote 4 of this opinion. It is "a well established principle that arguments cannot be raised for the first time in a reply brief. . . . [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . Specifically with regard to evidentiary rulings, this court, on multiple occasions, has declined to review claims where the appellant fails to analyze harmful error in his or her principal brief."

(Citations omitted; internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106–107, 174 A.3d 197 (2017). Consequently, although we have considered the harm argument made by the petitioner in his principal brief, we decline to consider the new and different harm argument raised for the first time in his reply brief.[8]

Thus, in light of the record, and the single harm argument presented by the petitioner in his principal brief, we conclude that the petitioner has failed to meet his burden to prove that the exclusion of exhibit 7 harmed him in a way that makes it more probable than not that the decision of the habeas court would have been different.

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] We also note that the petitioner in his reply brief did little to address the respondent's arguments as to why the court's error was harmless. We agree with the respondent that exhibit 7 was cumulative of other exhibits admitted during the habeas trial, particularly financial correspondence from his bank. In addition, the petitioner testified without objection about receiving exhibit 7 at the property and described it as a communication from the IRS concerning back taxes. Furthermore, it is undisputed that the petitioner had not given exhibit 7 to Sobol prior to the suppression hearing. Although the petitioner claims he did not look for the letter at the time because Sobol failed to tell him such correspondence was important, the petitioner testified that Sobol communicated to him prior to the suppression hearing about the importance of mail located on the property. The habeas court noted in its memorandum of decision that the petitioner appeared to contradict his own testimony concerning Sobol's alleged ineffectiveness in communicating the importance of mail located on the property to the petitioner. Finally, the habeas court, after noting the cumulative nature of the mail located on the property, found that none of the petitioner's clothes, toiletries, or other personal items were found at the property. Even the one piece of the petitioner's personal property, an aeration system, found on the property was addressed to the petitioner's Danbury residence.

# TIMOTHY SOLEK *v.* COMMISSIONER OF CORRECTION (AC 43288)

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

*Syllabus*

The petitioner, who had been convicted of the crimes of murder and sexual assault in the second degree, sought a second writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance, and the habeas court rendered judgment dismissing the petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. This court declined to review the petitioner's claim that the habeas court improperly determined that he had not established good cause for the untimely filing of his second petition sufficient to rebut the statutory (§ 52-470) presumption of unwarranted delay: the petitioner raised for the first time in his reply brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal, rendering that claim unreviewable; moreover, even if the petitioner properly had raised that threshold issue, the petitioner failed to establish that the court abused its discretion in denying certification to appeal, the petitioner having failed to demonstrate that the court's conclusion that he had not demonstrated good cause for delay was debatable among jurists of reason, a court could resolve the issue differently or the questions raised deserved encouragement to proceed further; furthermore, the petitioner's argument that his severe mental health issues provided good cause for the delay was unreviewable because the record was inadequate to review such a claim, as the habeas court did not address the issue in its memorandum of decision and the petitioner did not filed a motion for articulation.
2. The petitioner's claims that the habeas court failed to provide him with a meaningful opportunity to investigate and to present evidence as to good cause for the delay in filing his petition was not reviewable on appeal: the petitioner's claim that the court failed to provide him with a meaningful opportunity to present evidence as to a plea offer was unreviewable because the petitioner failed to raise that evidentiary issue in his petition for certification to appeal; moreover, the petitioner's claim that the court failed to provide him with a meaningful opportunity to conduct an investigation regarding newly discovered evidence regarding the plea offer to support good cause for delay was outside the scope of appellate review, as the petitioner did not raise the issue at any time before the court, request additional time from the court in which to

conduct an investigation, or include this ground in his petition for certification to appeal, which also precluded review under *State* v. *Golding* (213 Conn. 233).

Argued January 4—officially released March 16, 2021

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

*Jonathan M. Sousa*, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

*Opinion*

DiPENTIMA, J. The petitioner, Timothy Solek, appeals from the judgment of the habeas court dismissing as untimely, pursuant to General Statutes § 52-470 (d) and (e), his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) improperly determined that he had not established good cause for the untimely filing sufficient to rebut the statutory presumption of unwarranted delay and (2) failed to provide him with a meaningful opportunity to investigate and to present evidence as to good cause for the delay in filing his petition. We dismiss the appeal.

The following facts and procedural history are relevant. In 1999, the petitioner was convicted, following a jury trial, of murder and sexual assault in the second degree. The petitioner was sentenced to a total effective term of fifty-five years of incarceration. His conviction

was affirmed on direct appeal. See *State* v. *Solek*, 66 Conn. App. 72, 91, 783 A.2d 1123, cert. denied, 258 Conn. 941, 786 A.2d 428 (2001). Thereafter, the petitioner filed his first habeas petition, alleging, inter alia, ineffective assistance of trial and appellate counsel. The habeas court, *Hon. William L. Hadden, Jr.*, judge trial referee, dismissed the petition, and this court affirmed that judgment on appeal. See *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 488, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

On June 21, 2018, the self-represented petitioner filed a second petition for a writ of habeas corpus, which is the subject of this appeal. In this petition, he alleged new claims of ineffective assistance of trial counsel. The respondent, the Commissioner of Correction, filed a motion for an order to show cause regarding whether the second petition should be dismissed as untimely pursuant to § 52-470 (d) and (e). Section 52-470 (d) provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following . . . (2) October 1, 2014 . . . ."

At the hearing held on the respondent's motion to show cause, the petitioner, then represented by counsel, was the sole witness. He testified to his reasons for the delay, which included reliance on inaccurate advice of his habeas appellate counsel and the effect his mental health had on his ability to promptly file a second petition. In a memorandum of decision, the court found that the second habeas action was commenced after October 1, 2014, thereby triggering the statutory presumption of delay without good cause. It then concluded that the petitioner failed to demonstrate

good cause to rebut the presumption of delay and dismissed the action. The petitioner filed a petition for certification to appeal, and the court denied the petition. This appeal followed.

I

The petitioner claims that the court erred in dismissing his petition for a writ of habeas corpus. Specifically, he argues that the court improperly concluded that no good cause existed to rebut the presumption of delay in the filing of his petition for a writ of habeas corpus. We decline to review this claim because the petitioner has not properly raised a threshold claim.

The following legal principles are relevant to our analysis. In order to obtain appellate review of the dismissal of his petition for a writ of habeas corpus when his petition for certification to appeal that dismissal was denied, the petitioner was required to satisfy the two part standard set forth by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted.) *Simms* v. *Warden*, supra, 230 Conn. 612. "To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Owens* v. *Commissioner of*

*Correction*, 63 Conn. App. 829, 831, 779 A.2d 165, cert. denied, 258 Conn. 905, 782 A.2d 138 (2001).

The respondent argues that the petitioner's claim is unreviewable because the petitioner failed to address in his main appellate brief the issue of whether the habeas court abused its discretion in denying certification to appeal. We agree.

In *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 504–505, 225 A.3d 977, cert. granted, 335 Conn. 925, 234 A.3d 980 (2020), this court declined to review the petitioner's claims seeking to reverse the judgment of the habeas court on the merits because the petitioner failed to satisfy the first prong of *Simms* v. *Warden*, supra, 229 Conn. 187, as a result of having "failed to brief the threshold question of whether the habeas court abused its discretion in denying his petition for certification to appeal." In the present case, the petitioner did not raise the issue of the denial of the certification to appeal until his reply brief. A claim that the habeas court abused its discretion in denying certification to appeal when raised for the first time in a reply brief is unreviewable. "The appellate courts of this state have often held that an appellant may not raise an issue for the first time in a reply brief. . . . An appellant's claim must be framed in the original brief so that it can be responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. . . . We decline to consider the argument concerning this matter in the petitioner's reply brief." (Citations omitted; internal quotation marks omitted.) *Niblack* v. *Commissioner of Correction*, 80 Conn. App. 292, 298, 834 A.2d 779 (2003), cert. denied, 267 Conn. 916, 841 A.2d 219 (2004); id. (declining to consider claim that habeas court abused its discretion in denying certification to appeal when raised for first time in reply brief); see also *Thorpe* v. *Commissioner of Correction*, 165 Conn. App. 731, 733, 140 A.3d 319 (petitioner cannot

obtain appellate review of claim raised for first time in reply brief that habeas court abused its discretion in denying certification to appeal), cert. denied, 323 Conn. 903, 150 A.3d 681 (2016).

Furthermore, even if the petitioner properly had raised the threshold issue, we nonetheless would conclude that the petitioner failed to establish that the court abused its discretion in denying certification to appeal. The petitioner's underlying claim concerns the good cause standard enumerated in § 52-470. See *Blake* v. *Commissioner of Correction*, 150 Conn. App. 692, 695, 91 A.3d 535 (examination of underlying merits necessary when determining if habeas court abused discretion in denying certification to appeal), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). "[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34, A.3d (2020), cert. granted, 336 Conn. 912, A.3d (2021). A decision of a habeas court regarding good cause under § 52-470 is reviewed for abuse of discretion. Id., 38.

The court determined that the petitioner had not demonstrated good cause for the delay because, even if it found credible the petitioner's testimony that counsel gave incorrect advice,[1] it was not credible that, within

[1] The petitioner testified at the show cause hearing that when he inquired as to his options if he did not prevail on appeal, his habeas appellate counsel responded that "because it's a habeas. Once you lost that, we do the appeals. If you lose that, that's your last chance." We do not agree that such advice, standing alone, is incorrect. Presumably, counsel giving such advice had reviewed the petitioner's case and pursued all issues he or she believed worthy. Consequently, it is not surprising that a diligent attorney would tell a petitioner that once his appeals were exhausted there would be nothing left to pursue in state court. Certainly, we would not expect counsel, who believed he or she had diligently represented the petitioner, to tell a disappointed petitioner that he could always sue the attorney himself or herself for ineffective assistance of counsel.

the six years between the giving of the advice sometime in 2008, and the deadline for filing his second petition on October 1, 2014, the petitioner would not have discovered that the advice was incorrect. The court further noted that the petitioner's filing of a federal civil rights action demonstrates that he had the ability to find information regarding legal remedies available to him. We defer to and are bound by the court's assessment of the petitioner's credibility. See *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741, 937 A.2d 656 (2007); see also *Coleman* v. *Commissioner of Correction*, 202 Conn. App. 563, 575, A.3d (2021). The petitioner has not demonstrated that the court's conclusion that he has not demonstrated good cause for delay is debatable among jurists of reason, that a court could resolve the issue differently or that the questions raised deserve encouragement to proceed further. See *Owens* v. *Commissioner of Correction*, supra, 63 Conn. App. 831.

Moreover, the petitioner's additional argument that his "severe mental health issues" provided good cause for the delay in filing his second habeas petition is unreviewable because the record is inadequate to review such a claim.[2] The court did not address this issue in its memorandum of decision, and the petitioner did not file a motion for articulation. Practice Book § 61-10 (b) provides in relevant part: "The failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal. . . ."

[2] The petitioner testified at the show cause hearing that he had been diagnosed with having bipolar disorder at an early age and that a death in his family, which had occurred during the pendency of his prior habeas action, exacerbated his mental health condition to the point of his being at risk for suicide. He stated that he sought mental health treatment and was prescribed various psychiatric medications. He attached to his second habeas petition a document from the Department of Correction health center dated July 3, 2014, which indicated that he also had been diagnosed with additional mental health concerns.

The commentary to § 61-10 states that "[t]he adoption of subsection (b) is not intended to preclude the court from declining to review an issue where the record is inadequate for reasons other than solely the failure to seek an articulation, such as, for example, the failure to procure the trial court's decision pursuant to Section 64-1 (b) or the failure to provide a transcript, exhibits or other documents necessary for appellate review." Practice Book § 61-10, commentary. Any meaningful review of this issue is further frustrated by the fact that the transcript of the good cause hearing and the court's memorandum of decision are devoid of any findings regarding the impact of the petitioner's mental health status on his ability to timely file his second habeas petition. See, e.g., *Bowden* v. *Commissioner of Correction*, 93 Conn. App. 333, 342, 888 A.2d 1131 (record was inadequate to review petitioner's argument where court's decision was devoid of any findings or analysis on issue and petitioner did not seek articulation), cert. denied, 277 Conn. 924, 895 A.2d 796 (2006).

