STATE OF CONNECTICUT *v.* SUZANNE P.*
(AC 43859)

Suarez, Clark and DiPentima, Js.

Syllabus

Convicted on a plea of guilty of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs as a second offender, the defendant appealed to this court following the trial court's denial of her motion to modify a condition of her probation. As part of the plea agreement, the state entered a nolle prosequi as to each of two unrelated charges against the defendant, for breach of the peace in the second degree and criminal trespass in the first degree. The breach of the peace charge arose from an incident between the defendant and her boyfriend, L, and the criminal trespass charge arose from an incident in which the defendant trespassed on the property of her former husband, R, and their two children. As part of the defendant's sentence, the court imposed a special condition of probation, in which it ordered that the defendant have no contact with the "domestic violence complainants." After the commencement of her probationary period, the defendant filed a motion, requesting that the no contact condition be modified to delete the phrase "domestic violence complainants" and to replace it with language that specifically referenced only L and R. After a hearing, the trial court denied the motion and the defendant appealed to this court. *Held*:

1. The trial court's determination that the special condition prohibited the defendant from having any contact with her children was not improper: although the trial court's oral pronouncement that the defendant have no contact with the "domestic violence complainants" was ambiguous, its clarification that the phrase was meant to include the defendant's children was not manifestly unreasonable, because, even though criminal trespass is not a domestic violence crime, it was clear that the court

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

intended the phrase "domestic violence complainants" to include those affected by the defendant's criminal trespass in addition to the victim of the breach of the peace, L, and, although the children were not direct complainants in the criminal trespass charge, the terms "complainant" and "victim" may be used interchangeably in criminal proceedings, the defendant did not challenge the fact that R, who was also the victim of criminal trespass, was included in the no contact order, and, if the trial court had intended the order to apply only to L, it would have used the singular term "complainant" instead of the plural term "complainants"; moreover, the issue of no contact with the children was before the court at the defendant's sentencing hearing, as, during that hearing, R specifically requested that the defendant be prohibited from contacting him and the children and defense counsel argued that, if a no contact order were to be imposed, it should not apply to the children.

2. The trial court did not abuse its discretion in denying the defendant's motion for modification:

a. The defendant could not prevail on her unpreserved claim that her right to procedural due process was violated because she was not provided with notice and an opportunity to be heard with respect to the no contact condition, the defendant having failed to establish a violation of a constitutional right under *State* v. *Golding* (213 Conn. 233): the trial court was not required to canvass the defendant regarding the special condition of probation under the applicable rule of practice (§ 39-19) because the condition was not a direct consequence of the plea; moreover, at the sentencing hearing, R specifically and repeatedly requested that the defendant have no contact with him and the children and the defendant was provided with a meaningful opportunity to address the issue; furthermore, the defendant did not move to withdraw her plea even though she was aware, prior to the imposition of the sentence, that a special condition of probation prohibiting contact with the children was before the trial court.

b. The defendant's constitutional right to substantive due process was not violated because the special condition of probation did not violate her fundamental right to parent her children, as the condition did not reach further than was necessary to protect the children's safety: the no contact condition furthered a valid objective of probation because it sought to protect the safety of the children as members of the public; moreover, under the circumstances of this case, the trial court's taking into consideration the emotional and mental health safety of the defendant's children when fashioning its special conditions of probation was an appropriate extension of *State* v. *Ortiz* (83 Conn. App. 142), in which a no contact order was imposed to protect the physical safety of the defendant's children, as there was ample indication in the record of emotional harm, and the no contact order focused on the emotional well-being of the children.

Argued May 19—officially released November 9, 2021

Procedural History

Information charging the defendant with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and with the infraction of failure to display lights while operating a motor vehicle, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the defendant was presented to the court, *Baio*, *J.*, on a plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor or drugs as a second offender; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the infraction of failure to display lights; subsequently, the court, *Baio*, *J.*, denied the defendant's motion to modify a special condition of her probation, and the defendant appealed to this court. *Affirmed*.

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Kevin M. Black, Jr., former certified legal intern, with whom were *Michele C. Lukban*, senior assistant state's attorney, and, on the brief, *Sharmese A. Walcott*, state's attorney, and *Mark Brodsky*, former senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Suzanne P., appeals from the judgment of the trial court denying her amended motion to modify a special condition of her probation. On appeal, the defendant claims that the court improperly (1) determined that the special condition prohibited her from having any contact with her children, and (2) denied her amended motion for modification despite the fact that the special condition prohibiting contact with her children violates her right to due process. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. On July 6, 2018, the defendant pleaded guilty to operation of a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a as a second offender. As part of the plea agreement, the defendant also admitted to having violated the terms of her probation. Her pleas were part of a global resolution in which the following charges were nolled: breach of the peace in the second degree in violation of General Statutes § 53a-181, criminal trespass in the first degree in violation of General Statutes § 53a-107 and failure to display lights while operating a motor vehicle in violation of General Statutes § 14-96a (a). The breach of the peace charge arose from an incident involving the defendant and her boyfriend, L. The criminal trespass charge involved an incident in which the defendant, after having been warned not to trespass at the residence of her former husband, R, and their two children, left on the front porch of that residence a gift bag containing photographs and a note indicating that she would like to see their children. After canvassing the defendant, the court found that the plea was made knowingly and voluntarily and accepted the plea. The state recommended two years of incarceration, execution suspended after one year, with three years of probation. The state urged the court to order as a special condition of probation that the defendant have no contact with L. The court ordered a presentence investigation report (PSI), continued the matter for sentencing and noted that the defendant had the right to argue for a lesser sentence.

At the August 31, 2018 sentencing hearing, the issue of no contact with the defendant's children was raised. When invited to provide a victim statement to the court, R stated, "[W]ith a long history of [the defendant's]

insobriety, my children and I would just like a no contact."[1] The defendant noted her struggles with sobriety and expressed her desire not to force herself on her children. She explained, "Clearly alcohol has destroyed and taken away a lot of good things in my life. . . . I am a chronic relapser . . . . I just can't lose anymore. The worst of all of it is the time with my children." The court noted the defendant's history of unsuccessful attempts at sobriety and the loss of contact with her children. The court sentenced the defendant to two years of incarceration, execution suspended after one year, and three years of probation. One of the special conditions of probation ordered by the court was that the defendant have "no contact with the domestic violence complainants."[2] The court further stated that, after the defendant had completed four months of probation, she may file a motion to modify and "show that there has been justification to address the issue of no contact . . . ."[3]

Before the defendant began probation, she filed a motion to modify the no contact condition as to L, with whom she planned to reside following her release. At a January 18, 2019 hearing, the court denied the motion and clarified that the no contact order prohibited contact with L and the defendant's family.

The defendant's probationary period began on May 13, 2019. The relevant written special condition of her probation provided that she have "[n]o contact with

[1] L requested that the protective order be removed, which request the state opposed.

[2] Special conditions of probation are conditions aside from the standard conditions of probation that apply to all probationers. See, e.g., *State* v. *Johnson*, 75 Conn. App. 643, 646 n.3, 817 A.2d 708 (2003).

[3] Although the court expressly stated at the sentencing proceeding that the defendant could move to modify the special condition upon a showing of a justification for doing so, the defendant's amended motion to modify alleged no such justification.

victim(s)/complainant(s) [L], [R] or [the] victim's/complainant's family." The defendant filed a motion, dated July 29, 2019, for clarification and modification of the no contact special condition, in which she requested the court to clarify that the no contact condition of her probation did not apply to her children. In the motion, the defendant argued that R had prevented her from having visitation with her children as a result of the no contact special condition, despite the fact that, pursuant to a divorce settlement, the defendant and R shared joint legal custody of the children, aged thirteen and sixteen, who reside with R. The court denied the motion without prejudice because R, who had made it "abundantly clear that he did not want contact for himself or his children," was not provided notice of the hearing. The defendant then filed an "amended motion to modify condition of probation," dated November 13, 2019, in which she sought to "modify the 'no contact' condition of [her] probation by specifically deleting the condition of 'no contact with *the domestic violence complainants*' and substitute [it] with 'no contact with [*L*] and the *defendant's ex-husband* [*R*], *with the exception that* [*she*] *be permitted to have communication with* [*R*] *for the specific purposes of discussing the educational, financial, and health related needs of her minor children.*' " (Emphasis in original.) In her motion, the defendant contended that prohibiting her from contacting her children while on probation conflicted with the court's oral pronouncement of her sentence and violated her constitutional right to due process.

At the November 15, 2019 hearing on the defendant's amended motion to modify, defense counsel stated that the defendant is "minimally . . . seeking clarification . . . ." Counsel representing R and his children stated that they did not want contact with the defendant at this time and elaborated that the children "have suffered deep wounds because of their mother's behavior and

. . . they are going through recovery just as their mother is going through recovery . . . .'' R requested that the court ''uphold the no contact for myself and my children at this time.'' The court stated that, because the therapist of the older child ''is here, essentially, in a representative role for those children, I will allow a brief comment . . . .'' The therapist stated that the child was seeking stability and is not interested in having visitation with the defendant and that it was not in the best interest of the child to force her to have contact with the defendant. The court stated that ''there's a family court matter going on. Clearly there are going to be issues happening over there. . . . If the parties come back and say that there's no opposition to modification, the court will hear the motion.'' The court concluded that the no contact special condition pertained to the children and noted that, ''[i]f we were here today with the domestic violence victim and/or counsel on their behalf saying that there was no opposition and that they wanted contact, the court's order would be very different.'' At the conclusion of the hearing, the court denied the motion. This appeal followed.

On November 19, 2020, the court issued an articulation of its denial of the defendant's amended motion to modify in response to a motion for articulation filed by the defendant.[4] Additional facts will be set forth as necessary.

[4] The defendant filed a motion for articulation on July 17, 2020, seeking an articulation from the trial court of its reasons for denying her amended motion to modify. Following the court's denial of the motion for articulation, the defendant filed in this court a motion for review of the denial of her motion for articulation. This court granted the defendant's motion for review but denied the relief requested therein and further ordered, sua sponte, that the court ''articulate whether it considered the defendant's claim, raised in her November 13, 2019 'amended motion to modify condition of probation' that the no contact order with her children resulted in the termination of her parental rights for three years without due process, in violation of both the Connecticut and United States constitutions, and, if so, to state the factual and legal basis for its decision concerning this claim.'' In its articulation, the court explained the basis for its imposition of a no contact order as to

I

The defendant first claims that the court improperly determined that the special condition prohibited her from having any contact with her children. She argues that the court's oral pronouncement, made at the time of sentencing, that she have "no contact with the domestic violence complainants," is unambiguous and conflicts with the written memorialization of that special condition, which provides that the defendant have "[n]o contact with victim(s)/complainant(s) [L], [R] or [the] victim's/complainant's family." We are not persuaded that the court's determination was improper.

We note, preliminarily, that the court's oral pronouncement of the special condition controls and not the written memorialization of the oral pronouncement. "[B]ecause the sentence in a criminal case generally is imposed orally in open court . . . the written order or judgment memorializing that sentence, including any portion pertaining to probation, must conform to the court's oral pronouncement." (Citation omitted.) *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010). "Consequently, as a general matter, any discrepancy between the oral pronouncement of sentence and the written order or judgment will be resolved in favor of the court's oral pronouncement." Id., 531.

Whether the defendant's criminal trespass is an act of family violence under General Statutes § 46b-38a is not the issue presented to us in this appeal. The court apparently considered the trespass to be a domestic violence crime, but the issue in this appeal is whether the court used the term "domestic violence complainants" to include the children.[5] The court's use of the

the children, which included the defendant's multiple violations of protective orders, failure to comply with probation requirements and the protection of those closest to the defendant.

[5] At the August 21, 2019 hearing on the defendant's July 29, 2019 motion for clarification and modification, the court stated that the fact that the criminal trespass charge involving R was part of a global agreement in which

plural term "complainants" indicates that it intended to include more persons than L in the order. It, however, is ambiguous as to whether the term "complainants" includes, in addition to L, only R or R and the children. In light of this ambiguity, we next consider whether the court properly determined that the no contact condition applied to the defendant's children.

"In order to determine whether the trial court properly clarified ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court's judgment. It is well established that the construction of a judgment presents a question of law over which we exercise plenary review. . . . In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . In addition . . . because the trial judge who issues the order that is the subject of subsequent clarification is familiar with the entire record and, of course, with the order itself, that judge is in the best position to clarify any ambiguity in the order. For that reason, substantial deference is accorded to a court's interpretation of its own order. . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Citations omitted; internal quotation marks omitted.) *Bauer* v. *Bauer*, 308 Conn. 124, 131–32, 60 A.3d 950 (2013).

that charge was nolled "doesn't diminish [R's] right to be considered as a domestic violence victim."

"[T]he purpose of a clarification is to take a prior statement, decision or order and make it easier to understand. Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision." (Internal quotation marks omitted.) *Light* v. *Grimes*, 136 Conn. App. 161, 169, 43 A.3d 808, cert. denied, 305 Conn. 926, 47 A.3d 885 (2012).

At the November 15, 2019 hearing on the defendant's amended motion to modify, the court clarified that "the transcript was clear, that the hearing was clear, and that the sentence was clear that the no contact [condition] with the domestic violence victims and conditions imposed included no contact with the children." In its articulation of the denial of the defendant's amended motion to modify, the court stated: "At the time of sentencing, the defendant's ex-husband, [R], expressed . . . that he and his children wanted no contact with the defendant . . . and not[ed] that they can no longer handle the defendant's ongoing alcohol abuse. The defendant herself acknowledged her issues and that she would not force herself on her children. The court considered the effect on those closest to the defendant of her history of alcohol abuse and noncompliance with court orders."

The defendant disagrees with the court's clarification that the defendant's children are included within the phrase "domestic violence complainants." She argues that R was the sole complainant in the criminal trespass case and, furthermore, that criminal trespass is not a domestic violence crime. In criminal proceedings, "complainant" is often used in place of "victim." See, e.g., *State* v. *Warholic*, 278 Conn. 354, 369–70 and n.7, 897 A.2d 569 (2006). The interchangeable use of these terms does not render the court's clarification manifestly unreasonable simply because the children did not

directly complain of the criminal trespass but did so indirectly through R. We are also not persuaded by the defendant's argument that the children are not included as "domestic violence complainants" because criminal trespass is not a domestic violence crime. If so, then R would be eliminated from the no contact order, and the defendant does not challenge on appeal that the special condition applied to R. It is clear that the court intended the phrase "domestic violence complainants" to include those affected by the criminal trespass in addition to the victim/complainant of the breach of the peace, L. Finally, had the court intended the phrase to apply to L only, then it would have used the singular rather than the plural form of "complainants."[6]

Moreover, the issue of no contact with the children was before the court at the sentencing hearing. Although the state's recommendation at the sentencing hearing that the defendant have no contact with the "domestic violence victims" was unclear, the state, after making that recommendation, directed the court's attention to R, who had requested to be heard. R, who was a direct victim of the criminal trespass charge, stated that "my family and I are done with her not being sober," and requested "no contact with myself and my children and no drive-bys by my house and my street. . . . [M]y children and I are done looking behind our shoulder." Although the driving while intoxicated charge to which the defendant pleaded guilty did not involve the children, the criminal trespass charge, which involved the children, was part of the global plea agreement. Further demonstrating that the issue was before the court at

[6] Moreover, at the August 21, 2019 hearing on the defendant's July 29, 2019 motion for clarification and modification, the court referred to R as a domestic violence victim and stated that "it was expressly noted on the record and the state's attorney noted the docket number in which [R] was a domestic violence victim," which was the docket number for the criminal trespass charge.

the sentencing hearing, defense counsel argued that the no contact order should not apply to the children.

In light of the issues raised at the sentencing hearing, we conclude that the court's November 15, 2019 clarification that the phrase "domestic violence complainants" includes the defendant's children is not manifestly unreasonable.[7] See *Bauer* v. *Bauer*, supra, 308 Conn. 131–32 (" 'we will not disturb a trial court's clarification of an ambiguity . . . unless the court's interpretation . . . is manifestly unreasonable' "). Accordingly, we defer to the court's clarification of the no contact special condition of the defendant's probation.

II

The defendant next claims that the court improperly denied her amended motion to modify because the special condition prohibiting contact with her children violates her rights to (1) procedural due process and (2) substantive due process. We address each claim in turn.

We first set forth the following general principles. "Probation is the product of statute. . . . Statutes authorizing probation, while setting parameters for doing so, have been very often construed to give the court broad discretion in imposing conditions. . . . [General Statutes §] 53a-30 (c) authorizes a court to modify the terms of probation for good cause. . . . It is well settled that the denial of a motion to modify probation will be upheld so long as the trial court did

[7] We reject the defendant's alternative argument that "the court's refusal to modify the written conditions of probation to conform to its actual sentence is plain error." The defendant cannot prevail under this doctrine unless she "demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jackson*, 178 Conn. App. 16, 20, 173 A.3d 974 (2017), cert. denied, 327 Conn. 998, 176 A.3d 557 (2018). Because we conclude that the court's clarification was not manifestly unreasonable, the defendant has not demonstrated any error, much less plain error.

not abuse its discretion. . . . On appeal, a defendant bears a heavy burden because every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . The mere fact that the denial of a motion to modify probation leaves a defendant facing . . . strict conditions is not an abuse of discretion. Rather, [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Baldwin*, 183 Conn. App. 167, 174–75, 191 A.3d 1096, cert. denied, 330 Conn. 922, 194 A.3d 288 (2018). Section 53a-30 (c) provides in relevant part that, "[a]t any time during the period of probation or conditional discharge, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise . . . ."

A

The defendant argues that she "did not have notice that the [special no contact] condition would bar her from contacting her children for three years." She contends that the court failed to canvass her as to the no contact special condition of her probation prior to accepting her guilty plea.[8] The defendant did not raise these specific arguments in her amended motion to modify or at argument on that motion and seeks review to prevail pursuant to *State* v. *Golding*, 213 Conn. 233,

[8] The defendant also argues that she "lacked fair warning that the state could revoke her probation for noncriminal activity." See, e.g., *State* v. *Boseman*, 87 Conn. App. 9, 17, 863 A.2d 704 (2004) ("Where noncriminal activity forms the basis for the revocation of probation, due process requires specific knowledge that the behavior involved is proscribed. [W]here the proscribed acts are not criminal, due process mandates that the [probationer] cannot be subject[ed] to a forfeiture of his liberty for those acts unless he is given prior fair warning." (Internal quotation marks omitted.)), cert. denied, 272 Conn. 923, 867 A.2d 838 (2005). Because the defendant's probation has not been revoked, the requirement of fair warning of the conditions of probation prior to a revocation of probation has no application here.

567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015). 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." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40, as modified by *In re Yasiel R.*, supra, 781. The record is adequate for review and the claim, which alleges a violation of a fundamental right, namely, the right to family integrity, is of constitutional magnitude. See *State* v. *Ortiz*, 83 Conn. App. 142, 162–63, 848 A.2d 1246, cert. denied, 270 Conn. 915, 853 A.2d 530 (2004). Accordingly, we review the claim under the third prong of *Golding* to determine whether the alleged constitutional violation exists.[9]

[9] There has been no challenge on appeal to the trial court's jurisdiction to entertain the procedural due process claim raised by the defendant. We, however, note that "once a defendant's sentence is executed, the trial court lacks jurisdiction to entertain any claims regarding the validity of that plea in the absence of a statute or rule of practice to the contrary." (Internal quotation marks omitted.) *State* v. *Monge*, 165 Conn. App. 36, 42, 138 A.3d 450, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016). Section 53a-30 (c), which grants a trial court postsentencing jurisdiction to modify or enlarge conditions of probation for "good cause," is one such exception. We further note that the trial court, which has broad discretion in administering probation, would have jurisdiction to consider the defendant's unpreserved due process claim, and, therefore, we consider the claim. See *State* v. *Obas*, 320 Conn. 426, 431, 440–48, 130 A.3d 252 (2016) (reviewing state's claim that defendant was precluded from seeking exemption from sex offender registration, which he had raised in motion to modify probation, because he had entered into plea agreement with state); *State* v. *Crouch*, 105 Conn. App. 693, 694, 939 A.2d 632 (2008) (reviewing claim that trial court improperly added condition of probation in violation of terms of plea agreement and in violation of defendant's constitutional right to due process); *State* v. *Thorp*, 57 Conn. App. 112, 114, 747 A.2d 537 (reviewing claim that trial

There is no requirement that a trial court canvass a defendant regarding the consequences of her plea that are not direct consequences, which include the items listed in Practice Book § 39-19.[10] See *State* v. *Faraday*, 268 Conn. 174, 201–202, 842 A.2d 567 (2004) (Practice Book § 39-19 defines scope of constitutional mandate that defendant be advised of all direct consequences of plea). The no contact special condition of probation, which is not listed in § 39-19, is not a direct consequence of the plea. In the unusual circumstances of the present case, however, another set of procedural safeguards is implicated. "[A] parent has a fundamental liberty interest in the companionship, care, custody, and management of his or her children . . . . Therefore, a parent may not be deprived of his or her fundamental liberty interest without being afforded procedural due process. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 333–34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." (Citation omitted; internal quotation marks omitted.) *Garvey* v. *Valencis*, 177 Conn. App. 578, 593 n.5, 173 A.3d 51 (2017). "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are

court improperly imposed more restrictive conditions of probation without permitting defendant to withdraw guilty plea when it granted state's § 53a-30 (c) motion to modify), cert. denied, 253 Conn. 913, 754 A.2d 162 (2000).

[10] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; (3) The fact that the statute for the particular offense does not permit the sentence to be suspended; (4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and (5) The fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Merkel* v. *Hill*, 189 Conn. App. 779, 786, 207 A.3d 1115 (2019). "The due process clause demands that an individual be afforded adequate notice and a reasonable opportunity to be heard when the government deprives her of a protected liberty interest. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Garvey* v. *Valencis*, supra, 593.

The transcript of the sentencing hearing indicates that the defendant had notice that the issue of no contact with her children was before the court and had an opportunity to be heard. To provide context to the court's oral ruling, we note that, at the plea hearing, the court had informed the defendant that "we'll delay the sentencing subject to coming back here to see what the PSI demonstrates and hear[ing] arguments on sentencing." One such argument at the sentencing hearing was made by R, a victim of the criminal trespass charge. Practice Book § 43-10 (2) provides that "[t]he judicial authority shall allow the victim and any other person directly harmed by the commission of the crime a reasonable opportunity to make, orally or in writing, a statement with regard to the sentence to be imposed." In his statement regarding the sentence to be imposed, R specifically and repeatedly requested that the defendant have no contact with him and the children.

