CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE KARTER F.*
(AC 44496)

Alvord, Clark and Sullivan, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child, K. *Held*:

1. The respondent father could not prevail on his claim that the trial court improperly found that the Department of Children and Families made reasonable efforts to reunify him with K and that he was unable or unwilling to benefit from such efforts.

   a. The trial court's finding that the department made reasonable efforts to reunify the respondent father with K was supported by substantial evidence and was not clearly erroneous: in light of the circumstances created by the father, including his incarceration, this court could not conclude that the department's efforts were unreasonable; the department provided the father with the opportunity to visit with K, which he initially declined, and, once visits were requested, the department consistently provided them, and the department encouraged the father

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* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or other through whom that party's identity may be ascertained.

to avail himself of services offered by his correctional facility; thus, the department's efforts were in line with efforts that this court has previously found to be reasonable.

b. The trial court properly found that the respondent father was unable or unwilling to benefit from reunification services: the court recognized that, due to the father's incarceration, which this court has stated is a relevant and appropriate factor for the trial court to consider, he would be unavailable to K until his release, K was only four months old at the time of the father's incarceration and, even assuming that he was paroled at the earliest possible release date, K would be a five year old child who has no emotional connection to the father; the court made ample relevant factual findings, including that the father's incarceration rendered him unable to benefit from reunification efforts, and findings concerning the father's unresolved mental and emotional issues, his failure to take advantage of the opportunities that the department offered to treat those issues, and his failure to bond with K during his incarceration.

2. The respondent father's claim that the trial court incorrectly concluded that he failed to rehabilitate pursuant to statute (§ 17a-112 (j) (3) (B) (i)) was unavailing: although the father claimed that the court failed to consider the COVID-19 pandemic and the resulting cessation of services while he was incarcerated, he failed to acknowledge that the relevant date for considering whether he failed to rehabilitate was the date on which the petition for termination of parental rights was filed, which, in the present case, was approximately seven months before the onset of the COVID-19 pandemic; the father did not fully comply with the court-ordered specific steps requiring him to complete available mental health and intimate partner violence treatment and to visit K as often as permitted by the department, and the trial court properly found that the father's failure to engage in services and to improve his parenting skills called into question his ability to take responsibility as a parent and supported the court's finding that he puts his own needs before those of K and, thus, the record did not support the belief that the father could achieve a responsible role in K's life within a reasonable period of time.

3. The respondent father could not prevail on his claim that the trial court improperly found that termination of his parental rights was in K's best interests: the court made findings pursuant to each of the factors delineated by the applicable statute (§ 17a-112 (k)) and, although the father claimed that he could still rehabilitate, the trial court correctly determined that the father would not be able to assume a responsible position in K's life within a reasonable time; moreover, K's interests in stability and permanence outweighed the father's interest in the care and custody of K; furthermore, the father did not make progress in addressing his issues as required by his specific steps, and K, who was three years and nine months old at the time the court rendered judgment

terminating the father's parental rights, had lived with his half brother in the same foster home since he was adjudicated neglected, he had bonded with his foster parents, who hoped to adopt K, as well as with the other children in the home, and expert testimony indicated that removing K from the foster home would be not only disruptive, but traumatic.

Argued May 13—officially released August 24, 2021**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and transferred to the judicial district of New Haven, Juvenile Matters; thereafter, the case was tried to the court, *Conway*, *J.*; judgment denying the respondent father's motion to revoke commitment and transfer guardianship and terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

Elizabeth Bannon, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

CLARK, J. The respondent father, Charles W. (respondent), appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families (commissioner), terminating his parental rights with respect to his minor child, Karter

** August 24, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

F., pursuant to General Statutes § 17a-112 (j).[1] On appeal, the respondent claims that in terminating his parental rights, the trial court improperly found that (1) the department made reasonable efforts to reunify him with his child and that he was unable or unwilling to benefit from reunification services, (2) he had failed to rehabilitate, and (3) it was in the best interests of the child to terminate his parental rights. We disagree with the respondent and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant. The child was born in March, 2017. In June, 2017, the respondent was arrested on charges of breach of the peace in the second degree and assault in the third degree after he allegedly punched the mother in the face and spat on her, an incident for which the mother obtained a protective order against him. In July, 2017, the respondent again was arrested and charged with, inter alia, assault in the first degree, risk of injury to a child and carrying a pistol without a permit, in connection with an incident in which he allegedly shot a thirteen year old boy. His bond was set at $1 million and he was incarcerated at the Northern Correctional Institution.

On September 21, 2017, the Department of Children and Families (department) filed neglect petitions on behalf of the minor child and his maternal half brother. On October 10, 2017, the department invoked a ninety-six hour administrative hold on behalf of the child, due to the mother's unaddressed mental health and intimate partner violence issues, lack of stable housing, and the respondent's incarceration.[2] The respondent was given

[1] The court also terminated the parental rights of the respondent mother, Le'eisha F. (mother), who consented to termination and is not a party to this appeal. Because the mother is not participating in this appeal, we will refer in this opinion to the respondent father as the respondent.

[2] At that time, the child's older maternal half brother also was removed from the mother's care. The mother and the half brother's biological father

specific steps to facilitate reunification, which were approved and ordered by the court on October 13, 2017. On that same date, an order of temporary custody was filed and granted. The court held a hearing on October 20, 2017, to address the order of temporary custody. On October 26, 2017, the respondent appeared and, through appointed counsel, agreed to the order of temporary custody. The respondent requested a paternity test, which was ordered by the court. During the termination hearing, the court found that "[a]t a January 18, 2018 court hearing, the court and the parties reviewed the results of the paternity test: there existed a 99.99 percent likelihood that [the respondent] was [the child's] father." The respondent initially contested the results of the court-ordered paternity test and requested a contested paternity hearing, which the court scheduled. The respondent, however, elected not to proceed with the hearing and acknowledged paternity, which the court adjudicated on February 7, 2018.

Also in January, 2018, the child was adjudicated neglected and committed to the care and custody of the commissioner. Final specific steps were ordered for the respondent at the January 18, 2018 hearing, which required the respondent, inter alia, to engage in counseling; cooperate with service providers of mental health treatment, intimate partner violence treatment and education, and parenting services as determined appropriate by the department; attend and complete a domestic violence program; avoid the criminal justice system; and visit the child as often as permitted by the department. A department social worker first contacted the respondent in May, 2018. While he was incarcerated, from September, 2018, to March, 2020, the respondent engaged in monthly one hour supervised visits with

later consented to the termination of their parental rights as to the child's half brother.

the child.[3] Because the respondent was incarcerated, limiting what services the department could provide to him directly, the department encouraged the respondent to utilize services and programs available through the Department of Correction. Those services and programs were paused in 2020, when the COVID-19 pandemic rendered their provision no longer feasible.

On January 15, 2019, following a guilty plea and conviction of the criminal charges stemming from the incident in which the respondent shot a minor, the respondent was sentenced to seven years in prison. He was transferred from Northern Correctional Institution to Cheshire Correctional Institution, where he became eligible for a number of services and programs offered by that facility.

Approximately seven months prior to the start of the COVID-19 pandemic, on August 28, 2019, the commissioner filed a petition to terminate the respondent's parental rights as to the child pursuant to § 17a-112 (j), on the grounds that the child had been adjudicated neglected and the respondent had (1) failed to achieve sufficient personal rehabilitation and (2) lacked an ongoing parent-child relationship. The commissioner alleged that the department had made reasonable efforts to reunify the child with the respondent, but the respondent was unwilling or unable to benefit from the department's efforts because he had not engaged in recommended mental health services or otherwise addressed his issues, was incarcerated, and struggled to engage appropriately with the child during supervised visits, despite having received support and education. The commissioner further alleged that termination of the respondent's parental rights was in the child's best

[3] The respondent did not visit with the child in December, 2019, because the Department of Correction, for reasons not disclosed in the record, was unable to make the respondent available.

interests because the respondent had not engaged in court-ordered treatment or recommended services, displayed little interest in the child during supervised visits, and was serving a seven year prison sentence. The commissioner alleged that the child was attached to his foster parents, with whom he had lived, along with his half brother, since October, 2017.

The commissioner appended a social study to the termination petition pursuant to Practice Book § 35a-9, which was admitted into evidence. The study stated that the department encouraged the respondent to "partake in individual counseling services in May, 2018," and referred the respondent "to Integrated Wellness for individual therapy [and] employment assistance" and "mental health counseling with the Interface Center." Despite these referrals, the study stated that, although the respondent began participating in anger management services on January 25, 2019, he "ha[d] not started individual therapy at Cheshire Correctional [Institution] . . . ." The respondent "ha[d] not participated in any therapeutic services to date per his counselor's report." The respondent also "ha[d] not made efforts to utilize the correctional [facility's] books to educate himself on the roles of a father and the importance of engagement with [the child]." The court found that, although the respondent engaged in anger management sessions, prayer groups, and prison employment once he was transferred to Cheshire Correctional Institution, he "has yet to [engage] in meaningful and necessary mental health treatment or [intimate partner violence] treatment."

The study also stated that the respondent declined to request visitation with the child until August, 2018.[4]

[4] The only evidence of the reason for this delay is the department's social study, which states that the respondent had, at first, refused visits. At trial, the respondent disputed this evidence, testifying that he had requested visits in March, 2018. The court did not find that this testimony was credible, stating in its decision that "[t]he evidence does not support [the respondent's]

When visits between the respondent and the child commenced in September, 2018, the respondent "struggle[d] to engage with [the child] . . . [did] not speak to [the child] during his visits and during times [the child was] sad or crie[d], he [did] not attempt to nurture or console him. [The respondent] display[ed] little to no interest in [the child's] well-being during supervised visits and ha[d] limited physical contact with him. For example, [he] . . . [vented] about his life while incarcerated and [did] not ask for updates on [the child's] developmental, medical or social well-being."

The court conducted a termination trial remotely[5] on November 23 and 30, 2020. At trial, Inés Schroeder, a clinical and forensic psychologist, testified that she had performed a court-ordered psychological evaluation of the respondent in January, 2020. Schroeder's evaluation report was admitted into evidence, and revealed that the respondent struggles with anger, as evidenced by his June, 2017 domestic violence arrest, and has difficulty appreciating the needs of the child. When asked if the respondent demonstrated an understanding as to why the child was in foster care, Schroeder testified that the respondent "felt that he had not done anything wrong" and that the child was in the petitioner's care "because [the mother] was unable to take care of him . . . ." Schroeder also testified that she had observed the child and the respondent together. Consistent with the statements in the study, the child was silent for most of the observed visit and "did not engage playfully

time line." On appeal, the respondent does not challenge this factual determination.

[5] Due to the COVID-19 pandemic, the Judicial Branch held remote hearings using the Microsoft Teams platform. For more information, see State of Connecticut, Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 13, 2020), available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited August 20, 2021) ("Microsoft Teams is a collaborative meeting app with video, audio, and screen sharing features").

and actively until about the last ten minutes of the interaction and he did so at a distance." By contrast, the child was "very animated . . . [and] . . . sought physical affection voluntarily and spontaneously" when he was with his foster parents. The department's social worker also testified that the respondent had not participated in any mental health services while he was incarcerated and that he failed to engage with the child during visits or display an emotional bond with him.

Following the trial, on December 3, 2020, the court issued a memorandum of decision granting the petition on the grounds that the respondent had failed to rehabilitate[6] and that termination was in the child's best interests. The court first found that the department had made reasonable efforts to locate the respondent and to reunify him with the child, but found that the respondent was unable to benefit from those efforts. The court set forth the following factual findings in support of that determination. The respondent has been incarcerated since July, 2017, when the child was four months old, and his sentence runs until 2024, with the earliest possible release date in the fall of 2022. The department provided the respondent with monthly supervised visits with the child, but, due to the respondent's paternity challenge, those visits did not become possible until February, 2018, when the respondent's paternity was adjudicated. The respondent did not request visits with the child until six months later, in August, 2018. The department began to provide visits in September, 2018. After his sentencing in January, 2019, the respondent engaged in anger management sessions, prayer groups, and a work program. The court acknowledged that "the

[6] The court ultimately found that the respondent had failed to rehabilitate. It, therefore, did not reach the alternative ground alleged by the commissioner, lack of an ongoing parent-child relationship. See, e.g., *In re Shane P.*, 58 Conn. App. 234, 242, 753 A.2d 409 (2000) (satisfaction of one statutory ground under § 17a-112 (j) (3) is sufficient).

services available to a respondent father housed in [a correctional facility] [are] not as robust as community based services," but, nonetheless, found that the department made reasonable efforts to reunify the respondent with the child, given the monthly visits and referrals to programs offered by Cheshire Correctional Institution. The court also found that, regardless of the reduction in correctional programs due to the COVID-19 pandemic after the termination petition was filed, the respondent's protracted incarceration prevented reunification.

The court next addressed the adjudicatory ground of failure to rehabilitate. Reviewing the respondent's circumstances, the court determined that his "present situation renders him incapable of being a meaningful resource" for the child because his incarceration extended to at least the fall of 2022. The child was four months old when the respondent was incarcerated and, even if the respondent were released on the earliest possible release date, in the fall of 2022, the child would then be five years old and have no emotional connection to the respondent. Even on release, the respondent would need to reintegrate into the community and engage in "meaningful, beneficial, and direly needed mental health treatment" before he could parent the child. The court credited Schroeder's report extensively in support of this finding, quoting several of her observations. The court highlighted Schroeder's observation that the respondent struggles with depression and exhibits "below average cognitive functioning" and a "limited grasp of social etiquette and expectations." (Internal quotation marks omitted.) The respondent has difficulty managing his feelings, as "[i]ntense anger often yields highly volatile and aggressive actions . . . ." (Internal quotation marks omitted.) Significantly, the respondent disclosed to Schroeder, in discussing the June, 2017 domestic violence incident in

which he punched the mother, that "I am very paranoid and if someone gets close, I start swinging. It sets me into this mood and [I] don't see nothing but blackness. I don't recall what I do during the blackness period. I have had that since I was a little kid." (Internal quotation marks omitted.) Schroeder opined that the respondent "struggles to consider his child's needs above his own [and] . . . has limited insight into his child's psychological needs." (Internal quotation marks omitted.) The court, therefore, concluded that the petitioner had proven the adjudicatory ground of failure to rehabilitate under § 17a-112 (j) (3) (B) (i), namely, that the respondent "failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, [he] could assume a responsible position in the life of the child . . . ." The court found that the respondent's "requisite degree of parental rehabilitation . . . given [the child's] specific needs . . . is simply not foreseeable in a reasonable period of time."

The court proceeded to the dispositional phase of the proceedings, in which it addressed the best interests of the child pursuant to § 17a-112 (k), and made the findings required by that statute by clear and convincing evidence. The court found that, from July, 2017, when the respondent was arrested after shooting a minor, to September, 2018, when visits between the child and the respondent began, there was no contact between the respondent and the child. From September, 2018 to March, 2020, the respondent "was a once a month, one hour presence in [the child's] life," because, due to his incarceration, the department could only provide monthly supervised prison visits. During these visits, the respondent "squander[ed] his parenting time . . . ."

The court found that, while he was incarcerated, the respondent showed no interest in involving himself in

the child's life, and his behavior was consistent with Schroeder's observations that he put his own needs over those of the child. The court considered the respondent's behavior at visits, his lack of attempts to connect with the child outside of visits apart from mailing him one birthday card in 2020, and his paternity challenge.[7] The court also found that court-ordered specific steps had been in effect since October, 2017, but the respondent had yet to engage in either mental health or intimate partner violence treatment, which were necessary for him to rehabilitate.

The court also discussed the child's current placement. It found that, in October, 2017, the department placed the child and his half brother with the same foster family, which plans to adopt both children. The child, who remains in that placement, was three years and nine months old at the time of the court's judgment terminating the respondent's parental rights. The court emphasized, pursuant to § 17a-112 (k) (4), the child's strong attachment to his foster family and psychological home.[8] It credited Schroeder's testimony concerning the child's interactions, finding that "[b]oth brothers have thrived . . . and a positive, nurturing and loving

[7] In finding that the respondent put his own needs before those of the child, the court also considered the respondent's concurrent motion to revoke commitment and transfer guardianship of the child from his foster family to a nonrelative guardian. The respondent had previously expressed a desire that the child and his half brother not be separated. The court quoted the respondent's explanation at trial that "I changed my mind, why should I not be happy?" as indicative of the respondent's sense of entitlement. (Internal quotation marks omitted.) The court denied the respondent's motion in its decision. Although on his appeal form the respondent purports to appeal that order, the respondent has not briefed this issue, and, therefore, we decline to address it.

[8] "[T]he court is statutorily required to address in writing the feelings and emotional ties of the child with respect to . . . any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties." (Internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 870–71, 120 A.3d 1271 (2015).

parent-child bond exists between both boys and their foster parents." The court found that the child also enjoys a positive sibling bond with his foster parents' three biological children. Disrupting that attachment, as Schroeder opined, would "needlessly place [the child] at risk of emotional and psychological upset or harm."

Finally, the court found that it was not aware of "any person, parent, agency or economic circumstance" that had prevented the respondent from establishing or maintaining a meaningful relationship with the child. The court concluded, on the basis of clear and convincing evidence, that termination of the respondent's parental rights was in the best interests of the child. This appeal followed.

I

The respondent first challenges the court's findings, made pursuant to § 17a-112 (j) (1), that the department made reasonable efforts to reunify him with the child and that he was unable or unwilling to benefit from such efforts. We address these claims together.

Section 17a-112 (j) (1) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, *unless* the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . ." (Emphasis added.) "Because the two clauses are separated by the word 'unless,' this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. Section

17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original.) *In re Jorden R.*, 293 Conn. 539, 552–53, 979 A.2d 469 (2009).

"[W]e . . . review the trial court's decision . . . with respect to whether the department made reasonable efforts at reunification for evidentiary sufficiency." (Internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 59, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020). "[W]e review the trial court's subordinate factual findings for clear error." (Internal quotation marks omitted.) Id. Similarly, in reviewing a trial court's determination that a parent is unable to benefit from reunification services, "we review the trial court's ultimate determination . . . for evidentiary sufficiency, and review the subordinate factual findings for clear error." (Citation omitted.) *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015).

A

The respondent first claims that the court's finding that the department made reasonable efforts to reunify him with the child was clearly erroneous. He argues that monthly visits and mere referrals to treatment are not "reasonable" efforts and his incarceration does not excuse the department from satisfying its obligation to make reasonable efforts.[9] We disagree.

[9] The respondent also argues that the March, 2020 cessation of services due to the COVID-19 pandemic is a factor that should be considered in his favor, as well as his incarceration. The COVID-19 pandemic began *after* the petition to terminate the respondent's parental rights was filed in August, 2019, however, and this court has noted that Practice Book § 35a-7 provides that the trial court generally "is limited to evidence of events preceding the filing of the petition or the latest amendment" in the adjudicatory phase of a termination proceeding." (Internal quotation marks omitted.) *In re Yolanda V.*, 195 Conn. App. 334, 346, 224 A.3d 182 (2020). Moreover, despite the cessation of in person services in March, 2020, the department provided the respondent with services for more than one year *prior* to the COVID-19 pandemic.

"The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Emphasis omitted; internal quotation marks omitted.) *In re Hector L.*, 53 Conn. App. 359, 371, 730 A.2d 106 (1999).

The respondent essentially argues that the department should have gone to greater lengths on his behalf. Specifically, the respondent claims that the department could have provided "hands-on" teaching of parenting skills by a professional, rather than the mere granting of access to the prison library, or "additional services which could be implemented, such as therapeutic visitation, intensive family preservation, parent-child counseling (which can only be implemented when the child is in the home of the parent), as well as other services." (Internal quotation marks omitted.) He also suggests that the department "could at least have contracted with an outside provider to facilitate visits and engage [him] in parenting education at the same time . . . ." We disagree.

Merely arguing that the department could have done more is not enough to overturn the trial court's finding that the department's efforts were "reasonable" under the circumstances. "[I]n light of the circumstances created by the respondent"; *In re Anvahnay S.*, 128 Conn. App. 186, 192, 16 A.3d 1244 (2011); we cannot conclude that the department's efforts were unreasonable. As this court has stated, the reality is that "incarceration imposes limitations on what the department and its social workers can do and what services it can provide for an incarcerated parent facing termination of his or her parental rights." *In re Katia M.*, 124 Conn. App.

650, 670, 6 A.3d 86, cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010). The reasonableness of the department's efforts must be viewed in the context of these limitations.

This court has previously concluded that similar efforts by the department were reasonable for the purposes of § 17a-112 (j) (1). In *In re Hector L.*, supra, 53 Conn. App. 371–72, for instance, much like in the present case, the department provided consistent visits with the child and encouraged the respondent to take advantage of parenting and substance abuse programs offered by the Department of Correction. The respondent claimed that "the department 'could have done more' to provide reunification services while he was incarcerated." Id., 371. This court disagreed, concluding that, "[a]lthough the respondent could not avail himself of the programs normally available through the department because of the restraints imposed by his incarceration, he is not excused from making use of available programs offered by the [D]epartment of [C]orrection."[10] Id., 372. See also, e.g., *In re Kamal R.*, 142 Conn. App. 66, 71, 62 A.3d 1177 (2013) ("[w]hile the respondent faults the department for not being more involved in his programs while he was incarcerated, we note that while he was in the custody of [the Commissioner of Correction], the department was unable to offer him services"); cf. *In re Jermaine S.*, 86 Conn. App. 819, 838–39, 863 A.2d 720 (department made reasonable efforts when it recommended programs offered in prison, communicated with respondent's mother, and brought child to correctional facility for two visits with

[10] This court also noted that the respondent failed to identify "*how such services could have been offered while he was incarcerated.*" (Emphasis added.) *In re Hector L.*, supra, 53 Conn. App. 371–72. Similarly, in the present case, the respondent has not demonstrated that, in light of his incarceration, the department could have provided the additional services he claims it should have provided.

respondent father), cert. denied, 273 Conn. 938, 875 A.2d 43 (2005).

In the present case, the record supported the court's determination that the department made reasonable efforts to reunify the respondent with the child. The department provided the respondent with the opportunity to visit with the child, which the respondent initially declined until finally requesting visits in August, 2018. Once visits began in September, 2018, the department provided them on a consistent basis. The respondent was provided with final court-ordered specific steps in January, 2018, and, as early as May, 2018, the department encouraged him to avail himself of services and programs offered by his correctional facility. In sum, the respondent had the opportunity to pursue the therapeutic treatments offered by Cheshire Correctional Institution from at least January 15, 2019, when he was sentenced, onward.[11] The department's efforts to provide visits and to refer the respondent to resources offered by the Department of Correction are in line with efforts that this court has found reasonable in other cases involving incarcerated parents. See, e.g., *In re Jermaine S.*, supra, 86 Conn. App. 838–39; *In re Hector L.*, supra, 53 Conn. App. 371. We, therefore, conclude that the court's finding that the department made reasonable efforts to reunify the respondent with the child was supported by substantial evidence in the record and was not clearly erroneous.

B

The respondent also claims that the court improperly found that he was unable or unwilling to benefit from

[11] The department provided the respondent with initial court-ordered specific steps toward reunification on October 13, 2017, and final specific steps on January 18, 2018. Those specific steps described services that the respondent should have pursued, namely, mental health, parenting, and intimate partner violence treatment, "all as allowed by [the Department of Correction]." See, e.g., *In re Kamal R.*, supra, 142 Conn. App. 71 (respondent provided with specific steps).

reunification services for his child because he is presently incarcerated. Relying on the rule that incarceration alone is not a sufficient ground for the termination of one's parental rights; see, e.g., *In re Juvenile Appeal, Docket No. 10155*, 187 Conn. 431, 443, 446 A.2d 808 (1982); the respondent argues that the court's decision must be read to rest entirely on his incarceration. We do not agree with the respondent's characterization.

This court has stated, in the context of a parent's failure to rehabilitate, that although a parent's incarceration cannot form the sole basis for a termination of parental rights, it is a relevant and appropriate factor for the court to consider. See *In re Leilah W.*, 166 Conn. App. 48, 73, 141 A.3d 1000 (2016) (stating that "incarceration nonetheless may prove an obstacle to reunification due to the parent's unavailability" (internal quotation marks omitted)). That principle applies with equal force to the determination of whether a parent is unable or unwilling to benefit from reunification efforts. In finding that the respondent's "present situation renders him incapable of being a meaningful resource for [the child]," the court recognized the reality that the respondent would be unavailable as a resource for the child until at least the fall of 2022, if not until his 2024 maximum release date. The child was only four months old at the time of the respondent's incarceration and, even assuming that the respondent was paroled at the earliest possible release date, during the fall of 2022, the child would "then be a five year old boy who has no emotional connection or comfort level" with the respondent. These circumstances cannot be ignored.

Although the court's analysis of this prong is brief and states, perhaps inartfully, that the respondent's "protracted incarceration . . . renders him unable to benefit from reunification efforts," we do not construe

this analysis to mean that the mere fact of the respondent's incarceration was the sole basis for the court's finding that he was unable to benefit from the department's efforts. Our review of the court's memorandum of decision and the record reveals that the court made ample relevant factual findings concerning the respondent's unresolved mental and emotional issues and his failure to take advantage of the opportunities that the department offered him to treat those issues or to bond with the child during his incarceration. Specifically, the court found that the respondent did not complete the therapeutic treatment required by his specific steps. He does not challenge the court's finding that, as of the time of trial, he had not done so, nor does he even attempt to explain his failure to comply with that specific step. The respondent points only to his participation in *other* programs and services. Although he "participated" in supervised visits, the court credited the department social worker's observation that, when afforded the opportunity to visit with the child, the respondent did "not attempt to interact with [the child] at all." (Internal quotation marks omitted.) Moreover, visits were delayed for almost one year due to the respondent's conduct. He challenged paternity, even when biological testing determined that he was the child's father, delaying the possibility of visits until February, 2018. He then declined to request visits until August, 2018. The respondent has not demonstrated that any of these findings were clearly erroneous. Although the court made these findings in the context of its disposition of the respondent's failure to rehabilitate, they also support its determination that the respondent was unable or unwilling to benefit from the department's reunification efforts. Reading its decision as a whole; see, e.g., *In re November H.*, 202 Conn. App. 106, 118, 243 A.3d 839 (2020) (appellate court reads memorandum of decision in context as whole); we conclude that the court's finding that the respondent was

unable or unwilling to benefit from the department's reunification efforts was not clearly erroneous.

II

The respondent also claims that the court improperly found that he failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i).[12] We do not agree.

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under . . . § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase." (Internal quotation marks omitted.) *In re Jacob M.*, 204 Conn. App. 763, 777, A.3d , cert. denied, 337 Conn. 909, 253 A.3d 43 (2021), and cert. denied, 337 Conn. 909, 253 A.3d 44 (2021).

"Section 17a-112 (j) (3) (B) requires the court to find by clear and convincing evidence that . . . the parent of [the] child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position

[12] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

in the life of the child . . . .” (Internal quotation marks omitted.) *In re Corey C.*, supra, 198 Conn. App. 66–67.

“Personal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time.” (Internal quotation marks omitted.) *In re Damian G.*, 178 Conn. App. 220, 237, 174 A.3d 232 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018).

“[A] conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts . . . . Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous.” (Internal quotation marks omitted.) Id.

The essence of the respondent's claim is that the trial court improperly concluded that he failed to rehabilitate because it failed to consider the degree to which the COVID-19 pandemic and his incarceration affected him. In his brief to this court, he argues that “we cannot apply the same standard to [him] in this case . . . when he has not been in a position to receive and engage in service[s] due to circumstances beyond his control,

such as the COVID-19 pandemic safety issues."[13] As a result, he claims that the court should have afforded him with further opportunities to engage with resources provided through the department in order to demonstrate that he can rehabilitate. We do not agree.

Although the respondent argues that the court failed to consider the COVID-19 pandemic and the resulting cessation of services, he fails to acknowledge that the relevant date for considering whether he failed to rehabilitate is the date on which the termination of parental rights petition was filed, which in this case was in August, 2019, approximately seven months before the onset of the COVID-19 pandemic in March, 2020. See footnote 9 of this opinion. Although a court "*may* rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time"; (emphasis in original; internal quotation marks omitted) *In re Jennifer W.*, 75 Conn. App. 485, 495, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003); it is not required to do so.

As discussed in part I B of this opinion, the respondent was provided with final specific steps in January, 2018. He did not fully comply with these specific steps, which required him to complete available mental health and intimate partner violence treatment and to visit the child as often as permitted by the department, despite having approximately one and one-half years to do so. Moreover, the respondent appears to concede that he has not fully rehabilitated. In his brief, he admits that

[13] The respondent also appears to argue that the services available to him were insufficient for him to fully rehabilitate. Because we conclude in part I A of this opinion that the department's efforts were reasonable, this aspect of the respondent's claim is not persuasive and we do not address it further in this part of the opinion.

"there is no doubt that there were a number of issues that [he] has to deal with in order to reunify with [the child]." The record supports that concession and the trial court's finding that he will not do so within a reasonable amount of time.

As the trial court correctly found, the respondent's failure to engage in the rehabilitative services available to him and to work to improve his parenting skills calls into question his ability to take responsibility as a parent and supports the court's finding that he puts his own needs before those of the child. See *In re Mariah S.*, 61 Conn. App. 248, 266, 763 A.2d 71 (2000) (respondent mother who consistently put her own needs before those of child and did not take visitation and counseling obligations seriously or develop parenting skills failed to rehabilitate), cert. denied, 255 Conn. 934, 767 A.2d 104 (2001); *In re Amy H.*, 56 Conn. App. 55, 60, 742 A.2d 372 (1999) (respondent father who did not take advantage of visits or rehabilitative programs failed to rehabilitate). The court's finding relative to the respondent's lack of engagement and failure to take responsibility also finds support in Schroeder's report, which noted that the respondent blames the mother and does not recognize his own role in the child's removal from the home. The record simply does not support the belief that the respondent could achieve a responsible role in the life of the child within a reasonable period of time.

The question for the court was whether the respondent could rehabilitate in a *reasonable* period of time. See *In re Damian G.*, supra, 178 Conn. App. 237. The court stated that "it will take [the respondent] months, possibly years, to successfully reintegrate himself into the community, and to engage in meaningful, beneficial and direly needed mental health treatment. He would need to exhibit a sustained period of abstinen[ce] from

criminal and violent behaviors." The record demonstrates that the respondent has yet to seek said treatment. His anger issues remain as delineated in Schroeder's evaluation, which states that the respondent admitted that he sometimes blacks out in rage. The result, as the court concluded, is that he is "incapable of being a meaningful resource for [the child]" for the foreseeable future. The record supports the court's finding that the respondent's behavioral issues prevent him from assuming the role of a responsible parent in a reasonable time frame.

As a result, we conclude that the court's finding that the respondent failed to rehabilitate was not clearly erroneous. There was sufficient evidence in the record to support the court's findings and we are not left with a definite and firm conviction that a mistake was made.

III

The respondent next claims that the court improperly found that termination of his parental rights was in the child's best interests. We disagree.

We set forth the applicable law regarding the dispositional phase of a termination of parental rights hearing. "It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)].

. . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Internal quotation marks omitted.) *In re Alison M.*, 127 Conn. App. 197, 211, 15 A.3d 194 (2011).

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A]lthough a trial court shall consider and make written findings regarding the factors enumerated in § 17a-112 (k), a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 740, 120 A.3d 1177 (2015).

In the present case, the court made findings pursuant to each of the seven § 17a-112 (k) factors[14] before finding, by clear and convincing evidence, that termination

[14] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which

of the respondent's parental rights was in the best interests of the child. The substance of the respondent's claim on appeal concerns his rehabilitation; he claims that it is not in the child's best interests to be separated from his biological father because the respondent can still rehabilitate. This claim lacks merit because, for the reasons set forth in part II of this opinion, the court's determination that the respondent will not be able to assume a responsible position in the child's life within a reasonable time was not clearly erroneous and was supported by substantial evidence. Additionally, the child's interests in stability and permanence in this case outweigh the respondent's interest in the care and custody of his child.

The respondent also fails to recognize that, in the dispositional stage, the emphasis "appropriately shifts from the conduct of the parent to the best interest of the child . . . [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment." (Internal quotation marks omitted.) *In re Alison M.*, supra, 127 Conn. App. 211. To the extent that the parent's conduct is relevant, "the proper focus is on the ability of the biological parent and how that ability or limitation of ability relates to the best interest of the child . . . ." *In re Paul M.*, 154 Conn. App. 488, 505, 107 A.3d 552 (2014).

Notwithstanding the department's provision of supervised visits and referrals to services, the respondent

the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

did not make progress in addressing his issues as required by his specific steps. He claims that he did not have enough time with the child to develop a relationship, but the record contains evidence that he delayed initiating visits with the child and then "squander[ed]" his time with the child when visits occurred. The respondent also made little, if any, effort to stay informed about the child's life outside of the monthly visits. The department's social worker testified that the respondent did not exhibit a bond with the child.

The now four year old child has lived with his maternal half brother in the same foster home since October, 2017, where he has resided since he was approximately four months old. At the time of the court's judgment, the child was three years and nine months old. He has a bond with his foster parents and looks to them for support. He also has a positive relationship with the other children in the home. The foster parents plan to adopt him, thereby affording him long-term stability. Expert testimony in the record indicates that removing the child from the foster home would be not only disruptive, but traumatic. Moreover, the respondent is not expected to be released from incarceration until late 2022, at the very earliest; if released at that point, he would remain subject to parole. Even then, the court found that it would take months, if not years, for the respondent to find suitable housing and employment, reintegrate into the community, and engage in necessary mental health treatment.

The child needs a permanent and stable environment, which his foster family currently offers and which the respondent cannot provide within the foreseeable future. The court's findings concerning the child's attachment to his foster home stand in sharp contrast to its findings concerning the respondent's unavailability and lack of attachment to the child. See, e.g., *In re Davonta V.*, 98 Conn. App. 42, 49–50, 907 A.2d 126 (2006)

(contrasting respondent mother's "serious and long-term history of instability" and absences from child's life with stability of child's foster home), aff'd, 285 Conn. 483, 940 A.2d 733 (2008). "Children cannot wait for years for a determination that they should be returned to their natural parents [or] placed permanently in an adoptive home . . . . The delays that are annoying and frustrating to adults . . . can permanently damage children and their families . . . ." (Internal quotation marks omitted.) *Pamela B.* v. *Ment*, 244 Conn. 296, 314, 709 A.2d 1089 (1998). Given the child's young age and need for stability and permanence, we conclude that the record supports the court's finding that termination of the respondent's parental rights is in the child's best interests.

The judgment is affirmed.

In this opinion the other judges concurred.

CAROLYN COLEMAN *v.* MARTIN BEMBRIDGE
(AC 42669)

Alvord, Moll and Cradle, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant. The trial court ordered that the parties' minor child would maintain a primary residence with the plaintiff in Connecticut until the child's second birthday. At that time, the child's residence would begin to alternate, so that he would spend one half of each year with the plaintiff and one half with the defendant, who lived in Saskatchewan, Canada. In the event that the parties were unable to agree on a custody schedule, the trial court ordered that the child would spend two months at a time with each party. The trial court further ordered that, following the child's fifth or sixth birthday, he would be enrolled in a full-time academic program in Connecticut and would again maintain a primary residence with the plaintiff. *Held*:

1. The trial court's physical custody orders did not modify the physical custody of the child prospectively and were not improper: the substance of the trial court's orders reflected that it intended the parties to maintain joint physical custody of the child at all times; moreover, the trial court's

order requiring changes to the child's residence did not alter the nature of the joint physical custody award and, accordingly, did not require future modifications to the child's physical custody.

2. The plaintiff could not prevail on her claim that, to the extent the trial court awarded the parties joint physical custody, it lacked the statutory authority to do so and deprived the plaintiff of her due process rights: the trial court had the authority to award the parties joint physical custody notwithstanding that both parties sought only sole physical custody, as the applicable statute (§ 46b-56a) restricted the court's authority to award joint legal custody, not joint physical custody; moreover, the plaintiff failed to demonstrate that she lacked fair notice and a reasonable opportunity to be heard with respect to the trial court's award of joint physical custody, as she had requested broad relief and had the opportunity at trial to testify, to elicit testimony from a family relations counselor, to cross-examine the defendant, and to offer exhibits into evidence; accordingly, the trial court did not infringe on her due process rights.

3. The trial court did not abuse its discretion in entering the physical custody orders: the findings on which the orders were predicated, including the trial court's determination that the plaintiff was unlikely to foster a relationship between the defendant and the child without court orders, were based on substantial evidence; moreover, the physical custody orders did not hinder the plaintiff's ability to exercise the decision-making authority granted to her with respect to the legal custody orders; furthermore, the trial court determined that the physical custody orders it constructed were in the child's best interest in light of the child's young age and the large geographical distance between the parties' residences.

