IN RE RABIA K.*
(AC 45012)

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

Syllabus

The respondent mother, whose minor child, R, was adjudicated neglected and committed to the custody and care of the petitioner, the Commissioner of Children and Families, appealed to this court from the trial court's judgment, claiming that the court improperly found that R had been neglected, and that the Department of Children and Families had made reasonable efforts to prevent R's removal. After the mother had filed the present appeal, counsel for R filed a motion to revoke commitment in the trial court on the basis that R had returned home to the mother, who had moved to Massachusetts, and no longer wanted to be in the petitioner's custody. The trial court thereafter granted the motion to revoke commitment and closed the case, returning R to the care and custody of the mother. Subsequently, the petitioner moved to dismiss this appeal as moot, claiming that this court could not afford the mother any practical relief in light of the trial court's order revoking commitment of R. In her opposition, the mother acknowledged that the second issue on appeal, R's commitment to the petitioner, had been rendered moot but claimed that the first issue, the adjudication of neglect, was not moot because the mother could experience collateral consequences in

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

Massachusetts as a result thereof, as the adjudication of neglect could be used against her in a future child protection proceeding in Massachusetts to establish a pattern of repeated parental neglect. The petitioner responded that there was no reasonable possibility that prejudicial consequences would occur for the mother as a result thereof because R no longer lived in Connecticut, would soon reach the age of majority, and the juvenile court would lose jurisdiction over her at that time. *Held* that the respondent mother's appeal was dismissed as moot, there being no practical relief that this court could afford the mother on the issue of adjudication of neglect given that the underlying case had been closed and R had been returned to the care and custody of her mother; moreover, vacatur of the trial court's judgment was appropriate in order to avoid the possibility, however remote, of collateral consequences to the mother in Massachusetts, the adjudication of neglect was adverse to the mother, the mother did not cause the appeal to be moot through any voluntary action, and she was prevented from challenging the court's adjudication of neglect as a result of the trial court's granting the motion to revoke commitment.

Considered April 18—officially released May 16, 2022**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Windham, Child Protection Session at Willimantic, and tried to the court, *Carbonneau, J.*; judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner, from which the respondent mother appealed to this court. *Appeal dismissed*; *judgment vacated.*

Matthew C. Eagan, filed a brief for the appellant (respondent mother).

Jillian N. Hira, assistant attorney general, *William Tong*, attorney general, and *Evan M. O'Roark*, assistant attorney general, filed a brief for the appellee (petitioner).

** May 16, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PER CURIAM. In this neglect proceeding, the respondent mother, Michelle K., appeals from the judgment of the trial court adjudicating Rabia K., the respondent's minor daughter, neglected and committing her to the care and custody of the petitioner, the Commissioner of Children and Families.[1] On appeal, the respondent claims that the court improperly found that (1) Rabia had been neglected and (2) the Department of Children and Families (department) made reasonable efforts to prevent Rabia's removal.

After this appeal was ready for argument, Rabia's attorney filed in the trial court a motion to revoke commitment, representing that Rabia had returned home to the respondent in Massachusetts and no longer wanted to be in the custody of the petitioner. After a hearing, the court granted the motion to revoke commitment and closed the case. The petitioner did not oppose the motion and, thereafter, moved to dismiss this appeal as moot, arguing that this court is unable to grant the respondent any practical relief in light of the trial court's order revoking commitment of Rabia. The respondent opposed the motion to dismiss, and this court, sua sponte, ordered the parties to file supplemental memoranda giving reasons, if any, why we should not dismiss this appeal as moot and exercise the remedy of vacatur as to the trial court's judgment adjudicating Rabia neglected so as to avoid any possible collateral consequences as a result of the appeal being rendered moot. After considering the motion to dismiss and opposition thereto, as well as the parties' supplemental memoranda, we conclude that the respondent's claims are moot and that vacatur is appropriate.

[1] The respondent father, Ali K., also was named in the neglect petition and appeared in the trial court, but he did not file an appeal. We therefore refer in this opinion to the respondent mother as the respondent.

The record discloses the following relevant facts, as found by the court, and procedural history. Rabia's family moved from Massachusetts to Connecticut in 2016. On July 1, 2020, Rabia, who was fifteen years old, walked into the Willimantic Police Department and reported that her family had abused her for years. She informed the police officers that she did not recall attending public school and that she had not seen a doctor since she was eleven years old. After being alerted by the Willimantic Police Department, the petitioner filed a neglect petition on July 30, 2020, alleging that Rabia was being denied proper care and allowed to live under conditions injurious to her well-being. In May, 2021, the respondent was evicted from her residence in Willimantic and moved to Massachusetts, where she previously had resided.

On May 13, 2021, the court, *Chaplin*, *J.*, granted the petitioner's motion for an order of temporary custody and issued an ex parte order vesting temporary custody of Rabia in the petitioner. The court, *Carbonneau*, *J.*, held a consolidated hearing on the motion for an order of temporary custody and the neglect petition over the course of several days, beginning on August 9, 2021. On August 30, 2021, the last day of the hearing, the court issued its oral decision, adjudicating Rabia neglected and committing her to the care and custody of the petitioner. The court stated: "When a fifteen year old walks alone into a police station and makes allegations of physical abuse, educational . . . medical, and emotional neglect, there is a serious problem. Again, I'm not accusing the parents of anything at this point; that's beside the point. Either the girl is suffering terrible abuse at the hands of her family, or she is making false or exaggerated accusations that implicate her mental health. Either way, these are conditions and circumstances injurious to her health, both physical and mental." The court also vacated the order of temporary

custody. This appeal followed, challenging both the finding of neglect and the commitment of Rabia to the petitioner.

On March 2, 2022, the court, *Chaplin*, *J.*, granted Rabia's motion to revoke commitment and closed the case, returning Rabia to the care and custody of the respondent. The petitioner subsequently moved to dismiss this appeal as moot. In her opposition to the motion to dismiss, the respondent acknowledged that the second issue on appeal, Rabia's commitment to the petitioner, had been rendered moot but claimed that the first issue, the finding of neglect, is not moot because she will face collateral consequences in Massachusetts as a result of the court's adjudicating Rabia neglected.[2]

"Mootness is an exception to the general rule that jurisdiction, once acquired, is not lost by the occurrence of subsequent events." *In re Alba P.-V.*, 135 Conn. App. 744, 747, 42 A.3d 393, cert. denied, 305 Conn. 917, 46 A.3d 170 (2012). "Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule

[2] It is well established that "[a]n adjudication of neglect relates to the status of the child and is not necessarily premised on parental fault. A finding that the child is neglected is different from finding who is responsible for the child's condition of neglect. . . . [T]he adjudication of neglect is not a judgment that runs against a person or persons so named in the petition; [*i*]*t is not directed against them as parents*, but rather is a finding that the children are neglected . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Zamora S.*, 123 Conn. App. 103, 108–109, 998 A.2d 1279 (2010). At the same time, however, this court has explained that, "[a]lthough a court is not required to determine who was responsible for the neglect in adjudicating neglect of a child; see General Statutes § 46b-129; that is not to say that a court's subordinate factual findings cannot clearly identify who is responsible." *Matthew C.* v. *Commissioner of Children & Families*, 188 Conn. App. 687, 711, 205 A.3d 688 (2019).

In the present case, the respondent argues that the court found that she was at fault when it stated that she was "either unwilling or unable to provide the level of care that [Rabia] clearly needed . . . ." We agree that the court found the respondent responsible for the neglect of Rabia.

that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . .

"[D]espite developments during the pendency of an appeal that would otherwise render a claim moot, the court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . [T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture . . . but need not demonstrate that these consequences are more probable than not. . . . Whe[n] there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Citations omitted; internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 298–99, 898 A.2d 768 (2006).

Because the underlying case has been closed and Rabia has been returned to the care and custody of the respondent, an actual controversy no longer exists. See *In re Kiara R.*, 129 Conn. App. 604, 610, 21 A.3d 883 (2011) (appeal rendered moot after minor child returned

to respondent mother's care and custody). The respondent, however, contends that the appeal is not moot because there is a reasonable possibility that an adjudication of neglect could be used against her in a future child protection proceeding in Massachusetts. Specifically, she argues that the adjudication of neglect may be used against her in Massachusetts to establish a pattern of repeated parental neglect. Therefore, according to the respondent, "if the neglect adjudication were reversed, the respondent . . . would be able to argue that the state would be precluded from raising such an adjudication—and the facts used to support it—in any subsequent child protection case." The petitioner, noting that Rabia will turn eighteen years old in October of this year, responds that "there is no reasonable possibility that prejudicial collateral consequences will occur for [the respondent] as a result of the neglect adjudication . . . given that Rabia no longer lives in Connecticut and will soon reach the age of majority." The petitioner further notes that the juvenile court will lose jurisdiction over her at that time.

We are not persuaded that the respondent has established that there is a reasonable possibility that the underlying adjudication of neglect will result in prejudicial collateral consequences to her. Specifically, the respondent fails to address why there is a reasonable possibility that a future child protection proceeding would be initiated in Massachusetts in light of Rabia's age. Although an appellant is not required to establish that these consequences are more probable than not, there must be "more than mere conjecture . . . ." (Internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, supra, 278 Conn. 299. Nevertheless, under the unique circumstances of the present case, we conclude that vacatur is appropriate in order to avoid the possibility—however remote—of collateral consequences for the respondent in Massachusetts.

"Vacatur is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." (Internal quotation marks omitted.) *In re Yassell B.*, 208 Conn. App. 816, 823, 267 A.3d 816 (2021), cert. denied, 340 Conn. 922, 268 A.3d 77 (2022).

In the present case, the judgment adjudicating Rabia neglected was adverse to the respondent. As a result of the court's granting Rabia's motion to revoke commitment, which we have concluded rendered the respondent's appeal moot, the respondent, through no fault of her own, has been prevented from challenging the court's adjudication of neglect. Neither the respondent nor the petitioner opposes vacatur under these circumstances. Accordingly, we dismiss this appeal as moot and vacate the judgment of the court. See *Savin Gasoline Properties, LLC* v. *Commission on City Plan of Norwich*, 208 Conn. App. 513, 515, 262 A.3d 1027 (2021) (dismissing appeal and granting appellant's motion for vacatur of court's judgment because appeal became moot through no fault of appellant).

The appeal is dismissed and the judgment is vacated.

IN RE MARCQUAN C.*
(AC 45087)

Moll, Clark and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the trial court's judgment denying her motion to revoke the commitment of her minor child to the custody and care of the petitioner, the Commissioner of Children and Families. The mother claimed that the court erred in finding that cause for commitment continued to exist. *Held* that the trial court's determination that the mother did not meet her burden to prove that cause for commitment no longer existed was legally correct and factually supported; there was sufficient evidence in the record to support the court's conclusion, including the testimony of the petitioner's two witnesses that the mother had not adequately addressed her issues relating to her ability to collaborate effectively with the Department of Children and Families and to parent the minor child in a manner that would afford him both physical and emotional safety.

Argued April 4—officially released May 18, 2022**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child uncared for, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the court, *Conway, J.*, adjudicated the child uncared for and ordered protective supervision with custody vested in the respondent mother; thereafter, the court, *Conway, J.*, extended the period of protective supervision and sustained an order of temporary custody vesting custody of the minor child with the respondent father; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, vacated the order of temporary custody and ordered shared custody

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

** May 18, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and guardianship of the child between the respondent parents with primary physical custody vesting in the respondent father; thereafter, the court, *Hon. Richard E. Burke*, judge trial referee, sustained an order of temporary custody vesting custody of the minor child in the petitioner; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, granted the motion filed by the petitioner to open and modify the dispositive order of protective supervision, and committed the child to the custody of the petitioner; thereafter, the court, *Conway, J.*, denied the respondent mother's motion to revoke commitment, and the respondent mother appealed to this court, *Bright, C. J.*, and *Prescott* and *Suarez, Js.*, which dismissed the appeal; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, denied the respondent mother's motion to revoke commitment, and the respondent mother appealed to this court. *Affirmed.*

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

Seon Bagot, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark* and *Nisa Khan*, assistant attorneys general, for the appellee (petitioner).

Opinion

DiPENTIMA, J. The respondent mother, Monica C., appeals from the judgment of the trial court denying her motion to revoke the commitment of her minor child, Marcquan C., to the custody of the petitioner, the Commissioner of Children and Families (commissioner).[1] On appeal, the respondent contends that the court erred in

[1] The mother, Monica C., is hereinafter referred to as the respondent. The father, Mark B., although also a respondent in the underlying proceedings, is not participating in this appeal and for clarity is hereinafter referred to as the father.

The attorney for the minor child has submitted a statement, pursuant to Practice Book § 79a-6 (c), adopting the commissioner's brief on appeal.

finding that cause for commitment continued to exist. We affirm the judgment of the trial court.

The following facts, which are either undisputed or were found by the court, and procedural history are relevant to our resolution of this appeal. Marcquan C. is the twelve year old child of the respondent and the father. On September 6, 2016, the Department of Children and Families (department) received its first referral concerning Marcquan from the Emergency Mobile Psychiatric Services (EMPS).[2] EMPS had responded to Marcquan's school after receiving a report that Marcquan, who was five years old at the time, was exhibiting destructive behaviors and was attempting to run out of the school building. Marcquan also made concerning statements about bringing a knife to school and about being fearful of returning home because his mother beats him with a belt. EMPS then contacted the respondent, but she refused to go to the school. The respondent told EMPS to contact the department to take Marcquan because she did not want nor did she have time to deal with his behaviors. The commissioner did not take custody of Marcquan at that time and he remained in the care and custody of the respondent. EMPS recommended that the respondent engage Marcquan in mental health treatment at the Yale Child Study Center. Marcquan was subsequently enrolled in therapy at the Yale Child Study Center where he saw an outpatient clinician on a weekly basis.

In November, 2016, the department received its second referral concerning Marcquan. According to the referral from Marcquan's school, Marcquan continued to exhibit out of control behavior and had wrapped a cord around his neck.

[2] EMPS is a community based emergency service intended to provide children and families with immediate access to in-person care when a child is experiencing an emotional or behavioral crisis. EMPS is funded by the department.

On January 13, 2017, the commissioner filed a petition with the Superior Court alleging that Marcquan was being neglected. On May 16, 2017, the neglect petition was orally amended to allege only that Marcquan was uncared for. That same day, the court adjudicated Marcquan uncared for. The court ordered that Marcquan remain in the care and custody of the respondent under protective supervision for a period of six months. On October 12, 2017, the order of protective supervision was extended for an additional six months. The commissioner filed a motion to modify the order from protective supervision to commitment on December 20, 2017. The parties agreed, however, that Marcquan would remain in the respondent's care provided that she (1) permit the department access to her home, (2) sign releases, and (3) cooperate with the department in securing a male mentor for Marcquan.