After R made these requests at the sentencing hearing, the defendant was provided with a meaningful opportunity to address the issue. The defendant addressed the issue of contact with her children and

stated that she realizes that her daughter "is very upset about this and I'm not going to push myself on them . . . ." Defense counsel was provided the opportunity to discuss the no contact condition prior to sentencing. He stated that the defendant wants to "live a healthy lifestyle . . . free from drinking where she can serve as a proper parent to her children," and "resume . . . healthy relationships with her family . . . ." He specifically requested that "the court impose a no contact order except as to the children through a third, mutually agreed party for obvious reasons that relate to my client's sincere desire that as soon as she is alcohol free, she has some chance of resuming a proper relationship with her children."

Accordingly, the defendant was aware prior to the imposition of the sentence that the possibility of a special condition of probation prohibiting contact with her children was before the court, and defense counsel had a meaningful opportunity to argue that the no contact special condition should not include the defendant's children. Despite this opportunity, the defendant did not move to withdraw her plea or otherwise challenge the validity of her plea. For the foregoing reasons, we conclude that the defendant's right to notice and an opportunity to be heard was not violated. As a result, the defendant's claim fails under the third prong of *Golding* because the defendant failed to establish a violation of a constitutional right.

B

The defendant next argues that her right to substantive due process was violated when the court denied her amended motion to modify because the no contact special condition prohibiting her "from contacting her children for three years violates her 'fundamental liberty interest' as a parent."[11] We are not persuaded.

[11] This substantive due process claim concerns the ongoing conditions of supervision of the defendant while she is on probation. The trial court has jurisdiction to entertain such a claim in the context of a motion for

"The standard of review for the denial of a motion to modify probation is well established. . . . Section 53a-30 (c) authorizes a court to modify the terms of probation for good cause. . . . It is well settled that the denial of a motion to modify probation will be upheld so long as the trial court did not abuse its discretion. . . . On appeal, a defendant bears a heavy burden because every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . The mere fact that the denial of a motion to modify probation leaves a defendant facing a lengthy probationary period with strict conditions is not an abuse of discretion. Rather, [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Njoku*, 202 Conn. App. 491, 496–97, 246 A.3d 33 (2021). "In view of the nature and goals of probation, however, and because any number of probationary conditions or combinations thereof are likely to be suitable in any particular case, the trial court has an exceptional degree of flexibility in determining [the] terms [of probation] . . . and we therefore review those terms for abuse of discretion only." (Citation omitted; internal quotation marks omitted.) *State* v. *Imperiale*, 337 Conn. 694, 707, 255 A.3d 825 (2021).

"When sentencing a defendant to probation, a trial court has broad discretion to impose conditions. . . . Nevertheless, this discretion is not unlimited, as statutory and constitutional constraints must be observed." (Citations omitted; footnote omitted.) *State* v. *Graham*, 33 Conn. App. 432, 447, 636 A.2d 852, cert. denied, 229 Conn. 906, 640 A.2d 117 (1994). "[I]n determining whether a condition of probation impinges unduly [on] a constitutional right [in any particular case], a reviewing

modification pursuant to § 53a-30 (c), which encompasses the ongoing supervision of the probationer. See *State* v. *Smith*, 207 Conn. 152, 170, 540 A.2d 679 (1988).

court should evaluate the condition to ensure that it is reasonably related to the purposes of [probation]. . . . Consideration of three factors is required to determine whether [such] a reasonable relationship exists: (1) the purposes sought to be served by [the] probation[ary] [condition]; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." (Citation omitted; internal quotation marks omitted.) *State* v. *Imperiale*, supra, 337 Conn. 708; see also *State* v. *Smith*, 207 Conn. 152, 167–73, 540 A.2d 679 (1988) (court did not abuse its discretion in modifying terms of probation under § 53a-30 to include urinalysis testing, which defendant claimed was unreasonable search and seizure in violation of his fourth and fourteenth amendment rights under federal constitution).

One valid objective of probation is " 'to preserve the public's safety.' " *State* v. *Ortiz*, supra, 83 Conn. App. 164. We conclude that the no contact condition of the defendant's probation furthers that objective because it protects her children as members of the public. See id., 166 (protecting defendant's children as members of public serves goal of probation). In the present case, the court stated in its articulation that "the condition of no contact was warranted and proper based on the danger the defendant posed to those close to her as a consequence of her criminal history, multiple convictions for operating under the influence, her long-standing substance abuse and history of noncompliance with conditions of probation, including those related to substance abuse treatment."

Although no evidentiary hearing was conducted regarding the effect of the defendant's attempt to contact the children by leaving a gift and note on R's front porch after having been warned not to trespass, there were detailed comments from R regarding the effect

that the defendant's history of insobriety and prior unwanted attempts at contact had on the children. "[D]ue process does not require that information considered by the trial judge prior to sentencing meet the same high procedural standard as evidence introduced at trial. Rather, judges may consider a wide variety of information. . . . [T]he trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 83 Conn. App. 165.

The defendant claims that the condition unconstitutionally infringes on her right to parent her children. The condition of probation restricts parental rights and, thus, interferes with the exercise of a fundamental constitutional right. Therefore, we apply an additional layer of scrutiny to this restriction. "[C]hoices about marriage, family life, and the upbringing of children are among associational rights [the United States Supreme Court] has ranked as of basic importance in our society . . . rights sheltered by the [f]ourteenth [a]mendment against the [s]tate's unwarranted usurpation, disregard, or disrespect. . . . A prohibition on contact with one's children affects the defendant's associational rights." (Citation omitted; internal quotation marks omitted.) Id., 165–66. Even when a court is warranted in severely restricting the defendant's contact with her children in furtherance of the goal of probation to protect them as members of the public, "that restriction should not reach further than is reasonably necessary for the preservation of the children's safety." Id., 166.

In *Ortiz*, the defendant was convicted, inter alia, of kidnapping and assaulting the victim, with whom the defendant had three children. Id., 144–45. At the sentencing hearing, the prosecutor told the court that the victim had provided detailed accounts of the defendant's abuse of the children, including an incident in which he put a sock and tape over the mouth of his one year old child to stop the baby from crying and another occasion on which he allegedly shook another baby, which resulted in brain damage. Id., 164–65. The defendant received a total effective sentence of thirty years of incarceration, execution suspended after twenty years, and five years of probation with one of the conditions of probation being that he have no contact with his three children until they reach eighteen years of age. Id., 144, 161. The defendant claimed on appeal that the condition of no contact with his children was illegal. Id., 161. This court concluded that, "[i]n light of the information the court had before it at sentencing, the court was warranted in its concern of not just protecting the victim, but also her offspring. However, the defendant also attacks the breadth of the order, which proscribes *all* contact with his children. . . . A strict application of the court's order appears to prohibit the defendant from sending even a birthday card to his children. Yet, it is difficult to imagine how such mail contact could jeopardize their safety. We conclude that a blanket prohibition of all such contact with the children is violative of the defendant's constitutional rights." (Citation omitted; emphasis in original.) Id., 165–66. Accordingly, this court reversed the order only insofar as the no contact provision prohibited mail contact. Id., 166.

In the present case, the defendant argues that there was no indication that her misconduct had harmed her children. She contends that her children were not in

the car with her when she was driving under the influence and that the criminal trespass charge simply involves her having left a gift bag on R's porch. The charges and the harm stemmed from the defendant's actions in leaving a note for the children on R's porch, after having been warned not to trespass. *Ortiz* requires that a condition prohibiting contact with a defendant's children be reasonably necessary for the preservation of the children's "safety" but does not indicate whether that is restricted only to physical safety. Id.

We are persuaded that the trial court's taking into consideration the emotional and mental health safety of the children when fashioning its special conditions of probation is, under the circumstances of the present case, an appropriate extension of *Ortiz*. In the present case, it is undisputed that the defendant's criminal conduct, which victimized her children, arose out of and was intertwined with her alcohol abuse. It was reasonable for the court, in imposing its special conditions of probation, to take measures to protect the children from the defendant's intoxicated behavior. Moreover, it was reasonable for the court to infer that intoxicated behavior could cause emotional injury to the children even if did not occur in the children's presence. The notion that the defendant be able to resume contact with her children once she is capable of having a healthy relationship with her family was raised by the defendant herself as well as by her counsel at the sentencing hearing. The defendant, appearing to recognize the harm caused to her children, stated that she was "sick of disappointing everybody including myself," and that she did not want to "push" herself on her children or "bombard" them. Her counsel, also appearing to recognize the role that alcohol abuse had played in damaging the emotional bond between the defendant and her children, stated that it is "my client's sincere desire that as soon as she is alcohol free, she has some chance of resuming

a proper relationship with her children." The court crafted a special condition of probation that took into account the defendant's desire not to "bombard" the children and to have the chance to resume a healthy relationship with her children.

Moreover, there is ample indication in the record of emotional harm. At the sentencing hearing, R stated that he and the children are "done" with the defendant "not being sober . . . ." At the hearing on the defendant's amended motion to modify, counsel for R and the children stated that the children had suffered "deep wounds" and are "going through recovery . . . ." R further explained at that hearing that the last visit the children had with the defendant was in December, 2014, that the children did not want contact with the defendant and that they "feel [as] though . . . they can't really go to places such as the mall or to the center with their friends because they don't want to be looking behind their shoulder." In its articulation, the court noted that R had expressed both directly and through a letter that the children "can no longer handle the defendant's ongoing alcohol abuse." The therapist of the older child stated that "this is an ongoing issue . . . [the child] is at this point not interested in having visitation." These circumstances are significantly distinguishable from the circumstances of *Ortiz*. In *Ortiz*, the condition prohibiting all contact with the defendant's children until they reach the age of eighteen violated his constitutional rights because there was no information before the court that mail contact would jeopardize the safety of the children. *State* v. *Ortiz*, supra, 83 Conn. App. 166. In the present case, based on the information before the court, the no contact order reasonably focused on the emotional well-being of the children. Because the special condition does not reach further than reasonably necessary to protect the children's safety; see id., 163–66; the defendant's constitutional

right to parent was not violated. Accordingly, we conclude that the court did not abuse its discretion in denying the motion for modification.

The judgment is affirmed.

In this opinion the other judges concurred.

VICTOR DIAZ *v.* CITY OF BRIDGEPORT ET AL. (AC 44104)

Prescott, Suarez and Vertefeuille, Js.

Syllabus

The defendant employer and its insurer appealed from the decision of the Compensation Review Board affirming the Workers' Compensation Commissioner's decision to grant the plaintiff's request to commute into a lump sum certain disability payments. The defendant had employed the plaintiff as a member of its municipal police department. While employed by the defendant, the plaintiff was diagnosed with hypertension. Subsequently, the commissioner found that the plaintiff's hypertension was a significant, contributing factor in the development of his coronary artery disease and, accordingly, that such disease was compensable under the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff was later diagnosed with chronic kidney disease caused by his hypertension and, in a supplemental finding and award, was awarded 245 weeks of permanent partial impairment disability benefits. The plaintiff thereafter requested that the final 123 weeks of the award period be commuted into a lump sum. After a hearing, the commissioner concluded that the plaintiff had shown good cause for a commutation of his award pursuant to statute (§ 31-302), and, accordingly, granted the plaintiff's request for a commutation of the benefits due to him for weeks 123 through 245 of his award. The defendant appealed to the board, claiming, inter alia, that the commissioner improperly applied § 31-302 by ordering a commutation of the back end of the award without also awarding the defendant a moratorium of payment of benefits for the front end of the award. The board affirmed the order of the commissioner, and this appeal followed. *Held*:

1. The defendant could not prevail on its claim that the board improperly affirmed the commissioner's order granting the plaintiff's request for a commutation of the partial disability payments due to him for weeks 123 through 245 of his award, without instituting a moratorium against payment of the benefits due for the first 122 weeks of his award: although

the defendant argued that a lump-sum payment pursuant to a commutation order should be included in determining whether a payment exceeds the maximum weekly compensation under the applicable statute (§ 31-309) for workers' compensation benefits, this interpretation was inconsistent with the purpose of the commutation statute and, without reference to the lump-sum payment pursuant to the commutation, the plaintiff's award did not exceed the maximum weekly compensation under § 31-309.

2. The defendant's claim that the board erred in not concluding that the commissioner's commutation order violated the cap on heart and hypertension benefits pursuant to statute (§ 7-433b) was unavailing: although the statutory cap applied in the present case because the plaintiff was receiving both a disability benefit pursuant to statute (§ 7-433c) and a retirement pension, the plaintiff's award complied with the statutory cap imposed by § 7-433b because the plaintiff's lump-sum payments pursuant to the commutation award are excluded and the amount of the plaintiff's weekly disability benefit coupled with his pension payment did not exceed the statutory guidelines.

3. The board correctly concluded that the commissioner's commutation order did not violate the principles of equity: contrary to the defendant's claim, there was no double recovery because, although one-half of the award was paid in weekly installments and the other half was paid as a onetime lump sum, the plaintiff did not receive anything in excess of the original award to which he was entitled and, thus, the fact that the plaintiff received the lump sum while simultaneously receiving weekly payments of the award did not constitute a double recovery; moreover, although the commutation order may have presented a budgetary challenge for the defendant, this court was not persuaded that the commissioner's decision to commute the award in the fashion requested by the plaintiff was improper.

Argued April 14—officially released November 9, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District granting the plaintiff's request to commute certain disability benefit payments due to him into a lump sum, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Joseph J. Passaretti, Jr., with whom was *Amanda A. Hakala*, for the appellants (defendants).

David J. Morrissey, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this workers' compensation matter, the defendant employer, the city of Bridgeport,[1] appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner) of the Workers' Compensation Commission to grant the request of the plaintiff, Victor Diaz, to commute into a lump sum the permanent partial disability benefit payments due him for the final 123 weeks of an overall period of 245 weeks. On appeal, the defendant claims that the board improperly (1) affirmed the order of the commissioner granting the plaintiff's request without instituting a moratorium against payment of the plaintiff's first 122 weeks of permanent partial disability benefits, (2) concluded that the commissioner's commutation order does not violate the cap on heart and hypertension benefits pursuant to General Statutes § 7-433b (b), and (3) concluded that the commissioner's commutation order does not violate the principles of equity, including the prohibition against double recovery in the workers' compensation system. We affirm the decision of the board.

The following facts, as found by the commissioner or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. On and for some time prior to January 31, 1989, the defendant employed the plaintiff as a regular member of its municipal police department. Upon his entry into service, the plaintiff submitted to a preemployment physical examination, which failed to reveal evidence of heart disease or hypertension. On or about January 31, 1989, while

[1] PMA Companies, the workers' compensation insurer for the city of Bridgeport, was also a defendant in this case and is a party to this appeal. For convenience, we refer in this opinion to the city of Bridgeport as the defendant.

still employed by the defendant, the plaintiff was diagnosed with hypertension. Pursuant to an initial finding and award dated October 20, 1993, the commissioner awarded the plaintiff a specific award equal to a 10 percent permanent impairment of the heart.

On June 20, 2001, the plaintiff retired as a result of unrelated orthopedic injuries. On May 17, 2007, the plaintiff was diagnosed with coronary artery disease. By a finding and award dated August 9, 2010, the commissioner found that the plaintiff's hypertension was a significant, contributing factor in the development of his coronary artery disease and, accordingly, that such disease also was compensable under the Workers' Compensation Act, General Statutes § 31-275 et. seq. Pursuant to this finding and award, the plaintiff had sustained a 17 percent permanent impairment of the heart due to hypertension and a 14 percent permanent impairment of the heart as a result of coronary artery disease. By March 16, 2018, according to a subsequent finding and award, the plaintiff's permanent impairment of the heart had increased to 47 percent.

On January 19, 2017, Paul Nussbaum, a nephrologist, evaluated the plaintiff and determined that he suffered from chronic kidney disease. Nussbaum examined the plaintiff again on February 5, 2018, and determined that the plaintiff had a 70 percent permanent impairment of the bilateral kidneys caused by his hypertension. On the basis of this determination, on January 30, 2019, in a supplemental finding and award, the plaintiff was awarded 245 weeks of permanent partial impairment disability benefits at the weekly compensation rate of $551.13. The plaintiff's maximum medical improvement date was February 20, 2019. The plaintiff subsequently requested that the partial disability benefit payments due him for the final 123 weeks of the 245 week award period be commuted into a lump sum.

On April 15, 2019, a formal hearing was held to determine whether a portion of the plaintiff's permanent partial disability award was eligible for commutation pursuant to General Statutes § 31-302. The plaintiff indicated that he was seeking a lump-sum payment to pay past due property taxes, to reduce his credit card debt, and to pay a portion of his children's student loans. At the formal hearing, the plaintiff testified that he understood that any commutation of the award would be subject to a 3 percent actuarial reduction and that, once the lump sum was paid, he would be deemed to have been paid his full weekly rate for the weeks covered by the commutation period. The defendant objected to the plaintiff's request.

Following the hearing, the commissioner concluded that the plaintiff had shown "good and sufficient cause" for a commutation of his permanent partial disability award. Accordingly, the commissioner granted the commutation for benefits due the plaintiff for weeks 123 through 245 of his award. The commissioner also ordered the defendant to continue paying the plaintiff's weekly permanent partial disability benefits until the expiration of week 122, at which time the entire award would be satisfied.[2] The defendant could then terminate its weekly payments without filing a notice to discontinue benefits. The commissioner instituted a moratorium against the payment of weekly benefits for the time period covered by the commutation.

The defendant filed an appeal to the board. On appeal, the defendant claimed that the commissioner improperly applied § 31-302 when she ordered a commutation

[2] The plaintiff had been receiving weekly benefits since the commissioner issued the January 30, 2019 finding and award. Several weeks later, on April 15, 2019, when the commissioner granted the plaintiff's request to commute the final 123 weeks of the award, the plaintiff was still entitled to the remaining balance of the first 122 weeks of compensation, to be paid in weekly installments.

of the "back end" of the plaintiff's award without also awarding the defendant a moratorium of payment of benefits for the "front end" of the award. (Internal quotation marks omitted.) The board affirmed the order of the commissioner. In its decision, the board addressed the specific claims that are before us on appeal. These claims include that the plaintiff's total payment exceeded the maximum weekly payment under § 31-302, violated the statutory cap imposed by § 7-433b (b), and breached the principle against double recovery. This appeal from the decision of the board followed.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, 121 Conn. App. 144, 148, 994 A.2d 305 (2010).

To the extent that the claims raised in the present appeal require us to interpret the Workers' Compensation Act, "we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees. . . . This proposition applies as well to the provisions of [General Statutes] § 7-433c . . . because the measurement of the benefits to which a § 7-433c claimant is entitled is identical to the benefits

that may be awarded to a [claimant] under . . . [the Workers' Compensation Act]." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, 299 Conn. 265, 277–78, 8 A.3d 1093 (2010).

We must also set forth the legal principles common to the defendant's claims. "[Section] 7-433c entitles a qualified, hypertensive or heart-disabled firefighter or police officer to receive compensation and medical care equivalent to that available under . . . the Workers' Compensation Act." *Lambert* v. *Bridgeport*, 204 Conn. 563, 566, 529 A.2d 184 (1987). Subsection (a) of § 7-433c provides in relevant part that, "in the event . . . a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under [the Workers' Compensation Act] if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment . . . ." General Statutes § 7-433c (a).

"The benefits provided under § 7-433c are . . . payable and administered under the Workers' Compensation Act, contained in chapter 568 of the General Statutes, and the type and amount of benefits available pursuant to § 7-433c are the same as those under the Workers' Compensation Act . . . . The monetary benefits received under § 7-433c are the same as those available to anyone with similar disabilities who receives workers' compensation benefits under chapter 568; that

is, one would not receive additional compensation simply by receiving benefits under § 7-433c rather than under chapter 568." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, 286 Conn. 732, 752, 945 A.2d 936 (2008).

I

We first address the defendant's claim that the board improperly affirmed the order of the commissioner granting the plaintiff's request for a commutation of partial disability payments due the plaintiff for weeks 123 through 245 of his award, without instituting a moratorium against payment of the benefits due the plaintiff for the first 122 weeks. The defendant argues that the plaintiff's receipt of the lump-sum payment while simultaneously collecting the weekly benefit results in an award that exceeds the maximum weekly compensation under the Workers' Compensation Act. Because the plaintiff's weekly compensation rate does not, in and of itself, exceed the maximum weekly compensation under General Statutes § 31-309 (a), inherent in the defendant's argument is the notion that a lump-sum payment pursuant to a commutation order should be included in determining whether a weekly payment exceeds the maximum weekly compensation under the Workers' Compensation Act. We disagree.

To resolve the defendant's claim, we must interpret the language of § 31-309 (a). Our review, therefore, is plenary, and we apply established principles of statutory construction. See *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020). Under General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from 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 construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the act, we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purpose of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." (Citation omitted; internal quotation marks omitted.) *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 18–19, 151 A.3d 367 (2016).

We interpret § 31-309 (a) to establish a maximum weekly compensation for workers' compensation benefits. That statute provides in relevant part that "the weekly compensation received by an injured employee under the provisions of this chapter shall in no case be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of all workers in the state . . . ."[3] General Statutes § 31-309 (a). Section 31-302, however, expressly authorizes an alternative to weekly compensation, permitting the commutation of weekly compensation into monthly or quarterly payments or into a lump sum. Specifically, § 31-302 provides in relevant part: "Compensation payable under this chapter shall be paid at the particular times in the

[3] The maximum weekly compensation rate for the plaintiff's date of injury is $671.

week and in the manner the commissioner may order . . . except that when the commissioner finds it just or necessary, the commissioner may approve or direct the commutation, in whole or in part, of weekly compensation under the provisions of this chapter into monthly or quarterly payments, or into a single lump sum, which may be paid to the one then entitled to the compensation, and the commutation shall be binding upon all persons entitled to compensation for the injury in question."