Argued May 20—officially released August 31, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *K. Murphy, J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Sarah E. Murray, for the appellant (plaintiff).

Campbell D. Barrett, with whom was *Johanna S. Katz*, for the appellee (defendant).

Opinion

MOLL, J. In this dissolution matter, the plaintiff, Carolyn Coleman, appeals from the judgment of dissolution rendered by the trial court insofar as the court entered orders regarding the physical custody of the parties' minor child. On appeal, the plaintiff claims that (1) the court improperly modified the child's physical custody prospectively, (2) to the extent that it awarded the parties joint physical custody, the court (a) acted beyond its statutory authority and (b) violated the plaintiff's due process rights when neither she nor the defendant, Martin Bembridge, requested joint physical custody, and (3) the court abused its discretion in entering physical custody orders that were (a) predicated on inconsistent factual findings, (b) incompatible with the court's legal custody orders, and (c) not in the child's best interests. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. "The parties met through the social media website Twitter in April, 2015. After speaking on the phone, the couple eventually physically met in May, 2015. The plaintiff was living in Meriden . . . and the defendant lived in Saskatchewan, Canada. Shortly thereafter, in July, 2015, the defendant proposed marriage and the plaintiff accepted.

"The parties were married in Portland . . . on October 8, 2016. Following the date of their marriage, the two lived apart with the plaintiff continuing to live in Connecticut and the defendant continuing to live in Saskatchewan. They physically met on a few occasions before the plaintiff relocated on July 28, 2017, to Saskatchewan to live with the defendant. The parties' child was conceived approximately the first or second day after [the plaintiff] arrived in Canada. By the end of

August, 2017, the plaintiff discovered that she was pregnant. In the middle of September, [2017], the plaintiff informed the defendant that she did not find him attractive, did not love him, and wanted to end the marriage. By October 18, 2017, the plaintiff moved back to Connecticut and has resided in Meriden . . . in her father's house since that time. The parties' son . . . was born [in April, 2018]."

In February, 2018, the plaintiff commenced the present dissolution action. On May 8, 2018, following the birth of the parties' son, the plaintiff filed an amended complaint in which she requested sole legal custody and that the child's primary residence remain with her. Additionally, in the amended complaint, the plaintiff requested as relief "anything else the court deems fair."

The matter was tried to the trial court, *K. Murphy, J.*, over the course of three days in January, 2019. Prior to trial, each party submitted proposed orders. In her proposed orders, the plaintiff requested in relevant part (1) sole custody and (2) "[a]ll such other and further relief both in law and in equity to which the court deems appropriate." In his proposed orders, the defendant requested in relevant part joint legal custody and that the child's primary residence be with him, with the plaintiff enjoying "reasonable and liberal parenting time . . . ."

On February 15, 2019, the court issued a memorandum of decision dissolving the parties' marriage. As to custody, the court stated that "[w]eighing all of the evidence and balancing the interests of the parties has been difficult in this situation. The court's primary objective is the best interest of the parties' son . . . ." The court continued in relevant part: "The court is awarding joint custody to both parties. Primary residence of the child initially shall be with the [plaintiff]. Throughout the child's life the parties are directed to

discuss and work together in order to obtain agreement in regard to all major decisions, which includes decisions relating to health care and education. If after discussion and providing full information regarding the decision at issue the parties have not reached agreement, [the plaintiff] will have final decision-making authority. All other decisions of a 'nonmajor' nature shall be made by the parent with whom the child is residing at the time. If that decision involves an emergency health decision involving the child, the deciding parent should inform the other parent immediately but in the very most within twenty-four hours of being aware of the emergency."

With respect to the child's physical residence, the court ordered as follows. Prior to the child's second birthday, his primary physical residence will be with the plaintiff, subject to the defendant having one week of unsupervised visitation each month in Connecticut. On the child's second birthday, the child's physical residence will begin to alternate between the parties. This arrangement will continue either until the start of the academic school year following the child's fifth birthday or, if he is not ready to enroll in a full-time academic program at that time, until the start of the academic school year following the child's sixth birthday. The parties are to agree in writing on a schedule that "will approximately allow the equal custody of the child by both parties for the three to four plus years" leading up to the child's enrollment in school, but, if the parties cannot reach an agreement, then the parties are to abide by a default schedule created by the court pursuant to which, beginning on May 1, 2020, the child's physical residence alternates between the parties approximately every two months. On the child's enrollment in school following either his fifth or sixth birthday, his primary physical residence will revert back to the plaintiff, with

the defendant having one week of unsupervised visitation each month; during such visitation the defendant will be responsible for ensuring that the child attends school. Additionally, "[f]ollowing the commencement of full-time school when the child has a week or more off during the school year, [the defendant] will be entitled to one week of uninterrupted parenting time during the school year and one week of uninterrupted parenting time during the Christmas break with the child at whatever location is convenient for [the defendant] and the child. During the summer break, the [defendant] is entitled to approximately two-thirds of that time when the child will physically reside with the [defendant]. [The plaintiff] will be entitled to approximately one-third of that summer break time." The court further ordered that each party will be allowed two thirty minute virtual visits per week when physically away from the child.[1] This appeal followed.[2] Additional facts and procedural history will be set forth as necessary.

Before turning to the plaintiff's claims, "we set forth our standard of review. [T]he standard of review in family matters is well settled. 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.

[1] The court entered other orders in dissolving the parties' marriage, none of which is at issue on appeal.

[2] On April 15, 2019, pursuant to Practice Book § 61-12, the plaintiff filed with the trial court a motion for a discretionary stay of the custody orders during the pendency of this appeal, which the court denied on June 19, 2019. On July 1, 2019, pursuant to Practice Book §§ 61-14 and 66-6, the plaintiff filed with this court a motion for review of the denial of her motion for a discretionary stay. On July 24, 2019, this court granted the motion for review but denied the relief requested therein.

. . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . 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. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014).

I

The plaintiff first claims that the trial court's physical custody orders[3] are improper because they modify the physical custody of the child prospectively. Specifically, the plaintiff contends that the physical custody orders "provide for automatic wholesale changes based solely upon the child's age" without real time determinations of the child's best interests. The defendant argues that the physical custody orders do not result in prospective modifications of custody but, rather, create a permissible "tiered custodial plan" based on the present best interests of the child. We agree with the defendant.

As we previously set forth in this opinion, "[o]ur deferential standard of review [in domestic relations cases] . . . does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . . Moreover, [t]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule,

[3] The plaintiff limits her claims on appeal to the court's physical custody orders. She does not challenge the court's award of joint legal custody.

[orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment." (Citation omitted; internal quotation marks omitted.) *Marshall* v. *Marshall*, 200 Conn. App. 688, 717, 241 A.3d 189 (2020).

Our precedent instructs that a trial court may not prospectively modify a custody order because, when contemplating whether to modify custody, a court must consider the real time best interests of the child. In *Guss* v. *Guss*, 1 Conn. App. 356, 472 A.2d 790 (1984), in dissolving the parties' marriage, the trial court awarded sole custody of the parties' two minor children to the defendant, subject to the plaintiff's rights to visitation. Id., 357–58. Thereafter, the parties executed a postjudgment stipulation agreeing to modify the terms of the dissolution judgment, inter alia, to provide that it was in the best interests of the children for the plaintiff to be automatically awarded sole custody in the event that the defendant removed the children from Connecticut. Id., 358. The court approved the stipulation and modified the dissolution judgment in accordance therewith. Id. Subsequently, the defendant moved to California with the children. Id. After being notified by the plaintiff of the defendant's relocation, the court, without holding a hearing to determine the children's best interests, issued an order transferring sole custody to the plaintiff. Id., 358–59.

On appeal, this court set aside the custody modification order. Id., 360–61, 363. This court observed that "[u]nder [General Statutes § 46b-56 (b)], it is clear that the [trial] court must resolve the issue of custody in the best interests of the child. . . . When, as in this case, the court is called upon to apply an agreement deciding custody, the dispositive consideration still remains the child's best interests." (Citation omitted; footnote omitted.) Id., 360. This court concluded that

"[t]here was no determination, other than at the time the judgment of dissolution was modified in accordance with the stipulation, that enforcement of the agreement would serve the best interests of the children. A child's best interests, however, cannot be prospectively determined. Before transferring custody to the plaintiff, the [trial] court was bound to consider the child[ren's] *present* best interests and not what would have been in [their] best interests at some previous time." (Emphasis in original; internal quotation marks omitted.) Id., 360–61.

In *Emerick* v. *Emerick*, 5 Conn. App. 649, 502 A.2d 933 (1985), cert. dismissed, 200 Conn. 804, 510 A.2d 192 (1986), the trial court, in rendering a dissolution judgment, ordered that the plaintiff would have "interim custody" of the parties' minor child and that, on the satisfaction of certain conditions, the parties would be awarded joint custody approximately one and one-half years after the dissolution judgment. Id., 652. In addition, the court ordered that " '[i]n the event of . . . a [permanent] removal [of the child from Connecticut by either party], custody, without further order . . . shall vest immediately and solely in the remaining parent.' " Id., 652–53, 653 n.3. On appeal from the dissolution judgment, this court, citing *Guss*, concluded that the trial court's order providing for the automatic shifting of custody was improper, reasoning that "[t]he paramount concern in awarding custody is the best interest of the child. . . . A child's best interests, however, cannot be prospectively determined. . . . The judicial hands of a future court cannot be bound by an earlier court's determination that the best interests of a child as to custody remain constant. A transfer of custody cannot be automatically accomplished upon the happening of a future event, in this case, removal of the child from Connecticut." (Citations omitted; internal quotation marks omitted.) Id., 659.

The plaintiff contends that the court violated the principles enunciated in *Guss* and *Emerick*[4] by ordering that physical custody of the parties' child automatically changes, without real time determinations of the child's best interests, (1) following the child's second birthday, when primary residence with the plaintiff changes to an alternating residences arrangement, and (2) following the child's fifth or sixth birthday, depending on his capability to enter a full-time academic program, when the alternating residences arrangement returns to primary residence with the plaintiff. The plaintiff's reliance on these cases is misplaced, however, because we reject the plaintiff's foundational premise that the court's physical custody orders result in future modifications of the child's physical custody. Instead, under the court's orders, no parent has sole physical custody of the child; rather, the child benefits from parenting by each of his parents, under the circumstances of this case, by alternating between his parents' residences.

In its decision, the court awarded the parties "joint custody." General Statutes § 46b-56a (a) defines " 'joint custody' " as "an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and providing that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents. . . ." This court has interpreted the statutory definition of "joint custody" to encompass "joint legal custody, meaning joint decision making, and joint physical custody, meaning a sharing of continued contact

[4] The plaintiff also cites *Stahl* v. *Bayliss*, 98 Conn. App. 63, 907 A.2d 139, cert. denied, 280 Conn. 945, 912 A.2d 477 (2006), to support her claim. In *Stahl*, this court concluded that the trial court had erred in incorporating a stipulation, executed by the parties in 2003, regarding custody and visitation, into its dissolution judgment, rendered in 2005, without considering the present best interests of the parties' minor children. Id., 69–70. In the present case, the trial court considered the child's present best interests in entering its custody orders. Thus, we do not consider *Stahl* to be germane here.

with both parents." *Emerick* v. *Emerick*, supra, 5 Conn. App. 656. Thus, on its face, the court's award of "joint custody" indicates an award of both joint legal custody *and* joint physical custody.

We recognize that, alone, the court's use of the phrase "joint custody" does not demonstrate per se that the parties were awarded joint physical custody. See *Blake* v. *Blake*, 207 Conn. 217, 221, 223, 541 A.2d 1201 (1988) (in light of other provisions ordered by trial court regarding custody, including that children would " 'reside primarily' " with plaintiff and that plaintiff was permitted to move children to California to live, court's use of phrase "joint custody" in its decision implied that court awarded parties joint legal custody but not joint physical custody). The substance of the court's physical custody orders, however, reflects that the court intended the parties to maintain joint physical custody of their child at all relevant times. That the court ordered the child's residential custody to change from primary residence with the plaintiff to an alternating residences arrangement and then back to primary residence with the plaintiff does not alter the nature of the joint physical custody award. "It is common for a joint-custody order to provide that the child will reside 'primarily' with one of the parents. It is also common to devise a schedule alternating the days, weeks, months or other blocks of time which the child will spend with each parent." A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 42:9, pp. 519–20. Put simply, we interpret the physical custody orders as assigning the parties joint physical custody—that is, "a sharing of continued contact with both parents"; *Emerick* v. *Emerick*, supra, 5 Conn. App. 656;—throughout the course of the child's minority, with a unique, fluid residential arrangement devised to promote the child's best interests and intended, as the court explained, "to deal with a difficult

situation [in which] the parents of a young child live in two very different and geographically diverse places . . . .”[5] Under the physical custody orders, at no point is the court’s order of joint physical custody ever changed into sole physical custody by one parent. Cf. *Emerick* v. *Emerick*, supra, 5 Conn. App. 652, 659 (improper prospective modification changing custody); *Guss* v. *Guss*, supra, 1 Conn. App. 358, 360–61 (same). Rather, the court determined that it was in the best interests of the child for his residential custody to alternate between his parents.

In sum, we conclude that the court’s physical custody orders, taken together, carry out an award of joint physical custody. The orders do not bring about future modifications of the child’s physical custody, and, therefore, we reject the plaintiff’s claim that the court improperly modified the child’s physical custody prospectively.

II

The plaintiff next claims that, insofar as the court awarded the parties joint physical custody, the court did so (1) without statutory authority and (2) without providing the plaintiff with fair notice and an opportunity to be heard, thereby depriving her of due process. We address each claim in turn.

A

The plaintiff asserts that the court lacked statutory authority to award the parties joint physical custody. Specifically, the plaintiff contends that, pursuant to

[5] In discussing the time period during which the child’s residence alternates between the parties, the court referred to this time frame as a “period of shared custody . . . .” We do not construe the court’s use of the phrase “shared custody” as demonstrating that the court intended for the parties to have joint physical custody *only* during that specific time frame; rather, it is reasonable to infer that the court was referencing the approximate equal split in time that the child was residing with each party during that time period.

§ 46b-56a, the court had the authority to award the parties joint physical custody only if they had agreed to joint physical custody or if one of the parties had requested it. The plaintiff asserts that she and the defendant both requested sole physical custody, and, thus, the court acted beyond its statutory authority in awarding them joint physical custody. The defendant argues that the plaintiff conflates joint physical custody with joint legal custody and that there is no legal authority mandating an agreement by the parties or a request by one of the parties as a prerequisite to a joint physical custody award. We agree with the defendant.

Resolution of the plaintiff's claim requires us to employ the relevant principles of statutory construction. "Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *O'Toole* v. *Hernandez*, 163

Conn. App. 565, 571–72, 137 A.3d 52, cert. denied, 320 Conn. 934, 134 A.3d 623 (2016).

Section 46b-56 (a) provides in relevant part: "In any controversy before the Superior Court as to the custody or care of minor children, and at any time after the return day of any complaint under section 46b-45, the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the provisions of chapter 815p. Subject to the provisions of section 46b-56a, the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . ."

Section 46b-56a provides in relevant part: "(a) For the purposes of this section, 'joint custody' means an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and providing that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents. The court may award joint legal custody without awarding joint physical custody where the parents have agreed to merely joint legal custody.

"(b) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage. . . .

"(c) If only one parent seeks an order of joint custody upon a motion duly made, the court may order both parties to submit to conciliation at their own expense with the costs of such conciliation to be borne by the

parties as the court directs according to each party's ability to pay. . . ."

This court previously has addressed the question of whether a trial court has the statutory authority to award joint custody without the parties agreeing to joint custody or one of the parties requesting the same. In *Emerick* v. *Emerick*, supra, 5 Conn. App. 649, on appeal from a dissolution judgment, the plaintiff challenged the trial court's prospective joint custody award, inter alia, on the basis that neither party had agreed to or sought joint custody. Id., 653. This court interpreted "joint custody," as set forth in § 46b-56a (a), "as including joint legal custody, meaning joint decision making, and joint physical custody, meaning a sharing of continued contact with both parents. Further, joint physical custody is severable from joint legal custody." Id., 656–57. This court then construed § 46b-56a to provide that "[a] court may award joint legal custody, with or without joint physical custody, if the parties agree to joint custody or if one party seeks joint custody." Id., 657. This court observed that (1) § 46b-56a (b) establishes a presumption that joint custody is in the child's best interests if the parties have agreed to joint custody, and the statute does not provide that joint custody may be awarded in the absence of an agreement, and (2) § 46b-56a (c) permits a trial court to order parties to submit to conciliation when one party moves for joint custody, and § 46b-56a (b) authorizes the court to award joint custody once the recalcitrant party, following conciliation, agrees to joint custody. Id., 657–58. This court reasoned that § 46b-56a, "read as a whole, reflects a legislative belief that joint custody cannot work unless both parties are united in its purposes. Therefore, joint custody cannot be an alternative to a sole custody award where neither seeks it and where no opportunity is given to the recalcitrant parent to embrace the concept. Further, it is significant that the statute contains

no additional subsection providing for a procedure in the event neither parent seeks joint custody." Id., 658. As neither party had agreed to joint custody or moved for conciliation after a motion had been made seeking joint custody, this court determined that the trial court's prospective joint custody award constituted error. Id.; see also *Cabrera* v. *Cabrera*, 23 Conn. App. 330, 346–47, 580 A.2d 1227 (citing *Emerick* in concluding that trial court properly determined that it could not grant joint custody without agreement of parties to joint custody or motion for conciliation following motion for joint custody by one party), cert. denied, 216 Conn. 828, 582 A.2d 205 (1990).

In a subsequent decision, this court construed *Emerick* as providing that a trial court is authorized to award joint custody when one of the parties has requested joint custody in the pleadings, provided that joint custody is in the best interests of the child. See *Giordano* v. *Giordano*, 9 Conn. App. 641, 645, 520 A.2d 1290 (1987) (citing *Emerick* in determining that "[w]hen one of the parties has sought joint custody in the pleadings, it is not error for the court, in the exercise of its discretion, to award joint custody"); see also *Keenan* v. *Casillo*, 149 Conn. App. 642, 647–48, 89 A.3d 912 (concluding that trial court had statutory authority to grant joint custody when plaintiff's complaint requested joint custody), cert. denied, 312 Conn. 910, 93 A.3d 594 (2014); *Tabackman* v. *Tabackman*, 25 Conn. App. 366, 368–69, 593 A.2d 526 (1991) (concluding that trial court improperly awarded joint custody without pleading requesting joint custody, agreement of parties to joint custody, or motion for conciliation following motion for joint custody by one party).

Relying chiefly on *Emerick*, the plaintiff maintains that the court did not have the statutory authority to award the parties joint physical custody when both

parties sought only sole physical custody. This contention is unavailing. In *Emerick*, this court addressed a trial court's statutory authority under § 46b-56a to award joint *legal* custody, whether accompanied by joint or sole physical custody. *Emerick* v. *Emerick*, supra, 5 Conn. App. 656–57. Neither *Emerick* nor any other appellate authority of which we are aware interprets § 46b-56a to impose restrictions on a court's authority to award joint *physical* custody.

Indeed, a plain reading of § 46b-56a (a) reveals that the legislature sought to define a court's authority to award joint *legal* custody, not joint *physical* custody. The final sentence of § 46b-56a (a) provides that "[t]he court may award joint legal custody without awarding joint physical custody where the parents have agreed to merely joint legal custody." There is no similar language circumscribing a court's ability to award joint physical custody. As this court observed in *Emerick*, "joint physical custody is severable from joint legal custody." *Emerick* v. *Emerick*, supra, 5 Conn. App. 656–57.

In sum, we conclude that, under § 46b-56a, the court had the authority to award the parties joint physical custody notwithstanding that both parties sought only sole physical custody. Thus, the plaintiff's claim fails.

B

The plaintiff also asserts that the court, in awarding the parties joint physical custody, violated her rights to due process.[6] More particularly, the plaintiff asserts

[6] "We analyze the [appellant's] due process claim under the federal constitution only because [the appellant] has not provided an independent analysis of an alleged due process violation under the state constitution. See *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 694 n.8, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018)." *Petrucelli* v. *Meriden*, 197 Conn. App. 1, 13 n.8, 231 A.3d 231, cert. denied, 335 Conn. 923, 233 A.3d 1091 (2020).

that, because neither party sought joint physical custody, she did not have fair notice that the court was contemplating a joint physical custody award or a reasonable opportunity to be heard regarding the propriety of a joint physical custody award. We are not persuaded.

This court previously has stated that, "although a court has broad discretionary authority when determining custody orders, it must exercise that authority in a manner consistent with the due process requirements of fair notice and reasonable opportunity to be heard." (Internal quotation marks omitted.) *Kidwell* v. *Calderon*, 98 Conn. App. 754, 758, 911 A.2d 342 (2006). "Whether a party was deprived of his [or her] due process rights is a question of law to which appellate courts grant plenary review." (Internal quotation marks omitted.) *Petrucelli* v. *Meriden*, 197 Conn. App. 1, 14, 231 A.3d 231, cert. denied, 335 Conn. 923, 233 A.3d 1091 (2020).

Our resolution of the plaintiff's due process claim is guided by this court's decision in *Kidwell* v. *Calderon*, supra, 98 Conn. App. 754. In *Kidwell*, the plaintiff filed a custody complaint seeking joint legal custody of the parties' minor child, liberal and flexible visitation rights, and " '[a]ny further orders that the [c]ourt and law or equity deems necessary.' " Id., 755. Following a custody hearing, which the trial court continued twice at the defendant's request, the court awarded the plaintiff sole custody. Id., 756–57.

On appeal from the custody judgment in *Kidwell*, the defendant asserted that the court improperly awarded the plaintiff sole custody when the plaintiff did not expressly request sole custody in his custody complaint or file a motion seeking sole custody, thereby depriving the defendant of due process. Id., 758. This court rejected that claim. Id., 758–59. First, this court noted that the trial court held a custody hearing, for which

the court gave the defendant adequate time to prepare, during which the defendant testified and had the opportunity to cross-examine witnesses, including a family relations counselor who recommended that sole custody be awarded to the plaintiff. Id. In a footnote, this court observed that the defendant became aware of the family relation counselor's custody recommendation prior to the custody hearing and, thus, was on notice that the trial court "would consider the possibility of following the . . . recommendation to award sole custody of the child to the plaintiff." Id., 758–59 n.2. Additionally, observing that the plaintiff's custody complaint requested "joint legal custody and any further orders that the court deemed necessary," this court stated that "[w]hen looking at the relief sought in the custody complaint alone, it is difficult to understand the defendant's contention that the court was limited, if at all, to making an award of joint legal custody. It is here that we must reiterate the principle that when making or modifying custody orders, the court's ultimate concern is determining the best interest of the child." Id., 759. This court proceeded to conclude that, in light of the evidence before it, the trial court properly considered the child's best interest in awarding sole custody to the plaintiff. Id.

Applying the rationale of *Kidwell* to the present case, we conclude that the court did not infringe on the plaintiff's due process rights in awarding the parties joint physical custody. Similar to the custody complaint at issue in *Kidwell*, the plaintiff's amended complaint requested not only that the primary residence of the parties' child be with the plaintiff but also "*anything else the court deems fair*." (Emphasis added.) In her pretrial proposed orders, the plaintiff requested not only sole custody but also "[*a*]*ll such other and further relief both in law and in equity to which the court deems appropriate*." (Emphasis added.) At trial, where

custody was the primary contested issue,[7] the plaintiff testified, elicited testimony from a family relations counselor, cross-examined the defendant, and offered exhibits into evidence. On the basis of the evidence before it, the court concluded that it was in the best interests of the parties' child to award the parties joint physical custody.[8] Under these circumstances, particularly where the plaintiff herself requested broad relief from the court, we are not convinced that the plaintiff lacked fair notice and a reasonable opportunity to be heard as to the court's award of joint physical custody.[9] Thus, we reject the plaintiff's due process claim.

III

The plaintiff's final claim is that the trial court abused its discretion in entering the physical custody orders because the orders were (1) based on inconsistent factual findings, (2) in conflict with the court's legal custody orders, and (3) not in the child's best interests. We disagree.

"[Section] 46b-56 provides the legal standard for determining child custody issues. The statute requires that the court's decision serve the child's best interests." *Altraide* v. *Altraide*, 153 Conn. App. 327, 338, 101 A.3d 317, cert. denied, 315 Conn. 905, 104 A.3d 759 (2014). "The controlling principle in a determination respecting

[7] In its decision, the court stated that "[t]he main issue at dispute in this action is the custody of the minor child."

[8] In part III of this opinion, we address and reject the plaintiff's claim that the court's physical custody orders were not in the best interests of the child.

[9] We recognize that this court in *Kidwell* stated in a footnote that, prior to the custody hearing, the defendant was sufficiently put on notice that the trial court would consider awarding the plaintiff sole custody on the basis that the defendant had learned of the family relations counselor's recommendation that sole custody be given to the plaintiff. *Kidwell* v. *Calderon*, supra, 98 Conn. App. 758–59 n.2. We do not construe this court's disposition of the defendant's due process claim in *Kidwell* as hinging on the defendant's discovery of the family relations counselor's custody recommendation.

custody is that the court shall be guided by the best interests of the child." (Internal quotation marks omitted.) *D'Amato* v. *Hart-D'Amato*, 169 Conn. App. 669, 683, 152 A.3d 546 (2016). Our Supreme Court "has consistently held in matters involving child custody . . . that while the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child [that] must control the decision of the court. . . . In making this determination, the trial court is vested with broad discretion which can . . . be interfered with [only] upon a clear showing that that discretion was abused. . . . Thus, a trial court's decision regarding child custody must be allowed to stand if it is reasonably supported by the relevant subordinate facts found and does not violate law, logic or reason. . . . Under § 46b-56 (c),[10] the court, in determining custody, must consider the best interests of the child and,

[10] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of

in doing so, may consider, among other factors, one or more of the sixteen factors enumerated in the provision.

"[T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference." (Citations omitted; footnote added; internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 632–33, 223 A.3d 775 (2020).

In entering its custody orders, the court made the following relevant factual findings. "The plaintiff has done a good job of caring for [the child] since his birth . . . . Doctors' information reflects the good health of the child. With limited information, Family Relations found that both parties were good and capable parents. The Family Relations' representative indicated that the role of the main custodial parent as gatekeeper to foster the relationship between noncustodial parent and child was critically important. In regard to this issue, Family Relations was not aware that the plaintiff referred to the defendant as 'pure evil,' 'not good for [the child's] soul,' and a 'horrible human being.'

"Family Relations recommended that the child physically reside with the plaintiff. In doing so, Family Relations did not have access to some of the evidence, which

the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

reflects the court's greater substance abuse concerns[11] although the Family Relations' representative did speak to the plaintiff's brother's wife who said that she had observed the plaintiff drinking and had concerns about the plaintiff's substance abuse. The Family Relations' representative discounted this information because of her concerns that the plaintiff's brother's wife was biased against the plaintiff.

"The plaintiff's concerns with the defendant as a father were that the defendant had unaddressed mental health concerns, [had] a history of abusing alcohol, worked frequently, and had a busy social life. [The plaintiff] also complains that the defendant did not show any interest in the child during the gestational period. The court finds [that] the defendant's explanation for his lack of contact with the plaintiff during this period [is] reasonable, namely, that the plaintiff refused to allow him to contact her during this period and he was concerned that he not upset the plaintiff. It is clear from the evidence that in January, 2018, the plaintiff insisted that the defendant not contact her at all. In regard to the plaintiff's other concerns, there was no evidence that the defendant had unaddressed mental health issues. He admits to a distant history of abusing

[11] Earlier in its decision, the court stated that "upon the credible evidence in this trial the court is concerned about the plaintiff's dependence on [intoxicating] substances." The court found that the plaintiff (1) used cocaine recreationally between October, 2012, and February, 2017, (2) took prescription medications " 'off and on' " while pregnant with the parties' child in contravention of the direction of a health professional, (3) smoked cigarettes during the first sixth months of the pregnancy, and (4) consumed alcohol frequently and to excess. In making its findings concerning the plaintiff's substance use, the court credited the defendant's testimony on the subject while discrediting the plaintiff's testimony. The court further found that "[the plaintiff's] disregarding the health of her unborn child concerns the court. It also supports the defendant's position that the plaintiff has a substance-dependency issue." The court credited the plaintiff, however, for agreeing to a "cursory testing for illegal substances of which she tested negative for all illegal substances."

alcohol but indicates that he has not consumed alcohol for over twenty years. There is no evidence to the contrary. The court concludes that the defendant does not have any significant substance abuse issues. It appears that he does have work responsibilities, which frequently interrupted communications with the plaintiff. Finally, the court makes no findings in regard to his social life, there is no evidence regarding a 'busy social life.' Ultimately, there was no evidence to support any of the plaintiff's stated concerns. The information obtained by Family Relations and the credible evidence in this case presents the defendant as an able father.

"On the other hand, the court did have concerns about the plaintiff's substance abuse issues based upon the credible evidence in this case. The court has tried to examine all of the evidence to determine what would be in the child's best interest.

"One of the factors that the court considers in deciding the appropriate custodial arrangement for the child is how likely the residential parent is to foster the relationship between the child and the nonresidential parent. The court finds that, short of specific court orders, it is unlikely that [the plaintiff] will foster the relationship between the child and [the defendant]. . . . This conclusion is based upon substantial evidence in the proceeding. For example, [the plaintiff] viewed [the defendant] as 'pure evil' and 'a horrible human being' and as someone that she did not want to have contact with her son. She ended communication between herself and [the defendant] approximate[ly] three months prior to the birth of their child. She did not consult with [the defendant] in naming the child and did not give the child [the defendant's] last name. Her attitude toward the [defendant] in her testimony and in her text communications [that were admitted into evidence] relays a clear hostility toward the [defendant]. To her credit, she has communicated with [the defendant]

since the birth of the child through the Internet and phone regarding the child and there has been regular video contact. On the other hand, [the defendant] has visited with the child multiple days on three separate periods of time from the child's birth in April, 2018, through the end of December, 2018, and [the plaintiff] has never allowed [the defendant] to have more than one hour [of] visitation during any daily visits. During the initial visit, [the plaintiff] denied [the defendant] visitation until the court was involved." (Footnote added.)

Additionally, the court found that the defendant "has an adequate housing and 'day care' system in place for his son when his son lives with him in Saskatchewan. He is capable of caring for his child. He participated significantly and substantially in the raising of other children in the past.[12] He indicated that his sixty-eight year old mother, who is currently watching a three year old and a seven year old, is also available when [the defendant] has work responsibilities [that] would prevent him from watching his son." (Footnote added.)

We first address the plaintiff's contention that the physical custody orders were predicated on inconsistent findings. In particular, the plaintiff contends that the court's finding that, without court orders, she was unlikely to foster a relationship between the defendant and the child is inconsistent with its finding that the plaintiff facilitated contact between the defendant and the child following the child's birth. We are not persuaded. The court's finding regarding the plaintiff's inability to be an adequate gatekeeper promoting a relationship between the defendant and the child was grounded in "substantial evidence" demonstrating that (1) the plaintiff harbored "clear hostility" toward the

[12] Earlier in its decision, the court found that the defendant helped raise two children of a prior spouse and has an adult daughter who lives with him.

defendant, whom she described as " 'pure evil' " and " 'a horrible human being,' " (2) the plaintiff terminated communication with the defendant shortly before the child's birth and limited the defendant's in person interactions with the child, and (3) the plaintiff did not consult with the defendant when naming the child. We perceive no inconsistency in the court making the reasonable determination that, although the plaintiff had communicated with the defendant about the child following his birth and maintained regular video contact, the totality of the evidence established that, without court intervention, the plaintiff was unlikely to foster a relationship between the defendant and the child.[13]

We next turn to the plaintiff's contention that, by ordering that the child will reside with the defendant regularly during the time when the child's residence alternates between the parties, the court made it impractical for the plaintiff to exercise the final decision-making authority granted to her vis-à-vis the court's legal custody orders. We are not persuaded. The court's legal custody orders require the parties "to discuss and work together" in making all major decisions concerning the child, with the plaintiff having final decision-making authority if no agreement can be reached. We are unconvinced that the physical custody orders hinder the plaintiff's ability to communicate with the defendant in relation to those major decisions and,

[13] The plaintiff also asserts that the court's finding that, without court orders, she was unlikely to foster a relationship between the defendant and the child is inconsistent with the court's orders granting her final decision-making authority over major decisions involving the child and designating her residence as the child's primary physical residence for the bulk of the child's minority. As the court observed in its decision, however, the likelihood of the plaintiff fostering a relationship between the defendant and the child was but one factor it considered in constructing the custody orders. The court weighed all of the evidence before it and considered the best interests of the child in entering the custody orders. Thus, we do not agree with the plaintiff that an inconsistency exists.

if necessary, to assert her final decision-making authority.[14]

Further, we address the plaintiff's contention that the physical custody orders were not in the child's best interests. The plaintiff posits that the orders create an unstable environment for the child, inhibit the development of consistency with respect to, inter alia, the child's medical care and social activities, and, during the years when the child's residence alternates between the parties, wholly deprive the child of physical interaction with the nonresidential parent for months at a time. The plaintiff further maintains that she has a greater ability to care for the child than the defendant.

We iterate here that the trial court is conferred with the authority to exercise judicial discretion under § 46b-56, and "[n]othing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Zhou* v. *Zhang*, supra, 334 Conn. 633. We have no such conviction in this case. As the court stated, its custody orders were fashioned with the best interests of the child in mind and to address a "difficult situation [in which] the parents of a young child live in two very different and geographically diverse places . . . ." The court found that the defendant was an "able father," that the plaintiff's concerns with the defendant's ability to parent were not supported by the evidence, and that the defendant had "an adequate housing and 'day care' system in place" for the child. The court also found that the plaintiff had "done a good job of caring" for the child, although it expressed concern regarding the plaintiff's substance abuse issues and did not believe that she would function

[14] We note that, to assist the parties in carrying out the custody orders, the court ordered them to engage in co-parenting counseling with a licensed counselor for one hour every month for the first six months following the dissolution and for one hour every two months for the following year.

as an adequate gatekeeper fostering a relationship between the defendant and the child. Weighing all of the evidence before it, the court determined that the physical custody orders it constructed were in the child's best interests.[15] In light of the record before it and the unique circumstances presented by this case, we cannot conclude that the physical custody orders entered by the court constituted an abuse of discretion.

Finally, we note that "§ 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award [must] be based upon either a material change of circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall consider the best interests of the child, and in doing so may consider several factors. General Statutes § 46b-56 (c)." (Internal quotation marks omitted.) *Peters* v. *Senman*, 193 Conn. App. 766, 778, 220 A.3d 114 (2019), cert. denied, 334 Conn. 924, 223 A.3d 380 (2020). "Section 46b-56 permits a court to modify child custody and visitation orders at any time."

[15] General Statutes § 46b-56 (b) provides in relevant part that "[i]n making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child *and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests*. . . ." (Emphasis added.)

We also note that, on the final day of trial, following closing argument, the court discussed with the parties its intent to enter interim orders pending the issuance of its dissolution judgment. During that discussion, the court stated that it was "important to the court . . . that the [defendant] start a normal—I mean, it's very difficult to have a normal relationship with someone when you're living so far away. But it's important . . . that [the defendant] gets started in having a relatively normal relationship with the child. The child is still very young [and] probably won't remember anything that's going on right now."

Perry v. *Perry*, 130 Conn. App. 720, 724, 24 A.3d 1269 (2011). Thus, in the event that either party maintains that a material change of circumstances has occurred, such that a modification of the court's custody orders would serve the best interests of the child, either party has the ability to move to modify the court's custody orders.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GLEN S.*
(AC 43101)

Prescott, Suarez and Vitale, Js.

