ISSCHAR HOWARD *v.* COMMISSIONER OF CORRECTION (AC 42824)

Prescott, Alexander and Suarez, Js.

Syllabus

The petitioner, who had been convicted, after a jury trial, of, inter alia, capital felony, sought a writ of habeas corpus. The habeas court, on its own motion and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's petition pursuant to the rule of practice (§ 23-29), finding that the court lacked jurisdiction because the petition failed to challenge the petitioner's conviction or the conditions of confinement. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The trial court abused its discretion in denying the petition for certification to appeal: in light of our Supreme Court's recent decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), the resolution of the underlying claim of procedural error concerning the right to notice and an opportunity to respond in writing prior to a dismissal under Practice Book § 23-29 involved issues that were debatable among jurists of reason, a court could resolve the issues in a different manner, and the questions were adequate to deserve encouragement to proceed further.
2. This court concluded that, although the habeas court was not required to hold a full hearing, the petitioner was entitled to notice of that court's intention to dismiss his petition and an opportunity to file a brief or a written response concerning the proposed basis for dismissal, which it did not do; accordingly, on remand, the habeas court may elect to dismiss the petition, or any amended petition properly filed by the petitioner, on its own motion pursuant to Practice Book § 23-29, but it must comply with the procedure set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and an opportunity to submit a brief or written response addressing the issue.

Argued September 16, 2021—officially released December 27, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition

for certification to appeal, and the petitioner appealed to this court. *Reversed*; *further proceedings*.

Mary Boehlert, assigned counsel, for the appellant (petitioner).

Thadius L. Bochain, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, former state's attorney, *Laurie N. Feldman*, assistant state's attorney, *John P. Doyle, Jr.*, state's attorney, and *Adrienne Russo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Isschar Howard, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus pursuant to Practice Book § 23-29.[1] The petitioner argues that the court abused its discretion in denying certification to appeal because the court improperly (1) dismissed the petition for a writ of habeas corpus sua sponte under § 23-29 without first providing him fair notice and an opportunity to be heard with respect to the proposed basis for dismissal and (2) concluded that it lacked jurisdiction over the petition for a writ of habeas corpus. We agree with the petitioner that the court abused its discretion in denying his petition for certification to appeal. Furthermore, in light of our Supreme Court's

[1] Practice Book § 23-29 provides: "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;

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

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

recent decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and in *Brown*'s companion case, *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), we agree with the petitioner that the habeas court committed error in dismissing the habeas petition pursuant to § 23-29 without first providing him with prior notice of its intention to dismiss, on its own motion, the habeas petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court.[2]

The following procedural history is relevant to this appeal. Following a jury trial, the petitioner was convicted of capital felony in violation of General Statutes (Rev. to 1999) § 53a-54b (8), two counts of murder in violation of General Statutes § 53a-54a (a), criminal possession of a firearm in violation of General Statutes (Rev. to 1999) § 53a-217 (a), carrying a pistol or revolver without a permit in violation of General Statutes (Rev. to 1999) § 29-35, and possession of narcotics in violation of General Statutes (Rev. to 1999) § 21a-279 (a). The trial court, *Harper*, *J.*, sentenced the petitioner to a total effective term of life in prison without the possibility of release, plus seventeen years of imprisonment. In 2005, following a direct appeal, this court affirmed the judgment of conviction. *State* v. *Howard*, 88 Conn. App. 404, 870 A.2d 8, cert. denied, 275 Conn. 917, 883 A.2d 1250 (2005).

On October 14, 2016, the petitioner, who was self-represented at the time, filed a petition for a writ of

[2] Because we agree with the petitioner's first claim, which concerns a procedural error, and that claim is dispositive of the appeal, we need not and do not consider the petitioner's second claim, that the court improperly concluded that it lacked jurisdiction over the petition. The court, in its discretion, may choose to revisit this issue during the proceedings on remand, provided that it does so consistent with the procedure set forth in this opinion.

habeas corpus on a state supplied form.[3] On the same day, the petitioner filed a request for appointment of counsel and an application for waiver of fees, which the court granted on October 31, 2016. On October 31, 2016, the court also assigned a docket number to the habeas action and, in response to the petitioner's request for appointment of counsel, referred the petitioner to the Office of the Chief Public Defender for an investigation into whether he was indigent. On December 2, 2016, the State's Attorney's Office for the New Haven judicial district appeared on behalf of the respondent, the Commissioner of Correction. On December 6, 2016, the law firm of Zingaro & Cretella, LLC, appeared on behalf of the petitioner as assigned counsel.

No further activity is reflected on the habeas court docket until September 7, 2018, when the court, *Newson, J.*, issued a scheduling order. The order, bearing the signatures of counsel for the petitioner and the respondent, provided that an amended petition was to be filed, if at all, by January 1, 2020, that the case was to be claimed to the trial list on January 20, 2021, and that a certificate of closed pleadings was to be filed no later than March 30, 2020.

On January 24, 2019, counsel for the petitioner, Zingaro & Cretella, LLC, filed a motion to withdraw appearance. The attorney who submitted the motion, Eugene J. Zingaro, represented that he was unable to devote the time necessary to represent the petitioner in this matter or, for that matter, to manage any other "assigned counsel appointments." Zingaro requested that the court permit the withdrawal in this case, and he requested that "new assigned counsel be appointed [for the petitioner] by the Chief Public Defender's office."

[3] We do not construe the grounds set forth in the petition for a writ of habeas corpus because it is unnecessary for us to do so.

Nothing in the record reflects that the court either considered or ruled on the motion to withdraw appearance. Instead, by order dated February 1, 2019, the court, *Newson*, *J.*, sua sponte dismissed the action "pursuant to Practice Book § 23-39."[4] Prior to dismissing the action, the court did not notify the parties that it was considering dismissing the action and did not provide the petitioner an opportunity to respond to the proposed basis for dismissal. The court's order stated: "Upon review, the petition is dismissed for lack of jurisdiction. More specifically, the petition does not challenge the conviction but alleged constitutional violations that preceded trial. As such, giving the [petition] the most reasonable reading possible, it fails to challenge the conviction or the conditions of confinement."

On March 5, 2019, pursuant to General Statutes § 52-470 (g), the petitioner, in a self-represented capacity, filed a petition for certification to appeal from the court's ruling.[5] The petitioner also filed an application for waiver of fees, costs and expenses and appointment of counsel on appeal. In the portion of the petition for certification in which the petitioner set forth the grounds for which certification was being sought, the

[4] The respondent suggests, and we agree, that, in light of the rationale of the court's order, its reference to Practice Book § 23-39, which governs depositions in habeas matters, appears to be a scrivener's error. The rationale of the court's order strongly suggests that the court intended to refer to Practice Book § 23-*29*, which governs dismissals of habeas petitions for lack of jurisdiction. Accordingly, in this opinion, we will construe the court's ruling to have been made pursuant to § 23-29.

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

petitioner incorporated by reference the grounds set forth in his application for waiver of fees, costs and expenses and appointment of counsel on appeal. There, the petitioner set forth those grounds as follows: "Dissatisfied with decision." On March 8, 2019, the court denied the petition for certification to appeal. On March 27, 2019, the court granted the petitioner's application for waiver of fees, costs and expenses and appointment of counsel on appeal. This appeal followed.

On September 16, 2021, this court heard oral argument in this appeal. On February 22, 2022, this court, sua sponte, stayed the appeal pending the final resolution of the appeals in *Brown* and *Boria*, which involved similar claims and, at that time, were pending before our Supreme Court. After our Supreme Court officially released its decisions in *Brown* and *Boria*, we ordered the parties to file supplemental briefs "addressing the effect, if any, of *Brown* v. *Commissioner of Correction*, [supra, 345 Conn. 1], and *Boria* v. *Commissioner of Correction*, [supra, 345 Conn. 39], on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24.' *Brown* v. *Commissioner of Correction*, supra, 17 and n.11; *Boria* v. *Commissioner of Correction*, supra, 43." The parties have complied with our supplemental briefing order.

In this appeal, we focus on the dispositive claim advanced by the petitioner, that the court improperly dismissed the petition for a writ of habeas corpus sua sponte under Practice Book § 23-29 without first providing him fair notice and an opportunity to be heard with respect to the proposed basis for dismissal. As a threshold consideration, however, we must address the issue of whether the court abused its discretion in denying the petition for certification to appeal. "Faced with

a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation

marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

The petitioner argues that the habeas court's denial of the petition for certification to appeal reflected an abuse of its discretion. The respondent argues that the petitioner is unable to demonstrate that the court abused its discretion in denying his petition for certification to appeal because the petition for certification to appeal was untimely. The respondent also argues that, beyond expressing the petitioner's dissatisfaction with the court's decision, the petition for certification to appeal did not set forth any precise legal grounds, let alone the grounds on which he relies in this appeal. We reject those contentions.[6] We conclude, in light of our Supreme Court's recent decisions in *Brown* and *Boria*, that the resolution of the underlying claim of procedural error involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further. Accordingly, we agree with the petitioner that the habeas court's denial of the petitioner's petition for certification to appeal reflected an abuse of its discretion.

We now turn to the merits of the appeal. The petitioner argues that the court "should not have dismissed

[6] First, the record does not suggest that the court denied the petition on timeliness grounds. Second, although the petition does not reflect the precision and detail that it might have if it had been prepared by an attorney skilled in the law, we are mindful that it was filed by the petitioner in a self-represented capacity after the law firm appointed as his counsel asked the court to permit it to withdraw its appearance. Under these circumstances, and mindful of our obligation to construe the pleadings filed by self-represented litigants liberally; see, e.g., *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 140, 7 A.3d 911 (2010); we conclude that the petition reasonably may be interpreted so as to encompass the court's decision to dismiss the petition sua sponte in reliance on Practice Book § 23-29 without first providing the petitioner notice of its intent to dismiss the petition or an opportunity to respond in writing.

the petition sua sponte, at its current state in the proceedings, without affording [him] fair notice and a hearing." The petitioner argues that "[t]he court was required to and should have read the petition broadly to allow [him] to have the opportunity to have his case fully and fairly heard." The petitioner also argues that, when the court dismissed the petition, the only petition that had been filed was the petition that he filed in a self-represented capacity, the time in which to file an amended petition had not yet passed,[7] and "[he had not been] provided with the services of his assigned counsel to assist him in clarifying his [self-represented], handwritten petition to better express or fine tune his claims, arguments, and supporting facts." The petitioner relies on the fact that the court's dismissal did not occur pursuant to Practice Book § 23-24, incident to a preliminary review of his petition by the judicial authority before it issued the writ.[8] Instead, the court dismissed the petition on jurisdictional grounds nearly two years after the writ had issued. The petitioner argues that "[o]nce the habeas court reviewed the petition and issued the writ . . . [it] should have provided [him] and his assigned counsel with fair notice and a hearing,

[7] Practice Book § 23-32 provides in relevant part that "[t]he petitioner may amend the petition at any time prior to the filing of the return. . . ." As we stated previously in this opinion, the court's scheduling order provided that the petitioner had until January 20, 2020, to file an amended petition. Also, the order provided that the respondent had until February 20, 2020, or thirty days from the petitioner's filing of an amended petition, to file a return. At the time that the court dismissed the petition, the petitioner had not filed an amended petition, the respondent had not filed a return, and neither party had filed a certificate of closed pleadings.

