STATE OF CONNECTICUT *v.* CHAZANTINE M. GRIFFIN (AC 45349)

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

Syllabus

Convicted of the crimes of robbery in the first degree and assault in the second degree, the defendant appealed to this court. The victim, a rideshare driver, picked up the defendant in his vehicle from a residence in Bristol, and, after the defendant entered the vehicle, the defendant yelled at the victim, grabbed his neck, punched him in the face, breaking his nose, took the victim's cell phone and ran back inside the residence. Audio recordings of the incident were captured by a dashboard camera in the victim's vehicle. The police responded to the scene and summoned B, the owner of the residence, to return home and contact the defendant. B exchanged several text messages with the defendant, which she showed to the police. After the defendant exited the residence, his arrest and transportation to the police department were recorded by a police officer's body camera. On or about June 23, 2020, approximately eleven months after his arrest, the defendant, who was then represented by counsel, sent a document, in a self-represented capacity, to the Office of the State's Attorney in New Britain titled "Motion for a Speedy Trial." On October 12, 2021, after the conclusion of jury selection in his criminal trial, the defendant filed a motion to dismiss, arguing that it was a renewal of his motion for a speedy trial. The trial court denied the defendant's motion. During trial, the state called B as a witness, but she refused to testify, invoking her fifth amendment privilege. The court noted that it did not see a fifth amendment issue and ordered B to testify. When she continued to refuse, the court held her in contempt, and she was taken into custody and was detained overnight in a state correctional facility. The following day, B agreed to testify. Following the verdict, the defendant filed a motion for a new trial on the basis that B's testimony was coerced, which the court denied. *Held*:

1. The trial court properly denied the defendant's motion to dismiss:

a. The trial court did not violate the defendant's right to a speedy trial pursuant to the applicable statute (§ 54-82m) and rule of practice (§ 43-41): the court's finding that the defendant never filed his 2020 motion for a speedy trial was not clearly erroneous, as the copy of the motion in the record was date stamped only by the Office of the State's Attorney in New Britain but was not date stamped by a courthouse clerk as having been filed, and there was no indication in the record that the defendant or any of his counsel sought to be heard on the purported 2020 motion in the fifteen months that elapsed from that alleged filing to the commencement of his trial; moreover, the defendant filed his motion to dismiss after his trial had commenced and, thus, pursuant to Practice Book § 43-41, the defendant waived any right to dismissal based on his speedy trial claim; furthermore, the defendant's claim that the motion to dismiss was not untimely because it "related back" to the motion for a speedy trial was unavailing, as the court found that the motion for a speedy trial had never been filed with the court, and, thus, there was no motion to which it could have related back.

b. The trial court did not violate the defendant's constitutional right to a speedy trial; this court applied the four factors of the balancing test set forth in *Barker* v. *Wingo* (407 U.S. 514) and determined that, although there was a delay of more than two years in the defendant's trial, the reasons for the delay, including the time period during which jury trials were suspended due to the COVID-19 pandemic and the defendant's requests for continuances, were excludable time and were not the result of the state's actions, the defendant failed to assert his right to a speedy trial, as his self-represented motion for a speedy trial was not filed with the court and was otherwise presumptively invalid as he was represented by counsel, he did not file his motion to dismiss based on his speedy trial claim until after the commencement of trial, and the defendant's ability to adequately prepare his case was not impaired because, although the defendant had been incarcerated, he did not remain incarcerated and was not incarcerated at the time of the hearing on his motion, his trial was one of the first to be held following the resumption of jury trials in the wake of the COVID-19 pandemic, and he did not make a specific argument as to how his defense was prejudiced by the passage of time.

2. This court declined to review the defendant's unpreserved evidentiary claim that the trial court erred in denying his motion for a new trial because B's testimony was coerced: at trial, the defendant objected to B's testimony on the ground that an inspector for the state improperly spoke to B while she was a sworn witness during a recess, but he did not object to her testimony as violative of his right to due process or argue that it should be excluded as coerced until after the verdict was returned; moreover, the defendant acknowledged that the court detained B to encourage her to testify, and he neither challenged the court's ruling that B had no valid fifth amendment privilege nor argued that

her detention was for the purpose of forcing her to testify in a particular or dishonest manner; furthermore, even if the admission of the testimony had been improper, any error would have been harmless, B's testimony was only of marginal benefit to the state, if at all, as her answers to the state's most pertinent questions indicated a lack of recall, and the other evidence of the defendant's guilt was strong.

3. Assuming, without deciding, that the trial court improperly limited defense counsel's cross-examination of B concerning the conditions of her confinement in the correctional facility, such error was harmless: the defendant did not claim that B was coerced into giving false testimony, and the testimony she did give was not beneficial to the state's case, as she primarily testified to a lack of recollection; moreover, the state presented ample evidence to support a finding of guilt beyond a reasonable doubt, including the victim's testimony, audio recordings from the victim's dashboard camera, testimony from the police sergeant to whom B showed her cell phone containing text messages with the defendant, and a photograph of a text message the defendant sent to B that clearly indicated the defendant was the perpetrator.
4. The defendant could not prevail on his claim that the prosecutor conducted an improper in-court voice identification of him that was unreliable and unnecessarily suggestive; footage from both the victim's dashboard camera and the police officer's body camera had been admitted into evidence as two full exhibits, and the prosecutor's comment urging the jury, as the finder of fact, to compare the voices on the two recordings did not constitute an identification of the defendant.

Argued March 20—officially released July 4, 2023

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the court, *Baldini, J.*, denied the defendant's motion to dismiss; thereafter, the case was tried to the jury before *Aurigemma, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Alexander T. Taubes, for the appellant (defendant).

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, were *Christian M. Watson*,

state's attorney, and *Robert F. Mullins*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Chazantine M. Griffin, appeals from the judgment of conviction, rendered following a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and assault in the second degree in violation of General Statutes § 53a-60 (a) (1). On appeal, the defendant claims that (1) the trial court improperly denied his motion to dismiss, in which he alleged a violation of his statutory and constitutional rights to a speedy trial, (2) the detention of a witness for the state who initially refused to testify was so coercive as to render her testimony unreliable and its use a violation of the defendant's right to due process, (3) the trial court violated his federal constitutional rights to confrontation and due process when it prevented him from cross-examining that witness concerning the circumstances of her detention, and (4) the prosecutor conducted an unreliable and unnecessarily suggestive first-time, in-court voice identification of the defendant. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant. On July 23, 2019, Sung Chon, a rideshare driver, received a notification to pick up a customer at 268 Cameron Drive in Bristol. Chon, whose vehicle was equipped with a dashboard camera, arrived at 268 Cameron Drive, and the defendant emerged from the residence at 272 Cameron Drive signaling to Chon to come to that location. After placing some of his belongings in the vehicle, the defendant returned back inside the residence. While waiting for the defendant, Chon moved the vehicle forward in the driveway in an effort to prevent the defendant from having to walk again through a swarm of flies.

The defendant, who thereafter entered Chon's vehicle, expressed his anger at Chon for having moved the vehicle and for initially having arrived at the wrong address. Chon explained what had occurred while gesticulating with his hands and fingers, but the defendant became angrier. Chon stopped the vehicle and wanted to cancel the ride, but the defendant demanded Chon continue driving because he was late. As Chon resumed driving, he dropped his Bluetooth device and stopped the vehicle to locate it. The defendant yelled at Chon, asking him, "Do you wanna get smoked today? Do you wanna get killed today? You like life?" He grabbed Chon's neck with his left hand and punched Chon with his right hand, breaking Chon's nose. When Chon tried to call 911, the defendant took Chon's cell phone and ran inside the residence at 272 Cameron Drive. Using a neighbor's phone, Chon called the police, who arrived within minutes. The police set up a perimeter around 272 Cameron Drive for eight hours to ensure that no one went inside or exited the residence. During that time, then Sergeant Lang Mussen of the Bristol Police Department contacted Deborah Bernier, the owner of 272 Cameron Drive, who, after arriving on the scene, informed Mussen that the defendant resided in the house with her. At Mussen's request, Bernier contacted the defendant via text message, but she was unable to convince the defendant to exit the house. Bernier showed those text messages to Mussen. One of the texts sent by the defendant to Bernier stated: "You know I didn't robbed nobody Asian try to do sum Kong fu shit and hit me with his phone and got hit." After obtaining a search warrant, the police breached the front door to 272 Cameron Drive and called inside, and the defendant exited the house.

Following a jury trial, the defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (1) and assault in the second degree in violation of

§ 53a-60 (a) (1) and was sentenced to a total effective sentence of seven years of incarceration followed by five years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly denied his motion to dismiss, in which he alleged a violation of his statutory and constitutional rights to a speedy trial. We are not persuaded.

"[O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 478, 964 A.2d 73 (2009). "The determination of whether a defendant has been denied his right to a speedy trial is a finding of fact, which will be reversed on appeal only if it is clearly erroneous. . . . The trial court's conclusions must stand unless they are legally and logically inconsistent with the facts." (Internal quotation marks omitted.) *State* v. *Cote*, 101 Conn. App. 527, 532, 922 A.2d 322, cert. denied, 284 Conn. 901, 931 A.2d 266 (2007).

The following additional facts and procedural history are relevant to the defendant's claim. On or about June 23, 2020, the defendant, although represented by counsel at the time, sent a handwritten document titled "Motion For A Speedy Trial" to the Office of the State's Attorney in New Britain, which was received there on June 29, 2020. Jury selection began on the defendant's criminal trial on September 21, 2021. The defendant was represented by counsel at that time. On October 12, 2021, after the conclusion of jury selection, but before the presentation of evidence, the defendant filed

a motion to dismiss in which he sought dismissal of the charges against him and argued that his constitutional right, as guaranteed by article first, § 8, of our state constitution and the sixth and fourteenth amendments to the federal constitution, and his statutory right, pursuant to General Statutes § 54-82m, to a speedy trial had been denied. The defendant argued that the October 12 motion to dismiss was a renewal of his June 23, 2020 motion for a speedy trial. The state filed an opposition titled "Motion Opposing Defendant's Motion to Dismiss."

At the October 14, 2021 hearing on the defendant's October 12, 2021 motion to dismiss, defense counsel argued, among other things, that the defendant himself, while incarcerated, had filed with the court a motion for a speedy trial. After noting that a copy was received and date stamped by the Office of the State's Attorney, defense counsel argued that it was "implausible that the defendant would have filed it with the state's attorney and not with the court," and that he believed that the court "may have unintentionally misplaced" the motion. In denying the motion, the court noted that it had not seen the motion for a speedy trial that purportedly was filed by the defendant, that it was not aware that such a motion was in the file, and that, even if the motion had been filed, it was not a proper motion because it was not adopted by any of the defendant's attorneys.[1] Furthermore, the court concluded that the October 12, 2021 motion to dismiss was untimely under Practice Book §§ 43-41 and 43-42 because it was filed after "trial had commenced . . . [j]ury selection had begun," and "an entire jury panel had already been selected . . . ."

[1] The defendant discharged three different attorneys during the proceedings in the trial court.

A

We first address the defendant's argument that the court violated his statutory right to a speedy trial pursuant to § 54-82m. "[Section] 54-82m codifies a defendant's . . . right to a speedy trial and confers on the judges of the Superior Court the authority to make such rules as they deem necessary to establish a procedure for implementing that right. Pursuant to that authority, the judges adopted Practice Book §§ 43-39 through 43-41." (Footnote omitted.) *State* v. *Hampton*, 66 Conn. App. 357, 366–67, 784 A.2d 444, cert. denied, 259 Conn. 901, 789 A.2d 992 (2001). Pursuant to § 54-82m and Practice Book § 43-41, "if the defendant's trial does not begin within twelve months from the filing of the information or from the date of his arrest, whichever is later, he may file a motion for a speedy trial. If, in the absence of good cause shown, a trial is not commenced within thirty days of the filing of a motion for speedy trial by the defendant at any time after such time limit has passed, the information shall be dismissed with prejudice, on motion of the defendant filed after the expiration of such thirty day period. . . . Commencement of a trial is defined as the commencement of the voir dire examination in jury cases . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Hargett*, 343 Conn. 604, 636–37, 275 A.3d 601 (2022). Practice Book § 43-41, however, further provides: "Failure of the defendant to file a motion to dismiss prior to the commencement of trial *shall constitute a waiver of the right to dismissal under these rules*." (Emphasis added.)

The defendant first challenges the court's factual finding that he never filed a motion for a speedy trial as required by § 54-82m and Practice Book § 43-41. Our review of the court file, which does not contain a copy of the defendant's 2020 speedy trial motion, supports the court's finding that the defendant's 2020 motion for

a speedy trial was not filed with the court. The only copy of the motion that was presented to the court, which the defendant purportedly filed himself despite being represented by counsel at the time,[2] shows that it was date stamped by the Office of the State's Attorney in New Britain but was not date stamped by a courthouse clerk as having been filed. Moreover, the record is bereft of any indication that the defendant or any of his counsel sought to be heard on the purported 2020 speedy trial motion in the fifteen months that elapsed from the alleged filing to the date at which trial was commenced. Accordingly, the court's finding that the June, 2020 motion was never filed was not clearly erroneous.

The defendant also argues that the court's conclusion that the October 12, 2021 motion to dismiss was untimely was in error because that motion related back to the June, 2020 motion for speedy trial, which was filed before voir dire commenced. There are two problems with the defendant's argument. First, as previously noted, the court's finding that the June, 2020 motion for a speedy trial was never filed was not clearly erroneous. Consequently, there was no motion to which the October 12, 2021 motion could have related back. Second, Practice Book § 43-41 explicitly provides in relevant part that the "[f]ailure of the defendant to file a motion to dismiss prior to the commencement of trial shall constitute a waiver of the right to dismissal under these rules." Even if the defendant had filed his June, 2020 motion for a speedy trial, that motion was not a motion to dismiss. The record is clear that the first and only motion to dismiss was filed by the defendant on October

[2] We note that, in *State* v. *Gibbs*, 254 Conn. 578, 758 A.2d 327 (2000), our Supreme Court emphasized that, although "a defendant either may exercise his right to be represented by counsel . . . or his right to represent himself . . . he has no constitutional right to do both at the same time." (Citations omitted; emphasis omitted.) Id., 610.

12, 2021, after his trial had commenced on September 21, 2021. Because the October 12, 2021 motion was filed after the commencement of trial, the defendant waived any right to the dismissal based on his statutory speedy trial claim. See *State* v. *Hampton*, supra, 66 Conn. App. 368 ("[t]he defendant failed to file a motion to dismiss prior to the commencement of trial and consequently is deemed to have waived his right to a dismissal"); see also Practice Book § 43-41.

B

The defendant also argues that the court violated his constitutional right to a speedy trial.[3] Resolution of the defendant's claim requires us to apply the balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which involves a consideration of the following four factors to determine whether a defendant's constitutional right to a speedy trial has been violated: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. See, e.g., *State* v. *Gaston*, 86 Conn. App. 218, 226, 860 A.2d 1253 (2004), cert. denied, 273 Conn. 901, 867 A.2d 840 (2005). This "balancing test is to be applied on a case by case basis. . . . The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into

[3] "The sixth amendment guarantee of a speedy trial is a fundamental right applicable to the states through the fourteenth amendment to the United States constitution. . . . This right also is guaranteed by the constitution of Connecticut, article first, § 8." (Citation omitted.) *State* v. *Rosario*, 118 Conn. App. 389, 397, 984 A.2d 98 (2009), cert. denied, 295 Conn. 903, 988 A.2d 879 (2010). Because the defendant has not set forth a separate analysis of his claim under the Connecticut constitution, we address his claim only under the sixth amendment to the federal constitution. See *Barros* v. *Barros*, 309 Conn. 499, 507 n.9, 72 A.3d 367 (2013) ("we will not entertain a state *constitutional* claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue" (emphasis added; internal quotation marks omitted)).

the other factors that go into the balance." (Citations omitted; internal quotation marks omitted.) Id., 226–27.