Syllabus

The defendant, who had been convicted of sexual assault in a spousal or cohabiting relationship, appealed to this court from the judgment of the trial court revoking his probation. The defendant requested that he appear as a self-represented party in his violation of probation proceeding. Following a canvass, the trial court determined that the defendant was competent to represent himself and granted his request. During the evidentiary hearing portion of the proceeding, the defendant had difficulty formulating nonargumentative, noncompound questions while cross-examining the state's witnesses. After the state rested its case, the defendant requested that a specific attorney be appointed as his defense counsel. The trial court was unable to grant the request because the attorney was not on the authorized list of special public defenders. The trial court instead appointed a special public defender to act as standby counsel, as the defendant continued to insist that he represent himself, and it ordered a competency evaluation of the defendant pursuant to the applicable statute (§ 54-56d). After the defendant refused to cooperate with the evaluators, the trial court determined that the defendant was no longer competent to represent himself and appointed his standby counsel to fully represent him. At the request of defense counsel, the trial court ordered a second competency evaluation to determine whether the defendant was competent to stand trial. The

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

defendant again refused to cooperate with the evaluators, and the trial court, finding that the defendant understood the charges against him and was capable of assisting with his defense, proceeded with the evidentiary hearing. The defendant declined the opportunity to recall the state's witnesses for reexamination, and he did not testify or put forth any of his own witnesses. The trial court found the defendant in violation of his probation. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court's canvass regarding the waiver of his right to be represented by counsel was constitutionally inadequate under *Faretta* v. *California* (422 U.S. 806) because the claim failed under the third prong of *State* v. *Golding* (213 Conn. 233), as the defendant did not demonstrate that a constitutional violation existed: the trial court reasonably could have concluded that the defendant was competent to waive his right to counsel, as his request for self-representation was clear and unequivocal, he indicated during the trial court's canvass that he had represented himself in prior federal cases, that he was voluntarily waiving his right to counsel, and that he was aware of the disadvantages to proceeding as a self-represented party, and his technical legal knowledge was irrelevant to the competency determination; moreover, the trial court apprised the defendant of his maximum exposure for the violation of his probation and was not required to advise him of his maximum exposure with respect to certain misdemeanor charges that were not before the trial court at the time of the canvass.
2. The defendant could not prevail on his claim that, even if the canvass regarding the waiver of his right to be represented by counsel was constitutional, he was entitled to a new trial under *State* v. *Connor* (292 Conn. 483): the defendant failed to present sufficient evidence to demonstrate that he suffered from such a significant mental impairment that the trial court should have, sua sponte, determined that he was incompetent to represent himself, as the defendant failed to cooperate during the two court-ordered competency evaluations and his inability to effectively cross-examine the state's witnesses was insufficient, alone, to overcome the statutory presumption of competency.
3. The trial court did not err when it failed, sua sponte, to canvass the defendant about the waiver of his constitutional right to testify and this court declined to exercise its supervisory authority to require trial courts to conduct such a canvass: our Supreme Court previously determined in *State* v. *Paradise* (213 Conn. 388), that trial courts were not constitutionally required to canvass a defendant about the waiver of his right to testify in instances such as the present case, where the defendant did not allege that he wanted to testify or that he did not know that he could testify; moreover, the exercise of supervisory powers relating to the issue was better left to our Supreme Court.
4. The defendant's claim that the trial court's judgment should be reversed because he was deprived of his constitutional right to conflict free

representation because an actual conflict existed was unavailing: his public defender's one sentence reference to the defendant's threat of physical violence against him in a motion for appointment of a guardian ad litem, which was filed in an attempt to obtain releases of the defendant's relevant health information in order to determine his competency, did not provide an adequate factual basis for the defendant's contention that an actual conflict existed; moreover, the record did not reflect that his public defender sought to withdraw from further representation or that his public defender made any statements that were representative of divided loyalty.

Argued March 3—officially released August 31, 2021

Procedural History

Substitute information charging the defendant with the crime of violation of probation, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and transferred to the judicial district of Waterbury, geographical area number four; thereafter, the matter was tried to the court, *Fasano*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Conrad Ost Seifert, assigned counsel, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, and *John R. Whalen*, supervisory assistant state's attorney, for the appellee (state).

Opinion

VITALE, J. The defendant, Glen S., appeals from the judgment of the trial court revoking his probation after finding that he had violated the conditions of his probation in violation of General Statutes § 53a-32. On appeal, the defendant claims: (1) the court's canvass regarding the waiver of his right to be represented by counsel was constitutionally inadequate under *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); (2)

even if the canvass was constitutional under *Faretta*, he is entitled to a new trial under *State* v. *Connor*, 292 Conn. 483, 973 A.2d 627 (2009), because he exhibited a noticeable impairment during the first day of the violation of probation evidentiary hearing; (3) this court should exercise its supervisory authority to require that trial courts canvass criminal defendants about the waiver of their constitutional rights to testify; (4) this court should review his claim of ineffective assistance of counsel on direct appeal because the ineffectiveness of his trial counsel is clear from the record; and (5) the court's judgment should be reversed because he was deprived of his constitutional right to conflict free representation. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The defendant pleaded guilty on August 13, 2008, to sexual assault in a spousal or cohabiting relationship in violation of General Statutes (Rev. to 2007) § 53a-70b. The defendant thereafter was sentenced by the court, *Fasano*, *J.*, to a term of fifteen years of incarceration, execution suspended after five years, and fifteen years of probation. The sentencing court imposed conditions of probation, which provided, inter alia, that the defendant (1) not violate any criminal law of Connecticut, (2) report to his probation officer as directed, (3) keep his probation officer apprised of any arrests during the probationary period, (4) keep the probation officer apprised of his location and inform the probation officer of any changes to his address or contact information, (5) undergo sex offender evaluation and treatment, and (6) register as a sex offender. On October 5, 2011, the court, *Damiani*, *J.*, imposed another condition of probation, barring the defendant from having any contact with the Office of the State's Attorney or any member of that office. The defendant signed an agreement detailing the conditions

of his probation on March 15, 2012, and was released from prison on October 31, 2012. The defendant again signed an acknowledgment of the conditions of probation on May 3, 2017.

During his probation period, the defendant failed to complete the required sex offender treatment program and, consequently, was discharged from the program in February, 2018. In a letter to Jason Grady, the defendant's probation officer, a therapist for the sex offender treatment program informed Grady that the defendant had been discharged due to his constant outbursts and that the defendant's individual sessions were ineffective due to his escalating mental health instability. Grady then attempted to locate the defendant in May, 2018, after the defendant missed numerous probation appointments. While searching for the defendant, Grady discovered that the address provided by the defendant for the sex offender registry was for an administrative office and the defendant had not been living at that listed address. Grady further learned that the defendant had been arrested in Norwalk on June 28, 2018, for charges of interfering with an officer in violation of General Statutes § 53a-167a and breach of the peace in violation of General Statutes § 53a-181. As a result, Grady obtained an arrest warrant on July 20, 2018, for violation of probation on the basis of the defendant's arrest in Norwalk, his failure to report to adult probation as directed, and his failure to keep Grady apprised of his address. The defendant subsequently was arrested on August 28, 2018, after an arrest warrant was issued.

The defendant was arraigned on August 29, 2018, in Superior Court in Norwalk for violation of probation as well as for his refusal to submit to fingerprinting in violation of General Statutes § 29-12. During the arraignment, the defendant asserted that he wanted to repre-

sent himself for the bond hearing. The court, *McLaughlin*, *J.*, denied the defendant's request to represent himself at the bond hearing and, instead, appointed a public defender to represent the defendant for the bond hearing only. The defendant repeatedly objected to the appointment of counsel throughout the bond hearing. Due to the defendant's multiple outbursts during the bond hearing, the defendant's assigned public defender requested that mental health treatment be provided by the Department of Correction for the defendant.[1] The court granted the public defender's request and ordered on the mittimus that the defendant receive mental health treatment. The violation of probation case was thereafter transferred to the Superior Court in Waterbury. The misdemeanor charges underlying the violation of probation remained in Norwalk, along with the fingerprint charge.

On August 30, 2018, during the arraignment before the Superior Court in Waterbury, the defendant continued his outbursts and insisted that he be allowed to represent himself. The defendant's assigned public defender for the bond hearing in Waterbury informed the defendant that he would not be permitted to represent himself. The defendant continued to interrupt the proceedings while claiming that the court was violating his right to represent himself. As a result of the defendant's multiple outbursts during the arraignment, the assigned public defender requested that the court order mental health and medical treatment for the defendant, which request was granted by the court and ordered on a second mittimus. The defendant's violation of probation case was thereafter transferred to the judicial district of Waterbury.

On September 12, 2018, the court, *Fasano*, *J.*, asked the defendant if he would like to have an attorney to

[1] The purpose of the requested mental health treatment is unclear from the record.

represent him, to which the defendant responded that he would like to represent himself. The court then went on to canvass the defendant in order to assess his ability to represent himself, after the defendant reiterated his desire to appear as a self-represented party. Following the canvass, the court granted the defendant's request to represent himself in the violation of probation proceeding, concluding that the canvass satisfied its concerns about whether the defendant was indeed competent to represent himself.

On October 9, 2018, the state filed a long form information alleging five grounds for the violation of probation charge against the defendant. Specifically, the state alleged that the defendant had failed to abide by the conditions that he (1) not violate any criminal laws of Connecticut, (2) report to his probation officer as directed, (3) keep his probation officer informed of his whereabouts, (4) complete sex offender evaluation and treatment, and (5) provide truthful information to the Connecticut State Police Sex Offender Registry Unit. A violation of probation evidentiary hearing was held on October 30, 2018.[2]

During the violation of probation hearing, the state presented testimony from Charles Santiago, the probation officer who had completed the defendant's probation intake and reviewed the conditions of probation with the defendant on March 15, 2012, and Grady, the

[2] "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . The state must establish a violation of probation by a fair preponderance of the evidence. . . . That is to say, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Citations omitted; internal quotation marks omitted.) *State* v. *Parker*, 201 Conn. App. 435, 444–45, 242 A.3d 132 (2020).

defendant's probation officer at the time of his arrest for violation of his probation. Santiago testified that he reviewed the conditions of probation with the defendant prior to the defendant's release and that the defendant agreed to the conditions of probation by signing the form delineating the conditions. Grady testified that he typically had weekly check-ins with the defendant. After the defendant missed several appointments, Grady attempted to locate the defendant but could not find the defendant at his home or at his father's home. Further, he testified that the defendant had changed his address in the sex offender registry to an address for an administrative office. The state rested its case at the close of the defendant's cross-examination of Grady.

At the close of the October 30, 2018 hearing, the defendant sought to have the court appoint Attorney William T. Koch, Jr., as his defense counsel; however, the court was unable to grant the defendant's request because Koch was not on the authorized list of special public defenders. The court, however, advised the defendant that he could retain Koch as private counsel. The court then continued the evidentiary hearing until December 30, 2018, to allow the defendant more time to prepare after the defendant indicated that he intended to call numerous witnesses to testify. The court also admonished the defendant numerous times for his repeated outbursts throughout the violation of probation hearing.

On November 8, 2018, the defendant filed a request with the court to be appointed a special public defender, specifically, Koch. While in court on November 30, 2018, a member of the public defender's office indicated to the court that the defendant was eligible for public defender services. Nevertheless, the defendant then insisted on continuing to represent himself and made

a request that Koch[3] be appointed as his standby counsel. The attorney with the public defender's office who was present in court that day informed the court that Koch was not on the authorized list of special public defenders, despite the defendant's protestations to the contrary. The court informed the defendant that he would be appointed a special public defender to act as standby counsel and that Koch would be appointed only if he was indeed on the special public defender list. While in court on January 2, 2019, Attorney J. Patten Brown III was appointed as the defendant's standby counsel, and the court, sua sponte, also ordered a competency evaluation of the defendant pursuant to General Statutes § 54-56d, after raising concerns about the defendant's ability to stand trial due to his outbursts.[4] The defendant expressed that he had no intention of cooperating with the § 54-56d competency evaluators.

On February 13, 2019, after receiving a report that the defendant had failed to cooperate with the evaluators, the court determined that the defendant was not

[3] Although the transcript references Attorney William Cox, the defendant was actually requesting that Koch be appointed.

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

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

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

"(d) . . . If the court finds that the request for an examination is justified and that, in accordance with procedures established by the judges of the Superior Court, there is probable cause to believe that the defendant has committed the crime for which the defendant is charged, the court shall order an examination of the defendant as to his or her competency. . . ."

competent to represent himself and appointed Brown to fully represent him. The court nevertheless determined that the defendant was competent to stand trial because of the presumption of competence. Specifically, the court found that the defendant was "at least minimally competent . . . in terms of understanding the nature of the charges . . . and . . . capable of assisting in [his] defense . . . [but] choose[s] not to . . . ." The court determined that the defendant was minimally competent to stand trial by comparing the defendant's conduct to what it considered to be the standard for minimal competence.

The court, however, asserted that it did not believe the defendant to be capable of continuing to represent himself because of the motions that the defendant had filed and because the defendant "[spoke] over the court's voice . . . disregard[ed] orders, [was] long winded, [and asked] inappropriate questions . . . ." Brown, believing that the defendant presented competency issues, objected to the court's determination that the defendant was competent to stand trial to the extent that the court had found him competent enough to understand the nature of the charges and to assist with his defense. Brown, consequently, requested another § 54-56d competency evaluation. The court overruled Brown's objection regarding its competency findings. On March 12, 2019, Brown filed a motion seeking the appointment of a guardian ad litem for the defendant in order to obtain the release of the defendant's protected health information to assist in determining his competency. During a hearing on April 10, 2019, Brown renewed his request for another § 54-56d competency evaluation in light of the defendant's assertion that he would cooperate with the competency evaluators. The court granted Brown's request and ordered a § 54-56d competency evaluation.

The violation of probation evidentiary hearing was continued to May 9, 2019. On that date, the court

reported that the defendant once again had refused to cooperate with the evaluators after it had ordered a second evaluation for the defendant on Brown's April 10, 2019 request. The court then reiterated its conclusion that the defendant was competent to stand trial but not to represent himself. Brown raised his objection again as to the court's conclusions and requested that a guardian ad litem be assigned to the defendant or, in the alternative, if the court believed the defendant to be competent to stand trial, that it allow the defendant to represent himself. The court denied Brown's requests because the defendant twice had failed to cooperate with the evaluators and because the court, which initially had allowed the defendant to represent himself, no longer believed that he was capable of doing so. The defendant did not put forth any witnesses during the evidentiary hearing nor did he testify. The court then instructed the parties to present their closing arguments as to whether the defendant had violated one or more conditions of his probation and as to sentencing.

Following closing arguments, the court found the defendant in violation of his probation. With respect to sentencing, the court opened the defendant's underlying judgment, vacated the suspension order and imposed a sentence of ten years of imprisonment, execution suspended after six years, and the remaining period of probation. After learning that the misdemeanor charges had been transferred to Waterbury, Brown moved for a dismissal of those charges, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court's canvass regarding his waiver of his right to be represented by counsel was constitutionally inadequate under *Faretta* v. *California*, supra, 422 U.S. 806. Specifically, the defendant contends that the court did not thoroughly

canvass him regarding his competence to make a knowing and voluntary waiver and failed to advise him of his total maximum sentence exposure on both the violation of probation and the underlying misdemeanor charges. As the state correctly observes, the defendant's *Faretta* claim is unpreserved; however, we review the defendant's claim pursuant to the bypass doctrine enunciated in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[5] because the record is adequate for review and the defendant's claim is of a constitutional nature. The defendant's claim, however, fails under the third prong of *Golding* because the defendant has failed to show the existence of a constitutional violation.

The following additional facts and procedural history are relevant to this claim. On September 12, 2018, the court, *Fasano*, *J.*, canvassed the defendant after he asserted that he wanted to represent himself in order to ascertain whether the defendant was knowingly, intelligently, and voluntarily waiving his right to coun-

[5] "*Golding* is a narrow exception to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court. The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 749, 91 A.3d 862 (2014).

"Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; internal quotation marks omitted.) *State* v. *Lemanski*, 201 Conn. App. 360, 365–66 n.3, 242 A.3d 532 (2020), cert. denied, 336 Conn. 907, 244 A.3d 147 (2021).

sel.[6] After canvassing the defendant, the court found that he was competent to represent himself.

[6] The following colloquy occurred at the time of the defendant's arraignment in Waterbury:

"The Court: You have to be competent to represent yourself.

"The Defendant: I am. . . .

"The Court: So let me ask you some questions. I have to canvass you about representing yourself, okay?

"The Defendant: I understand that, Your Honor, yes.

"The Court: You understand you have the right to be represented by an attorney, even if you can't afford an attorney? Do you understand you have that right?

"The Defendant: Yes, Your Honor.

"The Court: Are you waiving that right voluntarily?

"The Defendant: Yes. I have too much money to get a public . . . defender.

"The Court: Okay. Have you had any experience representing yourself?

"The Defendant: Yes, Your Honor.

"The Court: Yes?

"The Defendant: Yes. I filed several federal lawsuits in federal court and had positive results as a result. . . .

"The Court: So you've handled these cases on your own; is that right?

"The Defendant: Yes, Your Honor, over the years, yes.

"The Court: Have you any law school—

"The Defendant: Yes. The private school I went to in New Hampshire, the last quarter of tenth grade and the eleventh grade when we studied law, and I graduated at the end of eleventh grade before I turned sixteen in September.

"The Court: All right. So you've had occasion to study law. You understand that the state has gone to college, has gone to law school, and they are very well versed in the law. I just want to show you the disadvantages.

"The Defendant: Well, Your Honor, there's no case—

"The Court: Just tell me if you understand that they've gone to law school and college.

"The Defendant: Yes, no problem.

"The Court: You understand they have experience putting on these hearings. You have a violation of probation. You don't have any other pending charges, right?

"The Defendant: In Norwalk that is the basis for the violation of probation. It was an illegal arrest, and I was assaulted . . . .

"The Court: You're going to represent yourself in that one, too?

"The Defendant: Yes, Your Honor.

"The Court: Let me tell you the disadvantages, if you understand them. That's all I need to do.

"The Defendant: All right.

"The Court: Number one: The state's been to law school. Number two: They've tried cases. They know how to put on evidence. They know how to cross-examine witnesses. They know how to argue at the conclusion of the evidence. These are all things you really haven't had a lot of experience with.

"The Defendant: Your Honor, [80] percent of the cases get pled out, okay.

"The Court: Yes, I'm pretty sure I know that.

"It is well established that [w]e review the trial court's determination with respect to whether the defendant

"The Defendant: Right. I'm just reconfirming that I am competent to represent myself pro se. Furthermore, this is nothing because it's a house of cards built on a foundation of lies and a false arrest in Norwalk.

"The Court: You don't have to argue your case just yet. I just want to be sure you're capable.

"The Defendant: Yeah, no problem.

"The Court: You have to understand all the advantages they have. And I think you do understand that.

"The Defendant: Thank you, Your Honor.

"The Court: What's the amount of time he could receive, the exposure?

"[The Prosecutor]: Ten years. . . .

"The Defendant: Maximum.

"The Court: So you're looking at a violation of probation where you could receive up to ten years. Do you understand that?

"The Defendant: Yes, Your Honor. I already have a habeas corpus put in a year ago.

"The Court: Because you're going to be representing yourself, and at the conclusion, you can't really yell at your lawyer if you get up to ten years in jail.

"The Defendant: Your Honor, I'm not. I'll be in jail for a maximum of ninety more days, if that.

"The Court: In any event, you understand the exposure?

"The Defendant: Yes, Your Honor. Yes.

"The Court: Nonetheless, you wish to proceed on your own?

"The Defendant: Right.

"The Court: You're doing that voluntarily and of your own free will. You're aware of all the disadvantages that I enumerated, right?

"The Defendant: Right.

"The Court: You're aware of the exposure in this particular case?

"The Defendant: Yes, Your Honor.

"The Court: All right. I'm satisfied that you're competent, that you're capable of representing yourself.

"The one other thing is you're going to have to allow the state to state its case. You're going to have to listen to the orders of the court. You're going to have to comply with those orders and the rules of evidence and so on. You understand that?

"The Defendant: Yes. I just have one request. That when I'm speaking, I don't get interrupted by the district attorney's office and vice versa. I will not interrupt the district attorney's office when they are speaking.

"The Court: How about the court? Are you going to interrupt them?

"The Defendant: No, I'm not going to interrupt you, Your Honor.

"The Court: All right. I appreciate that. So you're going to comply with the rules?

"The Defendant: Yes.

"The Court: You're going to give the state an opportunity to be heard. You're going to listen to the court. You're going to let them finish its sentence before you say something.

"The Defendant: Yes.

"The Court: So you're going to be allowed to represent yourself.

"The Defendant: Thank you. They can go first."

knowingly and voluntarily elected to proceed [as a self-represented party] for abuse of discretion." (Internal quotation marks omitted.) *State* v. *Joseph A.*, 336 Conn. 247, 254, 245 A.3d 785 (2020). "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." (Internal quotation marks omitted.) *State* v. *Cooke*, 42 Conn. App. 790, 797, 682 A.2d 513 (1996).

"The right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but [because] the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . .

"[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . . Rather, a record that affirmatively shows that [he] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will sufficiently supports a waiver. . . . The nature of the inquiry that must be conducted to substantiate an effective waiver has been explicitly articulated in decisions by various federal courts of appeals. . . .

"Practice Book § [44-3] was adopted in order to implement the right of a defendant in a criminal case to act as his own attorney . . . . Before a trial court may accept a defendant's waiver of counsel, it must conduct an inquiry in accordance with § [44-3], in order to satisfy itself that the defendant's decision to waive

counsel is knowingly and intelligently made. . . . Because the § [44-3] inquiry simultaneously triggers the constitutional right of a defendant to represent himself and enables the waiver of the constitutional right of a defendant to counsel, the provisions of § [44-3] cannot be construed to require anything more than is constitutionally mandated. . . .

"The multifactor analysis of [Practice Book § 44-3], therefore, is designed to assist the court in answering two fundamental questions: first, whether a criminal defendant is minimally competent to make the decision to waive counsel, and second, whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion. . . . As the United States Supreme Court [has] recognized, these two questions are separate, with the former logically antecedent to the latter. . . . Inasmuch as the defendant's competence is uncontested, we proceed to whether the trial court abused its discretion in concluding that the defendant made the waiver decision in a knowing, voluntary, and intelligent fashion." (Citations omitted; internal quotation marks omitted.) *State* v. *Joseph A.*, supra, 336 Conn. 254–56. Further, as our Supreme Court observed in *State* v. *Cushard*, 328 Conn. 558, 568, 181 A.3d 74 (2018), "the court may accept a waiver of the right to counsel without specifically questioning a defendant on each of the factors listed in [Practice Book] § [44-3] if the record is sufficient to establish that the waiver is voluntary and knowing." (Internal quotation marks omitted.)

The defendant, in essence, claims that the court did not inquire sufficiently into whether he indeed was competent to knowingly and voluntarily waive his right to counsel. In response, the state argues that the court fully complied with Practice Book § 44-3, even though it was not required to do so, as strict adherence to § 44-3 is not necessary to establish that a court's canvass is constitutionally sufficient. The state contends that the

canvass was adequate because (1) the record reflects that the defendant was aware of his right to counsel and the court repeatedly informed the defendant of his right to counsel, (2) the exchange between the defendant and the court exhibited that the defendant had the intelligence and capacity to appreciate the consequences of his waiver, (3) the record reflects that the defendant understood the nature of the charges against him because the defendant informed the court that his arrest in Norwalk is what predicated the violation of probation proceeding and that he knew that the maximum exposure for the violation of probation was ten years, (4) the court repeatedly explained to the defendant the pitfalls and dangers of representing himself, and the defendant acknowledged the disparity between the prosecutor's legal education and his own, and (5) the defendant indicated that he desired to represent himself and was voluntarily deciding to do so despite the potential disadvantages.

We begin by noting that the defendant's request for self-representation was clear and unequivocal. See *Faretta* v. *California*, supra, 422 U.S. 835. "[T]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Connor*, supra, 292 Conn. 512. The record reflects a lengthy canvass conducted by the court in which the defendant informed the court that he had represented himself in previous federal cases. Moreover, the court repeatedly asked the defendant if he was waiving his right to counsel voluntarily and whether he was aware of the disadvantages of proceeding as a self-represented party, to which the defendant answered affirmatively. There is no indication in the record that the defendant was unaware that he was waiving his right to counsel or that he was doing so involuntarily. "The purpose of the knowing

and voluntary inquiry . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (Emphasis omitted; internal quotation marks omitted.) Id. Although the defendant also argues that the trial court's canvass was inadequate because it did not "follow up or explore the defendant's obvious lack of legal education and training," we fail to see how an inquiry into the defendant's legal training and education would have had any bearing on his competence to waive his right to counsel. "In other words, the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. . . . Consequently, a defendant's technical legal knowledge is not relevant to the determination [of] whether he is competent to waive his right to counsel . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Connor*, supra, 511. Notably, during the January 2, 2019 hearing, the defendant stated that the court's canvass during the September 12, 2018 arraignment had been thorough. On the basis of the record, the court reasonably could have concluded that the defendant was competent to waive his right to counsel. Therefore, we conclude that the court did not abuse its discretion in determining that the defendant knowingly, intelligently, and voluntarily had waived his right to counsel. See *State* v. *D'Antonio*, 274 Conn. 658, 709–11, 877 A.2d 696 (2005).

The defendant also claims that the canvass was constitutionally deficient because he was not advised of the total maximum sentence exposure for both the violation of probation and the underlying misdemeanor charges.

During the canvass, the court advised the defendant that he was "looking at a violation of probation where [he] could receive up to ten years" of incarceration, to

which the defendant responded that he understood. The defendant argues that the court should also have indicated the maximum exposure for the misdemeanor charges; however, as the state correctly notes, the defendant was not arraigned on the misdemeanor charges in Waterbury because those charges had not been transferred from Norwalk as of the defendant's September 12, 2018 arraignment in Waterbury, when the canvass took place. Thus, there was no need for the court to canvass the defendant about the misdemeanor charges that were not yet before it. The defendant also asserts that his statement to the court during the canvass that he would not be in jail for more than "ninety more days" was an indication that he was not aware of his maximum exposure at sentencing. A review of the record reveals that the defendant's statement concerning the amount of time for which he believed he would be incarcerated was premised on his belief that "[the violation of probation proceeding] is nothing because it's a house of cards built on a foundation of lies and a false arrest in Norwalk." There is no indication that the court did not apprise the defendant of the maximum exposure for the violation of probation. Therefore, the defendant's unpreserved claim that the court's canvass was constitutionally deficient fails under the third prong of *Golding*.

II

Alternatively, the defendant contends that, even if the court's canvass was adequate under *Faretta*, he is entitled to a new trial pursuant to our Supreme Court's decision in *State* v. *Connor*, supra, 292 Conn. 483. Specifically, the defendant argues that he is entitled to a new trial because he "suffered from an impairment noticeable enough during the violation of probation evidentiary hearing on October 30, 2018," and could not perform basic representational functions during that hearing, such that the court should have appointed

counsel no later than the defendant's attempted cross-examination of the state's first witness during that hearing.[7] In other words, the defendant asserts that the court should have, sua sponte, determined that he was incompetent to represent himself. We disagree.

A review of the record reveals that the defendant had difficulty formulating nonargumentative, noncompound questions while cross-examining Santiago on October 30, 2018, during the first day of the evidentiary hearing.[8] Our Supreme Court in *State* v. *Connor*, supra, 292 Conn. 518–19, exercised its supervisory authority and established that, "upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial, the trial court must make another determination, that is, *whether the*

[7] Although the defendant claims that counsel was not appointed until May, 2019, the record reveals that full counsel was appointed on February 13, 2019.

[8] For instance, the following exchange occurred during the defendant's cross-examination of Santiago, the state's first witness:

"[The Defendant]: All right. Now the reason why you, when I met with you and I was complaining about the public defender, the reason why you committed perjury and falsely accused me of threating her was because you were not happy that I was granted parole to the feds, and that it would be less time for you guys to be able to violate my probation on a technicality because even the federal probation officers did not want me released on my release date, and that's why they had me illegally put in Whiting Forensic Institute without a prior court order, and that the Connecticut local mental health authority said that there was no clinical reason to keep me locked up in a mental hospital, and so you had that same feeling. Because any time anybody says, sexual assault, it makes the rule book and the laws go, and justice out the window.

"[The State]: Objection, Your Honor.

"The Court: Sustained. Here is the thing. You have to ask a question, not tell the story. . . .

"The Court: So, you ask a question now. . . .

"[The Defendant]: So, why did you feel you were above the law? Because you thought you weren't going to get caught, or because you thought, well, he's a sex offender, and he's got a long history of crimes? Nobody is going to believe him? Or is it that you are in a position of authority and you think you could do whatever you want . . . . So . . . why was it you felt that you could lie?"

defendant also is competent to conduct the trial proceedings without counsel.'' (Emphasis added.) On appeal, the defendant claims, in essence, that his inability to effectively cross-examine the state's first witness was an indication that he suffered from such a significant mental impairment that the court should have, sua sponte, determined that he was incompetent to represent himself or, at the least, continued the proceeding so that the defendant's competence to represent himself could be investigated further.

At the outset, we note that, after the defendant was appointed full counsel on February 13, 2019, the court gave the defendant the opportunity to recall the state's witnesses to reexamine them. The defendant, however, declined the invitation to do so. We also note that the defendant failed to cooperate with the competency evaluators during both of the court-ordered § 54-56d competency evaluations. Further, the defendant did not raise any objections to the trial court concerning the timing of the court's appointment of counsel, which he now claims on appeal came ''too late.'' The defendant objected only to the court's determination that he was capable of assisting with his own defense. In response to the defendant's objection and argument, the court granted his request for a second competency evaluation. ''Pursuant to § 54-56d (b), [every] defendant is presumed to be competent.'' (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 486, 180 A.3d 882 (2018). Because of his failure to cooperate with the competency evaluators, the presumption of competency to stand trial was not rebutted. The defendant's failure to cooperate with the evaluators undermines his argument and now causes him to rely on his alleged ineffective cross-examination of the state's witnesses to bolster his claim that an ''impairment noticeable enough'' existed during the evidentiary hearing on October 30, 2018, such that the court should

have determined that he was incompetent to represent himself.

To the extent that the defendant relies on his inability to effectively cross-examine the state's first witness as evidence of his incompetence to represent himself, our Supreme Court in *Connor* addressed a similar claim. The court in *Connor* reasoned that the defendant's lengthy and confusing questioning during voir dire, his " 'rambling dialogue' with the court concerning his health and the fact that he thought that correction officers planned to kill him . . . and . . . the [defendant's inability] . . . to pose relevant questions," reflected "more on the defendant's lack of legal experience and expertise than . . . on his mental condition." *State* v. *Connor*, supra, 292 Conn. 524. Although, competency to stand trial and competency for self-representation are separate concepts, the defendant's statutorily presumed competency to stand trial appertains to his competency for self-representation. In that vein, we observe that, with respect to the interrelated issue of competency to stand trial, our Supreme Court has held that a defendant's incompetence to stand trial is not "demonstrated by his lack of legal competence to try his case skillfully." *State* v. *Wolff*, 237 Conn. 633, 666, 678 A.2d 1369 (1996); see also *State* v. *Johnson*, 253 Conn. 1, 30, 751 A.2d 298 (2000) (citing *State* v. *Johnson*, 22 Conn. App. 477, 489, 578 A.2d 1085, cert. denied, 216 Conn. 817, 580 A.2d 63 (1990), for notion that "defendant's obstreperous, uncooperative or belligerent behavior . . . and hostility toward [his] attorney [does] not necessarily indicate defendant's incompetency" (internal quotation marks omitted)). Thus, in the present case, the defendant cannot solely rely on his inability to effectively cross-examine the state's witnesses to establish a purported impairment sufficient to sustain his claim pursuant to *Connor*. The defendant's failure to cooperate with the competency evaluators adversely affects

his present claim, given the statutory presumption of competency. The statutory presumption of competency was not overcome by sufficient evidence. The fact that an evaluation was merely ordered, but not completed, does not alter the nature of the record before us.

On the basis of the record and the facts before the court, there was insufficient evidence that the defendant suffered from such a significant mental impairment that the court should have, sua sponte, determined that he was incompetent to represent himself. Although an evaluation for the defendant's competency to stand trial would have been helpful in determining whether there was a basis for the court to determine that the defendant was incompetent to represent himself, the defendant, nevertheless, still must demonstrate that there was sufficient evidence to alert the court of a significant mental impairment that required the court to exercise its powers sua sponte. Accordingly, the defendant's claim under *Connor* fails.

III

The defendant next claims that the court erred when it failed, sua sponte, to canvass him about the waiver of his constitutional right to testify. This claim is unpreserved, but the defendant invites this court to provide him a remedy in the exercise of its supervisory authority. For the reasons set forth herein, we decline to do so.

"[T]his court possesses an inherent supervisory authority over the administration of justice. . . . [T]he integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . [O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . . Ordinarily, our supervisory powers are invoked to enunciate a rule that is not constitutionally required but that we think

is preferable as a matter of policy. . . . As our Supreme Court explained, [s]upervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . *State* v. *Valedon*, 261 Conn. 381, 386, 802 A.2d 836 (2002). At the same time, [a]lthough [w]e previously have exercised our supervisory powers to direct trial courts to adopt judicial procedures . . . we also have exercised our authority to address the result in individual cases . . . because [certain] conduct, although not rising to the level of constitutional magnitude, is unduly offensive to the maintenance of a sound judicial process." (Citations omitted; internal quotation marks omitted.) *State* v. *Jimenez-Jaramill*, 134 Conn. App. 346, 380–81, 38 A.3d 239, cert. denied, 305 Conn. 913, 45 A.3d 100 (2012).

As the defendant concedes in his appellate brief, our Supreme Court's decision in *State* v. *Paradise*, 213 Conn. 388, 404–405, 567 A.2d 1221 (1990), overruled in part on other grounds by *State* v. *Skakel*, 276 Conn. 633, 693, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006), is controlling with respect to whether a trial court is constitutionally required to canvass a defendant about the waiver of his or her right to testify. *Paradise* provides that federal law does not "[contain] any such procedural requirement" for a trial judge to affirmatively canvass the defendant "to ensure that his waiver of his right to testify is knowing, voluntary and intelligent . . . where the defendant has not alleged that he wanted to testify or that he did not know that he could testify." Id. In the present case, the defendant has not claimed that he expressed any such desire to testify at trial or that he did not know that he could testify; therefore, the

court had no constitutional duty to canvass him concerning his right to testify under *Paradise*.

The defendant, however, requests that this court exercise its supervisory authority to "impose an affirmative duty on our trial courts to canvass criminal defendants and alleged probation violators even when the defendant does not ask to testify or does not declare he will not testify." We previously declined a request to exercise our supervisory authority with respect to a similar issue in *State* v. *Dijmarescu*, 182 Conn. App. 135, 158–59, 189 A.3d 111, cert. denied, 329 Conn. 912, 186 A.3d 707 (2018), in which we declined to require trial courts to canvass defendants regarding their right against self-incrimination before testifying. "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) Id., 158. We see no reason to depart from our decision in *Dijmarescu*, in which we "conclude[d] that any determination of whether a court should be required to canvass a defendant regarding his right against self-incrimination before he testifies is better left to our Supreme Court." Id., 159. Accordingly, we decline the defendant's request that we exercise our supervisory authority with respect to this claim.

IV

The defendant next claims that he was deprived of his sixth amendment right to conflict free representation because an actual conflict existed.[9] The defendant contends that an actual conflict existed because he threat-

[9] The defendant also requests that this court review his ineffective assistance of counsel claim on direct appeal. We decline to do so. "[A] claim of ineffective assistance of counsel is more properly pursued on a petition for new trial or on a petition for a writ of habeas corpus rather than on direct

ened Brown with physical violence and Brown published it to the court.[10] The state contends that the

appeal . . . [because] [t]he trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action. . . . It is preferable that all of the claims of ineffective assistance, those arguably supported by the record as well as others requiring an evidentiary hearing, be evaluated by the same trier in the same proceeding. . . . Furthermore, [o]n the rare occasions that [this court has] addressed an ineffective assistance of counsel claim on direct appeal, [it has] limited [its] review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the trial court, rather than by those of his counsel. . . . [This court has] addressed such claims, moreover, only where the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development. . . . Additionally, this court has observed that a defendant may pursue a claim of ineffective assistance in a direct appeal in connection with a claim that his guilty plea was the result of ineffective assistance of counsel. A claim of ineffective assistance of counsel is generally made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal. . . . Section 39-27 of the Practice Book, however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Polynice*, 164 Conn. App. 390, 396–97, 133 A.3d 952, cert. denied, 321 Conn. 914, 136 A.3d 1274 (2016).

The defendant's claim that trial counsel provided ineffective assistance by recommending three years of incarceration would require an evidentiary hearing to ascertain the reasoning behind trial counsel's recommendation. "The transcript of the proceedings in the trial court allows us to examine the *actions* of defense counsel but not the underlying *reasons* for his actions." (Emphasis in original; footnote omitted.) *State* v. *Gregory*, 191 Conn. 142, 144, 463 A.2d 609 (1983). For example, given the strength of the state's evidence regarding the defendant's failure to comply with the conditions of his probation, by advancing the foregoing argument, defense counsel may very well have been attempting to mitigate the potential consequences of a finding that the defendant was in violation of probation.

The record is inadequate, and, thus, we decline to review this claim on direct appeal.

[10] The defendant also claims that the court was "under the duty to inquire whether there was a conflict of interest" when (a) trial counsel sought to have a guardian ad litem appointed for the defendant, (b) the court became aware that the defendant had filed a grievance against trial counsel, and (c) trial counsel failed to cross-examine any of the state's witnesses and failed to present any defense. In essence, the defendant claims that the court had a duty to inquire as to a potential conflict of interest; however, the defendant provided little to no analysis of this claim and, instead, focused his analysis on whether there was an actual conflict. "We are not required to review issues that have been improperly presented to this court through an inadequate brief." (Internal quotation marks omitted.) *State* v. *David P.*,

record is inadequate to review this claim. We disagree with the state because the basis for the alleged conflict is readily apparent from the record, as it consists mainly of the motion for appointment of a guardian ad litem in which counsel indicated that the defendant made a threat of physical violence. Because that is the basis of the motion, the record is not inadequate to review this claim, as the state contends.