On February 5, 2018, Marcquan appeared in school with a swollen eye and lines resembling belt marks on his temple. The respondent admitted to disciplining Marcquan by "beating" him on the buttocks with a belt. The respondent theorized that while doing so, she might have inadvertently struck him on the head with the belt. According to Marcquan, this was not an isolated incident. Marcquan expressed concern that one day the respondent would get so mad that she might shoot him.

On February 7, 2018, the department filed an affidavit seeking permission to place Marcquan in an out-of-home placement. The affidavit alleged that the respondent had "exerted excessive physical discipline on [Marcquan]," that she was "unable to control her impulses," and that she had "unaddressed mental health issues." That same day, the court vested temporary custody of Marcquan with his father. On April 11, 2018, with the parties' consent, the court vacated the order of temporary custody. The court ordered that the father and the respondent share custody and guardianship of Marcquan, with the

father having primary physical residence. Protective supervision remained in place until August 11, 2018.

Nevertheless, on July 10, 2018, at an in-court review hearing, the father reported that he could no longer care for Marcquan due to Marcquan's out of control behavior. As a result, the department invoked a ninety-six hour hold of Marcquan. On July 12, 2018, the court concluded that Marcquan was "in immediate physical danger from [his] surroundings," "[a]s a result of said conditions, [his] safety [was] endangered and immediate removal from such surroundings [was] necessary to ensure [his] safety," and "continuation in the home [was] contrary to [his] welfare." The court therefore vested temporary care and custody of Marcquan with the commissioner. The court also set forth specific steps to facilitate reunification between the respondent and Marcquan.[3]

[3] The specific steps set forth by the court on July 12, 2018, instructed the respondent: (1) to keep all appointments set by or with the department and to cooperate with home visits by the department or Marcquan's attorney; (2) to inform the department of her and Marcquan's location at all times; (3) to take part in counseling and to make progress toward identified treatment goals; (4) to submit to random drug testing; (5) to refrain from the use of illegal drugs and the abuse of alcohol or medicine; (6) to cooperate with service providers; (7) to cooperate with court-ordered evaluations or testing; (8) to sign releases allowing the department to communicate with service providers to check on attendance, cooperation, and progress towards identified goals; (9) to sign releases allowing Marcquan's attorney to review her medical, psychological, psychiatric, and educational records; (10) to maintain adequate housing and legal income; (11) to notify the department concerning any changes in the makeup of her household to make sure that the change would not hurt the health and safety of Marcquan; (12) to cooperate with any restraining or protective order or safety plan approved by the department to avoid domestic violence incidents; (13) to attend and complete an appropriate domestic violence program; (14) to not get involved with the criminal justice system and to follow any conditions of probation or parole; (15) to visit Marcquan as often as the department permitted; (16) to inform the department of any person she would like the department to investigate and to consider as a placement resource for Marcquan; and (17) to tell the department the names and addresses of the grandparents of Marcquan.

On July 17, 2018, the commissioner filed a motion to open and modify the order of protective supervision and to modify the disposition to an order of commitment. In support of the motion, the commissioner incorporated, by reference, an affidavit prepared by a department social worker dated July 12, 2018. The affidavit provided that Marcquan's father had informed the court that he could no longer care for Marcquan and that the respondent was admitted to a local hospital under observation and thus was also unable to care for Marcquan. According to the affidavit, there were no other known potential family resources for Marcquan. The affidavit concluded that Marcquan had "no responsible caretaker to provide for his needs and immediate removal from such surroundings [was] necessary to ensure the child's safety."

A hearing was held on July 27, 2018, and the court granted the commissioner's motion to modify the order of protective supervision and committed Marcquan to the care and custody of the commissioner. Since that time, Marcquan has remained committed to the care and custody of the commissioner, and the father has had no further involvement with the department. Marcquan was placed in nonrelative foster care until September 4, 2019, when he was placed with his godmother.

On September 30, 2019, the respondent filed her first motion to revoke commitment of Marcquan to the care and custody of the commissioner. Before the court held a hearing on the motion to revoke commitment, the commissioner filed a motion, on October 19, 2019, seeking a psychological evaluation of both Marcquan and the respondent. The court held a hearing on the commissioner's motion for psychological evaluation on October 29, 2019. The court subsequently denied the motion based on its belief that issuing a court-ordered psychological evaluation would be futile due to the respondent's refusal to cooperate.

The court held a hearing on the respondent's first motion to revoke commitment on November 25, 2019, and December 18, 2019. On December 26, 2019, the court, *Conway*, *J.*, issued a memorandum of decision. The court found that, although the respondent participated in supervised visits with her son, she continued to make inappropriate comments and to engage in inappropriate conversations in Marcquan's presence. Additionally, she failed to develop skills or a working knowledge of positive and effective forms of discipline. The court also found that the respondent struggled to collaborate effectively with social workers from the department, noting that, by September, 2019, the case had been assigned to the department's sixth social worker. The court further determined that any benefits the respondent had derived from her weekly counseling sessions were not "carrying over" to her reunification efforts with Marcquan or her ability to properly care for him. The court found that there had been no discernable improvement regarding the respondent's ability to conform her behavior so as to make it in Marcquan's best interest to return to her care. The court explained that without a credible psychological evaluation, it was impossible to understand or predict how the respondent would react to and with others, including Marcquan. The court further explained that "past and present reality has stalled Marcquan's return to [the respondent's] care and has undoubtedly negatively impacted Marcquan's fragile well-being." The court thus reconsidered its prior denial of the commissioner's motion for a psychological evaluation and ordered the respondent to participate in a court-ordered psychological evaluation.

On the basis of the record before it, the court denied the first motion to revoke commitment on the ground that the respondent failed to establish that cause for commitment no longer existed. The court explained that the respondent "has to understand that until she

demonstrates an ability to collaboratively and effectively interact with [the department] and service providers and she demonstrates a sustained ability to parent Marcquan in a manner which affords him both physical and emotional safety, reunification is highly unlikely. While no guarantee, her participation in a court-ordered evaluation and her sustained and effective follow through with treatment recommendations may potentially be the key to a reinvigorated reunification process."

The respondent then appealed from the court's order requiring her to participate in a psychological evaluation. This court dismissed the respondent's appeal, concluding that the order for a psychological evaluation was not part of the court's judgment denying the respondent's motion to revoke commitment and was not otherwise an appealable final judgment. See *In re Marcquan C.*, 202 Conn. App. 520, 523, 246 A.3d 41, cert. denied, 336 Conn. 924, 246 A.3d 492 (2021). A court-ordered psychological evaluation never occurred. Rather, the respondent arranged her own psychological evaluation with Ralph Balducci, a psychologist.

On April 26, 2021, the respondent filed her second motion to revoke commitment, which is the subject of the present appeal. The court held a hearing on the motion on July 1, 2021. At the beginning of the hearing, the court granted the commissioner's motion for judicial notice concerning prior hearings. The respondent called Balducci as a witness before testifying herself. The commissioner called Lucy Hernandez, Marcquan's therapist, and Andre Turner, a social worker previously assigned to the case, to testify.

In a memorandum of decision dated September 21, 2021, the court, *Hon. Richard E. Burke*, judge trial referee, concluded that grounds for commitment continued to exist and, therefore, denied the respondent's motion to revoke commitment. The court incorporated

by reference the memorandum of decision, dated December 26, 2019, denying the respondent's first motion to revoke commitment. The court also made the following additional findings of fact: "The respondent mother stated that she gets 'triggered' by [the department]. At one visit to the [department] offices on May 7, [2021] she was asked by security to take out her identification from her wallet to show it. The respondent mother thought that seeing it through the plastic opening in her wallet should be sufficient. Security did not agree and the respondent mother got 'triggered.' In addition to using racially charged language, the respondent mother told the [department] social worker that she would have him 'touched,' which he stated was a serious threat of harm. This took place in the presence of Marcquan. In the prior memorandum of decision denying [the respondent's] motion to revoke, [the court] stated that: 'The respondent mother has to understand that until she demonstrates an ability to collaboratively and effectively interact with [the department] and service providers and she demonstrates a sustained ability to parent Marcquan in a manner which affords him both physical and emotional safety, reunification is highly unlikely.' . . . Without question, [the respondent] has been unwilling or unable to collaborate with [the department]. Her behavior has gone far beyond a lack of collaboration." The court therefore concluded that grounds for commitment continued to exist and denied the respondent's second motion to revoke commitment. This appeal followed.[4]

We begin by setting forth the legal principles and standard of review that govern our analysis of the respondent's claim on appeal. "A motion to revoke commitment is governed by [General Statutes] § 46b-129 (m) and Practice Book § 35a-14A. Section 46b-129 (m)

[4] The respondent appeals only from the judgment of the trial court denying her second motion to revoke commitment.

provides: 'The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. No such motion shall be filed more often than once every six months.' " *In re Zoey H.*, 183 Conn. App. 327, 344, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

"Pursuant to § 46b-129 (j) (2), a trial court, prior to awarding custody of [a] child to the department pursuant to an order of commitment . . . must both find and adjudicate the child on one of three [statutorily defined] grounds: uncared for, neglected or [abused]. . . . Adjudication on any of these grounds requires factual support, and [t]he trial court's determination thereafter as to whether to maintain or revoke the commitment is largely premised on that prior adjudication. . . . Accordingly, [t]he court, in determining whether cause for commitment no longer exists . . . look[s] to the original cause for commitment to see whether the conduct or circumstances that resulted in commitment continue to exist." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Santiago G.*, 318 Conn. 449, 470, 121 A.3d 708 (2015).

Practice Book § 35a-14A provides in relevant part: "Where a child or youth is committed to the custody of the [c]ommissioner . . . the commissioner, a parent or the child's attorney may file a motion seeking revocation of commitment. The judicial authority may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth. Whether to revoke the commitment is a dispositional question, based on the prior adjudication, and the judicial authority shall determine whether to revoke the commitment upon a fair preponderance of the evidence. The party seeking revocation of commitment has the

burden of proof that no cause for commitment exists. If the burden is met, the party opposing the revocation has the burden of proof that revocation would not be in the best interests of the child. . . .''

''Pursuant to § 46b-129 (m) and Practice Book § 35a-14A, the moving party bears the burden of proving that a cause for commitment no longer exists; if he or she is successful, the court then must determine whether revocation of commitment is in the best interest of the child.'' *In re Zoey H.*, supra, 183 Conn. App. 344–45.

''Our Supreme Court has held that a natural parent, whose child has been committed to the custody of a third party, is entitled to a hearing to demonstrate that no cause for commitment still exists. . . . The initial burden is placed on the [person] applying for the revocation of commitment to allege and prove that cause for commitment no longer exists. . . . If the party challenging the commitment meets that initial burden, the commitment to the third party may then be modified if such change is in the best interest of the child. . . . The burden falls on the persons vested with guardianship to prove that it would not be in the best interests of the child to be returned to his or her natural parents.'' (Internal quotation marks omitted.) Id., 350–51.

''On appeal, our function is to determine whether the trial court's conclusion was legally correct and factually supported. We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses. . . . The determinations reached by the trial court . . . will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous.'' (Internal quotation marks omitted.) *In re Brooklyn O.*, 196 Conn. App. 543, 548, 230 A.3d 895 (2020). In the present

appeal, the respondent does not challenge any specific factual finding made by the trial court. As a result, we review the record to determine whether the trial court's conclusion was legally correct and factually supported.

The respondent claims that the trial court erred in denying her second motion to revoke commitment.[5] Specifically, the respondent contends that "the trial court in its decision essentially found that cause for commitment continued to exist because of the respondent's inability to effectively work with [the department]." In her view, the trial court only referenced "one specific instance as a factual basis to support this finding which was the [department] office visit."[6] We conclude that there was sufficient evidence in the record to support the court's conclusion that cause for commitment still existed.

[5] Although the respondent argues that the court erred in denying her second motion to revoke commitment, she concedes that revocation would not necessarily be in the child's best interests at this time because the commissioner has not properly engaged the respondent and her child with appropriate services. The respondent requests that this court reverse the judgment of the trial court denying her second motion to revoke commitment, "remand the case back to the trial court with instructions to stay the decision on the motion to revoke, and order the parties to fully cooperate with a court-ordered psychological evaluation to include the respondent, the minor child, and if appropriate, an interactional between the respondent and child, and to follow the recommendations of the evaluator, and then to hear additional evidence on the outcome of the implementation of the recommendation before issuing a final ruling." We reject the respondent's particular request for relief because we affirm the judgment of the trial court.

[6] The respondent also argues, in the alternative, that "it was not clearly demonstrated that it was in the best interest of the child to deny the motion to revoke when appropriate services to facilitate reunification were not implemented." We note, however, that the party seeking revocation of commitment has the burden to prove that no cause for commitment exists. Only if the movant satisfies that burden does the burden shift to the party opposing the revocation to show that revocation would not be in the best interests of the child. See *In re Zoey H.*, supra, 183 Conn. App. 344. We need not address this argument because we affirm the court's conclusion that the respondent failed to satisfy her burden of proving that no cause for commitment continued to exist.

At the hearing on the respondent's second motion to revoke commitment, the court heard testimony from Lucy Hernandez, Marcquan's therapist. Hernandez testified that Marcquan was very quiet and withdrawn, but, depending on his placement, his mood would change. Hernandez explained that Marcquan was diagnosed with dysthymia, a depressive order, the symptoms of which include a depressed mood, irritability, anger, low self-esteem, and appearing withdrawn. When asked whether Marcquan's symptoms were ever exacerbated or aggravated after interaction with the respondent, Hernandez testified: "I clinically believe that there are some impacts of his behavior and his mood. I think a lot of it has to do with frustration and irritability that he has described in sessions of whether it be feeling stuck in between, but also [split] amongst individuals." Hernandez also testified that Marcquan generally became more withdrawn after his visits with the respondent. According to Hernandez, Marcquan has stated that he was not interested in engaging in family therapy because he would not want the respondent to hurt Hernandez' feelings. Hernandez testified that Marcquan needs a nurturing, structured environment.