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

"(1) the court lacks jurisdiction;

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

"(3) the relief sought is not available.

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

in the event the court questioned subject matter jurisdiction."

"Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) (plenary review of dismissal under Practice Book § 23-29 [2]); *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008) (conclusions reached by habeas court in dismissing habeas petition are matters of law subject to plenary review)." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020).

In their supplemental briefs, the parties agree that, if we reach the issue of whether the court committed error by failing to afford the petitioner notice of its intent to dismiss the petition pursuant to Practice Book § 23-29 and an opportunity to respond in writing to address the issue, *Brown* and *Boria* require a reversal of the judgment dismissing the petition. We agree with the parties that *Brown* and *Boria*, both of which address claims similar in nature to the claim presently before us, govern our resolution of the appeal and require a reversal of the judgment of dismissal. In *Brown*, the court concluded "that § 23-29 requires the habeas court to provide prior notice of the court's intention to dismiss, on its own motion, a petition that it deems legally deficient and an opportunity to be heard on the papers by filing a written response. The habeas court may, in its discretion, grant oral argument or a hearing, but one is not mandated." *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4. In *Boria*, our Supreme Court adopted the reasoning and conclusions set forth in *Brown*. *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43.

We agree with the petitioner that, prior to the sua sponte dismissal, he was entitled to notice of the court's

intention to dismiss his petition and an opportunity to at least file a brief or a written response concerning the proposed basis for dismissal. The court's failure to follow this procedure requires reversal of the judgment of dismissal and a remand to the habeas court for further proceedings consistent with this opinion. To the extent that the petitioner argued in his principal appellate brief, however, that he was entitled to "a hearing" prior to the dismissal of the petition, *Brown* and *Boria* do not support his argument. As stated previously, the court is not required to hold a full hearing but may exercise its discretion to do so in cases in which it is deemed to be appropriate. See *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4.

In accordance with *Brown* and *Boria*, we must consider an additional issue, namely, whether, as suggested in footnote 11 of *Brown*, the habeas court on remand should first consider whether grounds exist to decline the issuance of the writ pursuant to Practice Book § 23-24. This issue leads us to discuss *Brown* in further detail. The petitioner in *Brown* filed a habeas petition on October 29, 2018. Id., 8. On November 15, 2018, the habeas court granted the petitioner's request for appointment of counsel and his application for a waiver of fees. Id. On November 19, 2018, the habeas court, acting on its own motion and without prior notice to the petitioner, issued an order dismissing the petition pursuant to Practice Book § 23-29 (3). Id. This court summarily dismissed the petitioner's appeal from the judgment dismissing his habeas petition but, following a grant of certification to appeal, our Supreme Court reversed this court's judgment on the ground that the habeas court improperly had failed to afford the petitioner prior notice of its intention to dismiss the petition and an opportunity to at least submit a brief or written response addressing the issue. Id., 5. Our Supreme Court remanded the case to this court with direction

to reverse the judgment of the habeas court and to remand the case to the habeas court for further proceedings consistent with its opinion. Id., 18.

Our Supreme Court in *Brown* also reasoned that, "[b]ecause the habeas court in [*Brown*] did not have the benefit of this court's decision in *Gilchrist*, the case must be remanded to the habeas court for it to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24. If the writ is issued, and the habeas court again elects to exercise its discretion to dismiss the petitioner's habeas petition on its own motion pursuant to Practice Book § 23-29, it must . . . provide the petitioner with prior notice and an opportunity to submit a brief or a written response to the proposed basis for dismissal." (Footnote omitted.) Id., 17–18; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43. In footnote 11 of its opinion, the court in *Brown* also stated, "[w]e are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist*. . . . In cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11; see also *Boria* v. *Commissioner of Correction*, supra, 43.

The judgment of dismissal in the present case occurred prior to our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548. In *Gilchrist*, our Supreme Court explained the proper application of Practice Book §§ 23-24 and 23-29. The court stated that "the screening function of . . . § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we

emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. . . . Screening petitions prior to the issuance of the writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded pro se. . . . [I]n such a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under § 23-24, *the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 560–61. The court explained that, "[i]n contrast [with § 23-24] . . . § 23-29 contemplates the dismissal of a habeas petition after the writ has issued on any of the enumerated grounds." Id., 561.

The petitioner argues that, by the time that the court sua sponte dismissed the petition in the present case, the action had advanced to such an extent that the rationale of footnote 11 of *Brown* does not apply. In contrast, the respondent argues that "this case falls squarely within the remand order contemplated by [our Supreme Court] in *Brown* and *Boria*." We agree with the petitioner. This court has not interpreted footnote 11 of *Brown* as a directive that applies in every appeal in which a habeas action must be remanded to the

habeas court following an improper sua sponte dismissal, predating *Gilchrist*, pursuant to Practice Book § 23-29. See *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 849–50, A.3d (2022) (declining to apply footnote 11 because, by time of habeas court's sua sponte dismissal, petitioner had filed amended petition); *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616, 623–24, A.3d (2022) (same). As this court has reasoned, the remand order described in footnote 11 need not be imposed if doing so could lead to an outcome that we do not believe our Supreme Court in *Brown* would have intended. *Hodge* v. *Commissioner of Correction*, supra, 624.

We note that, as in *Brown* and *Boria*, the sua sponte dismissal of the habeas petition in the present case occurred after the writ was issued but prior to the filing of an amended petition.[9] Significantly, however, at the

[9] We may infer that the habeas court issued the writ in the present case no later than October 31, 2016, when it assigned a docket number to the habeas action and granted the petitioner's request for appointment of counsel and his application for a waiver of fees. In *Gilchrist*, our Supreme Court explained that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. . . . If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24. . . . If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. *At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service.* . . . After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." (Citations omitted; emphasis added.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

time the habeas court in *Brown* sua sponte dismissed the petition at issue in that case, the habeas action had been pending on the court's docket for approximately three weeks, and counsel had not yet been appointed to represent the petitioner. *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 8. Similarly, the habeas court's sua sponte dismissal of the petition at issue in *Boria* occurred after the habeas action had been pending on the court's docket for approximately one month, and counsel had not yet been appointed to represent the petitioner. See *Boria* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008315-S (September 7, 2016). In contrast, in the present case, the court's sua sponte dismissal occurred approximately two years and three months after the petitioner filed the habeas petition and more than two years after counsel appeared on his behalf. At the time of the dismissal, the petitioner was represented by counsel, an agreed upon scheduling order was in place, and the time in which to file an amended petition had not yet passed.

Our Supreme Court has explained that the purpose of appointing counsel in habeas actions, following the issuance of the writ, is "so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 561. In the present case, the habeas court appointed counsel to represent the petitioner, and counsel will have an opportunity to address any potential deficiencies in the original petition that he filed in a self-represented capacity. In light of this fact, and the length of time in which the habeas action has been pending on the court's docket, we conclude that permitting the court on remand to decline to issue the writ pursuant to Practice Book § 23-24 could lead to an unjust outcome that our Supreme Court would not have intended. Consistent with the

principles set forth in *Gilchrist*, we believe that the best approach is to follow the directive set forth in footnote 11 of *Brown* in cases, like *Boria*, that are procedurally similar to *Brown*. Thus, we do not believe that the proper course on remand in the present case is for the court to reevaluate the petitioner's self-represented petition filed on October 14, 2016, to first determine whether any grounds exist to decline to issue the writ pursuant to § 23-24. During the proceedings on remand, the court may elect to dismiss the petition, or any amended petition properly filed by the petitioner, on its own motion pursuant to Practice Book § 23-29, but it must comply with the procedure set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and affording the petitioner at least an opportunity to submit a brief or written response addressing the issue.

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

In this opinion the other judges concurred.

JOHN J. BRITTO *v.* BIMBO FOODS, INC., ET AL.
(AC 44844)

Moll, Seeley and Lavine, Js.

Syllabus

Pursuant to statute (§ 31-294c (b)), whenever liability to pay workers' compensation is contested by an employer, the employer shall file with the Workers' Compensation Commissioner, on or before the twenty-eighth day after *receipt* of a written notice of claim, a proper notice denying liability.

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner denying his motion to preclude the defendant employer from contesting liability as to his injuries pursuant to § 31-294c (b). The plaintiff filed a form 30C notice of claim with the Workers' Compensation Commission and, on the same day, the plaintiff's

counsel sent by certified mail a copy of the form 30C to the defendant. The envelope was returned to the plaintiff with a marking indicating that it was undeliverable as addressed. Shortly thereafter, the plaintiff's counsel personally provided a copy of the form 30C to the defendant's counsel, who filed a form 43 denying the claim that same day. The plaintiff's motion claimed that the defendant was precluded from contesting liability on the ground that the defendant never accepted the certified mail containing the form 30C and that the form 43 filed by the defendant was untimely. In denying the plaintiff's motion, the commissioner concluded that the form 30C sent by certified mail was not delivered to the defendant and, therefore, that the defendant did not receive proper notice of the plaintiff's claim at that time. On appeal, the board affirmed the commissioner's decision, concluding that the commissioner's determination that the defendant did not receive proper notice of the form 30C until it was provided personally to the defendant's counsel was supported by the finding that the mail carrier never delivered the form 30C to the defendant, a finding that the board determined was supported by the record. *Held* that the board properly affirmed the commissioner's denial of the plaintiff's motion to preclude: the commissioner found that the defendant did not receive the form 30C that was sent by certified mail, rather, the defendant received the form 30C for the first time by way of subsequent personal service on its counsel, such that its form 43 was timely filed, and this court agreed with the board's conclusion that the commissioner's findings were supported by evidence in the record, including that the envelope containing the form 30C was returned to the plaintiff with a marking reflecting that the envelope was undeliverable as addressed; moreover, this court declined to disturb the commissioner's determination that the testimony of the plaintiff's expert witness, a retired postal worker, which, according to the plaintiff, demonstrated that the form 30C was delivered to the defendant but the defendant rejected it, was not credible; furthermore, this court rejected the plaintiff's reliance on the mailbox rule and his assertion that the board and the commissioner improperly imposed on him the burden to establish that the form 30C was returned to him because the defendant had rejected it, even assuming that the mailbox rule applied, the presumption of delivery could not withstand the commissioner's determination, as supported by the record, that delivery of the form 30C never occurred because, as the board stated in its decision, the "undeliverable as addressed" marking on the envelope containing the form 30C that was returned to the plaintiff suggested that the form was never presented to a responsible party who refused to accept it.

Argued October 11—officially released December 27, 2022

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District denying the

plaintiff's motion to preclude the defendants from contesting liability as to his claim for certain workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, with whom, on the brief, was *Victor Ferrante*, for the appellant (plaintiff).

Clayton J. Quinn, with whom, on the brief, was *Anna C. Borea*, for the appellee (named defendant).