Section 31-309 (a) limits a claimant's "weekly compensation . . . ." General Statutes § 31-309 (a). Affording this language its plain and unambiguous meaning, "weekly compensation" refers to compensation that a claimant is entitled to receive on a weekly basis. A lump-sum payment made pursuant to a commutation award, however, is not a weekly payment but, rather, a singular payment consisting of benefits that otherwise would have been paid to a claimant over the course of multiple weeks. Because of the nature of these types of payments, they will almost always exceed the established maximum weekly compensation that may be paid to a claimant. The defendant's interpretation of § 31-309 (a) is inconsistent with and undermines the purpose of the commutation statute and is, therefore, not a reasonable interpretation. Accordingly, we do not interpret § 31-309 (a) to encompass lump-sum payments.

In addition to the text of the statute itself, we must also consider the relationship of § 31-309 (a) to other statutes. See General Statutes § 1-2z. As acknowledged by our Supreme Court, "[an award pursuant to] . . . § 7-433c . . . is a work[ers'] compensation award in the sense that its benefits are payable and procedurally administered under the Work[ers'] Compensation Act . . . ." (Emphasis omitted; internal quotation marks omitted.) *Carriero* v. *Naugatuck*, 243 Conn. 747, 759,

707 A.2d 706 (1998). Further, unless there is a rational justification to do otherwise, courts should construe statutes in such a manner as to "foster harmony" with related statutes, thereby resulting in a consistent body of law. (Internal quotation marks omitted.) *State* v. *Spears*, 234 Conn. 78, 91, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995); see also *Carriero* v. *Naugatuck*, supra, 759.

As we have explained, § 31-302, by its plain language, specifically authorizes lump-sum payments made pursuant to commutation awards. Section 31-302 also provides that an award may be commuted "in whole or in part . . . ." General Statutes § 31-302. The only reasonable way to interpret the statute's authorization of a commutation "in part" is to mean that a portion of an award may be paid as a lump sum. After a partial lump sum has been paid, the portion of the award that has not been commuted remains payable to the claimant in the form of weekly benefits. The fact that the legislature, in § 31-302, prescribed that such awards may represent the whole or part of weekly compensation benefits reflects that the legislature intended to permit an award to be made while a claimant was also receiving weekly benefits. Our interpretation of § 31-309 (a) allows both §§ 31-309 (a) and 31-302 to have effect and fosters harmony between these related statutes.

Our interpretation also aligns with the remedial purpose of the Workers' Compensation Act. The provisions of § 31-302 afford a commissioner significant discretion to decide whether to grant a commutation and to structure a commutation in accordance with the needs or preferences of the party seeking the commutation. See General Statutes § 31-302. Specifically, a commutation may be granted whenever the commissioner "finds it just or necessary . . . ." General Statutes § 31-302. The commissioner also has the discretion to grant a commutation "in whole or in part," which makes possible a

number of award structures. General Statutes § 31-302. Interpreting § 31-309 (a) to include lump-sum payments pursuant to a commutation award in the calculation of the maximum weekly compensation would impede the commissioner's ability to grant a partial commutation of an award when a claimant is still receiving weekly payments to satisfy another portion of the same award. This would, in turn, diminish the commissioner's ability to structure an award to meet the needs and preferences of the claimant. As provided in § 31-302, a commissioner has the flexibility to structure an award in different ways, which reflects the remedial nature of the Workers' Compensation Act.

Without reference to the lump-sum payment pursuant to the commutation, the plaintiff's award does not exceed the maximum weekly compensation under § 31-309 (a). The plaintiff's weekly compensation rate was $551.13. The maximum weekly compensation rate for the plaintiff's date of injury is $671. Because we have determined that the plaintiff's award does not violate § 31-309 (a), we conclude that the board did not err in affirming the order of the commissioner granting the plaintiff's request for a commutation.

II

We next address the defendant's claim that the board erred in not concluding that the commissioner's commutation order violates the cap on heart and hypertension benefits pursuant to § 7-433b (b). The defendant argues that the sum of the plaintiff's commutation award, weekly disability benefit, and weekly pension benefit violates the statutory cap imposed by § 7-433b (b). We disagree.

We begin by setting forth the additional legal principles pertinent to this claim. Section 7-433b (b) imposes a cap on the benefits that employees may collect under § 7-433c, the Heart and Hypertension Act. See General

Statutes § 7-433b (b). Section 7-433b (b) provides in relevant part: "[T]he cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement."

In *Carriero* v. *Naugatuck*, supra, 243 Conn. 753, our Supreme Court held that this statutory cap on benefits is applicable to cumulative payments of disability compensation and retirement pension benefits whenever any portion of those payments is awarded under § 7-433c. If a retired employee receives any benefit under § 7-433c, the calculation of the ceiling on heart and hypertension benefits must take into account that employee's regular pension retirement benefits, not just the employee's disability pension benefits. See id., 750–51.

The statutory cap is applicable in the present case because the plaintiff was receiving both a disability benefit under § 7-433c and a retirement pension based on his years of service in the police department. Here, the plaintiff was receiving a disability benefit under § 7-433c to compensate him for a 70 percent permanent impairment of the bilateral kidneys caused by his hypertension. The award consisted of 245 weeks at the weekly compensation rate of $551.13. As a retired police officer, the plaintiff was also receiving a weekly pension benefit related to his years of service. Because the plaintiff was receiving disability benefits under § 7-433c as well as unrelated retirement pension benefits, the plaintiff's award must comply with the statutory cap imposed by § 7-433b (b).

Although the statutory cap applies, we agree with the board that the plaintiff's award does not violate § 7-433b (b). The defendant argues that the onetime payment to be made to the plaintiff by virtue of the commutation order, together with the weekly disability benefit and pension payment to the plaintiff, violates the cap on heart and hypertension benefits imposed by § 7-433b (b). The defendant does not argue, and there is no evidence before us, that the plaintiff's cumulative weekly payment, without considering the lump-sum payment pursuant to the commutation order, exceeds the statutorily prescribed limit. Accordingly, inherent in the defendant's argument is the idea that a calculation of benefits for the purposes of the cap imposed by § 7-433b (b) should take into account a lump-sum payment made pursuant to a commutation order. We do not agree.

To address the defendant's claim, we must interpret § 7-433b (b) in accordance with the principles of statutory interpretation set forth in part I of this opinion. Section 7-433b (b) provides in relevant part that the "cumulative payments . . . for compensation and retirement . . . benefits under section 7-433c shall be adjusted so that the total of such cumulative payments . . . shall not exceed one hundred per cent of the weekly compensation being paid . . . to members of such department in the same position which was held by such member at the time of his death or retirement." Examining the text's plain meaning, the phrase "cumulative payments" reflects that the legislature intended to put a cap on recurring weekly payments that are comprised of both a disability benefit and a retirement pension benefit. The statute refers to "payments" in the plural, indicating that it applies to multiple payments. When an award is commuted, however, a portion of the award is paid as a *onetime* lump sum, which is a singular payment. The use of the plural suggests that

the legislature did not intend to include a lump-sum payment pursuant to a commutation award in the calculations related to the statutory cap. Additionally, the statute refers to "cumulative payments" of disability and retirement benefits as being measured against and compared to the "weekly compensation" received by working members of the police department. This indicates that the legislature intended to limit the amount of *weekly* compensation benefits that a retired member of the department may receive. Because it is inconsistent with the plain meaning of the statute to treat a lump-sum payment pursuant to a commutation award to be a weekly payment, it should not be considered in calculations concerning the weekly statutory cap. We are persuaded that the statute's plain objective is to limit the cumulative effect of several weekly benefits, not to prohibit a onetime commutation award.

Further, we must consider the relationship of § 7-433b (b) to other statutes. See General Statutes § 1-2z. As we noted in part I of this opinion, courts should construe statutes in such a manner as to "foster harmony" with related statutes in order to create a consistent body of law. (Internal quotation marks omitted.) *State* v. *Spears*, supra, 234 Conn. 91. Our interpretation of § 7-433b (b) permits §§ 7-433b (b) and 31-302 to coexist. If this court were to adopt the defendant's argument, any significant lump-sum payment pursuant to a commutation award under § 31-302 would result in a onetime violation of the statutory ceiling imposed by § 7-433b (b). To interpret the statute as the defendant suggests would thwart the legislature's expressed intent to permit commutation awards "in whole or in part . . . ." General Statutes § 31-302. We agree with the board that there is no "reasonable basis for concluding that the legislature intended to impose a blanket prohibition against commutation orders for this reason."

Our interpretation of the statute is also consistent with the remedial nature of the Workers' Compensation Act. As we noted previously in this opinion, the Workers' Compensation Act is remedial in nature and "should be broadly construed in favor of disabled employees." (Internal quotation marks omitted.) *Ciarlelli* v. *Hamden*, supra, 299 Conn. 277. This principle also applies to the provisions of § 7-433c. Id., 277–78. Interpreting the statutory cap on benefits imposed by § 7-433b (b) to exclude lump-sum payments pursuant to a commutation award is consistent with the remedial purpose of the Workers' Compensation Act. If we interpret the statutory cap in § 7-433b (b) to include commutation awards, these awards would almost always violate § 7-433b (b). Such an interpretation would greatly limit the commissioner's ability to structure an award to meet the needs and preferences of a workers' compensation claimant. For this reason, our interpretation of the statutory cap in § 7-433b (b), namely, that it does not apply to lump-sum payments pursuant to a commutation award, is consistent with the remedial purpose of the Workers' Compensation Act.

We agree with the board that, regardless of whether the commissioner had granted the plaintiff's request for a commutation, § 7-433b (b) would be violated only if the cumulative amount of the plaintiff's weekly disability benefit coupled with his weekly pension payment exceeded the statutory guidelines. They did not. Without reference to the onetime, lump-sum payment, the plaintiff did not collect more than 100 percent of the weekly compensation being paid to others in the same position that the plaintiff held at his retirement. It is true that, during the week that the commutation award was granted, the plaintiff received the lump sum, the weekly disability benefit, and the weekly pension benefit. Although the lump-sum payment resulted in a single week in which the plaintiff received more than he would

have if he had been working, any commutation would have caused the same result. If the commutation had not been granted, however, and the award had been spread out over the 245 week period, the plaintiff's weekly payments would not have exceeded 100 percent of the weekly payment received by others employed in the same position. Accordingly, the plaintiff's award did not violate the statutory cap.

III

Finally, we address the defendant's claim that the board improperly concluded that the commissioner's commutation order does not violate the principles of equity, including the prohibition on double recovery in the workers' compensation system. The defendant argues that the commissioner's approval of the commutation of the "back end" of the plaintiff's award while the "front end" benefits were being paid concurrently constitutes a double recovery. (Internal quotation marks omitted.) We disagree.

This court has long recognized that "[o]ur [Workers' Compensation] Act does not permit double compensation. . . . When an injury entitles a worker to benefits both under the compensation statute and under other legislation, so that a double burden would be imposed on the employer, our courts have held that compensation payments during the period of disability reduce the employer's obligation created by other legislation." (Internal quotation marks omitted.) *McFarland* v. *Dept. of Developmental Services*, 115 Conn. App. 306, 313, 971 A.2d 853, cert. denied, 293 Conn. 919, 979 A.2d 490 (2009). This prohibition on double recovery stems from the rationale that "[t]he law cannot permit [a] claimant to enjoy a windfall, i.e., to be paid twice for his medical expenses." (Internal quotation marks omitted.) *Pokorny* v. *Getta's Garage*, 219 Conn. 439, 444 n.6, 594 A.2d 446 (1991).

Double recovery occurs "[w]hen an injury entitles a worker to benefits both under the compensation statute and under other legislation . . . ." (Internal quotation marks omitted.) *McFarland* v. *Dept. of Developmental Services*, supra, 115 Conn. App. 313. For example, this court has held, and our Supreme Court has affirmed, that an award received pursuant to the federal Longshore and Harbor Workers' Compensation Act must be "wholly credited" against a subsequent award arising out of the same injury under the state Workers' Compensation Act in order to prevent a double recovery by the plaintiff. *McGowan* v. *General Dynamics Corp./Electric Boat Division*, 15 Conn. App. 615, 615–16, 546 A.2d 893 (1988), aff'd, 210 Conn. 580, 566 A.2d 587 (1989). Our Supreme Court also has held that requiring an employer to pay a claimant for medical expenses that already have been paid by the claimant's medical insurance carrier constitutes an impermissible double recovery. See *Pokorny* v. *Getta's Garage*, supra, 219 Conn. 448.

In the present case, there is no double recovery. The plaintiff received a single award of 245 weeks of compensation at a rate of $511.13 per week. Although one-half of the award was paid in weekly installments and the other half was paid as a onetime lump sum, the plaintiff did not receive anything in excess of the *total* original award to which he was entitled. Thus, the fact that the plaintiff received the lump sum while he was simultaneously receiving weekly payments of the same award does not constitute a double recovery. As the board acknowledged in its decision, the plaintiff's "total payout is still predicated on, and limited to, the same number of weeks for which he would have received weekly benefits had he not chosen to convert part of his permanency award into a lump-sum payment."

Conceding that the plaintiff has received only the 245 weeks of compensation to which he is entitled, the defendant argues that the manner in which the payment

was structured, rather than the amount, constitutes a double recovery. This argument, however, also fails. As illuminated by our case law, the principle against double recovery seeks to prevent a claimant from receiving a "windfall" or being "paid twice for his medical expenses." (Internal quotation marks omitted.) *Pokorny* v. *Getta's Garage*, supra, 219 Conn. 444 n.6. The facts in the present case simply do not demonstrate that the commutation order resulted in a windfall or double payment for the plaintiff. As our case law reflects, the principle against double recovery is not violated simply by virtue of when or how benefits are paid but whether a claimant has been "paid twice . . . ." (Internal quotation marks omitted.) Id.

The defendant further argues that the commutation order "is not just to all parties interested in the award." (Emphasis omitted.) Specifically, the defendant argues that, because the plaintiff received the lump-sum payment (due him for weeks 123 through 245) while he was still receiving weekly payments (due him for weeks 1 through 122), the plaintiff is "placed in the best position possible . . . while the [defendant is] being unduly burdened without any consideration." We do not agree.

Our Supreme Court has held that the commutation statute "[confers] upon the commissioner authority to commute a compensation award in those cases only where it is reasonably necessary for the welfare of the claimant and his dependents, and at the same time *is just to all parties interested in the award*." (Emphasis added.) *Reid* v. *Hartford Fuel Supply Co.*, 120 Conn. 541, 546, 182 A. 141 (1935). The defendant argues that this particular commutation award is unjust to the defendant because it "allows a lump-sum payment, but also weekly benefits for that same time period . . . ." According to the defendant, the structure of the commutation award is "an unpredicted loss to the fiscal year

that could not have been budgeted for in advance." Although the structure of the commutation in the present case may present an unanticipated budgetary challenge for the defendant, like the board, "we are not persuaded that the financial difficulties attendant on compliance with the commutation order are such that the commissioner's decision to commute the award in the fashion requested by the claimant was improper." In fact, the initial financial burden on the defendant would have been more substantial had the plaintiff requested a commutation of the entire award at once, which he was entitled to do. It is unclear how the partial commutation of the award, coupled with a concurrent weekly benefit, constitutes an undue burden when the defendant could have been required to pay out the entire award up front had the plaintiff requested a full commutation. Further, the defendant is entitled to the usual actuarial discount in payment for the weeks covered by the commutation.[4] See General Statutes § 31-302. The actuarial discount contained in the commutation statute ensures that a "true equivalence of value [is] maintained" and that an employer is not made worse off due to a commutation. General Statutes § 31-302. We agree with the board's assessment that the actuarial reduction compensates the defendant for the prejudice associated with the contraction of the period of time over which the award must be paid. For these reasons, the plaintiff's award does not offend the principles of equity in our workers' compensation system.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[4] General Statutes § 31-302 provides in relevant part that "[i]n any case of commutation, a true equivalence of value shall be maintained, with due discount of sums payable in the future . . . ."

KYLE FREITAG *v.* COMMISSIONER OF CORRECTION (AC 42818)

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

Syllabus

The petitioner, who had been convicted, on pleas of guilty, of the crimes of murder and assault in the first degree, appealed to this court from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claimed that O, the attorney who represented him during the plea proceeding, rendered ineffective assistance, as did P, the attorney who represented him during the sentencing proceeding. The petitioner alleged that O failed to properly advise him regarding potential defenses and made misrepresentations to him about the willingness of a codefendant, B, to testify at the petitioner's criminal trial. The petitioner further alleged that P failed to present adequate mitigation evidence at the sentencing proceeding and failed to file a motion to withdraw the guilty pleas, pursuant to the applicable rule of practice (§ 39-27 (4)), on the basis of O's ineffective assistance. The petitioner testified at the habeas trial that O had met with and told him and his parents on the day of the plea proceeding that he had been informed by B's counsel that B was not willing to testify at the petitioner's criminal trial. The petitioner further testified that, until that meeting, he was under the impression that B was going to testify. The petitioner then appeared before the trial court for the plea proceeding and initially rejected a plea offer. The petitioner then changed his mind during the court's canvass of him and entered his guilty pleas, as it was his understanding that this was his final opportunity to accept the plea offer. Prior to the sentencing proceeding, however, the petitioner learned from his family that B was willing to testify. The habeas court, in determining that O did not render deficient performance, rejected the petitioner's claim that O incorrectly advised him about whether B was willing to testify. The court made an implicit factual finding that O had told the petitioner it was not likely that B would testify and an express finding that O's assessment was reasonable. The habeas court further determined that its conclusion as to the petitioner's claims against O foreclosed the petitioner's claim that P improperly failed to file a motion to withdraw the guilty pleas. The court reasoned that the petitioner failed to present credible evidence that his pleas were made unwillingly or involuntarily and determined that P made a reasonable decision not to file a motion to withdraw the guilty pleas because the state had insisted that the petitioner plead guilty to the murder charge. The habeas court thereafter granted the petitioner certification to appeal. *Held*:

1. The habeas court's implicit finding that O told the petitioner during their meeting on the day of the plea proceeding that it was not likely B would testify at the criminal trial was clearly erroneous, and, thus, the judgment had to be reversed and the case remanded for a new trial as to the claim that O rendered ineffective assistance in connection with his purported misrepresentation about B:

   a. There was no evidence to support the habeas court's finding, the petitioner and his father having testified that O, in absolute terms, told them B would not testify, and O having testified that he did not recall any discussion during the meeting about B's willingness to testify and that he did not recall ever having told the petitioner that B would not testify created a dispute as to that factual issue, and this court could not discern whether the habeas court would have credited the testimony of the petitioner and his father in the absence of the habeas court's clearly erroneous finding; moreover, contrary to the request by the respondent Commissioner of Correction, because this court made no conclusion as to whether O rendered deficient performance, a remand for further proceedings to address the issue of prejudice was not proper.

   b. Because the habeas court committed error with respect to the petitioner's principal claim that O made misrepresentations to him as to B's willingness to testify, the judgment also had to be reversed as to the petitioner's intertwined claim that O rendered ineffective assistance in failing to properly advise him as to potential defenses.

2. The habeas court's judgment as to the petitioner's claims of ineffective assistance of counsel as to P had to be reversed in part and the case remanded for a new trial on the claim that P was ineffective in failing to file a motion to withdraw the guilty pleas pursuant to § 37-27 (4):

   a. Because this court reversed the habeas court's judgment as to certain of the petitioner's ineffective assistance of counsel claims against O, the habeas court's denial of the petitioner's claim that P rendered ineffective assistance in failing to file a motion to withdraw the guilty pleas could not stand; certain of the habeas court's determinations in rejecting the claim as to P were untenable, and its reasoning that P made a strategic decision not to seek withdrawal of the pleas was irrelevant, as the purpose of seeking withdrawal of the guilty pleas was not to negotiate a better plea deal but to insist on going to trial.

   b. The habeas court properly concluded that the petitioner did not demonstrate that P rendered ineffective assistance as a result of his failure to present adequate mitigation evidence at sentencing; the record reflected that P submitted ample mitigation evidence, which the sentencing court took into consideration, and the petitioner did not identify any information P failed to present that would have made it reasonably probable that the sentencing court would have imposed a lesser sentence.

Argued October 19, 2020—officially released November 9, 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 denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Deren Manasevit, assigned counsel, with whom, on the brief, was *Peter Tsimbidaros*, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Joseph Valdes*, senior assistant state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Kyle Freitag, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court erred in denying (1) count one of the amended petition claiming ineffective assistance of counsel against Attorney Francis O'Reilly, his trial counsel at the time of his guilty pleas, and (2) count two of the amended petition claiming ineffective assistance of counsel against Attorney Norman A. Pattis, his trial counsel at the time of sentencing. We reverse, in part, the judgment of the habeas court and remand the case for a new habeas trial as to certain claims raised in counts one and two of the amended petition.

The following facts and procedural history, as set forth in the habeas court's corrected memorandum of decision or as undisputed in the record, are relevant to our resolution of this appeal. "The petitioner was the defendant in three matters pending in the judicial district of [Stamford-Norwalk] under docket numbers CR-12-0132590,

where he was charged with various drug charges, criminal possession of a handgun, and possession of a weapon in a motor vehicle; CR-12-0133383, the subject of the [underlying amended petition for a writ of habeas corpus], where he was charged with murder, attempted murder, two counts of assault [in the] first degree, criminal possession of a handgun, possession of a pistol without a permit, weapon in a motor vehicle, and others; and CR-12-0133384, where he faced a relatively minor possession charge. . . . The allegations in docket ending #383 were that the petitioner and [his] codefendant, [Terrance] Baxter, were driving in the petitioner's minivan on Fort Point Road in Norwalk on October 30, 2012. . . . Baxter was driving, and the petitioner was in the front passenger seat. At some point, the van came upon a scooter being driven in the same direction along the right-hand side of Fort Point Road by a Dajon Johnson, with a Bancroft Daley riding behind him as a passenger. The petitioner did not know the driver but was familiar with . . . Daley from prior interactions on the street. The two vehicles rode in the same direction relatively near each other for some period of time, when, according to one independent witness, the van suddenly accelerated to pull up alongside of the scooter. The petitioner's claim as to this portion of the incident is that the scooter was behind his vehicle and sped up alongside. In any event, when the van and the scooter were beside each other, the petitioner claims to have seen [Daley] reaching toward his waist area. The petitioner pulled out a .32 caliber pistol, reached out of the passenger window, and shot both parties. . . . Baxter immediately sped off, but the two were captured when the van was stopped about ten minutes later on the highway. According to [the] police, the petitioner made several rather unrepentant statements while in custody about shooting the victims because 'it was me or them.' . . . Johnson died as a result of his gunshot wounds, and . . . Daley was left

paralyzed from the mid-back down. The only weapon found in the possession of either victim was a three inch folding knife that was apparently found inside . . . Daley's pocket."