The court also heard the testimony of Andre Turner, a social worker employed by the department who previously had been assigned to the case in May, 2020, but then subsequently was removed from the case due to threats made by the respondent. According to Turner, the commissioner's main concern regarding the respondent was her history of physically and verbally abusing Marcquan. Turner testified that the respondent had not participated in a court-ordered psychological evaluation, despite Judge Conway's order to do so.[7] When

[7] In its memorandum of decision, the court found that the respondent credibly argued that, at some point, the department did not cooperate with the court-ordered psychological evaluation as it related to the child-parent relationship.

asked about the lack of visitation between the respondent and Marcquan, Turner testified that Marcquan did not want any in-person visits with the respondent because of the respondent's history of negative behavior. Turner further testified that during one in-person visit in May, 2021, after the respondent arrived at the department office, an incident occurred between the respondent and a security guard. According to Turner, the security guard advised the respondent that she was required to show him her identification, and the respondent showed it to him through her clear wallet. Turner testified that the security guard then asked the respondent to take her identification out of the wallet, at which point the respondent started to become disagreeable. Turner averred that he advised the respondent that if she was unable to follow the security guidelines, then he would not be able to facilitate the visit. According to Turner, the respondent then began to scream at him, called him names, made racist and derogatory remarks, and threatened him. Marcquan witnessed the entire incident and began crying. Turner also testified that the respondent had a history of making inappropriate statements in the presence of Marcquan, and that he was not the first social worker to whom the respondent had made derogatory comments. Finally, when asked whether the respondent had accomplished some of the court-ordered specific steps, Turner testified "no."

On the basis of our review of the record, we conclude that the court's determination that the respondent did not meet her burden to prove that cause for commitment no longer existed was legally correct and factually supported. The testimony of the commissioner's two witnesses provided sufficient evidence from which the court could have found that cause for commitment continued to exist. Specifically, the testimony supported the court's conclusion that the respondent had not adequately addressed her (1) issues relating to her ability

to collaborate effectively with the department, and (2) ability to parent Marcquan in a manner that would afford him both physical and emotional safety.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

BOARD OF EDUCATION OF THE CITY OF WATERBURY *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(AC 44570)

Cradle, Clark and DiPentima, Js.

Syllabus

The plaintiff employer appealed to the trial court from the decision of the defendant Commission on Human Rights and Opportunities sustaining a disability discrimination complaint filed by the defendant employee, L, and awarding L, inter alia, back pay and emotional distress damages. L, who is hearing impaired, was hired by the plaintiff in 2012 and assigned to a secretarial position in its education personnel department. She worked directly for the human resources assistant, M, and performed many of the same tasks as him and covered his duties when he was absent from the office. As a result of her hearing impairment, L tended to speak loudly, and, on occasion, coworkers had raised concerns to

[8] The respondent also argues that she "did demonstrate that she continued to be engaged in ongoing therapy and that contrary to . . . Turner's testimony that [she] had not addressed the concerns regarding her anger issues and its impact on parenting, [she] offered expert testimony to the contrary." However, "we repeatedly have held that [i]n a [proceeding] tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . Where there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 513, 167 A.3d 1112, cert. denied, 327 Conn. 973, 174 A.3d 192 (2017); see also *In re Brooklyn O.*, supra, 196 Conn. App. 548 ("[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses" (internal quotation marks omitted)).

T, the department's interim director, about the volume of her voice. In addition, S, who worked in the civil service personnel department, had inquired whether there was something wrong with L and had told M that he thought that L was loud and unprofessional. In 2014, M informed L that he intended to retire the following year. M encouraged L to apply for his position, began teaching her any duties of the position that she was not already performing, and strongly supported her candidacy. In August, 2015, the position was posted online, and L submitted an application. L met the qualifications listed in the posting. Two weeks later, S had the job posting removed and revised because he felt that he had a vested interest in assuring that the position was filled correctly. S interviewed prospective candidates for the position. Six candidates were interviewed for the position and two, P and J, were hired. L was not granted an interview because S concluded that she did not satisfy the revised minimum requirement of four years of human resources experience set forth in the revised job posting. After M retired, L became the interim human resources assistant until P's employment commenced. In her complaint, L claimed that the plaintiff had discriminated against her on the basis of her physical disability by failing to interview and promote her. Following a hearing, the commission's human rights referee concluded that the plaintiff had unlawfully discriminated against L on the basis of her disability in violation of statute ((Rev. to 2015) § 46a-60 (a) (1)) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), and awarded L back pay and emotional distress damages. The plaintiff appealed to the trial court, which dismissed the appeal and affirmed the commission's decision, concluding, inter alia, that the award of back pay was supported by substantial evidence and that the referee did not abuse her discretion in awarding emotional distress damages. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on its claim that the trial court improperly affirmed the commission's award of back pay because the award was not supported by substantial evidence: contrary to the plaintiff's contention, the referee's decision clearly indicated that the award of back pay was predicated on a finding that L would have been promoted to the human resources assistant position if not for the plaintiff's unlawful discrimination; moreover, the referee's conclusion that, in the absence of the unlawful discrimination, L would have been interviewed for and promoted to that position was supported by substantial evidence, as there was evidence that L had worked for the plaintiff for more than three years under M's supervision and guidance, M encouraged L to apply for his position, began training her on any duties she did not already perform, and participated in the candidate interviews, both T and M thought that L was more than qualified for the position because she already had experience performing the precise duties required, and L held one of the preferred undergraduate degrees specified in the original job posting and had established relationships with personnel

throughout the plaintiff's school district; furthermore, there was no merit to the plaintiff's contention that the referee improperly marshaled the evidence in favor of finding that L would have been chosen for the position because L placed only seventh on a civil service examination list, as the referee properly found that being placed on that list meant that the candidate was qualified for the position, and, although it was possible that L may not have been selected for the position, the referee properly resolved any uncertainty in favor of L in light of the remedial aims underlying the state's antidiscrimination laws.

2. This court declined to review the plaintiff's claim that the award of emotional distress damages was improper because the commission is not authorized to award compensatory damages pursuant to statute (§ 46a-58) in employment discrimination cases that fall within the scope of § 46a-60, as that claim was not raised before the commission or the trial court and, therefore, was not preserved for appellate review; moreover, this court declined the plaintiff's request to review its unpreserved claim pursuant to our supervisory authority over the administration of justice in light of our Supreme Court's recent decision in *Connecticut Judicial Branch* v. *Gilbert* (343 Conn. 90) because, having reviewed that decision, this court was not persuaded that the exercise of such authority was warranted.

Argued February 7—officially released May 24, 2022

Procedural History

Appeal from the decision of the human rights referee of the named defendant sustaining a complaint of disability discrimination filed by the defendant Cynthia Leonard against the plaintiff and awarding certain damages, brought to the Superior Court in the judicial district of New Britain, where the court, *Klau*, *J.*, rendered judgment dismissing the appeal and affirming the decision of the referee, from which the plaintiff appealed to this court. *Affirmed.*

Daniel J. Foster, corporation counsel, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiff, the Board of Education of the City of Waterbury, appeals from the judgment of

the trial court dismissing its administrative appeal and affirming the decision of the named defendant, the Commission on Human Rights and Opportunities (commission), which concluded that the plaintiff had discriminated against the defendant Cynthia Leonard on the basis of her physical disability by failing to interview and promote her. On appeal, the plaintiff claims that (1) the trial court improperly affirmed the commission's award of back pay because the award was not supported by substantial evidence and (2) the commission exceeded its statutory authority in awarding compensatory damages. We disagree with the plaintiff's first claim and decline to review the second claim because it is unpreserved. We, accordingly, affirm the judgment of the trial court.

The following facts, as found by the commission's presiding human rights referee (referee), and procedural history are relevant to this appeal. Leonard was hired by the plaintiff in 2012 and was assigned to a secretarial position in the education personnel department, which served as the human resources department for the Waterbury school district.[1] She worked directly for the human resources assistant, James Murray, until his retirement in 2015. Murray and Leonard were the only two employees in the education personnel department that supported the grant funded administrative and teaching positions within the school district. Leonard performed many of the same tasks as Murray and covered Murray's duties when he was absent from the office.

Leonard has a hearing impairment as a result of injuries she sustained in a motor vehicle crash in 1992. Consequently, she tends to speak loudly, particularly when

[1] The city of Waterbury has two separate and distinct human resources departments. The education personnel department supports the administrators and teachers within the city's school district. The civil service personnel department supports all of the city's civil service employees.

speaking on the telephone. Her colleagues on occasion had raised concerns to Shuana Tucker, the education personnel department's interim director, about the volume of Leonard's voice. Leonard's hearing impairment was generally known throughout the education personnel department and by others, including Scott Morgan, a human resources generalist, who worked for Waterbury's civil service personnel department. See footnote 1 of this opinion. Morgan had inquired if there was something wrong with Leonard because she was very loud and had told Murray that he thought that Leonard was loud and unprofessional.

In fall of 2014, Murray informed Leonard that he intended to retire in September, 2015. Murray encouraged Leonard to apply for his position, began teaching her the particular duties of the job that she was not already performing, and strongly supported her candidacy for human resources assistant. Murray had trained Leonard and thought she was an asset to the office. Tucker shared Murray's opinion of Leonard and both thought she was more than qualified for the position because she already was performing many of the duties and responsibilities required. On August 1, 2015, the job vacancy was posted online, and Leonard subsequently applied for the position.

The original job posting stated that applicants must have three years of human resources experience and that a bachelor's degree in human resources, business administration, or other related area was preferred. Leonard met those qualifications because she had worked for the plaintiff in its human resources department for more than three years, possessed a bachelor's degree in business administration, held a certificate in human resource management, and was working toward a master's degree in education. On her application, Leonard also noted that she had existing relationships with the schools, principals, and other staff that the education

personnel department supported and that she already was performing the job requirements of the position. Leonard also passed the required civil service examination, ranking seventh on the list of candidates.

On or about August 14, 2015, Morgan learned that the vacant position had been posted online. Morgan felt that he had a " 'vested interest' " in assuring that the position was filled " 'correctly' " and instructed an employee to remove the job posting for the purpose of revising it. Morgan revised the posting to state that applicants were required to have four years of human resources experience and a bachelor's degree from an accredited university, no longer indicating a preference for applicants who possessed a human resources or business administration degree. According to Tucker, Morgan removed the posting without her department's authorization and did not follow standard practices when he revised the job requirements without the approval of the plaintiff's personnel committee.

Tucker had taken intermittent leave to care for a family member in August and early September, 2015. Morgan covered Tucker's duties while she was away from the office, including interviewing prospective candidates for the human resources assistant position. Leonard was not granted an interview because Morgan had concluded that she did not satisfy the revised minimum qualifications, which required applicants to have four years of human resources experience. Morgan and Murray interviewed six candidates and subsequently hired Anne Phelan and Jaclyn Planas.[2] Neither Phelan nor Planas possessed a bachelor's degree in human resources or business administration and neither of them had Leonard's experience supporting grant funded positions

[2] In the fall of 2015, the education personnel department was restructured to implement the recommendations of a consulting firm that had conducted a staffing review of the department. As a result of that analysis, the department sought to reduce its administrative staff and also to increase the number of human resources professionals by hiring two individuals to replace Murray.

within the school district. After Murray retired in September, 2015, Leonard became the interim human resources assistant until mid-November, 2015, when Phelan's employment began.

On January 12, 2016, Leonard filed a complaint with the commission, alleging that the plaintiff had violated General Statutes (Rev. to 2015) § 46a-60 (a) (1),[3] as well as General Statutes § 46a-58 (a),[4] due to a deprivation of her rights under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2012) (ADA), and Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2012).[5] The commission investigated Leonard's complaint and, upon finding reasonable cause that a discriminatory employment practice had occurred and that efforts to conciliate had failed, held a hearing pursuant to General Statutes § 46a-84. The two day hearing commenced on October 16, 2018. The referee issued a memorandum of decision on October 3, 2019, concluding

[3] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (1) For an employer, by the employer or employer's agent . . . to refuse to hire or employ . . . any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . physical disability . . . ."

Hereinafter, all references to § 46a-60 in this opinion are to the 2015 revision of the statute.

[4] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . physical disability . . . ."

Section 46a-58 (a) was the subject of amendment after the filing of Leonard's complaint. See Public Acts 2017, No. 17-127, § 2. Because none of the changes is relevant to this appeal, for simplicity, we refer to the current revision of the statute.

[5] Leonard also alleged that the plaintiff violated § 46a-60 (a) (4), which provides that it is a discriminatory practice for an employer to discriminate against an employee for filing a complaint. It appears from the record that the commission and Leonard abandoned this claim.

that the plaintiff had unlawfully discriminated against Leonard, in violation of the ADA and § 46a-60 (a) (1), on the basis of her disability by failing to interview and promote her. The referee awarded Leonard $118,353.06 in back pay, as well as prejudgment and postjudgment interest, and $35,000 in emotional distress damages.

The plaintiff appealed to the trial court from the referee's decision, claiming, inter alia, that the referee improperly awarded Leonard back pay because there was no evidence to support Leonard's claim that she suffered a compensable injury. More specifically, the plaintiff argued that there was no evidence establishing that Leonard would have been selected for the position if she had been granted an interview, and, therefore, the back pay award was unduly speculative. Additionally, the plaintiff contended that the emotional distress damages awarded to Leonard were excessive under the facts of this case. The trial court dismissed the appeal and affirmed the decision, concluding that the referee's decision to award Leonard back pay was supported by substantial evidence and that the referee did not abuse her discretion in awarding Leonard emotional distress damages.[6] This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff claims that the trial court improperly affirmed the commission's award of back pay to Leonard because it is based on speculation and is not supported by the evidentiary record. The plaintiff argues that there was no evidence or findings made by the referee to support the referee's conclusion that Leonard would have been selected for the position had

[6] The plaintiff also challenged the referee's factual findings and conclusion that the plaintiff intentionally had discriminated against Leonard on the basis of her physical disability. Those issues were not raised on appeal to this court.

she been interviewed, and, as a result, she was not entitled to receive a back pay award. The commission counters that the court correctly determined that the substantial evidence in the record supported the referee's conclusion that Leonard would have been promoted in the absence of the plaintiff's discriminatory action of not interviewing Leonard for the position. We agree with the commission.

We first set forth the standard of review and legal principles that guide our resolution of the plaintiff's claim. "There is no absolute right of appeal to the courts from a decision of an administrative agency. . . . The [Uniform Administrative Procedure Act (UAPA)] grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well delineated circumstances. . . . Judicial review of an administrative decision is governed by General Statutes § 4-183 (a) of the UAPA, which provides that [a] person who has exhausted all administrative remedies . . . and who is aggrieved by a final decision may appeal to the [S]uperior [C]ourt . . . ." (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 442, 870 A.2d 448 (2005).