II

The petitioner also claims that the court improperly dismissed his petition for a writ of habeas corpus following the show cause hearing without providing him with a meaningful opportunity to (a) present evidence as to a plea offer and (b) conduct an investigation regarding that newly discovered evidence to support good cause for delay. We decline to review these claims.

Section 52-470 (e) provides: "In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after

such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."

A

At the show cause hearing, the petitioner testified that his first habeas counsel had informed him that his codefendant in the underlying criminal trial, who had prevailed on direct appeal, was offered by the state a term of forty-five years of incarceration in exchange for a guilty plea on remand. The petitioner further testified that he had asked his first habeas counsel to inquire whether the state would offer him the same plea deal if he were to withdraw his then pending habeas petition. When the petitioner's counsel then asked at the show cause hearing whether his first habeas counsel ever reported that the state had made an offer, counsel for the respondent objected on the ground of relevancy. The petitioner's counsel argued that after he had been appointed to the case, he discovered new evidence of an e-mail from the petitioner's first habeas counsel indicating that there had been such an offer made. The court sustained the objection and did not permit the petitioner to testify regarding any plea offers made to him by the state prior to his first habeas trial. The court ruled that the hearing was limited to whether good cause existed for the delay in bringing the second habeas action, which was premised on ineffective assistance of trial counsel, and that the issue of whether the petitioner had colorable claims that were not alleged in the operative petition was not a proper line of inquiry at the show cause hearing.

We decline to review this claim because the petitioner failed to raise the evidentiary issue in his petition for certification to appeal.[3] In his petition, the petitioner set forth the following grounds for requesting certification to appeal to this court: "The trial court erred in its dismissal of the petitioner's petition for writ of habeas corpus; any and all other grounds as determined after a review of the file and transcripts."

"We review only the merits of claims specifically set forth in the petition for certification to appeal. . . . This court has declined to review issues in a petitioner's habeas appeal in situations where the habeas court denied certification to appeal and the issues on appeal had not been raised in the petition for certification. . . . A habeas petitioner cannot establish that the habeas court abused its discretion in denying certification on issues that were not raised in the petition for certification to appeal. . . . [S]ee also *Pereira* v. *Commissioner of Correction*, 176 Conn. App. 762, 775, 171 A.3d 105 (because it is impossible to review exercise of discretion that did not occur, Appellate Court confined to reviewing only those issues which had been brought to attention of habeas court in petition for certification to appeal), cert. denied, 327 Conn. 984, 175 A.3d 43 (2017); *Ouellette* v. *Commissioner of Correction*, 159 Conn. App. 854, 858 n.2, 123 A.3d 1256 (use of broad language in petition for certification to appeal does not serve as basis for this court to consider claims not raised specifically in petition), cert. denied, 320 Conn. 907, 128 A.3d 952 (2015); *Campbell* v. *Commissioner of Correction*, 132 Conn. App. 263, 267, 31 A.3d 1182 (2011) (consideration of issues not distinctly raised in petition for certification would amount to ambuscade of habeas judge)." (Citations omitted; inter-

[3] We additionally note that the claim regarding the plea offer is based on the actions of his first *habeas* counsel, which are not the subject of the operative habeas petition, which alleges ineffective assistance of *trial* counsel.

nal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, supra, 202 Conn. App. 569–70. It is axiomatic that we cannot determine whether the court abused its discretion in denying certification on an issue that was never raised in the petition for certification. Therefore, we decline to review the petitioner's evidentiary claim because it was not specifically raised in his petition for certification.

B

The petitioner also argues that the court deprived him of a meaningful opportunity to investigate newly discovered evidence regarding the alleged plea offer made by the state. This claim is outside the scope of appellate review.

The petitioner did not raise this issue at any time before the habeas court. He did not request additional time from the court in which to conduct an investigation, either by way of motion prior to the show cause hearing or verbally during the show cause hearing. Moreover, the petitioner did not include this ground in his petition for certification to appeal. The petitioner seeks review of this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). "Section 52-470 (g) conscribes our appellate review to the issues presented in the petition for certification to appeal . . . . Permitting a habeas petitioner, in an appeal from a habeas judgment following the denial of a petition for certification to appeal, to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to achieve in enacting § 52-470 (g)." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 418–19, 236 A.3d 276, 286–87,

cert. denied, 335 Conn. 969, 240 A.3d 286 (2020). Therefore, we conclude that *Golding* review is unavailable to the petitioner with respect to this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

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## EDWARD BERMAN *v.* ELLEN BERMAN
## (AC 42554)

Elgo, Alexander and DiPentima, Js.

*Syllabus*

The plaintiff, whose marriage to the defendant had previously been dissolved, appealed from the decision of the trial court denying in part his postjudgment motion for modification of alimony. The plaintiff sought a modification of his obligation to pay alimony, to provide for the defendant's health insurance and to maintain life insurance, alleging that his income had decreased substantially since the date of dissolution. At the hearing on the motion, the self-represented defendant made statements regarding certain equity that she had not taken in the plaintiff's business during her cross-examination of the plaintiff and during her closing argument, but did not question the plaintiff regarding the equity that she allegedly gave up or any claims to real estate or business assets that she may have abandoned in exchange for alimony. *Held*:

1. The trial court improperly found that the defendant had relinquished claims she might have had to certain marital assets in exchange for lifetime alimony, as that finding was not supported by the record: there was no testimony or evidence proffered at the hearing on the motion for modification to demonstrate that the parties had made such an exchange, nor was there any language in the parties' agreement that supported the court's finding, and, although the defendant made statements at the hearing while questioning the plaintiff and during her closing argument that she gave up equity for alimony, her statements did not constitute evidence, and the court appropriately cautioned her to that effect, and the defendant did not offer testimony from any other witness, including herself, in support of her claim that she exchanged equity for lifetime alimony.
2. The trial court abused its discretion in denying the plaintiff's motion for modification of alimony on the basis of its erroneous finding that the defendant had given up claims during the dissolution proceedings; although the trial court implicitly found a substantial change in the plaintiff's financial circumstances since the date of the dissolution, there

was nothing in the separation agreement, which terms were negotiated with the assistance of counsel, to indicate that the defendant gave up equity or assets in exchange for lifetime alimony, nor was there any evidence proffered at the hearing on the motion demonstrating that the parties had made such an exchange; accordingly, there was a lack of an evidentiary basis in the record for the court's finding of an exchange of assets or equity for lifetime alimony, on which the court's ultimate decision denying the motion in part was based.

Argued December 7, 2020—officially released March 16, 2021

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Winslow*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Eschuk*, *J.*, denied in part the plaintiff's motion for modification of alimony, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

*Christopher P. Norris*, for the appellant (plaintiff).

*Ellen Berman*, self-represented, the appellee (defendant).

*Opinion*

DiPENTIMA, J. The plaintiff, Edward Berman, appeals from the judgment of the trial court denying in part his motion to modify his obligation to pay alimony and to provide health and life insurance to the defendant, Ellen Berman.[1] On appeal, the plaintiff claims

[1] The court denied the plaintiff's motion for modification with one exception, which concerned the plaintiff's obligation to pay for the defendant's round trip travel costs to Saint Maarten two times per year. Specifically, in its memorandum of decision, the court stated: "Since the defendant indicated that her accommodation in Saint Maarten was destroyed in Hurricane Irma, the plaintiff may suspend his obligation set out in paragraph 18.3 (10) [of the parties' separation agreement] . . . to afford the defendant two round trips to that island until his repayment of the Medicare penalties has been completed. . . . Other than the suspension of the round trip payments, the plaintiff's motion for modification is denied."

that the court erred in (1) finding that the defendant had ceded claims she might have had at the time of the dissolution of the parties' marriage in exchange for lifetime alimony, (2) denying his motion for modification of alimony on the basis of that finding and its finding that the defendant had given up claims during the dissolution proceedings as part of the mosaic, and (3) denying his motion for modification of alimony after finding that his income had decreased by approximately 32 percent since the date of the dissolution. We reverse the judgment of the trial court.

The following factual and procedural history is relevant to our resolution of the claims on appeal. The plaintiff and the defendant were married in Norwalk on October 24, 1976. Following a breakdown in the parties' marriage, the trial court, *Winslow*, *J.*, rendered a judgment dissolving their marriage on January 16, 2013. The court incorporated into the dissolution judgment a separation agreement (agreement) that had been executed and signed by the parties, both of whom had legal representation in negotiating the agreement. The agreement provided that, upon the sale of the marital residence in Ridgefield, the plaintiff was required to pay the defendant $6500 per month as alimony. Further, upon the sale of a condominium located in Vermont that was owned by the parties, the plaintiff's alimony obligation was to increase to $8000 per month and continue until either the death of the plaintiff, the death of the defendant or the defendant's remarriage. The agreement also required the plaintiff to be responsible for the defendant's medical and dental insurance, and to maintain term life insurance in the amount of $1 million with the defendant listed as the beneficiary. Pursuant to the agreement, the plaintiff also was responsible for a number of the parties' debts, including payment of an outstanding line of credit; payment of the mortgages on the marital residence, along with taxes,

insurance, utilities, repairs and maintenance expenses until the property is sold; payment of any deficiency related to the sale of the marital residence and the sale of the Vermont condominium; and payment of any outstanding loans related to his medical practice.

On August 29, 2018, the plaintiff filed a motion for modification of his alimony obligation as set forth in the agreement, as well as his obligation to pay for the defendant's health insurance and to maintain life insurance. In his motion, the plaintiff alleged that his income had decreased substantially since the date of the dissolution. On December 21, 2018, the trial court, *Eschuk*, *J.*, rendered judgment denying in part the plaintiff's motion for modification. See footnote 1 of this opinion. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth our standard of review. We review the court's judgment denying the motion for modification of alimony "under an abuse of discretion standard. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Callahan* v. *Callahan*, 192 Conn. App. 634, 644–45, 218

A.3d 655, cert. denied, 333 Conn. 939, 218 A.3d 1050 (2019).

"General Statutes § 46b-86 governs the modification of an alimony or child support order after the date of a dissolution judgment. Section 46b-86 (a) provides that a final order for alimony or child support may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the [General Statutes § 46b-84] criteria, make an order for modification. . . . A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Citation omitted; internal quotation marks omitted.) *Flood* v. *Flood*, 199 Conn. App. 67, 77–78, 234 A.3d 1076, cert. denied, 335 Conn. 960, 239 A.3d 317 (2020).

Moreover, "[i]t is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 200 Conn. App. 130, 136, 238 A.3d 113, cert. denied, 335 Conn. 970, 240 A.3d 286 (2020); see also *Winthrop* v. *Winthrop*, 189 Conn. App. 576, 581–82, 207 A.3d 1109 (2019).

I

The plaintiff first claims that the trial court improperly found that the defendant had relinquished claims she might have had to certain marital assets in exchange for lifetime alimony. Specifically, the plaintiff claims that there was no testimony or evidence in the record to support the court's finding that such an exchange of assets for alimony had occurred. We agree.

The following additional facts are necessary for our resolution of this claim. A hearing on the plaintiff's motion for modification was held on November 21, 2018, at which both parties testified. The plaintiff was represented by counsel; the defendant was, as she is before us, a self-represented party. The plaintiff testified that he is a medical doctor and is sixty-eight years old.

He offered as an exhibit his financial affidavit from the date of the dissolution of the marriage, which showed his gross and net weekly income at that time. He also offered as an exhibit his 2012 tax return, which showed an income of $466,000 the year before his divorce. He testified that in 2012, following an inquiry by a Medicare contractor, he entered into an agreement that resulted in a payment order, which required him to pay $215,000 related to the Medicare investigation. The plaintiff further testified that in June, 2015, major changes occurred in his medical practice. Specifically, he stated that as a result of a newspaper article about the Medicare settlement and other factors, he lost income on a variety of fronts. To support that claim, he offered as an exhibit his 2017 tax return, which showed an income of $151,093. He testified that he has $336,000 in liabilities and that the Vermont property is in foreclosure. When asked if he has a negative net worth on his financial affidavit, he responded, "Yes I do. I guess I'm worthless." Because his "financial situation was extremely different when [the] negotiations [regarding] the divorce were agreed upon," he testified that he could no longer afford his $6500 monthly alimony obligation, let alone the increase to $8000 in alimony as set forth in the agreement. Thus, he requested that his alimony obligation be terminated.