Attorney Howard Ehring, a public defender, initially appeared as the petitioner's criminal defense counsel. In November, 2014, O'Reilly, appointed as assigned counsel, filed an appearance in lieu of Ehring.

"All three [of the petitioner's criminal] matters were on the 'firm jury' list, and the [matter at issue] was scheduled to begin trial, when the cases were called on the docket [on] January 14, 2015. Following some discussions, an offer involving guilty pleas to the murder and assault [in the] first degree charges in exchange for a judicially indicated sentence of a minimum of [twenty-five] years to a maximum of [thirty years], followed by [ten] years of special parole, with a right to argue, was conveyed to the petitioner. That offer was initially rejected by the petitioner, through [Attorney O'Reilly], on the record. While the [trial] court was explaining the withdrawal of the offer and its impact on future negotiations, the petitioner changed his mind and agreed to enter pleas of guilty to one count of murder in violation of General Statutes § 53a-54a (a), and one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Following the canvass, [the court accepted the pleas, and] the matter was continued to March 11, 2015, for sentencing. On February [17, 2015], however, Attorney . . . Pattis filed an appearance in lieu of Attorney O'Reilly. On April 7, 2015, the petitioner appeared for sentencing represented by Attorney Pattis, where, after hearing from all parties, the court imposed a sentence of [thirty] years to serve, followed by [ten] years of special parole on the murder charge, and [twenty] years concurrent on the assault charge, for a

total effective sentence of [thirty] years, followed by [ten] years of special parole."[1] (Footnotes omitted.)

On September 15, 2015, the petitioner, representing himself, filed a petition for a writ of habeas corpus. On April 9, 2018, after assigned habeas counsel had appeared on his behalf, the petitioner filed his operative, two count amended petition for a writ of habeas corpus (amended petition). In count one of the amended petition, the petitioner asserted a claim of ineffective assistance of counsel against O'Reilly, alleging, inter alia, that O'Reilly had (1) incorrectly advised the petitioner that his codefendant, Baxter, had refused, or would refuse, to testify at his criminal trial, and (2) failed to properly advise the petitioner regarding potential defenses available to him.[2] The petitioner further alleged that, but for O'Reilly's deficient performance, he would not have pleaded guilty but, rather, would have asserted his right to a trial. In count two of the amended petition, the petitioner asserted a claim of ineffective assistance of counsel against Pattis, alleging, inter alia, that Pattis had failed (1) to present adequate mitigation evidence at sentencing, and (2) to file a motion to withdraw his guilty pleas predicated on the ineffective assistance of counsel rendered by O'Reilly.[3] The petitioner further alleged that, but for Pattis' deficient performance, it was reasonably

[1] After the sentencing court had announced the petitioner's sentence, the state entered a nolle as to the charges pending in docket number CR-12-0132590. The disposition of docket number CR-12-0133384 is unclear; however, in its decision, the habeas court noted that the plea deal agreed to by the petitioner "resolved all outstanding files and charges pending against the petitioner."

[2] In support of count one of the amended petition, the petitioner alleged additional deficiencies on the part of O'Reilly, which the habeas court rejected in its corrected memorandum of decision. The petitioner has not raised any claims on appeal concerning those additional alleged deficiencies.

[3] In support of count two of the amended petition, the petitioner alleged additional deficiencies on the part of Pattis, which the habeas court rejected in its corrected memorandum of decision. The petitioner has not raised any claims on appeal concerning those additional alleged deficiencies.

probable that he would have received a lesser sentence. On April 30, 2018, the respondent, the Commissioner of Correction, filed a return, leaving the petitioner to his proof as to his material allegations.

The matter was tried to the habeas court, *Newson, J.*, over the course of three days in July, August and November, 2018.[4] On February 26, 2019, the court issued a corrected memorandum of decision[5] denying both counts of the amended petition. Thereafter, the petitioner filed a petition for certification to appeal from the judgment, which the court granted.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner's first claim is that the habeas court improperly denied count one of the amended petition, in which he claimed that O'Reilly had rendered ineffective assistance of counsel. Specifically, the petitioner asserts that the court incorrectly rejected his ineffective assistance of counsel claim predicated on O'Reilly's alleged (1) misrepresentation to him about Baxter's willingness to testify at his criminal trial, and (2) failure to properly advise him about the potential defenses available to him. For the reasons that follow, we conclude that a new habeas trial is necessary as to these claims.

We begin by setting forth the following relevant legal principles and standard of review. "In a habeas appeal,

[4] On August 10, 2018, the parties rested and presented closing arguments. On August 13, 2018, the petitioner filed a motion to open the evidence to present the testimony of an additional witness, Attorney Francis DiScala, which the court granted, without objection, on August 24, 2018. On November 1, 2018, the parties elicited testimony from DiScala and, after resting, presented additional closing arguments.

[5] The court issued an original memorandum of decision on February 22, 2019. On February 26, 2019, the court issued the corrected memorandum of decision, which corrected certain typographical errors.

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

this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703–704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"The [long-standing] test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." (Citation omitted; internal quotation marks omitted.) *Carraway* v. *Commissioner of Correction*, 144 Conn. App. 461, 471, 72 A.3d 426 (2013), appeal dismissed, 317 Conn. 594, 119 A.3d 1153 (2015). "[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test enunciated by the United States Supreme Court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was

a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . .

"To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 704–705.

A

We first turn to the petitioner's claim of ineffective assistance of counsel predicated on O'Reilly's purported misrepresentation to him regarding Baxter's willingness to testify at his criminal trial. The petitioner contends that the evidence adduced at the habeas trial established that, almost immediately before the petitioner had entered his guilty pleas, O'Reilly misrepresented to him that Baxter would not testify and that, as a result of that misrepresentation, he entered guilty pleas that

were uninformed. We construe the essence of the petitioner's contention to be that the court, in determining that O'Reilly's performance was not deficient, made a clearly erroneous implicit factual finding that, prior to the petitioner pleading guilty, O'Reilly told him that it was *not likely* that Baxter would testify. We conclude that the court's implicit factual finding is clearly erroneous.

The following additional facts and procedural history are relevant to our resolution of this claim. At the habeas trial, the petitioner called the following witnesses: Baxter; Donald Freitag, the petitioner's father (petitioner's father); Ehring; O'Reilly; and Attorney Francis DiScala, who was Baxter's criminal defense counsel.

Baxter testified in relevant part as follows. On October 30, 2012, Baxter was driving the petitioner to the petitioner's place of employment. Before reaching their destination, the petitioner noticed that Johnson and Daley had started to follow them, at which point the petitioner told Baxter to "get out [of] here" because "[they're] coming . . . ." The petitioner appeared "scared" and "wasn't himself." Immediately before the shooting, Johnson and Daley were positioned on their scooter next to the passenger side of the petitioner's minivan, where the petitioner was seated, at which time Daley pulled a hood over his head and began moving his hand toward his waist. At that time, the petitioner was screaming, "going crazy," and stating that "they're following us, [t]hey're trying to get me . . . ." The petitioner then pulled out a gun and shot Johnson and Daley, after which Baxter sped away from the scene. Afterward, the petitioner conveyed to Baxter that he had observed Daley reaching for a gun in his waistband. The petitioner also expressed to Baxter that "these kids . . . keep coming for me," that he had "to go somewhere, [he had] to move or something," and that he was "tired of these kids [who had] killed his friend . . . ."[7]

[7] See footnote 8 of this opinion.

Sometime before the petitioner had entered his guilty pleas, Baxter, while he was in jail, met with O'Reilly, DiScala, and a private investigator for the purpose of "getting things situated for the trial." At some point in time, DiScala advised Baxter of his fifth amendment right against self-incrimination, but Baxter intended to waive that right and to testify in support of the petitioner.

The petitioner testified in relevant part as follows. On October 30, 2012, while Baxter was driving him to his place of employment, the petitioner noticed Johnson and Daley following them on a scooter. The petitioner believed Johnson and Daley to be members of a local gang that the petitioner had encountered on prior occasions.[8] The petitioner instructed Baxter to drive past his place of employment because he did not want Johnson and Daley to know where he worked. At that time, the petitioner was feeling "all over the place because [he was] wondering if [Johnson and Daley] were following [him] to get [him] . . . ." Johnson and Daley eventually maneuvered their scooter next to the passenger side of the minivan where the petitioner was seated. The petitioner noticed that Daley, who had a hood over his head, was moving his hand toward his waistband for a "metal object." Fearing that Daley was reaching for a gun to shoot him, the petitioner retrieved his gun and shot Johnson and Daley, after which Baxter sped away from the scene.

On January 14, 2015, before appearing in front of the trial court and entering his guilty pleas, the petitioner met with his parents and O'Reilly at the courthouse

[8] The petitioner testified that he was a witness in a criminal trial in which Amos Brown, his friend, was charged with, but later acquitted of, murder. The petitioner further testified that, following Brown's acquittal, Brown was killed by members of the local gang of which, the petitioner believed, Johnson and Daley were members. The petitioner testified that, following Brown's acquittal, he was threatened and attacked by members of the gang.

(January 14, 2015 meeting). During the January 14, 2015 meeting, O'Reilly told the petitioner that DiScala had informed him that Baxter was not willing to testify at the petitioner's criminal trial. Until that disclosure, the petitioner was under the impression that Baxter was going to testify. The petitioner considered Baxter's testimony to be "more than important" and believed that he "needed" Baxter's testimony to support his defense.

Three minutes after being informed by O'Reilly that Baxter would not be testifying, the petitioner appeared before the trial court to either accept or reject the plea offer. The petitioner's understanding was that this proceeding was his final opportunity to accept the plea offer.[9] Prior to January 14, 2015, and at the time he appeared before the court, the petitioner had no intention of pleading guilty. After O'Reilly had informed the court that the petitioner was rejecting the plea offer, and as the petitioner was being canvassed by the court, he changed his mind and decided to accept the offer. As the petitioner explained: "[A]s the judge was [canvassing me], my mind's bouncing all over the place. I got teary eyed. I started to get emotional based off what I just heard about my friend telling, you know, basically, you know, not coming forth for me. And that completely threw me off, and I just, I lost, I lost hope in that moment. And I just—I didn't know what [to] do." After entering his guilty pleas but before being sentenced, the petitioner learned from his family that Baxter was, in fact, willing to testify. Had he known that Baxter was willing to testify, the petitioner would not have pleaded guilty.

The petitioner's father testified in relevant part as follows. Prior to the January 14, 2015 meeting, the petitioner's father believed that Baxter would be a helpful

[9] The transcript of the January 14, 2015 hearing, which was admitted into evidence as a full exhibit during the habeas trial, reflects that the trial court informed the petitioner that any plea accepted by the court after that day would be an open plea exposing the petitioner to the maximum sentence.

witness for the petitioner, that Baxter would testify at the petitioner's criminal trial, and that the petitioner would insist on going to trial. During the January 14, 2015 meeting, however, O'Reilly conveyed that Baxter would not be testifying. According to the petitioner's father, the disclosure by O'Reilly that "[o]ne of the main witnesses [was] not going to testify" shocked and scared the petitioner.

Ehring testified in relevant part as follows. As the petitioner's initial criminal defense counsel, Ehring's defense strategy was to claim either self-defense or extreme emotional disturbance. During the course of his investigation, Ehring met with Baxter and DiScala. Ehring determined that Baxter's testimony would be helpful to the petitioner, as Baxter could bolster the petitioner's defense by testifying that the petitioner had felt terrified and threatened by Johnson and Daley immediately before the shooting. Ehring discussed with the petitioner the import of Baxter's prospective testimony, which, according to Ehring, the petitioner believed to be pivotal to his defense. Ehring also advised the petitioner that, if called as a witness at the petitioner's criminal trial, Baxter could invoke his fifth amendment right against self-incrimination and refuse to testify; however, on the basis of his conversations with DiScala and others, Ehring was "pretty certain" that Baxter would waive his fifth amendment right and elect to testify. After O'Reilly had replaced Ehring as the petitioner's criminal defense counsel, Ehring told O'Reilly that Baxter was willing to testify in support of the petitioner.

O'Reilly testified in relevant part as follows. After replacing Ehring as the petitioner's criminal defense counsel, O'Reilly met with Baxter, DiScala, and a private investigator at the jail where Baxter was being held "to see if [Baxter] might be helpful." O'Reilly did not recall whether there was any discussion during that meeting

regarding Baxter's willingness to testify at the petitioner's criminal trial; however, on the basis of the information that he gathered at the meeting, O'Reilly did not believe that Baxter's testimony would be helpful to the petitioner.

O'Reilly recalled the January 14, 2015 meeting, during which the discussion was focused on "[the petitioner's] future and . . . what [O'Reilly] thought the end result of going to trial would be and what [O'Reilly] thought the best outcome [was] for [the petitioner] to take under the circumstances." O'Reilly did not remember speaking specifically about Baxter during that meeting, and O'Reilly did not recall ever telling the petitioner that Baxter would not testify at his criminal trial. At the end of the meeting, notwithstanding O'Reilly's recommendation that the petitioner accept the plea offer, the petitioner expressed to O'Reilly that he wanted to decline the plea offer and to proceed to trial. O'Reilly did not recall whether the petitioner gave an explanation for his subsequent decision to change his mind and to accept the plea offer.

DiScala testified in relevant part as follows. As Baxter's criminal defense counsel, DiScala advised Baxter that, if called as a witness at the petitioner's criminal trial, he could invoke his fifth amendment right against self-incrimination and decline to testify. DiScala further advised Baxter that the state would potentially withdraw a favorable plea deal that had been offered to him if he elected to testify.[10] Nevertheless, DiScala believed that Baxter was "always willing" to testify at the petitioner's criminal trial.

With regard to his communications with O'Reilly, DiScala remembered meeting with Baxter, O'Reilly, and a

[10] Baxter testified that, on April 15, 2015, pursuant to a plea agreement, he pleaded guilty to several crimes, including hindering prosecution in relation to the events of October 30, 2012, and was subsequently sentenced to six years of incarceration followed by four years of special parole.

private investigator at the jail where Baxter was being held in order for O'Reilly "to get a better understanding of what Baxter would be testifying to." DiScala did not recall there being any discussion during that meeting on the topic of Baxter's willingness to testify at the petitioner's criminal trial. Additionally, DiScala did not recall having a specific conversation with O'Reilly following that meeting regarding Baxter's willingness to testify; however, DiScala was adamant that he never told O'Reilly that Baxter would not testify. DiScala speculated that he may have stated to O'Reilly either that Baxter would "be crazy to testify" or that he would recommend that Baxter invoke his fifth amendment privilege and decline to testify, but he would not have represented to O'Reilly that Baxter was not going to testify.

In its decision, the court found that O'Reilly had made an "assessment that . . . Baxter was not going to be available as [a] witness if the case went to trial." The court determined that there was "nothing unreasonable or deficient in Attorney O'Reilly's assessment . . . . An attorney's job is not to make perfect predictions but to make educated ones based on the reasonable possibilities. . . . All parties admit there was no definitive conversation about whether . . . Baxter would testify if called as a witness. Attorney O'Reilly believed it was unlikely that . . . Baxter would not have asserted his privilege against self-incrimination, given [that] he had an open plea agreement with the state. Even if . . . Baxter had expressed an overt willingness to 'help out,' Attorney O'Reilly made an assessment that his testimony would not have been particularly helpful, so he wasn't going to use him." (Citation omitted.) Subsequently in its decision, the court directly addressed and rejected the petitioner's claim that "Attorney O'Reilly 'incorrectly advised' him about whether . . . Baxter was willing to testify on his behalf if called to testify

for the defense at trial." The court stated that O'Reilly did not need to be " 'correct' in his assessments of potential witnesses" but was "only required to make a reasonable and educated assessment based on the information before him. In the present case, after taking the time to meet with [Baxter], Attorney O'Reilly made an assessment that [Baxter] was not likely to testify for the defense because [Baxter] had an open plea agreement pending with the state. Given that, [Attorney O'Reilly] presumed that . . . Baxter would likely assert his privilege against self-incrimination if [Attorney O'Reilly] attempted to call [Baxter] to testify. Even if [Baxter] did decide to testify, Attorney O'Reilly did not assess that [Baxter's] testimony would have been particularly helpful. In the end, whether Attorney O'Reilly was, in [hindsight], actually correct in his assessment of . . . Baxter's willingness to testify is not the question. . . . [Attorney O'Reilly] made a reasoned assessment, given the factors present before him at the time, and the court finds nothing deficient about his conduct." (Citation omitted.)

The petitioner maintains that O'Reilly performed deficiently during the January 14, 2015 meeting by misrepresenting to him, without reservation, that Baxter would not testify at his criminal trial. The court, however, did not find that O'Reilly conveyed to the petitioner, in absolute terms, that Baxter was not going to testify; rather, we read the court's decision as including an implicit factual finding that O'Reilly told the petitioner that it was *not likely* that Baxter would testify, coupled with an express finding that O'Reilly's assessment was reasonable. Thus, we construe the substance of the petitioner's contention to be that the court clearly erred by implicitly finding that, during the January 14, 2015 meeting, O'Reilly conveyed to the petitioner that it was *not likely* that Baxter would testify. We agree that the court clearly erred in making this implicit finding.

Preliminarily, we make clear that the court's express finding that "[a]ll parties admit there was no definitive conversation about whether . . . Baxter would testify if called as a witness" is not germane to the issue before us. Facially, this finding connotes that it was undisputed that no definitive conversation *ever* occurred between *any* individuals concerning Baxter's willingness to testify. If so broadly construed, this finding would be clearly erroneous in light of the testimony in the record, as summarized previously in this part of the opinion, plainly demonstrating that certain individuals, including the petitioner and the petitioner's father, maintained that discussions regarding Baxter's willingness to testify did occur. In his reply brief, however, the petitioner clarifies that he is not challenging this finding as clearly erroneous because, considered in context, this finding refers only to communications between O'Reilly and DiScala in relation to the meeting that they had with Baxter while he was in jail. In other words, the petitioner contends that this finding reasonably can be interpreted to be that there was no dispute that no definitive conversation happened *between O'Reilly and DiScala at that meeting* regarding Baxter's willingness to testify. We agree. Limited in the manner posited by the petitioner, this finding is supported by the record, as both O'Reilly and DiScala testified that they did not recall the subject of Baxter's willingness to testify being mentioned during that meeting.[11] This finding is separate and distinct from the implicit finding being challenged by the petitioner, that is, that O'Reilly conveyed

[11] The limited scope of this finding is further evinced by comments made by the habeas court and the petitioner's counsel during the closing arguments held following DiScala's testimony. Specifically, the following colloquy occurred:

"The Court: I mean, I'll listen to it back, and, I mean, I thought the testimony that was given here today was, we set a meeting at the jail, and I thought we were there to discuss whether or not Baxter was going to testify; *and I thought the testimony was something to the effect of, but* [*whether or not Baxter was going to testify*] *didn't come up during that meeting between* [*O'Reilly, DiScala and Baxter*].

to the petitioner, during the January 14, 2015 meeting, that Baxter was *not likely* to testify at his criminal trial.

We iterate that the finding at issue is an implicit finding necessarily found by the court. In rejecting the petitioner's claim that O'Reilly performed deficiently by " 'incorrectly advis[ing]' " him during the January 14, 2015 meeting about Baxter's willingness to testify, the court concluded that O'Reilly made a reasonable assessment that Baxter "was *not likely* to testify for the defense" because Baxter had an open plea agreement pending with the state, and, thus, "Baxter would *likely* assert his privilege against self-incrimination if [Attorney O'Reilly] attempted to call [Baxter] to testify." (Emphasis added.) Given that the crux of the petitioner's claim, as identified and rejected by the court, concerned the information conveyed by O'Reilly to the petitioner at the January 14, 2015 meeting, and that the court found that O'Reilly's assessment was that Baxter "was not likely" to testify and that Baxter "would likely" invoke his fifth amendment right against self-incrimination if called to testify, the only reasonable reading of the court's decision is that the court implicitly found that, during the January 14, 2015 meeting, O'Reilly told the petitioner that it was *not likely* that Baxter would testify.

We now turn our attention to the merits of the petitioner's claim. We observe that "[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." (Internal quotation

"[The Petitioner's Counsel]: That's correct, Your Honor. My recollection of the testimony . . . is that that meeting focused on what . . . Baxter's testimony would be . . . . *So, my understanding of the facts and the testimony is that there was never an in-depth discussion, would . . . Baxter testify at that meeting* . . . ." (Emphasis added.)

marks omitted.) *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 357, A.3d (2021), petition for cert. filed (Conn. September 29, 2021) (No. 210187). In the present case, there is no evidence in the record supporting the court's finding that, during the January 14, 2015 meeting, O'Reilly told the petitioner that it was *not likely* that Baxter would testify. None of the three individuals who attended that meeting and who testified at the habeas trial provided testimony that supports that finding. Both the petitioner and the petitioner's father testified that O'Reilly, in absolute terms, told them that Baxter *would not* testify, whereas O'Reilly testified that he did not recall there being any discussion during that meeting about Baxter's willingness to testify. There is no other evidence in the record that sheds light on any discussions had during the January 14, 2015 meeting relating to Baxter. Accordingly, we conclude that the court's finding is clearly erroneous.