"Review of an appeal taken from the order of an administrative agency such as the [commission] is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion." *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 477, 559 A.2d 1120 (1989). "[E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of the witnesses and to

the agency's right to believe or disbelieve the evidence presented by any witness . . . ." (Citation omitted; internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 452, 458, 806 A.2d 87, cert. denied, 262 Conn. 910, 810 A.2d 275 (2002). "As with any administrative appeal, our role is not to reexamine the evidence presented to the [commission] or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions." (Internal quotation marks omitted.) *Lawrence* v. *Dept. of Energy & Environmental Protection*, 178 Conn. App. 615, 638, 176 A.3d 608 (2017). "If the decision of the agency is reasonably supported by the evidence in the record, it must be sustained." (Internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, supra, 459.

When a discriminatory employment practice has been established, the commission's referee must "construct a remedy for discrimination that will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 694, 855 A.2d 212 (2004). The referee is vested with "broad discretion to award . . . back pay or other appropriate remedies specifically tailored to the particular discriminatory practices at issue." (Internal quotation marks omitted.) *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 136, 827 A.2d 659 (2003). This is so because the overriding remedial purpose of our antidiscrimination statutes is "to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination." (Internal quotation marks omitted.) Id.

As an initial matter, we address the plaintiff's contention that the back pay award must be vacated because

the referee never made explicit findings that Leonard would have been selected for the position if she had been granted an interview. The referee, however, determined that "Morgan's failure to interview *and hire* [Leonard] was motivated by discriminatory animus." (Emphasis added.) The referee noted in her decision that there was "persuasive evidence that [Leonard] was qualified for the . . . position" and found that the two employees who were ultimately hired did not have the bachelor's degrees preferred under the original job posting nor a human resources certificate. Moreover, the referee found that Leonard not only had performed all of the functions of the position but she also was the interim human resources assistant for nearly three months after Murray retired. Thus, the referee's decision makes clear that the back pay award was predicated on a finding that Leonard would have been promoted if not for the discriminatory act.

After thoroughly reviewing the record, we agree with the court that the referee's conclusion that, in the absence of the unlawful discrimination, Leonard would have been interviewed for *and* promoted to the human resources assistant position is supported by substantial evidence, and, therefore, the back pay award was appropriate. The referee reasonably concluded that, had Morgan not revised the minimum job qualifications for the position, Leonard likely would have been one of the two candidates selected to replace Murray. The referee found that Leonard had worked for the plaintiff for more than three years under the supervision and guidance of Murray, whose position was being filled. Murray encouraged Leonard to apply for his position, began training her on any duties she did not already perform, and participated in the candidate interviews. Both Murray and Tucker felt that Leonard was more than qualified for the position because she already had experience

performing the precise duties required. Moreover, Leonard holds one of the preferred undergraduate degrees specified in the original job posting and had established relationships with personnel throughout the school district.

The plaintiff contends that the referee improperly marshaled the evidence in favor of finding that Leonard was the obvious choice for the position because Leonard placed only seventh on the civil service examination list. The referee, however, found that being placed on the civil service examination list meant that the candidate was qualified for the position. The evidence supports this finding. Furthermore, there was substantial evidence in the record from which the referee could have concluded that, in the absence of the plaintiff's unlawful discrimination against her, Leonard would have been interviewed and hired for the position, notwithstanding her performance on the civil service examination. Although it is possible that Leonard may not have been selected if she had been granted an interview, the referee's decision to award back pay was not unduly speculative. See, e.g., *National Labor Relations Board* v. *Ferguson Electric Co.*, 242 F.3d 426, 431 (2d Cir. 2001) ("[m]ere [u]ncertainty . . . does not render a back pay award speculative, since [a] back pay award is only an approximation, necessitated by the employer's wrongful conduct" (internal quotation marks omitted)). In light of the remedial aims underlying our antidiscrimination laws and the substantial evidence in the record to support the referee's conclusion that Leonard would have been promoted in the absence of the discriminatory employment practice, the referee properly resolved any uncertainty in the present appeal in favor of Leonard. See, e.g., *Equal Employment Opportunity Commission* v. *Joint Apprenticeship Committee*, 164 F.3d 89, 100 (2d Cir. 1998).

We conclude that the referee's findings were supported by substantial evidence and the commission therefore did not abuse its discretion in awarding Leonard back pay. Consequently, the trial court properly dismissed the plaintiff's administrative appeal and affirmed the commission's decision with respect to this claim.

II

We next turn to the plaintiff's second claim. On appeal to the trial court, the plaintiff asserted that the commission's award of emotional distress damages was excessive when compared to the commission's prior decisions and under the facts of the present case. On appeal to this court, however, the plaintiff has abandoned that claim and, instead, argues that the award of emotional distress damages was improper because the commission is not statutorily authorized to award compensatory damages pursuant to § 46a-58 in employment discrimination cases that fall within the scope of § 46a-60. We decline to address the merits of this claim because it is unpreserved.

As a general matter, "[t]his court will not review issues of law that are raised for the first time on appeal." (Internal quotation marks omitted.) *Matto* v. *Dermatopathology Associates of New York*, 55 Conn. App. 592, 596, 739 A.2d 1284 (1999); see also Practice Book § 60-5 (reviewing court not bound to consider claim unless it was distinctly raised at trial). "Our rules of practice concerning unraised claims also apply to appeals from administrative proceedings. . . . A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the [agency]." (Citations omitted; internal quotation marks omitted.) *Bristol Board of Education* v. *State Board of Labor Relations*, 166 Conn. App. 287, 300, 142 A.3d 304 (2016). The failure

to raise a claim at the time of the administrative hearing ordinarily precludes our review of that issue on appeal. See *Berka* v. *Middletown*, 205 Conn. App. 213, 218, 257 A.3d 384, cert. denied, 337 Conn. 910, 253 A.3d 44, cert. denied, U.S. , 142 S. Ct. 351, 211 L. Ed. 2d 186 (2021). But see *Burnham* v. *Administrator, Unemployment Compensation Act*, 184 Conn. 317, 322–23, 439 A.2d 1008 (1981).

Although the plaintiff participated fully in the administrative hearing and the commission requested that Leonard be awarded emotional distress damages, it did not claim in its posthearing brief that the commission exceeded its authority in awarding Leonard compensatory damages. The plaintiff similarly did not raise this claim on appeal to the trial court.[7] As a result, neither the referee nor the trial court addressed this claim.

On appeal to this court, the plaintiff acknowledges that this claim was not preserved. Nevertheless, it invites us to review its claim pursuant to our supervisory authority over the administration of justice; see, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150–52, 84 A.3d 840 (2014); if a similar legal issue is resolved in an appeal from *Connecticut Judicial Branch* v. *Gilbert*, Superior Court, judicial district of New Britain, Docket No. CV-18-6048927-S (October 15, 2019), which was pending in our Supreme Court at the time the instant appeal was briefed and argued in this court. Our Supreme Court has since issued its decision in that case. See *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, A.3d (2022). We have reviewed that decision and are not

[7] In its appeal to the trial court from the commission's decision, the plaintiff summarily alleged as a ground for sustaining its appeal that the commission erroneously awarded emotional distress damages because that award is not authorized by statute. Nonetheless, the plaintiff did not address this claim in its brief or at oral argument before the trial court.

persuaded that it warrants an exercise of our supervisory authority over the plaintiff's unpreserved claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HERMAN K.*
(AC 44317)

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

Syllabus

Convicted, following a jury trial, of the crimes of assault in the first degree causing serious physical injury and carrying a dangerous weapon in connection with a stabbing incident, the defendant appealed to this court, claiming that the trial court judge, because of the appearance of partiality, was required to recuse himself at the defendant's sentencing hearing pursuant to the applicable rule of practice (§ 1-22) and the applicable rule (rule 2.11) of the Code of Judicial Conduct. Prior to trial, the defendant rejected a judge's plea offer of twelve years of incarceration, execution suspended after five years, and a period of probation. A separate judge thereafter presided over the defendant's trial, at which the jury returned a guilty verdict. When the defendant appeared for his sentencing, the judge brought to the attention of both the prosecution and the defense that he would strike a reference in the presentence investigation report to the rejected plea offer previously made to the defendant. The defendant moved for a mistrial and a new trial, which the court denied and interpreted as a motion to recuse the judicial authority. The court denied the defendant's motion for recusal, reasoning, inter alia, that it had no participation in any pretrial plea offers and, therefore, there was no violation of the rule set forth in *State* v. *Niblack* (220 Conn. 270), which held that a judge who participates in pretrial plea negotiations is disqualified from further proceedings if the offer is not accepted. The judge sentenced the defendant to twenty years of incarceration, suspended after twelve years, and three years of probation. On the defendant's appeal, *held* that the trial court did not abuse its discretion in denying the defendant's motion for recusal:

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

the defendant, as the moving party, failed to meet his burden in demonstrating that recusal was warranted, as there was nothing in the record to establish that a reasonable person would question the judge's impartiality, the judge did not participate nor have any involvement in plea negotiations or plea offers in the defendant's case and was not responsible for the improper reference to the plea offer in the presentence investigation report and, once he learned of such improper reference, he alerted both defense and the prosecutor, struck the reference thereto, and stated on the record that it would have no effect on the imposed sentence and that he had made no effort to confirm whether the alleged plea offer had been made; moreover, after attending the lengthy trial, the sentencing judge properly considered facts from the evidence relating to the seriousness of the crime and the resulting near-death injuries to the victim to determine the defendant's length of sentence and, although the sentencing judge considered other factors such as the defendant's remorse, his criminal history, and his age, the judge ultimately concluded that a lenient sentence was not warranted for his crimes; furthermore, the defendant's claim that the reference to the plea offer in the presentence investigation report created a floor that the judge might have felt an obligation to exceed was unavailing as courts are obligated to set aside irrelevant matter in performing their duties and courts are presumed to consider only properly admitted evidence when rendering a decision and, therefore, such a presumption applied equally to an improper mention of a rejected plea offer in a presentence investigation report provided to the judge.

Argued January 31—officially released May 24, 2022

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree and carrying a dangerous weapon, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Vitale*, *J.*; verdict of guilty; thereafter, the court, *Vitale*, *J.*, denied the defendant's motion to disqualify the judicial authority; subsequently, the court, *Vitale*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Melissa E. Patterson, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. Before this court is the defendant's appeal from the judgment of conviction, rendered following a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and carrying a dangerous weapon in violation of General Statutes § 53-206 (a). On appeal, the defendant claims that the trial court, *Vitale*, *J.*,[1] improperly denied the defendant's motion for disqualification at his sentencing hearing based upon what he contends was the appearance of partiality.[2] We disagree and affirm the judgment of the trial court.

We conclude that the court did not abuse its discretion in denying the defendant's motion for recusal. The court denied the defendant's motion for a mistrial, ruling that it was untimely in light of the rules of practice. The court also ruled that his retrial was unwarranted because of a probation officer's presentence report's mention of a rejected plea offer because it would have no bearing or impact on the sentence imposed. Judge Vitale then treated the motion as a motion to recuse and denied that relief.

The following facts reasonably could have been found by the jury. In May, 2018, the defendant had a fight with another man at a twenty-four hour convenience store

[1] Where necessary, we refer to Judge Vitale by name, but when our intent is clear that it is he who is acting, we use the term court interchangeably.

[2] The defendant also claimed on appeal that his right to confrontation under the sixth amendment to the United States constitution was violated by the hearsay testimony of a DNA analyst, but this claim was withdrawn by defense counsel at oral argument before this court.

in New Haven. The victim in this case, who is the defendant's nephew, was present at the time, but did not intervene on the defendant's behalf in that fight. Thereafter, on the night of June 16, 2018, the victim was hanging around the convenience store after 2 a.m. A red truck drove by and later returned and parked in the convenience store lot. The defendant exited the truck and, without warning, stabbed the victim in the back. When the victim abruptly turned around to confront his attacker, whom he quickly realized was his uncle, the victim was stabbed in the arm by him. The victim, who was bleeding profusely, ran 1360 feet and collapsed on the street. He was taken to a hospital by ambulance where he was treated by surgeons for injuries to his lung, diaphragm, spleen, and large intestine, as well as for a fractured rib, blood loss, and pooling of blood in his lung. The victim sustained life-threatening injuries.

The defendant was arrested and charged with assault in the first degree causing serious physical injury in violation of § 53a-59 (a) (1) and carrying a dangerous weapon in violation of § 53-206 (a). Subsequent to his arrest and prior to trial, a Superior Court pretrial proceeding was held before Judge Patrick Clifford at which the defendant rejected a plea offer of twelve years of incarceration, execution suspended after five years, and a period of probation.[3] In November, 2019, the defendant went to trial before a jury. On November 15, 2019, the jury returned verdicts of guilty on both counts. The court then deferred the imposition of sentence pending the filing of the required presentence investigation report by the Office of Adult Probation.

The following procedural history occurred postverdict. On January 30, 2020, the presentence investigation

[3] The actual time to be served was incorrectly stated in the presentence investigation report from the Office of Adult Probation as eight years of incarceration instead of the five years offered.

report had been completed and the defendant appeared in court for sentencing. At that time, Judge Vitale noted that he would strike from that report a reference to the plea offer made to the defendant by Judge Clifford. Judge Vitale termed the report's single reference to a rejected pretrial plea offer "inappropriate" and stated it would have "absolutely no impact or bearing on the . . . sentence to be imposed . . . ." The judge also indicated on the record that he had no involvement in any plea negotiations and lacked knowledge about whether any occurred. Defense counsel then stated that she would file a motion for mistrial and a new trial. That motion was denied by the court on March 10, 2020. The court then interpreted the motion for mistrial and a new trial as a motion for recusal and denied that motion to recuse.

The court, in denying the motion, stated that the reference to a pretrial plea offer before another judge should not have been included in the probation officer's presentence investigation report. It noted that the reference did not result from any impropriety on the part of the court or either counsel. The court noted that it had ordered the improper reference struck and redacted from the report. The court also stated that it had no participation in any pretrial plea offers, so that there was no violation of the rule set forth in *State* v. *Niblack*, 220 Conn. 270, 280, 596 A.2d 407 (1991). In *Niblack*, our Supreme Court held that a judge who participates in pretrial plea negotiations is disqualified from further proceedings if the offer is not accepted. Id.