During cross-examination of the plaintiff, the self-represented defendant asked the plaintiff if it is true that the defendant "took much less alimony than [she] could have gotten and took no equity," to which the plaintiff responded that "[t]here was no equity." Thereafter, the defendant stated that there was "about $300,000 equity in the office at the time of [the] divorce," and that she "did not take that equity." The court explained to the defendant that she needed to be asking the plaintiff questions, rather than making statements, and that she could make a statement later on, but that

her statement could not add evidence. After the court finished its explanation, the defendant again attempted to ask a question about equity, to which the plaintiff again replied that his medical practice did not have $300,000 of equity in the property.

During the remainder of her cross-examination of the plaintiff, the defendant did not ask any questions regarding the equity that she allegedly gave up or any claims to real estate or business assets that she may have abandoned in exchange for alimony. The defendant subsequently was called to the witness stand by the plaintiff's attorney and questioned concerning the requirement in the dissolution judgment that she apply for Social Security disability benefits within one day of the date of the judgment. After the defendant's brief testimony answering those questions, the plaintiff's attorney informed the court that he had no other witnesses to call, and the court stated to the defendant that she could now call witnesses. In response, the defendant called the plaintiff to the witness stand and questioned him further regarding the cost of his wedding and his ability to afford vacations. When the questioning of the plaintiff was completed, the court asked the defendant if there were any other witnesses that she wanted to call, including herself, to which she responded, "No." During her closing argument, the defendant stated twice that she took no equity and significantly less alimony because the plaintiff was supposed to assume all of the debt. She further stated that she did "not recall any discussions about [the plaintiff] being investigated by Medicare during the collaborative divorce," and, that if she knew, she "would have taken the office equity but was advised by [her] attorney that [she had] good alimony and not to worry."In its memorandum of decision denying the plaintiff's motion for modification of alimony, the court stated: "The agreement entered into by the parties at the time of the

divorce is a detailed and complicated one. It was entered into with the assistance of counsel on both sides. Courts have often described the careful redistribution of marital property at time of dissolution as a 'mosaic' in the sense that each part of the disposition fits into other parts making a whole 'picture.' The court finds that the agreement in this case truly reflects that concept. It would be difficult, if not impossible, to remove one part without damaging the remainder. The defendant is in poor health, a fact clearly contemplated at the time of the agreement, and has to have medical coverage: *a benefit for which she waived other claims. She also exchanged claims she might have had to real estate and business assets for the supposed security of lifetime support*. . . . [The plaintiff's] agreement to pay alimony to the defendant was clearly to support her ongoing needs, rather than being rehabilitative. She has no other source of income than her alimony. It is highly improbable that she could obtain employment. Even without her health issues her skills as a nurse are outdated and would be difficult to reacquire. Essentially, *the defendant appears to have exchanged her claims to various assets for lifetime alimony and payment of her medical expenses*." (Emphasis added.)

On the basis of our careful review of the record, including the transcript of the hearing on the plaintiff's motion for modification, we conclude that the court's finding that the defendant gave up her claims to certain marital assets in exchange for lifetime alimony is not supported by the record. There was simply no evidence proffered at the hearing on the motion for modification to demonstrate that the parties had made such an exchange, nor was there any language in the parties' agreement that supported the court's finding. Although the defendant made statements at the hearing while questioning the plaintiff and during her closing argument that she gave up equity for alimony, her statements

did not constitute evidence, and the court appropriately cautioned her to that effect. See *Hall* v. *Hall*, 182 Conn. App. 736, 756, 191 A.3d 182 (2018) ("[A]rgument is not evidence. As judges routinely admonish juries: Argument is argument, it is not evidence. . . . So, too, arguments of a pro se litigant are not proof. . . . *In re Justin F.*, 116 Conn. App. 83, 96, 976 A.2d 707, appeal dismissed, 292 Conn. 913, 973 A.2d 660, cert. denied, 293 Conn. 914, 978 A.2d 1109 (2009), cert. denied sub nom. *Albright-Lazzari* v. *Connecticut*, 559 U.S. 912, 130 S. Ct. 1298, 175 L. Ed. 2d 1087 (2010); see also *Baker* v. *Baker*, [95 Conn. App. 826, 832–33, 898 A.2d 253 (2006)] (representations of counsel are not evidence)." (Internal quotation marks omitted.)), aff'd, 335 Conn. 377, 238 A.3d 687 (2020). The defendant did not offer testimony from any other witness, including herself, in support of her claim that she exchanged equity for lifetime alimony. The court's factual finding of such an exchange, therefore, is clearly erroneous.

II

The plaintiff's second claim is that the trial court improperly denied his motion for modification on the basis of its clearly erroneous finding that the defendant had given up claims during the dissolution proceedings. We agree.

As we stated previously, the party moving for a modification of alimony must demonstrate the existence of a substantial change in circumstances since the last court order, which, in the present case, is the dissolution judgment. See *Brown* v. *Brown*, 199 Conn. App. 134, 157, 235 A.3d 555 (2020); *Flood* v. *Flood*, supra, 199 Conn. App. 77–78. "[W]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . .

make an order for modification." (Emphasis omitted; internal quotation marks omitted.) *Brown* v. *Brown*, supra, 157; see also *Callahan* v. *Callahan*, supra, 192 Conn. App. 645 (establishment of changed circumstances is condition precedent to party's relief).

The trial court made no express finding of a substantial change in circumstances. This court has determined previously, however, "that an implicit finding of a substantial change of circumstances by the trial court will satisfy the threshold predicate for modification of a support order." *Schade* v. *Schade*, 110 Conn. App. 57, 63, 954 A.2d 846, cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008). In *Schade*, this court reasoned that "[a] fair reading of the trial court's memorandum of decision and its articulation leads us to the more logical and compelling conclusion that the trial court did find a substantial change of circumstances and then concluded that the alimony order should remain the same." Id., 64.

We conclude that the present case presents a similar situation of an implicit finding of a substantial change in circumstances. After noting in its memorandum of decision that the plaintiff's 2012 tax return showed an annual gross income of $466,423, while his 2017 tax return showed a decline in his annual gross income to $151,093, the court found that "[t]he plaintiff's financial circumstances have undoubtedly deteriorated since the date of the dissolution." The court further noted the $215,000 penalty stemming from the Medicare investigation that the plaintiff was required to pay following the dissolution, along with the loss of business he sustained as a result of that investigation. After stating in its memorandum of decision that "[t]he court may modify an order for the payment of alimony pursuant to . . . § 46b-86 upon a showing of a substantial change in the circumstances of either party, *but is not required to do so*," the court found that "while [the plaintiff's] financial

state has worsened since the dissolution, the court finds that he still has resources available to him." (Emphasis added.) A fair reading of the court's memorandum of decision leads us to conclude that the court implicitly found a substantial change in the plaintiff's financial circumstances since the date of the dissolution but determined that the alimony order should not be modified.

In declining to modify the plaintiff's alimony obligation, the court noted that the "agreement entered into by the parties at the time of the divorce is a detailed and complicated one," and that "[i]t would be difficult, if not impossible, to remove one part without damaging the remainder." The court further explained that the defendant "has to have medical coverage: a benefit for which she waived other claims. She also exchanged claims she might have had to real estate and business assets for the supposed security of lifetime support. . . . Essentially, the defendant appears to have exchanged her claims to various assets for lifetime alimony and payment of her medical expenses." In part I of this opinion, however, we concluded that the court's finding of such an exchange of assets for alimony was clearly erroneous. Because the court's denial of the plaintiff's motion for modification was based, at least in part,[2] on its clearly erroneous finding that an exchange of equity for lifetime alimony had taken place, we are thus "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Thomasi* v. *Thomasi*, 181 Conn. App.

[2] In addition to finding that an exchange of equity for lifetime alimony had taken place, the court also found that the defendant is in poor health, that the plaintiff's financial difficulties could not be attributed to the defendant, that the plaintiff still has resources available to him despite the worsening of his financial state since the dissolution, that his payments to Medicare should end shortly, that he should ask his sons to assist in repaying their student loans, and that the plaintiff is able to afford out-of-state vacations, while the defendant does not have similar resources available to her.

822, 847, 188 A.3d 743 (2018); see also *LeSueur* v. *LeSueur*, 186 Conn. App. 431, 464, 199 A.3d 1082 (2018) ("[a]ppellate courts look at the record, and determine whether the [trial] court either incorrectly applied the law or could not reasonably conclude as it did" (internal quotation marks omitted)).

We are mindful that courts often describe "financial orders appurtenant to dissolution proceedings as entirely interwoven and as a carefully crafted mosaic, each element of which may be dependent on the other"; (internal quotation marks omitted) *Steller* v. *Steller*, 181 Conn. App. 581, 589, 187 A.3d 1184 (2018); and that the parties, both represented by counsel at the time, negotiated the terms that appeared in the agreement that was incorporated into the dissolution judgment. There is nothing in that agreement, however, indicating that the defendant gave up equity or assets in exchange for lifetime alimony,[3] nor was any evidence proffered at the hearing on the motion for modification demonstrating that the parties had made such an exchange, and it would be improper for this court to speculate as to what might have been exchanged for the terms agreed upon in the parties' agreement.

"Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . Self-represented parties are not afforded a lesser standard of compliance, and [a]lthough we are solicitous of the rights of pro se litigants . . . [s]uch a litigant is bound by the same rules

[3] In fact, the agreement contains a provision that permits a " 'second look' " or "de novo review . . . of alimony when the husband retires," which could occur when he turns sixty-eight, approximately five years after the dissolution judgment was rendered. Further, the defendant acknowledged at oral argument before this court that there was no formal exchange and stated that she "knew in the back of [her] mind" that she "didn't want to disturb" the plaintiff's business because she "wanted [her] alimony," so she "agreed with [her] attorney" to "just go for the alimony."

. . . and procedure as those qualified to practice law." (Internal quotation marks omitted.) *Rutka* v. *Meriden*, 145 Conn. App. 202, 218, 75 A.3d 722 (2013). Consequently, "[w]hen a defendant elects to proceed without the benefit of counsel, [she] takes the risk that because of [her] inexperience and lack of knowledge, [she] will suffer disadvantages to which, with proper representation, [she] would not be subject." *State* v. *Lo Sacco*, 12 Conn. App. 481, 496, 531 A.2d 184, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987). This case is illustrative of the dangers inherent in self-representation. The defendant's statements and closing argument at the hearing did not constitute evidence. See *Lavy* v. *Lavy*, 190 Conn. App. 186, 206 n.13, 210 A.3d 98 (2019) ("arguments of counsel are not evidence"); *Hall* v. *Hall*, supra, 182 Conn. App. 756 ("arguments of a pro se litigant are not proof" (internal quotation marks omitted)). The lack of an evidentiary basis in the record for the court's finding of an exchange of assets or equity for lifetime alimony, on which its ultimate decision denying the plaintiff's motion for modification was based at least in part, compels us to find that the court abused its discretion in denying the plaintiff's motion. Accordingly, a new hearing on the plaintiff's motion for modification is necessary.[4] See *Steller* v. *Steller*, supra, 181 Conn. App. 597–98 (because trial court's decision on motion for modification was based, in part, on clearly erroneous finding, case was remanded for new hearing on motion for modification); *LeSueur* v. *LeSueur*, supra, 186 Conn. App. 446 (same).

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

In this opinion the other judges concurred.

[4] In light of our determination as to the first two issues raised by the plaintiff on appeal, we need not address the plaintiff's third issue, in which he alleged that the trial court erred in denying his motion for modification of alimony after finding that his income had decreased by approximately 32 percent since the date of the dissolution.

# JOSEPH STEPHENSON *v.* COMMISSIONER OF CORRECTION (AC 43166)

Bright, C. J., and Moll and Suarez, Js.