Opinion

MOLL, J. The plaintiff, John J. Britto, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Fourth District (commissioner)[1] denying the plaintiff's motion to preclude the named defendant, Bimbo Foods, Inc.,[2] from contesting liability as to his claimed bilateral knee injury stemming from repetitive trauma.[3] On appeal, the plaintiff claims that

[1] General Statutes (Supp. 2022) § 31-275d (a) (1), effective as of October 1, 2021, provides in relevant part that, "[w]herever the words 'workers' compensation commissioner', 'compensation commissioner' or 'commissioner' are used to denote a workers' compensation commissioner in [several enumerated] sections of the general statutes, [including sections contained in the Workers' Compensation Act, General Statutes § 31-275 et seq.] the words 'administrative law judge' shall be substituted in lieu thereof . . . ."

As all events underlying this appeal occurred prior to October 1, 2021, we will refer to the workers' compensation commissioner who denied the plaintiff's motion to preclude as the commissioner and, unless otherwise noted, all statutory references in this opinion are to the 2021 revision of the statutes.

[2] The record indicates that the named defendant also is referred to as Bimbo Bakeries. ESIS, the workers' compensation insurer for Bimbo Foods, Inc., was also named as a defendant but is not a party to this appeal. We therefore refer in this opinion to Bimbo Foods, Inc., as the defendant.

[3] "General Statutes § 31-301b provides that '[a]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263.' Our appellate courts expressly have

the board improperly affirmed the commissioner's denial of his motion to preclude, which was predicated on the commissioner's determination that the defendant did not receive the notice of claim that the plaintiff sent to it by certified mail. We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner and which are not in dispute, and procedural history are relevant to this appeal. On December 12, 2017, the plaintiff filed a form 30C[4] with the Workers' Compensation Commission for the Fourth District (commission), alleging that he had sustained a compensable bilateral knee injury stemming from repetitive trauma[5] during the course of his employment with the defendant.[6] On the same day, the plaintiff's counsel sent, by certified mail, a copy of the form 30C to the defendant. The envelope with the form 30C enclosed was addressed to the defendant at "328 Selleck Street #A" in Stamford, on which premises is a building with "a very noticeable sign . . . which reads 'Office (with an arrow pointing to the left) 328 Selleck Street A.' " On January 10, 2018, the envelope was returned to the plaintiff with a stamped marking that read, inter alia, "[u]ndeliverable

recognized that the final judgment requirement does not apply to appeals taken from the board. See *Dechio* v. *Raymark Industries, Inc.*, 299 Conn. 376, 399–400, 10 A.3d 20 (2010); *Hadden* v. *Capitol Region Education Council*, 164 Conn. App. 41, 46 n.7, 137 A.3d 775 (2016)." *Reid* v. *Speer*, 209 Conn. App. 540, 542 n.1, 267 A.3d 986 (2021), cert. denied, 342 Conn. 908, 271 A.3d 136 (2022).

[4] "A form 30C is the form prescribed by the [W]orkers' [C]ompensation [C]ommission . . . for use in filing a notice of claim under the [Workers' Compensation Act, General Statutes § 31-275 et seq.]." (Internal quotation marks omitted.) *Salerno* v. *Lowe's Home Improvement Center*, 198 Conn. App. 879, 881 n.3, 235 A.3d 537 (2020).

[5] Appended to the form 30C was a document in which the plaintiff alleged in relevant part that his "[twenty-five] year work history as a wholesale delivery person required him to bend, squat, kneel, lift, carry, push and pull heavy loads, all of which resulted in [his] need for bilateral total knee replacements."

[6] The commission received the form 30C on December 14, 2017.

as addressed [and] [u]nable to forward." The envelope had additional markings indicating that the mail carrier had attempted delivery on three separate occasions in December, 2017. On January 18, 2018, during an informal hearing held in a different workers' compensation proceeding,[7] the plaintiff's counsel personally provided to the defendant's counsel a copy of the form 30C. The same day, the defendant's counsel filed a form 43[8] denying the bilateral knee injury claim.

On December 10, 2018, pursuant to General Statutes § 31-294c (b), the plaintiff filed a motion to preclude the defendant from contesting liability as to the bilateral knee injury claim.[9] The plaintiff contended that the defendant "never accepted the certified mail of the form 30C," and that the form 43 filed by the defendant on January 18, 2018, was untimely. The commissioner held formal hearings on the motion to preclude on April 29, September 16, and October 28, 2019, during which the commissioner heard testimony from multiple witnesses and admitted several exhibits, in full, into the record, including the envelope containing the form 30C that was returned to the plaintiff.

[7] On February 10, 2017, the plaintiff filed a form 30C with the commission, claiming a compensable left knee injury sustained on January 21, 2017, during the course of his employment with the defendant. The defendant filed a timely form 43 denying that claim.

[8] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation." (Emphasis omitted; internal quotation marks omitted.) *Salerno* v. *Lowe's Home Improvement Center*, 198 Conn. App. 879, 881 n.4, 235 A.3d 537 (2020).

[9] "If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Reid* v. *Speer*, 209 Conn. App. 540, 543 n.4, 267 A.3d 986 (2021), cert. denied, 342 Conn. 908, 271 A.3d 136 (2022). "We have described a motion to preclude in this context as a statutorily created waiver mechanism that, following an employer's failure to comply with the requirement of . . . § 31-294c (b), bars that employer from contesting the compensability of its employee's claimed injury or the extent of the employee's resulting disability." (Internal quotation marks omitted.) Id., 543 n.5.

On May 21, 2020, the commissioner denied the plaintiff's motion to preclude. The commissioner stated that she "[did] not accept the [plaintiff's] position in this matter. . . . [T]he form 30C alleging bilateral knee repetitive trauma was not delivered [by certified mail] to the [defendant]. Although the certified envelope had the correct address for the [defendant], and despite the clear and bold signage on the building indicating where the office for the [defendant] was located, for reasons unknown, the mail carrier failed to deliver the notice to the [defendant]. The form 30C was returned to the [plaintiff] on January 10, 2018. The outside of the envelope was marked '[u]ndeliverable.' Therefore, the [defendant] did not receive proper notice when the [plaintiff] initially filed the claim in December of 2017." The commissioner further determined that the defendant filed a timely form 43 denying the claim on January 18, 2018, the same day that the plaintiff's counsel personally provided to the defendant's counsel a copy of the form 30C. On June 18, 2020, the plaintiff filed a motion to correct, which the commissioner denied on July 10, 2020. On July 29, 2020, the plaintiff filed a petition for review with the board.

On appeal to the board, the plaintiff asserted that he served the defendant with the form 30C in accordance with General Statutes § 31-321 by sending, by certified mail, the form 30C to the defendant's place of business, such that the commissioner should have drawn the inference that the form 30C was delivered to the defendant but the defendant failed to accept it. Under such circumstances, the plaintiff posited, the form 43 filed by the defendant on January 18, 2018, was untimely. In reply, the defendant argued, inter alia, that it was not served with the form 30C by certified mail, as the commissioner's findings reflected that the form 30C was

returned to the plaintiff because it was " '[u]ndeliverable as addressed . . . .' " Moreover, the defendant contended that there was no evidence in the record indicating that it had refused to accept service of the form 30C.

On July 2, 2021, the board affirmed the commissioner's denial of the plaintiff's motion to preclude. The board concluded that the commissioner's determination that the defendant did not receive proper notice of the form 30C until January 18, 2018, when the form 30C was provided, in person, to the defendant's counsel, was supported by the commissioner's finding that the mail carrier never delivered the form 30C sent by certified mail to the defendant, a finding that the board determined to be supported by the record. As for the plaintiff's assertion that the commissioner should have inferred delivery of the form 30C because it was sent via certified mail in accordance with § 31-321, the board noted that the commissioner expressly found, on the basis of the evidence adduced at the formal hearings, that the form 30C never was delivered to the defendant by certified mail. The board opined in a footnote that "[t]o assume that a properly addressed and mailed piece of mail was received may make sense in some cases, but not in a case such as this when we know for a fact [that] it was returned to the [plaintiff] as undelivered." The board further stated that, "in the absence of further credited evidence," the envelope with the form 30C enclosed that was returned to the plaintiff suggested that the form 30C had not been presented to and refused by a responsible party acting on the defendant's behalf. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that, in affirming the commissioner's denial of his motion to preclude, the board improperly sustained the commissioner's determination that the defendant did not receive the form 30C that the plaintiff sent to it by certified mail. The

plaintiff maintains that he satisfied the statutory requirements of §§ 31-294c and 31-321 by sending, via certified mail, the form 30C to the defendant's place of business, and that the commissioner and the board incorrectly imposed an additional requirement on him to demonstrate that the form 30C was returned as a result of the defendant's refusal to accept it. Relying on the doctrine known as the mailbox rule,[10] the plaintiff contends that delivery of the form 30C should have been presumed and that the burden should have fallen on the defendant to establish that it did not receive the form 30C. The plaintiff further contends that the commissioner's findings were not supported by competent evidence. We reject these claims.

We begin by setting forth the governing standard of review and relevant legal principles. "The standard of review in workers' compensation appeals is well established. When the decision of a commissioner is appealed to the board, the board is obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts. . . . The commissioner has the power and duty, as the trier of fact, to determine the facts. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"[O]n review of the commissioner's findings, the [board] does not retry the facts nor hear evidence. It considers no evidence other than that certified to it by the commissioner, and then for the limited purpose of determining whether or not the finding should be

[10] The mailbox rule "provides that a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received." *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418, 880 A.2d 882 (2005).

corrected, or whether there was any evidence to support in law the conclusions reached. It cannot review the conclusions of the commissioner when these depend upon the weight of the evidence and the credibility of witnesses. . . . Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the . . . [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Arrico* v. *Board of Education*, 212 Conn. App. 1, 18, 274 A.3d 148 (2022).

"[Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and the board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.], we are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act

itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 677–78, 255 A.3d 885 (2021); see also General Statutes § 1-2z.

"[Section] 31-294c governs notice of claims for workers' compensation benefits." *Mehan* v. *Stamford*, 127 Conn. App. 619, 625, 15 A.3d 1122, cert. denied, 301 Conn. 911, 19 A.3d 180 (2011). Section 31-294c provides in relevant part: "(a) No proceedings for compensation under the provisions of [the act] shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury . . . . If an employee, other than an employee of the state or a municipality, opts to mail to his or her employer the written notice of a claim for compensation required under the provisions of this section, such written notice shall be sent by the employee to the employer by certified mail. . . ."

Section 31-294c (b) sets forth the "strict standards" imposed on an employer seeking to contest liability. *Mehan* v. *Stamford*, supra, 127 Conn. App. 626. Section 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission . . . . If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury . . . on or before the twenty-eighth day after he has received the written

notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury . . . unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury . . . on or before such twenty-eighth day. . . . Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury . . . on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury . . . on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury . . . ."

Section 31-321 provides in relevant part: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under [the act] to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. . . ."