At sentencing, Judge Vitale heard from the prosecutor, the defendant's trial counsel, the defendant's daughter and sister, and the defendant himself and evaluated the presentence investigation report except for the portion he ordered struck. Judge Vitale recounted that he had presided over several days of trial and heard the testimony of numerous witnesses who described the

stabbing by the defendant of his nephew in his back and arm, the damage to various parts of the victim's body, and the medical attention and sequela with which the victim now lives as a result of the vicious assault to which the defendant subjected him.

The court then proceeded to sentence the defendant. The court first reviewed the details of the defendant plunging a large knife into the victim's back without warning and then slashing the victim's arm as the victim attempted to defend himself. The court then described the victim running for his life for approximately 1300 feet, bleeding profusely in a bloody trail, which was later discovered by the police. After being transported to the hospital, the victim underwent several hours of surgery to deal with damage to his lung, diaphragm, large intestine, and a rib fracture, which caused the victim to be hospitalized for a significant period of time. The court found that the crime showed "a cold and cunning premeditation," which resulted in long-lasting injuries from which the victim nearly died. The court then reviewed the victim's attitude, who was seeking significant punishment, as reported by the victim's advocate. The court also reviewed the defendant's background, including his physical and mental health history, sparse work record, and his record of eleven prior convictions, ten of which were misdemeanors, and three prior violations of probation. The court also considered common goals of sentencing, including rehabilitation, punishment, deterrence, and protection of the public. Judge Vitale then sentenced the defendant to twenty years of incarceration, the execution of which was to be suspended after service of twelve years, followed by three years of probation on the charge of assault in the first degree. On the charge of carrying a dangerous weapon, the defendant was sentenced to one year of incarceration to be served concurrently with the sentence of assault. The defendant's total effective sentence was

twenty years of incarceration, suspended after twelve years, five years of which was a minimum mandatory term, and three years of probation.

On appeal, the defendant claims that when the court learned, from reading the presentence investigation report, of a prior plea offer of twelve years of incarceration suspended after eight years that the state had made to the defendant, it became obligated to recuse itself, not because of actual bias, but because there was an appearance of partiality. In order to preserve the integrity of the judicial sentencing process, he claims that a new sentence before a different judge is required.[4]

The defendant further argues that "[a] reasonable person might believe [that] the court felt an obligation to sentence [the] defendant to something higher than what was offered given the appraisal of the case by a fellow judge" and that "a reasonable person could believe this was simply something [the court] could not easily ignore." The defendant also argues that the disclosure of the terms of a pretrial plea offer resulting from a pretrial hearing before Judge Clifford created an "anchoring effect." The defendant defines the anchoring effect, to wit, as "a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.' " According to the defendant, if the court had not been exposed to the reference to a plea offer made by another judge prior to trial, the court would have been more likely to have imposed a less lengthy sentence.

The state argues that the court properly declined to recuse itself. It notes that the court (1) brought the

[4] Citing *State* v. *Milner*, 325 Conn. 1, 5, 155 A.3d 730 (2017), the defendant asserts that his claim is reviewable because the court treated his motion as a motion to disqualify. We agree with the defendant that the claim as to recusal was preserved and is reviewable.

probation officer's mistaken reference to a rejected plea offer to the parties' attention and ordered it struck from the presentence investigation report, (2) had no involvement in any plea negotiations, nor any conversations with the pretrial judge who supervises pretrial offers, nor had reviewed any other judge's advice, nor had the court discussed any pretrial offers with either counsel, and (3) indicated it had no personal stake in the matter and had no resentment toward the defendant, and that he would not consider the reference he had ordered struck. The state also argues that the court appropriately focused on proper factors when it imposed sentence on the defendant.

Both the state and the defendant contend that appellate review of the denial of a motion for disqualification of a judge is governed by an abuse of discretion standard. See *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017); *State* v. *Canales*, 281 Conn. 572, 593, 916 A.2d 767 (2007). The state further points out that *State* v. *Lane*, 206 Conn. App. 1, 8, 258 A.3d 1283, cert. denied, 338 Conn. 913, 259 A.3d 654 (2021), requires a reviewing court utilizing the abuse of discretion standard to "indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.)

For reasons that follow, we first observe that we disagree with the defendant's claim that the "concerns" expressed in *State* v. *D'Antonio*, 274 Conn. 658, 681–83, 698, 877 A.2d 696, 712 (2005), are relevant to Judge Vitale's role in this case.[5] *D'Antonio* is neither factually

[5] The defendant asserts that by learning there were negotiations and that an offer of twelve years suspended after eight years was made, the court was informed that a fellow judge felt that twelve years was an appropriate sentence and that eight years should be served. He further claims that a reasonable person might believe that the court then felt an obligation to sentence the defendant to something higher and that a reasonable person might not view the court as a neutral party.

similar to the present case nor are its requirements of the extraordinary level of plain error appellate review necessary or appropriate.

Unlike the present case, the "concerns" expressed in *D'Antonio* were related to whether there was "judicial vindictiveness" present on the part of a trial judge who had participated in unsuccessful plea negotiations and then, without objection, presided over the trial of the same defendant's charges. See id., 690–91. In reviewing and reversing the Appellate Court, our Supreme Court concluded that these concerns were not realized. Id., 698. Unlike this case, however, where Judge Vitale had not engaged in plea negotiations, *D'Antonio*, instead, involved a case in which the sentencing judge had made a pretrial offer that was not accepted and then presided over the trial of two charges against the defendant, and then sentenced him. See id., 663–66. It was from that dual role that the "concerns" in *D'Antonio* arose.

In *D'Antonio*, our Supreme Court reviewed the purposes of the procedural rule endorsed in *State* v. *Niblack*, supra, 220 Conn. 280, which provides that, "a trial court may participate in the negotiation of a plea agreement between the state and the defendant, so long as a different judge presides at trial and sentencing if the negotiations are unsuccessful . . . ." *State* v. *D'Antonio*, supra, 274 Conn. 660–61.

The court explained that "judicial participation in plea negotiations is likely to impair the trial court's impartiality. The judge who suggests or encourages a particular plea bargain may feel a personal stake in the agreement (and in the quick disposition of the case made possible by the bargain) and may therefore resent the defendant who rejects his advice. . . . As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems

to become an advocate for the resolution he has suggested to the defendant." (Internal quotation marks omitted.) Id., 676.

Additionally, however, the court "conclude[d] that establishing a violation of the *Niblack* rule does not, therefore, excuse the defendant [who claims review under the plain error doctrine] from demonstrat[ing] that the failure to grant relief will result in manifest injustice. . . . Rather, the defendant must demonstrate on appeal that the record in the case actually implicates the dangers of judicial participation in plea negotiations . . . ." (Citation omitted; internal quotation marks omitted.) Id., 681. Our Supreme Court "look[ed] beyond the fact of the *Niblack* violation and review[ed] the record as a whole for evidence of actual or apparent prejudice to the defendant." Id. "[I]n addition to judicial participation in unsuccessful plea negotiations followed by a harsher sentence than initially was offered," our Supreme Court looked to: "(1) whether the trial judge initiated the plea discussions with the defendant . . . (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing." (Internal quotation marks omitted.) Id., 682.

Ultimately, our Supreme Court in *State* v. *D'Antonio*, supra, 274 Conn. 658, overruled earlier Appellate Court reversals under the plain error doctrine in *State* v. *D'Antonio*, 79 Conn. App. 683, 691, 830 A.2d 1187 (2003), rev'd, 274 Conn. 658, 877 A.2d 696 (2005), and *State* v.

D'Antonio, 79 Conn. App. 696, 830 A.2d 1196 (2003), rev'd, 274 Conn. 658, 877 A.2d 696 (2005), ruling that the violation of the *Niblack* rule, although improper, did not constitute plain error where the record showed that the trial judge presided over proceedings in a fair and evenhanded manner, no reference was made at sentencing of the rejection of the prior plea offer, and sentence was imposed in an appropriate manner only on grounds involved in proceedings heard at trial. *State* v. *D'Antonio*, supra, 274 Conn. 690–91, 697–98. Our Supreme Court concluded that the "concerns of judicial vindictiveness" contemplated by the *Niblack* rule were not realized and, therefore, the Appellate Court improperly reversed the judgment of the trial court. Id., 698.

In the present case, the disparity between the plea offer and ultimate sentence imposed by Judge Vitale is the only thread in common between the proceedings before Judge Vitale, who had no involvement in plea bargaining, and the factors *D'Antonio* considered pertinent in determining whether judicial participation in unsuccessful plea negotiations mandates reversal under the plain error doctrine.[6] Not only is there no evidence that Judge Vitale in any way participated in plea negotiations in the defendant's case, the defendant makes no claim that any of the factors relevant to establishing whether either the actual or apparent form of prejudice are present, although he does emphasize that the sentence imposed by Judge Vitale after trial exceeded the sentence offered in the plea negotiations prior to trial before another judge. In sum, the concerns about "judicial vindictiveness" expressed in both *Niblack* and *D'Antonio* are not present here.[7] *State* v. *D'Antonio*,

[6] Unlike *D'Antonio*, the defendant was able to obtain review without resort to the plain error doctrine and facing its heightened burden of proving "manifest injustice" because Judge Vitale took the initiative to treat the defendant's motion as a motion to recuse, which was then preserved for appellate review. See *State* v. *D'Antonio*, supra, 274 Conn. 669.

[7] As a further example of the lack of vindictiveness, after Judge Vitale denied the defendant's motion for a new trial as inappropriate and untimely,

supra, 274 Conn. 698. Specifically, Judge Vitale never initiated plea discussions, did not participate in plea negotiations, and nothing in the record suggests that Judge Vitale departed from his role as an impartial arbiter, that the sentence to be imposed would hinge on the defendant's exercise of his right to trial, or that the length of the sentence to be imposed would be influenced because the defendant exercised his constitutional right to trial. Additionally, there are facts set out by Judge Vitale from the trial evidence relating to the seriousness of the crime and resulting near-death injuries, which explain the length of the sentence Judge Vitale imposed.

We next consider the defendant's argument that the sentencing court used the wrong standard applicable to claims of actual partiality rather than the appearance of it judged by whether a reasonable person might have questioned the court's impartiality in resolving the defendant's motion. In *State* v. *Milner*, supra, 325 Conn. 12–13, our Supreme Court held that where the record shows (as it does here) that the court, in reviewing a motion to recuse, had reviewed rule 2.11 of the Code of Judicial Conduct,[8] which covers both claims of actual bias and the appearance of partiality, it is fair to assume that the trial court reflected on the appropriate standard for both and rendered a conclusion consistent with its application of an objective inquiry.

Judge Vitale honored the defendant's rights and heard arguments regarding recusal, even though the defendant had filed no such motion or supporting affidavit. See Practice Book § 1-23. These actions further show a lack of any of the "concerns of judicial vindictiveness contemplated by the *Niblack* rule . . . ." *State* v. *D'Antonio*, supra, 274 Conn. 698.

[8] Rule 2.11 of the Code of Judicial Conduct provides in relevant part: "(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . ."

The defendant concedes that the court had no actual bias. In applying Practice Book § 1-22 (a)[9] and rule 2.11 of the Code of Judicial Conduct governing recusal of a judge, however, the reasonableness standard is an objective one. "Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances." *State* v. *Lane*, supra, 206 Conn. App. 9. When examining such circumstances, it must be restated that the abuse of discretion standard "requires us to indulge every reasonable presumption in favor of the correctness of the [trial] court's determination." (Internal quotation marks omitted.) Id., 8. Therefore, because our law presumes and expects that a duly appointed judge, consistent with his oath of office, will perform his duties impartially, the burden rests with the party moving for recusal to show that it is warranted. See *State* v. *Milner*, supra, 325 Conn. 12.

The following circumstances in the present case are pertinent. Judge Vitale never participated in plea negotiations, although another judge did. The defendant has not shown that Judge Vitale had any role or involvement in plea offers in connection with his case, nor was Judge Vitale responsible for the mistake of a probation officer who included mention of a rejected plea offer in his presentence report to the court. When Judge Vitale learned of this improper mention, he brought it to the attention of both the prosecution and defense, ordered it struck and redacted, and stated on the record it would have no effect on the sentence to be imposed. Moreover, as was true of the trial judge in *State* v. *Milner*, supra, 325 Conn. 12, Judge Vitale stated that he had reviewed

[9] Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ."

Practice Book § 1-22, rule 2.11 of the Code of Judicial Conduct, and the relevant case law in ruling on the defendant's motion. In addition, he set forth additional facts relevant to the objective inquiry of whether an appearance of bias might exist, including that he made no effort to confirm whether the alleged pretrial offer had been made. In short, there is nothing in the record to establish that Judge Vitale failed to consider whether his impartiality might reasonably be questioned under the objective standard. See *State* v. *Milner*, supra, 13 ("[w]e do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary" (internal quotation marks omitted)). Accordingly, we reject the defendant's claim that Judge Vitale applied the incorrect legal standard.

Nevertheless, the defendant briefs several reasons why, although there was no actual bias, the judge's impartiality might reasonably be questioned. First, the defendant argues that the reference in the presentence report to a pretrial sentence offer created, in effect, a floor that Judge Vitale, in sentencing, might have felt an "obligation" to exceed. We disagree. Whatever prior offer was made at a pretrial hearing before another judge, Judge Vitale made clear that he had been unaware of it and that it would have no impact whatsoever on the sentence he imposed. Instead, he based his sentence on proper considerations. He had sat through a lengthy trial where there were days of evidence about the defendant's brutal, unprovoked attack causing hospitalization and extensive medical treatment necessary to save the victim's life, which he referenced at sentencing. All of that evidence, which the court heard, pertained to matters for the sentencing court to take into account when considering the need for punishment, deterrence and protection of the public.

Second, despite the defendant's claim to the contrary, courts and sometimes even jurors are obligated and expected to set aside irrelevant matter in the performance of their duties to which they did not cause themselves to be subjected. See *State* v. *Roy D. L.*, 339 Conn. 820, 842, 262 A.3d 712 (2021). In *State* v. *Roy D. L.*, supra, 842, which involved an appeal from a bench trial, our Supreme Court reiterated the long held presumption that whenever "the court, act[s] as the trier of fact, [it] consider[s] only properly admitted evidence when it render[s] its decision." In that case, the court also noted that trial judges are less likely to be influenced by improper remarks made by counsel during a bench trial. See id., 843–44. These same presumptions apply equally to an improper mention of a rejected plea offer in a presentence investigation report given to the judge.