*Syllabus*

The petitioner, who had been convicted of burglary in the third degree, attempt to commit tampering with physical evidence and attempt to commit arson in the second degree, sought a writ of habeas corpus, claiming that the Commissioner of Correction and the Board of Pardons and Paroles violated and misapplied the parole eligibility statute (§ 54-125a) to increase his punishment, delay his parole eligibility date, and classify him as a violent offender. The habeas court issued an order declining to issue the writ of habeas corpus because, pursuant to the rule of practice (§ 23-24 (a)), the court lacked subject matter jurisdiction and the petition did not present a claim on which the habeas court could grant relief. Thereafter, the petitioner filed a petition for certification to appeal, which the habeas court denied, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal: the allegations in the petition were insufficient to allege a claim under the stigma plus test because inmates do not have a cognizable liberty interest in parole eligibility; moreover, assuming that a habeas petitioner could state, as a matter of law, a viable stigma plus claim on the basis of his classification as a violent offender, the petitioner failed to allege facts demonstrating that his classification as a violent offender caused him to suffer consequences that were qualitatively different from the punishments that are usually suffered by prisoners so that they constituted a major change in conditions of his confinement amounting to a grievous loss; accordingly, the petitioner failed to sufficiently allege a cognizable liberty interest invoking the subject matter jurisdiction of the habeas court.

Argued November 16, 2020—officially released March 16, 2021

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*Vishal K. Garg*, for the appellant (petitioner).

*Steven R. Strom*, assistant attorney general, with whom, on the brief were *William Tong*, attorney gen-

eral, and *Clare Kindall*, solicitor general, for the appellee (respondent).

*Opinion*

MOLL, J. The petitioner, Joseph Stephenson, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court declining to issue a writ of habeas corpus pursuant to Practice Book § 23-24 (a) (1) and (3).[1] On appeal, the petitioner claims that the court improperly (1) denied his petition for certification to appeal and (2) declined to issue the writ of habeas corpus when, in his petition for a writ of habeas corpus, he sufficiently alleged a claim under the stigma plus test adopted by our Supreme Court in *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 680–81, 166 A.3d 614 (2017), and, therefore, he alleged a cognizable liberty interest sufficient to invoke the subject matter jurisdiction of the court. We conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, and, therefore, we dismiss the appeal.

Our Supreme Court set forth the following facts in the petitioner's direct appeal from his conviction. "A silent alarm at the [Superior Court for the judicial district of Stamford-Norwalk, geographical area number twenty, located in Norwalk] was triggered at around 11 p.m. on Sunday, March 3, 2013, when the [petitioner] entered the state's attorney's office by breaking a window on the building's eastern side. Although the police

[1] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

were able to respond in about ninety seconds, the [petitioner] successfully evaded capture by running out of a door on the building's southern side. Footage from surveillance cameras introduced by the state at [the petitioner's criminal] trial show that the [petitioner] was inside of the building for slightly more than three minutes. In the investigation that followed, the police determined that the broken window belonged to an office shared by two assistant state's attorneys. One of those attorneys was scheduled to commence jury selection for a criminal trial against the [petitioner] on certain felony charges only two days after the break-in occurred. No other cases were scheduled to begin jury selection that week. Immediately after the break-in, various case files were discovered in an apparent state of disarray at the northern end of a central, common area located outside of that room. Specifically, several files were found sitting askew on top of a desk with two open drawers; still other files were scattered on the floor below in an area adjacent to a horizontal filing cabinet containing similar files. Photographs admitted as full exhibits clearly show labels on these files reading 'TUL' and 'SUM.' Finally, in a short hallway at the opposite end of that same common area, the police found a black bag containing six bottles of industrial strength kerosene with their UPC labels cut off. The bag and its contents were swabbed, and a report subsequently generated by the Connecticut Forensic Science Laboratory included the [petitioner's] genetic profile as a contributor to a mixture of DNA discovered as a result.

"Various other components of the state's case against the [petitioner] warrant only a brief summary. The day after the break-in, the [petitioner] called the public defender's office at the Norwalk courthouse to ask whether the courthouse was open and whether he was required to come in that day. The state also submitted

evidence showing that the [petitioner] drove a 2002 Land Rover Freelander with an aftermarket push bumper, a roof rack, and a broken tail light, and that surveillance videos from the area showed a similar vehicle driving by the courthouse repeatedly in the hours leading up to the break-in. Finally, the state submitted recordings of various telephone calls the [petitioner] made after he had been taken into custody as a result of his conviction on the criminal charges previously pending against him in Norwalk. During one such telephone call, the [petitioner] asked his brother, Christopher Stephenson, to get rid of 'bottles of things' for a heater, speculated about how the police located the vehicle, and attempted to arrange an alibi." (Footnote omitted.) *State* v. *Stephenson*, Conn. , , A.3d (2020).

In connection with the events of March, 2013, the petitioner was arrested on March 21, 2014. On October 28, 2016, following a jury trial, the petitioner was convicted of burglary in the third degree in violation of General Statutes § 53a-103, attempt to commit tampering with physical evidence in violation of General Statutes § 53a-49 (a) (2) and General Statutes (Rev. to 2013) § 53a-155 (a) (1), and attempt to commit arson in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B). On January 6, 2017, the petitioner was sentenced to a total effective sentence of twelve years of incarceration followed by eight years of special parole. The petitioner filed a direct appeal from the judgment of conviction, which remains pending on remand in this court from our Supreme Court.[2]

[2] On January 8, 2019, this court reversed the judgment of conviction and remanded the case to the trial court with direction to render a judgment of acquittal as to all three charges against the petitioner. See *State* v. *Stephenson*, 187 Conn. App. 20, 39, 201 A.3d 427 (2019), rev'd, Conn. , A.3d (2020). On December 18, 2020, after having granted the state's petition for certification to appeal, our Supreme Court reversed this court's judgment and remanded the case to this court for further proceedings on the ground that this court had erred in resolving the direct appeal on an

On March 15, 2019, the petitioner, representing himself, filed a petition for a writ of habeas corpus using a state supplied form. The petitioner alleged that the Commissioner of Correction (commissioner) and the Board of Pardons and Paroles (board) "ha[d] been misapplying and illegally [overbroadening] the scope, plain meaning and language of [General Statutes] § 54-125a (b) (2) (B)[3] to increase [his] punishment, [delay his]

issue of evidentiary sufficiency that the parties had not been afforded an opportunity to brief or argue. See *State* v. *Stephenson*, supra, Conn. .

[3] General Statutes § 54-125a (a) provides in relevant part: "A person convicted of one or more crimes who is incarcerated on or after October 1, 1990, who received a definite sentence or total effective sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the total effective sentence less any risk reduction credit earned under the provisions of section 18-98e or one-half of the most recent sentence imposed by the court less any risk reduction credit earned under the provisions of section 18-98e, whichever is greater, may be allowed to go at large on parole (1) in accordance with the provisions of section 54-125i, or (2) in the discretion of a panel of the Board of Pardons and Paroles, if (A) it appears from all available information, including any reports from the Commissioner of Correction that the panel may require, that there is a reasonable probability that such inmate will live and remain at liberty without violating the law, and (B) such release is not incompatible with the welfare of society. . . ."

General Statutes § 54-125a (b) (2) provides in relevant part: "A person convicted of . . . (B) an offense, other than [certain parole ineligible offenses], where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed."

General Statutes § 54-125a (c) provides in relevant part: "The Board of Pardons and Paroles shall, not later than July 1, 1996, adopt regulations . . . to ensure that a person convicted of an offense described in subdivision (2) of subsection (b) of this section is not released on parole until such person has served eighty-five per cent of the definite sentence imposed by the court. Such regulations shall include guidelines and procedures for classifying a person as a violent offender that are not limited to a consideration of the elements of the offense or offenses for which such person was convicted."

In 2015, amendments were made to § 54-125a (a) that have no bearing on this appeal. See Public Acts 2015, No. 15-84, § 1; Public Acts, Spec. Sess., June, 2015, No. 15-2, §§ 12 and 13. Additionally, at the time of the petitioner's offenses, General Statutes (Rev. to 2013) § 54-125a (b) (2) provided in relevant part: "A person convicted of . . . (B) an offense, other than [certain parole ineligible offenses], where the underlying facts and circumstances

parole eligibility date, violate [the] prohibition against ex post facto law, [and] classify [him] as [a] violent offender beyond what [the] law allows." (Footnote added.) As relief, the petitioner requested that the court order the commissioner and the board "to stop violating the plain meaning of § 54-125a (b) (2) (B), remove the violent offender classification, properly classify [him] to 50 [percent] designation for parole eligibility date, other relief etc."

Appended to the petition was a document entitled "Petition for Writ of Habeas Corpus" in which the petitioner alleged additional facts.[4] The appended document contained the following relevant allegations. After the petitioner had been sentenced and committed to the custody of the commissioner, the board informed him that, pursuant to § 54-125a, his conviction for attempted arson in the second degree rendered him ineligible for parole until he had served 85 percent of his definite sentence.[5] The board's decision was predicated on a "schedule" generated by the board listing " '85 [percent]' " designated offenses, including arson in the second degree, and a "brochure" providing that any individual convicted of, inter alia, attempt to commit any of the " '85 [percent]' " designated offenses

of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.) This appeal does not involve any claim concerning risk reduction credit. Accordingly, in the interest of simplicity, unless otherwise noted, we refer to the current revision of the statute.

[4] In setting forth the allegations on the state supplied form that he filed, the petitioner referred to the appended document. We construe the appended document to be a part of the petition. See *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 411 n.4, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

[5] "[D]efinite sentence is the flat maximum to which a defendant is sentenced . . . ." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 409 n.3, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

would be ineligible for parole prior to completing 85 percent of his or her definite sentence. According to the petitioner, none of the crimes of which he was convicted was listed or specified in § 54-125a, or involved "the use, attempted use or [threatened] use of physical force against another person" as set forth in § 54-125a (b) (2) (B), and, as a result, "[the commissioner and the board] ha[d] abused their discretion, misapplied, overbroadened the scope and plain meaning and language of [§ 54-125a], to illegally violate [the] petitioner's due process and liberty interest rights under [a]rticle [f]irst, [§§ 1, 8, and 20] of the constitution of the state of Connecticut as well as the United [States] constitution. By classifying [the] petitioner as a 'violent' offender subject to 85 [percent] designation for parole eligibility, whereas the plain meaning and language of the law does not so allow or [prescribe], [the commissioner and the board] ha[d] prejudiced [the] petitioner's liberty interest [and] constitutional rights and caused [the] petitioner to suffer adverse collateral consequences. Such harm include[d] an increase in punishment with a longer period of incarceration than allowed under the plain meaning of the parole eligibility statute and per the intent of the legislature in enacting said statute. Also, [the] petitioner ha[d] been classified to a higher risk level for [the] application of penological goals. [The] petitioner also . . . had to endure the stigma of being publicly [labeled] as a 'violent offender' for past, present and future disparate treatment." (Emphasis omitted.)

As relief, the petitioner requested, inter alia, orders requiring the commissioner and the board (1) to recalculate his parole eligibility date such that he would be eligible for parole when serving 50 percent, or less, of his definite sentence, (2) to "cease and desist" from continuing to classify him as a violent offender when such a classification was improper pursuant to § 54-125a, and (3) to

"cease and desist" from violating, expanding the scope of, and misapplying § 54-125a.[6]

On March 26, 2019, the habeas court, *Newson*, *J.*, issued an order declining to issue the writ of habeas corpus because the court lacked subject matter jurisdiction pursuant to Practice Book § 23-24 (a) (1) and because the petition did not "present a claim upon which the habeas court [could] grant relief pursuant to . . . § 23-24 (a) (3)." On April 23, 2019, the petitioner filed a motion for reconsideration, which the court summarily denied on April 24, 2019. Thereafter, the petitioner filed a petition for certification to appeal from the court's judgment, which the court denied.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first turn to the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal from the court's judgment declining to issue the writ of habeas corpus. We disagree.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be

[6] In his prayer for relief, the petitioner also requested an order directing the commissioner and the board to apply § 54-125a as it existed at the time of his "alleged [offenses] . . . to avoid any ex post facto law violation." On appeal, the petitioner does not raise any ex post facto claim.