It is undisputed that the plaintiff, by certified mail, sent the form 30C to the defendant, in accordance with § 31-294c (a);[11] however, our inquiry does not end there. Pursuant to § 31-294c (b), an employer seeking to contest liability vis-à-vis an employee's claimed injury must file a proper notice denying liability within twenty-eight days following the employer's *receipt* of the employee's notice of claim. See General Statutes § 31-294c (b). Thus, in order to ascertain when the twenty-eight day filing period commences under § 31-294c (b), the date on which the employer *received* the employee's notice of claim must be determined. In the present case, the commissioner found that the defendant did not receive the form 30C sent by the plaintiff via certified mail on December 12, 2017; instead, as the commissioner found, the defendant received the form 30C for the first time on January 18, 2018, by way of personal service on its counsel, such that the defendant's form 43, which was filed on the same day, was timely. We agree with the board's conclusion that the commissioner's findings are supported by evidence in the record, including the envelope containing the form 30C that was returned to the

[11] Pursuant to § 31-294c (a), the language of which was in effect when the plaintiff mailed the form 30C to the defendant on December 12, 2017, a written notice of claim mailed by an employee not employed by the state or a municipality to an employer must be sent by certified mail. See General Statutes § 31-294c (a) ("[i]f an employee, other than an employee of the state or a municipality, opts to mail to his or her employer the written notice of a claim for compensation required under the provisions of this section, such written notice shall be sent by the employee to the employer *by certified mail*" (emphasis added)). Following the passage of No. 22-89, § 2, of the 2022 Public Acts (P.A. 22-89), which amended § 31-294c (a) effective May 24, 2022, a written notice of claim mailed by an employee not employed by the state or a municipality to an employer must be sent in accordance with § 31-321. See General Statutes § 31-294c (a), as amended by P.A. 22-89 ("[i]f an employee, other than an employee of the state or a municipality, opts to mail to his or her employer the written notice of a claim for compensation required under the provisions of this section, such written notice shall be sent by the employee to the employer *in accordance with section 31-321*" (emphasis added)). Section 31-321 permits certified mail as one method of service by mail.

plaintiff with a marking reflecting, inter alia, that the envelope was "[u]ndeliverable as addressed . . . ."[12]

With regard to the envelope with the form 30C enclosed that was returned to him, the plaintiff asserts that the commissioner improperly disregarded the testimony of Jonathan Delvecchio, a retired United States Postal Service mail carrier whom the plaintiff called as an expert witness during the formal hearing held on September 16, 2019. Delvecchio testified in relevant part that the marking on the envelope reading, inter alia, "[u]ndeliverable as addressed" originated from "a generic stamp [that] goes on anything that has to be returned" for "[a]ny reason." Delvecchio further testified that, in his opinion, the envelope was "handled correctly" and was returned to the plaintiff "[b]ecause it wasn't delivered, [i]t wasn't signed for by the recipient." The plaintiff contends that Delvecchio's testimony demonstrates that the form 30C was delivered to the defendant but the defendant rejected it. In denying the plaintiff's motion to preclude, however, the commissioner stated that she "[did] not accept the [plaintiff's] position in this matter," and that she relied on the marking on the envelope reading, inter alia, that it was " '[u]ndeliverable' " to determine that "the [defendant] did not receive proper notice when the [plaintiff] initially filed the claim in December of 2017." We construe these

[12] During the formal hearing held on October 28, 2019, the defendant called Stephen Costa, one of its employees, as a witness. During his testimony, Costa described the layout of the defendant's property, where he previously had worked, as well as the building's operational hours and the procedures followed by staff to permit entry into the building. Costa further testified that it was "[h]ighly unlikely" that, on three separate occasions, a mail carrier attempted to deliver the form 30C to the defendant's property but was refused entry into the building. The plaintiff contends that Costa's testimony did not constitute competent evidence in support of the commissioner's findings. In short, we disagree with this contention. Even without Costa's testimony, however, we conclude that there is sufficient evidence in the record, including the envelope containing the form 30C that was returned to the plaintiff, supporting the commissioner's findings.

statements to reflect that the commissioner did not find Delvecchio's testimony to be credible. "[T]he power and duty of determining the facts rests on the commissioner, who is the trier of fact. . . . This authority to find the facts entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered by lay and expert witnesses." (Internal quotation marks omitted.) *Sprague* v. *Lindon Tree Service, Inc.*, 80 Conn. App. 670, 675, 836 A.2d 1268 (2003). We will not, on appeal, disturb the commissioner's credibility determinations.

We also reject the plaintiff's reliance on the mailbox rule and his assertion that the board and the commissioner improperly imposed on him the burden to establish that the form 30C was returned to him following delivery to the defendant because the defendant had rejected it. Put simply, even assuming arguendo that the mailbox rule applies in this case, the presumption of delivery cannot withstand the commissioner's determination, as supported by the record, that delivery of the form 30C, in fact, never occurred. Moreover, without delivery of the form 30C, there could not have been any burden placed on the plaintiff to demonstrate that the defendant had rejected the form 30C following delivery.

The plaintiff cites this court's decision in *Black* v. *London & Egazarian Associates, Inc.*, 30 Conn. App. 295, 620 A.2d 176, cert. denied, 225 Conn. 916, 623 A.2d 1024 (1993), and the board's decision in *Morgan* v. *Hot Tomato's, Inc.*, No. 4377, CRB 3-01-3 (January 30, 2002), to support his claims. The plaintiff's reliance on these decisions is misplaced.

In *Black*, on appeal following a decision of the board affirming a workers' compensation commissioner's denial of a motion to preclude, this court concluded in relevant part that a deceased employee's widow had complied with § 31-321 when the undisputed facts demonstrated that a postal worker had delivered a notice

of claim sent, via certified mail, by the widow to the employer. *Black* v. *London & Egazarian Associates, Inc.*, supra, 30 Conn. App. 296–98, 299–301. The facts further established that the postal worker had attempted to obtain a signature for the delivery, but the sole individual present at the employer's office at the time of delivery, who was not an employee or an authorized representative of the employer, had refused to provide a signature, causing the postal worker to leave the notice of claim on a receptionist's desk in the office. Id., 298. This court determined that the filing period for the employer to contest liability commenced on delivery of the notice of claim; id., 304; and that the employer and its insurer could not "avoid the consequences of ignoring [the notice of claim] merely because no responsible agent or employee was present in the office to accept delivery or to attend to the matter once the letter was delivered." Id., 301. Unlike the present case, the facts in *Black* established that the notice of claim was delivered to the employer but that the employer's own actions prevented it from becoming privy to the notice of claim at the time of delivery. Id., 301, 304. Thus, *Black* is distinguishable from the present case.

In *Morgan*, the facts reflected that, after sustaining an injury at work, an employee sent, via certified mail, a letter accompanied by a form 30C to her employer. *Morgan* v. *Hot Tomato's, Inc.*, No. 4377, supra. After five failed attempts to deliver the letter to the employer, the postal service returned the letter to the employee as "unclaimed mail." Id. The employer filed a form 43 more than two months after the last attempted delivery of the letter. Id. The employee then filed a motion to preclude, which a workers' compensation commissioner granted. Id. The commissioner stated that there was " 'substantial evidence' indicat[ing] that the postal

service attempted to obtain the signature of a . . . representative [of the employer] on five occasions," such that the employee had complied with the notice requirements of § 31-294c (a). Id. On appeal, the board affirmed the commissioner's decision, concluding that, "[u]nder our law, an employer may be held accountable for its failure to receive notice, should the facts permit the trier to infer that the employer was partially or wholly at fault for the unsuccessful delivery of certified mail. The trier drew such an inference here, which was not unreasonable given the evidence." Id. In the present case, unlike in *Morgan*, the commissioner did not infer from the facts that the defendant was partially or wholly at fault for the mail carrier's failure to deliver the form 30C. *Morgan* does not mandate a different outcome, as we remain mindful that "[i]t is within the discretion of the commissioner alone to determine the credibility of witnesses and the weighing of the evidence. It is . . . immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 71, 33 A.3d 832, cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012). As the board stated in its decision, the " '[u]ndeliverable as addressed' " marking on the envelope containing the form 30C that was returned to the plaintiff, "in the absence of further credited evidence, suggests that [the form 30C] was never presented to a responsible party who refused to accept [it]." For these reasons, *Morgan* does not advance the plaintiff's position.

In sum, we conclude that the board properly affirmed the commissioner's denial of the plaintiff's motion to preclude.[13]

[13] In its appellate brief, the defendant argues that, under the circumstances of this case, the plaintiff was required to serve the form 30C on the defen-

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

L. D. *v.* COMMISSIONER OF CHILDREN AND FAMILIES*
(AC 45323)

Alvord, Cradle and Suarez, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his administrative appeal from the decision of a hearing officer of the defendant Commissioner of Children and Families, who upheld the Department of Children and Families' decision to substantiate allegations of emotional neglect by the plaintiff against three of his minor children stemming from two incidents. The plaintiff and the children's mother had recently been involved in contentious dissolution proceedings and the police and the department were called multiple times to address family relations. The two incidents involved the plaintiff's interactions with his three children during his visits with them. In the first incident, the plaintiff, when picking the children up from their mother's house, had an irate reaction upon learning of a missing bag he asked one child to bring with him, exited the car and began screaming and cursing, drove his car out of the driveway while one of his children's doors remained open, and proceeded to drive with the children in an erratic and dangerous manner. In the second incident, the plaintiff was in his vehicle with his three children as passengers, became angry and hit one child's arm, eventually dragging the child out of the car, and

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dant's counsel in order to effectuate proper service. In light of the analysis underlying our resolution of this appeal, we need not address this argument further.

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), 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.

subsequently hit another child in the face when she intervened, which resulted in bruising and scratches on the children. The plaintiff claimed that the court improperly concluded that there was substantial evidence in the record to support the findings of emotional neglect. *Held* that the trial court properly dismissed the plaintiff's administrative appeal and determined that the hearing officer did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion in upholding the department's substantiation of the allegations of emotional neglect, as a review of the record revealed substantial evidence to support the hearing officer's findings and conclusions regarding the two allegations of emotional neglect as to the plaintiff's children; as to the first incident, the hearing officer emphasized that the children provided credible, consistent reports about what happened in the car that day and that one child's emotional response during her account of the incident was persuasive and lent additional credibility to the report, and, although the hearing officer's balanced approach acknowledged evidence that the children's mother fueled both the plaintiff's ire and the children's fear, she stated that the children were justifiably frightened and concluded that the plaintiff's conduct clearly demonstrated a serious disregard for the children's emotional well-being; in the second incident, the hearing officer noted that the plaintiff had engaged in a pattern of erratic and bullying behaviors that had intimidated and frightened his children on a repeated basis, his rage frightened his children, and the children had repeatedly told investigators that they were afraid of him, and, even though the hearing officer acknowledged evidence that the children's mother had contributed to the children's feelings, she concluded that the plaintiff's inability to restrain his anger had negatively impacted his relationship with his children and caused them trauma.

Argued November 9—officially released December 27, 2022

Procedural History

Administrative appeal from the decision of the defendant upholding the decision of the Department of Children and Families to substantiate allegations of emotional neglect by the plaintiff against certain of his minor children, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

L. D., self-represented, the appellant (plaintiff).

John E. Tucker, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Kim Mathias*, assistant attorney general, and *Evan*

O'Roark, assistant attorney general, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff father, L. D., who is self-represented in this court,[1] appeals from the judgment of the trial court dismissing his appeal from the decision of a hearing officer of the Department of Children and Families (department),[2] who upheld the department's decision to substantiate allegations of emotional neglect by the plaintiff against three of his children. On appeal, the plaintiff claims that the trial court improperly concluded that there was substantial evidence in the record to support the findings of emotional neglect.[3] We affirm the judgment of the trial court.