Third, the defendant urges that he was remorseful, had a criminal record consisting of mostly misdemeanors, and was fifty-five years old. The court considered all of those things, but found other factors, including the defendant's "cold and cunning premeditation" and the life-threatening injuries inflicted, and concluded a lenient sentence was not warranted for his crimes.

Finally, we do not place any significance on the defendant's reliance on the fact that both the sentence imposed and the purported prior plea offer involved a figure of twelve years.

On the basis of the foregoing, we determine that Judge Vitale did not abuse his discretion in denying the defendant's motion for recusal. We conclude that from all of the circumstances a reasonable person would not question the judge's impartiality. We thus conclude that there was no appearance of partiality to warrant disqualification of Judge Vitale, the trial judge at sentencing, based on a probation officer's single mistaken reference in the presentence investigation report to a rejected

plea offer, particularly when it was Judge Vitale who brought the officer's mistake to the parties' attention and took immediate steps to deal with it fairly.

The judgment is affirmed.

In this opinion the other judges concurred.

CATHIE PISHAL *v.* VICTOR PISHAL
(AC 43613)

Prescott, Suarez and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion to modify his alimony obligation. In his motion, the defendant alleged that his alimony obligation should be terminated on the basis of the plaintiff's cohabitation with a third party, or that his alimony obligation should be modified on the basis of a substantial change in his financial circumstances, as his current income was less than his income at the time of the dissolution as a result of his recent loss of employment. The court denied the defendant's motion in an oral ruling at the conclusion of a hearing on that motion. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly relied on a certain rule of practice (§ 15-8), which applied to civil actions and not to family matters, in denying his motion to modify his alimony obligation: the defendant failed to demonstrate that the trial court, in fact, relied on Practice Book § 15-8, as the plaintiff did not make a motion for judgment of dismissal under § 15-8 and the court did not dismiss the defendant's motion or refer to § 15-8 in its decision; moreover, the court's statement that the defendant had not proven a prima facie case of either cohabitation or a substantial change in circumstances reasonably could be interpreted to mean that, in its role as fact finder, the court had evaluated the totality of the evidence and did not find the relevant factual issues in the defendant's favor.
2. This court declined to review the defendant's remaining claims, namely, that the trial court improperly weighed the evidence and abused its discretion in declining to terminate or to modify the defendant's alimony obligation, the defendant having failed to provide an adequate record for review as required pursuant to the applicable rule of practice (§ 61-10): the record did not contain a proper statement of the court's decision, as the court did not file a memorandum of decision setting forth its reasoning in denying the motion and the defendant did not take steps

to obtain a transcribed copy of the decision signed by the trial court; moreover, although the record included the certified transcript, this court could not identify in the transcript the trial court's factual or legal bases for denying the defendant's motion, and the defendant failed to seek an articulation of the court's oral decision.

Argued January 10—officially released May 24, 2022

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Turner*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Gould*, *J.*, denied the defendant's motion to modify alimony, and the defendant appealed to this court. *Affirmed.*

Leslie I. Jennings-Lax, with whom was *Marissa B. Hernandez*, for the appellant (defendant).

Christine M. Gonillo, for the appellee (plaintiff).

Opinion

PER CURIAM. In this postdissolution action, the defendant, Victor Pishal, appeals from the judgment of the trial court denying his motion to modify his alimony payments to the plaintiff, Cathie Pishal. The defendant claims that (1) the court improperly relied on Practice Book § 15-8, which applies to civil actions and not family matters, in concluding that he did not establish a prima facie case; (2) even if the court properly relied on § 15-8, it nonetheless improperly weighed the evidence and failed to properly consider whether he had presented sufficient evidence to establish a prima facie case; (3) the court abused its discretion in concluding that he was not entitled to the termination of his alimony obligation because the plaintiff was cohabitating with a third party; and (4) the court abused its discretion in concluding that he was not entitled to a modification of his alimony obligation because of a substantial change

in his financial circumstances. We affirm the judgment of the court.

The following procedural history is relevant to this appeal. On November 9, 2006, the court, *Turner*, *J.*, dissolved the marriage of the parties. The court, in its judgment, incorporated by reference a written separation agreement entered into by the parties. Section 3 of the agreement states in relevant part: "The [defendant] shall pay to the [plaintiff] alimony in the amount of $100 per week for a period of twenty (20) years. Said amount shall be modifiable upon motion submitted to the Superior Court if there is a substantial change in circumstances. Said amount shall cease upon the [plaintiff's] death, remarriage or cohabitation, or the [defendant's] death."

On June 13, 2019, the defendant filed a motion seeking the termination or modification of his obligation to pay alimony to the plaintiff. The defendant alleged that the plaintiff had been "residing with her significant other in the plaintiff's home for at least the past four years." The defendant also alleged that "the plaintiff's significant other contributes to the plaintiff's residence, altering the financial needs of the plaintiff." Additionally, the defendant alleged that, at the time of the judgment of dissolution in 2006, he was gainfully employed but that, on April 12, 2019, he "was released from his longtime employer through no fault of his own. The company downsized and terminate[d] one-third of their employees." The defendant alleged that his current income, derived from his receipt of Social Security and unemployment benefits, was less than his income at the time of the dissolution. Relying on the plaintiff's cohabitation and his decrease in income, the defendant sought, inter alia, (1) a modification of his alimony obligation to zero dollars, (2) an immediate termination of his alimony obligation, and (3) a finding that he had overpaid alimony to the plaintiff.

On October 8, 2019, the court, *Gould*, *J.*, held a hearing on the defendant's motion. At the hearing, the defendant's attorney presented testimony from both parties.[1] The parties were cross-examined by the plaintiff's attorney. Both parties presented documentary evidence as well. After the witnesses were examined, the court asked the defendant's attorney if she wished to present any additional testimony, to which she replied, "[n]o, Your Honor." The court asked the defendant's attorney, "[m]oving party rests?" The defendant's attorney replied, "[y]es, Your Honor." Thereafter, the court denied the motion.

The court stated: "All right. . . . I've listened to the sworn testimony of the parties. I've carefully reviewed the evidence that's been offered on both parties' behalf. The gravamen of the motion filed on behalf of the defendant requires proof of cohabitation and/or a change—a substantial change in the circumstances on the part—behalf of the plaintiff. The court finds that the defendant has not proven a prima facie case of either cohabitation or a substantial change in circumstances. So, the motion is therefore denied." Immediately following the court's ruling, the defendant's attorney stated that she wanted to be heard with respect to the issue of cohabitation. The court replied that there was "nothing else that needs to be added . . . ." Then, the defendant's attorney stated that "we also had indicated a substantial change in circumstances was part" of the motion. The court replied, "I indicated, and I've ruled on that as well."

On October 28, 2019, the defendant, pursuant to Practice Book § 11-11, filed a motion for reargument with respect to the court's ruling as it related to both grounds on which the defendant relied in the motion for modification, namely, the alleged change in the financial circumstances of the parties and the alleged cohabitation

[1] The defendant also presented testimony from a private investigator.

of the plaintiff and a third party.[2] The court summarily denied the motion for reargument. This appeal followed.

I

We first address the defendant's claim that that the court improperly relied on Practice Book § 15-8, which applies to civil actions and not family matters, in concluding that he did not establish a prima facie case. The defendant cannot prevail on this claim.

To prevail on this claim, the defendant must first demonstrate that the court, in fact, relied on Practice Book § 15-8.[3] We take note of the fact that the plaintiff did not make a motion for judgment of dismissal under this rule of practice, nor did the court dismiss the defendant's motion. In its ruling denying the motion, the court did not refer to this rule of practice. After stating that it had considered evidence presented by both parties, the court stated "that the defendant has not proven a prima facie case of either cohabitation or a substantial change in circumstances." This statement does not establish that the court relied on Practice Book § 15-8. In light of the circumstances in which it was made, the court's statement reasonably could be interpreted to

[2] "[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 47–48 n.13, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020).

[3] Practice Book § 15-8 provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made."

mean that, in its role as fact finder, the court had evaluated the totality of the evidence and did not find the relevant factual issues in the defendant's favor.

It is well settled that the defendant can prevail on appeal not by raising the possibility that an error occurred, but by demonstrating on the basis of an adequate record that the court's ruling was erroneous. "We do not presume error. The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Carothers* v. *Capozziello*, 215 Conn. 82, 105, 574 A.2d 1268 (1990). The defendant has not demonstrated that the court relied on the rule of practice at issue and, thus, he is unable to demonstrate that its reliance on the rule constituted error. Accordingly, the defendant's claim fails.

II

We next turn to the defendant's three remaining claims. For the reasons that follow, we conclude that these three claims are unreviewable due to an inadequate record.

The defendant's second claim is that, even if the court properly relied on Practice Book § 15-8 and analyzed whether he established a prima facie case in support of one or both grounds set forth in his motion, the court nonetheless improperly weighed the evidence and did not properly consider whether he had presented sufficient evidence to establish a prima facie case. The defendant argues that the court's role in evaluating whether he established a prima facie case is limited to determining whether the evidence on which he relied, if taken as true and interpreted in the light most favorable to him, supported the grounds in his motion for modification. The defendant asserts that "the trial [court] employed the wrong standard" because "[its] conclusion that these facts did not support [his] motion for modification necessarily involved the trial court's

weighing the evidence . . . .'' To prevail on this claim, the defendant must first present this court with a record of what standard the court applied when it denied the motion.

The defendant's third claim is that the court abused its discretion in concluding that he was not entitled to the termination of his alimony obligation because the plaintiff was cohabitating with a third party. To prevail on this claim, the defendant must demonstrate that the court's legal analysis of the issue of cohabitation was flawed or that its findings related to the issue were clearly erroneous. See, e.g., *Cushman* v. *Cushman*, 93 Conn. App. 186, 198, 888 A.2d 156 (2006) (standard of review applicable to cohabitation determination). ''[General Statutes §] 46b-86 (b) is commonly known as the cohabitation statute in actions for divorce. . . . In accordance with the statute, before the payment of alimony can be modified or terminated [on cohabitation grounds], two requirements must be established. First, it must be shown that the party receiving the alimony is cohabit[ing] with another individual. If it is proven that there is cohabitation, the party seeking to alter the terms of the alimony payments must then establish that the recipient's financial needs have been altered as a result of the cohabitation.'' (Citation omitted; internal quotation marks omitted.) *Lehan* v. *Lehan*, 118 Conn. App. 685, 695, 985 A.2d 378 (2010).

To prevail on his fourth claim, that the court abused its discretion in concluding that the defendant was not entitled to a modification of his alimony obligation because of a substantial change in his financial circumstances, the defendant must demonstrate that the court's legal analysis of the issue of a substantial change in circumstances was flawed or that its findings related to the issue were clearly erroneous. ''Section 46b-86 (a) provides that a final order for alimony . . . may be

modified by the trial court upon a showing of a substantial change in the circumstances of either party. Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the [General Statutes § 46b-84] criteria, make an order for modification. . . . A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Internal quotation marks omitted.) *Berman* v. *Berman*, 203 Conn. App. 300, 304, 248 A.3d 49 (2021).

As we have explained, these three claims require this court to review a record that adequately sets forth the factual and legal basis of the court's decision. We must have a clear picture of what legal standard the court applied in ruling on the motion. With respect to the issue of cohabitation, we must be able to ascertain whether the court rejected the claim because it found that cohabitation did not occur or because it found

that cohabitation occurred but that it did not alter the plaintiff's financial needs. Finally, with respect to the issue of a change in the defendant's circumstances, we must be able to ascertain whether the court rejected the claim because it found that the defendant's circumstances had not changed since the last court order or because it found that circumstances had changed but that it was not unjust or inequitable to hold the defendant to the terms of the prior order.

"Practice Book § 61-10 (a) provides: 'It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal.' This court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of an adequate record. . . . The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative. . . . If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." (Citations omitted; internal quotation marks omitted.) *Berger* v. *Deutermann*, 197 Conn. App. 421, 426–27, 231 A.3d 1281, cert. denied, 335 Conn. 956, 239 A.3d 318 (2020).

First, we conclude that the record does not contain a proper statement of the court's decision. The defendant provided this court with a certified transcript of the

hearing on the motion for modification. The statements made by the court which appear previously in this opinion were excerpted from the transcript and are the full extent of the court's decision in this matter. The court did not file a memorandum of decision setting forth its reasoning in denying the motion for modification, nor did it prepare and sign a transcript of its oral ruling. See Practice Book § 64-1 (a).

The defendant did not take steps to obtain a transcribed copy of the court's decision, signed by the trial court, in compliance with our rules of practice which obligated him to file a notice pursuant to Practice Book § 64-1 (b) with the appellate clerk. "In cases in which the requirements of Practice Book § 64-1 have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. . . . This court has held, however, that despite an inadequate record, *such claims may be reviewed if the certified transcript provides the basis of the trial court's decision*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Santoro* v. *Santoro*, 132 Conn. App. 41, 47, 31 A.3d 62 (2011); see also *Michaels* v. *Michaels*, 163 Conn. App. 837, 845, 136 A.3d 1282 (2016) (reviewing court may overlook lack of signed transcript of oral decision provided that it can readily identify court's decision encompassing its findings). Although the record before us includes the certified transcript, we cannot identify in the transcript the factual or legal bases for denying the defendant's motion.

Second, the defendant did not attempt to seek an articulation of the court's oral decision pursuant to Practice Book § 66-5. "It is . . . the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of [a] decision . . . [or] to clarify the legal basis of a ruling." (Internal quotation marks omitted.) *CC Cromwell, Ltd. Partnership* v. *Adames*, 124 Conn.

App. 191, 194, 3 A.3d 1041 (2010); see also *Alliance Partners, Inc.* v. *Oxford Health Plans, Inc.*, 263 Conn. 191, 204, 819 A.2d 227 (2003). Because the court's oral decision denying the motion for modification does not specify the factual or legal basis for the ruling, the defendant's failure to seek articulation is especially significant.

The court's oral ruling does not afford this court with an adequate basis for review. The defendant not only failed to comply with Practice Book § 64-1, but failed to seek an articulation of the court's ruling. For these distinct reasons, we decline to consider the merits of the defendant's remaining claims.

The judgment is affirmed.