"The Connecticut rules of practice set out specific time limitations within which a criminal trial must commence. Practice Book §§ 43-39 and 43-40. Our courts have not held that any particular length of delay is presumptively prejudicial, but have stated that an extensive delay warrants an inquiry into the other factors of *Barker*." (Internal quotation marks omitted.) *State* v. *Lacks*, 58 Conn. App. 412, 417–18, 755 A.2d 254, cert. denied, 254 Conn. 919, 759 A.2d 1026 (2000). The defendant argues that the delay was more than two years. The state acknowledges in its appellate brief that courts have considered delays of a similar length to the present case as sufficient to warrant consideration of the other *Barker* factors. See *State* v. *Wall*, 40 Conn. App. 643, 652, 673 A.2d 530 ("[a]lthough no exact length of time has been established to be sufficient to presume prejudice, a delay of over two years is sufficient to cause investigation into the other factors of *Barker*"), cert. denied, 237 Conn. 924, 677 A.2d 950 (1996).

According to Practice Book § 43-39 (c), the defendant's criminal trial should have commenced within twelve months from the filing of the information or his arrest, whichever was later. The court noted that the time period during which jury trials were suspended due to the COVID-19 pandemic and the defendant's request for continuances were excludable time. See Practice Book § 43-40 (excludable time in speedy trial calculations includes period of delay resulting from granting of continuance requested by defendant and "[o]ther periods of delay occasioned by exceptional circumstances"). Although the court did not make a specific determination that the delay was presumptively prejudicial, the court nevertheless reviewed the remaining factors, and, thus, the record is adequate for us to consider the question of prejudice.

The second factor concerns the reasons for the delay of trial. "In examining the reason for the delay, we focus on whether the state was making a deliberate attempt to delay the trial in order to hamper the defense or whether there existed a valid reason . . . [that] should serve to justify appropriate delay." (Internal quotation marks omitted.) *State* v. *Rosario*, 118 Conn. App. 389, 398, 984 A.2d 98 (2009), cert. denied, 295 Conn. 903, 988 A.2d 879 (2010). The court noted that the delay is attributable to a variety of factors including that the defendant "demonstrated a dissatisfaction with three prior attorneys and has chosen to engage new counsel throughout the progression of his case," each of whom would want to seek continuances in order to obtain and review discovery, investigate the charges brought against the defendant, conduct interviews with relevant persons, and have meetings with the defendant to discuss the strength and weaknesses of the case. The court also noted that, due to the COVID-19 pandemic, directives were implemented that limited the ability to conduct jury trials. Neither reason for the delay was a result of the state's actions.

The third *Barker* factor is the defendant's assertion of his right to a speedy trial. The defendant never filed his self-represented motion for a speedy trial, and it was otherwise invalid as he was represented by counsel at the time. See, e.g., *State* v. *Gibbs*, 254 Conn. 578, 610, 758 A.2d 327 (2000). He did not assert his right to a speedy trial by way of a motion to dismiss until after the trial had commenced. This factor militates against the defendant's claim. The defendant's assertion of his right to a speedy trial after the commencement of trial, although not constituting a waiver of a constitutional claim, is afforded little weight in the *Barker* balancing test. See *State* v. *Rosario*, supra, 118 Conn. App. 400.

"The final *Barker* factor, prejudice to the defendant, is the linchpin of the speedy trial claim. . . . [U]nlike

the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself. . . . The right to a speedy trial is designed (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. . . . In *Barker* . . . the court noted that of the three interests served by the right to speedy trial, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." (Citation omitted; internal quotation marks omitted.) *State* v. *Lacks*, supra, 58 Conn. App. 419–20. The court in the present case noted that, although the defendant had been incarcerated for a period of time, he did not remain incarcerated and was not currently incarcerated at the time of the hearing. The court also stated that the defendant's case was "one of the first cases in the New Britain Judicial District to be called in for trial" following the resumption of jury trials in the wake of the COVID-19 pandemic.

The defendant argues that his "ability to confront the evidence against him was severely compromised by more than two years passing between the alleged incident in his case and the trial" because the state's evidence against him was weak and circumstantial, no evidence of identification existed, and some witnesses had their recollections refreshed. The defendant's general reliance on the passage of time, in the absence of a specific argument as to how his defense was prejudiced by the delay, is not persuasive. A claim "relying on the simple passage of time, cannot, without a more specific showing, be said to prejudice the defendant any more than the state. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be

weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof." (Internal quotation marks omitted.) *State* v. *Morrill*, 197 Conn. 507, 527–28, 498 A.2d 76 (1985). On the basis of our consideration of the four *Barker* factors, we conclude that the defendant was not denied his constitutional right to a speedy trial and that the court properly denied his motion to dismiss.

II

The defendant next claims that the detention of Bernier, a witness for the state, "was so coercive as to render her testimony unreliable and its use a violation of the defendant's due process rights." We decline to review that claim, as it was not preserved in the trial court.

The following additional facts and procedural history are relevant. When, at trial, the state questioned Bernier regarding whether she and the defendant had a close relationship, she invoked her right to remain silent under the fifth amendment. Following a colloquy outside the presence of the jury between Bernier and the court, and a recess for Bernier to consult with an attorney, Bernier continued to invoke her fifth amendment privilege. The court noted that it did not see any fifth amendment issue and ordered Bernier to answer the state's questions. Bernier refused to comply, and the court held her in contempt, noting that she could change her mind at any time and decide to testify, but, until then, she would remain in custody. She was then transported to the state correctional facility in Niantic to be held there overnight. The next morning, upon returning to court, Bernier initially refused to testify but thereafter agreed to do so following a recess to permit her to consult an attorney, a proffer by the state of the questions it intended to ask on direct examination, a second recess to permit consultation with an attorney

and her parents, and a reminder by the court that it would sentence her to one month incarceration for contempt if she continued to refuse to testify. She then testified in the presence of the jury that the defendant was not living with her on July 23, 2019, but that he had access to 272 Cameron Drive and that she did not recall showing officers any text messages between her and the defendant. Following the verdict, the defendant filed a motion for a new trial in which he argued that Bernier's testimony was obtained through coercion, and he attached an affidavit from Bernier describing the circumstances of her detention. Bernier stated in her affidavit that she was "shocked and scared" and placed in a "filthy" holding cell, and she suffered elevated blood pressure and an irregular heartbeat. The court denied the motion, reasoning that it has the power to incarcerate witnesses who do not have a valid reason for not testifying and that Bernier did not have a valid basis to assert her fifth amendment privilege.

On appeal, the defendant claims that the court erred in denying his motion for a new trial. In response, the state argues that any objection to Bernier's testimony as being coerced was not properly preserved because the defendant failed to raise such an objection during trial. We agree with the state.

At trial, the defendant did not object to Bernier's testimony on the ground that he now raises on appeal. He objected solely on the ground that the state's inspector spoke to Bernier while she was a sworn witness during a recess in which she was speaking with her attorney and her parents. The defendant never objected to Bernier's testimony as violative of his right to due process or argued that it should have been excluded as coerced. Although the defendant raised such a claim in his motion for a new trial, that is not sufficient to preserve the claim on appeal that Bernier's testimony should have been excluded. As this court reasoned in

State v. *Paris*, 63 Conn. App. 284, 294–95, 775 A.2d 994, cert. denied, 257 Conn. 909, 782 A.2d 135 (2001), "[w]e are not persuaded that evidentiary claims, not made at trial, can be preserved for appeal by raising them in a motion for a new trial after a guilty verdict. The problems inherent in allowing counsel to wait until after an adverse verdict to raise such objections to evidence are too obvious to warrant discussion." Accordingly, this claim is unpreserved, and we decline to review it. See, e.g., *State* v. *Qayyum*, 201 Conn. App. 864, 872 n.2, 242 A.3d 500 (2020), aff'd, 344 Conn. 302, 279 A.3d 172 (2022).

Furthermore, the defendant cannot obtain review of his unpreserved evidentiary claim by labeling it with a constitutional tag. See id., 872. The defendant acknowledges that the court detained Bernier to encourage her to testify, and he neither challenges the court's ruling that the witness had no valid fifth amendment privilege nor argues that Bernier's detention was for the purpose of forcing her to testify in any particular or dishonest manner. To be sure, being incarcerated is inherently coercive and Bernier's experience was not pleasant, but the defendant has not cited, nor are we aware of, any case law indicating that a court's lawful detention of a witness who refuses to testify at a defendant's trial implicates the due process rights of a defendant. "It is the duty of all good citizens when legally required to do so to testify to any facts within their knowledge affecting [the] public interest and . . . no one has a natural right to be protected in his refusal to discharge that duty. . . . Because of the importance of this obligation to the proper functioning of our judicial system, courts have the power to incarcerate witnesses who refuse to testify. E.g., General Statutes § 51-35; see also Practice Book § 1-16. Only a witness who can establish that he or she is entitled to invoke a recognized exception to the general obligation to provide testimony, such

as the existence of a valid testimonial privilege, will be excused from testifying." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Andrews*, 248 Conn. 1, 12–13, 726 A.2d 104 (1999).

Even if, however, the defendant's challenge to a nonconstitutional evidentiary ruling were preserved, a claim that the admission of Bernier's testimony constituted reversible error as a result of her having been detained in an effort to encourage her to testify is without merit. It bears repeating that the defendant does not claim that Bernier was coerced to testify untruthfully, only that she was detained in an effort to get her to simply testify. If a witness's testimony were to be rendered inadmissible simply because the witness was encouraged to testify through use of lawful detention, that would undermine the purpose of such lawful detention. Our Supreme Court in *Ullmann* v. *State*, 230 Conn. 698, 647 A.2d 324 (1994), stated that "when a witness refuses to testify there is an overwhelming necessity for empowering a court to adjudicate the contempt summarily and to impose punishment sufficiently substantial *to cause the witness to reconsider and deter such conduct by others*." (Emphasis in original; internal quotation marks omitted.) Id., 707. Accordingly, the court acted within its discretion in admitting Bernier's testimony after she had been lawfully detained in an effort to cause her to simply testify, which carries with it the duty to do so truthfully. Finally, even if the admission of the testimony had been improper, the defendant cannot prevail because, as explained in part III of this opinion, the admission of Bernier's testimony was harmless. In sum, Bernier testified to the most pertinent of the state's questions by saying that she lacked recollection, and the other evidence of the defendant's guilt was strong.

III

The defendant next claims that the trial court violated his federal constitutional rights to confrontation and

due process when it prevented him from cross-examining Bernier about the circumstances surrounding her testimony, including her detention. We are not persuaded.

The following additional facts are relevant to our analysis. On cross-examination, defense counsel asked, "Can you tell me where you spent the night last night," to which question Bernier responded, "At Niantic Correctional Institute." When further asked, "And where did you spend the night . . . before that," the state objected on relevancy grounds. After excusing the jury, the court heard arguments and ruled that defense counsel "will not inquire further as to where she spent the night . . . ." Upon resumption of cross-examination, defense counsel asked, "Do you feel under pressure to testify today," and Bernier responded, "To a degree, yes." When defense counsel asked Bernier, "[D]idn't a state inspector just speak to you and essentially threaten you," the state objected. The court stated that it had "already ruled this is not relevant. The statements she has given were truthful and how or what brought us to this point is not relevant. Do not ask any more about it . . . ."

The following legal principles are relevant. "The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . [T]o establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial. . . . Although the trial court has broad discretion in determining the admissibility of evidence and the extent of cross-examination, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment to the United States constitution. . . . The sixth amendment to the United States constitution guarantees the right

of an accused in a criminal prosecution to confront and cross-examine the witnesses against him. . . . We have held that [t]he primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying." (Citations omitted; internal quotation marks omitted.) *State* v. *Valentine*, 255 Conn. 61, 69–70, 762 A.2d 1278 (2000).

"Our standard of review of a claim that the court improperly limited the cross-examination of a witness is one of abuse of discretion. . . . The court's discretion, however, comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment [to the United States constitution]." (Citation omitted; internal quotation marks omitted.) *State* v. *Hedge*, 93 Conn. App. 693, 697, 890 A.2d 612, cert. denied, 277 Conn. 930, 896 A.2d 102 (2006). "The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gibson*, 340 Conn. 407, 421–22, 264 A.3d 83 (2021). "[I]f we conclude that the court improperly restricted the defendant's opportunity to impeach a witness for motive, interest, bias or prejudice, we then proceed with a harmless error analysis. . . .

Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) *State* v. *Fernando R.*, 103 Conn. App. 808, 819–20, 930 A.2d 78, cert. denied, 284 Conn. 936, 937 A.2d 695 (2007).

Even if we were to assume, without deciding, that the court improperly limited defense counsel's cross-examination of Bernier concerning the conditions of her confinement, we conclude that the state has established that any error was harmless beyond a reasonable doubt. The defendant does not claim that Bernier was coerced into giving false testimony. The conditions of her confinement, therefore, have no relevance. In any event, Bernier's testimony on the subject of the defendant's involvement in the attack on Chon was only of marginal benefit to the state, if at all. During the state's short direct examination of Bernier, her answers to the state's questions most pertinent to the defendant's involvement indicated a lack of recall, including that she did not remember whether she had shown her cell phone messages containing texts from the defendant to Mussen. We are hard-pressed to see the benefit of her testimony to the state's case.

Putting Bernier's testimony aside, the state presented ample evidence to support a finding of guilt beyond a reasonable doubt. Chon testified as to the events on the day in question. Specifically, he detailed that the customer exited from the residence at 272 Cameron Drive, grabbed his neck, punched his face, broke his nose, stole his phone, and ran back inside the residence and that Chon contacted and informed the police that

the rideshare customer who had attacked him was inside the residence. The audio from the video recorded by Chon's dashboard camera reveals the words spoken by the defendant during the altercation. Mussen testified that he contacted the officers on the scene and told them to monitor the perimeter of 272 Cameron Drive to make sure that no one entered or exited the residence and that he had information that the defendant was inside the residence. He further testified that he contacted Bernier, the owner of 272 Cameron Drive, who informed him that the defendant resided in the house with her, that she was asked to contact the defendant, that she texted the defendant to get him to come out of the house and that she showed Mussen her cell phone. The state submitted a photograph and video from Mussen's body camera, which were admitted as full exhibits. The photograph depicts Mussen holding Bernier's cell phone containing the text messages, and Mussen's body camera footage depicts Bernier showing him her cell phone. Mussen further testified that the perimeter around 272 Cameron Drive was maintained until a search warrant was obtained and that, after the police breached the front door and called inside, the defendant exited. Most significantly, when the defendant texted Bernier that Chon had hit him with his cell phone, that, in effect, was a clear admission that he was the perpetrator.[4] For the foregoing reasons, we conclude that, because the evidence of guilt was overwhelming, any error was harmless.

IV

The defendant last claims that the prosecutor, by asking the jury during closing argument to compare

[4] Although the state admitted as a full exhibit a photograph of the July 23, 2019 text messages between the defendant and Bernier during Bernier's testimony, it could have authenticated them through Mussen, who took the photographs. Footage from Mussen's body camera depicts Bernier handing her cell phone containing the messages to Mussen.

the audio contained in two full exhibits, conducted an unreliable and unnecessarily suggestive first-time, in-court voice identification of the defendant. We are not persuaded.

The following additional facts and procedural history are relevant. Video footage from Chon's dashboard camera was admitted as a full exhibit: it captured the street view from the front windshield of Chon's vehicle, and, although it did not capture any images of Chon's assailant, it contained audio of the words spoken inside the vehicle by Chon and the assailant before and during the attack. Video footage captured by the body camera of Officer Daniel Perkins of the Bristol Police Department was also admitted as a full exhibit. Perkins testified that the video depicts the individual who was removed from 272 Cameron Drive, whom Perkins identified as the defendant, being arrested and transported to the police department. During the video, in which the defendant is taken to the transport car, handcuffed, searched, transported and processed, he spontaneously makes several statements. During closing argument, the prosecutor commented, "You can listen to the known voice of the defendant from Officer Perkins' body camera and compare it to the voice on Chon's dash camera while you are deliberating. . . . Compare those voices while you are in deliberations in the jury room. . . . Listen to the tone of the voices. Listen to the intonation of the voices. Listen to the same phrases that are used on the dash cam in . . . Chon's car when the defendant became agitated. Compare that to the audio—the video you just saw of Officer Perkins' body camera. And when he opened up the door he asked for a glass of water, and Officer Perkins responded, 'I just got out of the car.' He wasn't happy with that response. 'Don't start. Don't start.' The same phrase that he used prior to assaulting and robbing . . . Chon's phone and causing his injuries."