Our conclusion that the court's finding is clearly erroneous does not mean that the petitioner has satisfied his burden to prove that O'Reilly rendered deficient performance. The petitioner asserts that he established that, during the January 14, 2015 meeting, O'Reilly rendered deficient performance by misrepresenting to him that Baxter would not testify at his criminal trial. It is axiomatic, however, that finding facts and resolving questions of credibility are within the sole province of the finder of fact, not this court. See *Brooks* v. *Commissioner of Correction*, 105 Conn. App. 149, 153, 937 A.2d 699, cert. denied, 286 Conn. 904, 943 A.2d 1101 (2008). Although the petitioner and the petitioner's father testified that O'Reilly told them, in absolute terms, that Baxter would not testify, we cannot discern whether the habeas court would have credited this testimony in the absence of the court's clearly erroneous finding. See *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 712, 177 A.3d 566 (2017) (observing that it

was uncertain whether, in absence of habeas court's clearly erroneous factual finding, habeas court would have credited petitioner's testimony to resolve factual issue). Moreover, O'Reilly testified that, although he did not recall Baxter's willingness to testify being discussed during the January 14, 2015 meeting, he also did not recall ever telling the petitioner that Baxter would not testify, thereby creating a dispute as to this factual issue. Under these circumstances, we conclude that the judgment rendered on count one must be reversed and the case must be remanded for a new trial as to the petitioner's claim that O'Reilly rendered ineffective assistance of counsel in connection with his purported misrepresentation about Baxter. See id., 712–13 (reversing judgment and remanding case for new habeas trial when habeas court made clearly erroneous factual finding, leaving unresolved factual issue that presented question of credibility to be addressed by habeas court).[12]

At this juncture, we note that the court disposed of the petitioner's ineffective assistance of counsel claim against O'Reilly on the performance prong of *Strickland-Hill* only without addressing the prejudice prong. See *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 255, 257 A.3d 423 ("[b]ecause both [the performance and the prejudice] prongs . . . must be established for a habeas petitioner to prevail, a court may

[12] We note that clearly erroneous factual findings are deemed harmless when they "do not undermine appellate confidence in the habeas court's fact-finding process . . . ." (Internal quotation marks omitted.) *Charles* v. *Commissioner of Correction*, supra, 206 Conn. App. 358. The record does not reflect that either (1) the court discredited the testimony of the petitioner and the petitioner's father, or (2) assuming that the testimony of the petitioner and the petitioner's father was credible, there was sufficient evidence to uphold the court's determination that the petitioner failed to prove deficient performance by O'Reilly. Cf. id., 358–59 (concluding that habeas court's clearly erroneous findings were harmless). Thus, we cannot conclude that the court's clearly erroneous finding was harmless.

dismiss a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 338 Conn. 909, A.3d (2021). In his appellate brief, the respondent requests that we remand the case to the court to make factual findings as to the prejudice prong in the event that we conclude that the court improperly determined that the petitioner failed to prove deficient performance by O'Reilly. In support of this argument, the respondent cites *Miller* v. *Commissioner of Correction*, 176 Conn. App. 616, 170 A.3d 736 (2017), in which a habeas court denied an ineffective assistance of counsel claim only on the basis of the performance prong. Id., 621. On appeal, this court concluded that (1) counsel's performance was deficient (because counsel's advice regarding immigration consequences was constitutionally insufficient), and (2) the record was inadequate to determine whether counsel's deficient performance prejudiced the petitioner, such that this court remanded the matter to the habeas court for further proceedings to make a determination on the prejudice prong. Id., 635–37. In the present case, unlike in *Miller*, we do not make a conclusion as to whether O'Reilly rendered deficient performance; rather, as a result of the habeas court's clearly erroneous finding, we conclude that a new trial is necessary. Under these circumstances, a remand to the habeas court for further proceedings to address the prejudice prong is not proper. See, e.g., *Salmon* v. *Commissioner of Correction*, supra, 178 Conn. App. 714–15 (reversing habeas court's judgment denying ineffective assistance of counsel claim and remanding case to court for new trial when court made clearly erroneous factual finding as to performance prong and did not address prejudice prong in its decision).

B

We next turn to the petitioner's claim of ineffective assistance of counsel predicated on O'Reilly's purported failure to properly advise him as to the potential

defenses available to him, including self-defense, which requires only a brief discussion. We construe this claim to be intertwined with the petitioner's principal claim predicated on O'Reilly's purported misrepresentation concerning Baxter's willingness to testify. Because we concluded in part I A of this opinion that the court committed error with respect to the principal claim and that a new trial as to that claim is necessary, we further conclude that the judgment rendered on count one must be reversed insofar as the petitioner claimed that O'Reilly rendered ineffective assistance of counsel in connection with his purported failure to properly advise the petitioner as to the potential defenses available to him, and the case must be remanded for a new trial as to that claim.

II

The petitioner's second claim is that the habeas court improperly denied count two of the amended petition, in which he asserted a claim of ineffective assistance of counsel against Pattis. Specifically, the petitioner asserts that the court committed error in rejecting his claim that Pattis rendered ineffective assistance by failing (1) to file a motion to withdraw the petitioner's guilty pleas under Practice Book § 39-27 prior to sentencing, and (2) to present adequate mitigation evidence at sentencing. We address each assertion in turn.

A

First, the petitioner contends that the court improperly concluded that Pattis did not render ineffective assistance of counsel as a result of his failure to file a motion to withdraw the petitioner's guilty pleas under Practice Book § 39-27 (4).[13] For the reasons that follow, we conclude that a new trial is necessary as to this claim.

[13] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows . . .

"(4) [t]he plea resulted from the denial of effective assistance of counsel . . . ."

The following additional facts and procedural history are relevant to our resolution of this claim. In the amended petition, the petitioner asserted that Pattis rendered ineffective assistance of counsel, in part, on the basis of an allegation that Pattis failed "to seek the trial court's permission to withdraw the petitioner's guilty pleas on the basis that they were unknowing, unwilling, and/or involuntary based on [O'Reilly's] deficient performance for the reasons stated in [count one of the amended petition] . . . ." In its decision, the court rejected this claim, stating the following three reasons. First, the court's conclusion that the petitioner failed to demonstrate that O'Reilly rendered ineffective assistance of counsel foreclosed this claim. Second, the petitioner failed to present any credible evidence that his guilty pleas were " 'unwilling or involuntary . . . .' " Third, there was evidence in the record demonstrating that Pattis had considered filing a motion to withdraw the guilty pleas, but he made a reasonable decision against doing so when he discovered that the state would "insist on the murder charge in any plea agreement, which meant that the present plea agreement gave the petitioner the opportunity to argue for the minimum mandatory sentence he was exposed to."

The petitioner asserts that his guilty pleas were not made knowingly, intelligently, or voluntarily in light of O'Reilly's ineffective assistance of counsel, and, thus, it was incumbent on Pattis to move to withdraw his guilty pleas under Practice Book § 39-27 predicated on a claim that he was denied effective assistance of counsel. In light of our conclusion in part I of this opinion that a new trial is necessary, in part, as to the petitioner's ineffective assistance of counsel claim against O'Reilly, we conclude that a new trial is also necessary as to this claim against Pattis. The court's first two reasons for rejecting this claim against Pattis—that the petitioner failed to establish that O'Reilly rendered ineffective assistance of counsel, and that the petitioner failed

to demonstrate that his pleas were unwilling or involuntary—are untenable following our reversal of the denial, in part, of count one of the amended petition and attendant remand for a new trial. As for the court's third reason, whether Pattis made a strategic decision not to seek withdrawal of the petitioner's guilty pleas because of the state's insistence on the petitioner pleading guilty to the murder charge—is irrelevant to the issue here. The petitioner's claim regarding O'Reilly was that, but for O'Reilly's ineffective assistance, the petitioner would have asserted his right to a trial rather than enter the guilty pleas. Thus, the purpose of seeking withdrawal of the guilty pleas was not to negotiate a better plea deal but to insist on going to trial.[14]

Accordingly, under the circumstances of this case, we conclude that the judgment rendered on count two must be reversed insofar as the petitioner claimed that Pattis rendered ineffective assistance of counsel by failing to file a motion to withdraw the petitioner's guilty pleas, and the case must be remanded for a new trial as to that claim.

B

Second, the petitioner contends that the court improperly concluded that Pattis did not render ineffective assistance of counsel as a result of his failure to present adequate mitigation evidence at sentencing. We disagree.

"Criminal defendants have a constitutional right to effective assistance of counsel during the sentencing stage." (Internal quotation marks omitted.) *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 31, 257 A.3d 399 (2021). "A claim of ineffective assistance

[14] At the habeas trial, the petitioner testified that he had discussions with Pattis about withdrawing his guilty pleas on the basis of Baxter's availability to testify at his criminal trial. Pattis was not called as a witness at the habeas trial.

of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . In *Strickland* [v. *Washington*, supra, 466 U.S. 687], the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . With respect to the prejudice component, [i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings." (Citations omitted; internal quotation marks omitted.) *Sotomayor* v. *Commissioner of Correction*, 135 Conn.

App. 15, 21–22, 41 A.3d 333, cert. denied, 305 Conn. 903, 43 A.3d 661 (2012).

The following additional facts and procedural history are relevant to our resolution of this claim. After pleading guilty on January 14, 2015, the petitioner was sentenced on April 7, 2015. During sentencing, Pattis asked the court to impose twenty-five years of incarceration, which was the mandatory minimum sentence for a murder conviction. See General Statutes § 53a-35a (2). Pattis offered mitigation evidence in support of the petitioner, including telling the court that (1) two people whom the petitioner knew were killed by local gang members after being "green-lighted," a term described by Pattis as "a signal sent to gang members in the [local] community that they could be killed with impunity," (2) the petitioner "struggled against things that, frankly, made his life a nightmare while he was a teenager," including attending a party where he witnessed his friend, Amos Brown, "involved in a lethal struggle," testifying as a witness at Brown's criminal trial, and "then believ[ing] he was put on a hit list and marked for death,"[15] (3) for the petitioner's safety, the petitioner's family sent him to school in New York for a few years before he returned to Connecticut to work with his family, (4) the petitioner was "not . . . proud of what he did," "made a mistake in shooting to kill," and "[understood] that he erred," and (5) the petitioner was not the "legal fiction that the state has tried to create" of "some irresponsible gangbanger carrying guns for anything other than self-protection." Pattis further brought in the petitioner's father and Brown's father to address the court, each of whom made positive remarks about the petitioner and discussed the violence that the petitioner had experienced in his life. The petitioner also addressed the court.

[15] See footnote 8 of this opinion.

In sentencing the petitioner to a total effective sentence of thirty years of incarceration, followed by ten years of special parole, the sentencing court acknowledged that the petitioner had lived in a violent environment, feared for his life, took full responsibility for his actions, and was "more than the events that occurred on October 30, 2012"; nevertheless, the court determined that the petitioner's conduct was not justified. Specifically, the court stated: "[The petitioner] did not have a right to take . . . Johnson's life. He did not have a right to put . . . Daley in a wheelchair for the rest of his life. . . . Johnson and . . . Daley had families, had friends. They had long lives ahead of them and . . . Johnson's life is obviously over and . . . Daley's life has been severely affected, and everyone, including [the petitioner], has to be accountable for his conduct." The court further observed that "[t]here have been allegations that [Johnson and Daley] were gang members and implications . . . that they were somehow violent or responsible for criminal conduct and, to my knowledge, they weren't. And even if they were—and, again, I'm not saying that they were, that does not justify what [the petitioner] did . . . ."

In its decision, the habeas court stated that the transcript of the petitioner's sentencing, which was admitted into evidence as a full exhibit during the habeas trial, reflected that "Attorney Pattis argued, in direct response to some of the state's comments, about the violence surrounding the petitioner, his attempts to avoid that conflict, and his fear of being targeted, and the court recognized those arguments." Accordingly, the court concluded that the petitioner's claim "fails because it is directly refuted by the evidence, and the petitioner has failed to present any new or additional evidence before this court that he claims would have altered the . . . sentence."

The petitioner claims that Pattis did not adequately advocate for him during sentencing because he "failed to establish critical facts in order to provide a context for the shooting in the most positive, sympathetic light to the petitioner," including that Johnson and Daley were members of the local gang that had threatened him in the past. We are not persuaded. As the habeas court properly determined, the record reflects that Pattis submitted ample mitigation evidence in support of the petitioner at sentencing, which the sentencing court took into consideration. In imposing its sentence, the sentencing court emphasized the serious nature and severe consequences of the petitioner's actions. As the habeas court correctly observed, the petitioner did not identify any information that Pattis failed to present that would have made it reasonably probable that the sentencing court would have imposed a lesser sentence. In particular, with respect to the petitioner's contention that Pattis should have provided information demonstrating that Johnson and Daley were gang members, the sentencing court stated that the petitioner's conduct was not justified *even if* Johnson and Daley were gang members who were "somehow violent or responsible for criminal conduct . . . ." Accordingly, we conclude that the habeas court properly concluded that the petitioner failed to demonstrate that Pattis rendered ineffective assistance of counsel in relation to this claim.

The judgment is reversed as to count one of the amended petition for a writ of habeas corpus only insofar as the petitioner claimed ineffective assistance of counsel against Attorney Francis O'Reilly in connection with the failure to correctly advise the petitioner concerning Terrance Baxter's willingness to testify and the failure to properly advise the petitioner about the potential defenses available to him and the case is remanded to the habeas court for a new trial as to those claims; the judgment is reversed as to count two of the amended

petition only insofar as the petitioner claimed ineffective assistance of counsel against Attorney Norman A. Pattis in connection with the failure to move to withdraw the petitioner's guilty pleas predicated on the ineffective assistance of counsel rendered by O'Reilly and the case is remanded to the habeas court for a new trial as to that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL F.*
(AC 43485)
(AC 43504)

Bright, C. J., and Elgo and Sheldon, Js.

Syllabus

The defendant, who had previously been convicted on pleas of guilty of various crimes in three separate cases, filed motions to open each of the disposed criminal cases in 2019. The defendant had been sentenced in 2010 and in 2013 in the underlying criminal cases. The trial court rendered judgments dismissing the motions to open, from which the defendant filed two appeals to this court. *Held*:

1. The trial court correctly determined that it lacked jurisdiction to consider the defendant's motions to open; under the well established common-law rule, the court lost jurisdiction following the imposition of the defendant's sentence in each of the underlying criminal cases.
2. The defendant's claim that the trial court abused its discretion when it failed to retain jurisdiction to determine the motions to open was without merit: insofar as the defendant claimed that the court had discretion to exercise jurisdiction in the present case, a court's subject matter jurisdiction is not a matter of discretion, and, as a matter of law, there simply was no jurisdiction for the court to retain; moreover, insofar as the defendant suggested that an allegation of ineffective assistance of counsel provided a trial court with continuing jurisdiction over a criminal case, this court recently rejected that proposition in *State* v. *Jin* (179 Conn. App. 185).

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* 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 others through whom that party's identity may be ascertained.

3. The trial court did not violate the defendant's right to due process when it dismissed his motions to open without providing him notice and an opportunity to be heard on the issue of jurisdiction, the procedures used being adequate to prevent the erroneous deprivation of the defendant's private interest in exercising his right to redress his grievances: given the defendant's claims before the trial court, there was no risk of an erroneous deprivation of any liberty interest the defendant possessed by the court proceeding as it did, the court having explained to the defendant that his motions to open had been filed in disposed cases and the court lacked jurisdiction to consider them, and the defendant acknowledged the court's ruling, did not request to be heard further and instead had a discussion with the court about the appointment of appellate counsel; moreover, by exercising his statutory right to appeal from the court's judgments, and because this court's standard of review is plenary, the defendant was afforded a meaningful opportunity to make his assertions and objections to any contrary arguments made by the state regarding the jurisdictional issue.

Argued September 23—officially released November 9, 2021

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of assault in the third degree and reckless endangerment in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Hadden*, *J.*, on a plea of guilty; judgment of guilty; information, in the second case, charging the defendant with the crimes of criminal violation of a protective order and criminal trespass in the first degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Licari*, *J.*, on a plea of guilty to criminal violation of a protective order; judgment of guilty; and substitute information, in the third case, charging the defendant with the crimes of assault in the third degree and conspiracy to commit assault in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Kamp*, *J.*, on a plea of guilty to

assault in the third degree; judgment of guilty; thereafter, the court, *Cradle, J.*, dismissed the defendant's motion to open in each case, and the defendant filed two appeals to this court, which consolidated the appeals. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant in both appeals (defendant).

Sarah Hanna, senior assistant state's attorney, with whom were *Melissa Patterson*, senior assistant state's attorney, and, on the brief, *Patrick Griffin*, state's attorney, and *Alexandra Arroyo*, special deputy assistant state's attorney, for the appellee in both appeals (state).

Opinion

BRIGHT, C. J. In these consolidated appeals, the defendant, Michael F., appeals from the judgments of the trial court dismissing for lack of subject matter jurisdiction his motions to open three disposed criminal cases. On appeal, the defendant claims that the court (1) improperly concluded that it lacked jurisdiction to consider the motions, (2) abused its discretion in failing to retain jurisdiction to rule on the motions, and (3) violated his right to due process when it dismissed the motions without providing him notice and an opportunity to be heard on the issue of jurisdiction. We affirm the judgments of the trial court.

The following procedural history is relevant to the defendant's claims. On April 25, 2008, in Docket No. CR-06-0062422-S (2008 case), the defendant was convicted of two counts of assault in the third degree, and the trial court sentenced him to a total effective sentence of eleven months of imprisonment, execution fully suspended, with two years of conditional discharge. In June, 2009, the defendant was arrested in connection with a physical altercation with the mother of his child and charged with assault in the third degree

and reckless endangerment in the first degree in Docket No. CR-09-0093196-S (2009 case). The trial court, *Damiani*, *J.*, entered a protective order prohibiting the defendant from having any contact with the victim.

On October 16, 2009, pursuant to a plea agreement, the defendant pleaded guilty under the *Alford* doctrine[1] to one count each of assault in the third degree and reckless endangerment in the first degree in the 2009 case. On the same date, the defendant admitted to violating his conditional discharge stemming from the 2008 case, and the court released him on a written promise to appear in each case, conditioned on the defendant entering and completing the Evolve program.[2] The court explained that, if the defendant successfully completed the program, the state would recommend that he receive a fully suspended sentence. If, however, the defendant failed to abide by the conditions of his release or to complete the Evolve program, he would be exposed to a total effective sentence of two years of imprisonment.

Prior to completing the Evolve program, the defendant was arrested and charged with criminal violation of a protective order and criminal trespass in the first degree in Docket No. CR-10-0101345-S (2010 case). Because the new arrest would violate the plea agreement in the 2009 case and expose the defendant to two

[1] "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. . . . 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).

[2] The Evolve program is a behavior modification program for male offenders of domestic violence. See *State* v. *Brown*, 145 Conn. App. 174, 177, 75 A.3d 713, cert. denied, 310 Conn. 936, 79 A.3d 890 (2013).

years of imprisonment, the court held a hearing on March 23, 2010, pursuant to *State* v. *Stevens*, 278 Conn. 1, 11–13, 895 A.2d 771 (2006), to determine whether probable cause existed to support his arrest. At the conclusion of the hearing, the court found that the defendant violated the conditions of his plea agreement and continued the matter for sentencing.

On May 21, 2010, the court, *Licari*, *J.*, terminated the defendant's conditional discharge in the 2008 case and, in the 2009 case, imposed a total effective sentence of two years of imprisonment, execution fully suspended, with two years of conditional discharge. On that same date, in the 2010 case, the defendant pleaded guilty, under the *Alford* doctrine, to criminal violation of a protective order, and the court sentenced him to an unconditional discharge.

In July, 2013, the defendant was arrested and charged with assault in the third degree and conspiracy to commit assault in the second degree in Docket No. CR-13-0139979-S (2013 case). On November 15, 2013, the defendant pleaded guilty under the *Alford* doctrine to assault in the third degree, and the court, *Kamp*, *J.*, sentenced him to one year imprisonment, execution fully suspended, with two years of probation. On December 3, 2014, the court, *Keegan*, *J.*, terminated the defendant's probation early.

In January, 2019, more than five years after his probation was terminated in the 2013 case and more than seven years after his sentences had been served in the 2008, 2009, and 2010 cases, the defendant filed motions to open the 2009, 2010, and 2013 disposed cases, alleging, inter alia, ineffective assistance of counsel in each of those cases due to an alleged conflict of interest. On January 11, 2019, the court, *Cradle*, *J.*, denied the motions on the papers without stating the reasons for its decisions.

The defendant thereafter filed applications for waiver of fees, costs and expenses and appointment of counsel on appeal in each of the three cases. On June 3, 2019, Judge Cradle held a hearing on the applications at which she addressed the defendant as follows: "[Your motions] were motions to open disposed cases. And it looks like on the papers this court denied the motion[s] . . . . The court checked the box that the motion is denied. I just want to note for the record . . . the reason why I denied the motions is because . . . I did not feel that this court had jurisdiction to hear these specific motions, okay. So technically, the matter should have been dismissed by the court, not denied. So I'll vacate my prior order[s] denying [them] and dismiss them for lack of jurisdiction."

The court then asked the defendant questions about his fee waiver application. After granting the fee waiver, the court returned to the motions to open and stated: "The prior orders [are] vacated. The . . . matter should have been dismissed for lack of jurisdiction as opposed to just stating it was denied, okay. That was the basis for the court's denial of the motion. But in retrospect it should have been a dismissal, okay." The defendant responded: "Yes, thank you." The court then had a further discussion with the defendant about the appointment of counsel and granted the defendant's application in the 2013 case only and appointed counsel to represent him on appeal. On June 7, 2019, the court held another hearing to address the two applications filed by the defendant in the 2009 and 2010 cases, which the court had overlooked at the previous hearing. The court granted the applications and appointed counsel to represent him on appeal in those cases as well. These appeals followed.[3]

[3] On October 10, 2019, the defendant filed his first appeal, Docket No. AC 43485, challenging the judgment dismissing his motion to open in the 2013 case. On October 16, 2019, the defendant filed a second appeal, Docket No. AC 43504, challenging the judgments dismissing his motions to open in the

I

We begin by setting forth our standard of review. Although we review a court's ruling on a motion to open a judgment for abuse of discretion; see *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 532, 253 A.3d 1033 (2021); the dispositive issue in this appeal is whether the court properly concluded that it lacked jurisdiction over the defendant's motions to open. The issue of subject matter jurisdiction presents a question of law over which our review is plenary. See *State* v. *Smith*, 150 Conn. App. 623, 634, 92 A.3d 975, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014).

On appeal, the defendant claims that the court improperly determined that it lacked jurisdiction to consider his motions to open. The state argues that the trial court properly determined that it lacked subject matter jurisdiction over the motions because the defendant had been sentenced already in each of the underlying criminal cases and there is no applicable constitutional or statutory grant of jurisdiction that permits the court to retain or exercise jurisdiction over the defendant's judgments of conviction after he has been sentenced. We agree with the state.