[7] The petitioner applied for, and was granted, a waiver of fees, costs, and expenses and appointment of counsel on appeal.

reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 (b)[8] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of

[8] "Pursuant to No. 12-115, § 1, of the 2012 Public Acts, subsection (b) of § 52-470 was redesignated as subsection (g)." *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 572 n.1, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; footnote in original; internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 572–73, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to demonstrate that (1) his claims are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to the merits of the petitioner's substantive claim, the petitioner asserts that the habeas court improperly declined to issue the writ of habeas corpus. Specifically, the petitioner contends that the allegations in the petition sufficiently alleged a claim under the stigma plus test and, therefore, sufficiently alleged a cognizable liberty interest invoking the subject matter jurisdiction of the court. This claim is unavailing.

The following legal principles and standard of review govern our review of the petitioner's claim. Initially, as to the procedural posture of the present case, we note that the court declined to issue the writ of habeas corpus pursuant to Practice Book § 23-24. As our Supreme Court explained in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), "[§] 23-24

. . . reverses the usual sequence followed in the ordinary civil case; the habeas petition first is filed with the [habeas] court, and the writ issues and service of process occurs only if the court determines, after a preliminary review of the petition, that the petition pleads a nonfrivolous claim within the court's jurisdiction upon which relief can be granted." Id., 557. "[T]he screening function of . . . § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his [or her] claims. . . . Screening petitions prior to the issuance of the writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded pro se. . . . [I]n such a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under § 23-24, the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced." (Citations omitted; internal quotation marks omitted.) Id., 560–61.

"[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . 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." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 420, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

Resolving the petitioner's claim requires us to review the allegations contained in his petition for a writ of habeas corpus, which he filed as a self-represented party. "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . However, [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he [or she] has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his [or her] complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings . . . to decide claims not raised." (Citation omitted; internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 850–51, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018). "In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, supra, 199 Conn. App. 418 n.9. "[W]e take the facts to be those alleged in the petition, including those facts necessarily implied from the allegations, construing them in favor of the petitioner for purposes

of deciding whether the court has subject matter jurisdiction." (Internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85–86, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

" 'Liberty interests protected by the [f]ourteenth [a]mendment may arise from two sources—the [d]ue [p]rocess [c]lause itself and the laws of the [s]tates.' . . . *State* v. *Matos*, 240 Conn. 743, 749, 694 A.2d 775 (1997). 'A liberty interest may arise from the [c]onstitution itself, by reason of guarantees implicit in the word "liberty," see, e.g., *Vitek* v. *Jones*, 445 U.S. 480, [493–94], 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (liberty interest in avoiding involuntary psychiatric treatment and transfer to mental institution), or it may arise from an expectation or interest created by state laws or policies, see, e.g., *Wolff* v. *McDonnell*, 418 U.S. 539, [556–58], 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (liberty interest in avoiding withdrawal of state-created system of good-time credits).' *Wilkinson* v. *Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005)." *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 346–47, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

In *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 668, our Supreme Court adopted the stigma plus test used in federal courts to determine whether the petitioner had alleged a cognizable liberty interest. Id., 680–81. In that case, the petitioner filed a petition for a writ of habeas corpus claiming that the Department of Correction improperly had classified him as a sex offender without providing him with procedural due process. Id., 672. Citing *Sandin* v. *Conner*, 515 U.S. 472, 479 n.4, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), our Supreme Court observed that "in certain situations, a different inquiry is appropriate to determine whether the due process clause directly confers a liberty interest

on inmates." (Internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, supra, 679. "Specifically . . . where a state action has '"stigmatizing consequences"' for a prisoner and results in a punishment that is '"qualitatively different"' from that 'characteristically suffered by a person convicted of crime,' the protected liberty interest arises from the due process clause directly." (Citation omitted.) Id. The court determined that the stigma plus test was applicable in the case before it, where the petitioner had "alleged that he was stigmatized when the [commissioner] wrongfully classified him as a sex offender, and allege[d] as the 'plus' that he suffered various negative consequences, including being compelled to participate in treatment or risk forfeiting good time credits and parole eligibility . . . ." Id., 680. Thus, the court continued, the inquiry before it "focuse[d] on whether the allegations of the petition demonstrate[d] that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." Id., 680–81. The court determined that the petitioner had sufficiently alleged a claim under the stigma plus test and, thus, had sufficiently alleged a protected liberty interest to invoke the habeas court's subject matter jurisdiction. Id., 686.

In the present case, the petitioner maintains that, in his petition, he sufficiently alleged a claim under the stigma plus test, and, therefore, he sufficiently alleged a cognizable liberty interest. We disagree and conclude that the habeas court lacked subject matter jurisdiction over the petition for two independent reasons.

First, construing the allegations in favor of the petitioner, we do not read the petition to assert a claim under the stigma plus test; rather, at its crux, the petition

constitutes an attempt by the petitioner to advance his parole eligibility such that he would be eligible for parole after serving 50 percent of his definite sentence under § 54-125a (a), rather than 85 percent of his definite sentence under § 54-125a (b). This is made apparent by the petitioner's repeated references throughout the petition to his parole eligibility and by his explicit request for relief that the habeas court order the commissioner and the board to reclassify him for parole eligibility purposes. As our Supreme Court has made clear, however, an inmate does not have a cognizable liberty interest in parole eligibility under § 54-125a (a) and/or (b). See *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 261–62, 914 A.2d 1034 (2007) (concluding that parole eligibility under General Statutes (Rev. to 2001) § 54-125a, as amended by Public Acts, Spec. Sess., June, 2001, No. 01-9, § 74,[9] "does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction"); see also *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 371, 163 A.3d 597 (2017) (The court

[9] General Statutes (Rev. to 2001) § 54-125a, as amended by Public Acts, Spec. Sess., June, 2001, No. 01-9, § 74, provides in relevant part: "(a) A person convicted of one or more crimes who is incarcerated on or after October 1, 1990, who received a definite sentence or aggregate sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the aggregate sentence or one-half of the most recent sentence imposed by the court, whichever is greater, may be allowed to go at large on parole in the discretion of the panel of the Board of Parole [now the Board of Pardons and Paroles] for the institution in which the person is confined, if (1) it appears from all available information, including any reports from the Commissioner of Correction that the panel may require, that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society. . . .

"(b) . . . (2) A person convicted of an offense, other than [certain parole ineligible offenses], where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed.

"(c) The Board of Parole [now the Board of Pardons and Paroles] shall, not later than July 1, 1996, adopt regulations . . . to ensure that a person

cited *Baker* for the proposition that there is no cognizable liberty interest in parole eligibility under § 54-125a and, additionally, observed that it is "[a] fundamental fact that the determination whether to grant an inmate parole is entirely at the discretion of the board. It follows that if an inmate has no vested liberty interest in the granting of parole, then the timing of when the board could, in its discretion, grant parole does not rise to the level of a vested liberty interest either." (Emphasis omitted.)).[10] As a result, we conclude that

convicted of an offense described in subdivision (2) of subsection (b) of this section is not released on parole until such person has served eighty-five per cent of the definite sentence imposed by the court. Such regulations shall include guidelines and procedures for classifying a person as a violent offender that are not limited to a consideration of the elements of the offense or offenses for which such person was convicted. . . ."

[10] In *Baker*, as this court recently summarized, "the petitioner had alleged that he improperly had been classified as a violent offender under General Statutes (Rev. to 2001) § 54-125a (b) (2) and (c), as amended by Public Acts, Spec. Sess., June, 2001, No. 01-9, § 74, thus rendering him ineligible for parole until he served 85 percent of his sentence, and that he should have been classified as a nonviolent offender under subsection (a) of that statute, which would have made him eligible for parole after he had served 50 percent of his sentence. *Baker* v. *Commissioner of Correction*, supra, 281 Conn. 245–46. Our Supreme Court held that the petitioner did not have a cognizable liberty interest in his parole eligibility status sufficient to invoke the subject matter jurisdiction of the habeas court. Id., 243, 251–52. In reaching that conclusion, the court was guided by United States Supreme Court precedent. See *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11–12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979) (*Greenholtz*) (holding that mandatory language in state's parole statute created cognizable liberty interest); *Board of Pardons* v. *Allen*, 482 U.S. 369, 378 n.10, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (same). In contrast to the statutes at issue in *Greenholtz* and *Allen*, the court in *Baker* observed that (1) the 'only mandatory language in [the amended 2001 revision of § 54-125a] is that in subsection (b) preventing the board from considering violent offenders for parole before they have served 85 percent of their sentences' . . . *Baker* v. *Commissioner of Correction*, supra, 255; (2) 'the broad, discretionary nature of the board's authority in classifying offenders [as violent] is underscored in subsection (c) [of § 54-125a]'; id., 255–56; and (3) 'the decision to grant parole [under § 54-125a] is entirely within the discretion of the board.' Id., 257. In light of the permissive language of § 54-125a, the court concluded that the petitioner did not possess a cognizable liberty interest in parole eligibility. See id., 257." (Emphasis omitted; footnote omit-

the habeas court lacked subject matter jurisdiction to entertain the petition.

Second, even assuming arguendo that a habeas petitioner could state, as a matter of law, a viable stigma plus claim on the basis of his or her classification as a violent offender and that the petitioner attempted to raise such a claim in his petition,[11] we conclude that

ted.) *Boyd* v. *Commissioner of Correction*, 199 Conn. App. 575, 582–83, 238 A.3d 88, cert. granted, 335 Conn. 962, 239 A.3d 1214 (2020).

Later, in *Anthony A.*, our Supreme Court observed that in *Baker*, in "consider[ing] the question of whether the actions of prison officials gave rise to a protected liberty interest, the court [had] resolved the issue by relying on authority that predated and was disapproved by [the United States Supreme Court in *Sandin* v. *Conner*, supra, 515 U.S. 472]." *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 685. The court determined that, because (1) the authority on which the court in *Baker* relied had been criticized by *Sandin* and (2) *Baker* did not appear to involve a petitioner who had claimed to have been stigmatized by the classification at issue, *Baker* did not control the outcome of the case before it regarding the petitioner's classification as a sex offender. Id.

We do not construe *Anthony A.* as having vitiated the conclusion reached in *Baker* and reaffirmed in *Perez* that parole eligibility under § 54-125a (a) and/or (b) is not a cognizable liberty interest. In *Wright* v. *Commissioner of Correction*, supra, 201 Conn. App. 339, this court observed that, notwithstanding the criticism in *Sandin* of the methodology used in *Greenholtz* and *Allen* as recognized by *Anthony A.*, "[i]t remains good law that an inmate does not have a constitutionally protected liberty interest in early parole consideration." Id., 349–50 n.4. Additionally, in decisions published after *Anthony A.*, this court has continued to rely on *Baker* or *Perez* for the proposition that that there is no cognizable liberty interest in parole eligibility under § 54-125a; see, e.g., *State* v. *Brown*, 192 Conn. App. 147, 156 n.4, 217 A.3d 690 (2019); *Dinham* v. *Commissioner of Correction*, 191 Conn. App. 84, 99, 213 A.3d 507, cert. denied, 333 Conn. 927, 217 A.3d 995 (2019); *Vitale* v. *Commissioner of Correction*, supra, 178 Conn. App. 868; *Byrd* v. *Commissioner of Correction*, 177 Conn. App. 71, 80 n.7, 171 A.3d 1103 (2017); with the exception of parole eligibility under § 54-125a (f), which was enacted by the legislature in 2015 and concerns juvenile offenders. See *Boyd* v. *Commissioner of Correction*, supra, 199 Conn. App. 577, 590 (concluding that petitioner had cognizable liberty interest in parole eligibility under § 54-125a (f)).