The following facts, as found by the hearing officer, and procedural history are relevant to this appeal. The plaintiff previously was married to the mother of his six children (children's mother). The children were born between the years of 2000 and 2008. In early 2016,[4] after seventeen years of marriage, the children's mother filed an action to dissolve the marriage, and the ensuing dissolution proceedings were very contentious. Throughout the course of the dissolution proceedings, the police and the department were called multiple

[1] The plaintiff was represented by counsel during the administrative proceeding before the hearing officer of the Department of Children and Families and on appeal to the Superior Court.

[2] In his appeal to the Superior Court, the plaintiff names as the defendant Vannessa Dorantes, in her official capacity as Commissioner of Children and Families. In this opinion, we refer to the department either as the department or the defendant.

[3] The plaintiff also raises on appeal four claims which are intertwined with his substantial evidence claim. See footnotes 9, 13, 14, and 15 of this opinion.

[4] "The credible evidence in the record reveals that the [plaintiff] and his former wife were in the initial stages of a contentious separation and divorce when the department first became involved with the family in February, 2016."

times "to deal with difficulties in the family's internal relations . . . ." Additionally, several complaints concerning the plaintiff's conduct, primarily asserted by the children's mother, were made to the police and the department.

The department received its first referral concerning the family on February 6, 2016 (February, 2016 incident), after the local police went to the family's residence after receiving a 911 hang up call from that residence. Upon arriving at the home, the police determined that the parents were engaging in a verbal altercation. The children's mother reported that the argument began when the plaintiff became angry at one of their children for wearing shoes in the house and the children's mother became upset because the plaintiff was yelling at the children, so she brought all six of the children into a bedroom. The plaintiff followed the children's mother into a back room, recorded the incident, and, at some point, called the police. The children's guardian ad litem,[5] who later watched the recording, reported that the recording depicted both parents yelling at each other and that one of the children had spat on the plaintiff. The plaintiff was arrested that evening on a charge of disorderly conduct. He was subsequently charged with risk of injury to a child, and, related to those charges, "[p]rotection orders were issued." The criminal charges against the plaintiff were dismissed after he completed a diversionary domestic violence program.

On July 3, 2018, the children's mother complained to the police about an incident that occurred on June 27, 2018, when the plaintiff picked up his three youngest children, with whom he was participating in court-ordered visitation, from their mother's residence. The

[5] A guardian ad litem was appointed for the children in the dissolution action.

plaintiff previously had asked one of those children, A, to bring with him a particular bag that the plaintiff had left in the home. A failed to bring the bag and told the plaintiff that it was not in the home. The plaintiff became enraged, which caused him to yell at the children, bang on the steering wheel, and drive his vehicle, containing the three children, in an erratic and dangerous manner (July, 2018 incident).[6]

A separate referral was made to the department after the July, 2018 incident. During the department's investigation into the incident, the three children, and one child who was at home and witnessed the incident, all reported that the plaintiff became irate upon learning of the missing bag, got out of the car, and began screaming and cursing. Additionally, they all reported that one of the children, S, attempted to get out of the car and that the plaintiff drove the car out of the driveway while her door remained open. While explaining the event to a department investigator, S began crying. The plaintiff acknowledged that there was a disagreement over the bag but felt that A was lying about the availability of the bag because they had discussed it the night before. Additionally, the plaintiff believed that the bag was in the home and that the children's mother had prevented the children from taking the bag.

On September 5, 2018, the department's Careline[7] received a referral alleging that the plaintiff had hit two of his children, A and S, and left bruises and scratches on them during a visit two days prior (September, 2018

[6] As set forth previously, the record reflects that the incident took place on June 27, 2018, but was reported to the police by the children's mother on July 3, 2018. The hearing officer refers to the incident as "Emotional neglect of [S], [A], and [A. A.] (July, 2018)." For consistency, we refer to the incident as the July, 2018 incident throughout the opinion.

[7] "Careline is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect." *In re Katherine H.*, 183 Conn. App. 320, 322 n.4, 192 A.3d 537, cert. denied, 330 Conn. 906, 192 A.3d 426 (2018).

incident). At the time of the September, 2018 incident, the plaintiff was in the driver's seat of his vehicle, A was in the front passenger seat, and S was in the backseat with her sister, A. A. During the department's investigation of the September, 2018 incident, S had a healing bruise under her left eye. S reported that the plaintiff was angry because the children were not wearing sneakers, she saw the plaintiff hit A, she got between them and was hit in the face, and that A. A. was crying. A reported that the plaintiff was upset because he did not like what A and S were discussing and wanted them to talk about something else. When they stopped speaking altogether, the plaintiff became angry and hit A on the arm, and later dragged A out of the car, scratching his arm. Additionally, A reported that the plaintiff hit S "when she tried to get between [A] and [the plaintiff]." A. A. reported that she did not see the plaintiff hit A, but did see the plaintiff hit S. The day after the September, 2018 incident, the children were taken to their pediatrician who concluded that the marks on the children were consistent with their explanations, however, the pediatrician did not immediately make a referral to the department based on her observations. The plaintiff was arrested and charged with three counts of risk of injury to a child, two counts of assault in the third degree, and criminal mischief in the third degree following the September, 2018 incident.

Following its investigation into the February, 2016 incident, the department substantiated the allegations of emotional neglect against the plaintiff as to his six children. Additionally, following the July, 2018 incident, the department substantiated the allegations of emotional neglect related to that incident against the plaintiff as to his three youngest children. Finally, following the September, 2018 incident, the department substantiated the allegations of physical abuse as to S and A, substantiated the allegations of emotional neglect of

the three youngest children, and recommended that the plaintiff's name be placed on the Central Registry of Persons Responsible for Child Abuse and Neglect (central registry). Thereafter, the plaintiff requested an administrative hearing to appeal from the substantiations and central registry determination.

An administrative hearing was scheduled for October 14, 2020, and rescheduled at the plaintiff's request for December 16, 2020. Prior to the rescheduled hearing, the plaintiff requested that the issues be adjudicated on the papers and both parties submitted documentary evidence for review by the hearing officer in making her determination.

On December 24, 2020,[8] following a thorough review of the eighteen exhibits submitted by the parties, the hearing officer issued her written decision. Concerning the February, 2016 incident, the hearing officer reversed the department's substantiation of the allegations of emotional neglect against the plaintiff as to his six children. In her decision, the hearing officer emphasized the fact that "[t]he children were not interviewed during this investigation" and "there was no evidence presented by the department as to the children's impressions or responses to this incident." Rather, the hearing officer highlighted that "[t]he department's findings are all predicated on the [children's] mother's complaints and the charges filed against the [plaintiff], all of which were subsequently dismissed following [his] successful

[8] We note that the record contains conflicting information regarding the date the hearing officer's memorandum of decision was issued. It appears that, at some point after submitting the original version of her decision with a mistaken date of December 24, 2021, the hearing officer later issued a corrected decision with a date of December 24, 2020. On appeal to the Superior Court, however, only the original version of the hearing officer's decision was submitted to the court, therefore, the trial court's decision indicates that the hearing officer's decision was released on December 24, 2021.

completion of a [diversionary] program." After summarizing the relevant facts, the hearing officer concluded that "[i]t is certainly possible that all six children heard the diatribe, and perhaps all six children observed it as well. It is equally possible that all six children were terrified and traumatized. However, the department has not established any of those scenarios with a preponderance of the evidence, and therefore, the allegations of emotional neglect must be reversed."

Concerning the July, 2018 incident, the hearing officer upheld the department's decision to substantiate the allegations of emotional neglect against the plaintiff as to his three youngest children. In reiterating the facts, the hearing officer emphasized "that the children provided consistent reports about what happened in the car that day," noted that "[t]he [plaintiff's] erratic behavior placed them at physical risk during the drive . . . [and] [t]he children were justifiably frightened," and stated that "[S's] emotional response during her account of the incident [was] persuasive and lends additional credibility to the report." Notably, the hearing officer recognized "that the children's mother fueled both the [plaintiff's] ire and the children's fear during this period . . . [h]owever, in this case, the children's disclosures were consistent and believable." Therefore, the hearing officer concluded that "[t]he [plaintiff's] conduct clearly demonstrated a serious disregard for the children's emotional well-being and the allegations of emotional neglect are therefore upheld."

Concerning the September, 2018 incident, the hearing officer reversed the department's decision to substantiate the allegations of physical abuse as to S and A, but upheld the department's decision to substantiate the allegations of emotional neglect as to the plaintiff's three youngest children. Regarding the allegations of physical abuse, the hearing officer noted that "[p]arents

have the right to utilize corporal punishment for discipline of their children . . . [and] [i]njuries that result from the physical discipline are not always considered to be abusive." Additionally, the hearing officer stated that, in making a determination as to whether the physical discipline rose to the level of physical abuse, "the department must consider the parent's motive, the amount of force used, and whether or not the child is able to understand the reason for the discipline." The hearing officer emphasized that the report containing evidence of the children's injuries did not describe them with specificity; "[t]he children's pediatrician was apparently not so alarmed that she immediately felt compelled to file a report with the department"; and the rationale for the plaintiff's behavior was missing or inconsistent, in that A and S provided different reasons for why the plaintiff became angry, which was "an essential element in determining the reasonableness of his discipline." In summarizing the allegations as to A, the hearing officer stated that "[t]he evidence is not sufficient . . . to conclude that [A] suffered any injury from being struck" by the plaintiff and that the injuries sustained by A when the plaintiff "attempted to forcibly remove [A] from the car . . . were likely minor . . . ." In discussing the allegations as to S, the hearing officer stated that "[t]he evidence supports the finding that the [plaintiff] struck [S] when she attempted to get in the middle of the [plaintiff] and [A] . . . [and] [t]his hit was likely accidental . . . ." Therefore, the hearing officer reversed the substantiation of physical abuse of A and S because there was "not enough . . . to conclude that the [plaintiff's] use of force was unreasonable, or that his conduct was abusive" toward A, nor that S's injury was intentional, as required under the department's definition of abuse.

Regarding the allegations of emotional neglect arising from the September, 2018 incident, the hearing officer

found that "[t]he [plaintiff] has engaged in a pattern of erratic and bullying behaviors that have intimidated and frightened his children on a repeated basis" and that the children "have repeatedly told investigators that they are afraid of him." The hearing officer recognized that, although "the [children's] mother has contributed to these feelings, the [plaintiff's] own loss of control in his children's presence is no less real." As a result, the hearing officer concluded that the record supported the department's substantiation of emotional neglect as to the plaintiff's three youngest children.

Finally, the hearing officer addressed the department's decision to place the plaintiff's name on the central registry. In making her determination, the hearing officer "consider[ed] the intent of the perpetrator, the severity of the conduct, chronicity or pattern of behavior and the presence of substance abuse or domestic violence." See 2 Dept. of Children and Families, Policy Manual § 22-4, pp. 1–2. In considering the plaintiff's intent, the hearing officer stated that the plaintiff "is a mature adult with no apparent cognitive limitations . . . [who] has been the subject of numerous interventions over the years . . . [therefore] he should reasonably be expected to know that his inability to control his anger in the presence of his children was likely to cause them harm . . . ." Regarding the plaintiff's actions, the hearing officer stated that his angry outbursts were severe in that they caused his children fear and angst over an extended period of time. The hearing officer recognized, however, that the chronic pattern of behavior was more closely tied to the plaintiff's conflict with the children's mother and that she "was an integral part in the breakdown in the relationship between the [plaintiff] and his children . . . ." Notably, the hearing officer emphasized that "it cannot be said that [the plaintiff] poses a risk to children in general. His conduct, and indeed his ability to harm

others, is the product of familial connections and does not necessarily correlate to his presentation outside those bonds." Lastly, the hearing officer stated that the plaintiff has not been diagnosed with any substance abuse concerns, recognized that "the allegations of spousal abuse have been embellished by the children's mother," and noted that all the criminal charges against the plaintiff have been dismissed or that a nolle prosequi had been entered. For these reasons, the hearing officer reversed the department's decision to place the plaintiff's name on the central registry.