ARLENE BENNETTA *v.* CITY OF DERBY
(AC 44871)

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

Syllabus

The plaintiff sought to recover damages from the defendant city for public nuisance in connection with injuries she sustained when she was physically and sexually assaulted while walking along a public trail in the city. The plaintiff's complaint alleged, inter alia, that the city has a high crime rate and is one of the least safe municipalities in the state, that the city had created or participated in the development of the trail and had invited people of all ages to walk the trail and that the trail was isolated, lacked security and was prone to criminal activity. The plaintiff sought damages under the statute (§ 52-557n (a) (1) (C)) that imposes liability on a municipality when its acts constitute the creation or the participation in the creation of a nuisance. The city moved to strike the complaint, asserting, inter alia, that the plaintiff's public nuisance action was barred by governmental immunity. The trial court granted the city's motion to strike, concluding that the complaint failed to allege that the city created the nuisance by some positive act as required by § 52-557n (a) (1) (C) and that there was no logical nexus by which to attribute the criminal actions of the plaintiff's assailant to the city. Thereafter, the plaintiff filed a substitute complaint, which contained the same allegations as the original complaint and an additional allegation that

the city permitted "vandals and other non-law-abiding people" to loiter, roam and congregate on the trail, which created a dangerous condition for people walking the trail. The city filed a motion to strike the substitute complaint, which the trial court granted for the same reasons that it had granted the city's previous motion to strike. Subsequently, the trial court granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on her claim that the trial court erred in granting the city's motion to strike because she properly had alleged in her substitute complaint that the city created the nuisance by a positive act as required by § 52-557n (a) (1) (C): although the plaintiff contended that the nuisance was the dangerous condition of the trail, the allegations viewed in the light most favorable to the plaintiff indicated that the nuisance, if any, was created by the "vandals and other non-law-abiding people" on the trail, and, despite alleging that the city permitted those individuals to be on the trail, the plaintiff did not allege that the city took any action to cause them to commit crimes, and, therefore, because the acts giving rise to the alleged nuisance were those of third parties and because the city's act of participating in the construction of the trail did not create or participate in the creation of a nuisance, the plaintiff failed to allege a legally sufficient cause of action for public nuisance; moreover, insofar as the plaintiff relied on her allegations that the city itself is especially dangerous in arguing that the city's conduct of constructing a trail, permitting "vandals and other non-law-abiding people" on that trail, and inviting the public to walk on the trail created the nuisance, such allegations were not a sufficient basis on which to conclude that the city positively acted to create the alleged nuisance, as the acts giving rise to the nuisance were of third parties and, therefore, were not positive acts of the city, and there was no logical nexus by which to attribute the criminal conduct of the "vandals and other non-law-abiding people" to the city.

Argued April 5—officially released May 24, 2022

Procedural History

Action to recover damages for public nuisance, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Pierson*, *J.*, granted the defendant's motion to strike the complaint; thereafter, the court granted the defendant's motion to strike the substitute complaint; subsequently, the court, *Pierson*, *J.*, granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Andrew J. Pianka, for the appellant (plaintiff).

Scott R. Ouellette, for the appellee (defendant).

Opinion

ALVORD, J. In this public nuisance action, the plaintiff, Arlene Bennetta, appeals from the judgment of the trial court rendered after it granted the motion filed by the defendant, the city of Derby, to strike the plaintiff's substitute complaint. On appeal, the plaintiff claims that the court erred in striking her complaint because she properly alleged that the defendant created the nuisance by a positive act as required by General Statutes § 52-557n.[1] We disagree and, therefore, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff commenced this action on March 27, 2020, by way of a one count complaint, alleging the following: "For many years, from at least the late 1990s to the present, the city of Derby has ranked as one of the least safe municipalities in the state of Connecticut, and continuously experiences high rates of violent and nonviolent crimes." In 2005, the defendant "created or participated in the development of a walking trail located on the west side of Derby along the Naugatuck and Housatonic Rivers. The project sought to invite people of all ages, including women, children, and the elderly to walk the trail."

Specifically, the plaintiff alleged that an area of the public trail located near the "Commodore Hull Bridge was constructed in an isolated area, lacked security, and was prime grounds for criminal activity." The plaintiff

[1] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . ."

alleged that the trail did not have "adequate surveillance cameras, phone stations, emergency call boxes, [or] police patrol," and was "out of sight from the general public." In addition, this area frequently was vandalized and often was visited by panhandlers. On November 2, 2019, the plaintiff, a senior citizen, went for a walk along the trail, and, in the area near the bridge, she was physically and sexually assaulted, suffering prolonged physical and mental injuries as a result. On the basis of these facts, the plaintiff alleged that the defendant was liable in nuisance.

On April 23, 2020, the defendant filed a motion to strike, arguing that the plaintiff's public nuisance action was "barred by recreational use immunity pursuant to [the Connecticut Recreational Land Use Act, General Statutes §§ 52-557f through] 52-557i, and governmental immunity pursuant to . . . § 52-557n for failure to state a claim and failure to allege a positive act." The plaintiff objected. On November 30, 2020, the court, *Pierson*, *J.*, granted the defendant's motion, determining that, "[e]ven when read in the light most favorable to the plaintiff, the complaint fails to allege any positive act taken by the defendant which led to the creation of a public nuisance" and that "there is no logical nexus by which to attribute the criminal actions of the plaintiff's assailant to the defendant." On December 2, 2020, the plaintiff filed a motion to reargue, which was denied.

On January 4, 2021, the plaintiff filed a substitute complaint. In addition to the original allegations, the substitute complaint alleged that "the defendant permitted vandals and other non-law-abiding people to loiter, roam, and congregate on and along the [public trail], which created a dangerous condition for those seeking to walk the trail."[2] The defendant filed a motion to strike

[2] In the substitute complaint, the plaintiff also stated that the section of the trail at issue "is owned and controlled by the state of Connecticut, but developed by the defendant . . . for the benefit of the defendant."

the substitute complaint as barred by recreational use immunity and governmental immunity. The defendant referenced the court's decision granting its first motion to strike and argued that the inclusion of the allegation that the defendant "permitted vandals and other non-law-abiding people" in the area did "not cure the defective pleading of the plaintiff's original complaint . . . ." Thereafter, on June 11, 2021, the court granted the motion to strike the substitute complaint, stating that "[t]he court agrees with the defendant that the additional allegations of the substitute complaint . . . fail to allege positive acts on the part of the defendant. As a result, and for the reasons stated previously by the court in its November 30, 2020 order . . . the defendant's motion to strike is granted." This appeal followed.[3]

On appeal, the plaintiff claims that she stated a legally sufficient public nuisance claim by alleging that the defendant (1) created or participated in the creation of the public trail in an area prone to criminal activity, (2) invited women, children, and the elderly to walk on the trail, and (3) permitted "vandals and other non-law-abiding people to loiter, roam, and congregate along the [trail] . . . ." The plaintiff contends that this conduct constituted positive acts within the meaning of § 52-557n (a) (1) (C). In response, the defendant argues that, although "the plaintiff alleges that the [defendant] created the [trail], the plaintiff has failed to allege that the criminal attack on her was created by some positive act by the [defendant]. The alleged positive act of creating the [trail] did not harm the plaintiff; it was the positive act of the perpetrator."[4] We agree with the defendant.

[3] The plaintiff's first appeal was dismissed by this court for lack of a final judgment because the trial court had not yet rendered judgment on the stricken pleading. Thereafter, on August 2, 2021, the trial court granted the plaintiff's motion for judgment, and this appeal followed.

[4] The defendant also argues that the judgment can be affirmed on the alternative ground that it is immune from liability pursuant to §§ 52-557f through 52-557i. Because we conclude that the plaintiff failed to allege a positive act on the defendant's part, we need not address this argument.

"We begin by setting out the well established standard of review in an appeal from the granting of a motion to strike. Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [defendants' motion] is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252–53, 990 A.2d 206 (2010).

We next set forth the principles applicable to a nuisance claim brought against a municipality. Our Supreme Court "has stated often that a plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages. . . . In addition, when the alleged tortfeasor is a municipality, our common law requires that the plaintiff also prove that the defendants, by some positive act, created the condition constituting the nuisance." (Citation omitted;

internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 146, 989 A.2d 593 (2010). This common-law rule is codified at § 52-557n (a) (1) (C), which provides in relevant part that "a political subdivision of the state shall be liable for damages to person or property caused by . . . acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . ."

Our Supreme Court has described the positive act requirement as follows: "[A]t a bare minimum, § 52-557n (a) (1) (C) requires a causal link between the 'acts' and the alleged nuisance. A failure to act to abate a nuisance does not fall within the meaning of the term 'acts,' as used in § 52-557n (a) (1) (C), because inaction does not create or cause a nuisance; it merely fails to remediate one that had been created by some other force. Accordingly, the plain meaning of § 52-557n (a) (1) (C) leads us to conclude that provision imposes liability in nuisance on a municipality only when the municipality positively acts (does something) to create (cause) the alleged nuisance." (Emphasis omitted; footnote omitted.) *Picco* v. *Voluntown*, supra, 295 Conn. 149–50.

A positive act is conduct that "intentionally created the conditions alleged to constitute a nuisance." *Elliot* v. *Waterbury*, 245 Conn. 385, 421, 715 A.2d 27 (1998). "[F]ailure to remedy a dangerous condition not of the municipality's own making is not the equivalent of the required positive act." (Internal quotation marks omitted.) *Brown* v. *Branford*, 12 Conn. App. 106, 112, 529 A.2d 743 (1987). Similarly, permissive continuation of the alleged nuisance is not a positive act. See id. Further, when the conditions comprising the nuisance are acts committed by third parties, there must be a "logical nexus by which to attribute any of the acts of the [third parties] to the defendant." Id., 113.

The following cases guide our resolution of this appeal. In *Brown* v. *Branford*, supra, 12 Conn. App. 107, the plaintiff instituted a nuisance action against the town of Branford after he "was struck by a motorcycle being driven by an unidentified youth." The plaintiff alleged that the town had "deliberately created" the nuisance; (internal quotation marks omitted) id., 112 n.4; and that "there existed in said area of public land . . . an unsafe and dangerous condition which was the source of numerous complaints from area residents, in that it has been used and frequented by youths from Branford and surrounding towns as a motorcycle race course and as an area where they could congregate, drink alcohol, use drugs and carouse not subject to any control." (Internal quotation marks omitted.) Id., 112 n.5. The trial court granted the defendant's motion to strike. Id., 107. On appeal, this court concluded that, "although perfunctorily stating that 'the said nuisance was deliberately created by the defendant,' [the complaint] recites nothing but a litany of acts amounting at most to a permissive continuation of the alleged nuisance." Id., 112. Because the nuisance was created by the youths with no connection to the defendant, the plaintiff's nuisance complaint failed to set forth a legally sufficient claim for want of a positive act. Id., 112–13.

Similarly, in *Elliot* v. *Waterbury*, supra, 245 Conn. 389, "[the decedent] was jogging on . . . an unpaved road in Morris when he was unintentionally shot and killed by . . . a person who was hunting in the watershed area adjacent to the road and owned by Waterbury." Although the defendant city of Waterbury allowed hunting in the watershed area, the defendant town of Morris did not allow hunting on the road. Id. Our Supreme Court concluded that "[t]he plaintiff . . . has offered no evidence that reasonably could be viewed as establishing that the Morris defendants, by some positive act, intentionally created the conditions

alleged to constitute a nuisance." Id., 421. Because "[h]unting adjacent to the public roadway is the condition alleged to constitute the nuisance," and because the plaintiff alleged no facts establishing that the town of Morris did anything to create the nuisance, the plaintiff could not maintain a nuisance cause of action against the town. (Internal quotation marks omitted.) Id., 421–22.

Finally, in *Perry* v. *Putnam*, 162 Conn. App. 760, 762, 131 A.3d 1284 (2016), this court considered the plaintiffs' claim that the trial court improperly had granted the defendant town's motion to strike on the basis that they had failed to allege facts sufficient to support a nuisance action. The plaintiffs alleged that the defendant had constructed a public parking lot next to their home and further alleged "a litany of annoyances emanating from the parking lot, ranging from vehicle noise, littering of automotive parts, assorted criminal activity, loud music, and headlights shining directly into the plaintiffs' home," interfering with the use and enjoyment of their property. (Internal quotation marks omitted.) Id., 762–63. This court determined that, because "the acts giving rise to the annoyances of which the plaintiffs complain are those of third parties," the defendant's "act of siting and constructing a parking lot did not [create] or [participate] in the creation of a nuisance . . . ." (Internal quotation marks omitted.) Id., 767–68. Accordingly, this court concluded that the trial court properly granted the motion to strike. Id., 768.

In the present case, although the plaintiff argues that the nuisance is the dangerous condition of the public trail, namely, the location of the trail, a reading of the allegations in the light most favorable to the plaintiff discloses that the nuisance, if any, was created by the "vandals and other non-law-abiding people" on the trail. See *Brown* v. *Branford*, supra, 12 Conn. App. 112. Thus, in order to survive a motion to strike, the plaintiff was

required to allege facts that establish that the defendant *did something* to *cause* the conduct of the "vandals and other non-law-abiding people . . . ." See *Picco* v. *Voluntown*, supra, 295 Conn. 149–50. She has failed to do so. Although the plaintiff alleged that the defendant permitted the "vandals and other non-law-abiding people" to be on the trail, she did not allege that the defendant took any action to cause those individuals to commit crimes. Because the acts giving rise to the alleged nuisance are those of third parties, namely the "vandals and other non-law-abiding people" on the trail, and because the act of participating in the construction of the trail did not create or participate in the creation of a nuisance, the plaintiff has not alleged a legally sufficient public nuisance cause of action. See *Perry* v. *Putnam*, supra, 162 Conn. App. 768.

Ultimately, the plaintiff relies on her allegations that Derby itself is especially dangerous in arguing that the defendant's conduct of constructing a trail, "permitt[ing] vandals and other non-law-abiding people" on that trail, and inviting the public to walk on the trail created the nuisance.[5] We disagree that such allegations create a sufficient basis on which to conclude that the defendant positively acted to create the alleged nuisance. As in *Perry* v. *Putnam*, supra, 162 Conn. App. 767–68, and *Brown* v. *Branford*, supra, 12 Conn. App. 112, the acts giving rise to the nuisance in the present case are those of third parties and, therefore, are not positive acts of the defendant as required by § 52-557n (a) (1) (C).