In resolving this claim, it is important to note what the defendant does *not* argue. He does not argue that the court erred in admitting into evidence the footage from Perkins' body camera or Chon's dashboard camera. He does not argue that the prosecutor's comments constituted prosecutorial impropriety, nor does he cite any case law supporting such a contention. Instead, he argues that the prosecutor made an improper in-court voice identification. This argument is unpersuasive. The prosecutor did not engage in an identification of the defendant as the person whose voice can be heard on the video from Chon's dashboard camera. Rather, the prosecutor described the fully admitted evidence presented by way of Chon's dashboard camera and Perkins' body camera, which is permissible, and then invited the jury to compare the audio on those two full exhibits, which comparison is within the province of the finder of fact. See *State* v. *Ciullo*, 314 Conn. 28, 41, 100 A.3d 779 (2014) ("[i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom" (internal quotation marks omitted)); see also *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018) ("[t]he jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt" (internal quotation marks omitted)), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). The defendant has not cited any case law, and our research has not revealed any, supporting his argument that a prosecutor, by inviting the jury to compare two fully admitted exhibits, engaged in an improper in-court identification. For the foregoing reasons, we conclude that the defendant cannot prevail on the argument presented.

The judgment is affirmed.

In this opinion the other judges concurred.

KEITH PRIOLEAU *v.* NITZA AGOSTA (AC 45317)

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

Syllabus

The plaintiff father appealed to this court from the trial court's judgment awarding him and the defendant mother joint legal and physical custody of their minor child. The parties, who had never married, had exercised a voluntary, mutual custody arrangement in which the father exercised parenting time every weekend until the mother filed a child support action. The father then filed this custody application seeking, inter alia, to formalize the joint legal custody arrangement. Following the judgment, in which the court issued orders granting the father, inter alia, parenting time with the child every weekend, the mother filed a motion for clarification, articulation and reargument requesting that the court amend its orders to grant her parenting time at least one weekend per month. The court, treating the mother's motion as a motion for reconsideration, amended its orders to grant the mother parenting time one weekend each month and to grant the father additional parenting time during one weeknight of each month. *Held*:

1. The plaintiff father could not prevail on his claim that the trial court either lacked jurisdiction to grant the defendant mother's motion to reconsider the court's original judgment or abused its discretion in doing so: because the court had the inherent authority to reexamine and reconsider its original judgment, and it treated the mother's motion, timely filed within days after the court rendered judgment and seeking an alteration of the judgment solely on the basis of evidence presented at trial, as a motion for reconsideration and not for modification, it possessed the authority to alter its earlier judgment to correct what it concluded was an error; moreover, the court did not abuse its discretion in granting the mother the relief sought in her postjudgment motion as the court's conclusion that the judgment required change was reasonably supported by evidence presented at trial, including the child's more recent desire to spend time with friends on the weekends and her inability to do so when she was with the father, and the mother's lack of quality parenting time on weekdays due to her work schedule.
2. The trial court did not abuse its discretion in allocating parenting time by reducing the number of overnight stays the plaintiff father had with the child; although the court's orders reduced the number of overnight stays the father had with the child under the parties' arrangement before

the custody action by approximately eighty nights per year, the court awarded the father additional parenting time on weekdays, which he had not enjoyed before the custody action in an attempt to apportion the parties' visitation to serve the child's best interests pursuant to the applicable statute (§ 46b-56).

Argued March 1—officially released July 4, 2023

Procedural History

Application for custody as to the parties' minor child, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Klau, J.*; judgment issuing certain orders regarding custody; thereafter, the court, *Klau, J.*, granted the defendant's motion for reconsideration and amended its orders, and the plaintiff appealed to this court. *Affirmed.*

Keith Prioleau, self-represented, the appellant (plaintiff).

Kelly S. Therrien, for the appellee (defendant).

Opinion

BRIGHT, C. J. In this contested custody action, the self-represented plaintiff, Keith Prioleau, appeals from the judgment of the trial court awarding him and the defendant, Nitza Agosta, joint legal and physical custody of their minor child, Kayla. On appeal, the plaintiff claims that the court (1) lacked jurisdiction to grant the defendant's motion to reconsider the court's original judgment or abused its discretion in doing so and (2) abused its discretion in allocating parenting time between the parties.[1] We disagree and, therefore, affirm the judgment of the trial court.

[1] We note that the defendant initiated a support action against the plaintiff before the plaintiff brought the underlying custody action. See *Agosta* v. *Prioleau*, Superior Court, judicial district of Hartford, Docket No. FA-19-6119171-S. On appeal, the plaintiff claims that "this court in its plenary review should also review the impact that actual custody has on the [family support magistrate's] August 4, 2021 child support order . . . ." The plaintiff further claims that this "court should order that neither party pay child support to the other but rather keep their incurred half of child support for expenses they incur." We lack jurisdiction over the plaintiff's claims regarding the support action.

In its memorandum of decision, the court set forth the following relevant facts, which are undisputed. "The parties are parents of a daughter, [Kayla], born June, 2009. The plaintiff . . . was present at [Kayla's] birth and signed a paternity acknowledgment. He is also listed as [Kayla's] father on her birth certificate. . . . Although the parties never married, they were in a romantic relationship for eighteen years. They separated in 2013. For several years after [Kayla's] birth, the [plaintiff] was the stay-at-home parent and primary caretaker. After the relationship ended in 2013, the parties continued to be effective coparents and, as a practical matter, exercised joint legal custody. They agreed that [Kayla] would reside primarily with the defendant . . . and that the plaintiff would have parenting time every weekend from Friday after school until Monday morning.

"This voluntary, mutual arrangement worked well for the parties and [Kayla]—until October, 2019, when the [defendant] filed a child support action. The [plaintiff] responded by filing [the underlying] custody application two months later. Through the application, the [plaintiff] sought to formalize the joint legal custody arrangement and proposed a shared parenting plan in lieu of the long-standing every weekend plan.

The appellate procedure set forth in General Statutes § 46b-231 (n) (1), (2), and (6) provides that a party aggrieved by a final decision of a family support magistrate shall file a petition for appeal in the Superior Court, which will then conduct a hearing. The Superior Court may "affirm the decision of the family support magistrate . . . remand the case for further proceedings . . . [or] reverse or modify the decision" if certain conditions are met. General Statutes § 46b-231 (n) (7). Pursuant to § 46b-231 (o), the aggrieved party can only appeal to the Appellate Court after the Superior Court has made a final determination on the appeal from the decision of the family support magistrate. In the present case, because the plaintiff did not file a petition for appeal from the family support magistrate's decision in the Superior Court, we lack jurisdiction to consider his claims related to the family support magistrate's decision. Accordingly, we limit our review to the judgment of the trial court in the underlying custody action.

"In February, 2019, the court, *Connors*, *J.*, referred the parties to Family Services for a comprehensive custody evaluation. . . . [U]nfortunately, the COVID-19 pandemic caused significant disruptions in court proceedings, not to mention the parties' lives. Even so, the parties adapted. For a substantial period, while the parties stayed and/or worked from home, and [Kayla] attended school virtually, the parties followed an alternating week parenting schedule. In May, 2021, a change in the [plaintiff's] employment status—he took a job with Raytheon in Massachusetts—necessitated a change in the parenting schedule. However, the [plaintiff] pursued reassignment to Collins Aerospace in Connecticut, where he commenced working in mid-October of 2021.

"Having returned to Connecticut, the [plaintiff] wants to return to the alternating week parenting schedule. In response, the [defendant] proposes that the [plaintiff] have parenting time on alternate weekends and on two afternoons each week. Alexa Joseph, the Family Relations Counselor who conducted the comprehensive custody evaluation, proposes the same parenting schedule as the [defendant].

"A main point of contention is how the parties' respective parenting time proposals will affect [Kayla's] academic performance in school. . . . In 2018 or 2019, [Kayla] began to struggle in math and literacy. The [defendant] asked the school to schedule Student Assistance Team (SAT) meetings. There were five meetings through October, 2020, which both parties attended. Updated information shows that [Kayla] is performing well in her STEM classes and improving in literacy but struggles at times completing homework and class assignments in a timely manner. She also allows herself to be drawn into her peer's personal dramas, has experienced behavioral issues in her class, and speaks poorly about other students on social media.

"The [defendant] contends that her proposed parenting schedule will provide a more stable home situation for [Kayla], which the [defendant] believes will lead to improved school performance and lessen the behavioral issues that [Kayla] is experiencing. The [defendant] also asks the court to find that, although both parents 'have historically been and currently are significantly involved in the child's life, the [defendant] very clearly takes the lead with regard to the child's academics as well as other areas of life.'

"The court agrees with and adopts the first proposed finding, but not the second. That is, the court finds that both parents are actively engaged with [Kayla's] education and her school. Dr. Lauren Daveron, the Assistant Principal at [Kayla's] school, testified that the [plaintiff] 'has definitely been involved with [Kayla's] school,' that both parties attended SAT meetings and that the [plaintiff] has 'always been available for meetings by phone or in person.' "

After noting that it had considered the statutory factors relevant to its determination as to the best interests of Kayla; see General Statutes (Rev. to 2021) § 46b-56 (c); the court found "that the regular weekly parenting schedule the parties followed for many years before October, 2019—by mutual agreement and without the need of court intervention—is in [Kayla's] best interests. That schedule worked well for the parties and, most importantly, for [Kayla]. Indeed, although the [plaintiff] initially resisted the 'every weekend' parenting schedule when the [defendant] first proposed it, he admitted that 'he grew to love it and the relationship [it fostered] with his daughter.' But for the [defendant] filing the child support action in October, 2019, and then the COVID-19 pandemic, it is likely that the parties would have continued to follow that schedule for the foreseeable future." Accordingly, the court issued the following orders. "The parties shall share joint legal

custody of [Kayla]. . . . The [defendant] shall have primary residence. . . . Except as amended below, the [defendant's] proposed orders dated September 24, 2021 . . . are fair, just and equitable and in the best interests of [Kayla]. Subject to the following amendment, the court adopts the [defendant's] proposed orders and incorporates them by reference. . . . Paragraph two of the [defendant's] proposed orders [is] amended as follows: the [plaintiff] shall have parenting time every weekend from Friday at 6 p.m. until Sunday evening at 7 p.m." (Footnote omitted.)

Paragraph two of the defendant's proposed orders provided that "the plaintiff . . . shall have parenting time with the minor child every Tuesday and Thursday from 4 p.m. to 7 p.m. and every other Friday at 6 p.m. until Sunday at 7 p.m. The defendant . . . shall have parenting time during all other times."

The court issued its decision on January 6, 2022, and the defendant filed a "motion for clarification, articulation, and reargument, postjudgment" on that same date. The defendant amended her motion on January 11, 2022, to correct a clerical error.[2] In her motion, the defendant claimed that awarding the plaintiff parenting time during every weekend is not in the best interests of Kayla. The defendant argued that the evidence presented at trial "supported the fact that the plaintiff . . . does not allow the minor child to attend social or educational activities on the weekends she spends at his home."[3]

[2] The defendant amended her motion to comply with Practice Book § 11-11, which provides that a party filing a motion to reargue a decision that is a final judgment "shall indicate on the bottom of the first page of the motion that such motion is a Section 11-11 motion."

[3] At trial, the defendant testified that she stopped agreeing to the every weekend schedule approximately three years before the trial. The defendant explained that "Kayla has actually shown interest to do things with her friends and so, it was, you know—I would bring her, you know—I would be the one to take her to these friendly functions. And so, most times these things can't happen until the weekends and so, [the plaintiff] for the most part did not take her to any [events], you know—if [any]—a few events with her friends."

She also argued that the court's order prevents the defendant from spending quality time with the child because she works Monday through Friday each week. The defendant requested "that the court grant [the] motion and amend its orders dated January 6, 2022, such that the defendant . . . be allowed to have parenting time at least one weekend per month (specifically the third weekend) with the minor child."

On February 2, 2022, the plaintiff, who was represented by counsel before the trial court, filed an objection to the defendant's motion. In his objection, the plaintiff argued that the defendant was not seeking a clarification or an articulation of the court's judgment and, instead, was "requesting a modification of the January 6, 2022 order." Therefore, according to the plaintiff, "[t]he appropriate procedural vehicle to modify an existing order is a motion for modification—not a motion for articulation." The plaintiff also argued that the defendant's request for reargument should be denied because she failed to establish "that the court either overlooked controlling law or misconstrued the factual evidence before it."

On February 8, 2022, the court issued an order denying the defendant's motion insofar as it sought clarification and articulation of the original judgment. The court, however, treated the defendant's motion to reargue as a motion for reconsideration; see *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 74, 256 A.3d 684 ("[m]otions for reargument and motions for reconsideration are nearly identical in purpose"), cert. denied, 339 Conn. 909, 261 A.3d 744 (2021); see also *State* v. *Taylor*, 91 Conn. App. 788, 791–92, 882 A.2d 682 ("a motion is to be decided on the basis of the substance of the relief sought rather than on the form or the label affixed to the motion"), cert. denied, 276 Conn. 928, 889 A.2d 819 (2005); and ordered: "Upon reconsideration, the court determines that it is in the

best interests of the minor child to amend the parenting schedule as follows: The defendant . . . shall have the child on the third weekend of each month, from after school on Friday until the start of school on Monday morning. During the fourth week of each month, the plaintiff . . . shall have parenting time with the child one afternoon during the week, from after school until 7 p.m. If the parties are unable to agree on the day of the week, the [plaintiff] shall have the child on Wednesdays after school until 7 p.m. In all other respects, the court's January 6, 2022 orders remain unchanged.'' This appeal followed.

As a preliminary matter, we note that, during oral argument before this court, the parties initially disagreed as to the effect of the court's amendment to the defendant's proposed parenting time order. Ultimately, the plaintiff agreed with the defendant's counsel, who explained that, pursuant to the court's January 6, 2022 decision, because the court amended but did not replace paragraph two of her proposed order, the plaintiff was entitled to parenting time (1) every weekend from Friday at 6 p.m. until Sunday at 7 p.m. and (2) every Tuesday and Thursday from 4 p.m. until 7 p.m. The parties also agreed that, pursuant to the court's February 8, 2022 order, the plaintiff is entitled to parenting time (1) three weekends each month from Friday at 6 p.m. until Sunday at 7 p.m., (2) every Tuesday and Thursday afternoon from 4 p.m. until 7 p.m., and (3) one additional weekday afternoon in the fourth week of each month from after school until 7 p.m. With this point clarified, we turn to the plaintiff's claims on appeal.

I

The plaintiff first claims that the court lacked jurisdiction to modify the judgment and, in the alternative, that the court abused its discretion in doing so. We disagree.

We begin with the applicable standard of review. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Swanson* v. *Perez-Swanson*, 206 Conn. App. 266, 272, 259 A.3d 39 (2021). "The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Fain* v. *Benak*, 205 Conn. App. 734, 746, 258 A.3d 112 (2021), appeal dismissed, 345 Conn. 912, 283 A.3d 980 (2022); see also *Novak* v. *Levin*, 287 Conn. 71, 78, 951 A.2d 514 (2008) ("Whether a court retains continuing jurisdiction over a case is a question of law subject to plenary review. . . . Whether a court properly exercised that authority, however, is a separate inquiry that is subject to review only for an abuse of discretion." (Internal quotation marks omitted.)).

A

The plaintiff claims that the court lacked jurisdiction to modify the judgment in response to the defendant's postjudgment motion because "[t]he defendant never completed and submitted a form JD-FM-174 Motion for Modification which requires special questions to be answered by the moving party to establish material change and a payment of fees." According to the plaintiff, the defendant was required to file a motion to modify the court's custody order pursuant to § 46b-56.[4] The

[4] "[Section] 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award must be based upon either a material change [in] circumstances which alters the court's finding of the best interests of the child

defendant responds that the "court had the absolute discretion to reexamine and reconsider the original [judgment] and come to a different conclusion." We agree with the defendant.