On February 3, 2021, the plaintiff filed an administrative appeal pursuant to General Statutes § 4-183, challenging the hearing officer's decision upholding the substantiations of emotional neglect stemming from the July, 2018 and September, 2018 incidents. In his complaint, the plaintiff claimed that "[t]he [department's] decision to find that the plaintiff emotionally neglected his three younger children is not support[ed] by the record in this matter." Specifically, the plaintiff took issue with the fact that the hearing "was conducted on the 'papers' without the benefit of testimony," asserted that the "decision is legally and factually inconsistent," and argued that "the record does not support . . . that any specific conduct of the plaintiff resulted in or was the cause of the condition of neglect" but that the condition of neglect arose due to the emotional turmoil caused by the dissolution proceedings.

The parties submitted preargument briefs to the court, and, on February 14, 2022, the court held oral argument on the plaintiff's appeal. During oral argument, counsel for the plaintiff maintained that the hearing officer's decision to uphold the substantiation of emotional neglect from the July, 2018 and September, 2018 incidents was "somewhat inconsistent with the overall factual decision itself and the actual evidence and exhibits that were entered into the record." Counsel

for the plaintiff elaborated that despite recognizing that these circumstances were "a product of a contentious divorce" and making "specific findings about the credibility of certain individuals . . . [and the] type of inappropriate influence [that] may have been occurring amongst the family," the hearing officer ultimately found that "these two specific findings . . . are credible, or the evidence supports these statements. Whereas, for other findings she directly discredits the evidence put forward or discredits the testimony of others." Counsel for the defendant responded that the hearing officer's "decision is extremely well written, extremely detailed in her analysis . . . [a]nd . . . because she was so careful . . . she made decisions to not uphold certain substantiations having carefully considered the evidence before her." Additionally, counsel for the defendant noted that the hearing officer acknowledged the contentious divorce and her "trouble with [the] mother's credibility . . . ." Counsel for the defendant emphasized, however, that the hearing officer "gave tremendous weight to the consistency and clarity of the children's statements and reports" of the July, 2018 incident and regarding the September, 2018 incident, "was very careful in saying [that] she was really concerned that in spite of everything else that was going on in the children's lives, [that] the plaintiff's inability to restrain his anger and his intimidating bullying behavior had this negative impact on his relationship with his children." In rebuttal, counsel for the plaintiff stated that the relevant "inquiry is whether the conduct of a particular parent created the [emotional] neglect," and argued that here "the record doesn't support . . . that the plaintiff's conduct is what created the condition of neglect in the children."

The following day, the court issued a memorandum of decision affirming the hearing officer's decision and dismissing the plaintiff's appeal. In its decision, the

court summarized the findings made and the conclusions drawn by the hearing officer, as well as the law governing allegations of emotional neglect and the department's burden to substantiate such allegations. The court set forth that "the plaintiff, as father of the subject children, is a person responsible for the children's health, welfare, or care. Thus, the focus of the analysis must be on the plaintiff's actions and/or omissions in relation to his children's positive emotional development, to determine whether or not the plaintiff denied proper care and attention, or allowed the children to live under injurious conditions, all as related to the children's emotional development."

The court found substantial evidence that the plaintiff had a significant temper, lost control of his temper in relation to his children during the July, 2018 and September, 2018 incidents, and that these incidents "involved the plaintiff screaming, driving dangerously, hitting the children, and acting in a manner that genuinely frightened the children." The court found that the plaintiff's behavior exhibited a "serious disregard for the emotional well-being of the children and has impaired their emotional development." Additionally, the court stated that the hearing officer "treated the plaintiff fairly in her decision" by reversing the department's findings of physical abuse and determination to place the plaintiff's name on the central registry and understanding that the children's mother "inappropriately enflamed the situation and embellished her reports . . . ." The court emphasized, however, that the hearing officer "appropriately held the plaintiff responsible for his inability to control himself, his rage, and the effect of his inappropriate behavior upon the children." The court found "[t]he most compelling evidence of emotional neglect in the record is the consistent testimony of the plaintiff's children that they are

afraid of him, nervous to be around him, and in some cases experiencing physical symptoms from their fear."

On the basis of the foregoing, the court found that the hearing officer's determination that the plaintiff emotionally neglected his three children was supported by substantial evidence in the record and was reasonable. Accordingly, the court found that the plaintiff had failed to establish on appeal that "the hearing officer's final decision was (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Following the court's dismissal, the plaintiff appealed to this court. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims, inter alia, that the court erred when it concluded that the findings of the hearing officer, substantiating the allegations of emotional neglect, were supported by substantial evidence in the record. We conclude that the court properly dismissed the plaintiff's appeal.

We first set forth the applicable standard of review. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the

trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [This] court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *Natasha B.* v. *Dept. of Children & Families*, 189 Conn. App. 398, 403–404, 207 A.3d 1101 (2019).

"The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . . It is fundamental that a plaintiff has the burden of proving that the [C]ommissioner [of Children and Families], on the facts before [her], acted contrary to law and in abuse of [her] discretion . . . . The law is also well established that if the decision of the commissioner is reasonably supported by the evidence it must be sustained." (Internal quotation marks omitted.) *F.M.* v. *Commissioner of Children & Families*, 143 Conn. App. 454, 475, 72 A.3d 1095 (2013).

Furthermore, § 4-183 (j) provides in relevant part that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," and, on appeal, "[n]either this court nor the trial court may retry the case . . . ." (Internal quotation marks omitted.) *Natasha B.* v. *Dept. of Children & Families*, supra, 189 Conn. App. 403. "The reviewing court must take into account contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . "

(Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 411–12, 94 A.3d 588 (2014).

The plaintiff argues that "the record does not demonstrate that [he] engaged in any conduct which would support a finding that he emotional[ly] neglected his children. . . . [Additionally] the record does not support . . . that any specific conduct of the [plaintiff] resulted in or was the cause of the condition of neglect."[9] The plaintiff also argues "that the hearing officer's decision was not supported by the weight of the substantial evidence on the entire record." In support of this position, he maintains that the record reflects: "1. [i]nconsistencies in the children's accusations, 2. [p]roblems with the conduct and credibility of the [children's] mother,[10] [and] 3. [t]he [plaintiff's] having successfully passed various programs." (Footnote added.)

[9] In addition, the plaintiff argues that the hearing officer's "decision is legally and factually inconsistent . . . [because] [t]he hearing officer in this matter found that certain alleged conduct of the [plaintiff] did not [rise] to the level of conduct which would result in central registry placement [for] substantiation of certain neglect allegations." To the extent that the plaintiff is arguing that the hearing officer's decision was inconsistent because it reversed certain substantiations and yet upheld two substantiations of emotional neglect, we construe that argument as a reformulation of his claim that the record lacked substantial evidence to support the hearing officer's decision. We are not persuaded by that argument.

[10] The plaintiff argues that "[t]he emotional abuse was actually being caused by the [children's mother] falsely accusing and coercing the children, shaming the [plaintiff] to the children, brainwashing the children and used sheer manipulation tactics." In support of this argument, the plaintiff devotes a significant portion of his brief to discussing "malicious parent syndrome." Neither the hearing officer nor the court made any findings as to "malicious parent syndrome," and it is "axiomatic that this appellate body does not engage in fact-finding." (Internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 85, 165 A.3d 193 (2017). We note, however, that the court stated that "[t]he hearing officer found that the [children's mother] was not a credible witness, unfairly embellished reports, and purposefully provoked the plaintiff." Therefore, the record reflects that the hearing officer carefully considered the conduct of the children's mother.

Additionally, he claims "that the hearing officer ignored evidence showing the [children's] inconsistencies in their accusations and that the children had been 'coached' by their mother to make these accusations against [him]."[11] We disagree.

General Statutes § 46b-120 (4) provides that "[a] child may be found 'neglected' who, for reasons other than being impoverished, (A) has been abandoned, (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child . . . ."

[11] In his brief and during oral argument before this court, the plaintiff makes a passing reference to a claimed "refus[al] and/or [neglect]" by the department to interview several individuals, who the plaintiff contends were interviewed by the children's guardian ad litem and "refuted the [children's] mother's claims" or "witnessed 'alienating patterns' of the [children's] mother [and] false reporting . . . ." The plaintiff also briefly posits "the question that should be asked is why did [the department] not include any of this in their reports?" The plaintiff's concerns are " 'merely mentioned and not briefed beyond a bare assertion' " and, accordingly, are inadequately briefed. *Marvin* v. *Board of Education*, 191 Conn. App. 169, 178 n.8, 213 A.3d 1155 (2019); id. ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)).

Moreover, assuming that the information the plaintiff claims was omitted was of evidentiary value, we note that he did not include the information as part of the exhibits that he submitted, through his counsel, for review by the hearing officer and, on appeal, our review is confined to the record before the hearing officer. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 739, 261 A.3d 1182 ("[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence *in the administrative record*" (emphasis added; internal quotation marks omitted)), cert. denied, 339 Conn. 915, 262 A.3d 134 (2021); see also *Blinkoff* v. *Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 723, 20 A.3d 1272 ("We take [the plaintiff's contention], essentially, to be a claim that the record should be expanded to include information that was not submitted for the consideration of the referee. In so arguing, the plaintiff misapprehends the scope of review of an administrative appeal, which is confined to the record."), cert. denied, 302 Conn. 922, 28 A.3d 341 (2011).

To substantiate the allegations of emotional neglect against the plaintiff, the department was required to demonstrate that he is a person responsible for the health, welfare, or care of his children and that he denied his children proper care and attention emotionally, or failed to respond to their affective needs, which had an adverse impact on them or seriously interfered with their positive emotional development. See Policy Manual, supra, § 22-3, pp. 7–8.[12]

After conducting a thorough review of the documentary evidence submitted by the plaintiff and the defendant,[13] the hearing officer upheld the department's decision to substantiate two allegations of emotional

[12] Section 22-3 of the department's policy manual provides in relevant part: "Whether or not the adverse impact has to be demonstrated is a function of the child's age, cognitive abilities, verbal ability and developmental level. Adverse impact is not required if the action/inaction is a single incident which demonstrates a serious disregard for the child's welfare.

"The adverse impact [of emotional neglect] may result from a single event and/or from a consistent pattern of behavior and may be currently observed or predicted as supported by evidenced based practice.