[11] Following *Anthony A.*, this court has considered the stigma plus test in habeas cases that, like *Anthony A.*, involved claims that a petitioner improperly was classified as a sex offender. See *Carolina* v. *Commissioner of Correction*, 192 Conn. App. 296, 301–303, 217 A.3d 1068, cert. denied, 334

the allegations in the petition do not sufficiently allege a stigma plus claim. To plead a stigma plus claim, a petitioner must allege facts demonstrating that a classification "was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 681. In the present case, at a minimum, the petitioner failed to sufficiently allege facts satisfying the "plus" portion of the stigma plus test.[12]

As our Supreme Court explained in *Anthony A.*, "[a] recent decision of the United States Supreme Court highlights the difficulty of determining what constitutes a qualitative difference or major change in the conditions of confinement amounting to a grievous loss. [See *Wilkinson* v. *Austin*, supra, 545 U.S. 223.] One cannot do so without reference to what constitutes 'typical' or 'ordinary' conditions of confinement for a prisoner. . . . What must be determined . . . is the degree of departure from the 'baseline.' . . . The emphasis in *Wilkinson* on the need to first determine the baseline requires that our inquiry be a pragmatic one, aimed at determining the degree to which the conditions alleged by the petitioner depart from the expected norm of prison confinement." (Citations omitted.) *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 682–83. Our Supreme Court further observed that, in considering whether decisions made by prison officials have caused "a major change in the conditions of confinement amounting to a grievous loss, it is relevant to

Conn. 909, 221 A.3d 43 (2019); *Vitale* v. *Commissioner of Correction*, supra, 178 Conn. App. 868–71.

[12] The stigma plus test is conjunctive and, therefore, we need not consider whether the petitioner sufficiently alleged facts satisfying the remaining portions of the test.

consider the degree of discretion accorded to the officials making those decisions. The greater the discretion, the more difficult it becomes to establish a departure from the norm." Id., 683.

A careful review of the petition reveals that the only consequences alleged by the petitioner that stemmed from his classification as a violent offender were (1) "an increase in punishment with a longer period of incarceration than allowed under the plain meaning of the parole eligibility statute and per the intent of the legislature in enacting said statute" and (2) the petitioner being "classified to a higher risk level for [the] application of penological goals." We do not construe these conclusory allegations as identifying consequences that were " 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 681; see *Vitale* v. *Commissioner of Correction*, supra, 178 Conn. App. 870–71 (petitioner's allegations "imply[ing] that he was subject to a condition of parole imposed and/or monitored by a special sex offender unit" were insufficient to satisfy "plus" portion of stigma plus test); cf. *Anthony A.* v. *Commissioner of Correction*, supra, 686 (petitioner's allegation that he was required to participate in sex offender treatment or risk losing certain benefits satisfied "plus" portion of stigma plus test). Having failed to sufficiently allege a stigma plus claim, the petitioner has not sufficiently alleged a cognizable liberty interest over which the habeas court had subject matter jurisdiction. See, e.g., *Vitale* v. *Commissioner of Correction*, supra, 871 ("[b]ecause the petitioner has satisfied neither factor of the stigma plus test, we conclude that he has failed to allege sufficient facts to assert a cognizable liberty interest that affords jurisdiction to the habeas court over his claim").

We are mindful of our Supreme Court's instruction that Practice Book § 23-24 "is intended only to weed out obviously and unequivocally defective petitions," that there is "a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his [or her] claims," and that, in cases involving self-represented petitioners, "courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed." (Internal quotation marks omitted.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 560. We conclude that the petition in the present case falls within the category of those petitions that are "obviously and unequivocally defective." Id. The petitioner failed to sufficiently allege a cognizable liberty interest invoking the subject matter jurisdiction of the habeas court, and, therefore, the court properly declined to issue the writ of habeas corpus under Practice Book § 23-24 (a) (1).[13] Accordingly, we further conclude that the court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* MARK STEVEN CAPASSO, JR.
## (AC 43051)

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

*Syllabus*

Convicted, after a jury trial, of the crimes of reckless burning and false reporting of an incident in the second degree, the defendant appealed

[13] The court declined to issue the writ of habeas corpus for lack of subject matter jurisdiction under Practice Book § 23-24 (a) (1) and for failure to "present a claim upon which the . . . court can grant relief" under § 23-24 (a) (3). Because we conclude that the court properly determined that it lacked subject matter jurisdiction under § 23-24 (a) (1), we need not address the court's separate reliance on § 23-24 (a) (3).

to this court. The defendant, who previously had been living in China for more than a decade, and his wife and two children were temporarily living with his parents. The defendant and his family intended to return to China but were having difficulty obtaining certain travel documentation. As a result, the defendant devised a plan that he hoped would expedite that documentation, whereby he sought to leverage one Chinese agency against another by making it appear that the Chinese government had attempted to intimidate him and his family by entering his parents' house and starting a fire. To effectuate this plan, the defendant spread an accelerant, Sterno, a flammable, fire starting gel, throughout the house while his parents, wife, and children were sleeping. The defendant then lit a candle and used it to burn a sheet for thirty to sixty seconds. After extinguishing the fire, the defendant awakened his parents and told them that he had heard someone in the house and that the person had spread accelerant and started a fire. His father then called 911. On appeal, the defendant claimed that the evidence was insufficient to support his conviction of reckless burning and that the trial court erred in denying his motion to set aside the verdict because his conviction of reckless burning was against the manifest weight of the evidence. Specifically, the defendant claimed that the state failed to present sufficient evidence to prove beyond a reasonable doubt that he recklessly endangered the building "of another" as required by the reckless burning statute (§ 53a-114 (a)) and that his conviction was against the manifest weight of the evidence because his behavior was not reckless. *Held*:

1. The evidence was sufficient to support the defendant's conviction of reckless burning: the jury reasonably could have concluded beyond a reasonable doubt that the endangered building where the fire was set was a building "of another" as required by § 53a-114; moreover, contrary to the defendant's claim, the state did not have the burden to prove that the house was owned exclusively by someone other than the defendant, as the phrase "of another" plainly and unambiguously applies to any proprietary or possessory interest in the endangered building by someone other than the defendant, whether exclusive or nonexclusive; furthermore, the jury was presented with evidence from which it reasonably could have concluded that the defendant's parents owned the house, including evidence that the defendant stated to the police that the house belonged to his parents and that he felt like he was imposing on his parents by staying there with his family, the fact that he had lived in China for nearly twelve years, and the defendant's failure to state affirmatively that he owned the house when questioned by the state at trial about who owned the house.
2. The trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict on the ground that the verdict was contrary to the manifest weight of the evidence: there was a reasonable basis for the jury to find that the defendant's intentional starting of the

fire recklessly placed the house in danger of destruction or damage; there was evidence that the defendant spread an accelerant around the house at 2 a.m. while his parents, wife, and children were sleeping, he set a sheet on fire within five feet of the accelerant, he did not fully read the warning labels for the accelerant, he had no experience using the particular accelerant, and he did not have a fire extinguisher or a contingency plan in place should his plan go awry; moreover, contrary to the defendant's claim, the court did not rely exclusively on the jury's verdict in ruling on the motion but independently weighed the evidence in accordance with the standard governing a trial court's consideration of a manifest weight of the evidence claim, the court's statements indicating that it conducted its own assessment of the evidence.

Argued January 4—officially released March 16, 2021

*Procedural History*

Substitute information charging the defendant with the crimes of reckless burning and false reporting of an incident in the second degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*W. Theodore Koch III*, assigned counsel, for the appellant (defendant).

*Beth M. Kailey* and *Geoffrey B. Young*, certified legal interns, with whom were *Jennifer F. Miller* and *Matthew A. Weiner*, assistant state's attorneys, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

*Opinion*

MOLL, J. The defendant, Mark Steven Capasso, Jr., appeals from the judgment of conviction, rendered following a jury trial, of reckless burning in violation of General Statutes § 53a-114.[1] On appeal, the defendant

[1] The jury also found the defendant guilty of false reporting of an incident in the second degree in violation of General Statutes (Rev. to 2016) § 53a-180c (a) (1). The defendant does not challenge that conviction in the present appeal.

claims that (1) the evidence was insufficient to support his conviction of reckless burning, and (2) his conviction of reckless burning was against the manifest weight of the evidence. We disagree and, accordingly, affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of the defendant's claims. In December, 2004, the defendant moved to China to perform missionary work, and he lived there for nearly twelve years prior to returning to Connecticut. In September, 2017, the defendant, his wife, and their two children were living temporarily with his parents at 145 Bloomingdale Road in Quaker Hill. The defendant and his family intended to return to China but were having difficulty obtaining travel documentation for their children. As a result of these difficulties, the defendant devised a plan that he hoped would expedite the travel documentation process. Specifically, the defendant sought to leverage one Chinese agency against another by making it appear as though the Chinese government had attempted to intimidate him and his family by entering his parents' house and starting a fire.

To accomplish this goal, the defendant purchased Sterno, a flammable, fire starting gel, from a Walmart store. Three days later, on September 4, 2017, at approximately 2 a.m., the defendant spread Sterno throughout the house while his parents, his wife, and their children were sleeping. The defendant then lit a candle and used it to burn a sheet for thirty to sixty seconds. After extinguishing the fire, the defendant awakened his parents and told them that he had heard someone in the house and that the person had spread accelerant and started a fire. The defendant's father then called 911.

When the police arrived, the defendant informed them that he was in the basement on the phone with the

Chinese consulate when he heard footsteps upstairs. He then went upstairs and found a burning candle and sheet, along with a bottle of Sterno that he had never seen before. The defendant also told the police that he believed the Chinese consulate was responsible for the incident.

While at the scene, the police searched the premises for signs of forced entry but found none. An officer wrote down the stock keeping unit (SKU) number that was on the Sterno bottle to help determine where the bottle had been purchased and began investigating whether any local stores carried Sterno products with the same SKU number. The officer determined that the SKU number on the Sterno bottle matched that of a Sterno product sold at a Walmart store in Waterford. He viewed the store's security footage and observed the defendant purchasing the Sterno. The officer contacted the defendant and asked him to come to the police department to discuss the case further. During the interview, the defendant admitted that he had purchased the Sterno and had spread it around his parents' house.

Thereafter, the defendant was arrested and charged by way of a substitute information with one count of reckless burning in violation of § 53a-114 and one count of false reporting of an incident in the second degree in violation of General Statutes (Rev. to 2016) § 53a-180c (a) (1). The jury found the defendant guilty of both counts, and the court sentenced the defendant to four years of incarceration, execution suspended after one year, followed by three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that his conviction of reckless burning must be reversed because the state failed

to present sufficient evidence to prove beyond a reasonable doubt that he recklessly endangered a building "of another." See General Statutes § 53a-114 (a). The defendant's claim distills into two closely related parts, namely, that the state failed to prove that (1) the defendant did not have an ownership interest in the house, and (2) the house at 145 Bloomingdale Road was owned by someone other than the defendant. In response, the state argues that (1) proof of *exclusivity* of ownership by someone other than the defendant is not required under § 53a-114, and (2) it produced ample evidence from which the jury reasonably could have found that someone other than the defendant (i.e., the defendant's parents) owned the house. We agree with the state.

Before we reach the merits of the defendant's contentions, we set forth the following relevant legal principles and standard of review. "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the

defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crafter*, 198 Conn. App. 732, 737–38, 233 A.3d 1227, cert. denied, 335 Conn. 957, 239 A.3d 318 (2020).

To the extent our analysis of the defendant's claim requires us to interpret the reckless burning statute, "our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to [the broader statutory scheme]. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 466–67, 108 A.3d 1083 (2015).

A

We begin by addressing the defendant's argument that the state had the burden to prove that he did not have an ownership interest in the house at 145 Bloomingdale Road. Stated differently, the defendant contends that the phrase "building . . . of another" in § 53a-114 (a) is satisfied only if the endangered building is owned *exclusively* by someone else. We disagree.

We turn to the text of § 53a-114 (a), which provides: "A person is guilty of reckless burning when he intentionally starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly places a building, as defined in section 53a-100, *of another* in danger of destruction or damage." (Emphasis added.) General Statutes § 53a-114 (a). We observe that there is no statutory language to support the defendant's proposition that the state must prove that the endangered building is owned (or possessed) *exclusively* by someone else. Nor does such a proposition make sense as a matter of public policy. "[T]he purpose of § 53a-114 . . . [is] to penalize those who endanger another's property through recklessness." (Footnote omitted.) *State* v. *Parmalee*, 197 Conn. 158, 164, 496 A.2d 186 (1985). It would make little sense for the reckless burning statute to except from its purview an individual—whose conduct otherwise would fall within its reach—merely because that individual also has some ownership or possessory interest in the endangered building. Accordingly, we consider the language "of another" to be unambiguous because it is not susceptible to more than one *reasonable* interpretation. In short, we construe the phrase "of another" to apply plainly and unambiguously to any proprietary or possessory interest in the endangered building by someone other than the defendant, whether exclusive or nonexclusive.

Moreover, even if the phrase "of another" in § 53a-114 (a) were deemed susceptible to more than one reason-

able interpretation, and therefore ambiguous, extratextual evidence of the meaning of the statute buttressesour conclusion. Section 53a-114 is contained within our arson statutes, which "are based on parallel provisions of the New York Revised Penal Law and the Model Penal Code and similarly define the various grades of arson in terms of the degree of risk to human safety. Report of the Commission to Revise the Criminal Statutes (1965), pp. 3, 13–14." (Footnote omitted.) *State* v. *Parmalee*, supra, 197 Conn. 163. Although the General Statutes do not define "of another" for purposes of the arson statutes, the Model Penal Code[2] defines "of another" for purposes of arson and related offenses as "anyone other than the actor [having] a possessory or proprietary interest . . . ." 2 A.L.I., Model Penal Code and Commentaries (1985) § 220.1 (4), p. 140.

On the basis of the foregoing, we reject the defendant's argument that the state had the burden to prove that the house at 145 Bloomingdale Road was owned *exclusively* by someone other than the defendant.

B

We next address the defendant's argument that there was insufficient evidence to prove beyond a reasonable doubt that the house was owned by someone else. This argument also fails.

The following evidence, on which the jury reasonably could have relied, and procedural history are relevant to our analysis. During the course of their investigation, the police interviewed the defendant twice. The first interview occurred shortly after the police responded

[2] The Model Penal Code provides that a person commits reckless burning or exploding "if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly: (a) places another person in danger of death or bodily injury; or (b) places a building or occupied structure of another in danger of damage or destruction." 2 A.L.I., Model Penal Code and Commentaries (1985) § 220.1 (2), p. 140.

to the scene. During this interview, an officer asked the defendant whether his parents could have started the fire. The defendant responded that his parents did not set the fire because "it's their house." The defendant also told the officer that he had lived in China for most of the past twelve years and mentioned that he occasionally brings groups back from China to Connecticut for short-term trips. When asked by the officer if he brings these groups to his parents' house, the defendant responded "no" and instead stated that they stay in hotels or with host families. He also told the officer that he and his brother would rent a house in New London to accommodate these groups.

The police interviewed the defendant for the second time later that morning at the police station. During this interview, the defendant told the police that he and his family did not intend to stay in Connecticut permanently and that they planned on returning to China where he taught English. He also admitted that he felt that his family was imposing on his parents while staying at the house. Specifically, the defendant stated that "he knew deep down" that "his parents, as welcoming as they've been for the past couple of months . . . have their lifestyle and . . . if we have to overstay because of the situation . . . I feel like it's more of a burden on them."

Finally, during trial, the prosecutor questioned the defendant about who owned the house. The defendant did not affirmatively state that he owned the house. Instead, he simply responded that "[i]t's my home when I'm here . . . ."

After the state rested its case, the defendant moved to dismiss the reckless burning count on the ground that the state had failed to prove that the defendant recklessly endangered a building "of another" because it did not offer any evidence of who owned the house.

The trial court denied the motion, concluding that there was sufficient evidence that a person other than the defendant owned the house. After the jury returned its verdict, the defendant filed a motion to set aside the verdict with respect to the reckless burning count, in which he, inter alia, repeated the same argument. In that connection, the defendant argued that the state should have been required to prove ownership of 145 Bloomingdale Road "with proof of the highest level of certitude: a deed, a mortgage, land records from city hall or some other such hard document." The court denied his motion, stating that, "[a]lthough the state did not introduce land records or a deed or mortgage, the evidence, in fact, was overwhelming that the defendant and his family were living at his parents' house. In fact, the defendant's own statements included his feelings about imposing on his parents by living there with his wife and children."

In his principal appellate brief, the defendant claims, without citation to any relevant legal authority, that the state should have been required to produce documentary evidence of the ownership of 145 Bloomingdale Road (such as a deed or a mortgage) unless the state could show that such direct evidence was unavailable. At oral argument before this court, however, the defendant abandoned his assertion that *documentary* evidence of ownership is required in a reckless burning case. Instead, the defendant argued, additional evidence was required in the present case in the form of, for example, testimony of someone who was present at the closing, a representative of the bank, or a representative from town hall. The defendant's argument is unavailing.

As an initial matter, the plain language of § 53a-114 (a) does not require that "of another" be proven by a particular form of evidence, such as a deed, a mortgage, or the testimony of a particular individual. The defendant has not cited, and we are unaware of, any authority

that supports such a proposition, and we decline the defendant's invitation to exercise our inherent supervisory authority to adopt such a requirement.

In the present case, the state produced sufficient evidence from which the jury reasonably could have found that the defendant's parents owned the house. When interviewed at the scene, the defendant expressly stated that it was "their house." The state also produced evidence indicating that the defendant had spent most of the last twelve years in China, he and his family did not intend to move back to Connecticut permanently, they planned their return to Connecticut as a short-term trip, and they already had plans to move back to China. The defendant also told the police that he felt as though he was burdening his parents by staying with them. Moreover, when an officer asked the defendant whether he brought groups to Connecticut for short-term trips to his parents' house, the defendant responded that he did not, and stated that they stayed in hotels, with host families, or at a house in New London that he and his brother would rent to accommodate them. He also failed to state affirmatively that he owned the house when questioned at trial about who owned the house, allowing for a reasonable inference that he did not own the house.

In sum, viewing all of the evidence available in the light most favorable to sustaining the verdict; see *State* v. *Crafter*, supra, 198 Conn. App. 738; we conclude that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the endangered building was that "of another." Accordingly, the defendant's sufficiency of the evidence claim fails.

II

The defendant also claims that the court erred in denying his motion to set aside the verdict as to the reckless

burning count because the verdict was against the manifest weight of the evidence in that "his behavior, though ill-advised, manifestly was not reckless."[3] For the reasons that follow, we are unpersuaded.

We begin by reviewing the legal principles that govern a weight of the evidence claim. "At the outset, we note that a challenge to the *weight* of the evidence is not the same as a challenge to the *sufficiency* of the evidence. A sufficiency claim dispute[s] that the state presented sufficient evidence, if found credible by the jury, to sustain [the defendant's] conviction. . . . In contrast, a weight claim does not contend that the state's evidence . . . was insufficient, as a matter of law, to establish the defendant's guilt beyond a reasonable doubt. . . . Rather, [it] asserts that the state's case . . . was so flimsy as to raise a substantial question regarding the reliability of the verdict [and that there was a] serious danger that [the defendant] was wrongly convicted. . . . .

"Given that these two types of claims raise fundamentally different issues, the inquiry appropriately undertaken by a court ruling on a sufficiency of the evidence claim differs substantially from that of a court ruling on a weight of the evidence claim. In reviewing the sufficiency of the evidence, a court considers whether there is a reasonable view of the evidence that would support a *guilty* verdict. . . . In doing so, the court does not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some

[3] General Statutes § 53a-3, which contains the definitions for our Penal Code, unless different meanings are expressly specified, provides that "[a] person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ." General Statutes § 53a-3 (13).

doubt of guilt is shown by the cold printed record. . . . [It] cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Thus, a court will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient. . . .

"In contrast, a court determining if the verdict is against the weight of the evidence does precisely what a court ruling on a sufficiency claim ought not to do. That is, the court must do just *what every juror ought to do* in arriving at a verdict. The juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly. . . . The trial judge in considering the verdict *must do the same* . . . and if, in the exercise of all his knowledge from this source, he finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or were governed by ignorance, prejudice, corruption or partiality, then it is his duty to set aside that verdict and to grant a new trial. . . . In other words, the court specifically is required to act as a [seventh] juror because it must independently assess [the] credibility [of witnesses] and determine the weight that should be given to . . . evidence. . . .

"Thus, because a court is required to independently assess credibility and assign weight to evidence, a weight of the evidence claim necessarily raises the issue of which courts are competent to perform those tasks. It is well settled that *only the judge who presided over the trial* where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence . . . . Consequently, *a judge*

*in a later proceeding, such as a direct appeal* or a habeas corpus proceeding, *is not legally competent* to decide such a claim on the basis of the cold printed record before it. . . . The rationale behind this rule is sound: [T]he trial court is uniquely situated to entertain a motion to set aside a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . [T]he trial judge can gauge the tenor of the trial, as [an appellate court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 745–48, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

It necessarily follows that appellate review of a weight of the evidence claim is greatly circumscribed. Id., 750. "[T]he proper appellate standard of review when considering the action of a trial court granting or denying a motion to set aside a verdict and a motion for a new trial is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . We do not . . . determine whether a conclusion different from the one reached could have been reached. . . . A verdict must stand if it is one that a jury reasonably could have returned and the trial court has accepted. . . .

"Thus, if asked to review the trial court's ruling on a weight of the evidence claim presented to it, an appellate court is not to independently make credibility determinations or assign weight to evidence. Furthermore,

our task is not to assess the jury's credibility determinations and assignment of weight to evidence. Rather, our task is to review, for an abuse of discretion, the trial court's assessment of the jury's credibility determinations and assignment of weight to evidence." (Citations omitted; internal quotation marks omitted.) Id., 750–51.

The following additional evidence, on which the jury reasonably could have relied, and procedural history are relevant to our review of the trial court's assessment of the jury's verdict on the reckless burning count. To facilitate his plan to leverage one Chinese agency against another, the defendant traveled to a Walmart store to purchase an accelerant. Although the defendant had never used the Sterno flammable gel before, he chose it because he believed that he would be able to see it, thus making it easier to manage. He did not, however, read the entire warning label on the bottle, which stated that the product should be used only in well ventilated areas and away from heat, sparks, and open flames. While the defendant was carrying out his plan, he also did not have a fire extinguisher nearby, despite lighting the candle and sheet in close proximity to the accelerant.[4] Nor did he have any other contingency plan in the event that the fire became unmanageable.

In the defendant's motion to set aside the verdict, he argued that the jury's verdict on the reckless burning count was contrary to the weight of the evidence. Specifically, he claimed that his behavior was not reckless because he consciously regarded the risks by carefully planning the conditions under which he would start the fire. On April 9, 2019, the court heard oral argument on the motion. The court rejected the defendant's argument, concluding that "an individual can think about

[4] At trial, the defendant estimated that the open flame was approximately five feet away from the Sterno.

their conduct, but in deciding to pursue a course of conduct, they can, in fact, act recklessly. And here the jury found that that is what happened. The jury found, in accordance with the evidence, that the defendant consciously disregarded a substantial and unjustifiable risk. The verdict was not against the manifest weight of the evidence . . . .'' Accordingly, the court denied the motion.

On appeal, the defendant largely seeks to reargue certain evidence relating to the manner in which he ''staged the scene''—evidence that was assessed by the jury. His argument ignores other evidence necessarily assessed by the jury, including the following. The jury heard evidence that the defendant spread Sterno, an accelerant, around the house at around 2 a.m. while his wife, their children, and his parents were asleep upstairs. He then lit a candle and used it to set a sheet on fire for approximately thirty to sixty seconds within five feet of some of the Sterno. The defendant engaged in such conduct without reading the product's warning labels fully, without having any experience using this particular Sterno product, without having a fire extinguisher nearby, and without any other contingency plan in case his plan went awry. Although the defendant testified that he selected the Sterno gel because he thought that he would be able to see and manage it, the jury reasonably could have found that the defendant, in failing to read and abide by the warning label and in failing to have a contingency plan, consciously disregarded a substantial and unjustifiable risk. Because there was a reasonable basis for the jury to find that the defendant's intentional starting of the fire recklessly placed the house in danger of destruction or damage, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict on the ground that the verdict was against the weight of the evidence.

The defendant further argues that the court abused its discretion in denying his motion because the court appears to have relied exclusively on the jury's verdict and neglected to conduct its own assessment of the evidence. We disagree with the defendant's characterization of the court's analysis. The court, in denying the defendant's motion, concluded that "an individual can think about their conduct, but in deciding to pursue a course of conduct, they can, in fact, act recklessly" and that the "jury found, in accordance with the evidence, that the defendant consciously disregarded a substantial and unjustifiable risk." The court then stated its own conclusion that the "verdict was not against the manifest weight of the evidence . . . ." These statements indicate that the court independently weighed the evidence and that it did not substitute the jury's analysis for its own in accordance with the standard governing a trial court's consideration of a weight of the evidence claim.[5] See *State* v. *Soto*, supra, 175 Conn. App. 747–48.