As an initial matter, we note "the distinction between a trial court's jurisdiction and its authority to act under a particular statute. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999). Although the plaintiff states his claim in terms of the court's jurisdiction, he does not challenge the court's " 'competence to entertain the action before it' "; id., 728; but, rather, the court's authority to modify its original judgment. Indeed, there is no question that the court had jurisdiction over the custody action. See General Statutes § 46b-1 (a) ("[m]atters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving . . . (8) . . . proceedings to determine the custody and visitation of children"); General Statutes § 46b-56 (a) ("[i]n

. . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall consider the best interests of the child and in doing so may consider several factors. . . . Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child. . . . These requirements are based on the interest in finality of judgments . . . and the family's need for stability. . . . The burden of proving a change to be in the best interest of the child rests on the party seeking the change." (Footnotes omitted; internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 511–12, 146 A.3d 26 (2016).

any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the [Uniform Child Custody Jurisdiction and Enforcement Act]"). Thus, "[c]onsistent with our policy of leniency to self-represented litigants"; *Budlong & Budlong, LLC* v. *Zakko*, 213 Conn. App. 697, 712 n.13, 278 A.3d 1122 (2022); we construe the plaintiff's argument as challenging the court's authority to reconsider its judgment.[5]

With respect to a court's authority to reconsider and modify its judgment, our Supreme Court has explained that, "[n]otwithstanding the absence of a rule or statute, it is the inherent authority of every court, as long as it retains jurisdiction, to reconsider a prior ruling. . . . If a court is not convinced that its initial ruling is correct, then in the interests of justice it should reconsider the order, provided it retains jurisdiction over the subject matter and the parties." (Citations omitted.) *Steele* v. *Stonington*, 225 Conn. 217, 219 n.4, 622 A.2d 551 (1993). Likewise, "courts have the inherent authority to open, correct or modify judgments, but this authority is restricted by statute and the rules of practice." (Internal quotation marks omitted.) *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 541, 37 A.3d 766 (2012).

Practice Book § 11-11 provides in relevant part: "[A]ny motions which, pursuant to Section 63-1, would toll the appeal period and cause it to begin again, shall be filed simultaneously . . . and shall be considered by the judge who rendered the underlying judgment or

[5] Indeed, as our Supreme Court has recognized, "the distinction between challenges to the trial court's subject matter jurisdiction and challenges to the exercise of its statutory authority is not always clear and sometimes has proven illusory in practice." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 466, 239 A.3d 272 (2020).

decision. . . . The foregoing applies to motions to reargue decisions that are final judgments for purposes of appeal . . . .” Practice Book § 63-1 (c) (1) provides in relevant part: “If a motion is filed within the appeal period that, if granted, would render the judgment . . . ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . . Motions that, if granted, would render a judgment . . . ineffective include . . . motions that seek . . . reargument of the judgment . . . or any alteration of the terms of the judgment.”

In addition, it is well settled that a civil judgment of the Superior Court may be opened if a motion to open or set aside is filed within the statutory four month period. A motion to open a judgment is governed by General Statutes § 52-212a and Practice Book § 17-4. Section 52-212a provides in relevant part: “Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. . . .” Practice Book § 17-4 states essentially the same rule.

“The provisions of § 52-212a do not operate to strip the court of its jurisdiction over its judgments, but merely operate to limit the time period in which a court may exercise its substantive authority to adjudicate the merits of a case.” *Bridgeport* v. *Triple 9 of Broad Street, Inc.*, 87 Conn. App. 735, 744, 867 A.2d 851 (2005). “A court has broad discretion to treat a motion for clarification of a judgment or a motion to reargue a judgment as a motion to open and modify the judgment provided that the motion is filed within the four month period and the substance of the motion and the relief requested

therein is sufficient to apprise the nonmovant of the purpose of the motion." *Von Kohorn* v. *Von Kohorn*, 132 Conn. App. 709, 714–15, 33 A.3d 809 (2011).

Thus, under the rules of practice, courts have "continuing authority to adjudicate any properly filed motions to reargue, reconsider or open the judgment that is the subject of the appeal; see Practice Book § 11-11; irrespective of the possibility that the trial court's action on such a motion potentially could render [an] appeal moot." *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 762 n.8, 286 A.3d 467 (2022); see also *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 578, 910 A.2d 235 (2006) ("[w]hether denominated as a motion for reargument or reconsideration, the motion filed by the plaintiff was a proper vehicle for the court to exercise its equitable discretion to reexamine its decision"). The court's authority in this regard "is consistent with the rule that the filing of a motion that seeks an *alteration*, rather than a clarification, of the judgment suspends the appeal period." (Emphasis added.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 699, 882 A.2d 53 (2005).

Nevertheless, a trial court's authority to alter its judgment through reconsideration or reargument is not absolute. In *Jaser* v. *Jaser*, 37 Conn. App. 194, 655 A.2d 790 (1995), this court considered whether the trial court, in response to the defendant's "motion for reargument, reconsideration and to set aside judgment," improperly modified its judgment as to child support and alimony. Id., 200. Similar to the plaintiff's argument in the present case, the plaintiff in *Jaser* argued that, before the court could modify its judgment, it needed to determine, pursuant to General Statutes § 46b-86, whether there was a substantial change in circumstances that would warrant a modification. Id., 201. The defendant in *Jaser* argued that such a showing was not necessary because he only sought reconsideration, and not modification,

of the judgment. This court held that resolution of the issue did not turn on the title of the defendant's motion. "Regardless of how the defendant characterizes his motion, we must examine the practical effect of the trial court's ruling in order to determine its nature. Only then can we determine whether the ruling was proper. . . . A modification is defined as [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. Black's Law Dictionary (6th Ed. 1990) [p. 1004].

"Conversely, the purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . A reconsideration implies reexamination and possibly a different decision by the [court] which initially decided it. . . . While a modification hearing entails the presentation of evidence of a substantial change in circumstances, a reconsideration hearing involves consideration of the trial evidence in light of outside factors such as new law, a miscalculation or a misapplication of the law. To set aside means [t]o reverse, vacate, cancel, annul, or revoke a judgement . . . . Black's Law Dictionary (6th Ed. 1990) [p. 1372]." (Citations omitted; internal quotation marks omitted.) *Jaser* v. *Jaser*, supra, 37 Conn. App. 202–203. In *Jaser*, this court concluded that the trial court improperly modified the judgment without making the necessary finding of a substantial change in circumstances. Id., 204. In reaching this conclusion, the court noted that the trial court treated the defendant's motion as a motion to modify and that the parties did not "bring to the attention of the court that what was sought was other than a modification of the judgment." Id. Furthermore, in support of his motion,

the defendant relied on events that had transpired after the court had rendered judgment. Id., 203 n.10.

Applying our reasoning in *Jaser* to the present case, we review the defendant's motion and the parties' and court's treatment of it to determine whether it properly is considered a motion for reconsideration or a motion for modification governed by § 46b-56. The defendant filed the motion within days after the court rendered judgment, pursuant to Practice Book § 11-11, seeking an alteration of the judgment. In her motion, the defendant highlighted certain facts presented at trial in support of her request that the court amend its parenting time order to allow the defendant to have parenting time on the third weekend of each month. Thus, the defendant requested that the court reconsider the judgment solely on the basis of the evidence presented at trial. See *Wasson* v. *Wasson*, 91 Conn. App. 149, 161, 881 A.2d 356 ("reconsideration implies reexamination and possibly a different decision by the [court] which initially decided it" (internal quotation marks omitted)), cert. denied, 276 Conn. 932, 890 A.2d 574 (2005). In turn, the court did not consider new evidence when ruling on the defendant's motion but instead concluded, in light of the evidence that it had previously heard, that its January 6, 2022 judgment was incorrect. In fact, the court's ruling made clear that, "[u]pon reconsideration, the court determines that it is in the best interests of the minor child to amend the parenting schedule . . . ." Thus, unlike in *Jaser*, the court in the present case treated the defendant's motion as a motion for reconsideration and not as a motion for modification. We conclude that the court's treatment of the motion as such was proper. Thus, it possessed the authority to alter its earlier judgment to correct what it concluded was an error.

Consequently, because the court acted pursuant to its "inherent authority to open, correct or modify judgments"; (internal quotation marks omitted) *TD Banknorth,*

N.A. v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 133 Conn. App. 541; which is distinct from its statutory authority to modify a visitation order pursuant to § 46b-56, the requirements for granting a motion for modification simply do not apply in these circumstances. See, e.g., *Bridgeport* v. *Triple 9 of Broad Street, Inc.*, supra, 87 Conn. App. 744 ("[g]iven the relief requested by [the defendant] in its postjudgment motion, and in light of the court's continuing jurisdiction over its judgments and its authority to act substantively to open its judgments within four months of rendition, the court in this instance had the authority to treat [the defendant's] postjudgment pleading as a motion to open the judgment"); see also *Fitzsimons* v. *Fitzsimons*, 116 Conn. App. 449, 455, 975 A.2d 729 (2009) (concluding that, because motion to reargue was filed within four month period as required under § 52-212a, "the [trial] court was vested with the discretion to modify its property division").

B

The plaintiff also claims that the court abused its discretion in granting the defendant's motion because the court "was never provided with any new evidence to analyze, there was never any hearing, no discovery, no nothing given by the defendant, so the trial court's [granting of] reconsideration is not reasonable nor based in new material factual evidence or circumstances." The defendant responds that the court was not required to hold a hearing on the motion or receive evidence of a material change in circumstances. She argues that "the court . . . could have found . . . that it overlooked the best interests standard or misapprehended the facts of the case when it originally granted the plaintiff father parenting time during all of the child's free time on the weekends." We agree with the defendant.

"It is well settled that a motion for reconsideration is intended to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts." (Internal quotation marks omitted.) *In re Elianah T.-T.*, 327 Conn. 912, 913–14, 171 A.3d 447 (2017); see also *Steele* v. *Stonington*, supra, 225 Conn. 219 n.4 ("[i]f a court is not convinced that its initial ruling is correct, then in the interests of justice it should reconsider the order, provided it retains jurisdiction over the subject matter and the parties"). Moreover, "a court is not required to hold a hearing upon granting a motion to reargue a decision that is a final judgment because such motions are governed by Practice Book § 11-11." *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 715 n.11, 284 A.3d 341 (2022); see also *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 536, 253 A.3d 1033 (2021) ("[section] 11-11 do[es] not require the court to schedule a hearing upon granting a movant's motion to reargue").

As previously noted, in the present case, the defendant neither sought to present new evidence nor claimed that there was a change in circumstances. Instead, she requested that the court modify its parenting time order on the basis of the evidence presented at trial. Given that the defendant had previously testified about Kayla's more recent desire to socialize with friends and her inability to do so when she spends the weekend with the plaintiff; see footnote 3 of this opinion; the court reasonably could have concluded, upon reconsideration of the evidence, that it was in Kayla's best interests to spend one weekend each month with the defendant to allow for more socializing with her friends. The court also may have concluded further that it had initially overlooked the defendant's testimony regarding her work schedule in assessing the

practical effect of its parenting time order and, upon reconsideration, found the defendant's arguments persuasive on this point. See *Beeman* v. *Stratford*, 157 Conn. App. 528, 540, 116 A.3d 855 (2015) ("[i]f a court believes that it has made a mistake, there is little reason, in the absence of compelling circumstances to the contrary, to stick slavishly to a mistake"). In other words, the court reasonably could have concluded, on the basis of the evidence presented at trial, that a change to the judgment was required. Moreover, the court recognized that the plaintiff would have less parenting time due to its decision to grant the defendant's requested relief and attempted to offset some of that lost time by providing the plaintiff with additional parenting time during the fourth week of each month. Consequently, because the court's order is supported by the evidence in the record, we conclude that the court did not abuse its discretion in granting the defendant the relief sought in her postjudgment motion.

II

Finally, the plaintiff claims that the court abused its discretion in allocating parenting time by reducing the number of overnight stays he has with Kayla. We are not persuaded.

"We utilize an abuse of discretion standard in reviewing orders regarding custody and visitation rights . . . . Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *R. A.* v. *R. A.*, 209 Conn. App. 327, 334, 268 A.3d 685 (2021).

In support of his claim, the plaintiff notes that the court, by ordering that he will have Kayla on weekends until Sunday evening rather than Monday morning, reduced the number of his overnight stays from nearly 180 each year under the parties' arrangement before

the custody action to approximately 100 each year going forward. The plaintiff further notes that one study has shown that "the quality of [a father's] relationship [is] linked incrementally to how much overnight time the father and child or children spend together." To be sure, the court's order has the effect of reducing the number of nights that Kayla sleeps at the plaintiff's home. Nevertheless, the court also awarded the plaintiff additional parenting time on weekdays, time which he had not enjoyed before the custody action. Thus, the court increased his parenting time during the week despite reducing the number of overnight stays the plaintiff has with Kayla. The court determined, pursuant to § 46b-56, that it was in Kayla's best interests to allow both parents to enjoy roughly equal amounts of parenting time with Kayla and attempted to apportion the parties' visitation accordingly. Consequently, although we understand the plaintiff's dissatisfaction with the reduction of the number of overnight stays, we cannot conclude that the court's attempt to balance the parties' competing desires for quality time with their child constitutes an abuse of its broad discretion.[6]

[6] The plaintiff also asserts that "courts need to establish a means test by which dads who really want to parent their child or children can do so as an equal time sharing arrangement with the mothers. . . . A parent wanting anything other than 50/50 parenting time should have to prove by clear and convincing evidence that the other parent's exercise of parenting time would seriously endanger the child's physical, mental, moral, or emotional health. . . . Furthermore, courts should establish a legal presumption of equal parenting time in all cases. Judges should presume that every parent should have exactly equal parenting time, regardless of the facts and circumstances of their case, when no abuse is involved." (Internal quotation marks omitted.) The legislature has spoken as to the burdens and presumptions in custody and visitation matters. See General Statutes § 46b-56 (b) ("[i]n making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests"); General Statutes § 46b-56a (b) ("There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing

The judgment is affirmed.

In this opinion the other judges concurred.

HAYDUSKY'S APPEAL FROM PROBATE*
(AC 44507)

Alvord, Clark and DiPentima, Js.

Syllabus

Pursuant to statute (§ 45a-186 (b)), "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. An appeal . . . shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree . . . by mail . . . ."

The plaintiff appealed to the Superior Court from the Probate Court's order overruling her objection to the retention of D Co., a law firm, by the administrator of the estate of her mother. The plaintiff alleged in her objection that a conflict of interest existed because she previously had consulted with D Co., seeking its representation in the matter. On September 27, 2019, the Probate Court overruled the objection, and, on October 16, 2019, the plaintiff filed an application for reconsideration, which the Probate Court denied on November 21, 2019. On December 16, 2019, the plaintiff appealed to the Superior Court, asserting that she was appealing from both the Probate Court's order overruling her objection and its order denying her application for reconsideration. The Superior Court granted the defendants' motion to dismiss the appeal, concluding, inter alia, that it lacked subject matter jurisdiction because the appeal from the order overruling her objection was not filed with the thirty day time period set forth in § 45a-186 (b). From the judgment rendered thereon, the plaintiff appealed to this court. *Held* that the

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for the purpose of determining the custody of the minor child or children of the marriage. If the court declines to enter an order awarding joint custody pursuant to this subsection, the court shall state in its decision the reasons for denial of an award of joint custody."). Therefore, "the primary responsibility for formulating public policy must remain with the legislature." (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 659, 224 A.3d 147 (2020).

* In the Superior Court, the case was captioned *Marianne Haydusky* v. *Estate of Audrey L. Hayducky*. The caption of the case that appears here conforms to the convention our appellate courts use for appeals from probate. See, e.g., *Garrett's Appeal from Probate*, 237 Conn. 233, 676 A.2d 394 (1996); *Haydusky's Appeal from Probate*, 201 Conn. App. 746, 242 A.3d 531 (2020), cert. denied, 336 Conn. 915, 245 A.3d 424 (2021).

Superior Court properly determined that it lacked subject matter jurisdiction over the plaintiff's appeal from the Probate Court's order overruling her objection to the retention of D Co. by the administrator of the estate: although the plaintiff claimed she was appealing from the Probate Court's denial of her application for reconsideration, none of the plaintiff's allegations challenged the Probate Court's findings with respect to the four statutory grounds (§ 45a-128 (b)) applicable to an application for reconsideration, rather, the plaintiff's allegations were limited to the order overruling her objection to D Co.'s representation of the estate and, accordingly, although the plaintiff's appeal from the order denying her application for reconsideration would have been timely had she challenged the merits of the Probate Court's denial of her application, this court concluded that, on appeal to the Superior Court, the plaintiff solely challenged the Probate Court's order overruling her objection; moreover, the Superior Court properly dismissed the plaintiff's appeal from the Probate Court's order overruling her objection for lack of subject matter jurisdiction because, contrary to her claim, the thirty day appeal period pursuant to § 45a-186 (b) was not tolled by her application for reconsideration, and, thus, the plaintiff failed to timely appeal from the Probate Court's order overruling her objection.