"Evidence of emotional neglect includes, but is not limited to, the following: inappropriate expectations of the child given the child's developmental level; failure to provide the child with appropriate support, attention and affection; and/or permitting the child to live under conditions, circumstances or associations injurious to his well-being including, but not limited to, the following . . . psychiatric problem of the caregiver, which adversely impacts the child emotionally; and exposure to family violence which adversely impacts the child emotionally.

"Indicators may include, but are not limited to, the following: depression; withdrawal; low self-esteem; anxiety; fear; aggression/passivity; emotional instability; sleep disturbances; somatic complaints with no medical basis; inappropriate behavior for age or development; suicidal ideations or attempts; extreme dependence; academic regression; and/or trust issues." Policy Manual, supra, § 22-3, pp. 7–8.

[13] The plaintiff argues that his "inability to call the children as a witness and the admission of hearsay evidence against him" violated his due process rights. Additionally, he argues that "he was deprived of fundamental fairness and due process because he was unable to cross-examine an opposing witness presented by the department . . . ."

The defendant responds that the plaintiff's "argument fails because the plaintiff chose not to call any witnesses and did not object to the admission of the department's exhibits containing hearing statements of the children

neglect as to the plaintiff's three youngest children, arising from the July, 2018 and September, 2018 incidents. In regard to the July, 2018 incident, the record reflects that, when picking the children up from their mother's house, the plaintiff had an irate reaction upon learning of a missing bag, exited the car and began screaming and cursing, then drove his car out of the driveway while one of his children's doors remained open, and proceeded to drive with the children in an erratic and dangerous manner. In upholding the substantiation of emotional neglect, the hearing officer emphasized "that the children provided consistent reports about what happened in the car that day," which were "believable," and that one child's "emotional response during her account of the incident is persuasive and lends additional credibility to the report."

and others. . . . In reality, the plaintiff chose not to have a hearing at which testimony would be presented. Counsel for the plaintiff filed a request with the department asking that the administrative hearing be decided on the papers." As a result, the defendant contends that the plaintiff "cannot now complain that there was not a hearing with live testimony" and "[b]ecause the plaintiff failed to raise [the hearsay] issue with the hearing officer, this court should decline to review it." We agree with the defendant and conclude that the plaintiff waived this claim by inducing any claimed error.

"[T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party. . . . [W]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 724, 200 A.3d 1118 (2019).

Our review of the record leads us to conclude that the plaintiff, through counsel, induced the claimed error in this case by requesting and consenting to the format whereby the administrative hearing was adjudicated on the papers, and, furthermore, by declining to object to the documentary evidence submitted by the department and by failing to raise the claimed error on appeal to the Superior Court. Accordingly, we decline to review the plaintiff's claims.

Although the hearing officer's balanced approach acknowledged evidence that "the children's mother fueled both the [plaintiff's] ire and the children's fear," she stated that the children "were justifiably frightened" and concluded that "[t]he [plaintiff's] conduct clearly demonstrated a serious disregard for the children's emotional well-being."

Regarding the September, 2018 incident, the record reflects that the plaintiff was in his vehicle with his three youngest children as passengers, became angry and hit A's arm, subsequently hit S in the face when S intervened between the plaintiff and A, and later dragged A out of the car, which resulted in bruising and scratches on the children. In upholding the substantiation of the allegations of emotional neglect arising from this incident, the hearing officer noted that "[t]he [plaintiff] has engaged in a pattern of erratic and bullying behaviors that have intimidated and frightened his children on a repeated basis. . . . His rage frightens his children. They have repeatedly told investigators that they are afraid of him." The hearing officer again acknowledged evidence that "the [children's] mother has contributed to the children's feelings," and then concluded that the plaintiff's "inability to restrain his anger has negatively impacted his relationship with his children [and] caused them trauma . . . ." Therefore, our review of the record reveals substantial evidence to support the hearing officer's findings and conclusions.

Additionally, we agree with the court's assessment that "the hearing officer treated the plaintiff fairly in her decision in view of the overall record," contrary to the plaintiff's assertion that the hearing officer failed to adequately consider inconsistencies in the children's accusations or issues with the conduct and credibility of the children's mother. Notably, the court found that, "[i]n reversing [the department's] findings of physical

abuse[14] and [the department's] determination to place the plaintiff on the registry, the hearing officer reasonably understood that the [children's mother] inappropriately enflamed the situation and embellished her reports . . . [h]owever, the hearing officer also appropriately held the plaintiff responsible for his inability to control himself, his rage, and the effect of this inappropriate behavior upon the children." (Footnote added.)Additionally, the court stated that "[t]he most compelling evidence of emotional neglect in the record is the consistent testimony of the plaintiff's children that they are afraid of him, nervous to be around him, and in some cases experiencing physical symptoms from their fear." On appeal, "[i]t is not the role of [the trial] court to second-guess the factual findings and discretionary decisions of an administrative agency."

[14] The plaintiff argues that the hearing officer's decision was in excess of her statutory authority in that the officer "failed to hold a hearing regarding the reasonableness of the [plaintiff's] discipline of the children" and that he "did not intend to hurt or injure the child, but rather to discipline misbehavior." In support of his argument, the plaintiff cites to General Statutes (Rev. to 2017) § 53a-18, a statute which provides in relevant part that "[t]he use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (1) [a] parent, guardian or other person entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor . . . ." Consistent with the policy underlying this statute, the department is required to consider the reasonableness of the parent's discipline of his or her children prior to substantiating an allegation of *physical abuse*. See *Lovan C.* v. *Dept. of Children & Families*, 86 Conn. App. 290, 297, 860 A.2d 1283 (2004); see also *State* v. *Nathan J.*, 294 Conn. 243, 259, 982 A.2d 1067 (2009) ("[u]nder [the *Lovan C.*] framework, abuse always consists of two primary elements—(1) physical injury, and (2) wilfulness—but, in order to respect the legislature's intent to protect parents from reprisal for reasonable physical discipline of their children, any substantiation of abuse hearing against a parent also must include a *separate* evaluation of reasonableness" (emphasis in original)). As we previously noted, the hearing officer reversed the department's substantiation of the allegations of physical abuse against the plaintiff. Accordingly, as this is the only ground on which the plaintiff challenges the hearing officer's statutory authority, we are unpersuaded.

Northwest Hills Chrysler Jeep, LLC v. *Dept. of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-18-6042924-S (April 15, 2019) (reprinted at 201 Conn. App. 132, 163, 241 A.3d 739), aff'd, 201 Conn. App. 128, 241 A.3d 733 (2020). On the basis of the foregoing, we conclude that the court properly determined that the hearing officer did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion in upholding the substantiation of the allegations of emotional neglect.[15] See *Natasha B.* v. *Dept. of Children & Families*, supra, 189 Conn. App. 404. Accordingly, the court properly dismissed the plaintiff's administrative appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

ANNA SMORODSKA *v.* COMMISSIONER OF CORRECTION
(AC 44881)

Alvord, Cradle and DiPentima, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of, inter alia, arson in the first degree, sought a writ of habeas corpus, claiming that

[15] In one page of his brief, the plaintiff argues that the hearing officer's decision was based on unlawful procedure and error of law, in support of which the plaintiff renews his assertion that "[t]he hearing in this case was conducted on the 'papers' without the benefit of testimony." The plaintiff then proceeds to delineate the procedure by which a person who has been substantiated as an individual responsible for abuse or neglect can appeal that determination. The plaintiff does not set forth any additional analysis connecting this claim to any alleged error beyond separately briefing his due process claim. See footnote 13 of this opinion. Accordingly, we decline to review his claim. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)).

her trial counsel, S, rendered ineffective assistance by failing to properly advise her about the immigration consequences of her pleading guilty. The petitioner was born in Ukraine, entered the United States on a temporary visa that had expired, and was not lawfully residing in the country at the time of her arrest and conviction. S testified at the habeas trial that he advised the petitioner that arson in the first degree constituted an aggravated felony that subjected the petitioner to deportation and removal, that the assumption and the presumption should be that she would be deported or removed, and that he made no representation to the petitioner that anything could occur aside from her being deported for an aggravated felony conviction. S further testified that he informed the petitioner that a plea pursuant to *North Carolina* v. *Alford* (400 U.S. 25) "may or may not" have an effect on the matters considered by immigration officials, but it would not rescue her from being deported or reduce the strength of the case the immigration authorities had against her. The petitioner ultimately pleaded guilty pursuant to the *Alford* doctrine. Following trial, the habeas court denied the petition for a writ of habeas corpus, finding that S had unequivocally conveyed to the petitioner that the immigration consequences of her guilty plea to a charge of arson in the first degree was deportation mandated by federal law, that there was no credible evidence that S failed to adequately advise or affirmatively misadvised the petitioner about the deportation consequences of her plea agreement, and that the likelihood of deportation was sufficiently explained to the petitioner. On the petitioner's appeal to this court, *held* that the habeas court properly concluded that S did not render deficient performance in advising the petitioner of the immigration consequences of her *Alford* plea and properly rejected her claim of ineffective assistance of counsel: S made no representation to the petitioner that anything could occur aside from her being deported for an aggravated felony conviction and, therefore, S's advice to the petitioner regarding the likelihood of her deportation resulting from her plea to an aggravated felony was accurate, unequivocal, and comported with the requirements of state and federal law; moreover, even assuming that S's advice expressed equivocation as to the likelihood of enforcement, that advice did not negate the import of S's repeated and unequivocal advice stating that, regardless of his uncertainty as to the effect of the *Alford* plea on immigration authorities, the clear consequence of the petitioner's *Alford* plea was deportation.

Argued September 15—officially released December 27, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the

granting of certification, appealed to this court. *Affirmed.*

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

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, former state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, J. The petitioner, Anna Smorodska, appeals from the judgment of the habeas court denying her petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that her trial counsel did not render ineffective assistance in advising her about the immigration consequences of her pleading guilty pursuant to the *Alford* doctrine.[1] We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner was arrested on December 14, 2015, in connection with allegations that she started fires in the middle of the night in the yard of a residence of her former boyfriend that caused damage to flammable, inflatable Christmas decorations and to a corner of the house. The petitioner admitted to police that she had burned love letters in the yard and had attempted to burn the inflatable

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . A defendant often pleads guilty under the *Alford* doctrine to avoid the imposition of a possibly more serious punishment after trial." (Citation omitted; internal quotation marks omitted.) *Robles* v. *Commissioner of Correction*, 169 Conn. App. 751, 752 n.1, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

decorations. The petitioner pleaded guilty pursuant to the *Alford* doctrine to arson in the first degree in violation of General Statutes § 53a-111, threatening in the second degree in violation of General Statutes (Rev. to 2015) § 53a-62, and criminal violation of a protective order in violation of General Statutes § 53a-223. During the plea process, the petitioner was represented by Attorney Stephan Seeger. The trial court, *Shaban*, *J.*, sentenced the petitioner to a total effective sentence of three and one-half years of incarceration, followed by six and one-half years of special parole. The petitioner was born in Ukraine, entered the United States on a temporary visa that expired in August, 2014, and was not lawfully residing in the country at the time of her arrest and conviction.