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . .

2009 and 2010 cases. Thereafter, this court granted the defendant's motion to consolidate the appeals for briefing and argument.

"[In other words] the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . This principle is memorialized in Practice Book § 39-26, which provides: A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in [Practice Book §] 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed. . . .

"Thus, although this court has recognized the general principle that there is a strong presumption in favor of jurisdiction . . . in criminal cases, this principle is considered in light of the common-law rule that, once a defendant's sentence has begun . . . th[e] court may no longer take any action affecting a defendant's sentence unless it *expressly* has been authorized to act." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 133–35, 49 A.3d 197 (2012); cf. *State* v. *Waterman*, 264 Conn. 484, 491, 825 A.2d 63 (2003) ("[i]t is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment *before the sentence has been executed*" (emphasis added; internal quotation marks omitted)).

The defendant attempts to avoid this clear rule of law by arguing that there is a presumption in favor of courts exercising jurisdiction and by analogizing to statutes and rules of practice, including those applying solely to civil proceedings, which are simply inapplicable to the defendant's motions to open in these cases. Recently, in *State* v. *McCoy*, 331 Conn. 561, 578–84, 206 A.3d 725 (2019), our Supreme Court rejected arguments

similar to those raised by the defendant. In particular, the court reviewed the history of the common-law rule limiting the trial court's jurisdiction in criminal cases and noted two anomalies in its previous decisions. Specifically, in *State* v. *Wilson*, 199 Conn. 417, 437, 513 A.2d 620 (1986), our Supreme Court suggested that the civil rule allowing trial courts to open or set aside civil judgments within four months of judgment applies to criminal cases. In addition, in *State* v. *Myers*, 242 Conn. 125, 136, 698 A.2d 823 (1997), the court, citing its decision in *Wilson*, held that "the trial court retained jurisdiction to entertain the motion for a new trial after sentencing because it could have opened the judgment." (Footnote omitted.) See *State* v. *McCoy*, supra, 331 Conn. 583.

In *McCoy*, the court explained that, "given the long and consistent history of our courts applying the traditional rule that jurisdiction is lost upon the execution of a sentence, we cannot conclude that *Myers* reflects a retreat from that common-law rule. Instead, we acknowledge that *Myers* and *Wilson* are anomalies in this court's case law, and we take this opportunity to clarify and reiterate, as we have consistently done since *Myers*, that a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority. . . . Thus, any reliance on *Myers* by the defendant to extend the jurisdiction of the trial court beyond the point at which his sentence was executed is misplaced."[4] (Citation omitted.) *State* v. *McCoy*, supra, 331 Conn. 586–87. The court in *McCoy* reaffirmed in the strongest terms possible that in the absence of a specific constitutional or

[4] Although he acknowledges our Supreme Court's decision in *McCoy*, the defendant nevertheless cites *State* v. *Wilson*, supra, 199 Conn. 417, and holds it out as support for his contention that "in certain circumstances, even after a defendant's sentence begins, or ends, the court does retain jurisdiction." In doing so, the defendant ignores the fact that, in *McCoy*, the Supreme Court labeled *Wilson* an anomaly.

statutory grant of jurisdiction a trial court loses subject matter jurisdiction once a defendant is sentenced. Id.

In the present case, the defendant cannot point to such a specific grant of jurisdiction because none exists. Thus, under the well established common-law rule, the court lost jurisdiction after it sentenced the defendant on May 21, 2010, in the 2009 and 2010 cases, and on November 13, 2013, in the 2013 case. See id., 586–87; see also *State* v. *Jin*, 179 Conn. App. 185, 193–94, 179 A.3d 266 (2018) ("We iterate that following the imposition of the defendant's sentence on January 12, 2016, the court was divested of jurisdiction. Accordingly, it was without the power to consider the defendant's claim of ineffective assistance of counsel that was raised in the . . . motion to open.").

Accordingly, we conclude that the court properly determined that it lacked jurisdiction to consider the defendant's motions to open because the court lost jurisdiction following the imposition of the defendant's sentence in each of the underlying criminal cases.

II

The defendant also claims that the court "abused its discretion when it failed to retain jurisdiction to determine the motions to open . . . on their merits." He argues that "when an action came before the [court] . . . alleging that a just defense existed, in whole or part, that his counsel had a conflict of interest, resulting in the denial of the defendant's constitutional right to counsel, the [court] had the statutory authority not only to retain jurisdiction, but to consider the motions on the merits and to grant a new trial." This claim is without merit.

Insofar as the defendant claims that the court had discretion to exercise jurisdiction in the present case, we note that a court's subject matter jurisdiction is not

a matter of discretion. See *Mirabal* v. *Mirabal*, 30 Conn. App. 821, 825, 622 A.2d 1037 (1993) ("[s]ubject matter jurisdiction . . . cannot be conferred on the court by waiver or consent of the parties, nor can the court confer jurisdiction on itself"). For the reasons set forth in part I of this opinion, as a matter of law, there simply was no jurisdiction for the court to "retain." Similarly, insofar as the defendant suggests that an allegation of ineffective assistance of counsel provides a trial court with continuing jurisdiction over a criminal case, this court recently has rejected this proposition. See *State* v. *Jin*, supra, 179 Conn. App. 192–94 (concluding that trial court lacked jurisdiction to consider defendant's ineffective assistance of counsel claim raised in motion to open because court divested of jurisdiction following imposition of sentence).

III

Finally, we address the defendant's claim that his right to due process was violated when the trial court dismissed his motions to open without providing him notice and an opportunity to be heard on the issue of jurisdiction. The defendant argues that he "has a vested liberty interest in his right to redress his grievances" pursuant to the first amendment to the United States constitution and article first, §§ 10 and 14, of the Connecticut constitution.[5] He argues that "[t]he right to due process encompassed the right to make his assertions

[5] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Article first, § 14, of the Connecticut constitution provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

that the court did have jurisdiction to hear his motions, and to make his objections to any contrary arguments made by the state or by the court" before the court ruled on the motions.

In response, the state argues that the defendant had an opportunity to address the issue of subject matter jurisdiction at the hearing on his fee waiver applications on June 3, 2019, when the court, after noting that his motions were directed to previously disposed cases, vacated its rulings denying the motions to open and dismissed the motions for lack of subject matter jurisdiction. Alternatively, the state argues that the defendant has failed to demonstrate that he was entitled to any further process than that already afforded to him.

In his reply brief, the defendant argues that he was not provided a meaningful opportunity to be heard at the June 3, 2019 hearing because he was not notified that the jurisdictional issue would be addressed at that time and because the hearing occurred only after the court already had rendered its decision on his motions. We conclude that the defendant's right to due process was not violated in the present case.

"We resolve due process claims pursuant to *Mathews* v. *Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). . . . Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the [s]pecific dictates of due process generally require consideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state's] interest, including the function involved and the fiscal and administrative burdens that

the additional or substitute procedural requirement would entail. . . .

"When determining what procedures are constitutionally required, we must bear in mind that [t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice of the case against him and [an] opportunity to meet it. . . . The elements of notice and opportunity, however, do not require a judicial-type hearing in all circumstances. . . . So long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens on the state under the guise of due process." (Citations omitted; internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 134 Conn. App. 405, 411–12, 40 A.3d 336 (2012), appeal dismissed, 312 Conn. 215, 91 A.3d 898 (2014).

In the present case, given the defendant's claims before the trial court, there was no risk of an erroneous deprivation of any liberty interest the defendant possessed by the court proceeding as it did. At the June 3, 2019 hearing, the court explained to the defendant that his motions to open had been filed in disposed cases, the court lacked jurisdiction to consider the motions, and the court therefore was vacating its prior order denying the motions and was dismissing them instead. The defendant acknowledged the court's ruling, did not request to be heard further, and instead had a discussion with the court about the appointment of appellate counsel. Given that the court clearly was without jurisdiction to hear the defendant's motions, we cannot say that the court's interaction with the defendant deprived him of due process. Furthermore, by exercising his statutory right to appeal from the court's judgments, and because our standard of review is plenary, the defendant has been afforded a meaningful opportunity "to make his assertions that the court did

have jurisdiction to hear his motions, and to make his objections to any contrary arguments made by the state" regarding the jurisdictional issue.

Accordingly, we conclude that the procedures used in the present case have been adequate to prevent the erroneous deprivation of the defendant's private interest in exercising his right to redress his grievances.

The judgments are affirmed.

In this opinion the other judges concurred.

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY (AC 43291)

Bright, C. J., and Elgo and Sheldon, Js.

Syllabus

The plaintiffs, S and D Co., sought to recover damages for, inter alia, the defendant's alleged breach of contract related to its offer to provide funding for the renovation of real property owned by D Co. The trial court granted the defendant's motions for summary judgment and rendered judgment in favor of the defendant, from which the plaintiffs appealed to this court. *Held* that the judgment of the trial court was affirmed; the trial court, having fully addressed the claims and arguments raised in this appeal, this court adopted the trial court's thorough and well reasoned memoranda of decision as proper statements of the relevant facts, issues and applicable law on those issues.

Argued September 23—officially released November 9, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment; thereafter, the court granted the plaintiffs' motion to reargue and vacated in part the summary judgment entered in favor of the defendant; subsequently, the court granted the defendant's motion

for summary judgment and rendered judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Steven J. Zakrzewski, with whom, on the brief, was *Matthew S. Carlone*, for the appellants (plaintiffs).

Linda L. Morkan, with whom was *Benjamin C. Jensen*, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiffs, David Squillante and DJS45, LLC,[1] appeal from the judgment rendered by the trial court in favor of the defendant, Capital Region Development Authority, following the granting of the defendant's two motions for summary judgment challenging the plaintiffs' right to prevail on all three counts of their operative complaint. On appeal, the plaintiffs claim that the court erred in granting the defendant's motions for summary judgment. We affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiffs for purposes of reviewing the trial court's summary judgment rulings; see *Cefaratti* v. *Aranow*, 321 Conn. 637, 641, 138 A.3d 837 (2016); reveals the following facts. Squillante is the sole member of DJS45, LLC, a limited liability company. The defendant is a quasi-municipal corporation created by statute.[2] In 2011, DJS45, LLC, purchased a five-story commercial building located at 283-291 Asylum Street in Hartford. Squillante then renovated the ground floor of the building and eventually opened a restaurant on the premises.

[1] In this opinion, we refer to Squillante and DJS45, LLC, individually by name where necessary and collectively as the plaintiffs.

[2] General Statutes § 32-602 (a) provides in relevant part: "The purpose of the Capital Region Development Authority shall be (1) to stimulate new investment within the capital region and provide support for multicultural destinations and the creation of a vibrant multidimensional downtown . . . ."

Beginning in early 2013, Squillante engaged in conversations with representatives of the defendant concerning the possibility of procuring financing for the renovation of residential apartment units on the upper floors of the building. These conversations eventually resulted in a letter from the defendant to Squillante dated May 10, 2013, setting out what is described as a "preliminary outline of general business terms of the potential project," which was "expressly subject to the completion of [a] due diligence investigation [by the defendant] including the provisions of necessary documents as outlined [in the letter] and the securing of complete financing for the [p]roject."

Over the next several months, representatives of the defendant and the plaintiffs worked together to finalize the deal. In December, 2013, the defendant's legal counsel sent the plaintiffs a "closing checklist" identifying all outstanding items that required resolution in order to finalize the deal. The following month, however, in an e-mail dated January 7, 2014, a representative of the defendant wrote to Squillante, stating: "[W]e have a variety of issues outstanding. I have attached the closing [checklist] for the project that was sent to your attorney in early December and little has been done to advance the items on the list. . . . [W]e need to hasten the consummation of this deal. The funds are now very 'old' . . . . If we do not bring this to conclusion in the next [forty-five to sixty] days, I will have little choice but to [reallocate] the funds."

In an e-mail dated May 14, 2014, and again in a letter dated July 30, 2014, a representative of the defendant notified Squillante that its offer to provide funding for renovation of the building at 283-291 Asylum Street had expired due to the failure to timely resolve the outstanding requirements but that the plaintiffs could reapply for project funding at a future date.

The plaintiffs commenced the present action on July 26, 2016, by serving the defendant with a three count complaint alleging breach of contract, promissory estoppel, and negligent misrepresentation. On October 23, 2017, the defendant filed its first motion for summary judgment, in which it asserted that it was entitled to judgment as a matter of law on the plaintiffs' claim of breach of contract because the May 10, 2013 letter was merely an agreement to agree, not a legally enforceable contract. The defendant also asserted that it was entitled to judgment as a matter of law on the plaintiffs' claim of promissory estoppel because it had never made a clear and definite promise to the plaintiffs that it would provide funding for the proposed project. Finally, the defendant alleged that the plaintiffs' negligent misrepresentation claim was time barred because it was brought outside of the limitation period proscribed for such claims in General Statutes § 52-584.

On November 14, 2017, prior to filing an objection to the defendant's motion, the plaintiffs amended their complaint, resulting in what became the operative complaint, in order to clarify the allegations of their claims in light of the defendant's motion for summary judgment and to include additional facts they had learned through discovery. On January 2, 2018, the plaintiffs objected to the motion for summary judgment on the grounds that (1) material questions of fact existed as to their breach of contract claim, (2) the May 10, 2013 letter specified that a precondition to finalizing the parties' agreement was the provision of either a personal guarantee " 'or' " a payment and performance bond, (3) their negligent misrepresentation claim was not time barred by § 52-584 because that statute does not apply to claims of negligence not resulting in personal injury, and (4) there was evidence that the defendant had made a misrepresentation concerning what was required to finalize the parties' agreement by stating that the plaintiffs

needed to provide either a guarantee " 'or' " a payment and performance bond. (Emphasis omitted.)

On July 18, 2018, the trial court, *Noble*, *J.*, granted the defendant's motion for summary judgment as to all three counts of the complaint. As for the plaintiffs' breach of contract claim, the court concluded that there was no genuine issue of material fact that the May 10, 2013 letter, on which the plaintiffs relied, in part, to demonstrate the existence of a contractual duty, was not a legally enforceable contract. As for the plaintiffs' claim of promissory estoppel, the court concluded that there was no genuine issue of material fact that the defendant had not made a clear and definite promise to loan the plaintiffs funding for the proposed project. The court initially granted the motion for summary judgment in favor of the defendant as to the negligent misrepresentation claim in count three, but it did so under the general tort statute of limitations, General Statutes § 52-577, not the separate statute applicable to negligence actions resulting in personal injury, § 52-584, which the defendant had invoked. Thereafter, by order dated August 21, 2018, the court vacated the entry of summary judgment on count three because the defendant had not pleaded that the claim was barred under § 52-577, the statute of limitations that was applicable to the plaintiffs' claim. Subsequently, the defendant sought leave to amend its answer to include the special defense that the action was time barred under § 52-577.

On October 11, 2018, the defendant filed its second motion for summary judgment, which was directed only to count three and was accompanied by two affidavits. The defendant asserted in that second motion that the plaintiffs' claim of negligent misrepresentation was time barred by § 52-577, that the continuing course of conduct doctrine did not apply to that claim, and that the plaintiffs could not establish the elements for a claim of negligent misrepresentation. On November 23, 2018,

the plaintiffs filed an objection to the motion, with an affidavit by Squillante attached, asserting that the defendant knew or should have known that it had made false statements pertaining to the bonding requirement and that there were genuine issues of material fact as to whether the continuing course of conduct doctrine applied and, thus, tolled the statute of limitations. On March 15, 2019, the trial court issued a memorandum of decision granting the defendant's second motion for summary judgment on the plaintiffs' claim of negligent misrepresentation. The court concluded that the plaintiffs had failed to establish a genuine issue of material fact with respect to the applicability of the continuing course of conduct doctrine and that the action was time barred under § 52-577.

The plaintiffs appeal from the judgment of the trial court rendered in favor of the defendant, following its granting of summary judgment on all three of the plaintiffs' claims. Specifically, they argue that the court abused its discretion by granting the motions for summary judgment because there are multiple disputes of material fact as to each of the claims.

"Appellate review of the trial court's decision to grant summary judgment is plenary." (Internal quotation marks omitted.) *Chelsea Groton Bank* v. *Belltown Sports, LLC*, 199 Conn. App. 294, 299, 236 A.3d 265, cert. denied, 335 Conn. 960, 239 A.3d 318 (2020). After a careful review of the record, as well as the parties' briefs and relevant law, we are convinced that the plaintiffs' claims on appeal lack merit and, accordingly, that the trial court acted properly when it granted the defendant's two motions for summary judgment disposing of all three counts of the operative complaint. In granting the defendant's two motions for summary judgment, the trial court issued two thorough and well reasoned memoranda of decisions, both of which are proper statements of the facts, issues, and applicable law. See

Squillante v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (July 18, 2018) (reprinted at 208 Conn. App. 682, A.3d), vacated in part by court order, August 21, 2018; *Squillante* v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (March 15, 2019) (reprinted at 208 Conn. App. 699, A.3d). We therefore adopt those memoranda of decision as proper statements of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Ortiz* v. *Torres-Rodriguez*, 205 Conn. App. 129, 132, 255 A.3d 941, cert. denied, 337 Conn. 910, 253 A.3d 43 (2021).

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY*

Superior Court, Judicial District of Hartford
File No. CV-16-6070594-S

Memorandum filed July 18, 2018

Proceedings

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

Matthew S. Carlone, for the plaintiffs.

Benjamin C. Jensen, for the defendant.

* Affirmed. 208 Conn. App. 676, A.3d (2021).

Opinion

NOBLE, J.

The question presented by the motion for summary judgment of the defendant, the Capital Region Development Authority (CRDA), is whether, in the absence of disputed material facts, CRDA is entitled to judgment as a matter of law on the breach of contract, promissory estoppel, and negligent misrepresentation claims asserted by the plaintiffs, David Squillante (Squillante) and DJS45, LLC (DJS45). The court finds that no enforceable agreement was created between the parties and holds that judgment should enter on all three claims in favor of CRDA.

FACTS

The following facts and procedural history are relevant to this decision. This action was commenced by service of process on CRDA on July 26, 2016. The operative complaint is the amended complaint dated November 14, 2017 (complaint), which asserts in three counts, respectively, claims of breach of contract, promissory estoppel, and negligent misrepresentation. Squillante is the sole member of DJS45, a limited liability company. CRDA is a quasi-municipal corporation created by statute,[1] whose purpose is to "stimulate new investment within the capital region" and "encourage residential housing development." General Statutes § 32-602 (a) (1) and (3). Squillante formed DJS45, which thereafter purchased a five-story commercial building located at 283-291 Asylum Street in Hartford (property). Squillante opened a restaurant in the ground floor of the property and sought financing for the renovation and conversion of the upper four floors into residential apartments. Beginning in early 2013, Squillante engaged in conversations with representatives of CRDA about potential

[1] See General Statutes § 32-600 et seq.

financing that resulted in the execution of a letter dated May 10, 2013 (letter). CRDA ultimately withdrew the offer to provide financing. The plaintiffs assert that the letter constitutes a binding contract, evinces a promise to provide financing upon which the plaintiffs reasonably relied, and contains misrepresentations upon which the plaintiffs relied to their detriment.

In particular, the letter provides that CRDA was "pleased to provide you with the terms and conditions under which CRDA will extend financial assistance for the conversion of 283-91 Asylum Street (the 'Project') into a mixed use residential project. The terms set forth below are intended to be *a preliminary outline of general business terms of the potential project and are expressly subject to the completion of CRDA due diligence investigation* including the provisions of necessary documents as outlined below and the securing of complete financing for the Project. *This letter is not intended to create any legal liability for CRDA* and is to serve as an explanation of assistance to be provided by CRDA." (Emphasis added.) The letter was signed by Squillante, on behalf of DJS45, and Michael Freimuth, executive director of the CRDA, on its behalf. The letter proposed a construction loan for an unspecified amount not more than $575,000 and then a permanent loan of an also unspecified amount, but no more than $518,000 for a twenty year term at 1.5 percent.

Several terms and various contingencies remained unresolved. Because CRDA was only funding a portion of the project, the amount that it would actually lend depended upon (a) the amount of funding DJS45 was able to secure from private lenders, and (b) the amount of state historic tax credits to be awarded.[2] The letter

[2] The letter provided that "CRDA assistance is contingent on the Sponsor successfully securing permanent financing from other sources [in the amount of $1,055,000] to reduce the CRDA construction loan assistance and to fully fund the Project's costs." It also contemplated the award of a Connecticut Historic Tax credit in the amount of $195,131.

specified that DJS45 "must present a final development budget and project application that will be incorporated into a formal Assistance Agreement between CRDA and Sponsor. Sponsor shall be responsible for the payment of all necessary and appropriate costs associated with this transaction, whether or not a closing takes place . . . ." The formal assistance agreement was never executed. Other terms were not identified by the letter, including dates for completion of any obligations. The letter provided that DJS45 "shall be responsible for any costs above the budget outlined in this letter to complete the Project in accordance with the plans and specifications finally approved by CRDA. [DJS45] will provide a guaranty or payment and performance bonds to the benefit of CRDA by a credit worthy entity approved by CRDA for the completion of the Project in a lien free state." While CRDA's board of directors had approved the terms and conditions of the letter, "such approval [was] contingent on the approval of the State of Connecticut Bond Commission. In the event that such approval is [not] obtained or any time CRDA determines in its discretion that such approval is not likely to be obtained with a reasonable period of time, CRDA may terminate this proposal." Finally, the letter informed DJS45 that, "[a]lthough not an exhaustive list, CRDA may request and [DJS45] shall provide the following: appraisals, title searches, covenants, insurance certificates, plans and specifications, evidence of financing, permits and approvals, contractor agreements, surveys, environmental clearance, final budget and final application."

On June 21, 2013, the state of Connecticut bond commission (commission) voted to approve the allocation of up to $575,000 for the CRDA's proposed loan to DJS45. On September 17, 2013, CRDA sent DJS45 a template of the formal assistance agreement identified in the letter. Section 3.9 of the assistance agreement,

titled "Payment and Performance Bond," provided that "[DJS45] shall provide CRDA with Payment and Performance Bonds with respect to each Contractor that enters into a Major Contract with [DJS45] . . . ." On December 4, 1993, CRDA sent DJS45 a "closing checklist" identifying various items that needed to be provided. Item 33 included bonds from the general contractor and the subcontractors.

Although the plaintiffs now assert that the requirement of performance and payment bonds, rather than simply a personal guarantee, was a material breach of the contract embodied in the letter, this claim is negated by communications between Freimuth and Squillante. On January 7, 2014, Freimuth wrote to Squillante in an e-mail that there were "a variety of issues outstanding. I have attached the closing check list for the project that was sent to your attorney in early December and little has been done to advance the items on the list. I hear that your contractor cannot get bonded which is a non-starter . . . ." The e-mail inquired about the timing-out of an initial lender agreement and the lack of a fully executed commitment from the permanent lender. Freimuth indicated that they needed to consummate the deal because the "funds are now very 'old' and pressure is on to return them for other deals. If we do not bring this to conclusion in the next [forty-five to sixty] days, I will have little choice but to reallocate the funds."

Squillante replied to CRDA on January 7, 2014, representing that "[t]here are no issues with any of your concerns . . . . Also my contractor can get bonding, he was just looking not to incur the expense." DJS45 never obtained the performance or payment bonds. On July 25, 2014, the commission voted to reallocate the proposed funding for the project and CRDA revoked its approval of the application without prejudice. This action followed.

On October 23, 2017, CRDA filed its motion for summary judgment asserting that the letter was not a legally enforceable contract. Rather, in its view, the letter was an agreement to agree. Moreover, even if it was an enforceable agreement, the plaintiffs never performed because they never obtained permanent financing or provided performance bonds. CRDA asserts that it never made a clear and definite promise to the plaintiffs for a loan such that the second count asserting a promissory estoppel claim fails. Finally, the negligent misrepresentation claim fails, in the view of CRDA, because it was commenced outside of the limitation period provided by General Statutes § 52-584 and because CRDA did not make any misrepresentations.

The plaintiffs object on the grounds that material questions of fact exist as to whether the letter was intended to be a binding contract, and whether there was any breach thereof by CRDA. The second count sounding in promissory estoppel survives summary judgment, in the estimation of the plaintiffs, because the letter provided for a personal guarantee "or" a payment and performance bond. As to their negligent misrepresentation claim, the plaintiffs observe that § 52-584 is inapplicable here, and the misrepresentation in the present case is that of providing financing if the plaintiffs provided a guarantee "or" payment and performance bond.

LEGAL STANDARD

The legal standard governing summary judgment motions is well settled. "Summary judgment is a method of resolving litigation when 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 . . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is

no real issue to be tried . . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996).

DISCUSSION

With the governing legal standard in mind, the court now addresses the breach of contract, promissory estoppel, and negligent misrepresentation claims in turn.

I

COUNT ONE: BREACH OF CONTRACT

The court finds that CRDA has established a lack of any genuine issue of material fact as to the absence of an enforceable agreement. Specifically, the letter provided merely the contours of a potential deal that might, when reduced to a subsequent writing, result in a binding contract. "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages . . . . The interpretation of definitive contract language is a question of law . . . ." (Citation omitted; internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017). "A contract is not made so long as, in the contemplation of the parties, something remains to be done . . . ." (Internal quotation marks omitted.) *Santos* v. *Massad-Zion Motor Sales Co.*, 160 Conn. App. 12, 19, 123 A.3d 883, cert. denied, 319 Conn.

959, 125 A.3d 1013 (2015); see id. (lack of precise terms of confidentiality agreement to which parties agreed to integrate into settlement agreement, such as what information was protected, method of enforcement, and to whom settlement details could be disclosed, rendered settlement contract unenforceable). "So long as any essential matters are left open for further consideration, the contract is not complete." (Internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, 53 Conn. App. 524, 535, 732 A.2d 181, (citing 17A Am. Jur. 2d, Contracts § 32 (1991)), cert. denied, 250 Conn. 901, 734 A.2d 984 (1999); see *L & R Realty* v. *Connecticut National Bank*, supra, 538 (agreement to subordinate loan which lacked terms and conditions was unenforceable). Where a writing is "no more than a statement of some of the essential features of a proposed contract and not a complete statement of all the essential terms," which terms require further development in an executed written contract, no enforceable agreement exists. *Westbrook* v. *Times-Star Co.*, 122 Conn. 473, 481, 191 A. 91 (1937). "Whether the parties intended legally to bind themselves prior to the execution of a formal contract is to be determined from (1) the language used, (2) the circumstances surrounding the transaction, and (3) the purpose that they sought to accomplish. . . . A consideration of these factors enables a court to determine if the informal contract . . . is enforceable or merely an intention to negotiate a contract in the future." (Citation omitted.) *Fowler* v. *Weiss*, 15 Conn. App. 690, 693, 546 A.2d 321, cert. denied, 209 Conn. 814, 550 A.2d 1082 (1988).

"Under established principles of contract law, an agreement must be definite and certain as to its terms and requirements." (Internal quotation marks omitted.) *Perricone* v. *Perricone*, 292 Conn. 187, 223, 972 A.2d 666 (2009). "[N]umerous Connecticut cases require definite agreement on the essential terms" in order to render

the agreement enforceable. *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 845, 779 A.2d 174 (2001). Whether a term is essential turns "on the particular circumstances of each case." Id. Clearly, an essential term is one without which a party would not have entered into an agreement. See, e.g., *Hawley Avenue Associates, LLC* v. *Robert D. Russo, M.D. & Associates Radiology, P.C.*, 130 Conn. App. 823, 830-31, 25 A.3d 707 (2011) (no enforceable lease/contract where no agreement on precise location and shape of parking area and party would not have signed lease because dimensions were integral part of decision to enter into agreement). In *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 107, 100 A.3d 450 (2014), an alleged settlement agreement between an internet service provider and its customers resolving a breach of contract action was held unenforceable where a confidentiality provision was an essential component of the agreement and the parties had failed to agree to the terms of the confidentiality provision. Similarly, a promise indicating an intent to make a future employment contract, absent an agreement on the material terms of employment, is not binding as a contract regardless of the promisor's partial performance. *Geary* v. *Wentworth Laboratories, Inc.*, 60 Conn. App. 622, 628, 760 A.2d 969 (2000).

In accordance with these principles, the court considers the first *Fowler* factor and concludes that the letter was in the nature of an "agreement to agree," rather than an enforceable contract, because essential terms had yet to be agreed upon. The letter was self-described as "*a preliminary outline of general business terms of the potential project and are expressly subject to the completion of CRDA due diligence investigation* including the provisions of necessary documents as outlined below and the securing of complete financing for the Project. *This letter is not intended to create*

any legal liability for CRDA and is to serve as an explanation of assistance to be provided by CRDA." (Emphasis added.) By its very language, it identified itself as merely setting out the framework of a future contract, the formal assistance agreement, whose terms were yet to be agreed upon. These terms include the contents of the final development budget and the project application that were to be incorporated in the assistance agreement as well as the unidentified terms of the assistance agreement. Additionally, the letter contemplated final approval by CRDA of as yet undrafted "plans and specifications." Finally, CRDA provided a nonexhaustive list of additional agreements, the terms of which were not specified, that the plaintiffs would be required to provide, including but not limited to "covenants" and "contractor agreements." The dispositive case law compels the conclusion that these yet to be determined agreements and terms renders the letter unenforceable as an "agreement to agree."

The plaintiffs suggest that *Connecticut Parking Services, LLC* v. *Hartford Parking Authority*, Superior Court, judicial district of Hartford, Docket No. CV-11-6018221-S (April 2, 2013), provides the court with an example of contract language that articulated an intent not to create a contractual obligation, which was ultimately found by the court to present questions of fact upon which summary judgment was denied. The reliance on this case is misplaced. In *Connecticut Parking Services, LLC*, language in a request for proposal that the parties would "enter into negotiations, *which may ultimately lead to a contract*" was raised by the defendant as an indication that the request for proposal was not an enforceable contract document. (Emphasis in original; internal quotation marks omitted.) Id. The court denied summary judgment in favor of the defendant on the grounds that the language had to be considered in the context of other language specifying that

the terms in the request for proposal, in combination with other documents, represented the contract documents. Id. This case may be distinguished because a final agreement, to which the request for proposal was attached, was actually reached. In the present case it is undisputed that a formal assistance agreement between CRDA and DJS45 was never consummated.

The court therefore grants summary judgment to CRDA on the first count of the complaint because the defendant has established the absence of material facts relative to the lack of essential terms, making the letter unenforceable.

II

COUNT TWO: PROMISSORY ESTOPPEL

The defendant also claims entitlement to summary judgment on the second count, which asserts liability against the CRDA for promissory estoppel. "[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 415, 168 A.3d 658, cert. denied, 327 Conn. 975, 174 A.3d 195 (2017). "Under our [well established] law, any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. . . . It

is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge." (Internal quotation marks omitted.) *Chotkowski* v. *State*, 240 Conn. 246, 268, 690 A.2d 368 (1997).

The promise which the plaintiffs seek to enforce is none other than the act of extending a loan in an amount in excess of $500,000. The letter, however, premised the financing on a number of contingencies which, in the aggregate, rendered the promise to loan $500,000 or more tentative, rather than definite. These included CRDA's due diligence investigation, agreement of the terms, execution of a formal assistance agreement, the plaintiffs' obtaining permanent financing, and the execution of other unspecified documents. Simply put, there was no definite promise to loan the plaintiffs over $500,000, and, accordingly, summary judgment as to this claim is appropriate.

The plaintiffs assert that the promise upon which they relied was for the extension of the loan upon the provision of either a guarantee or a payment and performance bond. In the plaintiffs' view, the later insistence by CRDA on an onerous payment and performance bond for each of [their] contractors from an insurance company with a Best Rating of A- VII or, alternatively, that each of the plaintiffs' contractors provide the same is different from what was indicated in the letter, which provided for a guarantee preferred by the plaintiffs "or" a performance and payment bond, works an injustice and caused them injury.[3] This ignores that this was only

[3] The plaintiffs' November 14, 2017 amended complaint added the heretofore not included allegations that the defendant failed to provide the plaintiffs with necessary information in a commercially reasonable time including the form agreements until September, 2013, and the closing checklist until December, 2013, including the additional condition of the type of bonding required. These new allegations implicate only the manner in which CRDA's

one of many contingencies that were required to be met before a loan was made. Moreover, the letter employed the disjunctive "or" between the two possibilities of the provision of a guarantee and a payment and performance bond without articulating which of the parties were permitted to elect the manner in which CRDA would be assured of the completion of the project in a lien free state. There is nothing in the record before the court which demonstrates that the plaintiffs exercised any diligence to determine the truth of which or lacked any reasonably available means of acquiring this knowledge. See *Chotkowski* v. *State*, supra, 240 Conn. 268. Summary judgment is therefore granted as to the second count.

III

COUNT THREE: NEGLIGENT MISREPRESENTATION

The last theory of liability upon which summary judgment is sought is that contained in the third count of negligent misrepresentation. The elements of an action for negligent misrepresentation are "(1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351-52, 71 A.3d 480 (2013).

CRDA asserts that the plaintiffs' action is barred by the statute of limitations. The following additional information is required [for a] discussion of this argument. The CRDA's motion for summary judgment was filed on October 23, 2017, and raised the bar of the statute of limitations. On November 14, 2017, the plaintiffs filed

later conduct deviated from the original promise sought to be enforced and do not affect the analysis herein.

a request for leave to amend the complaint pursuant to Practice Book § 10-60(a) (3) and alleged that the plaintiffs would be required to obtain payment and performance bonds for each of [their] contractors from an insurance company licensed to do business in Connecticut with a " 'Best Rating of A- VII' " or, in the alternative, each of the plaintiffs' contract[or]s would be required to obtain similar bonding. The defendant is alleged to have failed to provide the plaintiffs with the necessary information in a commercially reasonable time, including form agreements and closing checklist when it had a duty to disclose the material facts within a commercially reasonable time after the plaintiffs' receipt of the letter. Thereafter, on March 5, 2018, the plaintiffs amended their first special defense to . . . allege that the applicable statute of limitations is tolled by the course of conduct doctrine.

In the plaintiffs' view, the applicable statute is § 52-584, which applies to negligence actions seeking damages for injury to the person or real or personal property.[4] Section 52-584 contains both a discovery and repose limitation wherein applicable actions are barred two years from the date of discovery of injury but in no event more than three years from the act or omission complained of. The [defendant] claim[s], and the court agrees, that, to the contrary, the applicable statute of limitations is that of General Statutes § 52-577, which provides that: "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[4] General Statutes § 52-584 provides: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

The court is mindful that, in *Lombard* v. *Edward J. Peters, Jr., P.C.*, 79 Conn. App. 290, 830 A.2d 346 (2003), the Appellate Court held that a claim of negligent misrepresentation was subject to the limitations contained in § 52-584. The dispositive issue for the *Lombard* court, however, was that the "plaintiffs' claim is predicated on injury to their personal property caused by negligence . . . ." Id., 299. In the present case, however, the plaintiffs' negligent misrepresentation claim asserts economic loss rather than injury to person, real property or personal property.

This court aligns itself with that body of case law that holds that the dispositive issue relative to which of the two statutes applies is the nature of the injury claimed. See, e.g., *Teal Associates, LLC* v. *Alfin*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-12-6028814-S (September 5, 2014) (§ 52-584 applies only to actions to recover damages for injury to person or property); *Evans* v. *Province*, Docket No. CV-07-600855, 2008 WL 3916445 (Conn. Super. August 4, 2008) (*Lombard*'s holding is limited to claims of negligent misrepresentation that allege injuries to either person or property). The applicable limitation period is thus the three year period contained in § 52-577.

Section 52-577 is an occurrence statute which runs from the date of the defendant's conduct, not the date that the plaintiff first discovered the injury. See *Watts* v. *Chittenden*, 301 Conn. 575, 583, 22 A.3d 1214 (2011). The date of the defendant's conduct is May 10, 2013, the date of issue of the letter. According to the return of service contained in the court's file the action was commenced on July 26, 2016.[5] The commencement of

[5] An action is commenced when the writ of process is served on the defendant. *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Courts may take judicial notice of the contents of their files. *In re Jeisean M.*, 270 Conn. 382, 402, 852 A.2d 643 (2004).

the action was thus more than three years from the act complained of, to wit, the misrepresentations contained in the letter.

The plaintiffs, however, assert that the limitation period is tolled by the continuing conduct doctrine as alleged in their special defense. Moreover, the plaintiffs remark that "the defendant, which of course has the burden of proving the absence of any issue of material fact, completely fails to address the continuing course of conduct doctrine, and accordingly summary judgment should be denied." Entry No. 147, p. 3. The plaintiffs, who presumably relied on the CRDA's lack of argument as to the continuing course of conduct doctrine, themselves provided no analysis of why the limitations should be extended by the doctrine.

The plaintiffs misapprehend the nature of the shifting burden attendant to the tolling of [a] statute of limitations. "Typically, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . In these circumstances, it is incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact [as to the timeliness of the action] exists." (Citations omitted; internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 192, 177 A.3d 1128 (2018). Thus, the burden to rebut the statutory limitations bar shifts to the plaintiff to demonstrate an issue of fact. This they have declined to do. Although the court need not

consider an argument neither argued nor briefed; see *Hoenig* v. *Lubetkin*, 137 Conn. 516, 524, 79 A.2d 278 (1951); it will address the assertion of tolling by the continuing conduct doctrine.

In evaluating the continuing course of conduct doctrine in the context of a summary judgment motion the court must determine whether there is a genuine issue of material fact with respect to whether "the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 313, 94 A.3d 553 (2014), citing *Witt* v. *St. Vincent's Medical Center*, 252 Conn. 363, 370, 746 A.2d 753 (2000). As the plaintiffs assiduously point out in their briefing, the nature of the third count is a claim for negligent misrepresentation. See Entry No. 147, p. 5. The court notes that a violation of a duty to disclose is not asserted. Moreover, the plaintiffs provide no authority for the proposition that an actor, having made a negligent misrepresentation, has a continuing duty to correct the misrepresentation. There is, for example, no claim of the existence of a special relationship between the plaintiffs and the CRDA such that a fiduciary duty existed. *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 86, 873 A.2d 929 (2005). Moreover, the plaintiffs have not directed the court's attention to any conduct that constituted a continual breach of a duty to make accurate representations of fact—such as repetition over time of the misrepresentation. See *Teal Associates, LLC* v. *Alfin*, supra, Superior Court, Docket No. X04-CV-12-6028814-S (series of misrepresentations tolled statute of limitations). The court concludes that no genuine issue of material fact exists with respect to the bar of the limitations imposed by § 52-577 and grants summary judgment as to the third count.

IV

CONCLUSION

For the foregoing reasons summary judgment is granted in favor of the defendant, CRDA, on all three counts of the plaintiffs' complaint.

APPENDIX

DAVID SQUILLANTE ET AL. *v.* CAPITAL REGION DEVELOPMENT AUTHORITY*

Superior Court, Judicial District of Hartford
File No. CV-16-6070594-S

Memorandum filed March 15, 2019

Proceedings

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

Matthew S. Carlone, for the plaintiffs.

Benjamin C. Jensen, for the defendant.

Opinion

NOBLE, J.

Before the court is the motion of the defendant, Capital Region Development Authority (CRDA), for summary judgment as to the single remaining count for negligent misrepresentation on the grounds that (1) the statute of limitations has expired; and (2) there is no genuine issue of material fact as to the plaintiffs' inability to establish the elements of negligent misrepresentation. For the following reasons the court grants the motion for summary judgment on the former ground.

* Affirmed. 208 Conn. App. 676, A.3d (2021).

FACTS

This action arises out of a series of communications between the plaintiff David Squillante and the defendant, CRDA, regarding potential financing for a housing development project located at 283-291 Asylum Street in Hartford.[1] This action was commenced by service of process on CRDA on July 26, 2016. The operative complaint is the three count amended complaint, dated November 14, 2017. In count three, which is the only count at issue, the plaintiffs allege a negligent misrepresentation claim.[2]

Specifically, the plaintiffs allege that, after several conversations, the parties executed a letter dated May 10, 2013 (letter), in which CRDA agreed to provide financing for the project if the plaintiffs complied with the terms and conditions outlined therein. One such condition allegedly misrepresented that the plaintiffs would be required to provide a guarantee "or" payment and performance bonds, when, at all times, CRDA actually required a guarantee "and" payment and performance bonds. In addition, the plaintiffs allege that, in communications subsequent to the letter, CRDA failed to provide certain necessary information, including form agreements, a closing checklist, and that it required a payment and performance bond for each of the plaintiffs' contractors from an insurance company licensed to do business in Connecticut with a " 'Best Rating of A-, VII.' " According to the plaintiffs: (1) CRDA had a duty to disclose these material facts within a commercially reasonable time after receipt of the letter; (2) they reasonably relied on CRDA's misrepresentation and omissions; (3) CRDA knew its representation was

[1] DSJ45, LLC, a limited liability company of which Mr. Squillante is the sole member, is also a plaintiff in this case. Mr. Squillante and DSJ45, LLC, will be referred to collectively as the plaintiffs.

[2] Counts one and two allege claims of breach of contract and promissory estoppel, respectively.

false and that the plaintiffs were acting in reliance on it; and (4) they suffered financial damages as a result.

On October 23, 2017, CRDA filed a motion for summary judgment. By order dated July 18, 2018, summary judgment was granted as to each count. Familiarity with the facts recited therein and the decision are presumed. See *Squillante* v. *Capital Region Development Authority*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070594-S (July 18, 2018). With regard to count three, this court determined that the claim was time barred by the applicable statute of limitations, General Statutes § 52-577. By order dated August 21, 2018, the entry of summary judgment as to count three was vacated on the basis that CRDA did not plead that the claim was time barred under § 52-577, but rather pleaded that it was time barred under General Statutes § 52-584. See *Mac's Car City, Inc.* v. *DeNigris*, 18 Conn. App. 525, 529, 559 A.2d 712 (error for court to grant summary judgment based on § 52-577 where statute not raised in pleadings), cert. denied, 212 Conn. 807, 563 A.2d 1356 (1989). CRDA amended its answer to include the defense that the action was time barred under § 52-577.

On October 11, 2018, CRDA filed a second motion for summary judgment as to count three on the grounds that the claim is time barred under § 52-577 and the plaintiffs cannot establish the elements of negligent misrepresentation. CRDA filed a memorandum of law in support of the motion and affidavits by Michael Freimuth, the executive director of CRDA, and Benjamin Jensen, the attorney representing CRDA in this action. On November 23, 2018, the plaintiffs filed an objection to the motion, which incorporated the facts set forth in their memorandum in opposition to CRDA's first motion for summary judgment, along with excerpts from the depositions of Mr. Freimuth, Mr. Squillante,

and Richard Polivy, the plaintiffs' expert. CRDA subsequently filed a reply memorandum on November 30, 2018.

STANDARD

The legal standard governing summary judgment motions is well settled. "Summary judgment is a method of resolving litigation when 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. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

"Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996). "Typically, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . In these circumstances, it is incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact [as to the timeliness of the action] exists."

(Citations omitted; internal quotation marks omitted). *Doe* v. *West Hartford*, 328 Conn. 172, 192, 177 A.3d 1128 (2018).

DISCUSSION

CRDA argues that count three is time barred, pursuant to § 52-577, because the sole alleged misrepresentation appeared in a letter dated May 10, 2013, and the plaintiffs commenced the present action on July 26, 2016 (i.e., more than three years later). In response, the plaintiffs argue that the statute of limitations was tolled pursuant to the continuing course of conduct doctrine. Specifically, the plaintiffs claim that, in communications subsequent to the letter, including two e-mails that CRDA sent on June 10, 2013, and September 17, 2013, CRDA misrepresented the requisite conditions of financing and failed to disclose certain material facts, such as that the plaintiffs would need to procure a payment and performance bond for each contractor from an insurance company with a " 'Best Rating of A-, VII.' "

Section 52-577 provides: "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Because this is an occurrence statute, the limitation period runs from the date of the defendant's conduct, not the date when the plaintiff first discovers his injury. See *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 311, 94 A.3d 553 (2014). Moreover, as previously mentioned, "[w]hen the plaintiff asserts that the [limitation] period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014). The continuing course of conduct doctrine is one such equitable exception that, if applicable, will

toll the statute of limitations until the course of conduct is completed. See *Flannery v. Singer Asset Finance Co., LLC*, supra, 311.

In evaluating the continuing course of conduct doctrine in the context of a summary judgment motion, the court must determine whether there is "a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) Id., 313. "Where . . . [the court has] upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) Id., 312.

In the present case, the alleged initial wrong is that the May 10, 2013 letter from CRDA to the plaintiffs contained a misrepresentation and material omission related to the conditions of financing. To wit, it stated that the plaintiffs would be required to provide a guarantee "or" payment and performance bonds, when they would actually be required to provide a guarantee "and" payment and performance bonds for each contractor from an insurance company with a " 'Best Rating of A-, VII.' " As to the continuing duty prong, the plaintiffs argue that: (1) CRDA engaged in later wrongful conduct related to the initial wrong when, in subsequent communications between the parties, it allegedly made material misrepresentations concerning the conditions of financing, and failed to disclose, until December 4, 2013, that the plaintiffs would need to procure a payment and performance bond for each contractor from an insurance company with a " 'Best Rating of A-, VII' ";

and (2) the relationship between the parties, the customs of the trade or other objective circumstances were such that the plaintiffs would reasonably expect CRDA to fully disclose the conditions of financing before December 4, 2013.

A. Later Wrongful Conduct Related to the Prior Act

With regard to the plaintiffs' later wrongful conduct argument, they specifically point to two e-mails that CRDA sent on June 10, 2013, and September 17, 2013. Because the former is still outside of the applicable three year statute of limitations, this court need not address its content. Moreover, the September 17, 2013 e-mail cannot serve as a basis for applying the continuing course of conduct doctrine because it does not reflect any wrongful conduct on the part of CRDA. That is, contrary to the plaintiffs' contention, the e-mail does not contain a material misrepresentation with regard to the financing conditions. In fact, the e-mail explicitly notifies the plaintiffs that it expects that the list of contracts/commitment letters that the plaintiffs identified as necessary to provide to CRDA before closing "will be expanded." Moreover, in another e-mail sent to the plaintiffs on the same day (i.e., September 17, 2013), CRDA attached a template of the formal assistance agreement mentioned in the May 10, 2013 letter. Section 3.9 of that template, titled "Payment and Performance Bond," put the plaintiffs on notice that "[DSJ45] shall provide CRDA with Payment and Performance Bonds with respect to each Contractor that enters into a Major Contract with [DSJ45] . . . ." (Entry No. 172, Freimuth Affidavit at pp. 12, 21).[3]

[3] The fact that the template did not disclose that the requisite payment and performance bonds would need to be from an insurance company with a " 'Best Rating of A-, VII' " does not constitute a fraudulent nondisclosure because there is no indication in the record that CRDA knew of this fact and deliberately withheld it from the plaintiffs, with the intention or expectation to cause a mistake in order to induce the plaintiffs into the transaction. See *Wedig* v. *Brinster*, 1 Conn. App. 123, 130-31, 469 A.2d 783 (1983) ("[O]nce a vendor [assumes] to speak, he must make a full and fair disclosure as to the

In addition, the plaintiffs have failed to demonstrate that CRDA violated a duty to disclose by not notifying the plaintiffs, until December 4, 2013, that the requisite payment and performance bonds for each contractor needed to be from an insurance company with a " 'Best Rating of A-, VII.' " 3 Restatement (Second), Torts, Liability for Nondisclosure § 551 (2) (e), p. 119 (1977) provides: "[o]ne party to a business transaction is under a duty . . . to disclose to the other before the transaction is consummated . . . facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." There are at least three reasons why this section does not apply to the present case and, therefore, cannot satisfy the second prong of the continuing course of conduct doctrine.

First, the rating of the insurance company that was to provide the payment and performance bonds cannot be fairly construed as a fact "basic to the transaction" because it is not a significant enough aspect of the transaction. See 3 Restatement (Second), supra, § 551 (2) (e), comment (j), p. 123 ("A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of . . . what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic.").

matters about which he assumes to speak. He must then avoid a deliberate nondisclosure. . . . [T]he nondisclosure must be by a person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction." (Citations omitted; internal quotation marks omitted.)), cert. denied, 192 Conn. 803, 472 A.2d 1284 (1984).

Second, the plaintiffs have failed to establish that there is a question of material fact that CRDA knew that the plaintiffs were about to enter into the transaction under a mistaken belief as to the bond requirement. As the plaintiffs' own exhibit submitted in opposition to the subject motion for summary judgment reveals, Mr. Freimuth made the assumption that the plaintiffs' construction budget included the price of obtaining an acceptable payment and performance bond. (Entry No. 178, Freimuth Dep. at pp. 67-68). See 3 Restatement (Second), supra, § 551 (2) (e), comment (k), p. 124 ("when the defendant has no reason to think that the plaintiff is acting under a misapprehension, there is no obligation to give aid to a bargaining antagonist . . . and if the plaintiff . . . does not have access to adequate information, the defendant is under no obligation to make good his deficiencies"); see also id., comment (*l*), p. 125 ("[i]n general, the cases in which the rule stated in Clause (e) has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware").

Third, according to the plain language of 3 Restatement (Second), supra, § 551 (2), the time frame for communicating information that requires disclosure under this section is "before the transaction is consummated." Id., 119. Here, as this court previously determined, an enforceable agreement was never consummated. As such, even assuming arguendo that CRDA had a duty to disclose all of the details of the requisite payment and performance bonds, they did so on December 4, 2013, which was before the transaction was consummated. Thus, in the September 17, 2013 e-mail that the plaintiffs point to, CRDA did not engage in any wrongful

conduct related to the initial wrong that would warrant application of the continu[ing] course of conduct doctrine and toll the applicable statute of limitations.

B. Special Relationship

The plaintiffs have also failed to establish that there was a special relationship between the parties that could give rise to a continuing duty on the part of CRDA to tell the plaintiffs, prior to December 4, 2013, that they would be required to provide payment and performance bonds for each contractor from an insurance company with a " 'Best Rating of A-, VII.' " With regard to the meaning of "special relationship" in the context of the continuing course of conduct doctrine, the Appellate Court has analyzed the question in terms of whether a fiduciary or confidential relationship existed between the parties. See *Carson* v. *Allianz Life Ins. Co. of North America*, 184 Conn. App. 318, 331-32, 194 A.3d 1214 (2018), cert. denied, 331 Conn. 924, 207 A.3d 27 (2019). "[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . [N]ot all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Internal quotation marks omitted.) Id., 331, quoting *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 640, 804 A.2d 180 (2002).

In *Carson* v. *Allianz Life Ins. Co. of North America*, supra, 184 Conn. App. 331-32, the court held that the continuing course of conduct doctrine did not apply to toll the applicable statute of limitations because "[t]he plaintiff failed to offer contrary authority that her relationship with the defendant [life insurance company] was anything more than a commercial transaction. Nor

did she proffer evidence of a unique degree of trust and confidence between the plaintiff and the defendant akin to a fiduciary or special relationship." Similarly, here, the facts indicate that the relationship between the parties was commercial in nature, in that they were negotiating a business transaction, at arm's length, whereby CRDA would loan the plaintiffs a portion of the financing necessary for their housing development project. Moreover, the plaintiffs have not provided evidence of a unique degree of trust and confidence between the parties akin to a fiduciary relationship, nor that CRDA was under a duty to represent the plaintiffs' interests.[4]

Furthermore, the Supreme Court in this state has made clear that a buyer-seller relationship is not a "special relationship" that gives rise to a legal duty to disclose any deception related to the transaction. See *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 313 ("the defendant and the plaintiff stood in relation of buyer and seller and, as such, there was no special relationship between them that imposed upon the defendant a duty to disclose to the plaintiff any deception attendant to the transaction"); see also *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 210, 541 A.2d 472 (1988) ("We are aware of no authority holding that the perpetrator of a fraud involving merely a vendor-vendee relationship has a legal duty to disclose his deceit after its occurrence and that the breach of that duty will toll the

[4] To the extent that the plaintiffs argue that the parties' relationship was akin to that of partners, they have not provided authority for the proposition, nor sufficient evidence to conclude that the parties had entered an informal partnership, known as a joint venture. See *Censor* v. *ASC Technologies of Connecticut, LLC*, 900 F. Supp. 2d 181, 201 (D. Conn. 2012) ("[t]o constitute a joint venture, courts in Connecticut prescribe a five part test that requires that (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit, (2) an agreement must evidence their intent to be joint venturers, (3) each must contribute property, financing, skill, knowledge or effort, (4) each must have some degree of joint control over the venture, and (5) there must be a provision for the sharing of both profits and losses").

statute of limitations. Such a [contractual] relationship does not give rise to obligations equivalent to those of a fiduciary."); *Harte Nissan, Inc.* v. *Market Scan Information*, Docket No. CV-99-0268959-S, 2003 WL 352948, *6 (Conn. Super. January 17, 2003) ("the act of entering into an agreement for the purchase of computer equipment and software does not, by itself, create the type of special relationship necessary for the [continuing course of conduct] doctrine to apply"). Likewise, the Supreme Court has held that parties negotiating an acquisition and financing agreement do not have a "special relationship" that would give rise to a fiduciary duty to timely disclose all information regarding the transaction. *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 85-86, 873 A.2d 929 (2005). These precedents further support the conclusion that there was no special relationship between the parties here that could give rise to a continuing duty to disclose all information pertaining to the payment and performance bond prior to December 4, 2013.

Thus, the plaintiffs have failed to establish a genuine issue of material fact with regard to the applicability of the continuing course of conduct doctrine and the court concludes that the action is barred by § 52-577. Consequently, in light of this conclusion, the substantive issues concerning the count need not be addressed by this court.

For the foregoing reasons the court grants the defendant's motion for summary judgment.

STATE OF CONNECTICUT *v.* JERMAINE LEE COWAN
(AC 42450)

Alvord, Clark and Norcott, Js.

Syllabus

Convicted of the crimes of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree in connection with his involvement in a bank robbery, the defendant

appealed to this court. One of the defendant's coconspirators, C, pleaded guilty to conspiracy to commit robbery in the first degree in connection with the incident. C testified for the state at the defendant's trial. She testified that the state had not offered to reduce her sentence in exchange for her testimony nor had she been promised any other benefit. Approximately two months after the defendant's conviction, C's sentence was modified and, approximately nine months later, her sentence was further modified to replace her probation period with a conditional discharge. The defendant appealed and, subsequently, filed a motion for augmentation and rectification, requesting that the trial court review the clerk's files for the cases against C and any relevant transcripts to determine whether her sentence modifications were influenced by her testimony against the defendant and that, if evidence of such influence existed, the court hold a hearing pursuant to *State* v. *Floyd* (253 Conn. 700) to determine whether a nonfrivolous, factual basis for a claim of unlawful withholding of impeachment material under *Brady* v. *Maryland* (373 U.S. 83) existed. The trial court denied the motion and, following this court's order in response to the defendant's motion for review, issued an articulation of its decision. The defendant did not file an additional motion for review requesting that this court order a *Floyd* hearing or seek any other relief in connection with the trial court's ruling on his motion. *Held* that the defendant could not prevail on his claim that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct: because the defendant did not seek further review of the trial court's articulation or make any mention of a *Floyd* hearing in his brief to this court, this court did not review the trial court's decision denying the defendant's request to hold a *Floyd* hearing and reviewed only whether C's testimony was false and whether the state improperly withheld impeachment evidence regarding her credibility; moreover, the defendant did not challenge the trial court's findings that there was no evidence that the state had promised to help C obtain a sentence reduction in exchange for her testimony at the defendant's trial, that C received a sentence modification based on her testimony, or that the state unlawfully withheld impeachment material from the defendant, nor did the evidence in the record indicate that the state sought or advocated for C's sentence to be modified after she testified; accordingly, there was no basis for the defendant's claim.

Argued September 21—officially released November 9, 2021

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the third degree, and conspiracy to commit larceny in the third

degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree, from which the defendant appealed to this court. *Affirmed.*

Jermaine Lee Cowan, self-represented, the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Seth Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Jermaine Lee Cowan,[1] appeals from the judgment of conviction, rendered after a jury trial, of robbery in the second degree, larceny in the third degree, and conspiracy to commit larceny in the third degree. On appeal, the defendant claims that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct. We conclude that this claim lacks merit and, accordingly, affirm the judgment of the trial court.

[1] The defendant was represented by counsel at trial. On March 28, 2019, after this appeal was filed, the defendant's appellate counsel filed with this court a motion for leave to withdraw as appellate counsel "[p]ursuant to Practice Book §§ 43-34, 43-35 and 62-9 (d), *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971) . . . ." Pursuant to Practice Book § 62-9 (d) (3), counsel's motion, his memorandum of law in support thereof, and transcripts from the proceedings were referred to the trial court for decision. The trial court held teleconferences with the defendant and his appellate counsel on September 24 and October 22, 2020. On November 19, 2020, the trial court granted the appellate counsel's motion, and the defendant has since proceeded as a self-represented litigant.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On March 12, 2014, Zakea Crawford-Brooks (Crawford) drove the defendant and Jermaine Brooks[2] to a bank in Woodbridge. The defendant and Jermaine Brooks exited the vehicle and proceeded to rob the bank, and, after they exited the bank with more than $7700, Crawford served as the getaway driver.[3] Crawford and Jermaine Brooks were arrested and later pleaded guilty in connection with their roles in the robbery. The defendant also was arrested and elected a jury trial.

A jury trial for the defendant commenced on February 8, 2016. On February 10, 2016, the state called Crawford as a witness to testify against the defendant. Crawford testified regarding the defendant's role in the robbery and stated that she had been convicted of conspiracy to commit robbery in connection with the March 12, 2014 incident and was serving time in prison for that conviction. Crawford further testified that she had not been promised any benefit in exchange for her testimony and that the state had not offered to reduce her sentence for testifying against the defendant. On February 16, 2016, following the trial, the defendant was found guilty of robbery in the second degree in violation of General Statutes § 53a-135 (a) (2), larceny in the third degree in violation of General Statutes § 53a-124, and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 and 53a-124. This appeal followed.

During the pendency of this appeal, on June 25, 2019, the defendant, "[p]ursuant to Practice Book §§ 60-2 (1)

[2] Crawford is married to Jermaine Brooks. For clarity, we refer to her as Crawford and to Jermaine Brooks by his full name throughout this opinion.

[3] Jermaine Brooks' sister, Mary Brooks, was also in the car at the time of the robbery. She also was arrested in connection with the robbery, but her participation in the crime is not relevant to the present appeal.

and (8), 60-5, 61-10, 66-5, and *State* v. *Floyd*, 253 Conn. 700, 756 A.2d 799 (2000)," filed a motion for augmentation and rectification of the record. In that motion, he stated that he had learned, through an off-the-record discussion with his trial counsel, that Crawford had received a sentence reduction in exchange for her testimony against him at his trial. He requested that the trial court review the clerk's files in the cases against Crawford and any relevant transcripts to determine if Crawford's sentence reductions were influenced by her testimony against him. The defendant further requested that, if the court determined that there existed prima facie evidence of such influence, it hold a hearing pursuant to *Floyd* "in order to make such findings as may be necessary for [his] counsel to determine whether there exists a nonfrivolous factual basis for an appellate claim of an unlawful withholding of impeachment material under *Brady* v. *Maryland*, 373 U.S. 83, [87,] 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) . . . ." On August 9, 2019, the defendant supplemented the motion by filing a notice with additional information about Crawford's original sentencing and sentence modifications. On August 13, 2019, the trial court summarily denied the motion.

On August 23, 2019, the defendant, "[p]ursuant to Practice Book . . . §§ 60-2, 66-5, 66-6 and 66-7," filed a motion for review with this court requesting that it "direct the trial court to hold an evidentiary hearing to determine whether the state engaged in a *Brady* . . . violation" or, alternatively, "to direct the trial court to articulate its findings of fact and conclusions of law underlying its denial of the defendant's motion for rectification so that the defendant [could] respond in an amended motion for review." On October 16, 2019, this court granted his alternative request and ordered the trial court to articulate the factual and legal basis for its denial of the defendant's motion.

On January 24, 2020, the trial court issued an articulation, which included the following information regarding Crawford's criminal record. On January 26, 2014, Crawford was arrested for the sale of narcotics. On August 17, 2015, she pleaded guilty to that charge. On the same date, pursuant to the *Alford*[4] doctrine, she pleaded guilty to conspiracy to commit robbery in the first degree in connection with her role in the bank robbery. On October 26, 2015, she was sentenced for both crimes, and the sentences were to run concurrently. On April 5, 2016, roughly two months after the jury found the defendant guilty, Crawford's sentence with respect to her conviction of conspiracy to commit robbery was modified. On April 6, 2016, her sentence with respect to her conviction for the sale of narcotics was modified. The state did not oppose either sentence modification. On December 27, 2016, Crawford's conspiracy sentence was modified again, on the record. The state did not object to that modification.[5]

In its articulation, the trial court stated that it had reviewed the clerk's files and transcripts for the robbery and narcotics cases in which Crawford was the named defendant. The court further stated that it had reviewed the application and sentence modification form filed by Crawford, along with a handwritten letter attached to her modification request in which she articulated

[4] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[5] When Crawford's robbery sentence was first modified on April 5, 2016, her modified sentence included three years of probation. On December 27, 2016, the court held a hearing on the record and, again, modified the sentence by replacing the period of probation with three years of conditional discharge. At the hearing, Senior Assistant State's Attorney Seth Garbarsky, who represented the state, stated: "My understanding is [Crawford] has found employment out of state and [the] probation [office], for whatever reason, was either not willing or not able to transfer the probation down south to where she resides. So I have no objection to converting that to a conditional discharge."

why she was seeking a sentence modification. To support her request, Crawford stated in the handwritten letter, among other things, that she had "[cooperated] with the state on the trial of [the defendant]." The court concluded: "This court's review of the previously mentioned clerk's files and transcripts does not show a promise by the state to . . . Crawford . . . to help her obtain a sentence reduction in exchange for her trial testimony. There is nothing in the review of the record that indicates . . . Crawford . . . received a modification of her sentence based on her testimony at the defendant's trial. A complete review of the record finds no evidence of an unlawful withholding of impeachment material. The defendant has not met his burden for the court to hold a . . . hearing pursuant to *State* v. *Floyd*, [supra, 253 Conn. 700]." (Internal quotation marks omitted.) The defendant did not file with this court a subsequent motion for review requesting that this court order a *Floyd* hearing nor did he seek any other relief in connection with the court's ruling on his motion to augment and rectify the record.

The defendant claims that his due process rights were violated because his conviction was obtained on the basis of false testimony, which the state failed to correct. Specifically, he alleges that Crawford falsely testified that she was not promised a benefit for testifying against him. We conclude that this claim lacks merit.

We begin by setting forth the standard of review and relevant principles of law. Under *Brady* v. *Maryland*, supra, 373 U.S. 87, the state is required to disclose to a defendant any materially exculpatory evidence in its possession. During or after a defendant's trial, "[t]he state has a duty to correct the record if it knows that a witness has testified falsely. . . . [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having

struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 754–55, 187 A.3d 1163 (2018).

"As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, [t]o establish a *Brady* violation, the [defendant] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [defendant], and (3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *State* v. *Bryan*, 193 Conn. App. 285, 315, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

"Pursuant to *State* v. *Floyd*, supra, 253 Conn. 700, a trial court may conduct a posttrial evidentiary hearing to explore claims of potential *Brady* violations . . . when a defendant was precluded from perfecting the record due to new information obtained after judgment. . . . In order to warrant such a hearing, a defendant must produce prima facie evidence, direct or circumstantial, of a *Brady* violation unascertainable at trial. . . . The trial court's decision with respect to whether to hold a *Floyd* hearing is reviewable by motion for review pursuant to Practice Book § 66-7 . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 182 n.7, 989 A.2d 1048 (2010).

"The existence of an undisclosed agreement is an issue of fact to be determined by the trial court, and the defendant has the burden of proving the existence of undisclosed exculpatory evidence." *State* v. *Henderson*,

83 Conn. App. 739, 744, 853 A.2d 115, cert. denied, 271 Conn. 913, 859 A.2d 572 (2004). "A court's factual finding as to whether undisclosed exculpatory evidence exists will not be disturbed on appeal unless it is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *State* v. *Dixon*, 72 Conn. App. 852, 859, 806 A.2d 1153, cert. denied, 262 Conn. 926, 814 A.2d 380 (2002).

In the present case, because the defendant did not seek further review of the trial court's articulation or make any mention of a *Floyd* hearing in his brief to this court, we are not tasked with reviewing the trial court's decision denying the defendant's request to hold a *Floyd* hearing. See *State* v. *Ouellette*, supra, 295 Conn. 183–84. Rather, the question before this court is whether the defendant established, on the basis of the record before the trial court, that Crawford's testimony was false and that the state improperly withheld impeachment evidence regarding her credibility. See id., 185. "[T]his is a fact based claim to be determined by the trial court, subject only to review for clear error." Id., 187.

The trial court stated in its articulation that Crawford testified that no one in the prosecutor's office or law enforcement promised her that she would receive a benefit in exchange for her testimony against the defendant. The court further stated that it found no evidence that the state had promised to help Crawford obtain a sentence reduction in exchange for her testimony at the defendant's trial, that Crawford received a sentence modification based on her testimony at the defendant's trial, or that the state unlawfully withheld impeachment

material from the defendant. Notably, the defendant does not challenge those factual findings on appeal.

The defendant has not produced any evidence that the state made a promise to Crawford in exchange for her testimony against him at his criminal trial. Instead, he merely speculates that such a promise was made. Furthermore, the evidence in the record does not indicate that the state sought or advocated for Crawford's sentence to be modified after she testified at the defendant's trial. Rather, the record indicates only that the state did not oppose Crawford's requests. In light of the court's finding, which is fully supported by the record, that the state did not make a promise to Crawford in exchange for her testimony, there is no basis for the defendant's claim that the state improperly relied on the allegedly false testimony of Crawford that she was not promised a benefit in exchange for her testimony. Accordingly, the defendant cannot prevail on his claim.

The judgment is affirmed.