Finally, although the plaintiff alleged that "[t]he defendant permitted vandals and other non-law-abiding people" on the public trail, she did not allege any facts

[5] During oral argument before this court, in response to a hypothetical question, the plaintiff's attorney conceded that, if the public trail was constructed *before* the crime rate in Derby allegedly increased, the plaintiff would have no argument that the defendant intentionally created the nuisance.

to create a logical nexus between the behavior of the "vandals and other non-law-abiding people" and the defendant. See *Brown* v. *Branford*, supra, 12 Conn. App. 113. The only positive acts alleged with respect to the nuisance are those on the part of the "vandals and other non-law-abiding people" and the individual who attacked the plaintiff while she was walking on the public trail. There is no logical nexus by which the conduct of the "vandals and other non-law-abiding people" can be attributed to the defendant because the only connection between the two is the fact that the conduct occurred on a public walking trail that the defendant helped create.[6] See id., 112–13. We therefore conclude that the trial court properly granted the defendant's motion to strike and rendered judgment thereon.

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] The plaintiff also argues on appeal that the motion to strike could not be granted on this basis because the issue of causation was not raised in the motion to strike. The defendant did, however, assert that there is no logical nexus by which to attribute the acts of the plaintiff's assailant to the defendant in its initial motion to strike, which was incorporated by reference into the second motion to strike. Furthermore, the defendant argued this point before the trial court during the hearing on its second motion to strike.

The plaintiff argues, in the alternative, that there is a logical nexus because "[t]he history of the area, the manner in which it was developed and maintained, and the invitation [to] vulnerable people to be exposed to non-law-abiding people, created a foreseeable risk that people would be victimized." Whether there is a "logical nexus by which to attribute any of the acts of the [third parties] to the defendant"; *Brown* v. *Branford*, supra, 12 Conn. App. 113; is not a question of causation but one of whether the alleged acts of the defendant constitute a positive act—it asks whether there is a connection between the defendant's actions and the third party's actions. See id. In the present case, there is no logical nexus connecting the creation of the public trail to the conduct of the "vandals and other non-law-abiding people" on the trail.

WILLIS W. *v.* OFFICE OF ADULT PROBATION*
(AC 44796)

Prescott, Moll and Suarez, Js.

Syllabus

The petitioner, who had been convicted, following a guilty plea, of two counts of reckless endangerment in the first degree, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance. The petitioner had been sentenced, inter alia, to a period of three years of probation, which ended on April 7, 2020. The habeas court granted the respondent's motion to dismiss the petition on the basis that it lacked jurisdiction, as the court did not receive the petition until April 24, 2020, at which point the petitioner was not in custody. The habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly dismissed the petition for lack of subject matter jurisdiction: although the petitioner effected personal delivery of his petition to a state marshal on the final day of his probation, the court declined to apply the savings statute (§ 52-593a), as a habeas action, unlike other civil actions, is not initiated until a petitioner files the petition with the clerk of the court for review by a judge; moreover, this court declined to review the petitioner's claim that he met the "in custody" requirement of the statute (§ 52-466) because he was being deprived of his liberty as a result of two standing criminal protective orders, effective for ten years, which were entered by the court at sentencing, as the petitioner failed to distinctly raise this claim before the habeas court and the court did not rule on this claim in a manner adverse to the petitioner.

Argued March 10—officially released May 24, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt, J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter,

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any party protected or sought to be protected under a protection order, protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Cameron L. Atkinson, with whom, on the brief, were *Norman A. Pattis*, and *Patrick Nugent*, certified legal intern, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. Following a grant of certification to appeal, the petitioner, Willis W., appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for lack of subject matter jurisdiction. The petitioner claims that the court erred by (1) declining to apply General Statutes § 52-593a,[1] a savings statute that allows a plaintiff to avoid dismissal of a civil action on statute of limitations grounds through timely personal delivery of process to a proper officer and (2) concluding that he did not meet the jurisdictional "in custody" requirement of General Statutes § 52-466 (a),[2] despite the fact that, at the time he filed his habeas petition, his liberty was being deprived as a result of two standing criminal protective orders. We affirm the judgment of the habeas court.[3]

[1] General Statutes § 52-593a provides in relevant part: "(a) Except in the case of an appeal from an administrative agency governed by section 4-183, a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery. . . ."

[2] General Statutes § 52-466 (a) provides in relevant part: "(1) An application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty. . . ."

[3] In its brief, the respondent, the Office of Adult Probation, argued that the form of the judgment is improper and that, rather than dismissing the

The relevant procedural history is not in dispute. On April 7, 2017, pursuant to a plea agreement, the petitioner pleaded guilty to two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63. The trial court, *Comerford*, *J.*, accepted the plea and imposed a total effective sentence of one year of incarceration, execution suspended, followed by three years of probation. The court also entered two standing criminal protective orders, which were effective for ten years. These orders precluded the petitioner from having any contact with his two minor children and from owning any firearms.

With respect to the filing of the petition for a writ of habeas corpus that is the subject of this appeal, the habeas court, *Bhatt*, *J.*, found in its memorandum of decision dismissing the petition that, "[o]n April 6, 2020, counsel for [the petitioner] gave [the habeas petition filed in the present case] to a state marshal to serve on the [Office of Adult Probation, the] named respondent.[4] Service was effectuated on April 8, 2020, and the Superior Court received a copy of the petition on April 24, 2020, and the matter was thereafter assigned a docket number. In that petition, [the petitioner] claim[ed] that he received ineffective assistance of counsel because trial counsel should not have advised him to accept a

petition pursuant to Practice Book § 23-29 (1), which grants the court the authority to dismiss a petition for a writ of habeas corpus at any time if it determines that it lacks jurisdiction, the habeas court should have declined to issue the writ of habeas corpus pursuant to Practice Book § 23-24 (a) (1), which grants the court the authority to decline to issue a writ if, following its preliminary review of the petition, it appears that the court lacks jurisdiction. During oral argument before this court, however, the respondent's attorney acknowledged that it would be proper for this court to affirm the court's dismissal of the petition under § 23-29.

[4] The court noted that "[the petitioner] initiated this petition by suing the Office of Adult Probation. The proper respondent in a habeas corpus [action] is the Commissioner of Correction. The Office of the Attorney General and the Office of the State's Attorney have filed appearances representing the respondent in this matter."

plea deal given the evidence against [him]. Had trial counsel adequately advised [the petitioner, the petitioner contended], he would not have pleaded guilty and would have received a more favorable outcome.

"On October 23, 2020, the [respondent] filed a motion to dismiss, arguing, inter alia, that the court lack[ed] jurisdiction because [the petitioner] was not in custody at the time the habeas petition was filed with the court on April 24, 2020.[5] On December 10, 2020, [the petitioner] filed a memorandum of law in opposition to the [respondent's] motion to dismiss. In that [memorandum], he alleged that his [trial] counsel mailed a copy of the petition to a state marshal who received it on April 7, 2020, the last day of his probationary period. He argues that this constitute[d] compliance with . . . § 52-593a and, therefore, the petition was filed while he was still in custody.[6] On January 12, 2021, the [respondent] filed a corrected memorandum of law in support of [its] motion to dismiss . . . . The court heard oral arguments on January 13, 2021." (Footnotes added; footnote omitted.)

In its decision granting the motion to dismiss, the court relied on the undisputed factual submissions of the petitioner with respect to the steps he took to initiate the

[5] The respondent filed a motion titled "Motion to Dismiss and/or to Strike Petition" in which it argued, in part, that the petition should be stricken because the petitioner brought the petition against an improper party and because the petitioner failed to plead sufficient facts to establish a cause of action. Alternatively, the respondent argued that the petition should be dismissed because the petitioner was not in custody when the petition was filed with the court. The court did not address or rule on the portion of the motion in which the respondent asked it to strike the petition.

[6] The court accurately noted that, "[i]n support of [the petitioner's] memorandum of law in opposition to the motion to dismiss, he submitted an affidavit from Donna Peat, an employee of [his] counsel's law firm, which states that, on April 6, 2020, she sent a copy of the petition by FedEx overnight delivery to state marshal Alex J. Rodriguez with instructions to make service as soon as possible. [The petitioner] also submitted an affidavit from Alex J. Rodriguez, which states that, on April 7, 2020, the original writ, summons and petition came with and in his hands for service. Rodriguez' affidavit further states that, on April 8, 2020, he made due and legal service on the [respondent]."

habeas action. The court, however, agreed with the respondent that it lacked subject matter jurisdiction over the habeas petition because the petitioner was not in custody—meaning in prison, on parole, or on probation—at the time that the habeas petition was filed with the court. In this regard, the court relied on § 52-466 and well established case law related thereto. The habeas court, referring primarily to this court's analysis in *Hastings* v. *Commissioner of Correction*, 82 Conn. App. 600, 847 A.2d 1009 (2004), appeal dismissed, 274 Conn. 555, 876 A.2d 1196 (2005), reasoned that the operative date for determining whether a petitioner in a habeas action is " 'in custody' " is the date on which the petition is received in court. The habeas court concluded that the petitioner was not in custody on the date on which his petition was received in court because his probationary period ended on April 7, 2020, and he was "free of any restraints on his liberty on April 24, 2020."

The habeas court rejected the petitioner's reliance on § 52-593a. As noted previously in this opinion, the petitioner argued that he was entitled to the protection afforded by this remedial statute and that the action was filed while he was in custody because he was still on probation on April 7, 2020, the date on which a marshal, Alex J. Rodriguez, received the petition to serve on the respondent. See footnote 6 of this opinion. The court, relying on *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 555–61, 223 A.3d 368 (2020), noted that, unlike other civil actions, a habeas action is initiated when a petitioner *files the petition with the clerk of the court* for review by a judge who, pursuant to Practice Book § 23-24, undertakes a preliminary review of the petition and determines whether the writ shall issue. As our Supreme Court explained in *Gilchrist*, in a habeas action, service of process does not occur until after a petition is filed in court for a preliminary review,

the court determines that the petition pleads a nonfrivolous claim upon which relief can be granted and over which the court has jurisdiction, and the writ issues. Id., 556–57. The habeas court reasoned that, "[d]ue to the difference in the manner in which a petition for a writ of habeas corpus is to be filed [with the court], § 52-593a is not implicated." Accordingly, the court dismissed the petition for lack of subject matter jurisdiction under Practice Book § 23-29 (1).[7] The court thereafter granted the petitioner's petition for certification to appeal, which was brought pursuant to General Statutes § 52-470.

"The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 784, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009).

"A court has subject matter jurisdiction if it has the authority to hear a particular type of legal controversy. . . . Our Supreme Court has held that the party bringing the action bears the burden of proving that the court has subject matter jurisdiction. . . . [W]ith regard to subject matter jurisdiction, jurisdictional facts are [f]acts showing that the matter involved in a suit constitutes a subject-matter consigned by law to the jurisdiction of that court. . . .

"Our state's habeas proceedings are defined by General Statutes § 52-466 (a) (1), which provides in relevant

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

part that [a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty. . . . [O]ur Supreme Court [has] held that the custody requirement in § 52-466 is jurisdictional. . . . Accordingly, a habeas court has subject matter jurisdiction to hear a petition for a writ of habeas corpus only when the petitioner remains in custody on that conviction. . . . [C]onsiderations relating to the need for finality of convictions and ease of administration . . . generally preclude a habeas petitioner from collaterally attacking expired convictions. . . . Thus, once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual in custody for the purposes of a habeas attack upon it." (Citations omitted; internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 619, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010); see also *Hickey* v. *Commissioner of Correction*, 82 Conn. App. 25, 31, 842 A.2d 606 (2004), appeal dismissed, 274 Conn. 553, 876 A.2d 1195 (2005).

The petitioner's first claim pertains to the court's decision not to rely on § 52-593a. As he did before the habeas court, the petitioner argues that, when Rodriguez received the habeas petition on April 7, 2020, his probationary period had not yet expired and, therefore, he met the jurisdictional "in custody" requirement of § 52-466. Under our plenary standard of review, we conclude that the court, in its memorandum of decision, properly analyzed this issue consistent with *Gilchrist* and concluded that the petitioner was unable to avail himself of the remedy provided by § 52-593a. We will not repeat that analysis here.

The petitioner's second claim is that the court erred by concluding that he did not meet the jurisdictional

"in custody" requirement of § 52-466 (a) because, at the time he filed his habeas petition with the court, he was being deprived of his liberty as a result of two standing criminal protective orders that prevented him from having any contact with his two minor children and from possessing any firearms. The petitioner referred to "a protective order" in his petition but only to the extent that it prevented him from having contact with his children. In his memorandum of law in opposition to the motion to dismiss, however, the petitioner did not rely on the standing criminal protective orders continued effect as an alternative way of satisfying the jurisdictional "in custody" requirement of § 52-466. In fact, the petitioner in his memorandum of law did not refer to the existence of the standing criminal protective orders.[8] Instead, the petitioner expressly relied on his probationary status by arguing that he was entitled to the remedy provided by § 52-593a because "Rodriguez received the process within the time allotted by law for filing this action—namely, *before* [*his*] *probation had expired*." (Emphasis added.) As we stated previously in this opinion, the court did not consider in its memorandum of decision whether the petitioner was in custody because of the standing criminal protective orders. The court, in its analysis of the "in custody" requirement, considered only the petitioner's probationary period that expired on April 7, 2020. Following the court's ruling on the motion to dismiss, the petitioner did not file a motion for articulation related to this distinct ground.

In light of the foregoing facts, which unambiguously reflect that this ground was not distinctly raised before and ruled on by the court in a manner adverse to the petitioner, we decline to reach the merits of this claim.

[8] Likewise, the respondent did not refer to the existence of the standing criminal protective orders in its memorandum of law in support of the motion to dismiss. Instead, the respondent argued that the petitioner was not in custody when the petition was filed with the court on April 24, 2020, because the petitioner's period of probation had expired on April 7, 2020.

"It is well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another." (Citations omitted; internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408–409, 114 A.3d 168, cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). Our review of newly raised claims of this nature would amount to an ambuscade of the habeas judge. See, e.g., *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018); *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 655, A.3d (2022).[9]

The judgment is affirmed.

[9] The petitioner raised a third claim in this appeal, that the respondent erroneously had argued in its motion to dismiss and/or strike his petition that his petition should be stricken because he brought the action against the Office of Adult Probation, rather than the Commissioner of Correction. The petitioner acknowledges that the court did not address, let alone base its ruling on, this misjoinder argument. Because this "claim" does not challenge one or more of the grounds on which the court relied in rendering its judgment, we do not consider its merits. See *State* v. *Diaz*, 109 Conn. App. 519, 559, 952 A.2d 124 ("[w]e need not review the issue raised because in light of the court's analysis, it is irrelevant to the judgment from which the defendant appeals"), cert. denied, 289 Conn. 930, 958 A.2d 161 (2008).