In an amended petition for a writ of habeas corpus, filed in July, 2020, the petitioner alleged, inter alia, that Seeger provided ineffective assistance of counsel by failing to advise her adequately regarding the immigration consequences of her *Alford* plea.[2] Following trial, the habeas court, *Oliver*, *J.*, issued a memorandum of decision on June 18, 2021, denying the petition for a writ of habeas corpus. The court concluded that the petitioner had failed to establish deficient performance.[3] In so deciding, the court stated: "Attorney Seeger testified at the habeas trial that he advised the

[2] The petitioner also alleged in her amended petition that Seeger rendered ineffective assistance of counsel in multiple other ways and additionally alleged that her sentencing counsel, Attorneys Jason Messina and Charley Kurmay, rendered ineffective assistance. The habeas court rejected all of the petitioner's claims. On appeal, the petitioner only challenges the habeas court's rejection of her claim that Seeger provided ineffective assistance in connection with his advice regarding the immigration consequences of her *Alford* plea.

[3] The petitioner also argues that, although the court did not address the prejudice prong, this court may determine that she satisfied that prong based on the record. The respondent, the Commissioner of Correction, argues that the court implicitly determined that the petitioner did not establish prejudice and that such conclusion was proper. Because we conclude that the habeas court properly determined that Seeger had not performed

petitioner that arson in the first degree constituted an 'aggravated felony' that subjected the petitioner to deportation and removal. He testified that he told her that 'the assumption and the presumption should be that she would be deported or removed' and that he made no representation to the petitioner that anything could occur aside from her being deported for an aggravated felony conviction. Attorney Seeger further testified that he informed the petitioner that her *Alford* plea 'may or may not' have an effect on the matters considered by immigration officials, but it would not rescue her from being deported or reduce the strength of the case the immigration authorities had against her. He testified that he did not discuss the federal enforcement practices for deportation pursuant to an aggravated felony conviction beyond advising the petitioner that such a conviction would result in her deportation or removal. . . . Given the foregoing, and after a careful examination of the evidence, the court concludes that Attorney Seeger unequivocally conveyed to the petitioner that the immigration consequences of her guilty plea to an arson in the first degree charge was deportation mandated by federal law. There is no credible evidence that Attorney Seeger . . . failed to adequately advise or affirmatively misadvise[d] the petitioner about the deportation consequences of her plea agreement. The likelihood of deportation was sufficiently explained to the petitioner." Thereafter, the petitioner filed a petition for certification to appeal, which the court granted. This appeal followed.

On appeal, the petitioner claims that the court improperly concluded that she had not established that

below an objective standard of reasonableness in advising the petitioner regarding the immigration consequences of her *Alford* plea, we need not reach the petitioner's claim regarding prejudice. See *Nieves* v. *Commissioner of Correction*, 169 Conn. App. 587, 597, 152 A.3d 570 (2016), cert. denied, 324 Conn. 915, 153 A.3d 1288 (2017); id., 597 n.13 (well settled that reviewing court can find against petitioner on either ground of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Seeger was deficient in his performance for failing to advise her adequately of the immigration consequences of her *Alford* plea. Specifically, she contends that Seeger was "abundantly, bluntly clear in his immigration advice in this case—until he was not. Advice cannot be clear and unequivocal if a portion of that advice gives false hope . . . . [Seeger] . . . testified that he advised the petitioner that she should assume she would be removed as a result of her conviction . . . . Although he could not testify that he advised the petitioner that her removal was a 'certainty,' his advice otherwise was clear up to this point. However, that is when the topic of the *Alford* plea crept into the conversations between Seeger and the petitioner. By Seeger's own admission, he advised the petitioner that an *Alford* plea 'may or may not have an effect on what immigration authorities [consider].' His own words were 'may or may not.' . . . That is equivocation." (Footnotes omitted.) Alternatively, she argues that Seeger's "may or may not" advice concerned the likelihood of enforcement and negated the import of the overall immigration advice that he had conveyed.

The following legal principles and standard of review guide our analysis. "The sixth amendment to the United States constitution, made applicable to the states through the due process clause of the fourteenth amendment, affords criminal defendants the right to effective assistance of counsel. . . . Although a challenge to the facts found by the habeas court is reviewed under the clearly erroneous standard, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . It is well established that the failure to adequately advise a client regarding a plea offer from the state can form the basis for a sixth amendment claim of ineffective

assistance of counsel. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. . . . The petitioner has the burden to establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646–48, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

"A claim of ineffective assistance of counsel raised by a petitioner who faces mandatory deportation as a consequence of [her] guilty plea is analyzed more particularly under *Padilla* v. *Kentucky*, [559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)], a case in which the United States Supreme Court held that counsel must inform clients accurately as to whether a guilty plea carries a risk of deportation." (Internal quotation marks omitted.) *Olorunfunmi* v. *Commissioner of Correction*, 211 Conn. App. 291, 305, 272 A.3d 716, cert. denied, 343 Conn. 929, 281 A.3d 1186 (2022). Our Supreme Court analyzed *Padilla* under Connecticut law in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 142 A.3d 243 (2016), stating: "In *Padilla* . . . the United States Supreme Court concluded that the federal constitution's guarantee of effective assistance of counsel requires defense counsel to accurately advise a noncitizen client of the immigration consequences of a guilty plea. . . . [W]hen the immigration consequences under federal law are clearly discernable, *Padilla*

requires counsel to accurately advise his client of those consequences. . . . For some convictions, federal law calls for deportation, subject to limited exceptions. . . . In these circumstances, because the likely immigration consequences of a guilty plea are truly clear, counsel has a duty to inform his client of the deportation consequences set by federal law." (Citations omitted; internal quotation marks omitted.) Id., 511–12.

"In *Budziszewski*, our Supreme Court specifically set forth the advice criminal defense counsel must provide to a noncitizen client who is considering pleading guilty to a crime in which deportation pursuant to federal law is a consequence of a conviction." *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 10, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019). In *Budziszewski*, our Supreme Court held: "For crimes designated as aggravated felonies . . . federal law mandates deportation almost without exception. . . . We conclude that, for these types of crimes, *Padilla* requires counsel to inform the client about the deportation consequences prescribed by federal law. . . . Because noncitizen clients will have different understandings of legal concepts and the English language, there are no precise terms or one-size-fits-all phrases that counsel must use to convey this message. Rather, courts reviewing a claim that counsel did not comply with *Padilla* must carefully examine all of the advice given and the language actually used by counsel to ensure that counsel explained the consequences set out in federal law accurately and in terms the client could understand. In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading

guilty."[4] (Citations omitted.) *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507.

We first address the petitioner's challenge to the court's determination that Seeger's advice was unequivocal. She argues that, contrary to the court's determination, Seeger's advice failed to comply with the requirements of *Padilla* and *Budziszewski* because it was equivocal. In analyzing this argument, we note that it is undisputed that arson in the first degree, to which charge the petitioner pleaded guilty, constitutes an aggravated felony pursuant to 8 U.S.C. § 1101 (a) (43) and that for such crimes federal law mandates deportation.[5] Because the likely immigration consequences of her *Alford* plea were "truly clear," it was Seeger's "duty to inform his client of the deportation consequences set by federal law." (Internal quotation marks omitted.) Id., 512, citing *Padilla* v. *Kentucky*, supra, 559 U.S. 369. The following exchange, which is highlighted by the petitioner's argument, occurred between the petitioner's habeas counsel and Seeger:

"Q. Do you recall . . . your discussion of the *Alford* doctrine as it relates to immigration consequences in working with the petitioner?

"A. I indicated to her that she should assume that any—any plea to arson one would be an aggravated felony, that she would be deported. The *Alford* plea may or may not have any effect on what immigration authorities, you know, could consider but that she should—she should assume that the *Alford* plea wouldn't rescue her. It could be a layer of protection against the use of, you know, of her statements but that

[4] The petitioner does not challenge the court's decision on the ground that counsel failed to use terminology she could understand.

[5] Neither party disputes the inapplicability of the limited exceptions to deportation for aggravated felonies. See 8 U.S.C. § 1227 (a) (2) (A) (iii) (2018).

she should assume that she would be deported because of the aggravated felony."

The petitioner does not challenge the court's finding crediting Seeger's testimony but argues that Seeger's use of the words "may or may not" renders his advice equivocal as to the immigration consequences of the petitioner's *Alford* plea. Although the petitioner focuses on one phrase in Seeger's advice, we examine this claim in light of our Supreme Court's clarification of *Padilla* that reviewing courts "must carefully examine all of the advice given" to determine whether counsel "unequivocally convey[ed] to the client that federal law mandates deportation as the consequence for pleading guilty." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507.

Following the cross-examination of Seeger by counsel for the respondent, the Commissioner of Correction, the court asked Seeger to "unpack for us what you meant in your response to [the petitioner's counsel] as it related to the *Alford* plea when you said something like you told [the petitioner] that the *Alford* plea may or may not have any effect on the deportation and removal proceedings, that it would not protect her relating to the conviction but it may act as a shield against the use of her statements." Seeger responded, "my comment to her was it would not help in the deportation but that the immigration authorities are free to, sort of, treat that type of plea whichever way they wish. I did not think that they were bound, you know, to ignore the plea because it was an *Alford* plea, and that was the substance of the conversation." The court then asked: "Did you ever give any indication of any reduction in the strength of the immigration authority's case against her because of an *Alford* plea?" Seeger responded, "I did not." Although Seeger expressed uncertainty as to what effect, if any, an *Alford* plea might have on immigration authorities, he nonetheless

advised her that, despite his uncertainty, she should "assume" both that "the *Alford* plea wouldn't rescue her" and that "she would be deported" because arson in the first degree is an aggravated felony.

In addition to the one statement of Seeger on which the petitioner bases her claim, Seeger testified that he advised the petitioner that the immigration consequences of her *Alford* plea to arson in the first degree were deportation or removal. He testified that (1) he was aware of the petitioner's immigration status, (2) he was aware that arson in the first degree would be considered an aggravated felony and (3) he advised her that "a conviction for an aggravated felony would . . . result in her deportation or removal."

As correctly stated by the habeas court, Seeger "made no representation to the petitioner that anything could occur aside from her being deported for an aggravated felony conviction." Accordingly, given the foregoing, Seeger's advice to the petitioner regarding the likelihood of her deportation resulting from her plea to an aggravated felony was accurate, unequivocal, and comported with the requirements of *Padilla* and *Budziszewski*.

The petitioner contends, alternatively, that, even if Seeger's advice regarding the immigration consequences of her *Alford* plea satisfied the requirements of *Padilla*, his specific advice that her plea "may or may not have any effect on what immigration authorities, you know, could consider" cast doubt on the likelihood of enforcement and "undermined any clarity" of the immigration advice he previously had conveyed. In *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515–16, our Supreme Court held: "If counsel gave the advice required under *Padilla*, but also expressed doubt about the likelihood of enforcement,

the court must also look to the totality of the immigration advice given by counsel to determine whether counsel's enforcement advice effectively negated the import of counsel's advice required under *Padilla* about the meaning of federal law." Assuming Seeger's "may or may not" advice expressed equivocation as to the likelihood of enforcement, we conclude that that advice did not negate the import of his repeated and unequivocal advice stating that, regardless of his uncertainty as to the effect of the *Alford* plea on immigration authorities, the clear consequence of her *Alford* plea was deportation. For the foregoing reasons, we conclude that the habeas court properly concluded that Seeger did not render deficient performance in advising the petitioner of the immigration consequences of her *Alford* plea and properly rejected her claim of ineffective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.