Argued April 26—officially released July 4, 2023

Procedural History

Appeal from the decision of the Probate Court for the district of Milford-Orange overruling the plaintiff's objection to the retention of a certain law firm by the administrator of the estate of the plaintiff's mother, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Marianne Haydusky, self-represented, the appellant (plaintiff).

John-Henry M. Steele, for the appellees (defendants).

Opinion

ALVORD, J. The self-represented plaintiff, Marianne Haydusky, appeals from the judgment of the Superior

Court granting the defendants'[1] motion to dismiss, for lack of subject matter jurisdiction, her appeal from an order of the Probate Court.[2] We affirm the judgment of the Superior Court.

The following procedural history is relevant to our resolution of this appeal. The parties have engaged in extensive litigation before the Probate Court, the Superior Court, and our appellate courts on an array of issues concerning the admission to probate of the will of the decedent, Audrey L. Hayducky, and the distribution of her estate.[3] See *Haydusky's Appeal from Probate*, 201 Conn. App. 746, 242 A.3d 531 (2020), cert. denied, 336 Conn. 915, 245 A.3d 424 (2021); *Garces* v. *Haydusky*, Superior Court, judicial district of New Haven, Docket No. CV-20-6012595-S (June 1, 2022), appeal dismissed, Connecticut Appellate Court, Docket No. AC 45031 (November 15, 2022), cert. denied, 346 Conn. 918, 290 A.3d 800 (2023).

On July 17, 2019, the plaintiff filed with the Probate Court an objection to the retention of the law firm Dey Smith Steele, LLC (firm), by Garces on behalf of the estate of Audrey L. Hayducky (estate). In her objection,

[1] The following individuals were served with the appeal to the Superior Court: Daisy P. Garces, as administrator of the estate of Audrey L. Hayducky; Joanne Hayducky; the Probate Court for the district of Milford-Orange, via court clerk Christina Bianchi; Attorney Winthrop S. Smith; Audrey M. Stella; Karen Primavera; Reyne Maturo; and Attorney Ann McCarthy.

The Probate Court, Bianchi, Maturo, and McCarthy were nonappearing defendants before the Superior Court. Joanne Hayducky, Stella, and Primavera are not participating in this appeal. Accordingly, we refer in this opinion to Garces, as administrator of the estate of Audrey L. Hayducky, and Attorney Smith collectively as the defendants.

[2] The plaintiff's appellate brief also raises myriad other claims. Because we conclude that the Superior Court properly determined that it lacked subject matter jurisdiction over the plaintiff's appeal, we need not consider these claims.

[3] Although the plaintiff spells her last name slightly differently from the decedent's, she is the daughter of the decedent. See *Garces* v. *Haydusky*, supra, Superior Court, Docket No. CV-20-6012595-S.

the plaintiff alleged that a conflict of interest existed in that she previously had consulted with the firm seeking their "represent[ation] . . . in this matter." (Emphasis omitted.) She further claimed that she "had multiple telephone conferences and in person meetings with this firm"; that she "shared with Attorney [Winthrop] Smith, who then brought in Attorney John-Henry M. Steele for further consultation (the attorney who signed the retainer agreement with Attorney Garces), private, confidential facts of the case which would create a conflict that would give the defendants an unfair and seemingly unethical advantage in this case"; and that the "firm's attorneys [had] already interviewed [her] key witness in this case." (Emphasis omitted.)

On August 20, 2019, the Probate Court held a hearing on the plaintiff's objection. On September 27, 2019, the Probate Court issued an order overruling the objection. In support of its decision, the court stated that "[n]o other party objects to the firm . . . representing the estate in the appeal. Having heard argument and testimony by parties and counsel, the court finds no conflict of interest." Pursuant to the Probate Court Rules of Procedure; see Probate Court Rules § 8.2;[4] the clerk of the Milford-Orange Probate Court certified that a copy of the order overruling the plaintiff's objection was

[4] Section 8.1 of the Probate Court Rules provides in relevant part: "Unless otherwise provided by law or these rules, the court shall . . . (2) give notice of each hearing or conference in the manner provided in sections 8.2 through 8.9."

Section 8.2 (a) of the Probate Court Rules provides in relevant part: "The court shall give notice under section 8.1 to each: (1) party; (2) attorney of record; (3) fiduciary for a party . . . and (4) other person required by law."

Section 8.10 (a) of the Probate Court Rules provides in relevant part: "The court shall send a copy of each decree to each person entitled to notice under section 8.2, free of charge, by transmitting: (1) a digital image of the decree to each registered filer . . . ." Moreover, § 8.10 (d) provides that "[t]he court shall certify the date the decree was sent and the persons to whom the decree was sent. The court shall send the certification together with the decree."

mailed to all of the required parties, including the plaintiff, on September 30, 2019.

On October 16, 2019, the plaintiff filed an application for reconsideration of the Probate Court's order overruling her objection. Therein, the plaintiff argued, inter alia, that she was "denied her right to a fair trial," "the judge has given the defendants a completely unfair advantage in the case," she "was denied her legal right to admit her evidence, evidence which would have unequivocally proven her case," and "[t]he order represents a prejudicial decision by the judge . . . [and] shows a clear and obvious bias on the part of the judge." (Emphasis omitted.) Additionally, the plaintiff asserted that she "also reiterates all of her arguments contained in her original objection," i.e., in support of her contention that a conflict of interest exists. Several of the defendants objected to the plaintiff's application for reconsideration.[5]

The Probate Court held a hearing on the plaintiff's application for reconsideration on November 21, 2019. Later that same day, the Probate Court issued an order denying the plaintiff's application. In its order, the Probate Court set forth the applicable law governing its authority to reconsider, modify, or revoke a Probate Court order pursuant to General Statutes § 45a-128. Additionally, the Probate Court noted that the plaintiff's application for reconsideration was timely filed.

In its order denying the plaintiff's application for reconsideration, the Probate Court stated that, pursuant to § 45a-128 (b), "the court finds that there is no authority to reconsider the subject decree." The Probate Court elaborated on its finding by addressing each of the four statutory considerations as follows: "First, the court

[5] The record reflects that Garces, Joanne Hayducky, Primavera, and Stella objected to the plaintiff's application for reconsideration. See footnote 1 of this opinion.

may reconsider a decree 'if all parties in interest consent to reconsideration, modification or revocation . . . .' General Statutes § 45a-128 (b) (1). Other than the movant herself, all parties object to reconsideration and, therefore, there is no requisite consent to the motion. Second, the court may reconsider a decree 'for failure to provide legal notice to a party entitled to notice under law . . . .' General Statutes § 45a-128 (b) (2). Not only did the movant not allege that there was such a failure of legal notice, the court finds that all parties entitled to notice of that earlier proceeding were in fact provided such notice. Third, there is no assertion [of] nor does the decree on its face set forth any scrivener's or clerical error. General Statutes § 45a-128 (b) (3). Accordingly, there is no authority to reconsider on this basis provided in the statute. And finally, the fourth basis by which the court may reconsider this decree is 'upon discovery or identification of parties in interest unknown to the court at the time of the order or decree.' General Statutes § 45a-128 (b) (4). There is no assertion that new parties to the matter have been identified or discovered nor does the court find that such is the case here. The court finds that all the heirs, all counsel of record and all persons entitled to notice have been identified and were provided notice as required.

"If a decree has been issued after proper notice, it may not thereafter be set aside or modified by the Probate Court except upon express statutory authority." In addition, the Probate Court stated that "[t]he [plaintiff's] concerns here go directly to the substance of the court's decree. The proper vehicle by which a party may assert error by the court is to appeal the decree as provided by General Statutes § 45a-186."[6] Pursuant to § 8.2 of the Probate Court Rules, the clerk

[6] Although § 45a-186 was the subject of technical amendments in 2021 and 2022; see Public Acts 2021, No. 21-40, §§ 42, 43; Public Acts 2021, No. 21-100, § 9; Public Acts 2022, No. 22-112, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

certified that a copy of the Probate Court's order denying the plaintiff's application for reconsideration was mailed to all the required parties, including the plaintiff, on November 21, 2019. See footnote 4 of this opinion.

On December 16, 2019, the plaintiff filed a complaint in the Superior Court in which she asserted that she was appealing from the Probate Court's order overruling her objection, dated September 27, 2019, and its order denying her application for reconsideration, dated November 21, 2019. In her complaint, the plaintiff asserted that she "reiterates all of her arguments contained in her original objection dated July 17, 2019 . . . and . . . in [her] [application] for reconsideration dated October 16, 2019 . . . ." (Citations omitted.) The plaintiff specifically challenged the Probate Court's finding, in support of its order overruling her objection, that "[n]o other party objects to the firm . . . representing the estate in the appeal," and asserted that "the judge's logic here is without merit, reason or thought" because "[e]very other party in the case stands to be the very lucky beneficiaries of the conflict of interest which exists by the hiring of this firm." Additionally, she asserted that the Probate Court failed to admit the plaintiff's evidence at the hearing, to consider the evidence, to hear the testimony of the key witness in the matter, and to weigh the facts properly. Moreover, the plaintiff asserted that the Probate Court erred in making "a clearly prejudicial decision based on an obvious bias against the plaintiff" and "based on perjury . . . ." In conclusion, she asserted that "the Probate Court decision to overrule the objection of the plaintiff to the retaining of the firm . . . to represent the estate in the pending appellate appeal/motion to remove the law firm . . . from this case as a serious conflict of interest exists and the court's decision to deny the [application] for reconsideration by [the plaintiff] is erroneous and is hereby appealed."

On February 5, 2020, the defendants filed a motion to dismiss the plaintiff's appeal and a memorandum in support thereof. They argued, inter alia, that the Superior Court lacked subject matter jurisdiction over the plaintiff's appeal because (1) the plaintiff's appeal from the Probate Court's order overruling the plaintiff's objection was untimely and (2) the plaintiff's appeal from the denial of her application for reconsideration does not present any justiciable issues. In support of their contention that the appeal from the order overruling the plaintiff's objection was untimely, they noted that the order was mailed to the plaintiff on September 30, 2019, and, pursuant to § 45a-186 (b), the plaintiff "had until October 30, 2019, to appeal this decision. . . . Yet, the instant appeal was not taken until December, 2019 . . . ." (Citation omitted.) In support of their contention that the plaintiff's appeal from the Probate Court's denial of the plaintiff's application for reconsideration is not justiciable, they argued, inter alia, that, "on appeal, the plaintiff's complaint fails to allege any facts which, if true, would permit this court to reverse the Probate Court's ruling. . . . As a result, there is no actual controversy here with respect to the [application] to reconsider."

On March 3, 2020, the plaintiff filed an objection to the defendants' motion to dismiss her appeal and a memorandum in support thereof. In her objection, she asserted, inter alia, that the appeal was not untimely because "[t]he decision of the Probate Court is dated November 21, 2019 . . . . The current appeal was filed on December 10, 2019, within thirty days and was filed pursuant to the instruction of the probate judge in her decision (dated November 21, 2019)." Additionally, she argued that pursuant to § 45a-128 (a), "the [application] for reconsideration 'shall be made or filed before any appeal' . . . [and, here] the [application] for reconsideration was filed before any appeal."

On January 4, 2021, the Superior Court held a hearing on the defendants' motion to dismiss. The defendants' counsel reiterated their arguments, as set forth in their memorandum in support of their motion to dismiss, that the Superior Court lacked subject matter jurisdiction. Additionally, the court asked the defendants' counsel whether the application for reconsideration tolled the time period for filing the appeal, to which he responded, "[n]o, there is no statutory basis for it." In support of her argument, the plaintiff reiterated, inter alia, that she "followed the exact instruction of the probate judge in her decision, which was dated November 21. So, the application for reconsideration was filed before the appeal, the appeal being the next step in the legal process." Following the parties' arguments, the court stated that it was "going to take the papers on this and read everything, and then . . . make a decision."

Later that same day, the Superior Court issued a written order granting the defendants' motion to dismiss. The Superior Court stated: "The plaintiff filed this appeal from probate from an order of the Probate Court . . . overruling her objection to the law firm['s] . . . representation of the estate . . . . The order appealed from was mailed to the parties on September 27, 2019. In accordance with . . . § 45a-186 [b], the plaintiff was required to file a complaint appealing the order not later than thirty days after the mailing of the order. General Statutes § 45a-186 [b]. 'A party appealing to the Superior Court from the Probate Court is required to commence the appeal by filing it with the Superior Court clerk within thirty days of the order, denial or decree of the Probate Court. Failure to do so deprives the Superior Court of subject matter jurisdiction and renders such an untimely appeal subject to dismissal.' *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 67, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009). The plaintiff filed an [application] for reconsideration

of the Probate Court's September 27, 2019 order, which [application] was denied by the Probate Court. The order denying the reconsideration [application] was mailed on November 21, 2019. The [application] for reconsideration, however, does not extend or otherwise toll the appeal period. *Scofield* v. *Scofield*, Superior Court, judicial district of Fairfield, Docket No. CV-19-5041126-S (October 11, 2019); *Bandonee* v. *State*, Superior Court, judicial district of New Haven, Docket No. CV-16-5037067-S (November 17, 2016) (63 Conn. L. Rptr. 400). The complaint was filed on December 16, 2019, well beyond the thirty day time period. Therefore, the court lacks subject matter jurisdiction to hear the present appeal. Because the court lacks subject matter jurisdiction, the court need not, and cannot, consider the defendants' additional claim that the appeal should be dismissed for a lack of a justiciable issue." This appeal followed.

On appeal, the plaintiff claims that the Superior Court improperly determined that it lacked subject matter jurisdiction over her appeal from the Probate Court's order. We first set forth the applicable standard of review and relevant legal principles. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . .

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations. . . . It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over [it] . . . . Failure to comply with the relevant time limit set forth in . . . § 45a-186 [b] deprives the Superior Court of subject matter jurisdiction and renders such an untimely appeal subject to dismissal." (Internal quotation marks omitted.) *Rider* v. *Rider*, 210 Conn. App. 278, 285–86, 270 A.3d 206 (2022).

We next set forth the statutory framework governing appeals of Probate Court orders. Section 45a-186 (b) provides in relevant part: "Any person aggrieved by any order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . . Except as provided in sections 45a-187 and 45a-188, an appeal from an order, denial or decree in any other matter shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree. The appeal period shall be calculated from the date on which the court sent the order, denial or decree by mail or the date on which the court transmitted the

order, denial or decree by electronic service, whichever is later."

Finally, § 45a-128 (b), which governs motions for reconsideration, modification and revocation in probate matters, provides in relevant part that "any order or decree . . . made by a court of probate may, in the discretion of the court, be reconsidered and modified or revoked by the court . . . on the written application of any interested person. Such application shall be made or filed within one hundred twenty days after the date of such order or decree and before any appeal is allowed or after withdrawal of all appeals. . . ."

The following brief summary of the timing of the filings preceding this appeal is helpful to resolving the plaintiff's claim. On September 30, 2019, the Probate Court's order overruling the plaintiff's objection to the firm representing the estate was mailed to the relevant parties. On October 16, 2019, the plaintiff filed an application for reconsideration of the Probate Court's order overruling her objection. On November 21, 2019, the Probate Court issued and mailed its order in which it denied the plaintiff's application for reconsideration. On December 16, 2019, the plaintiff filed a complaint with the Superior Court, in which she asserted that she was appealing from *both* the Probate Court's order overruling her objection *and* its order denying her application for reconsideration.

On appeal before this court, the plaintiff argues, inter alia, that "[a] single appeal was taken from two probate decrees, as the plaintiff['s] complaint dated December 10, 2019, states . . . . The trial court erred when the judge misinterpreted/misapplied the law and failed to rule regarding the Probate Court decree on the plaintiff['s] [application] for reconsideration, which was, in fact, timely filed and part of the same Superior Court appeal." (Citation omitted.) She further argues that

"[t]he appeal of the Probate Court's order overruling the plaintiff's objection to the firm in question representing the estate was *not* untimely. . . . The final 'order,' the 'denial,' the 'decree' of the Probate Court regarding this matter was mailed on November 21, 2019. The Superior Court appeal was filed on December 10, 2019, within the thirty days allowed. . . . Since the final decision . . . was not yet made by the Probate Court, [she] could not have appealed sooner . . . ." (Citations omitted; emphasis in original.)