In sum, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict as to the reckless burning count on the ground that the verdict was contrary to the weight of the evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

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[5] In addition, to the extent the defendant suggests that the court was required to make detailed factual findings in connection with its denial of the defendant's motion to set aside the verdict, we note that he has not cited any authority that stands for such a proposition, and we are not aware of any.

# C & H SHORELINE, LLC *v.* LORRAINE RUBINO ET AL.
## (AC 43197)

Moll, Alexander and DiPentima, Js.

*Syllabus*

The plaintiff home cleaning company, C Co., sought to recover damages from the defendants for breach of contract in connection with the defendants' failure to pay for services rendered. The parties' agreement contained a one year limitation provision that provided that no action relating to the subject matter of the agreement could be brought more than one year after "the claiming party" knew or should have known of the cause of action. The trial court found that by September, 2016, C Co. was aware that the defendants were refusing to pay and did not commence the action until March, 2018. The court therefore found in favor of the defendants on their special defense that the action was time barred under the agreement. On C Co.'s appeal to this court, *held* that the trial court properly rendered judgment in favor of the defendants on the basis that C Co.'s claims were contractually time barred; this court concluded that, because C Co. offered a reasonable interpretation of the limitation period, that the term "claiming party" referred only to the customer, and the defendants offered a competing reasonable interpretation, that the term "claiming party" was otherwise not defined in the agreement and the agreement consistently used the terms "client," "customer," and "provider" when referring to the parties individually, so that the newly introduced term meant any party bringing a cause of action relating to the agreement, the limitation provision was ambiguous and applied the contra proferentem rule, resolving the ambiguity against C Co. as the undisputed drafter of the agreement and concluding that the one year limitation period applied to any contracting party; accordingly, because there was no dispute that C Co. commenced the action after one year from the time it knew or should have known of it, its claims were contractually time barred.

Argued January 6—officially released March 16, 2021

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

*Frank J. Kolb, Jr.*, for the appellant (plaintiff).

*Michael P. Barry*, for the appellees (defendants).

*Opinion*

MOLL, J. The sole issue in this appeal is whether the one year limitation period set forth in the parties' agreement[1] applies to the claims brought by the plaintiff. The plaintiff, C & H Shoreline, LLC d/b/a Servpro, appeals from the judgment of the trial court rendered in favor of the defendants, Lorraine Rubino and John Rubino. On appeal, the plaintiff argues that the court improperly concluded that the contractual limitation period barred the plaintiff's claims. We affirm the judgment of the trial court.

The trial court's memorandum of decision sets forth the following relevant facts and procedural history. "[The plaintiff] does business as 'Servpro.' . . . [The plaintiff] . . . commenced the present action by service of process on March 26, 2018. . . . The complaint consists of six counts. The first count alleges breach of contract. The second count alleges unjust enrichment. The third count alleges quantum meruit. The fourth count alleges conversion. The fifth count alleges breach of the implied covenant of good faith and fair dealing. The sixth count alleges negligent misrepresentation. All counts relate to a contract between [the plaintiff] and Lorraine Rubino signed on January 7, 2016. Substantively, [the plaintiff] claims that the [defendants] hired it to clean their summer home after a flood caused by bursting pipes and haven't paid for services rendered. The [defendants'] substantive defense is that [the plaintiff] failed to perform its contractual duties.

[1] Although the contract at issue was signed only by Lorraine Rubino on the part of the defendants, for ease of reference, we refer in this opinion to the contract as "the parties' agreement." The fact that the defendant John Rubino is not a signatory to the parties' agreement is not a subject of this appeal.

"In addition to its substantive defense, the [defendants] . . . asserted a special defense [as its first special defense] that, '[t]his action is barred by paragraph 7 of the parties' agreement.' The special defense refers to paragraph 7 of the January 7, 2016 contract between the parties . . . . The paragraph in question provides that: '7. Any claim by Client for faulty performance, for nonperformance or breach under this Contract for damages shall be made in writing to Provider within sixty (60) days after completion of services. Failure to make such a written claim for any matter which could have been corrected by Provider shall be deemed a waiver by Client. NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION.' . . . The contract defines [the plaintiff] as the 'Provider.' The term 'Client' is not expressly defined (Lorraine Rubino is identified as 'Customer'), but the term presumably refers to the recipient of services. The term 'claiming party' is not defined." (Emphasis in original.)

The action was tried to the court, *Hon. Jon C. Blue*, judge trial referee, on June 19, 2019. On July 11, 2019, the court rendered judgment in favor of the defendants on all counts of the plaintiff's complaint, concluding that the defendants' first special defense was dispositive of the action. With respect to its interpretation of paragraph 7 of the parties' agreement, the court concluded that the one year limitation provision contained therein was unambiguous and applied to the plaintiff's claims. The court reasoned as follows: "Paragraph 7 consists of three sentences. The first two sentences expressly refer to claims by 'Client.' The third sentence, containing the one year limitation period in question here, does not. The third sentence instead expressly refers

to 'the claiming party.' 'Claiming party' is not a defined term in the contract. Under these circumstances, 'claiming party' can be safely assigned its meaning in ordinary English as 'a party making a claim.' This meaning is reinforced by the third sentence's express reference to the time when 'the claiming party knew or should have known of the cause of the action.' A 'claim' is 'a cause of action.' . . .

"The typeface of the contract reinforces the conclusion that the third sentence of paragraph 7 has a meaning significantly broader than that of the first two sentences. The first two sentences are in ordinary print. The third sentence is entirely in capital letters and boldface print. The contractual typeface, like the contractual language, emphasizes the fact that the third sentence has an independent—and crucially important—meaning." (Citations omitted.)

In rendering its decision, the court recognized that, in a separate case, another Superior Court judge had reached a different conclusion with respect to the identical paragraph of the same Servpro contract executed here. In *Servpro of Milford-Orange-Stratford* v. *Byman*, Docket No. CV-11-6008337-S, 2012 WL 2044570, *2 (Conn. Super. May 11, 2012), the court concluded that, in "[v]iewing the contract in its entirety, it is clear that paragraph [7] is a warranty provision and that the sentence relied upon by the [defendant customers] contemplates claims *brought by a customer*, including claims for faulty performance, nonperformance or breach of contract. In this regard, the court agrees with the plaintiff [service provider] that the intention of paragraph [7] is not to limit the plaintiff's ability to seek reimbursement for goods and services." (Emphasis in original.)

The court in the present action went on to conclude, in the alternative, that a judicial finding of ambiguity with respect to the one year limitation provision would

not aid the plaintiff because any ambiguity would be construed against the drafter. Relevant to this conclusion, the court found that "the contract is a boilerplate instrument prepared by [the plaintiff]. It was not a negotiated contract. [The plaintiff] does not contest this issue." The court also referred to the parties' agreement as "Servpro's standard contract of adhesion . . . ."

Having concluded that the one year limitation provision applied to all parties to the contract, the court found in favor of the defendants on their first special defense as to all counts.[2] In this connection, the court found that the plaintiff "did not commence this action within the limitation period mandated by its own contract . . . . [The plaintiff] was fully aware by the end of August, 2016, that the [defendants] did not intend to pay for the services allegedly rendered. Lorraine Rubino credibly testified that she informed [the plaintiff] of her intention to refuse payment during the summer of 2016. A business record compiled by [the plaintiff] . . . indicates that this conversation occurred on June 7, 2016. Giving [the plaintiff] every benefit of the doubt, the conversation occurred no later than September 1, 2016. . . . [The plaintiff] commenced the present action by service of process on March 26, 2018. That date was, at a minimum, more than one year and six months after [the plaintiff] knew or should have known of the cause of action. The action is consequently time barred by [the plaintiff's] own contract." The court therefore rendered

[2] We pause to note that reasonable contractual limitation periods have long been deemed valid under Connecticut law. See, e.g., *Monteiro* v. *American Home Assurance Co.*, 177 Conn. 281, 283, 416 A.2d 1189 (1979) ("[s]ince a provision in a fire insurance policy requiring suit to be brought within one year of the loss is a valid contractual obligation, a failure to comply therewith is a defense to an action on the policy unless the provision has been waived or unless there is a valid excuse for nonperformance; and such a condition requiring suit to be brought within one year does not operate as a statute of limitations"). Here, the *validity* of the one year limitation period in the parties' agreement is not disputed.

judgment in favor of the defendants on all counts of the plaintiff's complaint. This appeal followed.

Because the plaintiff's claim challenges the court's interpretation of the parties' agreement, we begin our analysis by setting forth the applicable standard of review and general principles of law relevant to the construction of contracts. "The law governing the construction of contracts is well settled. When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 357–58, 166 A.3d 800 (2017). "When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . [When] there is definitive contract language, [however] the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017).

"We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms. . . . Where the language is ambiguous, however, we must construe those ambiguities against the drafter [sometimes referred to as the contra proferentem rule]. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere

fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005).

We continue with a review of paragraph 7 of the parties' agreement, which, as stated previously, provides: "Any claim by Client for faulty performance, for nonperformance or breach under this Contract for damages shall be made in writing to Provider within sixty (60) days after completion of services. Failure to make such a written claim for any matter which could have been corrected by Provider shall be deemed a waiver by Client. NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION." (Emphasis in original.)

The parties disagree about the applicability of the third sentence of paragraph 7, which contains the one year limitation period, to the plaintiff's claims. The plaintiff argues that because the first two sentences of paragraph 7 relate solely to claims brought by the "Client," it necessarily follows that the term "Claiming Party" in the third sentence refers only to the customer.

In contrast, while urging us to adopt the trial court's conclusion, the defendants counter that paragraph 7 is unambiguous and that the term "Claiming Party," which is otherwise not defined in the parties' agreement and appears only once therein, means any party asserting a cause of action. Relatedly, the defendants highlight the fact that the parties' agreement consistently uses (1) the terms "Client" and "Customer" when referring solely to the party receiving the services and (2) the term "Provider" when referring to the Servpro franchisee providing the services. The defendants argue that it follows, therefore, that the newly introduced term—"Claiming Party"—means any party bringing a cause of action relating to the parties' agreement. In the alternative, the defendants argue that, even if the use of the term "Claiming Party" were deemed ambiguous, the plaintiff's claim still fails because, in the absence of the trial transcript being made a part of the record, there is an inadequate record on appeal. We agree that the plaintiff's claim is unavailing.

Because the plaintiff offers a reasonable interpretation of the third sentence on the one hand (i.e., akin to the one espoused by the court in *Servpro of Milford-Orange-Stratford* v. *Byman*, supra, 2012 WL 2044570, *2) and the defendants offer a competing, reasonable interpretation on the other hand (i.e., the one espoused by the court in the present case), we conclude that the third sentence of paragraph 7 is ambiguous as to whether the term "Claiming Party" refers only to the client or, instead, to any party asserting a cause of action relating to the contract. "If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, supra, 273 Conn. 735.

Having determined that the third sentence in paragraph 7 of the parties' agreement is ambiguous, and because the plaintiff does not suggest that there is any countervailing extrinsic evidence to support a finding that the parties understood the third sentence to apply only to claims brought by the "Client" or "Customer," we apply the contra proferentem rule, which resolves the ambiguity against the plaintiff as the undisputed drafter. See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 108, 84 A.3d 828 (2014) (contra proferentem rule should be invoked "only as a last resort if [the trial court] is unable to resolve the ambiguity . . . by considering the extrinsic evidence").

In sum, we construe the ambiguity in the third sentence of paragraph 7 of the parties' agreement against the plaintiff as the drafter and conclude that the one year limitation period contained therein applies to any contracting party asserting a cause of action. Because there is no dispute that the plaintiff commenced the present action after one year from the time it knew or should have known of its cause of action, we conclude that judgment was properly rendered in favor of the defendants on the basis that the plaintiff's claims were contractually time barred.

The judgment is affirmed.

In this opinion the other judges concurred.