The following additional facts are relevant to the resolution of this claim. On March 12, 2019, Brown filed a motion with the court seeking an appointment of a guardian ad litem for the defendant. Although the motion requested appointment of a guardian ad litem "for the purpose of obtaining releases of information as necessary to determine [the defendant's] competency," nothing was developed in the record in connection with the motion related to the existence of an actual conflict of interest. It appears that Brown included, inter alia, one sentence in that motion indicating that the defendant had threatened him and the court with physical violence.

We begin by setting forth the standard of review and legal principles that govern our analysis. "Our review in this case is plenary. Although the underlying historical facts found by the . . . court may not be disturbed unless they were clearly erroneous, whether those facts constituted a violation of the [defendant's] rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

70 Conn. App. 462, 473, 800 A.2d 541, cert. denied, 262 Conn. 907, 810 A.2d 275 (2002). We, therefore, decline to review the defendant's claim that the court had a duty to inquire about a potential conflict because it was inadequately briefed.

"The sixth amendment to the United States constitution as applied to the states through the fourteenth amendment, and article first, § 8, of the Connecticut constitution, guarantee to a criminal defendant the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest. . . . The right attaches at trial as well as at all critical stages of a criminal proceeding . . . .

"Our Supreme Court has described a conflict of interest as that which impedes [an attorney's] paramount duty of loyalty to his client. . . . Thus, an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client . . . . Conflicts of interest . . . may arise between the defendant and the defense counsel. The key here should be the presence of a specific concern that would divide counsel's loyalties. . . .

"In a case of a claimed conflict of interest, therefore, in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance." (Citations omitted; internal quotation marks omitted.) *DaSilva* v. *Commissioner of Correction*, 132 Conn. App. 780, 784–85, 34 A.3d 429 (2012).

The defendant argues on appeal that Brown's assertion concerning the defendant's threats of physical violence, standing alone, was "an actual conflict . . . because the defendant threatened [Brown] with violence and [Brown] published this [information] to the court." (Emphasis omitted.) Moreover, the defendant

argues that Brown's decision to include that statement in the motion was an indication that Brown's performance was affected by the purported threats. "To demonstrate an actual conflict of interest, the [defendant] must be able to point to specific instances in the record which suggest impairment or compromise of his interests for the benefit of another party. . . . A mere theoretical division of loyalties is not enough." (Internal quotation marks omitted.) *DaSilva* v. *Commissioner of Correction*, supra, 132 Conn. App. 785–86. A review of the guardian ad litem motion that Brown filed, however, demonstrates that the sole purpose of the motion and the inclusion of the statement at issue was to obtain releases of the defendant's relevant health information, which Brown needed in order to determine the defendant's competency. The defendant has not provided a factual basis apart from the one sentence included in Brown's written motion that mentioned the defendant's threat to support his contention that an actual conflict existed. The record does not reflect that Brown sought to withdraw from further representation of the defendant following the purported threat, nor does the record contain any statements by Brown that are representative of divided loyalty. In the absence of additional facts in the record in support of the defendant's claim, we are not persuaded that there was an actual conflict or, stated differently, an "impairment or compromise of [the defendant's] interests for the benefit of another party." (Internal quotation marks omitted.) Id. Thus, this claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM L. STAFFORD, JR. *v.* COMMISSIONER OF CORRECTION (AC 43208)

Prescott, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted, in two cases, of the crime of felony murder on a plea of guilty in each case, sought a writ of habeas corpus, claiming, inter alia, that the respondent Commissioner of Correction and the Board of Pardons and Paroles improperly determined that he was not parole eligible. On the first count of felony murder, which was alleged to have been committed on June 30 or July 1, 1981, the petitioner was sentenced to an indefinite term of incarceration of not less than twenty-five years nor more than life pursuant to statute ((Rev. to 1981) § 53a-35). On the second count of felony murder, which was alleged to have been committed on August 16, 1981, the petitioner was sentenced to a definite term of incarceration of fifty-five years pursuant to statute ((Rev. to 1981) § 53a-35a). The trial court ordered the sentences to run concurrently. The petitioner had served the entire length of his definite sentence of fifty-five years, as reduced by credits he had earned while incarcerated, by May 28, 2014. He then sought a parole eligibility date for his indeterminate sentence but was told that he was not eligible for parole because his determinate sentence, which he had fully served, was not a parole eligible offense. At his habeas trial, however, S, the executive director of the board, testified that the petitioner was parole eligible. Thereafter, the habeas court dismissed the petition, concluding that it lacked jurisdiction because the petitioner failed to state a claim involving the deprivation of a recognized liberty interest and that the issue of obtaining a parole eligibility determination was moot in light of S's testimony that the board had found the petitioner to be eligible for parole but declined to grant him a hearing. The court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court. On appeal, the respondent conceded that the petitioner was eligible for parole. *Held*:

1. This court had jurisdiction to reach the merits of the petitioner's claims, as the respondent's concession that the petitioner was parole eligible did not render the appeal moot: in his habeas petition, the petitioner sought three forms of relief, a declaration by the habeas court that he was eligible for parole, an order that the respondent classify him as eligible for parole, and a classification by the board and the Department of Correction that he was eligible for parole and that they accord him consideration based on the criteria set forth in the applicable statute (§ 54-125), of which only the final request for relief was arguably satisfied by the respondent's concession, thus, this court could order practical

relief by remanding the case with direction to render judgment that the petitioner is parole eligible; moreover, the petitioner's classification as a parole eligible inmate was a tangible benefit on which his release from prison, pursuant to a finding of parole suitability, was contingent; furthermore, the notion that there was no actual controversy between the parties on the issue of the petitioner's parole eligibility was belied by the existence of the appeal and the lack of a stipulation as to the petitioner's eligibility.

2. The habeas court improperly dismissed the petition for a writ of habeas corpus as moot; at the habeas trial, although S testified that the petitioner was eligible for parole, a representative from the department testified that the petitioner would never be eligible, and this conflicting testimony, in conjunction with the respondent's closing remarks that it was "not entirely clear that this is a parole eligible sentence," indicated that there was an ongoing controversy regarding the petitioner's eligibility for parole, despite S's testimony.

3. The habeas court erred in concluding that it did not have jurisdiction to consider the petitioner's ex post facto claim in his petition: the petitioner established a cognizable claim under the ex post facto clause of the United States constitution, as he made a colorable showing that the respondent's and the department's interpretation and application of certain statutes (§§ 53a-38 (b) and 54-125a (b) (1)) that rendered him categorically ineligible for parole on his indeterminate sentence on the first offense created a genuine risk that he would be incarcerated for longer than he would have been under the law that existed at the time he committed the first offense; accordingly, in light of the respondent's concession on appeal that the petitioner is parole eligible, this court granted the petitioner practical relief by directing the habeas court to render judgment declaring the petitioner to be parole eligible and did not reach a determination as to whether the respondent's interpretation and application of § 54-125a to the petitioner's sentence violated the ex post facto clause.

Argued February 11—officially released August 31, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Newson, J.*; judgment dismissing the petition; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Reversed; judgment directed.*

Melissa King and *Hannah Kogan*, certified legal interns, with whom were *Timothy H. Everett*, assigned

counsel, and, on the brief, *Christopher Boyer*, certified legal intern, for the appellant (petitioner).

Madeline A. Melchionne, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Steven R. Strom*, assistant attorney general, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, William L. Stafford, Jr., appeals from the judgment of the habeas court dismissing his amended petition for a writ of habeas corpus, which challenged the categorical refusal by the respondent, the Commissioner of Correction, and the initial failure by the Board of Pardons and Paroles (board), to deem the petitioner eligible for parole despite the fact that he is incarcerated for a parole eligible offense.

On appeal, the petitioner claims that the court improperly dismissed his petition on the grounds that (1) the court lacked subject matter jurisdiction because the petitioner failed to state a claim involving the deprivation of a recognized liberty interest, and (2) the petition was rendered moot by a witness' testimony at the habeas trial. We agree with both jurisdictional claims and, accordingly, reverse the judgment of the habeas court and remand with direction to render judgment stating that the petitioner is parole eligible.

The following facts and procedural history are relevant to our disposition of the petitioner's claims.[1] In 1981, the petitioner was charged with two counts of felony murder in violation of General Statutes (Rev. to

[1] We rely on the facts as found and set forth by the habeas court in its memorandum of decision as well as on undisputed facts disclosed in the record.

1981) § 53a-54c,[2] the first of which was alleged to have been committed on June 30 or July 1, 1981, and the second of which was alleged to have been committed on August 16, 1981. On October 14, 1982, the petitioner entered guilty pleas as to both counts. On the first count, the petitioner was sentenced to an indefinite term of incarceration of not less than twenty-five years nor more than life pursuant to General Statutes (Rev. to 1981) § 53a-35.[3] On the second count, the petitioner was sentenced to a definite term of fifty-five years of incarceration pursuant to General Statutes (Rev. to 1981) § 53a-35a.[4] The court ordered the sentences to run concurrently. "The petitioner 'maxed out' on the fifty-five year sentence on May 28, 2014, and is deemed

[2] General Statutes (Rev. to 1981) § 53a-54c provides in relevant part: "A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants . . . ."

[3] General Statutes (Rev. to 1981) § 53a-35 provides in relevant part: "(a) For any felony committed prior to July 1, 1981, the sentence of imprisonment shall be an indeterminate sentence, except as provided in subsection (d). When such a sentence is imposed the court shall impose a maximum term in accordance with the provisions of subsection (b) and the minimum term shall be as provided in subsection (c) or (d).

"(b) The maximum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows: (1) For a class A felony, life imprisonment . . . .

"(c) Except as provided in subsection (d) the minimum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows: (1) For a class A felony, the minimum term shall not be less than ten nor more than twenty-five years . . . ."

[4] General Statutes (Rev. to 1981) § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows . . .

"(2) for the class A felony of murder, a term not less than twenty-five years nor more than life . . . ."

to have been 'released' from that conviction."[5] Just prior to the expiration of that sentence, the petitioner submitted the first of three inmate request forms to Institutional Parole Officer Vadnais (IPO Vadnais),[6] seeking a parole eligibility date for his indeterminate twenty-five years to life sentence. IPO Vadnais responded to all three requests, indicating each time that the petitioner was not eligible for parole on the indeterminate felony murder sentence because the determinate felony murder sentence was not a parole eligible offense.[7]

Subsequently, the petitioner filed a petition for a writ of habeas corpus as a self-represented litigant. On May

[5] "The petitioner 'maxed out' his sentence through the earning [of] certain 'good time' and job credits to reduce his term of incarceration . . . ." In other words, the petitioner served the entire length of his fifty-five year sentence, as reduced by good conduct credits and job credits that he earned while incarcerated. See General Statutes §§ 18-7a and 18-98a.

[6] This individual's first name was not provided.

[7] Two parole statutes are at issue because of the dates of the underlying offenses: General Statutes §§ 54-125 and 54-125a. Section 54-125 provides in relevant part: "Any person confined for *an indeterminate sentence*, after having been in confinement under such sentence for not less than the minimum term, or, if sentenced for life, after having been in confinement under such sentence for not less than the minimum term imposed by the court, less such time as may have been earned under the provisions of section 18-7, *may be allowed to go at large on parole* in the discretion of the panel of the Board of Pardons and Paroles for the institution in which the person is confined, if (1) it appears from all available information, including such reports from the Commissioner of Correction as such 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. . . ." (Emphasis added.)

Section 54-125a 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 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 . . . .

(b) (1) No person convicted of any of the following offenses, which was *committed on or after July 1, 1981*, shall be eligible for parole under

10, 2016, the petitioner, through counsel, filed an amended petition for a writ of habeas corpus alleging that the respondent improperly determined that the petitioner is not parole eligible, despite the fact that he is currently incarcerated for a parole eligible offense pursuant to General Statutes § 54-125, which constitutes a violation of the petitioner's rights under the due process and ex post facto clauses of the United States constitution. The relief requested in the amended petition includes, inter alia, (1) a declaration by the court that the petitioner is eligible for parole, (2) an order that the respondent classify the petitioner as eligible for parole, and (3) that the board and the Department of Correction (department) classify the petitioner as parole eligible and accord him consideration in accordance with the criteria set forth in § 54-125.[8] The respondent filed a return on July 9, 2018, in which he alleged as a "defense" that the petitioner is not eligible for parole consideration.

At the petitioner's habeas trial, on February 26, 2019, three witnesses testified: (1) Michelle Deveau, a records specialist with the department; (2) Richard Sparaco, the executive director of the board; and (3) the petitioner. Specifically, Deveau testified, inter alia, that the department generates a parole eligibility date for the board that is based on relevant statutes and her office's calculations. She acknowledged that the presentence investigation report prepared at the time of the sentencing of

subsection (a) of this section . . . (C) felony murder, as provided in section 53a-54c . . . ." (Emphasis added.)

[8] Specifically, the amended petition states: "That the Office of Pardons and Paroles in the [d]epartment . . . classify the petitioner as a parole eligible inmate and accord him consideration in accordance with the criteria set forth in . . . § 54-125." It thus appears that the petitioner was operating under the mistaken belief that the board is a part of the department, as opposed to a separate and distinct entity. We interpret the petitioner's request for relief as applying to both entities.

the petitioner[9] stated that "[u]nfortunately [for] . . . society [the petitioner] will be eligible for parole in the future." Nevertheless, Deveau testified that the petitioner was not, and would never be, eligible for parole pursuant to General Statutes §§ 53a-37,[10] 53a-38 (b),[11] and 54-125a[12] because, even though the petitioner reached the maximum term of his definite sentence, that sentence still serves as a bar to the petitioner's parole eligibility on the indeterminate sentence.[13]

By contrast, Sparaco testified, inter alia, that the petitioner is parole eligible because, when his fifty-five year sentence reached its maximum, on May 28, 2014, the petitioner was left to serve only his indeterminate sentence, which was imposed for a parole eligible offense pursuant to § 54-125. Sparaco's testimony in this regard was contrary to what the respondent had indicated Sparaco's opinion would be in his expert witness disclo-

[9] Presentence investigation reports are prepared by the Office of Adult Probation.

[10] General Statutes § 53a-37 provides in relevant part: "When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms in such manner as the court directs at the time of sentence. The court shall state whether the respective maxima and minima shall run concurrently or consecutively with respect to each other, and shall state in conclusion the effective sentence imposed. . . ."

[11] General Statutes § 53a-38 (b) provides in relevant part: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under *more than one definite sentence*, the sentences shall be calculated as follows . . . If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run . . . ." (Emphasis added.)

[12] At the time that the petitioner committed the offenses at issue, and at the time he was sentenced, § 54-125a had not yet been enacted. It was enacted in 1990.

[13] Deveau also testified that she did not take General Statutes § 53a-35c into account when calculating the petitioner's parole eligibility. Section 53a-35c provides: "The sentence of life imprisonment without the possibility of release shall not be available as a sentence for an offense committed prior to October 1, 1985."

sure. Sparaco explained, in his testimony, that "[p]arole eligibility is the gateway to a hearing," it is statutorily determined, and the board does not exercise discretion in determining eligibility. Sparaco further testified that (1) he became aware of the petitioner's case in 2015 because of the present habeas litigation, (2) the board did not receive notice of the petitioner's eligibility from the department "as we do with many other cases," (3) the board has determined that the petitioner is parole eligible, and (4) the board has not reached a conclusion as to whether the petitioner should be afforded a parole hearing.[14]

Following the habeas trial, the court issued a memorandum of decision and dismissed the petition. The court concluded that the petitioner's claims were not justiciable for two reasons: (1) the petitioner has failed to state a claim involving the deprivation of a recognized liberty interest and, thus, has failed to state a claim over which the habeas court has jurisdiction; and (2) the issue of obtaining a parole eligibility determination has become moot because there is no longer a viable dispute in light of Sparaco's testimony that the board has found the petitioner to be eligible for parole but has declined to grant him a hearing. The petitioner then filed a timely motion for reconsideration, which the court denied. Subsequently, the petitioner filed a peti-

[14] The following colloquy ensued:

"[The Petitioner's Counsel]: Has [the petitioner] been accorded a parole hearing or a parole review by your office?

"[Sparaco]: He has not been reviewed by my office for a, even given hearing.

* * *

"[The Petitioner's Counsel]: Okay. And do, have you evaluated whether the court has adequate information to accord [the petitioner] a hearing?

"[Sparaco]: Yes.

"[The Petitioner's Counsel]: And what is your conclusion at this point?

"[Sparaco]: We have not made the conclusion because we have—the answer to that question has not completely been provided to me. It's if we have enough information or we don't have enough information to proceed with a hearing."

tion for certification to appeal, which the court granted on May 28, 2019.

On December 11, 2019, the petitioner filed a motion for articulation, seeking further explanation as to why the habeas court did not address whether it had jurisdiction to decide the petitioner's ex post facto claim, as distinct from his due process claim, and to clarify certain findings with respect to its conclusion that the petition was moot. The court denied the motion for articulation, and the petitioner sought review from this court pursuant to Practice Book § 66-5.[15] This court granted the motion for review but denied the relief requested therein. This appeal followed. On appeal, the respondent concedes that the petitioner is parole eligible. Additional facts will be set forth as needed.

I

As an initial matter, before addressing the petitioner's claims, we first discuss whether, in light of the respondent's concession before this court that the petitioner is parole eligible, this appeal is moot. We conclude that it is not.

The following legal principles guide our review. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Citation omitted; internal quotation

[15] Practice Book § 66-5 provides in relevant part: "The sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion [for articulation] . . . shall be by motion for review under Section 66-7. . . ."

marks omitted.) *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 685–86, 168 A.3d 530 (2017). "[I]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016).

"Under our well established jurisprudence, [m]ootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . In other words, the ultimate question is whether the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 178 Conn. App. 191, 194, 174 A.3d 860 (2017). "[W]hen, 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.) *Gainey* v. *Commissioner of Correction*, 181 Conn. App. 377, 383, 186 A.3d 784 (2018).

In his habeas petition, the petitioner specified that the form of relief he was requesting was (1) a declaration by the court that he is eligible for parole, (2) an order

that the respondent classify him as eligible for parole, and (3) that the board and the department classify him as eligible for parole and accord him consideration in accordance with the criteria set forth in § 54-125. Only the last of these forms of relief has arguably been satisfied by the respondent's concession.[16] As such, this court can order practical relief by remanding the case with direction to render judgment that the petitioner is parole eligible. This is the principal form of relief that the petitioner has sought. Moreover, the respondent indicated to the habeas court that it too is "seeking [the

[16] It remains unclear whether the board has reviewed the petitioner for parole and determined, in its discretion, whether it will afford him a parole hearing. We note that this point relates to the petitioner's suitability for parole, as opposed to his eligibility for parole. See *Baker* v. *Commissioner of Correction*, 91 Conn. App. 855, 859 n.6, 882 A.2d 1238 (2005) ("Eligibility for parole and suitability for parole release are two distinct concepts . . . . [P]arole eligibility means that the prisoner may be considered by the board for release, whereas suitability is the determination by the board that the prisoner is actually entitled to release under the relevant guidelines."), rev'd in part on other grounds, 281 Conn. 241, 914 A.2d 1034 (2007). The petitioner maintains that no suitability determination has been made.

In its memorandum of decision, the habeas court stated in relevant part: "Sparaco . . . testified that the board *conducted a review* of the petitioner's file after it became aware of the habeas action, that the board has found the petitioner to be eligible for parole, but the board *has declined to grant him with a hearing*." (Emphasis altered; footnote omitted.) On our review of the transcript, however, it seems that Sparaco testified that the board has not reviewed the petitioner for parole, nor has it reached a conclusion as to whether or not the petitioner will be granted a parole hearing. See footnote 14 of this opinion.

Our reading of Sparaco's testimony is further supported by counsel for the respondent's later statement on the record at trial that, based on a conversation he had with Sparaco, it was his belief that, if the petitioner made certain statements on the record, "*I think* [*Sparaco*] *would at least put him in the pipeline for a hearing*. And now the hearing may result in a board saying we don't have enough information to make a decision so we're gonna have to deny the, deny the case or continue the case." (Emphasis added.)

Furthermore, at oral argument to this court, the respondent's counsel represented that Sparaco's testimony is the only evidence in this case that the board has reviewed the petitioner's case and determined that he is not suitable for parole.

court's] guidance in whether or not this is a parole eligible sentence . . . . [I]t's not entirely clear that this is a parole eligible sentence."

In our view, the petitioner would benefit from a judicial determination of eligibility because it is an enforceable judgment that would ensure that the petitioner would not need to seek such a declaration by a court in the future if the respondent or the department were again to change their position regarding whether the petitioner is parole eligible. In the absence of such a judicial determination, in light of the long-standing confusion on the issue of the petitioner's parole eligibility by the board and the department,[17] we are not convinced that the respondent's concession is sufficient to ensure that the petitioner is deemed parole eligible for all relevant future purposes. As of the date of oral argument

[17] The facts of this case exemplify the importance of both the department and the board having the same view on whether an inmate is parole eligible. With respect to which of these two entities has the ultimate authority to determine whether an inmate is parole eligible, we note that General Statutes § 54-124a (f) provides that the board has independent decision-making authority to grant or to deny parole in accordance with a number of statutes, including § 54-125, which is the statute that governs parole of an inmate serving an indeterminate sentence as the petitioner is in this case. Deveau testified, however, that the department is the entity that initially determines the parole eligibility date *for the board*.

The notion that, in practice, the board only begins to consider an inmate's parole eligibility after it receives notice from the department is consistent with Sparaco's testimony. Specifically, he testified that the board had not received any directives or information from the department regarding the petitioner, such as his name on a list of individuals who are eligible for parole "as it does with many other cases." Sparaco only became aware of the issue regarding the petitioner's parole eligibility after the petitioner initiated this habeas action, which was six or more months after the petitioner completed serving his sentence with the definite term and, in Sparaco's view, the petitioner became parole eligible. Therefore, irrespective of the fact that the board has ultimate decision-making authority on the issue of parole eligibility, the facts of this case make clear that, in effect, the department's determination that an inmate is not eligible for parole can prevent the inmate from being deemed parole eligible by the board for a significant period of time, nearly five years in the present case.

to this court, the petitioner had not received any formal indication or writing from either the board or the department that he is parole eligible.[18]

Moreover, as Sparaco aptly explained in his testimony, "Parole eligibility is the gateway to a hearing." Even assuming arguendo that the board has declined to grant the petitioner a parole hearing, which is indisputably in its discretion to do, the petitioner could later be granted a follow-up review and be found suitable for parole.[19] See *Baker* v. *Commissioner of Correction*, 91 Conn. App. 855, 859 n.6, 882 A.2d 1238 (2005) ("Eligibility for parole and suitability for parole release are two distinct concepts . . . . [P]arole eligibility means that the prisoner may be considered by the board for release, whereas suitability is the determination by the board that the prisoner is actually entitled to release under the relevant guidelines."), rev'd in part on other grounds, 281 Conn. 241, 914 A.2d 1034 (2007). As such, the petitioner's classification as a parole eligible inmate is a tangible benefit on which his release from prison is contingent and, at this point, the petitioner still has not received the one thing he consistently has requested: an enforceable judgment stating that he is parole eligible.

We further note that the notion that no actual controversy between the parties exists regarding the issue of the petitioner's eligibility is somewhat belied by this

[18] The facts underlying this habeas corpus appeal bring to mind the bureaucratic squabbling so brilliantly depicted in the 1985 dystopian film "Brazil."

[19] In this vein, while Sparaco was testifying, the following colloquy ensued between him and the petitioner's counsel:

"Q. So an initial parole eligibility date is different, really, from follow-up parole reviews. Correct?

"A. Could you repeat that one more time? Sorry.

"Q. The initial parole eligibility date for a sentenced inmate is different in kind from follow-up reviews that might be granted after a person's been denied following a hearing?

"A. Yes."

appeal. That is to say, if there truly is no dispute between the parties on the issue of the petitioner's parole eligibility, the parties could have so stipulated at any time, or the respondent could have confessed to a judgment in the petitioner's favor in the habeas court. For these reasons, we conclude that this appeal is not rendered moot by the respondent's concession that the petitioner is parole eligible, and we have jurisdiction to reach its merits.

II

One of the petitioner's claims on appeal is that the habeas court improperly concluded that the petition was rendered moot by Sparaco's testimony that the board has found the petitioner to be eligible for parole but has declined to grant him a hearing. With respect to this claim, we rely on the jurisdictional principles and the standard of review set forth in part I of this opinion. For many of the same reasons we concluded in part I of this opinion that this appeal is not moot, we agree with the petitioner that the habeas court improperly dismissed the underlying petition as moot.

As previously mentioned, in the petitioner's habeas petition, he specified that the form of relief he was requesting was (1) a declaration by the court that he is eligible for parole, (2) an order that the respondent classify him as eligible for parole, and (3) that the board and the department classify him as eligible for parole and accord him consideration in accordance with the criteria set forth in § 54-125. None of these forms of relief was provided by virtue of Sparaco's testimony that *the board* has determined that the petitioner is parole eligible.

At the habeas trial, there was no indication that the department deems the petitioner to be parole eligible. Three times the petitioner submitted an inmate request form to the department, specifically to IPO Vadnais,

seeking a parole eligibility date, and three times he was told that he was not eligible for parole. The only representative from the department to testify, Deveau, stated unequivocally that, based on her office's calculations, the petitioner would never be eligible for parole. Moreover, Sparaco clearly testified that the board had not received anything from the department regarding the petitioner, such as his name on a list of individuals who are eligible for parole, "as it does with many other cases." Sparaco only became aware of the issue regarding the petitioner's parole eligibility after the petitioner initiated this habeas action, which was six or more months after the petitioner's definite term reached its maximum and, in Sparaco's view, the petitioner became parole eligible. This conflicting testimony,[20] in conjunction with the lack of any evidence to suggest that the department deems the petitioner parole eligible, indicates that there was still an ongoing controversy after Sparaco's testimony. Likewise, the respondent's closing argument to the habeas court further indicates that Sparaco's testimony did not resolve the issue of whether the petitioner is parole eligible. Specifically, the respondent stated in his closing argument, "[T]he board is seeking [the court's] guidance in whether or not this is a parole eligible sentence . . . . [I]t's not entirely clear that this is a parole eligible sentence." Accordingly, we conclude that the court improperly concluded that the case was moot.

III

Finally, we address the petitioner's claim on appeal that the habeas court improperly concluded that it lacked subject matter jurisdiction on the basis that the petitioner failed to state a claim involving the deprivation of a recognized liberty interest. The petitioner

[20] The court specifically characterized the testimony of Sparaco and Deveau as conflicting.

argues that the court's conclusion in this regard does not account for his ex post facto claim, which is distinct from his due process claim, over which the court has jurisdiction irrespective of whether the petitioner has alleged an impairment of a vested right. Specifically, the petitioner maintains that the respondent has interpreted and applied § 54-125a, which was not enacted until 1990, to his sentence in a way that violates the ex post facto clause. We conclude that the petitioner has alleged a cognizable ex post facto claim that is sufficient to invoke the jurisdiction of the habeas court.

We begin by setting forth certain governing principles of law as well as our standard of review. "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020). "[When] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008). "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016).

"The ex post facto clause of the United States constitution prohibits retroactive application of a law that inflicts a greater punishment, than the law annexed to the crime, when committed. . . . In other words, the clause forbids the application of any new punitive measure to a crime already consummated, to the detriment

or material disadvantage of the wrongdoer." (Citation omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 470, 196 A.3d 789 (2018). "To establish a cognizable claim under the ex post facto clause, therefore, a habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 818, 786 A.2d 1091 (2002).

"In addition it is firmly established that statutes governing parole eligibility are part of the law annexed to the crime for ex post facto clause purposes. . . . As the United States Supreme Court explained in [*Warden* v. *Marrero*, 417 U.S. 653, 658, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974)], [a]lthough . . . the precise time at which the offender becomes eligible for parole is not part of the sentence . . . it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can properly be viewed as being determined—and deliberately so—by the sentence of the [court]." (Citations omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, supra, 330 Conn. 472.

"Furthermore, [t]he United States Supreme Court has recognized that a law *need not impair a vested right to violate the ex post facto prohibition*. Evaluating whether a right has vested is important for claims under the [c]ontracts or [d]ue [p]rocess [c]lauses, which solely protect [preexisting] entitlements. . . . The presence or absence of an affirmative, enforceable right is not

relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the [e]x [p]ost [f]acto [c]lause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." (Emphasis added; internal quotation marks omitted.) Id., 471. "Thus, to determine whether a habeas court has subject matter jurisdiction over a petitioner's ex post facto claim, [t]he controlling inquiry . . . [is] whether retroactive application of the change in [the] law create[s] a sufficient risk of increasing the measure of punishment attached to the covered crimes. . . . [A] habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 421, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

In the present case, the law in effect when the petitioner committed the two felony murders at issue was such that the sentence for any felony murder committed prior to July 1, 1981, was to be indeterminate, whereas, the sentence for any felony murder committed on or after July 1, 1981, was to be definite. See General Statutes (Rev. to 1981) §§ 53a-35 and 53a-35a. Moreover, pursuant to § 54-125, a person serving an indeterminate sentence becomes eligible for parole after having served the minimum term. See footnote 7 of this opinion. The petitioner was sentenced in accordance with these statutes; namely, he received an indeterminate sentence of twenty-five years to life for a felony murder committed prior to July 1, 1981, and a definite sentence of fifty-five years for a second felony murder committed after

July 1, 1981, to be served concurrently. Moreover, as reflected in the presentence investigation report, the petitioner was deemed to be eligible for parole in the future.

Despite the petitioner's having fully served the definite sentence and having served the minimum term of the indeterminate sentence, the department has informed him on numerous occasions that he is not eligible for parole on the indeterminate sentence that he is currently serving. The department's position, as explained by Deveau at the habeas trial, is that the petitioner is not parole eligible because (1) pursuant to §§ 53a-37 and 53a-38 (b), the term of the two sentences has merged and will not be deemed satisfied until the longest term, in this case the life sentence, has run, and (2) pursuant to § 54-125a (b) (1), which only became effective on October 1, 1990, a person who received a definite sentence after having been convicted of a felony murder committed on or after July 1, 1981, is categorically ineligible for parole, even for a separate, parole eligible offense. The petitioner maintains that the department's interpretation and application of these statutes is inaccurate[21] and effectively transforms the petitioner's sentence into one of life imprisonment without the possibility of parole, which is a more severe punishment than that assigned by law when the petitioner committed the felony murders at issue and, thus, it violates the ex post facto clause.[22]

[21] With regard to § 53a-38 (b), the petitioner correctly points out that, by its plain language, it only applies where a person is "under *more than one definite sentence* . . . ." (Emphasis in original.) With regard to § 54-125a (b), the petitioner maintains that it does not apply to offenses committed prior to July 1, 1981. Moreover, the petitioner argues that there is no indication that the legislature intended to retroactively alter parole eligibility for an indeterminate sentence.

[22] The petitioner also argues that the department's position regarding the petitioner's eligibility violates § 53a-35c, which provides that the sentence of life imprisonment without the possibility of release is not available as a sentence for an offense committed prior to October 1, 1985. See footnote 13 of this opinion.

Our Supreme Court has clearly expressed that due process claims are distinct from ex post facto claims in that "a law need not impair a vested right to violate the ex post facto prohibition." (Internal quotation marks omitted.) *Breton* v. *Commissioner*, supra, 330 Conn. 471; see *Johnson* v. *Commissioner of Correction*, supra, 258 Conn. 817–19; see also *Baker* v. *Commissioner of Correction*, supra, 91 Conn. App. 862–63. Accordingly, in the present case, it was improper as a matter of law for the habeas court to conclude that the petitioner "has failed to state a claim involving the deprivation of a recognized liberty interest, so he has failed to state a claim over which the habeas court has jurisdiction." (Internal quotation marks omitted.) Such a conclusion fails to account for the petitioner's ex post facto claim, which the habeas court made note of in the procedural history portion of its decision but did not address further.[23]

In addition, we conclude that the petitioner has established a cognizable claim under the ex post facto clause because he has made a colorable showing that the department's interpretation and application of §§ 53a-38 (b) and 54-125a (b) (1) creates a genuine risk that he will be incarcerated longer than he would have been under the law that existed at the time he committed the offenses at issue. That is, at the time the petitioner

[23] Specifically, the court stated: "The petitioner asserts that the respondent's categorical refusal to classify him as parole eligible based on the now expired felony murder conviction violates his rights to due process because it has effectively converted the sentence he is now serving, which is parole eligible under . . . § 54-125, into one that is not. He also claims that it violates the prohibition against *ex post facto* laws, because parole eligibility was a component of the sentence imposed by the trial court." (Emphasis in original.) The fact that the court did not set forth its rationale for concluding that it lacked jurisdiction to consider the ex post facto claim in its memorandum of decision or by way of articulation does not hamper our ability to resolve the present claim because the claim rests on undisputed procedural facts and, as we have stated previously in this opinion, the jurisdictional issue presents a question of law over which our review is plenary.

committed the first felony murder, the sentence for that offense was indeterminate and parole eligible. Subsequent to the commission of both felony murders and the petitioner's sentencing for those crimes, § 54-125a was enacted and has served as the basis for the department's view that the petitioner's second felony murder conviction renders him ineligible for parole on his first felony murder conviction. Thus, the department's interpretation and application of § 54-125a creates a genuine risk that the petitioner will be incarcerated for the rest of his life without the possibility of parole, for what was originally a parole eligible sentence. Accordingly, the habeas court had jurisdiction to consider the petitioner's ex post facto claim, and it was error for the court to conclude otherwise.

In light of the respondent's concession on appeal, and the fact that there are no other material facts in dispute, it is not necessary to remand this matter for a trial in the habeas court. Moreover, because we can grant practical relief by directing the habeas court to render a judgment declaring the petitioner to be parole eligible, we need not determine whether the respondent's prior interpretation and application of § 54-125a to the petitioner's sentence violates the ex post facto clause.

The petitioner had to wait almost five years after becoming parole eligible for a trial on the issue of whether he is, in fact, parole eligible. By reversing and remanding this case with direction to render judgment that the petitioner is parole eligible, we will ensure that he does not have to seek this same declaration from a court again in the future and that both the respondent and the board will treat him as such.

The judgment is reversed and the case is remanded to the habeas court with direction to render judgment stating that the petitioner is parole eligible.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHRISTOPHER J. DIONNE (AC 43775)

Prescott, Moll and Lavery, Js.

Syllabus

Convicted, after a jury trial, of the crimes of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court committed plain error by permitting the victim's mother to testify as a constancy of accusation witness regarding statements the victim made to her disclosing the assault perpetrated by the defendant: the defendant's counsel raised the issue of the victim's delayed disclosure of the assault at trial during his cross-examination of the victim, thus, the court's admission of the mother's constancy of accusation testimony was consistent with the procedures established by our Supreme Court in *State* v. *Daniel W. E.* (322 Conn. 593) and contained in the applicable provision (§ 6-11) of the Connecticut Code of Evidence; moreover, the defendant's claim that the victim's disclosure of the assault within twenty-four hours should have precluded the use of constancy of accusation testimony was an issue of first impression and, thus, the defendant failed to establish the existence of an error so obvious it affected the fairness and integrity of and public confidence in the judicial proceedings.
2. The defendant could not prevail on his unpreserved claim that the trial court committed plain error by admitting into evidence a videotape of the victim's forensic interview under the constancy of accusation doctrine or pursuant to the medical diagnosis or treatment exception to the rule against hearsay evidence; nothing in the record indicates that the videotape was admitted pursuant to the constancy of accusation doctrine, and, as the defendant did not object to the admissibility of the videotape on any grounds or question the victim regarding her understanding of the purpose of the interview during trial, the record was inadequate to determine whether the victim understood that what she said during the interview was for the purpose of receiving medical diagnosis or treatment.

Argued May 10—officially released August 31, 2021

Procedural History

Substitute information charging the defendant with one count each of the crimes of sexual assault in the

fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New London, geographical area number ten, and tried to the jury before *Jongbloed*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (defendant).

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Theresa Ferryman*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Christopher J. Dionne, appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A) and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that the trial court improperly (1) permitted the victim's mother[1] to testify as a constancy of accusation witness regarding statements made by the victim to her that disclosed the sexual abuse perpetrated by the defendant, and (2) admitted a videotape of the victim's forensic interview under the constancy of accusation doctrine or pursuant to the medical diagnosis or treatment exception to the rule against hearsay evidence. The defendant concedes that both of these claims are unpreserved and are not of constitutional magnitude. Accordingly, he seeks to prevail under the plain error doctrine. We conclude that the defendant has failed to meet his high burden of demonstrating plain error and, accordingly, affirm the judgment of conviction.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

The jury reasonably could have found the following facts. The victim was ten years old at the time the defendant sexually assaulted her. She was best friends with the defendant's daughter. The defendant and his family lived on the same street as the victim.