We first examine the allegations contained within the plaintiff's complaint to the Superior Court because the determination of whether she appealed from the Probate Court's order overruling her objection or from the Probate Court's order denying her application for reconsideration guides our resolution of her claim on appeal. Pursuant to § 45a-128 (b), a Probate Court may reconsider, modify, or revoke any order or decree on four statutory grounds: "(1) For any reason, if all parties in interest consent to reconsideration, modification or revocation, or (2) for failure to provide legal notice to a party entitled to notice under law, or (3) to correct a scrivener's or clerical error, or (4) upon discovery or identification of parties in interest unknown to the court at the time of the order or decree." In its order denying the plaintiff's application for reconsideration, the Probate Court expressly addressed each of the four grounds and concluded "that there is no authority to reconsider the subject decree." Specifically, the Probate Court stated: "Other than the movant herself, all parties object to reconsideration and therefore, there is no requisite consent to the motion. . . . Not only did the movant not allege that there was such a failure of legal notice, the court finds that all parties entitled to notice of that earlier proceeding were in fact provided such notice. . . . [T]here is no assertion nor does the decree

on its face set forth any scrivener's or clerical error. . . . There is no assertion that new parties to the matter have been identified or discovered nor does the court find that such is the case here. The court finds that all the heirs, all counsel of record and all persons entitled to notice have been identified and were provided notice as required." (Citations omitted.)

Although in her complaint to the Superior Court the plaintiff asserted that she was appealing from the Probate Court's denial of her application for reconsideration, none of the plaintiff's allegations challenged any of the Probate Court's findings in regard to the four statutory grounds under § 45a-128 (b). The record before the Superior Court was devoid of any allegation or evidence that (1) all parties consented to reconsideration, (2) there was a failure to provide legal notice to a party entitled to such notice, (3) there was a scrivener's or clerical error in the Probate Court's order overruling her objection, or (4) the plaintiff had identified or discovered any new parties in interest who were previously unknown. See General Statutes § 45a-128 (b). Rather, the allegations of the plaintiff's complaint were limited to the Probate Court's order overruling her objection to the law firm representing the estate. The plaintiff repeatedly asserted that a "conflict of interest exists," which gives "the defendants a totally unfair advantage in the case and [puts] the plaintiff in a very unfair position of disadvantage." Moreover, the plaintiff's argument that the Probate Court "refused to consider, accept, admit any of the plaintiff['s] multiple pieces of evidence, even though at *both* hearings the plaintiff attempted to argue that [she] had evidence which proved her claims," similarly was limited to evidence in support of her objection to the firm representing the estate. (Emphasis in original.) Accordingly, although we agree with the plaintiff that her appeal

from the Probate Court's order denying her application for reconsideration would have been timely had she challenged the merits of the court's denial of her motion,[7] we conclude that, on appeal to the Superior Court, the plaintiff solely challenged the Probate Court's order overruling her objection and did not challenge its order denying her application for reconsideration. See, e.g., *Rider* v. *Rider*, supra, 210 Conn. App. 283 n.10 (on basis of careful review of record, court concluded that plaintiff appealed only from Probate Court's original order and not from denial of motion for revocation); see also *Silverstein* v. *Laschever*, 113 Conn. App. 404, 414, 970 A.2d 123 (2009) ("[a]n appeal [brings] before the Superior Court for review only the order appealed from" (internal quotation marks omitted)).

We now address whether the Superior Court had subject matter jurisdiction over the plaintiff's appeal

[7] It is undisputed that, on September 30, 2019, the Probate Court mailed its order overruling the plaintiff's objection to the firm representing the estate. The plaintiff filed an application for reconsideration of the Probate Court's order overruling her objection on October 16, 2019, which was timely because it was filed within 120 days of the Probate Court's order overruling her objection. See General Statutes § 45a-128 (b) ("[A]ny order or decree other than a decree authorizing the sale of real estate made by a court of probate may, in the discretion of the court, be reconsidered and modified or revoked by the court . . . on the written application of any interested person. Such application shall be made or filed within one hundred twenty days after the date of such order or decree and before any appeal is allowed or after withdrawal of all appeals.").

It is also undisputed that, on November 21, 2019, the Probate Court mailed its order denying the plaintiff's application for reconsideration. On December 16, 2019, the plaintiff filed a complaint with the Probate Court, which was a timely appeal from the Probate Court's denial of her application for reconsideration because it was filed within thirty days of the mailing of that order. See General Statutes § 45a-186 (b) ("Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. An appeal . . . shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree. The appeal period shall be calculated from the date on which the court sent the order, denial or decree by mail . . . .").

from the Probate Court's order overruling her objection. The plaintiff argues that her appeal from the Probate Court's order overruling her objection was filed timely because, pursuant to § 45a-128, an "[application] for reconsideration 'shall be made or filed before any appeal.' Which, in this case, it was. . . . The [application] for reconsideration was filed before any appeal . . . . The appeal being the *next* step in the legal process." (Citations omitted; emphasis in original.) The defendants respond, inter alia, that the Superior Court properly dismissed the plaintiff's appeal from the Probate Court's order overruling her objection for lack of subject matter jurisdiction because the thirty day appeal period was not tolled by her application for reconsideration. We agree with the defendants.

The plaintiff's argument is premised on a misconception of the statutory scheme governing appeals in probate cases. "[T]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met." (Internal quotation marks omitted.) *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61, 209 A.3d 690 (2019). As previously set forth, pursuant to § 45a-186 (b), "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. An appeal . . . shall be filed on or before the thirtieth day after the date on which the Probate Court sent the order, denial or decree . . . by mail . . . ." It is undisputed that, on September 30, 2019, the Probate Court mailed its order overruling the plaintiff's objection to the firm representing the estate. Pursuant to § 45a-186 (b), the plaintiff was required to file an appeal from the Probate Court's order overruling her objection on or before October 30, 2019. She did not do so. Accordingly, her "[f]ailure to do so [deprived] the Superior Court of subject matter jurisdiction and

[rendered] such an untimely appeal subject to dismissal." *Corneroli* v. *D'Amico*, supra, 116 Conn. App. 67.

Despite the foregoing undisputed timeline, the plaintiff argues that the language in § 45a-128 (b), governing the deadline for filing an application for reconsideration of a Probate Court's order, excuses her failure to timely appeal from the Probate Court's order overruling her objection.[8] Although the plaintiff filed her application for reconsideration on October 16, 2019, prior to the "thirtieth day" after the Probate Court mailed its order overruling her objection; see General Statutes § 45a-186 (b); an application for reconsideration pursuant to § 45a-128 "does not toll the appeal period for the underlying decision." *Rider* v. *Rider*, supra, 210 Conn. App. 288. This court previously has stated: "The statutory scheme that governs appeals in probate cases pro-

[8] Specifically, the plaintiff points out that, under § 45a-128 (b), an application for reconsideration must be filed "within one hundred twenty days after the date of such order or decree *and before any appeal is allowed* or after withdrawal of all appeals." (Emphasis added.) The requirement that an application for reconsideration be filed before an appeal is "allowed," however, appears to be a vestige of the prior statutory scheme requiring a party to seek permission from a Probate Court before pursuing an appeal in the Superior Court. The legislature eliminated that requirement in 2007. See Public Acts 2007, No. 07-116, § 33 (P.A. 07-116) (amending § 45a-186 and repealing General Statutes §§ 45a-191 and 45a-192); *Corneroli* v. *D'Amico*, supra, 116 Conn. App. 65 ("The significant changes to this statute, brought about by [the] passage of P.A. 07-116, coupled with the simultaneous repeal of §§ 45a-191 and 45a-192, the only statutes that referred to the previous practice of filing a motion for permission to appeal with the Probate Court, reveal a clear legislative intention to consolidate and even to simplify and to clarify the probate appeal process. In amending the statute, the legislature eliminated any previous requirement that an aggrieved party file a motion for permission to file an appeal with the Probate Court to commence his appeal."). We need not decide the continuing vitality or application of that language in this appeal, however, because that language pertains only to the deadline for filing an application for reconsideration under the prior statutory scheme requiring a party to seek permission from a Probate Court before commencing an appeal in the Superior Court. That language has no bearing on the question before us, which is whether the filing of such an application tolls or otherwise extends the deadline for filing an appeal under § 45a-186 (b).

vides the sole circumstance that tolls the appeal period. General Statutes § 45a-186c provides that the appeal period is tolled when an application for a waiver of costs is filed. Our legislature clearly addressed tolling the appeal period and did not include the filing of a motion pursuant to § 45a-128 as an action that tolls the appeal period. . . .

"In addition, § 45a-128, which governs motions for reconsideration . . . in probate matters, addresses the appeal procedure for such motions and does not provide that such motions toll the appeal period with respect to the underlying decision. . . . We find persuasive that the legislature expressly addressed appellate procedure in § 45a-128 and did not provide that such a motion would toll the appeal period for the underlying court action. See General Statutes § 45a-128 (c); cf. *Ierardi* v. *Commission on Human Rights & Opportunities*, 15 Conn. App. 569, 575–76, 546 A.2d 870 (appeal period in administrative case tolled because governing statute provided that [a] request for reconsideration postpones the running of the appeal period . . . until the decision thereon), cert. denied, 209 Conn. 813, 550 A.2d 1082 (1988)." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Rider* v. *Rider*, supra, 210 Conn. App. 287–88. Because the plaintiff failed to appeal from the Probate Court's order overruling her objection within the thirty day statutory appeal period, and because her filing of an application for reconsideration did not toll the appeal period, we conclude that the Superior Court properly determined that it lacked subject matter jurisdiction over the appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGEL J. MORALES *v.* COMMISSIONER OF CORRECTION (AC 45412)

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

Syllabus

The petitioner, who had been convicted of, inter alia, intentional manslaughter in the first degree with a firearm, sought a writ of habeas corpus. He claimed that his trial counsel, W, rendered deficient performance by failing to abandon a theory of self-defense after the petitioner testified that the gun he was holding discharged by accident, causing the victim's death, thus negating the viability of the theory of self-defense. The petitioner had engaged in an altercation outside a club, during which the petitioner's friend struck the victim's friend in the head with a gun, which fell to the ground. The petitioner, who was struggling with the victim on the ground, retrieved the gun and fired a single shot into the victim's chest. The fistfight and subsequent shooting were captured on a video recording, and, in light of the video showing the victim attacking the petitioner and the petitioner picking up the gun and shooting the victim, W and the petitioner agreed to present to the jury a theory of self-defense. During his testimony, however, the petitioner claimed that the gun went off accidentally, in addition to testifying that he was being attacked by the victim, feared for his life, and believed that, had the victim obtained the gun, he would have shot the petitioner. In closing argument, W presented both a theory of accident and a theory of self-defense to the jury. The trial court included an instruction on self-defense in the charging instructions to the jury, which included instructions on, inter alia, murder, and the lesser included offenses of manslaughter in the second degree and criminally negligent homicide. At the habeas trial, the petitioner claimed, inter alia, that W failed to clearly and adequately argue the petitioner's defense to the jury and, in support thereof, presented the testimony of an expert witness, D, who claimed that W's performance was deficient in that, once the petitioner testified that the shooting was accidental, a claim of self-defense could no longer be asserted as that theory was inconsistent and negated by the petitioner's testimony. At the habeas trial, W testified that he believed the petitioner's testimony supported a self-defense theory and, accordingly, included self-defense in his closing argument, and also framed his closing argument with the alternative theory of accident, because the petitioner had testified that the shooting was an accident. The habeas court found that the petitioner failed to prove that W's closing argument constituted ineffective representation and that the petitioner had failed to sustain his burden of proving that he was prejudiced by W's allegedly deficient performance. The habeas court denied the petition for a writ of habeas,

and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. Contrary to the claim of the respondent, the Commissioner of Correction, the petitioner properly preserved for appellate review his claim that W's decision to argue self-defense to the jury was objectively unreasonable in light of the petitioner's testimony regarding the accidental discharge of the gun: although the habeas court did not address specifically whether W's decision to argue self-defense to the jury itself constituted ineffective assistance in light of the petitioner's testimony, in reaching its determination that W's closing argument did not fall below an objective standard of reasonableness, the habeas court considered whether W's decision to proceed with self-defense, rather than accident, as the primary theory of defense in his closing argument was within the broad range of legitimate defense strategies to pursue at summation; moreover, although in his amended petition, the petitioner phrased his claim simply that his trial counsel was deficient because, inter alia, he failed to clearly and adequately argue the petitioner's defense to the jury, it was sufficiently clear from the record that, throughout the habeas proceedings, the petitioner contended that W's representation was deficient because his closing argument was not in line with the defense strategy to which the petitioner testified, specifically, that the shooting was accidental, and not intentional, counsel for both parties questioned W at the habeas trial regarding whether and how the petitioner's testimony at the criminal trial impacted his closing argument, why he chose to argue a self-defense theory to the jury, and his decision to present alternative theories of defense in his closing argument, indicating that both the respondent and the habeas court were aware that the petitioner's claim that W rendered ineffective assistance during his closing argument was based on the theory that W's decision to advance a theory of self-defense was objectively unreasonable given the petitioner's testimony at the criminal trial; furthermore, the petitioner's habeas counsel made arguments during summation at the habeas trial that mirrored the petitioner's claim on appeal.
2. The habeas court did not err in denying the petitioner's ineffective assistance of counsel claim: the defense strategy that W employed, which included presenting self-defense as the primary theory of defense while still allowing for the jury to find that the petitioner did not intend to fire the gun, was supported by ample tactical justifications and fell into the category of trial strategy or judgment calls which this court consistently has declined to second guess, and, accordingly, W's performance was not deficient; moreover, although portions of the petitioner's testimony were inconsistent with a claim of self-defense, W's presentation of alternative theories accounted for the possibility that the jury, having been presented with the video evidence of the altercation, might come to the conclusion that the petitioner had shot the victim in self-defense, a theory that the state bore the burden of disproving beyond

a reasonable doubt; furthermore, contrary to the petitioner's assertion, the jury would not have had to wholly disbelieve the petitioner's testimony in its entirety in order to conclude that he had acted in self-defense, the jury was free to credit those portions of the petitioner's testimony in which he stated that he feared for his life when he dove for and picked up the gun and viewed that testimony as evidence supporting his theory of self-defense, and, therefore, portions of the petitioner's testimony that were inconsistent with the theory of self-defense did not render W's decision to present the theory of self-defense in closing argument constitutionally deficient; additionally, whereas self-defense was a complete defense to the charged offenses, the theory of accident would serve only to negate the element of intent, which would not have served as a defense to the offenses involving a lesser mental state, including reckless manslaughter, of which the jury found the petitioner guilty, the state did not have had the burden of disproving the theory of accident beyond a reasonable doubt, and, given that W's closing argument was consistent with the evidence presented in the case and afforded the jury two potential pathways to finding the petitioner not guilty of murder, this court could not conclude that there was no tactical justification for W's decision to argue both self-defense and accident in his closing argument.

Argued April 11—officially released July 4, 2023

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, *M. Murphy*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Carlos Cruz*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Angel J. Morales, appeals, following the granting of certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner

claims that the habeas court improperly concluded that he failed to establish that he was deprived of the effective assistance of counsel during his criminal trial. We disagree, and, accordingly, affirm the judgment of the habeas court.

The jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal, at the petitioner's criminal trial. "On the evening of August 29, 2013, the [petitioner] drove with his friend, Christopher Spear, and two female companions to a nightclub in downtown Hartford known as 'Up or On the Rocks.' The [petitioner] parked his car in a nearby parking lot located in the area of High Street and Church Street. Also at the club that night were the victim, Miguel Delgado, his brother, Jose Delgado,[1] and a friend, Steven Castano, all of whom had arrived by taxi. While on the second floor of the club and with the [petitioner] present, Delgado and Spear bumped into each other; Spear spilled his drink on Delgado. An argument ensued, during which Spear made a racially charged threat to shoot someone. Returning from the bar, Castano found the two men arguing and tried to separate them. Spear, however, slapped the drink Castano was holding at him, the victim, and Delgado. At that point, the club's security escorted Spear, the [petitioner], and their companions out of the club while detaining the victim, Delgado, and Castano inside the club in an effort to defuse the situation and prevent violence.

"Club security held the victim and Delgado in the club for about ten minutes. When they left, Delgado and Spear renewed their argument outside of the nightclub where the [petitioner] had been waiting with Spear. With the [petitioner] present, Spear again threatened

[1] "Although Miguel Delgado and Jose Delgado share a surname, herein we refer to Miguel Delgado as the victim and to Jose Delgado by his surname." *State* v. *Morales*, 172 Conn. App. 329, 332 n.1, 160 A.3d 383, cert. denied, 327 Conn. 988, 175 A.3d 1244.

to shoot someone. Although their friends, but not the [petitioner], attempted to defuse the altercation, Delgado and Spear agreed to engage in a fistfight, and the parties proceeded to the parking lot where the [petitioner] had parked his car.

"When the men reached the parking lot, Spear struck Delgado on the head with a hard object injuring him. When Spear attempted to retrieve the object, which had fallen to the ground, Delgado punched him, rendering him unconscious. Despite the fact that Spear was unconscious on the ground, Delgado continued to beat Spear, causing him significant injuries to his head and face.

"Meanwhile, the [petitioner] recognized that the object with which Spear struck Delgado was a gun. The [petitioner] went to pick it up, but the victim, who was behind him, engaged the [petitioner] and the two men struggled with each other on the ground. In the course of the ensuing struggle, the [petitioner] obtained the gun. As the victim stood up, he struck the [petitioner] in the face and the [petitioner] fired a single shot, which struck the victim in the chest.

"The victim ran toward Allyn Street where he collapsed on the sidewalk. Despite intervention by Delgado, a passerby who administered cardiopulmonary resuscitation, and medical personnel, the victim later died at the hospital at 2:15 a.m. of a gunshot wound to his chest.

"After shooting the victim, the [petitioner] fled. He discarded the gun in a garbage receptacle. He then drove away, leaving behind Spear and the women who had accompanied them.

"On October 29, 2014, in a single long form information, the state charged the [petitioner] with murder in violation of General Statutes (Rev. to 2013) § 53a-54a

and reckless manslaughter in the first degree with a firearm in violation of [General Statutes] § 53a-55a (a) (murder charges), as well as criminal possession [of a firearm].'' (Footnote in original.) *State* v. *Morales*, 172 Conn. App. 329, 332–34, 160 A.3d 383, cert. denied, 327 Conn. 988, 175 A.3d 1244 (2017).

The following additional facts and procedural history are relevant to our resolution of this appeal. Attorney John R. Williams represented the petitioner in the criminal proceedings. The petitioner and Williams agreed, prior to trial, to pursue a theory of self-defense. Accordingly, on November 14, 2014, the petitioner submitted a request that the court charge the jury concerning self-defense. The petitioner's criminal trial took place over the course of five days from November 17 through 21, 2014. At trial, the state introduced a cell phone video taken by a bystander, that captured the fight and the shooting. In the video, the petitioner and the victim are depicted tussling with each other on the ground. The victim stands up and strikes the petitioner as the petitioner is getting up off the ground, raising his arm, and shooting the victim. After the victim was shot, he ran out of frame. ''At trial, the [petitioner] stipulated that he shot the victim, but he testified both that the gun accidentally discharged and that he was acting in self-defense.'' Id., 334. The following exchanges took place on direct examination between the petitioner and Williams:

''[The Petitioner]: So I was on the ground and I was tussling with someone and, you know, I turned around and as I turned around, you know, to try to get up I had got punched in the face and I had lost my balance and I was actually falling and that's when the gun discharged. . . . [A]nd the gun actually goes off accidentally and—and I fall down.

* * *

"[Williams]: Why did you dive for that gun?

"[The Petitioner]: I mean, at the time I'm in the city I'm not—I don't know anyone. You know it's a gun. People are trying to fight us or whatnot. I'm so scared that I wasn't thinking or I mean I just [tried] to get out of harm's way, you know what I mean. My friend is getting attacked, there's a gun available. I tried to get it, you know, I tried to get possession of it so no one [would] harm me or anybody I'm with . . . .

* * *

"[Williams]: Now, what do you mean then as the shooter when you say [the gun] accidentally discharged?

"[The Petitioner]: I mean, as I [was] hit and I was falling down that's when the gun went off. I didn't have—I didn't mean to aim it or shoot somebody with it. It was just in my motion that it discharged.

"[Williams]: Well, were you holding that gun and pointing it at the individual who, in fact, was shot?

"[The Petitioner]: Yes.

"[Williams]: And why were you doing that?

"[The Petitioner]: I was being attacked and I panicked. I mean everything happened so fast in that situation I wasn't thinking. You know I got hit and everything happened so quickly.

"[Williams]: Could you tell us whether or not you were in fear?

"[The Petitioner]: Yes.

"[Williams]: What was the nature of your fear? What were you afraid of?

"[The Petitioner]: To be honest with you, I was scared the whole time. I didn't want to be there ever since when the drink spilled and on the way I was nervous the whole time, so you know so as soon as my friend got attacked and I see a gun I'm fearing, you know, the worst for my life and whatnot . . . .

"[Williams]: And is that why you pointed the gun at him?

"[The Petitioner]: I remember when I was on the ground I turned and [got] hit and as I was falling I fell to the right so my body shifted left so that's when the gun probably . . . turned a left direction and . . . the gunshot went off. I didn't have no intention [of] hurting nobody or whatnot.

* * *

"[Williams]: Did you believe that you were being attacked by the person who got shot?

"[The Petitioner]: Yes, I was attacked.

"[Williams]: And did you believe that he was going to hurt you?

"[The Petitioner]: Yes. I felt like if he were to get possession of—of, you know, the gun that he would have did the same thing to me."

On cross-examination, the following exchange occurred between the petitioner and the prosecutor:

"[The Prosecutor]: And the gun accidentally went off. You pulled the trigger.

"[The Petitioner]: I did, but not intentionally.

"[The Prosecutor]: How do you pull the trigger and not intentionally?

"[The Petitioner]: As same as how you crash a car from driving. I mean it just happened.

* * *

"[The Prosecutor]: Are you saying you accidentally pulled the trigger because you were drunk?

"[The Petitioner]: No.

"[The Prosecutor]: Are you saying that the gun just went off when you fell?

"[The Petitioner]: Yes.

"[The Prosecutor]: You know that a gun just can't go off without pulling the trigger, right?

"[The Petitioner]: I know that, ma'am. I mean everything happened so fast. I mean, I acted with instinct. It was instantaneous."

After the close of evidence, the court, *Dewey*, *J.*, heard argument on the parties' proposed jury instructions. As a result of the petitioner's testimony that the shooting was accidental, the state objected to the petitioner's proposed self-defense instruction. In response, Williams maintained that the evidence supported the instruction, notwithstanding the petitioner's testimony. Williams argued that "[t]he act of taking the gun into his hand and . . . pointing it in the general direction of the assailant is a sufficient predicate act to impose criminal liability and, therefore, the [defense of] self-defense is applicable to that." The court agreed that the evidence warranted a self-defense instruction as evidenced by its inclusion in the jury charge. In addition to the murder charge in count one, the court included an instruction on the lesser included offenses of manslaughter in the first degree with a firearm,[2] manslaughter in the second degree with a firearm, and criminally negligent homicide. The court further instructed the

[2] The court included instructions on both intentional manslaughter in the first degree and reckless manslaughter in the first degree.

jury that self-defense constituted a "complete" defense to each of those charges.

In his closing argument, Williams contended that the state had failed to prove that the petitioner acted with the requisite mental state to support a criminal conviction and that the state had failed to meet its burden of proving beyond a reasonable doubt that the petitioner did not act in self-defense. At the outset, Williams stated: "Obviously, we submit that there's not any evidence of intent to kill, but that again is only the beginning, because this is a self-defense case." Before addressing the self-defense argument, Williams reviewed each of the charged offenses and lesser included offenses with the jury, emphasizing the state's burden to prove that the petitioner possessed the requisite mental state required for each offense beyond a reasonable doubt. Williams then reviewed, in detail, the video of the shooting with the jury and argued that the state could not prove beyond a reasonable doubt that the shooting was not justified by self-defense.[3] At no point in his closing

[3] Williams argued: "Now, at this point, you can see up the left—the fight which is going on on the ground between [the victim] and [the petitioner]. Now, what do we see here? It is [the victim] who begins to rise. Now, you can see that [the petitioner] is still essentially prone on the ground and [the victim], at this point, seems to be in a crouched position. He's now, [the victim] is now standing bending over. [The petitioner] . . . appears to be on his belly. Look it, you see . . . [the victim] pulling back his arm to strike . . . [the petitioner]. [The petitioner] is still on his knees, again, you can see a strike taking place there. [The petitioner] is clearly is being assaulted. Again, you see here [the victim] standing in a fighting stance. [The petitioner] still on his knees. [The victim] clearly is advancing on [the petitioner]. Again, [the petitioner is] still on his knees. [The victim] still in a fighting stance and there the shot is discharged. . . .

"[T]he video doesn't make a mistake. The distance between the shooter and the person who was shot is crystal clear from that video and what was happening at that instant is crystal clear from that video. Again, it is so important and indeed it's required by the law that you put yourselves in that position. Had you been in that position, had you seen what [the petitioner] saw in the moments leading up to this, had you then having . . . been on the ground literally on your stomach while you're being attacked by the brother of the person who with his friend has just been in the process

argument did Williams concede that the petitioner intended to kill the victim.

"The jury returned a verdict of not guilty on the murder charge, but it found [the petitioner] guilty of the lesser included offense of intentional manslaughter in the first degree with a firearm. Additionally, the jury found the [petitioner] guilty of reckless manslaughter in the first degree with a firearm, and criminal possession. The court accepted the jury's verdict but a month later vacated the guilty verdict on the reckless manslaughter charge because of double jeopardy concerns. The court then sentenced the [petitioner] to thirty-five years [of] incarceration, suspended after twenty years, with five years [of] probation on the intentional manslaughter conviction, and five years [of] incarceration and a fine of $5000 for the criminal possession conviction. The court ordered that the sentences be served concurrently for a total effective sentence of thirty-five years [of] incarceration, suspended after twenty years, with five years [of] probation, and a $5000 fine." *State* v. *Morales*, supra, 172 Conn. App. 334. This court affirmed the judgment of conviction on direct appeal. Id., 350.

On January 22, 2021, the petitioner filed an amended petition for a writ of habeas corpus in this matter claiming that Williams had provided ineffective assistance during the petitioner's criminal trial. The petitioner alleged that Williams had been ineffective in that he (1) "failed to adequately counsel and prepare the petitioner to testify in the underlying case," (2) "failed to meaningfully discuss his theory of defense with the petitioner so as to avoid the possibility of the jury being left with the impression that the petitioner was asserting seemingly contradictory defenses of self-defense and accident," and (3) "failed to clearly and adequately argue

of inflicting clearly great physical injury upon the other fellow at no point off your knees what would you have done?"

the petitioner's defense to the jury." The respondent, the Commissioner of Correction, filed his return on March 16, 2021, denying the allegations of ineffectiveness.

The court, *M. Murphy, J.*, conducted a habeas trial on October 25 and 26, 2021, at which the petitioner testified in support of his petition and presented the testimony of Williams and an expert witness, Attorney Christopher Duby. At trial, the court admitted several exhibits, including transcripts from the underlying criminal proceeding and the video of the shooting that was admitted into evidence at the criminal trial. On February 17, 2022, the court issued a memorandum of decision denying each of the petitioner's claims. As to his first claim, the court found that the petitioner failed to demonstrate that Williams' counseling and preparation of the petitioner to testify constituted deficient performance. The court also rejected the petitioner's second claim, reasoning that the petitioner had not overcome the presumption that Williams' decisions could be considered sound trial strategy given the circumstances.

Last, the court rejected the petitioner's third claim, determining that "[a] review of the transcript of [Williams'] closing argument shows that counsel discussed the state's burden of proving the absence of self-defense at length. He informed the jurors that they were required to evaluate what the petitioner thought at the time of the incident based [on] the evidence presented and determine what a reasonable person would have believed and done in those circumstances. [Williams] also showed the jurors the videotape evidence again during his closing argument, highlighting the brutal, continuous attack on the petitioner's friend and the struggle between the petitioner and the decedent. The court finds pursuant to its review that [Williams'] closing argument was in line with the defense strategy and

did not fall below an objective standard of reasonableness. The petitioner failed to prove that the argument constituted constitutionally ineffective representation, particularly considering the deference entitled to counsel's summation."

As to all three claims, the court also found that the petitioner had failed to sustain his burden of proving that he was prejudiced by Williams' allegedly deficient performance. The court thereafter granted the petition for certification to appeal filed by the petitioner, and this appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner challenges only the court's finding as to his third claim alleging that Williams rendered ineffective assistance when he "failed to clearly and adequately argue the petitioner's defense to the jury." In particular, the petitioner claims that "Williams' decision to argue self-defense to the jury when the [petitioner's] testimony negated the viability of that defense was objectively unreasonable and served only to confuse the jury" and that he was prejudiced by this deficient performance. The respondent disagrees, contending that (1) the petitioner's claim on appeal is not preserved, (2) Williams' argument of self-defense was not deficient as it fell within the wide range of reasonable trial strategy, and (3) in the alternative, the petitioner has failed to demonstrate that the habeas court erred in finding that the petitioner was not prejudiced by Williams' alleged deficient performance.

I

As an initial matter, we must address the respondent's claim that the petitioner failed to properly preserve his claim for appellate review. The respondent maintains that, "[a]lthough [the petitioner's] habeas counsel's comments in summation briefly touched upon the specific claim he now presents on appeal, the habeas court

never ruled on the petitioner's claim. Instead, the habeas court's memorandum of decision only addressed the question of whether counsel effectively communicated the defense of self-defense to the jury during closing argument. Thus, while the habeas court found that Williams effectively argued self-defense to the jury, the habeas court did not address whether his decision to argue self-defense to the jury *itself* constituted ineffective assistance of counsel in light of the petitioner's testimony." (Emphasis in original.) We disagree with the respondent.

The following legal principles are relevant to our analysis. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"); Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority").

"As our Supreme Court has explained, principles of fairness dictate that both the opposing party and the trial court are entitled to have proper notice of a claim.

. . . Our review of a claim not distinctly raised at the trial court violates that right to notice. . . . [A]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge . . . . Accordingly, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 655, 273 A.3d 252, cert. denied, 343 Conn. 922, 275 A.3d 212 (2022); see also *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408, 114 A.3d 168 ("this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim" (internal quotation marks omitted)), cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015).

Our Supreme Court has emphasized that whether a claim was distinctly raised frequently depends on whether a petitioner presented evidence or elicited testimony "that would have supported the allegation," or presented "any argument that would have alerted either opposing counsel or the habeas court that he was pursuing that allegation." *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 599, 188 A.3d 702 (2018); id., 602 n.7 ("[w]e emphasize that our conclusion that the petitioner failed to distinctly raise the claim that [trial counsel] rendered deficient performance . . . relies on the fact that the petitioner both presented no evidence and made no argument to the habeas court on the issue"). See, e.g., *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 540–42, 198 A.3d 52 (2019) (petitioner distinctly raised claim where record demonstrated he elicited testimony supporting allegation,

presented argument on allegation, respondent did not object to argument, and habeas court's memorandum of decision reflected understanding of allegation).

We conclude that the petitioner in the present case distinctly raised before the habeas court the claim that he now advances on appeal. Although, in his amended petition, the petitioner phrased his claim simply as "[t]he petitioner's trial counsel's performance was deficient because . . . he failed to clearly and adequately argue the petitioner's defense to the jury," it is sufficiently clear from the record that, throughout the habeas proceedings, the petitioner contended that Williams' representation was deficient because "his closing argument was not 'in line with the defense strategy' as [the petitioner] had testified [that] the shooting was accidental, not intentional," and that it was unreasonable for Williams to argue a theory of self-defense to the jury because self-defense was inconsistent with the petitioner's testimony.

Our review of the habeas trial transcripts reveals that both parties questioned Williams regarding whether and how the petitioner's testimony at the criminal trial impacted his closing argument, why he chose to argue a self-defense theory to the jury, and his decision to present alternative theories of defense in his closing argument. In addition, the petitioner elicited testimony from Duby that supported the allegation that, because the petitioner testified that the shooting was accidental, Williams' decision to argue self-defense in closing argument was objectively unreasonable.[4]

[4] For example, when asked whether, after a "review of [the petitioner's] testimony and seeing that [the petitioner] testified that the discharge of the firearm was accidental," he had "an opinion as to whether or not a self-defense claim could've been asserted in this case," Duby replied, "[n]o, it could not have been." Duby further testified that "[Williams] would know that the [petitioner] said this was an accident, that he couldn't then argue something that required a jury to find that it was intentional" and that presenting the case on a theory of self-defense after the petitioner's testimony was "the wrong play."