On November 25, 2017, the victim slept over at the defendant's house. At 1:30 a.m., the defendant returned home and entered the living room where the victim was sleeping. After awaking the victim by his presence, he proceeded to touch and rub the victim's buttocks and her breasts. He also asked the victim to kiss his penis to which she responded, "No." He warned the victim not to tell anyone about what he had done to her.

On November 26, 2017, the victim disclosed to her mother that the defendant had touched her buttocks and breasts. She also repeated the disclosure to a family therapist, during which time she became physically ill.

On the following day, the victim's mother reported the victim's disclosure to the Department of Children and Families (DCF), spoke to a resident state trooper, Kazimera Morse, and turned over to Morse clothing that the victim had been wearing during her sleepover at the defendant's house. Morse informed the victim's mother that DCF would contact her regarding what to do next with the "medical process." DCF contacted the victim's mother later that day to schedule a forensic interview of the victim.

A forensic interview of the victim was conducted on November 29, 2017, at Yale New Haven Hospital by a licensed clinical social worker. During the interview, the victim disclosed in greater detail the sexual assault committed by the defendant. Immediately following the interview, a physician performed a physical examination of the victim, the results of which were normal.

The defendant later admitted to the police that he had physical contact with the victim during the

sleepover but represented that the contact had not been sexual in nature. Subsequent DNA analysis of swabs taken from the victim's pajama shorts further inculpated, albeit not conclusively, the defendant. As a result, the defendant was arrested in January, 2018.

At the defendant's jury trial, the victim was the first witness to testify. She described the sexual abuse perpetrated on her by the defendant, explained why she did not disclose the abuse immediately the following morning, and stated that she first disclosed the abuse to her mother late the following day after taking a bath. During his cross-examination of the victim, defense counsel asked a series of questions that suggested that she had had various opportunities throughout the day to tell her mother what had happened but failed to do so.

The state subsequently offered, and the court admitted without objection, testimony by the victim's mother regarding the disclosure made to her by the victim about the abuse the previous night. This testimony was elicited in compliance within the strictures regarding constancy of accusation testimony set forth in § 6-11 (c) of the Connecticut Code of Evidence.[2] The court also gave a limiting instruction to the jury regarding the proper use of constancy of accusation testimony.

The court also admitted without objection a videotape of the forensic interview of the victim. During the interview, the victim provided additional information regarding the sexual abuse perpetrated on her by the

[2] Section 6-11 (c) of the Connecticut Code of Evidence provides in relevant part: "[Constancy of accusation] witnesses may testify that the allegation was made and when it was made, provided that the complainant has testified to the facts of the alleged assault and to the identity of the person or persons to whom the alleged assault was reported. Any testimony by the witnesses about details of the alleged assault shall be limited to those details necessary to associate the complainant's allegations with the pending charge. The testimony of the witnesses is admissible only with regard to whether the complaint was made and not to corroborate the substance of the complaint."

defendant. This evidence was admitted for substantive purposes. The defendant was expressly asked by the court on two separate occasions whether he had any objection to the admission of the videotape, and his counsel stated that he did not.

The jury subsequently found the defendant guilty of both charges. The court imposed a total effective sentence of seven years of incarceration, suspended after three years, followed by ten years of probation and a $7500 fine. This appeal followed.

I

The defendant first claims that the court committed plain error by admitting, without objection, the testimony of the victim's mother, pursuant to the constancy of accusation doctrine, that the victim had disclosed to her, on the day following the sleepover, that the defendant had sexually assaulted her. Specifically, the defendant asserts that the admission of the mother's testimony under the constancy of accusation doctrine was plain error because that doctrine should not apply in cases in which the victim's delay in disclosing the sexual abuse is less than twenty-four hours. We conclude that the defendant has failed to demonstrate that the trial court committed plain error.

"It is well established that the plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . 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. . . . In addition, the plain

error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernable] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable.

. . . [A] complete record and an obvious error are prerequisites for plain error review . . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Moon*, 192 Conn. App. 68, 97–99, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

We next briefly summarize the constancy of accusation doctrine. "The constancy of accusation doctrine traces its roots to the fresh complaint rule . . . [t]he narrow purpose of [which] . . . was to negate any inference that because the victim had failed to tell anyone that she had been [sexually assaulted], her later assertion of [sexual assault] could not be believed. . . . [B]ecause juries were allowed—sometimes even instructed—to draw negative inferences from the woman's failure to complain after an assault . . . the doctrine of fresh complaint evolved as a means of counterbalancing these negative inferences. Used in this way, the fresh complaint doctrine allowed the prosecutor to introduce, during the case-in-chief, evidence that the victim had complained soon after the [sexual assault]. Its use thereby forestalled the inference that the victim's

silence was inconsistent with her present formal complaint of [assault]. . . . In other words, evidence admitted under this doctrine effectively served as anticipatory rebuttal, in that the doctrine often permitted the prosecutor to bolster the credibility of the victim before her credibility had first been attacked. . . . The fresh complaint doctrine thus constituted a rare exception to the common-law rule that prohibited rehabilitative evidence in the absence of an attack on the [witness'] credibility. . . .

"Presently, the constancy of accusation doctrine, as modified by our Supreme Court in [*State* v. *Daniel W. E.*, 322 Conn. 593, 618–19, 142 A.3d 265 (2016)], permits the victim in a sexual assault case . . . to testify on direct examination regarding the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. . . . Thereafter, if defense counsel challenges the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting, the state will be permitted to call constancy of accusation witnesses subject to [certain] limitations . . . . If defense counsel does not challenge the victim's credibility in any fashion on these points, the trial court shall not permit the state to introduce constancy testimony but, rather, shall instruct the jury that there are many reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent the victim delayed in reporting the offense, the delay should not be considered by the jury in evaluating the victim's credibility. . . . A constancy of accusation witness is limited to testifying only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the

identity of the alleged perpetrator." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Prince A.*, 196 Conn. App. 413, 417–19, 229 A.3d 1213, cert. denied, 335 Conn. 949, 238 A.3d 20 (2020).

The defendant's claim of plain error regarding the admission of the testimony of the victim's mother warrants only a brief discussion. First, the defendant conceded at oral argument before this court that his trial counsel raised the issue of delayed disclosure when he cross-examined the victim about her opportunities to speak to her mother throughout the day following the sexual assault. Thus, the court's admission of the constancy of accusation testimony by the victim's mother was entirely consistent with the procedures established by our Supreme Court in *State* v. *Daniel W. E.*, supra, 322 Conn. 593, and that are contained in § 6-11 (c) of the Connecticut Code of Evidence. If this case plainly did not involve a question of delayed disclosure, as the defendant now argues, then it would have been entirely unnecessary for his counsel to attack the victim's credibility on cross-examination by suggesting that she had prior opportunities to disclose the sexual assault but had not done so. Indeed, his trial counsel stated at the charge conference that "while this may not be your traditional late disclosure case, there is an element of it," and he agreed that the court should provide a constancy of accusation instruction to the jury.

Second, the defendant's claim on appeal that constancy of accusation testimony should not have been permitted in a case like the present one, in which the victim disclosed the assault within twenty-four hours of its occurrence, is not readily answered by our existing jurisprudence. The defendant has failed to cite to any cases holding that the constancy of accusation doctrine is inapplicable in cases in which the delay in disclosing the sexual assault is less than twenty-four hours. In fact, the defendant conceded at oral argument before

this court that there was no guidance in our case law regarding how much time must pass before a victim's disclosure of sexual abuse is deemed to be a delayed disclosure. Simply put, the defendant on appeal characterized this issue as being one of first impression. See *State* v. *Fagan*, 280 Conn. 69, 88, 905 A.2d 1101 (2006) (defendant could not prevail under plain error doctrine with respect to issue of first impression), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Under these circumstances, the defendant has fallen far short of establishing that "the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings."[3] (Internal quotation marks omitted.) *State* v. *Moon*, supra, 192 Conn. App. 98. Accordingly, we reject the claim.

II

We next address the defendant's claim that the court committed plain error by admitting the videotape of the victim's forensic interview. Specifically, the defendant asserts that the videotape was plainly inadmissible under (1) the constancy of accusation doctrine, or (2) the well established exception to the hearsay rule for statements made for purposes of obtaining medical diagnosis or treatment because there was no medical purpose for the forensic interview. We are not persuaded on this record that the court committed plain error in admitting the videotape of the forensic interview.

Because we previously set forth the standard governing claims of plain error, we need not repeat it here. The defendant's first contention that the trial court committed plain error by admitting the videotape of the forensic interview under the constancy of accusation

[3] We express no opinion as to how this claim may have been resolved had it been properly preserved. See *State* v. *Fagan*, supra, 280 Conn. 89 n.14.

doctrine is meritless because its underlying premise finds no support in the record. Nothing in the record suggests that the videotape was admitted under that doctrine. At the time the court admitted the videotape, it did not instruct the jury that it may not consider the victim's statements on the videotape as substantive evidence as would have been required if it were constancy of accusation evidence. It also did not mention this evidence when it did provide a constancy of accusation instruction to the jury regarding the use of the testimony of the victim's mother about the victim's disclosure to her of the sexual assault. Finally, the contents of the victim's statements were not limited to the permitted subjects set forth in § 6-11 (c) of the Connecticut Code of Evidence. See footnote 1 of this opinion.

Accordingly, we turn to the defendant's second contention that the trial court committed plain error by admitting the videotape under the medical treatment and diagnosis exception to the hearsay rule. With respect to the admissibility of forensic interviews in sexual assault cases, our Supreme Court recently concluded that statements obtained during such interviews are admissible for substantive purposes if the statements meet the foundational requirements of the exception to the hearsay rule for statements made for purposes of obtaining medical diagnosis or treatment. See *State* v. *Manuel T.*, 337 Conn. 429, 446, A.3d (2020); see also Conn. Code Evid. § 8-3 (5); *State* v. *Griswold*, 160 Conn. App. 528, 551–52, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

We recently described the standards of admissibility of such interviews under the medical diagnosis and treatment exception as follows: "A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general

character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment. Admissibility of such statements turns on whether the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends. . . . The rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his [or her] health . . . will restrain him [or her] from giving inaccurate statements to a physician employed to advise or treat him [or her]. . . .

"[S]tatements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the primary purpose of the inquiry that prompted them, or the principal motivation behind their expression. . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially. . . .

"[T]he statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has a medical purpose. Statements of others, including the interviewers, may be relevant to show the circumstances. . . . In [*State* v. *Manuel T.*, 186 Conn. App. 51, 62, 198 A.3d 648 (2018), rev'd on other grounds, 337 Conn. 429, A.3d (2020)], this court explained that the focus of the medical treatment exception is the declarant's understanding of the purpose of the interview . . . . Accordingly, the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to

the declarant. . . . This focus accords with the rationale for the medical diagnosis and treatment exception that patients are motivated to speak truthfully to their medical care providers when their own well-being is at stake.

"Under our case law, the state need only show that the forensic interview had a medical purpose that the declarant reasonably understood. . . . This court on numerous occasions has upheld the admission of forensic interviews where the purpose of the interview was primarily investigative." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Freddy T.*, 200 Conn. App. 577, 590–93, 241 A.3d 173 (2020).

"Finally, the focus on the understanding of the declarant that there is a medical purpose for the interview remains even when the declarant is a young child. The law in Connecticut is that, although statements made by young children are admissible under the medical diagnosis and treatment exception to the hearsay rule, the principle holds true that '[s]tatements made [in sexual assault cases] . . . reciting history, causation, and the identity of the person causing the injury should be scrutinized to ensure that they are generated for the proper purpose, namely treatment and not litigation.' E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.17.4 (b), p. 569 . . . . Consequently, our case law recognizes that the age of a child sometimes necessitates allowing an inference, rather than direct evidence, to conclude that the declarant understood the purpose of the interview to be medical." (Citations omitted.) *State* v. *Freddy T.*, supra, 200 Conn. App. 596–97.

In the present case, because the defendant did not raise an objection to the admissibility of the forensic interview, the record is mostly barren regarding evi-

dence relating to the victim's subjective understanding of the purpose of the interview, including whether it was for medical diagnosis or treatment. In fact, the defendant did not ask the victim any questions on cross-examination regarding her understanding of the purpose or purposes of the interview. Moreover, because the defendant did not object to the admissibility of the videotape on any grounds, the state was never put on notice that it needed to develop further the record regarding the victim's subjective understanding of whether there was a medical purpose to the interview. At best, the record shows, as the defendant concedes, that the victim was told at the beginning of the interview by the social worker that "I am here to make sure that you're safe and that your body is healthy. . . . Some of the people I work with are doctors and nurses and they give the kids I talk to check-ups . . . . Everything that I talk to kids about, the doctors and nurses can hear . . . ."

Under these circumstances, the defendant's claim of plain error founders on the requirement that "the error is indeed plain in the sense that it is patent [or] readily [discernable] on the face of a factually adequate record . . . . [A] complete record and an obvious error are prerequisites for plain error review . . . ." (Internal quotation marks omitted.) *State* v. *Moon*, supra, 192 Conn. App. 98. Because the record is inadequate to determine whether the victim understood that what she said during the interview was for the purpose of receiving medical diagnosis or treatment, the defendant's claim of plain error fails.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

[4] Indeed, in his brief on appeal, the defendant recognizes the weakness of his claim by stating: "[The defendant's] claim on this issue is easily defeated if this court concludes that the forensic interview was not constancy evidence at all, but was, in fact, introduced under the exception to the hearsay rule permitting statements to medical providers."

ROBERT BELEVICH *v.* RENAISSANCE I, LLC
(AC 43085)

Moll, Alexander and DiPentima, Js.

Syllabus

The plaintiffs, B and Y Co., sought to recover damages from the defendants, certain companies possessing, controlling, managing and maintaining certain premises, for personal injuries B sustained in connection with an alleged slip and fall as a result of untreated ice on the premises. The trial court granted the defendants' motion for summary judgment on the basis of the ongoing storm doctrine, and the plaintiffs appealed to this court. *Held* that the trial court properly granted the defendants' motion for summary judgment because the defendants met their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm at the time of B's fall, and the plaintiffs thereafter failed to sustain their burden: as the movants for summary judgment, the defendants met their initial burden by submitting admissible evidence showing it was undisputed that there was an ongoing storm at the time of B's alleged fall, and the burden subsequently shifted to the plaintiffs to demonstrate the existence of a genuine issue of fact as to whether B's fall was caused by a slippery condition that existed prior to the ongoing storm and whether the defendants had actual or constructive notice of the allegedly preexisting condition, and the plaintiffs failed to do so, as their evidentiary submission contained no evidence to suggest that the allegedly icy condition at the location where B fell had existed prior to the ongoing storm or that the defendants had actual or constructive notice of any preexisting icy conditions; moreover, this court expressly adopted the burden-shifting approach used by the state of New York in addressing this issue of first impression to determine precisely what a movant for summary judgment must demonstrate to satisfy its initial burden when relying on the ongoing storm doctrine and any burden shifting that may follow.

Argued October 7, 2020—officially released August 31, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle*, *J.*, granted a motion to intervene as a party plaintiff filed by Yale University; thereafter, the court granted the named plaintiff's motions to cite in B & W

Paving & Landscaping, LLC, and Winstanley Property Management, LLC, as party defendants; thereafter, the court, *Abrams*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Russell J. Bonin, with whom was *Phyllis M. Pari*, for the appellants (plaintiffs).

David M. Houf, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Robert Belevich, and the intervening plaintiff, Yale University (Yale) (collectively, plaintiffs), appeal from the summary judgment rendered by the trial court in favor of the defendants, Renaissance I, LLC (Renaissance), B & W Paving & Landscaping, LLC (B & W), and Winstanley Property Management, LLC (Winstanley) (collectively, defendants), on Belevich's one count complaint sounding in premises liability arising out of his alleged slip and fall.[1] On appeal, the plaintiffs claim that the court improperly granted summary judgment in favor of the defendants on the basis of the ongoing storm doctrine because (1) the defendants did not establish the absence of a genuine issue of material fact as to the applicability of the doctrine, and (2) the court improperly, albeit implicitly, shifted the burden to the plaintiffs to negate the applicability of the doctrine, contending that the defendants should have been required to demonstrate that the ongoing storm produced the black ice on which

[1] Although the plaintiffs' joint appeal form indicates that the plaintiffs also appeal from the trial court's June 19, 2019 denial of Belevich's motion to reargue, they have not provided any analysis in their appellate briefs with respect to that ruling. Accordingly, we deem any such claim to be abandoned. See, e.g., *Corrarino* v. *Corrarino*, 121 Conn. App. 22, 23 n.1, 993 A.2d 486 (2010).

Belevich allegedly fell.[2] We affirm the summary judgment of the trial court.

Belevich alleged, inter alia, the following facts in the operative complaint. On January 31, 2017, Belevich was caused to slip and fall as a result of untreated ice on premises possessed, controlled, managed, and maintained by the defendants. Such occurrence was alleged to have resulted from the negligence of the defendants in one or more of seven ways specified in the complaint. As a result of such fall, Belevich suffered various physical injuries and has incurred, and may continue to incur, medical expenses, pain and suffering, loss of enjoyment of life's activities, and a loss of wages and earning capacity.

On November 1, 2017, Belevich commenced the present action against Renaissance. On November 29, 2017, pursuant to General Statutes § 31-293, Yale filed a motion to intervene as a party plaintiff, alleging that, on or about January 31, 2017, Belevich was an employee of Yale, and claiming that any damages recovered by him shall be paid and apportioned such that Yale would be reimbursed for all workers' compensation benefits it paid to or on behalf of Belevich pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq. The court granted Yale's motion to intervene on January 17, 2018. Thereafter, B & W and Winstanley were cited in as party defendants.

On July 11, 2018, Belevich filed his second amended complaint, which became the operative complaint,

[2] The plaintiffs also claim on appeal that—to the extent that the court's rendering of summary judgment was based on the defendants' second argument in support of their motion for summary judgment—namely, that the defendants did not owe a duty to Belevich because they lacked actual or constructive knowledge of the alleged defect—the defendants did not establish the absence of a genuine issue of material fact that they did not have actual or constructive notice of the alleged black ice. Because the trial court did not reach the defendants' second argument, however, we need not address this claim.

sounding in one count of premises liability.[3] In the operative complaint, Belevich alleged that on January 31, 2017, he was caused to slip and fall as a result of untreated ice stemming from the negligence of the defendants. The defendants answered the complaint and asserted a special defense alleging that Belevich's alleged injuries and damages were caused, in whole or in part, by his own negligence.

On October 31, 2018, the defendants filed a motion for summary judgment directed to the operative complaint, accompanied by a supporting memorandum of law and appended exhibits. The defendants argued therein that they were entitled to judgment as a matter of law on the grounds that they owed no duty to Belevich (1) on the basis of the ongoing storm doctrine and (2) because they lacked actual or constructive notice of the alleged defect. As evidentiary support for their motion, the defendants submitted transcript excerpts from the September 20, 2018 deposition of Belevich.

Those excerpts reflected Belevich's testimony to the following facts. On January 31, 2017, Belevich was an HVAC controls mechanic employed by Yale. It was snowing when he arrived at work. Belevich did not know when it started to snow that morning. As far as he knew, from the time he arrived at work until his fall at 2:30 p.m., it continued to snow. He was sure that while he was working, he looked out windows and saw that it was continuing to snow. At 2:30 p.m., while walking toward the garage where he had parked his car, he slipped and fell in a parking lot in front of 344 Winchester Avenue in New Haven. Belevich testified unequivocally that it was snowing at the time of his fall. In addition, there were a couple of inches of snow

[3] On July 13, 2018, in light of Belevich's second amended complaint, Yale filed a request for leave to file an amended intervening complaint and appended the proposed amendment, which was deemed to have been filed by consent, absent objection.

on the ground, and at least one snowplow was in the process of plowing the parking lot. Belevich testified that he walked from the part of the parking lot that was covered in snow to the area that had been cleared; he "walk[ed] a little bit faster . . . picked up speed and . . . fell." He thought he fell on black ice. He had no idea how thick the ice was, and he did not know how long it had been there.

On March 6, 2019, Belevich filed a memorandum of law in opposition to the defendants' motion for summary judgment with appended exhibits, including additional transcript excerpts from his deposition, as well as his March 6, 2019 affidavit.[4] In his affidavit, Belevich stated, among other things, that, on January 31, 2017, during the 11 a.m. hour while he was waiting for a Yale van to transport him from a job assignment, he did not see any snow falling and that he did not remember seeing snow falling during a fifteen minute ride when his lunch break was over at 12:30 p.m. He also stated that, on January 31, 2017, at approximately 2:30 p.m., around the time of his afternoon break, he noticed that it was snowing.

On May 17, 2019, the trial court granted the defendants' motion for summary judgment on the basis of the ongoing storm doctrine.[5] The court reasoned: "While the only evidence before the court regarding the ongoing storm issue is [Belevich's] deposition testimony indicating that it was snowing when he fell, that testimony is uncontroverted and, as a result, sufficient to allow the defendant[s] to meet [their] factual burden on the ongoing storm issue. Clearly, had [Belevich] presented the court with certified climatological data, testimony or any other evidence to the contrary, it would

[4] Yale filed an objection to the defendants' motion for summary judgment, incorporating and adopting Belevich's opposition thereto.

[5] The court set forth its decision in a JDNO notice, which we treat as the court's memorandum of decision.

give rise to a genuine issue of material fact, but no such evidence is before the court. As a result, the defendant[s'] motion for summary judgment is hereby granted."[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the plaintiffs' claims on appeal, we set forth the relevant standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Emphasis

[6] Belevich and Yale filed separate motions to reargue. Belevich's motion to reargue was denied; Yale's motion to reargue was marked off after the plaintiffs filed their appeal.

omitted; internal quotation marks omitted.) *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016).

On appeal, the plaintiffs claim that the court improperly rendered summary judgment in favor of the defendants on the basis of the ongoing storm doctrine because (1) the defendants did not establish the absence of a genuine issue of material fact as to the applicability of the doctrine, and (2) the court improperly shifted the burden to the plaintiffs to negate the applicability of the doctrine because the defendants provided no evidence that an ongoing storm produced the black ice on which Belevich allegedly fell. We disagree and address these interrelated claims together.

This appeal requires us to consider the application of the ongoing storm doctrine in the context of summary judgment and its attendant burden-shifting. In *Kraus* v. *Newton*, 211 Conn. 191, 197–98, 558 A.2d 240 (1989), our Supreme Court adopted the ongoing storm doctrine relating to the duty to protect invitees upon one's property when a snowstorm is in progress at the time of the plaintiff's alleged injury. The court defined the doctrine as follows: "[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps.[7] To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical. Our decision, however, does not

[7] We previously have held that a defendant's status as a commercial property owner does not constitute an unusual circumstance under *Kraus*. See *Sinert* v. *Olympia & York Development Co.*, 38 Conn. App. 844, 848–50, 664 A.2d 791, cert. denied, 235 Conn. 927, 667 A.2d 553 (1995).

foreclose submission to the jury, on a proper evidentiary foundation, of the factual determinations of whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." (Footnote added; footnote omitted.) Id.; see also *Umsteadt* v. *G. R. Realty*, 123 Conn. App. 73, 82–83, 1 A.3d 243 (2010) (addressing accuracy of jury charge in light of *Kraus*); *Cooks* v. *O'Brien Properties, Inc.*, 48 Conn. App. 339, 342–47, 710 A.2d 788 (1998) (same).

In *Leon* v. *DeJesus*, 123 Conn. App. 574, 575, 2 A.3d 956 (2010), a negligence action, this court affirmed the summary judgment rendered by the trial court in favor of the defendant on the ground that, pursuant to the ongoing storm doctrine, the defendant owed no legal duty to the plaintiff. This court reasoned that, pursuant to our Supreme Court's decision in *Kraus*, because it was undisputed that there was an ongoing storm at the time of the plaintiff's alleged fall, the defendant was entitled to judgment as a matter of law. Id., 578. In *Leon*, we did not expressly opine on (1) precisely what a movant for summary judgment must demonstrate to satisfy its initial burden when relying on the doctrine and (2) any burden-shifting that may follow. This appeal provides such an opportunity.

We initially observe that the appellate authority from other jurisdictions that have adopted the ongoing storm doctrine in which courts have addressed the doctrine in the context of summary judgment is relatively scant. Nevertheless, the doctrine has been the subject of frequent application in New York,[8] and we turn to that

[8] Cf. *Solazzo* v. *New York City Transit Authority*, 6 N.Y.3d 734, 735, 843 N.E.2d 748, 810 N.Y.S.2d 121 (2005) (applying New York law) ("A property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter . . . . Here, it had been snowing, sleeting and raining on and off all day and the steps down into the subway were exposed to those weather conditions. Thus, summary judgment was properly granted in [the] defendants' favor." (Citation omitted.)); see also, e.g., *Sherman* v.

body of law for guidance. See *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 573, 113 A.3d 932 (2015) ("[w]hen contemplating issues of first impression with regard to Connecticut's common law, we often have sought to benefit from the collective wisdom and experience of our sister states").

We find the New York Appellate Division's decision in *Meyers* v. *Big Six Towers, Inc.*, 85 App. Div. 3d 877, 925 N.Y.S.2d 607 (2011), to be particularly helpful. In *Meyers*, the court stated the following with respect to burden-shifting in the context of the ongoing storm doctrine, often referred to as the "storm in progress" doctrine under New York law: "As the proponent of the motion for summary judgment, the defendant ha[s] to establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition . . . . [T]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell . . . . [Upon the defendant meeting its burden], the burden shift[s] to the plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident . . . . To do so, the plaintiff [is] required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation

New York State Thruway Authority, 27 N.Y.3d 1019, 1020, 52 N.E.3d 231, 32 N.Y.S.3d 568 (2016) (affirming reversal of denial of defendant's motion for summary judgment on basis of storm in progress doctrine); *Baker* v. *St. Christopher's Inn, Inc.* 138 App. Div. 3d 652, 653–54, 29 N.Y.S.3d 439 (2016) (affirming granting of defendants' motion for summary judgment on basis of storm in progress doctrine); *Meyers* v. *Big Six Towers, Inc.*, 85 App. Div. 3d 877, 877–78, 925 N.Y.S.2d 607 (2011) (reversing denial of defendant's motion for summary judgment on basis of storm in progress doctrine); *Sfakionas* v. *Big Six Towers, Inc.*, 46 App. Div. 3d 665, 665–66, 846 N.Y.S.2d 584 (2007) (affirming granting of defendant's motion for summary judgment on basis of storm in progress doctrine).

from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition . . . .'' (Citations omitted.) Id., 877–78. We are persuaded by the foregoing burden-shifting approach as it has been articulated under New York law, we note that it is consistent with *Leon* v. *DeJesus*, supra, 123 Conn. App. 574, and we expressly adopt it as a matter of Connecticut common law.

We now turn to an application of such principles to the present case. As the movants for summary judgment, the defendants bore the initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm when Belevich allegedly fell. See *Meyers* v. *Big Six Towers, Inc.*, supra, 85 App. Div. 3d 877. Here, the defendants submitted admissible evidence in the form of Belevich's deposition testimony. Specifically, during his deposition, Belevich testified that it was snowing when he fell, and that it had been snowing all day. More specifically, Belevich was asked if ''it continue[d] to snow all day until 2:30 [p.m.],'' to which he answered, ''[y]es.'' Additionally, when asked if it was snowing ''on [his] head'' ''[a]s [he] walk[ed] toward the garage,'' Belevich answered, ''[y]es.'' The evidence submitted in opposition to the defendants' motion did not create a triable issue of fact in this regard. Most notably, Belevich's affidavit left the fact of an ongoing storm uncontroverted. Instead, Belevich reaffirmed that fact by stating that ''[a]t approximately 2:30 p.m., around the time of my afternoon break, I noticed that it was snowing.'' Thus, it remained undisputed that there was an ongoing storm at the time of Belevich's alleged fall.[9] Thus, the defendants

[9] Because Belevich's affidavit does not contradict his prior deposition testimony on this point, we need not address the applicability of the ''sham affidavit'' rule, which ''refers to the trial court practice of disregarding an offsetting affidavit in opposition to a motion for summary judgment that contradicts the affiant's prior deposition testimony. . . . Connecticut appellate courts have yet to expressly adopt this rule.'' (Citations omitted; internal quotation marks omitted.) *Kenneson* v. *Eggert*, 176 Conn. App. 296, 310, 170 A.3d 14 (2017).

satisfied their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm when Belevich allegedly fell. See, e.g., id. (defendant sustained burden by presenting evidence of storm in progress when plaintiff fell); see also *Ryan* v. *Beacon Hill Estates Cooperative, Inc.*, 170 App. Div. 3d 1215, 1216, 96 N.Y.S.3d 630 (2019) (defendants sustained burden where it was undisputed that storm was in progress at time of plaintiff's accident).

Accordingly, the burden shifted to the plaintiffs to demonstrate the existence of a genuine issue of fact as to whether Belevich's fall was caused by a slippery condition that existed prior to the ongoing storm and whether the defendants had actual or constructive notice of the allegedly preexisting condition. See *Meyers* v. *Big Six Towers, Inc.*, supra, 85 App. Div. 3d 877–78. The plaintiffs failed to show that there existed a genuine issue of fact "as to whether the accident was caused by a slippery condition at the location where [Belevich] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition . . . ." Id., 878. Belevich's evidentiary submission, which included additional deposition excerpts and his affidavit, contained no evidence to suggest that the allegedly icy condition at the location where he fell had existed prior to the ongoing storm or that the defendants had actual or constructive notice of any preexisting icy conditions. Indeed, Belevich's deposition excerpts reflected his testimony that he did not know how long the black ice had been there and had no idea how thick it was. His affidavit was silent on these issues. See footnote 9 of this opinion. Thus, the plaintiffs failed to sustain their burden. See, e.g., *Campanella* v. *St. John's University*, 176 App. Div. 3d 913, 913, 112 N.Y.S.3d 153 (2019) (The plaintiff's "opposition papers failed to raise a triable

issue of fact as to whether the accident was caused by ice that existed prior to the storm, as opposed to precipitation from the storm in progress, and whether the defendant had actual or constructive notice of the alleged preexisting condition . . . . In particular, the opinions contained in an affidavit of the plaintiff's meteorologist as to when and how the alleged ice patch was formed were based on speculation and conjecture . . . ." (Citations omitted.)), appeal denied, 35 N.Y.3d 914, 153 N.E.2d 447, 130 N.Y.S.3d 2 (2020); *Battaglia* v. *MDC Concourse Center, LLC*, 175 App. Div. 3d 1026, 1028, 108 N.Y.S.3d 607 (2019) (notwithstanding plaintiff's deposition testimony and statement of plaintiff's expert, court concluded that "[t]o say that old ice caused the subject ice patch opposed to the storm in progress would require a jury to resort to conjecture and speculation in order to determine the cause of the incident" (internal quotation marks omitted)), aff'd, 34 N.Y.3d 1164, 144 N.E.3d 367, 121 N.Y.S.3d 757 (2020); *Ryan* v. *Beacon Hill Estates Cooperative, Inc.*, supra, 170 App. Div. 3d 1216 ("The plaintiff's opposition papers failed to raise a triable issue of fact as to whether the accident was caused by ice that existed prior to the storm, as opposed to precipitation from the storm in progress, and whether the defendants had constructive notice of the alleged preexisting condition . . . . The opinions contained in the affidavit of the plaintiff's meteorological expert as to when and how the ice was formed were based on speculation and conjecture . . . ." (Citations omitted.)); *Powell* v. *Cedar Manor Mutual Housing Corp.*, 45 App. Div. 3d 749, 749–50, 844 N.Y.S.2d 890 (2007) ("In opposition, the plaintiff failed to raise a triable issue of fact . . . . The plaintiff's contention that she fell on 'old' ice from a prior storm which was hidden under the new snowfall is mere speculation and insufficient to defeat the defendants' motion for summary judgment . . . ." (Citations omitted.)); *DeVito* v. *Harrison House Associates*, 41 App.

Div. 3d 420, 421, 837 N.Y.S.2d 726 (2007) ("Here the injured plaintiff's allegations that the ice which allegedly caused her accident had been present for 'a day or two,' or that it was 'from another time,' were insufficient to raise a triable issue of fact as to whether she fell on 'old' ice . . . . The plaintiffs also did not submit any evidence to substantiate their claim that the weather conditions prior to the accident date could have resulted in the creation of icy patches in the area where the accident occurred, or any proof that the respondents had notice of such a condition . . . ." (Citations omitted.)); *Martin* v. *Wagner*, 30 App. Div. 3d 733, 735, 816 N.Y.S.2d 243 (2006) (concluding that defendants' motion for summary judgment should have been granted because plaintiff failed to satisfy his burden, upon proper burden-shifting, as he produced no proof indicating that " 'snow-ice' " condition that he claimed caused his fall was anything other than result of fresh accumulation).

Notably, under the New York burden-shifting approach that we expressly adopt today, even "[e]vidence that there was ice in the general vicinity of the accident prior to the storm is insufficient to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition of the specific area within the parking lot where the plaintiff fell . . . ." *Meyers* v. *Big Six Towers, Inc.*, supra, 85 App. Div. 3d 878, citing *Alers* v. *La Bonne Vie Organization*, 54 App. Div. 3d 698, 863 N.Y.S.2d 750 (2008), *Powell* v. *Cedar Manor Mutual Housing Corp.*, supra, 45 App. Div. 3d 749, *DeVito* v. *Harrison House Associates*, supra, 41 App. Div. 3d 420, *Robinson* v. *Trade Link America*, 39 App. Div. 3d 616, 833 N.Y.S.2d 243 (2007), *Small* v. *Coney Island Site 4A-1 Houses, Inc.*, 28 App. Div. 3d 741, 814 N.Y.S.2d 240 (2006), *Regan* v. *Hartsdale Tenants Corp.*, 27 App. Div. 3d 716, 813 N.Y.S.2d 153 (2006), *Dowden* v. *Long Island Railroad*, 305 App. Div.

2d 631, 759 N.Y.S.2d 544 (2003), and *Zoutman* v. *Goshen Central School District*, 300 App. Div. 2d 656, 752 N.Y.S.2d 711 (2002). The plaintiffs' evidence missed even this mark by failing to present any evidence of icy conditions prior to the ongoing storm in the vicinity of the location of his fall.

The plaintiffs argue that "the court erred in shifting [the] burden because the defendants provided zero evidence that the storm which caused snow to fall on [Belevich] at 2:30 p.m. also produced the black ice on which [Belevich] fell." They additionally argue that "it was not incumbent on [Belevich] to prove that the storm which caused snow to fall on him at 2:30 p.m. also produced the black ice on which he fell. The defendants provided no evidence of freezing rain, temperature, or, critically, when the black ice was formed. That was their burden, they did not even attempt to meet it, and the court, instead of holding them to their burden, shifted it to the plaintiff[s]. The court erred when it so shifted the burden." We disagree. As previously stated, the burden was on the defendants to show that there was an ongoing storm at the time of Belevich's alleged fall. Upon the defendants' meeting their burden, the burden then shifted to the plaintiffs to demonstrate the existence of a genuine issue of fact as to whether Belevich's fall was caused by a slippery condition that existed prior to the ongoing storm and whether the defendants had actual or constructive notice of the allegedly preexisting condition. We note that the plaintiffs presented even less evidence—e.g., no expert testimony, no weather reports—than what was deemed insufficient in the New York cases cited previously in this opinion.

Finally, we note that the plaintiffs have cited no authority—and we are not aware of any—to support their suggestion that there exists a "black ice" or icy condition exception to the ongoing storm doctrine.

Indeed, the conditions at issue in *Kraus* and *Umsteadt*, among others, involved icy conditions.

In sum, the defendants met their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm at the time of Belevich's fall. The plaintiffs thereafter failed to sustain their burden. Therefore, we conclude that the court properly granted the defendants' motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

KIMBERLY N. FINNEY *v.* COMMISSIONER OF CORRECTION
(AC 43105)

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

Syllabus

The petitioner, who had been convicted in 2008, on a guilty plea, of the crime of kidnapping in the second degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. As relief, the petitioner requested that the habeas court allow him to withdraw his guilty plea. The respondent Commissioner of Correction filed a request for an order to show cause why the petition should be permitted to proceed. Following a hearing, the habeas court determined that the petition, which was filed in 2018, was timely filed within the limitation period set forth in the applicable statute (§ 52-470 (c)) because it was filed within five years of the disposition in 2016 of the petitioner's most recent violation of the probationary portion of his sentence on the 2008 conviction. The habeas court then, on its own motion, dismissed the petition pursuant to the relevant rule of practice (§ 23-29 (2)) on the ground that the petition failed to state a claim on which habeas corpus relief could be granted. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court improperly dismissed the habeas petition pursuant to Practice Book § 23-29 (2), the petition having stated a claim on which habeas relief could be granted; the petition raised allegations of ineffective assistance of counsel that, when viewed in the light most favorable to the petitioner, implicitly challenged whether the petitioner knowingly

and voluntarily entered the guilty plea, which states a cognizable claim for habeas relief.

2. The habeas court improperly determined that the habeas petition was timely filed within the limitation period set forth in § 52-470 (c); this court disagreed with the habeas court's construction of § 52-470 (c), as the timeliness of a petition under the statute is evaluated on the basis of when the judgment of conviction, not the sentence imposed for that conviction, is final, and any disposition following a violation of a probationary portion of a sentence cannot, as a matter of law, toll or restart the limitation period for filing a petition challenging the conviction; moreover, although the habeas petition was not timely, it having been filed six months beyond the limitation period, because the issue of whether the petitioner can establish good cause for the delay in filing his petition was not determined by the habeas court, the case was remanded to that court for further proceedings on that issue in accordance with § 52-470 (e).

Argued January 14—officially released August 31, 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, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Naomi T. Fetterman, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Kimberly N. Finney, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the court improperly dismissed his habeas petition pursuant to Practice Book § 23-29 (2) on the ground that the petition failed to state a

claim on which habeas relief could be granted.[1] The respondent, the Commissioner of Correction, both refutes the petitioner's claim and raises as an alternative ground for affirmance that, even if the petition raises a cognizable claim for habeas relief, the court should have dismissed the petition as untimely filed in accordance with General Statutes § 52-470.[2] We agree with the petitioner that the habeas court improperly dismissed the petition pursuant to Practice Book § 23-29 (2). We also agree that, in resolving the court's order to show cause why the petition should be permitted to proceed in accordance with § 52-470, the habeas court improperly determined that the petition was filed within the prescribed statutory time limit. Accordingly, we reverse the judgment of the habeas court and remand the case with direction (1) to deny the court's own motion to dismiss and (2) to conduct a new hearing to

[1] 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 . . . (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ."

[2] General Statutes § 52-470 provides in relevant part: "(c) . . . there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

"(e) In a case in which the rebuttable presumption of delay . . . 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. . . ."

determine, in accordance with § 52-470 (e), whether the petitioner can demonstrate good cause for the delay in filing the petition and, if not, to dismiss the petition on that basis.[3]

The record reveals the following undisputed facts and procedural history. The petitioner pleaded guilty on May 21, 2008, to one count of kidnapping in the second degree in violation of General Statutes § 53a-94. He was sentenced on September 5, 2008, to a term of twenty years of incarceration, execution suspended after five years, followed by five years of probation. The petitioner violated the terms of his probation on at least two occasions. On December 22, 2016, following the petitioner's admission to a third violation of probation, the petitioner was sentenced to a term of twelve years of incarceration, execution suspended after six years, followed by two years of probation.

On April 2, 2018, the petitioner, acting as a self-represented party, filed a petition for a writ of habeas corpus directed at his 2008 conviction.[4] In the petition, he

[3] The petitioner also claims on appeal that the habeas court improperly dismissed his habeas petition without allowing his court-appointed counsel a reasonable opportunity to file an amended petition. Because we agree with the petitioner that the petition, as filed, was legally sufficient to withstand a motion to dismiss pursuant to Practice Book § 23-29 (2) and resolution of the claim has no bearing on the habeas court's consideration on remand of whether good cause exists for the petitioner's delay in filing the petition, we do not reach this additional claim of error.

[4] The petitioner previously had filed a petition for a writ of habeas corpus in 2009 challenging his 2008 conviction but voluntarily withdrew that petition in 2011. Subsection (d) of 52-470 provides that, "[f]or the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment." Accordingly, because the petitioner withdrew this prior petition, it did not constitute "a judgment on a prior petition challenging the same conviction," and, therefore, the statutory time limits set forth in subsection (c) of 52-470 apply in the present case rather than the limitation period found in subsection (d), which only applies in a case involving successive petitions. See General Statutes § 52-470 (d) (creating "rebuttable presumption that the filing of [a] *subsequent petition* has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior

alleged that he improperly was convicted in 2008 because his trial counsel had provided him with constitutionally ineffective assistance. The petitioner attached to the petition form a single page that contained more detailed allegations in support of his ineffective assistance of counsel claim.[5] By way of relief, the petitioner sought to have the court allow him to withdraw his guilty plea. Accompanying the petition was a request for the appointment of counsel and an application for a waiver of fees.[6]

petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act" (emphasis added)).

[5] The attached document, captioned "Ineffective Counsel," appears to be incomplete. Nevertheless, the petitioner, in arguing to the habeas court that the allegations in the petition were sufficient to survive a motion to dismiss, relied on only the following paragraphs:

"1. Counsel failed to do a thorough or adequate investigation of the case and therefore was not adequately prepared for trial.

"2. Counsel failed to adequately prepare the petitioner for trial in that he only visited the petitioner one time the entire time he was his lawyer and never discussed the defense strategy to be utilized at trial.

"3. Counsel lied about speaking to multiple witness[es] in the [defense's] favor but had their names on the defense witness list as if he had spoken with them about being witness[es].

"4. Counsel failed to ask for continuance or to inform the judge that he was not prepared for trial, but told the petitioner that he did and was told he could not stop selection or the trial.

"5. Counsel failed to suppress statement by the complainant . . . .

"6. Counsel failed to obtain the single most important factor and information that linked the petitioner to the crime. . . .

"9. Counsel failed to provide information about DNA testing sent to [an] independent tester to the petitioner which was requested by the petitioner.

"10. Counsel failed to speak to alibi witness about alibi."

[6] On April 6, 2018, a clerk of the court granted the fee waiver application. An initial trial management and scheduling order was also issued by the court. That order stated that a referral had been made to the Office of the Chief Public Defender for an investigation of whether the petitioner was indigent. The order also provided procedures and time limits for the filing of an amended petition, if deemed necessary.

On August 9, 2018, the respondent filed a motion for an order to show cause why the petition should be permitted to proceed because it was filed outside of the applicable five year limitation period set forth in § 52-470 (c). On September 4, 2018, the habeas court ordered that the motion "be set down for a hearing," which was subsequently scheduled for October 26, 2018.[7]

On September 20, 2018, the petitioner filed a notice of intent to file an amended habeas petition. The petitioner's counsel indicated to the court that transcripts of prior proceedings, including "the underlying plea transcripts," were necessary to the drafting of an amended petition but had not yet been received. On October 25, 2018, the petitioner sought the court's permission to file a "delayed" response to the respondent's motion for order to show cause. The court granted permission and accepted the response as submitted. In that response, the petitioner argued that the petition was timely filed under § 52-470 (c) because the operative date for calculating the filing deadline was not the date his original judgment of conviction became final. Rather, he argued, "due to the fact that his sentence was reopened and modified in his violation of probation proceeding, which was decided on December 22, 2016, the date of that ruling serves as the time at which his conviction became final." In the alternative, he argued that, even if his petition was untimely, he had "substantial" good cause for any delay.[8]

[7] Initially, the habeas court, noting the outstanding referral to the Office of the Chief Public Defender related to the appointment of counsel, ordered that the respondent's motion "cannot be scheduled for a hearing or acted upon until counsel appears." Counsel was thereafter appointed for the petitioner on or about August 20, 2018. The court vacated its initial order and rendered the modified September 4, 2018 order.

[8] The petitioner argued that he had withdrawn a timely petition in 2011 after learning that his twelve year old son had been diagnosed with cancer. According to the petitioner, the Department of Correction refused to allow the incarcerated petitioner to have his bone marrow tested as a potential donor for his son. His scheduled release date at that time was March 19,

At the October 26, 2018 hearing, the habeas court, *Newson*, *J.*, informed the parties that it intended "to raise a couple of issues" pursuant to its authority under Practice Book § 23-29. After hearing some initial arguments by counsel, the court indicated that it intended to issue a written order requesting additional briefing on several of the issues raised at the hearing. The court subsequently issued its written order giving the parties until January 4, 2019, to file briefs addressing several issues, of which the following are relevant to the present appeal: (1) "Whether the petition should be dismissed for failing to state a claim upon which habeas relief can be granted because the petitioner's guilty plea waived collateral attacks on his conviction that do not go to the voluntary, knowing and intelligent nature of the plea, and this petition fails to make such a claim and/or alternatively asserts claims that are considered to have been waived as a result of his guilty plea?" And (2) "Where a sentence imposed on a petitioner includes a period of probation and the petitioner has subsequently been found in violation of that probation: (a) Must a petition for a writ of habeas corpus attack the proceedings and representation relating to the most recent violation of probation disposition OR those related to the original sentencing OR can the petitioner choose to attack any of the proceedings from the original conviction to the most recent violation of probation disposition? (b) For purposes of calculating the time

2012, and his counsel advised him that, if he was successful regarding the pending petition, which was scheduled for trial in December, 2011, his release could be delayed because his plea would be vacated and he could be held on bond until a new criminal trial could be conducted, and that he could withdraw his petition and refile at a future date. The petitioner also argued that his counsel had refused to provide him with copies of certain legal documents in his file and that courts have concluded that lack of access to legal records is sufficient to rebut a presumption of delay without good cause. Finally, the petitioner argued that the death of his son in May, 2013, led to diminishing mental health and severe alcohol dependency that prevented him from pursuing another petition.

period(s) under . . . § 52-470 (c), does the date of the original sentencing OR the date of the most recent violation of probation sentencing control?"

Each party filed a timely, responsive brief. The respondent took the position that none of the allegations in the petition expressly was directed to the voluntariness of the petitioner's 2008 plea, and, therefore, the petition should be dismissed for failure to state a claim on which relief could be granted. The respondent conceded that a petitioner who is reincarcerated following a violation of probation properly may attack his initial conviction and/or the violation of probation. According to the respondent, however, if a petitioner chooses to attack only the initial conviction, the calculation of the limitation period set forth in § 52-470 (c) begins from the date that the initial conviction is deemed final.

The petitioner argued in his brief, inter alia, that his petition, if properly construed, stated a claim for habeas relief because it challenged the validity of his guilty plea. The petitioner clarified that his petition challenged the underlying 2008 criminal conviction rather than the most recent violation of probation proceedings but, nevertheless, argued that a determination of the date on which that underlying conviction became final for purposes of § 52-470 (c) "must be made based on the date by which the sentence was reopened and imposed last." In other words, the petitioner claimed that his habeas petition was not "delayed" within the meaning of § 52-470 (c), if measured from the disposition date for his latest violation of probation.

On April 15, 2019, the habeas court issued a memorandum of decision resolving both the order to show cause issued pursuant to § 52-470 and the court's own motion to dismiss raised pursuant to Practice Book § 23-29. The court first analyzed whether it was legally required

to give the petitioner's appointed habeas counsel time to review and revise the petition before addressing its legal sufficiency. The court determined that it was not and turned next to the issue of when the judgment of conviction is deemed to be final for purposes of § 52-470 (c). The court determined that, although the original sentence was imposed in 2008, the change in disposition following the revocation of probation meant that the petition was timely for purposes of § 52-470 (c) because "it was filed within five years of the most recent violation of probation disposition."[9] Finally, turning to its own motion to dismiss the petition pursuant to Practice Book § 23-29 (2), the court concluded that the petitioner had waived all of the specific allegations of ineffective assistance of counsel set forth in the petition by virtue of his decision to enter a guilty plea and that none of those allegations "could be said to reasonably allege that counsel provided ineffective assistance with respect to the entry of the plea, or which attacks the voluntary, intelligent and knowing character of the plea." Because the petition also failed to raise any challenge to counsel's performance with respect to the most recent violation of probation disposition, the court concluded that "the petition fails to state a claim upon which relief can be granted." Accordingly, the court

[9] The habeas court offered the following analysis to support its conclusion: "As the [respondent] concedes in its brief, a petitioner may at any time attack an illegal sentence under [a] provision like Practice Book § 43-22. That being the case, it would seem that a petitioner could attack either the original conviction resulting in a probation sentence, or the most recent disposition resulting in a revocation of that probation, because the disposition of a probation violation is considered a continuation of the original sentencing proceeding. . . . Also, a petitioner gets the benefit of the latter of the applicable limitation periods under § 52-470 (c) (1), (2) or (3) when an order to show cause is requested. The most recent violation of probation disposition on December 22, 2016, is well within the five year window provided for in § 52-470 (c) (1). Therefore, the respondent's order to show cause is denied." (Citation omitted; footnotes omitted; internal quotation marks omitted.)

dismissed the petition. Following the court's subsequent granting of certification to appeal, this appeal followed.

I

We begin with the petitioner's claim that the habeas court improperly dismissed his habeas petition pursuant to Practice Book § 23-29 (2), because, if properly construed in the light most favorable to him, the allegations in the petition state a claim on which habeas relief could be granted. We agree.

"Whether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it fails to state a claim upon which habeas corpus relief can be granted, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017). It is well settled that a 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 purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 780, 167 A.3d 952 (2017). Thus, as it would do in evaluating the allegations in a civil complaint, in evaluating the legal sufficiency of allegations in a habeas petition, a court must view the allegations in the light most favorable to the petitioner, which includes all facts necessarily implied from the allegations. See *Noble* v. *Marshall*, 23 Conn. App. 227, 229, 579 A.2d 594 (1990).[10]

[10] Whereas the legal sufficiency of pleadings in civil matters is tested by way of a motion to strike, which permits an opportunity to replead; see Practice Book § 10-44; legal sufficiency in a habeas action may be tested by way of a motion to dismiss because a cognizable habeas claim is necessary to invoke the jurisdiction of the habeas court. See *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 815, 786 A.2d 1091 (2002) ("[h]abeas corpus

It is a well settled proposition that "a guilty plea waives any nonjurisdictional defects that occurred prior to the entry of the plea, including any alleged constitutional deprivations." *Mincewicz* v. *Commissioner of Correction*, 162 Conn. App. 109, 112, 129 A.3d 791 (2015). "The focus of a habeas inquiry where there has been a guilty plea is the nature of the advice of counsel and the voluntariness of the plea, not the existence of a purported antecedent constitutional infirmity. . . . [A] guilty plea represents a break in the chain of events [that] has preceded it in the criminal process. [If] a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within [constitutionally acceptable] standards . . . . The plaintiff must, moreover, demonstrate that there was such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance." (Citations omitted; internal quotation marks omitted.) *Buckley* v. *Warden*, 177 Conn. 538, 542–43, 418 A.2d 913 (1979); see also *Dukes* v. *Warden*,

provides a special and extraordinary legal remedy for illegal detention" (internal quotation marks omitted)); *Dinham* v. *Commissioner of Correction*, 191 Conn. App. 84, 89, 213 A.3d 507 ("With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for [a writ of] habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief." (Internal quotation marks omitted.)), cert. denied, 333 Conn. 927, 217 A.3d 995 (2019). The petitioner's lack of an opportunity to replead demonstrates why it is important for habeas courts to construe the allegations in a habeas petition in the light most favorable to upholding its legal sufficiency.

161 Conn. 337, 344, 288 A.2d 58 (1971) ("an allegation of the ineffective assistance of counsel is a factor to be taken into consideration in determining whether a guilty plea was voluntary and intelligent"), aff'd, 406 U.S. 250, 92 S. Ct. 1551, 32 L. Ed. 2d 45 (1972).

Here, although we agree with the habeas court's assessment that the petition fails to connect expressly the asserted allegations of ineffective assistance of counsel directly to whether the petitioner's decision to enter a guilty plea was knowing and voluntary, we nevertheless conclude, on the basis of our plenary review, that it is reasonable to infer such an interrelationship from the allegations. This is particularly true given the early stage of the proceedings and the fact that the petition was filed by a self-represented party. See *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 560, 223 A.3d 368 (2020) ("when a petitioner has proceeded [as a self-represented party] . . . courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed" (internal quotation marks omitted)); *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 140, 7 A.3d 911 (2010) (cautioning that courts "should be solicitous to [self-represented] petitioners and construe their pleadings liberally in light of the limited legal knowledge they possess"). Significantly, the only relief that the petitioner requests in his petition is an opportunity to withdraw the guilty plea. That request for relief provides additional support for construing the allegations of ineffective assistance of counsel in the petition as relating to the petitioner's decision to enter a guilty plea.

Although ultimately it may prove that the petitioner is unable to produce evidence to support his allegations of ineffective assistance or to demonstrate any causal connection linking those allegations with his decision to enter a guilty plea, such speculation cannot support the granting of a motion to dismiss. In *Mincewicz* v.

Commissioner of Correction, supra, 162 Conn. App. 109, this court concluded that the habeas court, *following a trial*, properly determined that the petitioner waived his claim of ineffective assistance of counsel because the record before the habeas court supported its express factual finding "that counsel's advice preceded and did not affect the petitioner's decision to plead guilty . . . ." Id., 114.

Similarly, in *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 795–96, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018), a case cited and relied on by the respondent, this court concluded that the habeas court did not abuse its discretion in denying certification to appeal with respect to whether the petitioner had waived several claims that the habeas court had *determined were unrelated to his guilty plea*. In addition, we rejected the petitioner's request that we "interpret *Hill* v. *Lockhart*, 474 U.S. 52, 58–59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), such that it prohibits the application of the waiver rule to claims of ineffective assistance of counsel following an unconditional guilty plea." *Henderson* v. *Commissioner of Correction*, supra, 798. We stated that "*Hill* defines a petitioner's *burden of proof* with respect to ineffective assistance claims in the guilty plea context, thereby requiring a petitioner to demonstrate that but for counsel's errors, he would not have entered the plea. . . . *Hill* is not inconsistent with the application of the waiver rule, nor do we interpret it to have undermined the rule's application in a case . . . *in which the specific claims of ineffectiveness are unrelated to the validity of the unconditional guilty plea*. . . . The touchstone of the waiver inquiry is *whether the claim implicates the validity of the plea*." (Citation omitted; emphasis added.) Id., 798–99. In *Henderson*, following a habeas

trial, the court made a factual finding that, despite allegations of ineffective assistance of counsel, "the decision to accept the state's plea offer and to plead guilty was made solely by the petitioner." Id., 799.

In the present case, unlike in *Mincewicz* and *Henderson*, the habeas court's determination that the petitioner waived his claim of ineffective assistance of counsel because his allegations did not relate to the petitioner's decision to enter a guilty plea was premature. The court reached this decision at the pleading stage, a time when the allegations in the petition must be viewed in the light most favorable to the petitioner, rather than after a habeas trial or proceedings on a motion for summary judgment at which the petitioner would have had some opportunity to present evidence potentially linking his allegations of ineffective assistance of counsel that predate his decision to plead guilty with whether his decision to enter a guilty plea was knowingly and voluntarily made.

The allegations of ineffective assistance of counsel in the present petition reasonably can be construed as asserting—not expressly, but by implication—that the petitioner's decision to plead guilty was not knowingly made because his trial counsel had failed to investigate his case properly, to review the evidence against him or to consider whether a viable trial strategy existed.[11] In other words, the allegations, read in the light most favorable to the petitioner as is required at the pleading stage, suggest that counsel failed to prepare the case adequately so that the petitioner could have sufficient knowledge of the strength of the case and could make

[11] The habeas court summarized the allegations in the petition as follows: "[C]ounsel failed to conduct a thorough investigation, failed to suppress statements, failed to obtain personnel information on detectives involved in the case, failed to speak to an alibi witness, misrepresented information on the record to the trial court, and placed a witness on the witness list [who] counsel knew was not going to cooperate with the defense."

an informed decision as to whether to plead guilty. If proven, the petitioner could be permitted to withdraw the guilty plea, which is the only relief requested in the petition. In short, read in the context of the petition as a whole, including the relief requested, we conclude that the petitioner has raised allegations that implicitly challenge whether he knowingly and voluntarily entered a guilty plea, which states a cognizable claim for habeas relief. Accordingly, the habeas court improperly granted its own motion to dismiss.

Our conclusion that the habeas court improperly dismissed the petition pursuant to Practice Book § 23-29 (2) does not, however, end our inquiry. Rather we must next consider, as argued by the respondent, whether the court improperly determined, with respect to its order to show cause, that the petition was timely filed in accordance with § 52-470 (c) and, thus, whether the petition should have been dismissed for unreasonable delay.[12]

II

The respondent claims that, even if the habeas court improperly dismissed the habeas petition pursuant to

[12] Although, pursuant to § 52-470 (g), any party who wants to obtain appellate review of a judgment rendered in a habeas action must petition the habeas court for certification to appeal, the respondent was not aggrieved by the court's disposition of the order to show cause in light of the court's contemporaneous dismissal of the petition pursuant to its own Practice Book § 23-29 motion to dismiss. Accordingly, the respondent arguably could not have sought certification to file an appeal or cross appeal. Nevertheless, we conclude that his claim is properly before us for review pursuant to Practice Book § 63-4 (a) (1) (B), because the court's decision with respect to the order to show cause constituted an adverse ruling that only needed to be considered in the event the petitioner prevailed with respect to his appeal. We will consider the respondent's claim despite his failure to raise the issue properly by filing a preliminary statement of issues; see Practice Book § 63-4 (a) (1); because the petitioner was able to respond to the claim in his reply brief and thus was not prejudiced. See *State* v. *Osuch*, 124 Conn. App. 572, 580–81, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010).

Practice Book § 23-29 (2), the court's judgment of dismissal may be affirmed, albeit on a different basis, because the habeas court improperly determined that the petition was filed within the limitation period set forth in § 52-470 (c). The petitioner responds that the habeas court properly interpreted the limitation period in § 52-470 (c) as having restarted when the petitioner was found in violation of probation and received a new disposition regarding sentencing. Although, for the reasons that follow, we agree with the respondent that the court should have found that the petition was not timely filed, whether the petitioner can establish good cause for the delay in filing it remains to be determined. Accordingly, we remand the case to the habeas court for further proceedings on whether the petitioner can establish good cause in accordance with § 52-470 (e).[13]

Whether a petitioner filed a petition for a writ of habeas corpus within the applicable limitation period set forth in § 52-470 is a factual determination that we ordinarily would review on appeal under the clearly erroneous standard of review. To the extent, however, that the court's finding in the present case is made on the basis of its interpretation of the relevant statute, our review is plenary. See *State* v. *Bemer*, Conn. , , A.3d (2021) ("[b]ecause issues of statutory construction raise questions of law, they are subject to plenary review on appeal").

[13] The petitioner also argues that, even if the habeas court incorrectly determined that the petition was timely filed, that error alone would be insufficient to constitute an alternative basis for upholding the habeas court's dismissal of the petition because untimely petitions are not subject to dismissal as a matter of law but, rather, are subject to dismissal only if the petitioner is unable to demonstrate good cause for the delay in filing the petition, which is a factual finding that is absent from the record and cannot be made by this court for the first time on appeal. As is apparent from our disposition of the respondent's claim, we agree with the petitioner that the habeas court must make the good cause determination, and the petitioner will be afforded an opportunity to demonstrate good cause on remand.

Section 52-470 (c), (d), and (e) collectively set forth time limitations on a petitioner's right to file a habeas petition and address whether, if not timely filed, the petitioner can establish good cause for any delay in filing the petition. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 719, 189 A.3d 578 (2018). Subsection (e) of § 52-470 provides in relevant part: "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. . . ." As we previously have noted, subsection (d) of § 52-470 concerns the timeliness of a "petition filed subsequent to a judgment on a prior petition challenging the same conviction" and, thus, is inapplicable to the present case. See footnote 4 of this opinion.

The controlling provision with respect to the timeliness of the present petition is found in subsection (c) of § 52-470, which provides in relevant part: "[T]here shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed *after the later of the following*: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017;[14] or (3) two years after

[14] It can be inferred from the statutory scheme as a whole that the October 1, 2017 date was included by the legislature to ensure that any petitioner whose judgment of conviction became final before the enactment of comprehensive habeas reform in 2012, which included the adoption of the limitation periods now found in subsections (c) and (d) of § 52-470, would have at least five years in which to initiate a habeas action.

the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. . . .'' (Emphasis added.) Of the enumerated subdivisions of subsection (c), only the first two are potentially applicable with respect to the present petition.

The present petition challenges only the judgment of conviction rendered in 2008 following the petitioner's guilty plea to kidnapping in the second degree and asks the habeas court to allow the petitioner to withdraw his guilty plea. The petition raises no additional challenges directed at the petitioner's subsequent violation of probation proceedings or disposition. Ordinarily, a judgment of conviction in a criminal matter becomes a final judgment for purposes of appellate review once a sentence is imposed. Practice Book § 61-6 (a) (1); *State* v. *Ayala*, 222 Conn. 331, 339, 610 A.2d 1162 (1992). The judgment of conviction in turn becomes final for purposes of § 52-470 (c) (1) after the appeal period has expired or, if an appeal is filed, upon a final disposition of the appeal.

In the present case, the facts regarding the finality of the 2008 judgment of conviction are not in dispute. The petitioner was sentenced on the judgment of conviction on September 5, 2008. No appeal followed that judgment. Therefore, in accordance with § 52-470 (c), the time in which to file a timely habeas petition expired on October 1, 2017, which was later than five years after the judgment of conviction became final, which would have been sometime in 2013. The present petition was filed on April 2, 2018, or six months beyond the limitation period. Nothing in the habeas court's factual recitation contradicts these calculations.

Nevertheless, the habeas court determined that the present habeas petition was in fact timely filed. The court reasoned that, although the only conviction challenged in the petition was imposed in 2008, the original sentence imposed for that conviction "has been the subject of two violation of probation proceedings, the most recent of which was disposed of on December 22, 2016. The most recent disposition resulted in a period of incarceration that remained in effect as of the date of this hearing. The court finds that this petition survives because it was filed within five years of the most recent violation of probation disposition." We disagree with the habeas court's construction of § 52-470 (c).

To properly interpret § 52-470 (c), we look to the text of the statute, which is plain and unambiguous. See General Statutes § 1-2z. The plain language of § 52-470 (c) creates a rebuttable presumption that a habeas petition has been unreasonably delayed and thus subject to dismissal if it is filed more than five years after "the judgment of conviction is deemed to be a final judgment" or after October 1, 2017, whichever date is later. The statute, thus, provides a means by which to determine easily a date from which to measure the timeliness of a habeas petition challenging a conviction.

Section 52-470 contains no additional language providing for the tolling or restarting of the statute's limitation period if a petitioner is later found in violation of probation and receives a disposition that includes reinstating all or a portion of the unserved sentence. If the legislature, in enacting *comprehensive* habeas reform, had wanted to include such a provision, it clearly was capable of doing so, as evidenced by subsection (f) of the statute, which expressly exempts from the limitation period petitions asserting a claim of actual innocence or challenging a condition of confinement. General Statutes § 52-470 (f); see also *Bloomfield* v. *United Electrical Radio & Machine Workers of*

America, Connecticut Independent Police Union, Local 14, 285 Conn. 278, 289, 939 A.2d 561 (2008) ("[I]t is a principle of statutory construction that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . *or add exceptions merely because it appears that good reasons exist for adding them.* . . . The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Emphasis added; internal quotation marks omitted.)). The habeas court cites to no existing statutory language or case law interpreting § 52-470 that would support its interpretation of § 52-470 (c).[15]

In violation of probation proceedings, the punishment imposed on a criminal defendant, if any, "*is attributable to the crime for which he* [*or she*] *was originally convicted and sentenced.* Thus, any sentence [the]

[15] We also agree with the respondent's argument that the habeas court's interpretation of § 52-470 (c) would lead to absurd results. In his appellate brief, the respondent provided the following example: "[A] petitioner who was sentenced to serve a straight twenty year sentence would lose his right to bring a habeas challenge to his conviction after five years, under the statute. . . . [U]nder the habeas court's interpretation, [however] a petitioner who was sentenced to a twenty year sentence, suspended after ten years, followed by ten years of probation, initially would lose his right to challenge his conviction after the first five years of his sentence, but then regain that right if he is found in violation of his probation at any point during the second half of his sentence. In both instances, the prisoner is still in prison, serving his twenty year sentence, when he files his habeas petition, but the petitioner who was continuously imprisoned would have lost [in the absence of good cause] his right to file a habeas challenge to the original judgment of conviction while, in the habeas court's view, the petitioner who was released but engaged in further criminal conduct, resulting in a probation revocation, would not have lost his right to file a habeas challenge to the original judgment of conviction." (Emphasis omitted.) As the respondent correctly asserts, "[t]he legislature could not have intended such disparate treatment, which essentially affords a windfall to those who engage in misconduct [that] leads to a revocation of their probation."

defendant had to serve as the result of the [probation] violation . . . was punishment for the crime of which he [or she] had originally been convicted. Revocation is a *continuing consequence of the original conviction* from which probation was granted." (Emphasis added; internal quotation marks omitted.) *State* v. *Fagan*, 280 Conn. 69, 107 n.24, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). In other words, any punishment imposed as a result of a violation of probation flows directly from and is attributable to the original judgment of conviction. It in no way modifies the underlying judgment of conviction itself and, thus, has no effect on the finality of the judgment of conviction. Because the legislature, in enacting habeas reform, has determined that the timeliness of a petition is to be evaluated on the basis of when the judgment of conviction, not the sentence imposed for that conviction, is final, any violations of the probationary portion of a sentence imposed following a judgment of conviction cannot, as a matter of law, restart the period of time for filing a habeas petition to challenge that judgment. Because the petition in the present case raises no cognizable challenge with respect to the violation of probation proceeding itself, we do not opine on whether such a challenge would elicit a different result.

Although we have determined that the court improperly found that the petition was timely filed in accordance with § 52-470 (c), it nevertheless remains to be determined whether, pursuant to § 52-470 (e), the petitioner can demonstrate good cause for the delay in filing the petition, an issue never considered or addressed by the habeas court. Because "a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any

witness testimony" or other evidence that may be offered; *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 35–36, 244 A.3d 171 (2020), cert. granted, 336 Conn. 941, 250 A.3d 41 (2021); it is appropriate to remand the case to the habeas court for a new hearing on whether the petitioner can demonstrate good cause for the delay.

The judgment is reversed and the case is remanded with direction to deny the habeas court's motion to dismiss and for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON
(AC 40250)

Alvord, Prescott and Alexander, Js.

Syllabus

Convicted of the crimes of burglary in the third degree, attempt to commit tampering with physical evidence and attempt to commit arson in the second degree in connection with a break-in at a courthouse, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction of all three offenses. At the time of the events at issue, the defendant had two felony charges pending against him and was scheduled to commence jury selection in a trial of those charges. Two days before the start of jury selection, a silent alarm was triggered at the courthouse at about 11 p.m. The police discovered, inter alia, a broken window that provided ingress to an office shared by assistant state's attorneys, a duffel bag containing six canisters of industrial strength kerosene on the floor of the hallway outside the office, and case files atop a desk that had two of its drawers open and other files scattered on the floor. Surveillance video also depicted a vehicle, similar to one the defendant drove, driving by the courthouse repeatedly in the hours before the break-in, and, while the defendant was in custody after having been convicted of other charges that had been pending against him, he asked his brother, in a recorded telephone call, to get rid of "bottles of things" for a heater, speculated about how the police located the vehicle and attempted to arrange an alibi. On the defendant's appeal to this court, this court concluded

that the state had failed to produce sufficient evidence regarding the defendant's intent to commit tampering, which was a requirement common to all of the charged offenses, reversed the defendant's conviction and remanded the case to the trial court with direction to render judgment of acquittal as to all three charges. Our Supreme Court thereafter granted the state's petition for certification to appeal, reversed this court's judgment and remanded the case to this court for further proceedings. On remand, the defendant reiterated his claim that the evidence was insufficient to support his conviction of all three charges and asserted that the court improperly excluded testimony from L, who had represented him on the felony charges, that, prior to the break-in, the defendant had told L that he intended to plead guilty to the felony charges, which the defendant alleged would have provided a defense to his motive to disrupt or delay the proceedings against him. *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction was unavailing:

a. The totality of the evidence regarding the defendant's actions before, during and after the break-in supported the jury's finding that he broke into the prosecutors' area of the courthouse with the intent to tamper with evidence: from the manner in which the defendant conducted reconnaissance of the closed courthouse late at night and his chosen point of entry, the jury reasonably could have inferred that he planned to engage in criminal conduct and wanted to gain access to the office of the prosecutor who was handling the pending felony charges and to his own specific file, and the reasonable inference that the staff of the prosecutor's office would not have left files strewn on the floor permitted the jury's successive reasonable inference that it was the defendant who had been searching for his own case file and that, if he could tamper with it, the state would be unable to secure a conviction against him; moreover, that the defendant brought industrial strength kerosene into an office filled with combustible materials provided a reasonable basis for the jury to infer that he intended to start a fire that would consume the file associated with his case and any physical evidence contained therein, and that he understood that he also needed to destroy other files to cover up his destruction of the evidence in his case; furthermore, those reasonable inferences were supported by the defendant's conduct after the break-in, which included his flight from the courthouse, a phone call he made to the public defender's office inquiring whether the courthouse would be open on the day after the break-in and incriminating statements he made to his family.

b. Contrary to the defendant's assertion that the evidence was insufficient to support his arson conviction because the state failed to prove that he committed the completed crime of tampering with physical evidence, the state's burden was to prove that he intended to start a fire to conceal the crime of tampering with physical evidence and that he had taken a substantial step in a course of conduct planned to culminate in his

commission of the crime; moreover, the jury reasonably could have inferred that the defendant, by bringing kerosene into an area packed with files and other combustibles, possessed the requisite intent to damage or destroy the building as a natural consequence of his actions, and, even if his primary intent was to damage or destroy the files in the prosecutors' office area, the jury reasonably could have inferred that he also intended to damage the building to achieve that objective.

c. Notwithstanding the defendant's contention that his tampering conviction could not stand because the state failed to prove that any materials in the prosecutors' office constituted "physical evidence" as defined by statute (§ 53a-146 (8)), this court was not persuaded by his assertion that, even though the text of the tampering statute ((Rev. to 2013) § 53a-155) does not contain the phrase "physical evidence," the legislature intended to incorporate its definition in § 53a-146 (8) as an element of § 53a-155 because "physical evidence" is included in the title of § 53a-155; despite the title of § 53a-155, the plain language of the text of § 53a-155 required the state to prove that the defendant, believing that an official proceeding was pending, altered, destroyed, concealed or removed any record, document or thing with the purpose of impairing its verity or availability in an official proceeding.

2. The defendant could not prevail on his claim that the trial court's improper exclusion of his statement to L constituted harmful error:

a. Although the trial court abused its discretion by excluding the statement, which the defendant contended was admissible as evidence of his then existing mental state pursuant to § 8-3 (4) of the Connecticut Code of Evidence, he was not deprived of his constitutional rights to present a defense, as he was able to present his defense that he was not the perpetrator as well as alibi evidence via the testimony of his brother, and the defendant challenged the state's evidence regarding the issue of identity; moreover, the state presented considerable evidence regarding the defendant's activities prior to, during and after the break-in to establish his identity as the perpetrator and his intent, and his motivation to disrupt the court proceedings remained, as his stated interest in pleading guilty to the prior felony charges may have been diminished upon the realization that the offered plea agreement involved incarceration.

b. The trial court's improper exclusion of L's testimony did not constitute harmful error, as the state introduced substantial evidence of the defendant's identity and actions with respect to the offenses with which he was charged, and the period of incarceration that would have resulted from his stated intention to plead guilty to the prior felony charges may have provided him with an incentive to commit the burglary, arson and tampering offenses such that a fair assurance existed that the improper exclusion of L's testimony did not substantially affect the jury's verdict.

Argued March 11—officially released August 31, 2021

Procedural History

Substitute information charging the defendant with the crimes of burglary in the third degree, attempt to commit tampering with physical evidence and attempt to commit arson in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, *Sheldon*, *Bright* and *Mihalakos*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render judgment of acquittal; thereafter, the state, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Affirmed.*

Vishal K. Garg, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. This appeal returns to us on remand from our Supreme Court. In *State* v. *Stephenson*, 187 Conn. App. 20, 201 A.3d 427 (2019), rev'd, 337 Conn. 643, A.3d (2020), the defendant, Joseph A. Stephenson, appealed from the judgment of conviction, rendered after a jury trial, 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),[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). The court

[1] All references to § 53a-155 are to the 2013 revision of that statute.

imposed a total effective sentence of twelve years of incarceration followed by eight years of special parole. On appeal, the defendant claimed that (1) the state presented insufficient evidence to support his conviction of those charges, and (2) the court improperly excluded evidence regarding his mental state prior to the commission of those offenses.

This court concluded that the state had failed to produce sufficient evidence regarding the defendant's intent to commit the crime of tampering with physical evidence, a requirement common to all the charged offenses. Id., 39. Accordingly, we reversed the defendant's conviction and remanded the case with direction to render a judgment of acquittal on all three charges. Id. As a result of this conclusion, we did not address the other claims raised by the defendant in his appeal. See id., 30 n.4, 39.

After granting the state's petition for certification to appeal, our Supreme Court reversed the judgment of this court. *State* v. *Stephenson*, supra, 337 Conn. 654. Specifically, it agreed with the state that this court improperly had "addressed an issue of evidentiary sufficiency sua sponte without calling for supplemental briefing as required by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 84 A.3d 840 (2014) (*Blumberg*)." *State* v. *Stephenson*, supra, 645–46. As a result of this conclusion, our Supreme Court remanded the case to this court "in order to address the claims raised by the defendant in his initial appeal. If, during that proceeding, the Appellate Court chooses to exercise its discretion to reach the sufficiency issue raised in its previous decision, it must do so in a manner consistent with this court's decision in *Blumberg*." Id., 654; see also *Stephenson* v. *Commissioner of Correction*, 203 Conn. App. 314, 317 n.2, 248 A.3d 34, cert. denied, 336 Conn. 944, 249 A.3d 737 (2021).

In accordance with the directive from our Supreme Court, we ordered the parties to file simultaneous supplemental briefs addressing whether the evidence was sufficient to prove the defendant's intent to tamper with physical evidence. Following the receipt of the parties' supplemental briefs, we heard additional oral argument.

With this recitation of the appellate history of the case in mind, we set forth the issues before us, as presented in the defendant's original and supplemental briefs. The defendant first claims that the state failed to present sufficient evidence to support his conviction. Specifically, he argues that the evidence was insufficient to prove that (1) he had intended to tamper with evidence, an element common to all three offenses charged by the state, (2) he had (a) committed the completed crime of tampering with evidence or (b) intended to destroy or damage a building, which are elements of the offense of attempt to commit arson in the second degree as charged in this case, and (3) he had tampered with items that constituted physical evidence for the purpose of § 53a-155 (a) (1). Second, the defendant claims that the court erred in excluding evidence regarding his mental state prior to the commission of these offenses. Specifically, he argues that he suffered harm as a result of the court's improper ruling, or, in the alternative, that he was deprived of his constitutional rights to present a defense and that the state failed to demonstrate that the court's ruling was harmless beyond a reasonable doubt.

As to the defendant's first claim, the state counters that the evidence adduced at trial was sufficient to support the defendant's conviction. With respect to his second claim, the state concedes that the court's evidentiary ruling constituted an abuse of discretion but asserts that it amounted to harmless error. We agree

with the state on both claims and, accordingly, affirm the judgment of conviction.[2]

In its decision, our Supreme Court set forth the follow relevant facts and procedural history. "A silent alarm at the [Norwalk] courthouse was triggered at around 11 p.m. on Sunday, March 3, 2013, when the defendant entered the state's attorney's office by breaking a window on the building's eastern side. Although the police were able to respond in about ninety seconds, the defendant successfully evaded capture by running out of a door on the building's southern side. Footage from surveillance cameras introduced by the state at trial show that the defendant was inside of the building for

[2] We comment briefly on the somewhat unique situation in which this panel of the Appellate Court has reached a conclusion contrary to that of the 2019 panel that initially heard this appeal. See *State* v. *Stephenson*, supra, 187 Conn. App. 20. We frequently have stated and consistently have adhered to the policy that "we cannot overrule the decision made by another panel of this court in the absence of en banc consideration." *State* v. *Freddy T.*, 200 Conn. App. 577, 589 n.14, 241 A.3d 173 (2020); see also *State* v. *Jackson*, 198 Conn. App. 489, 507 n.12, 233 A.3d 1154, cert. denied, 335 Conn. 957, 239 A.3d 318 (2020); *State* v. *White*, 127 Conn. App. 846, 858 n.11, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011).

The contrary result reached in this opinion from that of the 2019 panel is made possible as a result of the remand order from our Supreme Court. See, e.g., *State* v. *Siler*, 204 Conn. App. 171, 178–79, 253 A.3d 995 (2021) (our Supreme Court is ultimate arbiter of law in this state, and this court is bound by its decisions). Specifically, it reversed the judgment of the 2019 Appellate Court panel and directed us "to address the claims raised by the defendant in his initial appeal [and consider] the sufficiency issued raised in [our] previous decision [only after supplemental briefing]." *State* v. *Stephenson*, supra, 337 Conn. 654. As a result of this order, our Supreme Court effectively vacated the 2019 opinion from this court.

Having the benefit of the supplemental briefing of the parties, and guided by the discussion and analysis contained in our Supreme Court's opinion in *State* v. *Rhodes*, 335 Conn. 226, 238, 249 A.3d 683 (2020), regarding the " 'line between permissible inference and impermissible speculation,' " we respectfully have reached an outcome different from the one reached by the 2019 panel of this court, which had determined that the evidence was insufficient to support the jury's verdict. *State* v. *Stephenson*, supra, 187 Conn. App. 39. For the reasons set forth in part I of this opinion, we have determined that the jury's verdict should be upheld.

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 [of] the defendant on certain felony charges [pending 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 defendant'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 defendant warrant only a brief summary. The day after the break-in, the defendant 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 defendant drove a 2002 Land Rover Freelander with an aftermarket push bumper, a roof rack, and a broken taillight, 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 defendant 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 defendant 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*, supra, 337 Conn. 646–47.

We noted in our previous opinion that the state sought to prove that the defendant had committed burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree under the following closely intertwined theories of factual and legal liability. *State* v. *Stephenson*, supra, 187 Conn. App. 27–28. "*As to the charge of burglary in the third degree*, the state claimed that the defendant had entered or remained unlawfully in the courthouse, when it was closed to the public and he had no license or privilege to be there for any lawful purpose, *with the intent to commit the crime of tampering with physical evidence therein*. Although the state conceded that the defendant had not completed the crime of tampering with physical evidence while he was inside the courthouse, it nonetheless claimed that he had intended to commit that offense within the courthouse by engaging in conduct constituting an attempt to commit that offense therein. On that score, the state further argued that the defendant had broken into the courthouse through the window of the assistant state's attorney who was prosecuting him on two pending felony charges, entered the larger state's attorney's office and gone directly to the file cabinets where the state stored its case files, and in the short time he had there before the state police arrived in response to the silent alarm, begun to rummage through the state's case files in an effort to find and tamper with the contents

of his own case files. Claiming that the defendant was desperate to avoid his impending trial, the state argued that the defendant thereby attempted to tamper with his case file by altering, destroying, concealing or removing its contents, and thus to impair the verity or availability of such materials for use against him in his upcoming trial. Finally, *as to the charge of attempt to commit arson in the second degree*, the state claimed that the defendant had committed that offense by breaking into the Norwalk courthouse as aforesaid, while carrying a duffel bag containing six canisters of industrial strength kerosene, and thereby intentionally taking a substantial step in a course of conduct planned to culminate in the commission of arson in the second degree by starting a fire inside the courthouse, *with the intent to destroy or damage the courthouse building, for the purpose of concealing his planned crime of tampering with physical evidence*, as described previously." (Emphasis added.) Id., 28–29.

I

The defendant first claims that the state failed to present sufficient evidence to sustain his conviction of all three charges.[3] Specifically, he argues that the evidence was insufficient to prove that (1) he intended to tamper with evidence, an element common to all three offenses charged by the state, (2) he committed

[3] We consider the defendant's sufficiency claims first due to the nature of the remedy. "We begin with this issue because if the defendant prevails on the sufficiency claim, [he] is entitled to a directed judgment of acquittal rather than to a new trial. See *State* v. *Calabrese*, 279 Conn. 393, 401, 902 A.2d 1044 (2006); see also *State* v. *Smith*, 73 Conn. App. 173, 178, 807 A.2d 500, cert. denied, 262 Conn. 923, 812 A.2d 865 (2002); *State* v. *Theriault*, 38 Conn. App. 815, 823 n.7, 663 A.2d 423 ([a]lthough we find the defendant's [jury charge claim] dispositive, we must address the sufficiency of the evidence claim since the defendant would be entitled to an acquittal of the charge if [he] prevails on this claim), cert. denied, 235 Conn. 922, 666 A.2d 1188 (1995)." (Internal quotation marks omitted.) *State* v. *Badaracco*, 156 Conn. App. 650, 656 n.11, 114 A.3d 507 (2015).

the completed crime of tampering with evidence or intended to destroy or damage a building, which are elements of the offense of attempt to commit arson in the second degree as charged in this case, and (3) the documents or materials he tampered with qualified as physical evidence for the purpose of § 53a-155 (a). The state counters that the evidence presented at the trial, and the fair inferences that the jury reasonably could draw therefrom, provided a sufficient basis to support his conviction. We agree with the state.

We begin with the relevant principles and our standard of review. Our Supreme Court has noted that "[a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. . . . In particular, before [an appellate] court may overturn a jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at the conclusion the jury did. . . . Although 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020).

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction 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. . . .

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . 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. *Covington*, 335 Conn. 212, 219, 229 A.3d 1036 (2020); see also *State* v. *Adams*, 327 Conn. 297, 304–305, 173 A.3d 943 (2017).

We are mindful, however, that inferences cannot be based on conjecture, surmise or possibilities. *State* v. *Josephs*, 328 Conn. 21, 35, 176 A.3d 542 (2018); *State* v. *Rodriquez*, 200 Conn. 685, 687, 513 A.2d 71 (1986); *State* v. *Ramey*, 127 Conn. App. 560, 565, 14 A.3d 474, cert. denied, 301 Conn. 910, 19 A.3d 177 (2011). As our Supreme Court recently has stated: "The line between permissible inference and impermissible speculation is not always easy to discern. . . . [P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis, but it must suffice to produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the

link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . . We therefore also must bear in mind that jurors are not expected to lay aside matters of common knowledge or their own observations and experiences . . . . [C]ommon sense does not take flight when one enters a courtroom." (Citations omitted; internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 238;[4] see also *State* v. *Torres*, 242 Conn. 485, 501, 698 A.2d 898 (1997) (noting that no clear line of demarcation exists between permissible inference and impermissible speculation); *State* v. *Hall-George*, 203 Conn. App. 219, 226, 247 A.3d 659 (line between permissible inferences and impermissible speculation not always easy to discern), cert. denied, 336 Conn. 934, 248 A.3d 709 (2021). Guided by these principles, we address each of the defendant's arguments in turn.

A

The defendant first argues that the evidence was insufficient to prove that he intended to tamper with physical evidence, an element common to all three offenses charged by the state in this case. The state counters that, upon a complete consideration of the entirety of the evidence,[5] sufficient evidence existed to prove that the defendant possessed the requisite intent. We agree with the state.

We begin by setting forth the relevant statutory language. See *State* v. *Knox*, 201 Conn. App. 457, 468, 242

[4] In his concurring and dissenting opinion in *Rhodes*, Justice Ecker, joined by Justices Palmer and McDonald, observed: "No objective formula or uniform template tells us how to distinguish reasonable inference from impermissible speculation." *State* v. *Rhodes*, supra, 335 Conn. 266 (*Ecker*, *J.*, concurring in part and dissenting in part).

[5] See *State* v. *Petersen*, 196 Conn. App. 646, 656–57, 230 A.3d 696 (established case law directs appellate courts to review claims of evidentiary insufficiency in light of *all* evidence adduced at trial), cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

A.3d 1039 (2020), cert. denied, 336 Conn. 905, 244 A.3d 146 (2021), and cert. denied, 336 Conn. 906, 243 A.3d 1180 (2021). Section 53a-155 (a)[6] provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding . . . ." See also *State* v. *Jordan*, 314 Conn. 354, 376–77, 102 A.3d 1 (2014).

The claim advanced by the defendant focuses on the element of his intent[7] as it relates to the offense of tampering with physical evidence. "As we have observed on multiple occasions, [t]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 320, 253 A.3d 548 (2020); *State* v. *Francis*, 195 Conn. App. 113, 124, 223 A.3d 404 (2019) (same), cert. denied, 335 Conn. 912, 228 A.3d 662 (2020). Intent may be proven by the

[6] "Section 53a-155 was amended in 2015 to add that one may be guilty of tampering during a criminal investigation or when a criminal proceeding is about to commence." *State* v. *Stephenson*, supra, 187 Conn. App. 33 n.9; see generally *State* v. *Lamantia*, 336 Conn. 747, 779–84, 250 A.3d 648 (2020) (*D'Auria*, *J.*, dissenting) (summarizing history and circumstances of 2015 amendment to § 53a-155). This amendment does not impact our analysis in the present case.

[7] General Statutes § 53a-3 (11) provides: "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." See also *State* v. *Reed*, 176 Conn. App. 537, 549, 169 A.3d 326, cert. denied, 327 Conn. 974, 174 A.3d 194 (2017); *State* v. *Raynor*, 175 Conn. App. 409, 431–32, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

defendant's conduct before, during and after the commission of the crime. *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015); *State* v. *Raynor*, 175 Conn. App. 409, 432, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019). "Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude . . . that is probative of the defendant's mental state." (Internal quotation marks omitted.) *State* v. *Bonilla*, supra, 766.

In his supplemental brief, the defendant focuses on the dearth of evidence regarding the prosecutors' files on the floor; specifically, how these materials ended up in disarray on the floor and the absence of any direct connection to the defendant. This myopic view, however, ignores the other evidence produced by the state, and the resulting permissible inferences, that provided a sufficient basis for the jury to find that the defendant intended to tamper with physical evidence.

In the hour prior to the 11 p.m. Sunday night break-in, surveillance cameras recorded the defendant slowly driving an SUV registered to his stepfather past the front of the courthouse and in and out of the courthouse parking lot. *State* v. *Stephenson*, supra, 187 Conn. App. 25. Additionally, these cameras captured the defendant, dressed in all black and carrying a dark colored bag, approach the side of the courthouse. Id. He entered the prosecutors' office in the closed courthouse by breaking a window. *State* v. *Stephenson*, supra, 337 Conn. 646.

The broken window provided ingress to an office used by the prosecutor who was scheduled to begin jury selection in a case involving the pending felony charges against the defendant. Id. The defendant's case was the only one scheduled for jury selection that week. Various files, including those labeled "TUL" and "SUM," were found in disarray. Id. The police discovered a

bag containing six bottles of industrial kerosene,[8] a flammable liquid, in the prosecutors' area with numerous combustibles, and testing revealed the defendant's genetic profile as a contributor to the DNA mixture recovered from the bag and its contents. Id., 646–47.

Following the break-in, the defendant called the office of the public defender and inquired whether the courthouse was open and whether he was required to appear in court that day. Id., 647. He subsequently made various incriminating statements. The defendant asked his brother to "get rid of 'bottles of things' for a heater, speculated about how the police located the [SUV], and attempted to arrange an alibi." Id.

The evidence presented at the defendant's trial detailing his actions before, during and after the break-in, and the reasonable inferences drawn therefrom, provided a sufficient basis for the jury reasonably to conclude that the defendant had entered the courthouse with the intent to alter, destroy, conceal, or remove any record, document or thing with the purpose of impairing its verity or availability for his imminent trial on the pending felony charges. See, e.g., *State* v. *Soyini*, 180 Conn. App. 205, 222, 183 A.3d 42, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018). Specifically, the jury reasonably could infer that the defendant planned to engage in criminal conduct on the basis of the manner in which he conducted reconnaissance of the closed courthouse late at night when it was likely that no one would be present. The jury also reasonably could infer, on the basis of his chosen point of entry, that the defendant wanted to gain access to the office of the prosecutor who was handling his pending felony charges and to his specific file. If the defendant's sole intent was to

[8] Jack Hubball, a chemist in the state forensic laboratory, testified that industrial kerosene generates more BTUs when burned, has a stronger odor and results in more smoke as compared to standard kerosene.

damage the courthouse, he could have chosen to make entry into the courthouse at any number of other locations. Thus, the jury reasonably could infer that there was significance to the point of entry chosen by the defendant.

Most importantly, the evidence and testimony regarding the scattered files on the floor of the prosecutors' office provided a basis from which the jury could make a series of additional reasonable inferences. First, the jury reasonably could infer, from common sense, logic, and the testimony of Suzanne Vieux, the supervisory assistant state's attorney at the courthouse, that the staff of the prosecutors' office would not have left the files strewn on the floor in the haphazard manner that is depicted in state's exhibit 27. Indeed, other photographs of the prosecutors' office admitted into evidence depict an orderly, well maintained, and professional office that is consistent with the requisite organization and careful recordkeeping necessary to prosecute a large volume of cases.

The inference that the staff would not have left these files in such a manner also would certainly permit a successive, reasonable inference that it was the defendant who had been searching through these files at the time he realized that there was a police presence at the courthouse. The fact that two of those files were associated with other defendants who had last names alphabetically close to the defendant's last name buttresses the inference that it was the defendant who had been going through these files and, more importantly, searching for his own case file. Indeed, the jury reasonably could infer that the defendant was searching for the file related to his case because he believed, even if mistakenly so, that it likely contained evidence that would be introduced against him at his criminal trial

and that, if he could tamper with that evidence, the state would be unable to secure a conviction against him.[9]

The fact that the defendant brought six bottles of industrial strength kerosene into an office filled with combustible materials also provided a reasonable basis for the jury to infer that the defendant had intended to start a fire that would consume the file associated with his case and any physical evidence contained therein. Indeed, the jury reasonably could infer that the defendant knew that he could not simply steal or remove just his file from the office because that would make it easier for the police to determine who had broken into the courthouse. Instead, the jury reasonably could have inferred that the defendant understood that to cover-up his destruction of the evidence in his case, he also would have needed to destroy other files as well.

The mere fact that such a fire might have also caused perhaps greater damage to the courthouse also does not in any way negate the jury's right reasonably to infer that he intended to tamper with physical evidence associated with his case. Indeed, from this evidence, there simply is no reason why the jury would be prohibited from determining that the defendant had the dual intent to tamper with the physical evidence in his case as well as damage the courthouse itself and thereby delay his impending court date.

These reasonable inferences are further supported by the defendant's conduct following his break-in at the courthouse and flight therefrom, including his call to the public defender's office inquiring whether the courthouse would be open on the day after the break-in and incriminating statements he made to his family. See *State* v. *Rhodes*, supra, 335 Conn. 244 (in viewing

[9] The fact that the defendant may not have been successful in locating his own file does not in any way vitiate the right of the jury to draw the inference that he was looking for his own file.

evidence that could yield contrary inferences, jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those consistent with innocence). The fact that this consciousness of guilt evidence could have been used by the jury to infer that the defendant had an intent to commit arson in the courthouse more generally does not mean that the jury was prohibited from using the same evidence to support an inference, in conjunction with all of the other evidence and inferences reasonably drawn therefrom, that the defendant had the necessary intent to tamper with the physical evidence in his case. See *State* v. *Richards*, 196 Conn. App. 387, 403, 229 A.3d 1157 (2020) (consciousness of guilt evidence may be used by jury to draw inference of intent to commit criminal offense), aff'd, Conn. , A.3d (2021); see generally *State* v. *Otto*, 305 Conn. 51, 73, 43 A.3d 629 (2012) (Supreme Court rejected defendant's argument that consciousness of guilt evidence could be used only to prove guilty act and not level of intent that attended such act, and noted that consciousness of guilt evidence is part of evidence jury can use to draw inference of intent to kill); *State* v. *Sivri*, 231 Conn. 115, 130, 646 A.2d 169 (1994) (consciousness of guilt evidence is part of evidence jury can use to draw inference of intent to kill); *State* v. *Grant*, 149 Conn. App. 41, 50, 87 A.3d 1150 (consciousness of guilt evidence is part of evidence from which jury may draw inference of intent to kill), cert. denied, 312 Conn. 907, 93 A.3d 158 (2014); *State* v. *Santos*, 41 Conn. App. 361, 371, 675 A.2d 930 (intent to kill may be inferred from defendant's failure to seek medical assistance for victim and consciousness of guilt evidence), cert. denied, 237 Conn. 932, 677 A.2d 1374 (1996).

We conclude, on the basis of this chain of evidence and the permissible inferences drawn therefrom, that

the jury reasonably could have found that the defendant, who possessed a strong motive, broke into the prosecutors' area of the courthouse with the intent to tamper with evidence. See *State* v. *Soyini*, supra, 180 Conn. App. 222; see generally *State* v. *Bonilla*, supra, 317 Conn. 768 (while not essential for state to prove motive for crime, state's case strengthened when it can show adequate motive).

In reaching this conclusion, we are mindful that "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.) *State* v. *Hall-George*, supra, 203 Conn. App. 226. Further, we emphasize that, in reviewing a claim of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdict and ask whether there is a reasonable view of the evidence that supports the verdict. *State* v. *Luciano*, 204 Conn. App. 388, 396–98, 253 A.3d 1005, cert. denied, 337 Conn. 903, 252 A.3d 362 (2021); see also *State* v. *Rhodes*, supra, 335 Conn. 233 (before reviewing court may overturn jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at conclusion that jury did); *State* v. *Torres*, supra, 242 Conn. 501–502 (reviewing court must uphold jury's verdict when it is sufficiently supported by circumstantial evidence even though another jury rationally could have reached different conclusion). Additionally, "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* . . . .'' (Emphasis added; internal quotation marks omitted.) *State* v. *Capasso*, 203 Conn. App. 333, 338, 248 A.3d 58, cert. denied, 336 Conn. 939, 249 A.3d 352 (2021); see also *State* v. *Sivri*, supra, 231 Conn. 130 (proof beyond reasonable doubt properly may be based on chain of inferences, each link of which may depend for its validity on validity of prior link in chain); *State* v. *James*, 141 Conn. App. 124, 132, 60 A.3d 1011 (same), cert. denied, 308 Conn. 932, 64 A.3d 331 (2013).

In the present case, the totality of the evidence presented by the state regarding the defendant's actions, and the permissible inferences drawn therefrom, support the jury's finding that the defendant intended to tamper with evidence. We therefore reject the defendant's claim that the evidence was insufficient to prove his intent.

B

The defendant next argues that the evidence was insufficient to prove that he committed the crime of attempt to commit arson in the second degree. Specifically, he contends that the state failed to prove that he had committed the completed crime of tampering with physical evidence, which, due to the information, was a necessary element of the offense of attempt to commit arson in the second degree. He also claims that the state failed to prove that he had intended to destroy or damage a building, as required by § 53a-112 (a) (1) (B). We are not persuaded.

We begin our analysis with the language of the operative information. Count three of the information provides in relevant part: ''And said [s]tate's [a]ttorney further . . . alleges that in the [c]ity of Norwalk on or about the [third] day of March, 2013, the said defendant

. . . with intent to destroy and damage a building, did an act, which, under the circumstances as he believed them to be, was an act which constituted a substantial step in a course of conduct planned to culminate in starting a fire, and such fire was intended to conceal the crime of tampering with physical evidence in violation of [§§] 53a-112 (a) (1) (B), 53a-49 (a) (2), and 53a-155 (a) (1)."

Next, we turn to the relevant statutory text. Section 53a-112 (a) provides in relevant part: "A person is guilty of arson in the second degree when, with intent to destroy or damage a building, as defined in section 53a-100, (1) he starts a fire or causes an explosion and . . . (B) such fire or explosion was intended to conceal some other criminal act . . . ." See also *State* v. *Rivera*, 268 Conn. 351, 353 n.4, 844 A.2d 191 (2004).

Section 53a-49 (a) provides in relevant part that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does . . . anything which, under the circumstances as he believes them to be, is an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Our inquiry therefore into whether a "substantial step" has occurred focuses not on what remains to be done but, rather, on what the defendant already has done. *State* v. *Daniel B.*, 331 Conn. 1, 13, 201 A.3d 989 (2019).

Thus, in order to convict the defendant of attempt to commit arson in the second degree in violation of §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B), the state was required to prove, beyond a reasonable doubt, that the defendant acted with the specific intent to commit arson in the second degree, which, in turn, includes the intent to start a fire to conceal the crime of tampering with physical evidence, and that the defendant took

a substantial step in a course of conduct planned to culminate in his commission of the crime.[10] See *State* v. *Servello*, 59 Conn. App. 362, 370, 757 A.2d 36, cert. denied, 254 Conn. 940, 761 A.2d 764 (2000). With this in mind, we consider each of the defendant's arguments in turn.

1

The defendant first contends that the state failed to present any evidence that any "records, documents, or items had been altered, destroyed, concealed, or removed" and, therefore, that there was insufficient evidence for the jury to find that he had tampered with physical evidence, which was the "other criminal act" that he had intended to conceal, as charged in the information. The state counters that proof of the completed crime of tampering with physical evidence was not a requirement for conviction; rather, its burden was satisfied upon proof of the defendant's intent to tamper with physical evidence and that his actions constituted a substantial step in a course of conduct planned to culminate in his commission of the crime. We agree with the state.

[10] General Statutes § 53a-49 (b) provides in relevant part: "Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law . . . (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances . . . ." See also *State* v. *Osbourne*, 138 Conn. App. 518, 527–28, 53 A.3d 284, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012).

"An attempt of a crime is accomplished when a person intentionally does . . . anything which, under the circumstances as he believes them to be, is an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. . . . The defendant also must have possessed the specific intent to commit the underlying crime. *An attempt is an inchoate crime, meaning that it is unfinished or begun with the proper intent but not finished.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Jones*, 96 Conn. App. 634, 641, 902 A.2d 17, cert. denied, 280 Conn. 919, 908 A.2d 544 (2006); see also *State* v. *Carey*, 13 Conn. App. 69, 74–75, 534 A.2d 1234 (1987) (attempt under § 53a-49 is act or omission done with intent to commit some other crime, and underlying rationale is that, although defendant may have failed in his or her purpose, conduct remains criminally culpable); see generally I. Robbins, "Double Inchoate Crimes," 26 Harv. J. on Legis. 1, 3 (1989) ("The inchoate crimes of attempt, conspiracy, and solicitation are well established in the American legal system. 'Inchoate' offenses allow punishment of an action even though [the actor] has not consummated the crime that is the object of his efforts." (Footnote omitted.)).

"[T]he standard for the substantial step element of criminal attempt focuse[s] on what the actor has already done and not what remains to be done. . . . The substantial step must be at least the start of a line of conduct which will lead naturally to the commission of a crime. . . . [T]he ultimate measure of the sufficiency of the defendant's conduct to constitute a substantial step in a course of conduct planned to culminate in the commission of [a crime] is not, to reiterate, how close in time or place or final execution his proven conduct came to the consummation of that crime, but whether such conduct, if at least the start of a line of conduct leading naturally to the commission of the crime,

strongly corroborated his alleged criminal purpose." (Internal quotation marks omitted.) *State* v. *Juarez*, 179 Conn. App. 588, 600, 180 A.3d 1015 (2018), cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019); see also *State* v. *Carter*, 317 Conn. 845, 856, 120 A.3d 1229 (2015). Additionally, our Supreme Court has reasoned that, "[w]hen the legislature codified the crime of attempt and incorporated the substantial step as one of the means by which a defendant could be held liable, it adopted the substantial step provision from the Model Penal Code. . . . The Model Penal Code's substantial step provision did not require a last proximate act or one of its various analogues in order to permit the apprehension of dangerous persons at an earlier stage than . . . other approaches without immunizing them from attempt liability. . . . The drafters of the Model Penal Code explained that just because further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial." (Citations omitted; internal quotation marks omitted.) *State* v. *Daniel B.*, supra, 331 Conn. 15–16.

Our analysis is informed by *State* v. *Servello*, supra, 59 Conn. App. 364–65. There, the state charged the incarcerated defendant with attempt to commit arson in the second degree by hiring another individual to start a fire. Id., 365. The defendant had attempted to hire an undercover state police trooper, posing as a Mafia associate, to set fire to a courthouse and to the house and car of a prosecutor. Id. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to establish that his conduct had constituted a substantial step toward hiring the undercover state trooper. Id., 371. In rejecting this claim, we noted that the pertinent question was whether the defendant had committed a substantial step toward hiring the undercover trooper to commit an arson, and not whether

that act had been completed. Id., 372. "Any other interpretation would impose a requirement of a more stringent standard of proof for attempt than is provided by § 53a-49." Id., 375.

Similarly, in the present case, the state was not required to prove the completed crime of tampering with physical evidence for purposes of convicting the defendant of attempt to commit arson in the second degree in violation of §§ 53a-49 and 53a-112 (a) (1) (B). We iterate that the state's burden was to prove, beyond a reasonable doubt, that the defendant had intended to start a fire in the courthouse to conceal the crime of tampering with physical evidence and that he had taken a substantial step in a course of conduct planned to culminate in his commission of the crime. We conclude, therefore, that this sufficiency argument raised by the defendant must fail.

2

The defendant next argues that the evidence was insufficient to prove that he intended to destroy or damage a building. Specifically, he claims that the state's theory of the case was that he intended to *damage or destroy some of the contents of the building*, namely, the evidence contained in the prosecutors' area of the courthouse, but that the state failed to show that he intended to *damage or destroy the structural components of the building itself*. The state counters that, "one intends the natural consequences of his/her actions, and, therefore, the defendant's intent to damage or destroy the contents of the building necessarily supports the inference that he also intended to damage or destroy the building itself." We agree with the state.

The state presented evidence that the defendant entered the courthouse with six bottles of industrial strength kerosene. The jury heard testimony from the state's expert witness, Jack Hubball, that kerosene is

a flammable liquid that could be used as an accelerant to start a fire.[11] Hubball further testified that if kerosene were poured on combustibles, such as papers, rags, cloth, curtains, carpeting, chairs, or the materials on chairs, both the kerosene and the combustibles will burn and propagate the fire.

The specific intent to damage or destroy a building[12] is an essential element of the crime of arson in the second degree. *State* v. *Chasse*, 51 Conn. App. 345, 369, 721 A.2d 1212 (1998), cert. denied, 247 Conn. 960, 723 A.2d 816 (1999). "[I]t is well established that the question of intent is purely a question of fact. . . . The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually proven by circumstantial evidence. . . . Intent may be and usually is inferred from conduct. . . . [W]hether such an inference should be drawn is properly a question for the jury to decide." (Internal quotation marks omitted.) *State* v. *Servello*, supra, 59 Conn. App. 369.

The jury may infer that a defendant intended the natural consequences of his actions. *State* v. *McRae*, 118 Conn. App. 315, 320, 983 A.2d 286 (2009); see also *State* v. *Daniel G.*, 147 Conn. App. 523, 538, 84 A.3d 9, cert. denied, 311 Conn. 931, 87 A.3d 579 (2014). Here, the defendant entered the courthouse while carrying

[11] See footnote 8 of this opinion.

[12] General Statutes § 53a-100 (a) provides in relevant part: "(1) 'Building' in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy. Where a building consists of separate units, such as, but not limited to separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to being a part of such building, a separate building . . . ." See also *State* v. *Domian*, 35 Conn. App. 714, 724–25, 646 A.2d 940 (1994), aff'd, 235 Conn. 679, 688 A.2d 1333 (1996).

six bottles of industrial strength kerosene, a chemical substance that generates more heat and smoke than standard kerosene. His entry point was where the prosecutors' offices and their files were located. The jury reasonably could find that, by bringing this flammable liquid into an area packed with files and other combustibles, the defendant possessed the requisite intent to damage or destroy the building as a natural consequence of his actions had he completed the act of starting a fire in that area of the courthouse. Additionally, we note that, even if the defendant's primary intent was to damage or destroy the contents of the building, i.e., the files contained in the prosecutors' office area, the jury reasonably could have inferred that he also intended to damage the building to achieve that objective. See, e.g., *State* v. *Ramey*, supra, 127 Conn. App. 568 (although suicide may have been defendant's primary goal, jury still reasonably could infer that he intended to damage building as means to that goal). For these reasons, we conclude that the defendant's sufficiency argument regarding the charge of attempt to commit arson in the second degree fails.

C

The defendant finally argues that the evidence was insufficient to prove that the documents or materials he had tampered with qualified as physical evidence. Specifically, he claims that the state failed to prove that any materials in the prosecutors' case files constituted "physical evidence" as defined by General Statutes § 53a-146 (8). The state responds that the text of § 53a-155 does not incorporate the definition of physical evidence set forth in § 53a-146 (8). We conclude that the plain language of § 53a-155 prohibits the alteration, destruction, concealment or removal of *any record, document or thing* with the purpose of impairing its verity or availability in an official proceeding. Accordingly, we reject the defendant's argument.

This specific sufficiency argument challenges the interpretation of the text of § 53a-155. "When . . . the claim of insufficient evidence turns on the appropriate interpretation of a statute . . . our review is plenary. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look 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 . . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Webster*, 308 Conn. 43, 51–52, 60 A.3d 259 (2013); see also *State* v. *Sabato*, 152 Conn. App. 590, 595–96, 98 A.3d 910 (2014), aff'd, 321 Conn. 729, 138 A.3d 895 (2016); see generally *State* v. *Jackson*, 39 Conn. 229, 230 (1872) ("[i]t is generally sufficient to describe a statutory [offense] in the words of the statute").

We begin our analysis with the title and text of § 53a-155. Specifically, that statute provides in relevant part:

"Tampering with or fabricating *physical evidence*: Class D felony. (a) A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) *Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding* . . . ." (Emphasis added.) General Statutes (Rev. to 2013) § 53a-155 (a). Next, we consider the statutory definition of the term "physical evidence." Section 53a-146 (8) provides: " 'Physical evidence' means any article, object, document, record or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding."

Despite the absence of the phrase "physical evidence" in the text of § 53a-155 identifying it as an element of that crime, the defendant contends that its inclusion in that statute's title signals an incorporation of the § 53a-146 (8) definition into § 53a-155. He further contends that, in the absence of any evidence as to what the files from the prosecutors' office actually contained, the state failed to meet its burden as to this element of § 53a-155. We are not persuaded.

Our Supreme Court has stated that, although a statutory title may provide some evidence as to its meaning, it cannot trump an interpretation that is based on the statutory text. *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 75, 52 A.3d 636 (2012); see also *State* v. *Tabone*, 279 Conn. 527, 539–40 n.14, 902 A.2d 1058 (2006); *State* v. *Castillo*, 165 Conn. App. 703, 726 n.7, 140 A.3d 301 (2016), aff'd, 329 Conn. 311, 186 A.3d 672 (2018); 1A N. Singer & J. Singer, Sutherland Statutes and Statutory Construction (7th Ed. 2009) § 18:7, pp. 77–78 (title of statute neither controls nor limits plain meaning of statutory text and, where text is clear and unambiguous, title is not considered to determine meaning of statute). Additionally, in *In re*

Jacklyn H., 162 Conn. App. 811, 826 n.14, 131 A.3d 784 (2016), this court determined that, although the title of General Statutes § 52-146s, a statute setting forth various definitions, contained the phrase "confidential information," the text of the statute used the word "privileged," and clearly intended that a privileged status would apply to communications and records between a professional counselor and a person consulting such a counselor.

On the basis of the plain language of the text of § 53a-155, we conclude that the state was required to prove beyond a reasonable doubt that the defendant, believing that an official proceeding was pending, altered, destroyed, concealed or removed *any record, document or thing*, with the purpose of impairing its verity or availability in an official proceeding. In other words, despite the title of § 53a-155, we are not persuaded that our legislature intended to incorporate the definition of "physical evidence" contained in § 53a-146 (8) as an element of § 53a-155. The defendant's argument, therefore, must fail.

II

The defendant next claims that the court improperly excluded evidence regarding his mental state prior to the commission of these offenses. Specifically, he argues that the court erred in sustaining the state's objection to the testimony of Attorney James LaMontagne, who represented the defendant with respect to the pending felony charges. LaMontagne would have testified that, prior to the break-in at the courthouse, the defendant had stated that he was going to plead guilty to the pending felony charges. The defendant contends that the court abused its discretion by sustaining the state's hearsay objection and that this error was harmful. The state concedes that the court improperly excluded this testimony but maintains that any error was harmless. We agree with the state.

The following additional facts are necessary for our discussion. Outside the presence of the jury, LaMontagne stated during the defendant's offer of proof that he had represented the defendant with respect to the pending felony charges that had been brought in 2012. The defendant pleaded guilty to these charges on Tuesday, March 5, 2013, two days after the break-in at the courthouse. LaMontagne explained that he had a lengthy discussion with the defendant on Friday, March 1, 2013, prior to the break-in. During that conversation, LaMontagne came to believe that the trial on the pending felony charges would not go forward because a plea bargain had been reached.

Defense counsel subsequently argued that he had proffered the testimony of LaMontagne "to establish at least a defense to the motive. [Defense counsel] had asked [LaMontagne] . . . whether or not he anticipated going to trial the following week based on his conversations with [the defendant] on the Friday before the incident, and he said, no, and that's because [the defendant] had told [LaMontagne] he was going to plead guilty." Defense counsel acknowledged that what the defendant had said to LaMontagne on March 1, 2013, constituted hearsay but claimed it was admissible, under, inter alia, the "then existing mental—mental state of the declarant at the time; that is, he did not have a future intention to go to trial, and, therefore, have an intention to get out [of] it somehow. He was going to accept responsibility. He was going to plead guilty . . . ." Defense counsel further claimed that the inability to call LaMontagne as a witness impacted the defendant's constitutional right to present a defense. The state argued that the defendant's statements to LaMontagne regarding his intention to plead guilty were inadmissible hearsay and not relevant.

After hearing further argument, the court agreed with the state that LaMontagne's proffered testimony constituted inadmissible evidence. The court further described

the statements as a means "of the defendant testifying without taking the witness stand."

On appeal, the defendant claims that the court improperly excluded the evidence of the defendant's then existing mental state. He acknowledges that this evidence constituted hearsay but contends that it was admissible pursuant to the "state of mind exception" codified in § 8-3 (4) of the Connecticut Code of Evidence.[13]

The defendant argues that he was harmed by this improper evidentiary ruling because the exclusion of LaMontagne's testimony substantially affected the jury's verdict. In the alternative, the defendant contends that the improper exclusion of this evidence violated his state and federal constitutional rights to present a defense, and that the state cannot demonstrate that the court's improper ruling was harmless beyond a reasonable doubt.

In its appellate brief, the state agrees that the court abused its discretion in excluding LaMontagne's testimony from evidence. The state claims, however, that the exclusion of this evidence did not deprive the defendant of his constitutional rights to present a defense. Finally, the state maintains that the defendant failed to establish harm as a result of the court's improper evidentiary ruling. We agree with state.

A

We first consider whether the court's improper evidentiary ruling violated the defendant's state and federal constitutional rights to present a defense. We consider this first because the resolution of that question

[13] Section 8-3 (4) of the Connecticut Code of Evidence provides: "Statement of then Existing Mental or Emotional Condition. A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed." See, e.g., *State* v. *Perkins*, 271 Conn. 218, 256 n.36, 856 A.2d

dictates the appropriate harmless error test that we must apply. As our Supreme Court has stated: "Our standard of review of an evidentiary ruling is dependent on whether the claim is of constitutional magnitude. If the claim is of constitutional magnitude, the state has the burden of proving [that] the constitutional error was harmless beyond a reasonable doubt. Otherwise, in order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted; internal quotation marks omitted.) *State* v. *Swinton*, 268 Conn. 781, 797–98, 847 A.2d 921 (2004).

Specifically, the defendant contends that his rights to present a defense pursuant to the fifth, sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution,[14] were violated by the court's ruling, which, he claims, excluded "the most compelling evidence available to [him, which] was crucial to his defense." The state counters that this evidence was neither central nor crucial to his defense and, therefore, that the impropriety of the court's ruling did not rise to the level of a constitutional violation.

Our Supreme Court has recognized that the federal constitution requires that a criminal defendant be

917 (2004); *State* v. *Mekoshvili*, 195 Conn. App. 154, 160–61, 223 A.3d 834, cert. granted, 334 Conn. 923, 223 A.3d 60 (2020).

[14] The defendant has not provided an independent analysis of his state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), and, therefore, we consider that claim abandoned and unreviewable. See, e.g., *State* v. *Rivera*, 335 Conn. 720, 725 n.2, 240 A.3d 1039 (2020); see also *State* v. *Wood*, 159 Conn. App. 424, 431 n.4, 123 A.3d 111 (2015) ("Because the defendant has not briefed his claims separately under the Connecticut constitution, we limit our review to the United States constitution. We have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue." (Internal quotation marks omitted.)).

afforded a meaningful opportunity to present a complete defense. *State* v. *Andrews*, 313 Conn. 266, 275, 96 A.3d 1199 (2014); *State* v. *Cerreta*, 260 Conn. 251, 260, 796 A.2d 1176 (2002). "In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 817, 135 A.3d 1 (2016); see also *State* v. *Holley*, 327 Conn. 576, 593–94, 175 A.3d 514 (2018); *State* v. *Cerreta*, supra, 260–61.

Additionally, our Supreme Court has stated that "[w]hether a trial court's . . . restriction of a defendant's or defense [witness'] testimony in a criminal trial deprives a defendant of his [constitutional] right to present a defense is a question that must be resolved on a [case-by-case] basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Internal quotation marks omitted.) *State* v. *Andrews*, supra, 313 Conn. 276; *State* v. *Sandoval*, 263 Conn. 524, 546, 821 A.2d 247 (2003).

The defendant claims that his discussion with LaMontagne regarding his intention to plead guilty constituted "the most compelling evidence available to [him] and was crucial to his defense." In support of his claim, he relies on *State* v. *Cerreta*, supra, 260 Conn. 251. In that case, the defendant claimed, inter alia, that the trial court improperly had excluded certain hair and fingerprint evidence obtained at the crime scene that forensic testing subsequently revealed could not have come from

the defendant. Id., 257. The trial court granted the state's motion in limine to preclude this evidence on the basis of relevancy. Id., 259.

Our Supreme Court first determined that the trial court had abused its discretion in granting the state's motion in limine on the ground that this evidence was irrelevant. Id., 262–63. Next, it concluded that the improper exclusion of this evidence violated the defendant's constitutional rights to present a defense. Id., 264. "The excluded evidence not only was relevant to the primary issue at trial, namely, the identity of the perpetrator, it was central to the defendant's claim of innocence. The defendant's claim was, in essence, that [two of] the state's key witnesses who had provided the only evidence connecting the defendant to the crime, had concocted their statements to the police and their testimony out of animus toward the defendant and a desire to collect the substantial reward being offered in the case. The excluded evidence was, in essence, the most compelling evidence available to the defendant and was crucial to his defense. We conclude that the evidence was of such importance to the defendant's ability to refute the [two witnesses'] testimony that its exclusion violated the defendant's right under the sixth and fourteenth amendments to defend against the state's accusations." (Footnote omitted.) Id.

This appeal is distinguishable from the circumstances found in *State* v. *Cerreta*, supra, 260 Conn. 251. In *Cerreta*, the crimes at issue had remained unsolved for nine years. Id., 255. The two witnesses who eventually implicated the defendant in the crimes were sisters; one sister had been married to the defendant twice, and the other had engaged in an affair with the defendant during the second marriage. Id., 255. The state's case "rested entirely upon the testimony" of these two witnesses. Id., 265.

The excluded evidence in the present case lacks the significance or importance of that in *State* v. *Cerreta*,

supra, 260 Conn. 251. Here, the state presented considerable evidence regarding the defendant's activities just prior to, during, and after the break-in to establish both his identity as the perpetrator and his intent.[15] Additionally the defendant faced a period of incarceration. His stated interest in pleading guilty may have been diminished upon the realization that the offered plea agreement involved incarceration. Thus, the defendant's motivation for disrupting or delaying court proceedings remained, despite the prospect of this agreement. Finally, we note that the defendant was able to present his defense that he was not the perpetrator despite the court's ruling regarding his statements to LaMontagne. Specifically, he presented alibi evidence via the testimony of his brother and challenged the various aspects of the state's evidence regarding the issue of identity. For these reasons, we disagree with the defendant's assertion that he was deprived of his constitutional right to present a defense as a result of the court's improper evidentiary ruling.

B

As a result of our conclusion that the trial court's evidentiary error did not implicate the defendant's constitutional rights, we next address the defendant's alternative claim that he has satisfied his burden to demonstrate that the court's improper evidentiary ruling was

[15] We iterate that, "[w]hile motive is not an element of a crime that the state has the burden of proving, the presence of evidence of motive may strengthen the state's case. . . . It is conceivable that the evidence adduced in a particular case would be so inconclusive that without evidence of motive a judgment of acquittal might be required because the jury could not rationally find that the state had proved the elements of the charged offense beyond a reasonable doubt. In such a case, a judgment of acquittal might be required not because motive was an element of the offense, but because evidence of motive would strengthen the state's otherwise insufficient evidence of an element of the offense, *such as identification or intent*." (Citation omitted; emphasis added.) *State* v. *Pinnock*, 220 Conn. 765, 773, 601 A.2d 521 (1992); see also *State* v. *Richards*, supra, 196 Conn. App. 402 (intent to kill may be inferred from evidence that defendant had motive to kill).

harmful error. Specifically, he contends that the exclusion of his statement to LaMontagne substantially swayed the jury's verdict, as this evidence was important and was not cumulative of other evidence. The defendant argues that there was no other evidence of his intent prior to the break-in and the state's case was not strong. The state responds that this evidence did not establish a lack of intent, identity or motive with respect to its prosecution of the defendant. The state argues that this evidentiary error by the court did not substantially affect the verdict. We agree with the state.

"The law governing harmless error for nonconstitutional evidentiary claims is well settled. When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the [defendant's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019); *State* v. *Favoccia*, 306 Conn. 770, 808–809, 51 A.3d 1002 (2012).

The defendant correctly points out that the court excluded the only evidence regarding his intention to plead guilty to the pending felony charges prior to the break-in. We disagree, however, with his overestimation of the strength and significance of this evidence. His intention on Friday, March 1, 2013, to enter a guilty plea to the pending felony charges may not have eliminated his intent to commit the offenses of burglary in the third degree, attempt to tamper with physical evidence and attempt to commit arson in the second degree during the late night hours of March 3, 2013. As we noted, the realization of the effect of such a plea, i.e., a period of incarceration, may have provided the defendant with an incentive to commit these offenses. Further, as we repeatedly have pointed out in this opinion, the state introduced substantial evidence of the defendant's identity and actions with respect to the charged offenses. For these reasons, we conclude that a fair assurance exists that the improper exclusion of LaMontagne's testimony did not substantially affect the jury's verdict.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HERIBERTO B.*
(AC 43966)

Alvord, Prescott and Flynn, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of two counts of the crime of risk of injury to a child, appealed to this court, claiming that the trial court improperly dismissed for lack of subject matter

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

jurisdiction the first of two motions he had filed to correct an illegal sentence and violated his right to a jury trial. The defendant asserted in his first motion to correct that his sentence on both risk of injury counts violated the fifth amendment's prohibition of double jeopardy. Concurrently with that motion, he filed a motion for the appointment of counsel to assist him in preparing and filing a motion to correct an illegal sentence. The trial court appointed P, who found no merit to the issues raised in the first motion to correct. P then filed a second motion to correct an illegal sentence and to vacate the guilty plea on the ground that the defendant's plea to one of the two risk of injury counts was not made knowingly and voluntarily because the prosecutor's recitation of the factual basis for the plea with respect to that count had referenced a sexual assault that was not alleged in the arrest warrant or charged in the state's operative information. When the trial court then advised the defendant about the option of proceeding as a self-represented party if he wanted to pursue the claims in his first motion to correct, he stated that he did not intend to proceed as a self-represented party. The court then denied a motion the defendant had filed to discharge P and denied the second motion to correct an illegal sentence, concluding that the claims raised in the second motion were more properly brought in a petition for a writ of habeas corpus. *Held*:

1. This court declined to review the defendant's claim that the trial court improperly dismissed his first motion to correct an illegal sentence; the trial court could not, and did not, render judgment on the merits of that motion, as it was superseded by the second motion to correct an illegal sentence, which became operative when the defendant requested the appointment of counsel and then declined the trial court's invitation to proceed as a self-represented party.
2. This court declined to consider the defendant's unpreserved constitutional claim that his right to a jury trial was violated; contrary to the defendant's assertion that his claim was ripe for review under *State* v. *Golding* (213 Conn. 233) or reversal under the plain error doctrine set forth in the applicable rule of practice (§ 60-5), extraordinary review under *Golding* and § 60-5 was not warranted because the defendant did not first present his claim to the "judicial authority," which, in the rule of practice (§ 43-22) governing motions to correct an illegal sentence, means solely the trial court, not the appellate courts of this state, and this court's decision to decline review of the defendant's claim would not result in hardship or injustice to him, as he may seek and obtain any appropriate redress for an illegal sentence before the trial court, which is in a superior position to fashion such a remedy.

Argued April 6—officially released August 31, 2021

Procedural History

Substitute information charging the defendant with six counts of the crime of sexual assault in the first

degree, five counts each of the crimes of risk of injury to a child and unlawful restraint in the first degree, four counts each of the crimes of sexual assault in the third degree and threatening in the second degree, and three counts of the crime of aggravated sexual assault of a minor, brought to the Superior Court in the judicial district of New Britain, where the defendant was presented to the court, *Alexander*, *J.*, on pleas of guilty to two counts of risk of injury to a child; thereafter, the state entered a nolle prosequi as to the remainder of the charges; judgment of guilty; subsequently, the court, *Keegan*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court; thereafter, the court, *Keegan*, *J.*, issued a corrected judgment dismissing the defendant's motion to correct an illegal sentence. *Affirmed*.

John L. Cordani, *Jr.*, assigned counsel, with whom, on the brief, was *Andrew A. DePeau*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Helen J. McLellan*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Heriberto B., appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence and to vacate his pleas on the ground that the court lacked subject matter jurisdiction to consider the motion. On appeal, the defendant claims that the trial court (1) improperly dismissed, for lack of subject matter jurisdiction, the first motion to correct an illegal sentence that he filed, and (2) violated his constitutional right to a jury trial under *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In an affidavit by the police in support of their application for a warrant for the defendant's arrest, the defendant was accused of sexually assaulting the victim, a child under the age of thirteen, on multiple occasions from November, 2012, through September 22, 2013. In connection with those allegations, the state charged the defendant in a twenty-seven count substitute, long form information with, inter alia, two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1]

In count eleven of the operative information, the state "accuse[d] the [defendant] of the crime of injury or risk of injury to or impairing the morals of a child, and allege[d] that on divers[e] dates between November 1, 2012, and September 21, 2013, between the hours of 6:30 a.m. and 4:30 p.m., on a Sunday, at a certain residence located within the city of New Britain, Connecticut . . . the [defendant] had contact with the intimate parts, including, but not limited to, the breasts, genital area, groin, inner thighs and buttocks of a child under the age of thirteen years . . . and subjected said child to contact with the intimate parts of said [defendant], specifically, his penis, all in a sexual and indecent manner likely to impair the health or morals of such child, said acts having occurred within the bedroom of said child, and all such acts were committed in violation of [§] 53-21 (a) (2) . . . ."

In count twenty-three of the operative information, the state "further accuse[d] the [defendant] of the crime

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . except that, if . . . the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

of injury or risk of injury to or impairing the morals of a child, and allege[d] that, *on or about Sunday, September 22, 2013*, between the hours of 6:30 a.m. and 4:30 p.m., at a certain residence located within the city of New Britain, Connecticut, the [defendant] had contact with the intimate parts, including, but not limited to, the breasts, the genital area, the groin, the inner thighs and buttocks, of a child under the age of thirteen years . . . and subjected said child to contact with the intimate parts of said [defendant], specifically, his penis, all in a sexual and indecent manner likely to impair the health or morals of such child, said acts having occurred within the bedroom of said child, and all acts were committed in violation of [§] 53-21 (a) (2) . . . ." (Emphasis added.)

On July 20, 2016, the defendant, represented by counsel, entered *Alford* pleas[2] with respect to the two counts of risk of injury to a child.[3] During the plea proceeding, the prosecutor articulated the following factual basis

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished *as if he were guilty* to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Emphasis in original; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 824 n.4, 189 A.3d 1215 (2018).

[3] The plea agreement was that the defendant would enter *Alford* pleas to counts eleven and twenty-three of the operative information, charging him with two counts of risk of injury to a child, and that the state would enter dispositions of nolle prosequi on the remaining charges. The sentencing recommendation to the court was that the defendant serve a maximum total effective sentence of fifteen years of incarceration, with the defendant having a right to argue for a minimum of seven years, followed by ten years of special parole.

for the defendant's pleas: "The first count, count eleven, that he pleaded to that had to do with his sexual contact and intercourse with a ten year old female . . . . It happened on diverse dates between November 1, 2012, and September 21, 2013. The defendant had moved in with the family. The mother had three children. This was the older of the three daughters. It was the only one involved. Apparently, the mother had to work on occasional Sundays, and, since she didn't have a baby-sitter, she had [the defendant] watch the children. He took advantage of the situation to have intercourse and touching all the intimate parts of the child under thirteen years and also had her [make] contact with his penis, all in a sexual manner. *The second* [*count to which the defendant pleaded*] . . . *was count twenty-three*, *and that was on a specific date*, *and that was November 22*, *2013*, same situation on a Sunday while the mother was at work, that it occurred in the bedroom, like the other one, of the young girl. He touched her all over and finally subjected her to penile . . . intercourse in her bedroom, and . . . some of the bedclothes were tested, and his DNA was found to be on a bedsheet and a blanket. . . . By that time . . . [the victim] was under thirteen years of age. . . . She would have been twelve." (Emphasis added.)

Thereafter, the defendant acknowledged his understanding of the facts that the state would have to prove for him to be found guilty of the two counts of risk of injury to a child, as well as his understanding of the definition of the charge. The court, *Alexander*, *J.*, found the defendant's pleas to be knowingly and voluntarily made, and that there was a factual basis for each plea. Accordingly, the court accepted the defendant's *Alford* pleas and found him guilty of two counts of risk of injury to a child. On October 20, 2016, with respect to each count and in accordance with the plea agreement, the court imposed identical sentences of seven years

of incarceration, five years of which was mandatory under each sentence, followed by five years of special parole under each sentence. The court ordered the sentences to run consecutively to one another for a total effective sentence of fourteen years of incarceration, ten years of which was mandatory, followed by ten years of special parole.[4]

On March 7, 2019, the defendant, as a self-represented party, filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22[5] (first motion to correct), in which he claimed, inter alia, that his sentence on the two counts of risk of injury to a child was illegal because it violated his federal constitutional protection against double jeopardy (double jeopardy claim).[6] Specifically, the defendant argued that his sentence was illegal because "[f]orcing [him] to defend against two counts of risk of injury for a single act against one victim is in direct opposition to the fifth amendment [to] the United States constitution, which states . . . 'nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.' "

[4] Specifically, the court, *Alexander*, *J.*, sentenced the defendant as follows: "On the first count of risk of injury to a minor, [§] 53-21 (a) (2), it is the sentence of the court that [the defendant] receive seven years to serve. It will be followed by five years of special parole. Five years is considered a mandatory minimum. On the second count of risk of injury to a minor, [§] 53-21 (a) (2), it is the sentence of the court that [the defendant] receive seven years to serve. That sentence will be followed by five years of special parole. Five years is a mandatory minimum. Those sentences run consecutively for the effective sentence of fourteen years to serve, ten years being a mandatory minimum, followed by ten years of special parole."

[5] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[6] In his first motion to correct, the defendant also claimed that (1) the state's use of certain words to describe his conduct "tarnish[ed] his image in an unlawful way," (2) evidence undermined the credibility of the victim's allegations, and (3) special parole constituted a separate sentence from the period of incarceration imposed and, thus, violated his federal constitutional protection against double jeopardy.

Concurrently with his first motion to correct, the defendant filed a motion for appointment of counsel pursuant to General Statutes § 51-296 to assist in preparing and filing a motion to correct an illegal sentence.[7] Thereafter, the court appointed Attorney William H. Paetzold to represent the defendant. After his review of the issues raised by the defendant in the first motion to correct, Paetzold found no merit to that motion. Specifically, with respect to that motion, Paetzold explained that the defendant "continues to want me to litigate issues that I believe are habeas corpus related issues and are not subject to a motion to correct an illegal sentence."

Instead of pursuing the defendant's first motion to correct, on August 29, 2019, Paetzold filed a subsequent motion to correct an illegal sentence and to vacate the pleas on behalf of the defendant (second motion to correct), which contained an issue that he "thought might have some merit." In the second motion to correct, the defendant claimed that his sentence was illegal because there was no factual basis to support his *Alford* plea to count twenty-three of the state's operative information and, thus, his plea to one count of risk of injury to a child was not made knowingly and voluntarily.

[7] General Statutes § 51-296 (a) provides in relevant part: "In any criminal action . . . the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant . . . ."

In *State* v. *Francis*, 322 Conn. 247, 140 A.3d 927 (2016), our Supreme Court explained that "a defendant who wishes to file a motion to correct an illegal sentence has a [statutory] right [under § 51-296 (a)] to the appointment of counsel for the purpose of determining whether . . . [there exists] a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." (Internal quotation marks omitted.) Id., 260.

More specifically, the defendant argued that the state's recitation of the factual basis for his plea with respect to count twenty-three erroneously referenced a November 22, 2013 sexual assault that was not alleged in the arrest warrant or charged in the state's operative information.[8] Accordingly, the defendant maintained that the court erred by relying on an inadequate factual basis in accepting his *Alford* plea as to count twenty-three.

On October 10, 2019, the state filed an objection to the second motion to correct. In its objection, the state argued that "the defendant's attack on the factual basis for the plea falls outside the parameters of the grounds permitted to be raised in a motion to correct." The state alternatively maintained that the defendant's claim failed on its merits because his "pleas were fully canvassed before being accepted by the court, and the record supports a factual basis for the elements of the crimes [of] which [he] was convicted."[9]

On November 13, 2019, the defendant, as a self-represented party, filed a motion to discharge Paetzold, his appointed counsel. In support of that motion, the defendant argued, inter alia, that he "recently filed a motion to correct an illegal sentence, which is pending before the court, concerning which . . . Paetzold has failed to raise challenge or objection on the state's action of sentencing the [defendant] twice on the same docket number by implication of an unsubstantiated, unproven charge." Accordingly, the defendant requested that "Paetzold be replaced."

On November 18, 2019, the court, *Keegan*, *J.*, held a hearing with respect to "two different motions in this case . . . ." The court stated: "I have a motion here

[8] Paetzold noted that the last incident of sexual assault, as alleged by the state, occurred on Sunday, September 22, 2013.

[9] The state did not address the claims raised in the defendant's first motion to correct.

filed by . . . Paetzold, motion to correct illegal sentence and vacate the plea, and that's dated August 28, 2019. Then, in October, the state filed an objection to the motion to correct illegal sentence and vacate plea, and now [the defendant] [has] a motion to fire . . . Paetzold." The court then engaged in the following colloquy with the defendant:

"The Court: Okay. Now . . . I'm sure that Judge Alexander told you when you originally filed your motion to correct [an] illegal sentence that it would be assigned to an attorney from the Office of the Public Defender for review and that, if they believed there was an issue that was worthy of being considered for a motion to correct illegal sentence hearing, that the attorney would stay on with you. And if they found that there was no basis for it, that you would have to represent yourself, correct?

"The Defendant: Yeah.

"The Court: Okay. And let me just take this procedurally, okay. . . . Is it your intention to argue this motion to correct [an] illegal sentence by yourself? . . .

"The Defendant: I wanted the court [to] give me the different attorney.

"The Court: No, you . . . don't get a different attorney. . . .

"The Defendant: Your Honor . . . he no represent me the . . . way he's supposed.

"The Court: No . . . he's probably not representing you the way you want, is that correct?

"The Defendant: He's supposed to do . . . what I say. . . .

"The Court: Do you have a law degree? . . .

"The Defendant: No, I learn by myself."

The court then had the following colloquy with Paetzold:

"The Court: . . . [Y]ou have examined [the defendant's] original claim. I have that. It's a handwritten-out motion from March of 2019.

"Attorney Paetzold: Yes.

"The Court: You filed a motion to correct [an] illegal sentence and vacate plea. Were there any other grounds in your legal opinion [that] should have been raised in this motion to correct [an] illegal sentence and vacate plea?

"Attorney Paetzold: Your Honor, [the defendant] has brought a number of issues to my attention. And as I explained to [the defendant] several times, those issues that he wants to pursue are issues involving habeas corpus, ineffective assistance of counsel, things that his trial counsel failed to do. They're not subject to correcting an illegal sentence. And I tried explaining that to [the defendant]. I also found an issue that I thought might have some merit . . . .

"The Court: Is this the claim . . . that there's no factual basis to support the plea to risk of injury to a minor because it erroneously references a November, 2013 event, and the state has indicated that that was an error on the part of the state. It should have been . . . September, 2013.

"Attorney Paetzold: Yes."[10]

[10] During the hearing and consistent with its objection to the second motion to correct, the state solely addressed the claim asserted by Paetzold in the second motion to correct. Specifically, the prosecutor argued that, "based on the transcripts and the information before the court, the court clearly had a factual basis for the pleas pursuant to the plea agreement." The prosecutor further argued that the court should reject the second motion to correct because "[t]he sentence of the court was legal. It's within statutory limits. It is consistent with the plea agreement reached by the parties, and the record clearly demonstrates an adequate factual basis for the defendant's pleas. The court canvassed the pleas, accepted them. The matter was set down for sentencing where the defendant would have the right to address

With that background, the court explained to the defendant: "[A]n illegal sentence is a very defined category of a reason to vacate a guilty plea. It has to exceed the maximum statutory limits for a crime, if it does not satisfy the mandatory minimum for a crime, if it violates double jeopardy rights, if the sentence is ambiguous or internally contradictory. Those are illegal sentences. Now, when there is something that happened at a trial or during the course of representation leading up to your guilty plea and sentencing, that is not an issue that's brought up during a motion to correct an illegal sentence. That is brought up during a petition for a [writ of] habeas corpus where you can make a claim to the court that the representation of your attorney fell below the limit and . . . the level that we recognize in court as effective assistance. And so what I'm hearing from . . . Paetzold, who is a very experienced attorney . . . [is] that the claims that you want to bring up are claims that are not for a motion to correct [an] illegal sentence, but they are habeas corpus claims." Ultimately, the court concluded: "So, based on the information that I have in front of me, I'm not letting . . . Paetzold withdraw. I am going to accept his argument today and the . . . motion that he prepared, I have read the state's objection. And so I have denied [the defendant's] motion to fire . . . Paetzold. I have denied the motion to correct [an] illegal sentence."[11] This appeal followed.

I

The defendant first claims that the trial court improperly dismissed his first motion to correct for lack of

the court. The victim spoke to the court. The court had the presentence investigation, the warrant affidavit, and heard argument from both counsel."

[11] Thereafter, on August 20, 2020, the court corrected the form of the judgment on the defendant's second motion to correct and "enter[ed] a dismissal, rather than a denial, of the motion." The court explained that "[t]he motion attacks the plea and not the sentence or the sentencing proceeding and, therefore, the court lacks jurisdiction."

subject matter jurisdiction because it raised "a well established type of double jeopardy claim" related to his sentencing on the two counts of risk of injury to a child. The defendant further asserts that "[i]t is equally well established that [a] sentence that violates a defendant's right against double jeopardy falls within the recognized definition of an illegal sentence correctable under Practice Book § 43-22." (Internal quotation marks omitted.) In response, the state argues that the defendant cannot resurrect the double jeopardy claim contained in his first motion to correct, which was deemed meritless by Paetzold. The state maintains that the double jeopardy claim was not included in the claims asserted by Paetzold on behalf of the defendant in the second motion to correct, and was not litigated by the parties or properly before by the court. We agree with the state and decline to review the defendant's claim.

Our discussion of the defendant's claim that the court improperly dismissed his first motion to correct is informed by the underlying procedural posture. In *State* v. *Casiano*, 282 Conn. 614, 627–28, 922 A.2d 1065 (2007), our Supreme Court recognized that, under § 51-296 (a), a defendant who wants to file a motion to correct an illegal sentence "has a right to the appointment of counsel for the purpose of determining whether . . . [there exists] a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion . . . ." In *State* v. *Francis*, 322 Conn. 247, 267–68, 140 A.3d 927 (2016), our Supreme Court expounded on the procedure with respect to the withdrawal of appointed counsel's representation: "If, after consulting with the defendant and examining the record and relevant law, counsel determines that no sound basis exists for the defendant to file such a motion, he or she must inform the court and the defendant of the reasons for that conclusion,

which can be done either in writing or orally. If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the defendant of the option of proceeding as a self-represented party."

At the defendant's request and pursuant to § 51-296 (a), Paetzold was appointed for the purpose of determining whether there existed a sound basis for filing a motion to correct an illegal sentence on behalf of the defendant. Paetzold determined that there was a sound basis for pursuing such a motion and, in accordance with the scope of his representation as set forth in *Casiano*, filed the second motion to correct on behalf of the defendant. Paetzold further represented to the court that, after reviewing the claims contained in the first motion to correct, there were no other sound bases that should have been raised in the second motion to correct. Before mentioning the first motion to correct, the court identified the second motion to correct as the operative motion before it for consideration. Consistent with the procedure set forth in *Francis* and in light of Paetzold's determination that the claims contained in the first motion to correct were without merit, the court advised the defendant of the option of proceeding as a self-represented party if he instead chose to pursue the claims contained therein. In response, the defendant indicated that he did not intend to proceed as a self-represented party in pursuing the first motion to correct. Moreover, although the defendant expressed his desire for substitute counsel, he clarified that he wanted to pursue a motion to correct an illegal sentence on the ground that he "got sentenced for something [he had] never [been] charged [with]." That ground was consistent with the claim raised by Paetzold in the second motion to correct. On the basis of this information, the court denied the defendant's motion to discharge appointed counsel, accepted the second motion to correct as the operative motion, and ultimately dismissed that motion.

The defendant's actions of requesting the appointment of counsel and subsequently declining the court's invitation to proceed as a self-represented party necessarily rendered operative the second motion to correct. See *State* v. *Henderson*, 307 Conn. 533, 546, 55 A.3d 291 (2012) ("The right to counsel and the right to self-representation present mutually exclusive alternatives. . . . [S]ince the two rights cannot be exercised simultaneously, a defendant must choose between them."); see also *State* v. *DeFreitas*, 179 Conn. 431, 446 n.4, 426 A.2d 799 (1980) (When counsel appears on behalf of the defendant, the defendant's attempt to interject issues inconsistent with counsel's strategic decisions must be rejected because, "[i]f . . . trial counsel could employ one trial tactic, and if that failed, then the defendant pro se could adopt another trial tactic, the trial court could be caught between two opposing positions. This would be a species of trial by ambuscade, a tactic which this court has been quick to disapprove."). In other words, the second motion to correct superseded the first motion to correct. Because the first motion to correct was not properly before the court, the court could not and, therefore, did not, render judgment on the merits of that motion.[12] Accordingly, we decline to review the defendant's claim.

[12] The defendant incorrectly claims that the court dismissed his first motion to correct for lack of subject matter jurisdiction. To support his position, the defendant references a single statement contained in the "amended criminal judgment file," prepared by the court clerk, which indicates that "both motions to correct [an] illegal sentence were denied after argument by Judge Keegan on [November 18, 2019]." We note, however, that during the November 18, 2019 hearing, the court specifically referenced the second motion to correct as the relevant motion to be considered, expressly accepted the second motion to correct as the operative motion before it, and subsequently rendered judgment on "*the motion* to correct [an] illegal sentence." (Emphasis added.) Moreover, the correction to the form of the judgment issued by the court on August 20, 2020; see footnote 11 of this opinion; was specifically captioned with respect to the "motion to correct an illegal sentence/*vacate plea*," and, in that correction, the court rendered a "dismissal, rather than a denial, of *the motion*." (Emphasis added.)

II

The defendant next claims that his right to a jury trial under the sixth amendment to the United States constitution was violated, pursuant to *Alleyne* v. *United States*, supra, 570 U.S. 99,[13] because he was subjected to an enhanced mandatory minimum sentence for the crime of risk of injury to a child in the absence of a waiver of his right to a jury finding or a specific plea to the relevant fact necessary to trigger the enhancement.[14] The defendant argues that, although "this issue was not raised in the trial court, it is ripe for review under *State* v. *Golding*, 213 Conn. 233, [567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], and for reversal under the . . . plain error doctrine" set forth in Practice Book § 60-5. The state responds that the defendant's claim is unreviewable because, "in the context of a motion to correct an

We note that a meticulous review of the case file reveals a November 18, 2019 order signed by Judge Keegan immediately following the first motion to correct, which stated that, "after considering in its totality the defendant's motion to correct an illegal sentence [it is] ordered: denied." We view this document as a denial not on the merits of the first motion to correct, but as simply a denial on procedural grounds and a reflection that the court could not properly adjudicate that motion in light of the fact that it had been superseded by the second motion to correct. "[T]he construction of [an order or] judgment is a question of law . . . [and] our review . . . is plenary." (Internal quotation marks omitted.) *Avery* v. *Medina*, 174 Conn. App. 507, 517, 163 A.3d 1271, cert. denied, 327 Conn. 927, 171 A.3d 61 (2017). We, therefore, find the defendant's contention misplaced.

[13] In *Alleyne* v. *United States*, supra, 570 U.S. 103, the United States Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and proved beyond a reasonable doubt. See also *State* v. *Evans*, 329 Conn. 770, 790, 189 A.3d 1184 (2018) ("[a] guilty plea to an underlying offense does not, in the absence of a specific plea to the specific facts necessary to trigger an enhanced sentence, operate to waive the defendant's right to that specific finding"), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

[14] General Statutes § 53-21 (a) provides in relevant part that a person who commits a violation of § 53-21 (a) (2) shall be guilty of a class B felony, "except that, if . . . the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

illegal sentence, the only court with the authority to correct such a sentence is the trial court," and, "[t]herefore, any claim not first presented to the trial court in a properly filed motion to correct cannot be used as a basis to alter a defendant's sentence in an appeal from such a motion." We conclude that the defendant's claim is not entitled to review under *Golding* or the plain error doctrine and, accordingly, we decline to consider it.

"Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [party] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Riley B.*, 203 Conn. App. 627, 636, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021). "An appellant may obtain review under the plain error doctrine upon a showing that failure to remedy an obvious error would result in manifest injustice." *State* v. *Starks*, 121 Conn. App. 581, 591, 997 A.2d 546 (2010); see also *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009) ("[an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice" (internal quotation marks omitted)).

In support of his argument that his unpreserved constitutional claim is reviewable, the defendant maintains

that, pursuant to Practice Book § 43-22, "[t]he judicial authority may *at any time* correct an illegal sentence . . . ." (Emphasis added.) The defendant relies on the interpretation of § 43-22 set forth in *State* v. *Cator*, 256 Conn. 785, 781 A.2d 285 (2001), which determined that the term "judicial authority" provides "[b]oth the trial court and [an appellate] court, on appeal, have the power, at any time, to correct a sentence that is illegal." (Internal quotation marks omitted.) Id., 804. As the state correctly mentions, however, in *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 779 A.2d 80 (2001), our Supreme Court clarified: "We recognize that this court previously has suggested that the language 'judicial authority,' found in § 43-22, included the appellate courts as well as the trial court that had ordered the sentence. . . . Today we clarify the meaning of 'judicial authority' in § 43-22, however, to mean solely the trial court." (Citations omitted.) Id., 38 n.13. Accordingly, the judicial authority that may, at any time, correct an illegal sentence pursuant to § 43-22 "refer[s] to the trial court, not the appellate courts of this state." *State* v. *Starks*, supra, 121 Conn. App. 591.

In *State* v. *Starks*, supra, 121 Conn. App. 581, this court declined to grant review under *Golding* or the plain error doctrine of an unpreserved claim of constitutional error on appeal from the denial of a motion to correct an illegal sentence. The court reasoned that "[o]ur rules of practice confer the authority to correct an illegal sentence on the trial court, and that court is in a superior position to fashion an appropriate remedy for an illegal sentence. . . . Furthermore, the defendant has the right, at any time, to file a motion to correct an illegal sentence and raise [a] double jeopardy claim before the trial court. Typically, our appellate courts afford review under *Golding* or the plain error doctrine in circumstances in which the failure to undertake such

an extraordinary level of review, effectively, would preclude an appellant from obtaining *any* judicial review of the claim raised. That is not the case here." (Citation omitted; emphasis in original.). Id., 592; see also *State* v. *Syms*, 200 Conn. App. 55, 59–60, 238 A.3d 135 (2020) (declining to grant *Golding* review of unpreserved claim of constitutional error on appeal from denial of motion to correct illegal sentence under same reasoning); *State* v. *Brescia*, 122 Conn. App. 601, 605 n.3, 999 A.2d 848 (2010) (same).

In the present case, the defendant may seek and obtain any appropriate redress for an illegal sentence before the trial court, which is in a superior position to fashion such a remedy. As in *Starks*, we are not persuaded that extraordinary review of the defendant's claim under *Golding*[15] or the plain error doctrine is warranted or that our declining to review the claim would result in any hardship or injustice to the defendant. We, therefore, decline to consider it.

The judgment is affirmed.

In this opinion the other judges concurred.

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[15] We acknowledge that our Supreme Court in *State* v. *McCleese*, 333 Conn. 378, 425 n.23, 215 A.3d 1154 (2019), and *State* v. *Evans*, 329 Conn. 770, 809 n.27, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019), and this court in *State* v. *Arnold*, 205 Conn. App. 863, 868 n.9, A.3d (2021), had reviewed unpreserved claims with respect to motions to correct an illegal sentence under *Golding*. *McCleese* and *Evans*, however, declined to overrule *State* v. *Starks*, supra, 121 Conn. App. 581, and do not compel our review of the defendant's unpreserved claim in this instance.