Moreover, the petitioner's habeas counsel made the following arguments during summation, which mirror those the petitioner makes on appeal: "[H]ow do you [reconcile] self-defense and accident in light of [the petitioner's] testimony at the underlying criminal trial? And that is the question that [Duby] seemed to indicate that he couldn't explain how you can still be arguing self-defense after your client testifies that it in fact was an accident. By testifying that it's an accident undercuts the claim of self-defense and pretty much makes the defense unassertable. But to continue to argue it to a jury leads to confusion . . . . Now, [Williams] himself said that he counseled self-defense. And under this unique set of facts, Your Honor, I can't . . . fault him for counseling that. But once [the petitioner] had decided on the defense of accident, [Williams] should have pursued that knowing full well that that's what the testimony was going to bear out.

"[The petitioner's third claim] is that he failed to clearly and adequately argue the petitioner's defense to the jury. I think [Williams'] closing argument sort of speaks for itself, Your Honor. And I will encourage Your Honor to review that. He clearly argues self-defense. He clearly tries to intertwine an accident defense in regards to that, which we pose as two contradictory things. You can't accidentally discharge a gun but yet intend to defend yourself. They don't work. They're legally opposite. . . .

"I think [Williams] failed to properly counsel [the petitioner] as to the theory of defense, improperly [prepared] him in his testimony before the court, and failed to adequately argue this to the jury. I would pose that it's ineffective assistance of counsel, and I'd ask Your Honor to grant the habeas petition. I would go on to further say that I do believe that the outcome here would've been different. I believe that if this had been

consistently argued to the jury under the theory of accident or the theory of self-defense, I think there is a very good likelihood that a jury would have seen this differently. Because in each particular case because of the nature of the way the state had charged this case with an intentional manslaughter as well as with a reckless manslaughter, I think the jury would've seen this one way or—could've seen this one way or the other. And I think the result ultimately could've been different. Instead, the convictions came back as both a conviction for intentional and a conviction for reckless."

Furthermore, the record makes clear that both the respondent and the habeas court were aware that the petitioner's claim that Williams rendered ineffective assistance during his closing argument was based on the theory that Williams' decision to advance a theory of self-defense was objectively unreasonable given the petitioner's testimony at the criminal trial. In response to the closing argument of the petitioner's counsel at the habeas trial, the respondent's counsel argued that Williams' actions were reasonable in that "what [Williams] did was try to come up with a consistent defense that's going to be clear to the jury" given the state of the evidence in the case.

As for the habeas court, in reciting the relevant law on this issue in its memorandum of decision, it stated that "[c]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important *because of the broad range of legitimate defense strateg*[*ies*] *at that stage.* Closing arguments should sharpen and clarify the issues for resolution by the trier of fact . . . but *which issues to sharpen and how best to clarify them are questions with many reasonable answers*." (Emphasis added; internal quotation marks omitted.) The court concluded that Williams' "closing argument was in line with the defense strategy

and did not fall below an objective standard of reasonableness. The petitioner failed to prove that the argument constituted constitutionally ineffective representation, particularly considering the deference entitled to counsel's summation. Moreover, *the petitioner failed to prove that it was reasonably probable that the outcome of the proceedings would have been different had [Williams] argued the defense strategy differently to the jurors*." (Emphasis added.) Similarly, in evaluating the petitioner's second claim—that Williams was ineffective in failing to meaningfully discuss the theory of defense with the petitioner—the habeas court concluded that there was "no evidence that a different defense strategy, including that of an accidental shooting, would have changed the outcome of the proceedings in light of the evidence presented by the state."

Given the foregoing, it is clear to us that, in reaching its determination that Williams' closing argument did not fall below an objective standard of reasonableness, the habeas court considered whether Williams' decision to proceed with self-defense rather than accident as the primary theory of defense in his closing argument was within the broad range of legitimate defense strategies to pursue at summation. Accordingly, we conclude that the petitioner adequately preserved his claim for our review. See *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 598.

II

We now address the merits of the petitioner's claim. Specifically, the petitioner argues that "Williams' decision to argue self-defense to the jury when [the petitioner's] testimony negated the viability of that defense was objectively unreasonable and served only to confuse the jury." The respondent disagrees and argues that "the petitioner has not demonstrated that [Williams'] decision to argue self-defense to the jury fell outside

the wide range of reasonable professional assistance and constituted an error so great that counsel was not functioning as the counsel guaranteed by the sixth amendment to the constitution of the United States." We agree with the respondent.

We begin by setting forth the applicable standard of review and principles of law that govern the petitioner's claim. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary . . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective 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)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge

a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is, the* [*petitioner*] *must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy*. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . .'' (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 216–19, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022).

The thrust of the petitioner's claim on appeal is that Williams' representation was deficient because ''his closing argument was not 'in line with the defense strategy' as [the petitioner] had testified the shooting was accidental, not intentional.'' In advancing this argument, the petitioner aptly notes that ''Connecticut considers accident and self-defense separate and inherently inconsistent claims, although a defendant may raise them as alternative theories.'' *State* v. *Singleton*, 292 Conn. 734, 753 n.14, 974 A.2d 679 (2009). Indeed, ''it is well established that it is not improper for defense counsel to pursue defenses that are inconsistent with each other.'' *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 259, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021); see also *State* v. *Nathan J.*, 294 Conn. 243, 262, 982 A.2d 1067 (2009) (''it is axiomatic that a defendant may present inconsistent defenses to the jury''); *Jackson* v. *Commissioner of Correction*, 129 Conn. App. 325, 330, 20 A.3d 75 (holding

that habeas court properly concluded "that there is no problem with presenting inconsistent and alternative theories of defense" (internal quotation marks omitted)), cert. denied, 302 Conn. 947, 31 A.3d 382 (2011). According to the petitioner, however, "although it is legally permissible for defense counsel to argue inconsistent theories to the jury, this does not alter the fact that [in the present case] the defenses, and testimony, are indeed inconsistent." Thus, the petitioner contends that "it was unreasonable for [Williams] in [the petitioner's] case to present inconsistent defenses where [the petitioner's] testimony was that the shooting was accidental, not intentional." (Emphasis omitted.) We are not convinced.

The following additional facts are relevant to our resolution of this claim. At the habeas trial, Williams testified that he had spent significant time speaking with the petitioner about their defense strategy. Williams acknowledged that from the outset of the case the petitioner claimed that the shooting was "something he did not intend to do, this horrible sudden development." Williams went on to testify that "[o]n the other hand of course . . . we were confronted with the video . . . ." Although Williams recognized that accident and self-defense were both possible theories in the petitioner's case, he felt that the video of the shooting was an important piece of evidence that impacted what defenses were available. According to Williams, "it was much, much more difficult to stand by [the petitioner's assertion that] this was an accident given what you see in the video. And that was certainly emphasized by the prosecutor before we got to put on our case. It certainly looked like, it looked like he pointed the gun and pulled the trigger." Therefore, Williams testified that he advised the petitioner that adopting a theory of self-defense was the best available option in his case.

Williams also testified that, although it is ultimately the petitioner's decision whether to testify, it would be inconceivable to present either an accidental shooting or self-defense theory without the petitioner's testimony. Williams stated that he has tried hundreds of criminal cases and noted that he does his best to prepare his clients to testify without crossing a line by telling them what they must say while on the stand. Williams testified that, during their preparation, he counseled the petitioner to discuss the theory of self-defense while on the witness stand and that the petitioner acknowledged that he would not testify about an accident because such testimony could be confusing to the jury. Thus, Williams testified that he was "shocked" when the petitioner testified and "got off the reservation on self-defense and started talking about [accident] . . . . And at that point it became my job to figure out a way to try to put those two things together."

Williams testified that he believed that the petitioner's testimony ultimately did support a self-defense theory and, accordingly, included self-defense in his closing argument. Williams acknowledged, however, that, because the petitioner had testified that the shooting was an accident, he framed his closing argument as "pleading [an] alternative [theory]." This was exemplified by his statement to the jury: "Ladies and gentleman, there's a number of things you have to find. And, if you find that it is completely accidental and he didn't intend to do it, then he's not guilty. And, if you . . . believe that the state has proven beyond a reasonable doubt that he intended to shoot him, then you should turn to the issue of did he act in self-defense. And, remember that the defendant has no burden whatsoever in that respect, that the burden is on the state to disprove that this was in self-defense. And these are the elements. Her Honor is going to charge you, and this . . . case classically fits all of those elements."

When asked if arguing both accident and self-defense "thwarted the self-defense claim" and caused confusion for the jury, Williams testified that "thwarted is not quite the word I would have used. If [the petitioner] was claiming that it was an accident, that's his burden. If he's claiming self-defense, then that's not his burden." Although Williams recognized that it could be potentially confusing to a jury to argue both theories, he testified that, "legally, it's entirely appropriate." Moreover, Williams testified that when a client testifies in an unexpected way, an attorney has to "roll with the punches" and that he did so by presenting the two seemingly contradictory theories of accident and self-defense to the jury.

The petitioner's expert witness, Duby, testified at the habeas trial that asserting a theory of self-defense presents an incredibly fact intensive inquiry for the jury, and the likelihood of success depends, to a great extent, on whether the defendant's testimony about the underlying events is persuasive and aligns with the other evidence presented. Duby agreed with Williams' assessment that the video of the shooting supported a theory of self-defense. Nevertheless, Duby testified that, once the petitioner testified that the shooting was accidental, a claim of self-defense could no longer be asserted in the case. Duby opined that a claim of self-defense was contrary to the petitioner's testimony that he did not intend to fire the gun and, therefore, Williams erred in continuing to argue self-defense to the jury. At the same time, Duby acknowledged that no matter how much an attorney prepares a client to testify, a client "almost always" says something unfavorable to the case while on the stand.

On appeal, the petitioner neither contends that Williams erred in determining that self-defense was the appropriate defense strategy at the outset of the case nor challenges the habeas court's finding that Williams'

conclusion that self-defense was the best strategy to pursue was a reasonable strategic decision. Rather, the petitioner argues that, once he testified that the shooting was accidental and that he had not intended to fire the gun, it became objectively unreasonable for Williams to continue with the theory of self-defense and present it to the jury in closing arguments because that theory was inconsistent with and "negated" by the petitioner's testimony. According to the petitioner, because "the jury would have to *wholly disbelieve* [the petitioner's] testimony that the shooting was accidental" for him to succeed on the claim of self-defense, there was "no possible benefit to . . . asking the jury to reject [the petitioner's] testimony." (Emphasis in original.)

We disagree with the petitioner's arguments because they reflect a misunderstanding of the appropriate standard for determining whether the petitioner was deprived of his constitutional right to effective counsel. "The test for deficient performance is whether trial counsel's strategy was objectively reasonable considering all of the circumstances . . . ." (Citation omitted.) *Crenshaw* v. *Commissioner of Correction*, supra, 215 Conn. App. 223. We conclude that Williams' strategy met this standard.

Williams' presentation of a theory of self-defense during his closing argument relied on much of the evidence presented in the criminal trial. Although the petitioner testified that he did not intend to shoot the gun, he also testified that he was being attacked by the victim, feared for his life, and believed that, had the victim obtained the gun, he would have shot the petitioner, all of which supported a theory of self-defense. Notably, the video of the shooting supported the theory of self-defense and was inconsistent with the accidental discharge theory. The petitioner's own expert witness, Duby, acknowledged that "it looked to me like [the petitioner]

was defending himself," and "I don't [think] that you could look at that video and say conclusively that [the petitioner is] not defending himself." Duby further testified: "I don't think . . . a person not involved in the incident can look at that video and think that there's a real bona fide way of saying that you didn't intend that outcome."

Consequently, rather than rely exclusively on the theory of accident, which was supported only by a portion of the petitioner's testimony, Williams' presentation of alternative theories accounted for the possibility that the jury might view the video of the shooting and come to the same conclusion that both Williams and Duby had reached—that the petitioner shot the victim in self-defense. Significantly, self-defense constituted a complete defense to each of the charged offenses and all of the lesser included offenses brought against the petitioner. Moreover, the state bore the burden of disproving it beyond a reasonable doubt. See *State* v. *Singleton*, supra, 292 Conn. 747 ("only the state has a burden of persuasion regarding a self-defense claim" (internal quotation marks omitted)). Therefore, although portions of the petitioner's testimony were inconsistent with a claim of self-defense, we nevertheless conclude that, in light of all of the evidence the jury heard and saw, it was sound trial strategy for Williams to present self-defense to the jury in his closing argument.

Furthermore, contrary to the petitioner's assertion, the jury would not have had to "wholly disbelieve" the petitioner's testimony in its entirety in order to conclude that he had acted in self-defense. (Emphasis omitted.) "[The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to

accept or reject." (Internal quotation marks omitted.) *State* v. *Covington*, 184 Conn. App. 332, 343, 194 A.3d 1224 (2018), aff'd, 335 Conn. 212, 229 A.3d 1036 (2020). Thus, the jury was free to credit those portions of the petitioner's testimony in which he stated that he feared for his life when he dove for and picked up the gun and view that testimony as evidence supporting the theory of self-defense. Therefore, that portions of the petitioner's testimony were inconsistent with the theory of self-defense does not render Williams' decision to present the theory of self-defense in closing argument constitutionally deficient.

Finally, we are not persuaded by the petitioner's argument that accidental discharge was objectively the better defense strategy to pursue once the petitioner had testified that the shooting was an accident. As noted previously, the accident defense was not supported by the video of the shooting, which Duby acknowledged appeared to show that the petitioner intended to fire the gun at the victim. Given that the jury would have reason to doubt the petitioner's version of the incident, it certainly was reasonable for Williams to decide to focus on the defense best supported by the video evidence. Furthermore, whereas self-defense was a complete defense to the charged offenses, the theory of accident would serve only to negate the element of intent. See *State* v. *Moye*, 119 Conn. App. 143, 153, 986 A.2d 1134 ("[a]ccident is not a justification for a crime . . . it negates only one element of the crime, namely, intent" (internal quotation marks omitted)), cert. denied, 297 Conn. 907, 995 A.2d 638 (2010). It thus would not have served as a defense to the offenses involving a lesser mental state, including reckless manslaughter—of which the jury found the petitioner guilty. In addition, the state would not have borne the burden of disproving the theory of accident beyond a reasonable doubt. Id., 153 ("[b]ecause a claim of accident is

not a defense but merely negates the intent element of the crime, we disagree with the defendant's contention that the court had to charge explicitly that the jury could not convict the defendant unless the state proved, beyond a reasonable doubt, that the death was not an accident"). For these reasons, we reject the petitioner's argument that abandoning the agreed upon strategy of self-defense and "proceed[ing] with the defense of accidental discharge only" was the only reasonable strategy for Williams' closing argument.

In reaching our conclusion, we emphasize that "a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Zachs* v. *Commissioner of Correction*, supra, 205 Conn. App. 262. Further, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough* v. *Gentry*, 540 U.S. 1, 5–6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). At the habeas trial, Williams testified that he presented the jury with both accident and self-defense as "alternative" theories of defense in an effort to "roll with the punches" after having been shocked by the petitioner's testimony. Accordingly, rather than foreclose the reasonable and well supported theory of self-defense, Williams adapted to the petitioner's testimony and wove it into a cohesive closing argument while preserving the previously agreed upon self-defense strategy. Given that Williams' closing argument was consistent with the evidence presented in the case and afforded the jury two potential pathways to finding the petitioner not guilty of murder, we cannot conclude that there was no tactical justification for Williams'

decision to argue both self-defense and accident in his closing argument.

For the foregoing reasons, we agree with the habeas court's conclusion that the petitioner did not meet his burden of demonstrating that Williams' closing argument and defense strategy therein were objectively unreasonable. We conclude that the defense strategy that Williams employed, which included presenting self-defense as the primary theory of defense while still allowing for the jury to find that the petitioner did not intend to fire the gun, was supported by ample tactical justifications and "falls into the category of trial strategy or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 132, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Thus, we conclude that Williams' performance was not deficient.[5] Consequently, the habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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[5] Accordingly, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Williams' closing argument. See, e.g., *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637–38, 212 A.3d 678 (2019) (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently).