SCHIMENTI CONSTRUCTION COMPANY, LLC *v.* JOSEPH SCHIMENTI (AC 44274)

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

Syllabus

The plaintiff construction management firm sought to recover damages from the defendant, a former employee, for, inter alia, breach of contract and breach of the covenant of good faith and fair dealing. The plaintiff hired the defendant in 1998. In 2014, the defendant was promoted and, in connection therewith, received and signed a promotion letter, which confirmed his promotion, described the responsibilities, compensation and benefits of his new position, stated that he remained an at-will employee, and provided that he was required to execute a nondisclosure agreement as a condition of his continued employment. The nondisclosure agreement, which the defendant also signed, included a provision that prohibited him from competing with the plaintiff's business for the duration of his employment and for two years following the termination of his employment. In 2018, the defendant resigned from his employment with the plaintiff and accepted a position with a competitor construction company. Thereafter, the plaintiff commenced this action, claiming that the defendant had breached the nondisclosure agreement. The defendant filed a motion for summary judgment as to two counts of the plaintiff's complaint, claiming that the restrictive covenants set forth in the nondisclosure agreement were unenforceable because the agreement lacked consideration. The trial court granted the defendant's motion, determining that the nondisclosure agreement was unenforceable for a lack of consideration, and it denied the plaintiff's motion for a determination in favor of an immediate appeal. Thereafter, the plaintiff withdrew the remaining counts of its complaint, and it appealed to this court. *Held* that the trial court erred in granting the defendant's motion for summary judgment as there was at least a genuine issue of material fact as to whether the defendant's continued employment constituted sufficient consideration for the nondisclosure agreement: pursuant to *Roessler* v. *Burwell* (119 Conn. 289), which was binding precedent, the continued employment of an at-will employee could constitute sufficient consideration for the execution of a restrictive covenant, and the Superior Court decisions that have held to the contrary since that decision either failed to consider *Roessler* or distinguished it on the basis of circumstances that were inapplicable to the present case; moreover, the evidence before the trial court, when viewed in the light most favorable to the plaintiff, showed that, by signing the nondisclosure agreement, the plaintiff received the benefit of the defendant's services and the benefit of the restrictive covenant and the defendant received the benefit of continued

employment, as the defendant was an at-will employee who could be terminated at the plaintiff's discretion, the promotion letter explicitly stated that the execution of the nondisclosure agreement was a condition of the defendant's continued employment, and the defendant continued his employment with the plaintiff for four years after executing the nondisclosure agreement before he voluntarily resigned; furthermore, the trial court's reliance on *Thoma* v. *Oxford Performance Materials, Inc.* (153 Conn. App. 50), in granting the defendant's motion for summary judgment, was misplaced because the holding in *Thoma* that continued employment was insufficient consideration for a restrictive covenant was limited to the facts of that case and was not inconsistent with, nor did it undermine, the reasoning of *Roessler*, as the court in *Thoma* did not conclude or suggest that continued employment could not constitute adequate consideration for a restrictive covenant.

Argued May 10, 2022—officially released January 17, 2023

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Moukawsher, J.*, granted the defendant's motion for summary judgment with respect to certain counts of the complaint; thereafter, the court, *Moukawsher, J.*, denied the plaintiff's motion for a written determination in favor of an immediate appeal; subsequently, the plaintiff withdrew the remaining counts of the complaint; judgment for the defendant, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Robert M. Barrack, with whom, on the brief, was *Peter E. Strniste, Jr.*, for the appellant (plaintiff).

Lori B. Alexander, with whom, on the brief, was *Stephen P. Rosenberg*, for the appellee (defendant).

Opinion

SEELEY, J. The plaintiff, Schimenti Construction Company, LLC, appeals from the summary judgment rendered by the trial court in favor of the defendant,

Joseph Schimenti, on counts one and two of its complaint alleging breach of an employment contract and breach of the covenant of good faith and fair dealing. On appeal, the plaintiff claims that the court erred in determining that continued employment of an at-will employee[1] does not constitute consideration for a restrictive covenant.[2] We agree with plaintiff's claim and, therefore, reverse the summary judgment rendered in favor of the defendant and remand the case for further proceedings.

The following facts and procedural history, viewed in the light most favorable to the plaintiff, as the nonmoving party, are relevant to our resolution of this appeal. See, e.g., *DAB Three, LLC* v. *Fitzpatrick*, 215 Conn. App. 835, 837, 283 A.3d 1048 (2022). The plaintiff, a construction management firm organized and existing under the laws of the state of New York, with its headquarters located in Ridgefield, Connecticut, employs more than 200 employees. The president and sole owner of the plaintiff is Matthew Schimenti (Matthew), the cousin of the defendant.[3] The plaintiff employed the defendant beginning in 1998. On various dates in 2013, the defendant informed Matthew that he "wanted more

[1] As a general matter, at-will employment is terminable by either the employee or the employer and does not require cause. See, e.g., *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697–98, 802 A.2d 731 (2002).

[2] The plaintiff also claims that the court improperly failed (1) to find that genuine issues of material fact exist as to whether the defendant's promotion and other benefits constituted consideration to support the restrictive covenant, and (2) to consider evidence extrinsic to the nondisclosure agreement and promotion letter at issue, which demonstrated that the defendant received a raise, bonuses and other valuable benefits in exchange for the restrictive covenant. As to the former, we agree with the plaintiff. See footnote 17 of this opinion. As to the latter, because of our conclusion that the court improperly rendered summary judgment in favor of the defendant, we need not address the plaintiff's claim.

[3] The plaintiff was formed in 1994 and specializes in building retail, commercial, entertainment, hospitality, corporate office space, banks, and other construction projects in the Northeast and in California.

responsibility and to be involved in the strategic growth of [the plaintiff] and the overall management" and indicated that his ultimate goal included obtaining an ownership interest in the plaintiff. Matthew responded that he would consider creating a new position that included additional responsibilities and increased compensation for the defendant but noted that providing him with an ownership interest "was not possible at that time . . . ." At the beginning of 2014, the defendant held the title of project executive[4] and received a salary of $165,000 per year. At some point in January or February, 2014, the defendant was promoted to managing director.[5]

On February 25, 2014, Matthew presented the defendant with two documents, a promotion letter and a nondisclosure agreement.[6] The promotion letter, dated February 25, 2014, confirmed the defendant's promotion to managing director, effective February 1, 2014. This promotion letter described, inter alia, the responsibilities, compensation, and benefits of the new position. It stated that the defendant's initial base salary as managing director would start at $165,000 per year and that, effective August 1, 2014, it would increase to $185,000 per year, provided that he achieved performance objectives and was actively employed with the plaintiff. The

[4] A project executive is responsible for overseeing a group of project managers and reports directly to Matthew.

[5] The position of managing director had not existed until the defendant's promotion in 2014. The responsibilities of this new position included "overseeing all of the [p]roject [e]xecutives, and executing the strategic direction of the [plaintiff]. [The defendant's] responsibilities would also include implementing and championing strategic initiatives."

[6] Although the defendant acknowledged receiving the nondisclosure agreement in late February, 2014, and the record reveals that he signed that document on February 28, 2014, he claimed that he was not provided with a copy of the promotion letter until approximately March 14, 2014, which he signed on March 17, 2014. As we previously have noted, we view the record in the light most favorable to the plaintiff, as the nonmoving party. See *DAB Three, LLC* v. *Fitzpatrick*, supra, 215 Conn. App. 837.

promotion letter further stated that the defendant's salary was subject to an annual review, benchmarked on relevant industry data, and was subject to adjustment based on an appraisal of the defendant's work performance and the finances of the plaintiff. It also detailed additional benefits that the defendant would be eligible for, including fringe benefit plans and an incentive program.

The promotion letter further provided in relevant part: "This letter will outline the terms and conditions of [the defendant's] employment with the [plaintiff]. *It does not create an employment contract between the* [*plaintiff*] *and* [*the defendant*]. [*The defendant*] *shall at all times be an employee at will of the* [*plaintiff*], and both [the defendant] and the [plaintiff] may terminate [the defendant's] employment at any time for any reason, with or without cause . . . . Nothing contained in this offer constitutes a promise of employment for any particular duration or [the defendant's] receipt of compensation or benefits of any level for any particular duration." (Emphasis added.) The promotion letter specifically stated: "As a condition of your continued employment by the [plaintiff], you must execute a Non-Disclosure, Assignment of Developments & Non-Solicitation Agreement ([nondisclosure agreement])," which the promotion letter indicated was attached to it. The nondisclosure agreement provided in relevant part: "In consideration and as a condition of my employment by [the plaintiff] . . . the [defendant] hereby agrees with the [plaintiff] as follows . . . ." Section one of the nondisclosure agreement was titled "Confidentiality of Information; Developments," section two was titled "Covenant Not to Compete/Solicit," and section three was titled "Miscellaneous." Section two prohibited the defendant from competing with the plaintiff's business for the duration of his employment and for two years

after the termination of his employment.[7] In section three, the nondisclosure agreement provided in relevant part that "[t]he [defendant] acknowledges and agrees that [he] is an 'employee-at-will' and this [a]greement does not create any obligation on the [plaintiff] or any other person or entity to continue the [defendant's] employment or to exploit any [d]evelopments."

The promotion letter directed the defendant to sign and date both the promotion letter and the nondisclosure agreement. It also stated these two documents contained "the entire understanding" of the defendant's employment by the plaintiff. The defendant signed the nondisclosure agreement on February 28, 2014, and the promotion letter on March 17, 2014.

Approximately four years later, in March, 2018, the defendant resigned from his employment with the plaintiff and accepted a position at JRM Construction Man-

[7] Section two of the nondisclosure agreement provides: "A. For so long as the [defendant] is employed by the [plaintiff] and for a period of twenty-four (24) months after the termination of such employment for any reason whatsoever, the [defendant] shall not, directly or indirectly, through or on behalf of any other person or entity, whether individually or in conjunction with any other person, or as an employee, agent, consultant, representative, or holder of any interest in any other person or entity or in any other capacity whatsoever: (i) solicit or accept construction business from any Client (whether as a general contractor, construction manager, subcontractor or otherwise) or perform any of the services performed or provided by the [plaintiff] for any Client; (ii) solicit, recruit or hire any employee of the [plaintiff] to work for a third party other than the [plaintiff] or engage in any activity that would cause any employee to violate any agreement with the [plaintiff] (or do any of the foregoing with respect to any former employee of the [plaintiff] until twelve (12) months after the date such employee has otherwise ceased performing any services for the [plaintiff]); (iii) induce or influence, or seek to induce or influence, any Client or any other person or entity which has a business relationship with the [plaintiff] (each a 'Business Affiliate') to withdraw, terminate or curtail its relationship with the [plaintiff] or to use the services of any competitor of the [plaintiff]; and/or (iv) make any disparaging comment about the [plaintiff], or any of its officers, members or employees, to any present, past or prospective Business Affiliate of the [plaintiff].

"B. So long as the [defendant] is employed by the [plaintiff], the [defendant] will not undertake the planning or organization of any business activity competitive with the business of the [plaintiff]."

agement, a construction company in New York City. The plaintiff commenced this action on June 25, 2018, claiming that the defendant had breached the nondisclosure agreement. The plaintiff sought both monetary damages and injunctive relief. Thereafter, the plaintiff filed an amended complaint (operative complaint) that contained seven counts.[8] Only counts one and two of the operative complaint, in which the plaintiff alleged claims of breach of contract and breach of the covenant of good faith and fair dealing, respectively, are relevant to this appeal. On March 12, 2019, the defendant filed a revised answer and special defenses, including that (1) the covenant not to compete in the nondisclosure agreement was unreasonable and, thus, unenforceable, (2) the covenant not to compete was unenforceable due to the lack of consideration, (3) the covenant not to compete was unenforceable due to the plaintiff's anticipatory breach, and (4) the plaintiff failed to mitigate its alleged damages and harm.

On September 20, 2019, the defendant filed a motion for summary judgment as to counts one and two of the plaintiff's operative complaint. The defendant claimed, inter alia, that the restrictive covenants set forth in the nondisclosure agreement were unenforceable because the nondisclosure agreement lacked consideration.[9]

[8] The operative complaint alleged claims of breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contractual relations with employees, tortious interference with business relations with clients and business contacts, unjust enrichment, and violation of the Connecticut Uniform Trade Secrets Act, General Statutes § 35-50 et seq.

[9] In his motion for summary judgment, the defendant also argued that (1) the restrictive covenants were unreasonably overbroad, and (2) the plaintiff materially breached the promotion letter. As to the former, the defendant argued that he was the only employee of the plaintiff required to enter into such an agreement. He further contended that the nondisclosure agreement was unreasonable as to the protection afforded to the plaintiff, the degree of restraint placed on the defendant's ability to pursue his occupation, and the scope of the nonsolicitation provision. See, e.g., *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 745–46, 194 A.3d 1 (2018) (setting forth five factor test to evaluate reasonableness of restrictive cove-

Specifically, he claimed that "the only item of value that [the defendant] arguably received for his [signing of the nondisclosure agreement] was his continued employment by [the plaintiff]" and that, "[b]ecause in this case there was no consideration for the [nondisclosure agreement] beyond [the defendant's] continued employment, the [nondisclosure agreement] is unenforceable as a matter of law."

On October 25, 2019, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment. In addressing the defendant's claim of lack of consideration, the plaintiff argued that the

nant). As to the latter, the defendant claimed that the plaintiff had materially breached the promotion letter by not reviewing the defendant's performance or salary and, as a result, that he was excused from performing any of his contractual obligations.

In its memorandum of decision, the court determined that genuine issues of material fact existed regarding the reasonableness of the defendant being the only employee required to sign a nondisclosure agreement, the terms that required the defendant to "stay away" from the plaintiff's clients and employees for a period of twenty-four months following the termination of the defendant's employment, and the confidentiality provisions. The court did not address, specifically, the defendant's claim of material breach by the plaintiff.

In his appellate brief, the defendant summarily claims that he "submitted evidence establishing that the restrictive covenants . . . are unenforceable, because they are unreasonable" and that "the record evidence establishes that the [nondisclosure] [a]greement is also unenforceable because [the plaintiff] materially breached its alleged promise . . . that [the defendant's] salary would be reviewed annually and benchmarked accordingly . . . ." (Internal quotation marks omitted.) He argues that this court should affirm the judgment on these alternative grounds. In its reply brief, the plaintiff contends, inter alia, that "these purported additional grounds for affirmance should not be considered because they are inadequately briefed . . . with no actual argument," have minimal citation to the record or to legal authority, and are devoid of any analysis. We agree that the cursory arguments advanced by the defendant as alternative grounds to affirm the summary judgment rendered by the trial court are briefed inadequately, and, therefore, we decline to consider them. See *Parnoff* v. *Stratford*, 216 Conn. App. 491, 506, A.3d (2022) (this court is not required to review issues that are improperly presented through inadequate brief and such issues are deemed abandoned).

promotion letter provided that the defendant's elevation to managing director became "effective February 1, 2014, that as part of that promotion he would be entitled to a raise to $185,000 per year (a $20,000 raise) effective August 1, 2014, and that as a condition of his continued employment in his new position he would sign the [nondisclosure agreement]." The plaintiff identified the promotion, additional employment responsibilities, and the promise of the $20,000 raise as consideration for the nondisclosure agreement. Finally, the plaintiff noted that Matthew " 'would have never promoted [the defendant] to managing director and provided him with increased compensation unless he signed [the nondisclosure agreement].' "

On December 11, 2019, the court issued its memorandum of decision granting the defendant's motion for summary judgment with respect to counts one and two of the operative complaint. At the outset, the court determined that both the promotion letter and the nondisclosure agreement were unenforceable due to a lack of consideration. It then stated that, pursuant to its interpretation of this court's decision in *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 100 A.3d 917 (2014), "a party giving nothing more than the status quo of continuing employment—neither offering a benefit nor accepting a harm—offers no consideration to exchange for his promise and the promise is, therefore, unenforceable." In the court's view, the restrictions placed on the defendant in the nondisclosure agreement were exchanged for the defendant's continued employment, which it concluded did not constitute consideration as a matter of law.

The court further explained that the language of the promotion letter specifically stated that it did not create an employment contract and that the defendant remained an at-will employee. Additionally, in the court's view, the promotion letter provided only the possibility of

future raises, bonuses, and salary reviews based on industry benchmarks. The court reasoned that the nondisclosure agreement also granted the defendant nothing in exchange for his promises to keep the plaintiff's confidences.

On December 27, 2019, the plaintiff filed a motion for determination in favor of an immediate appeal, pursuant to Practice Book § 61-4,[10] in which it alleged that the court's grant of summary judgment as to counts one and two of the operative complaint "presents issues of such significance to the determination of the final outcome of the case that it warrants immediate review . . . ." The court denied the plaintiff's motion on February 19, 2020. Thereafter, on September 1, 2020, the plaintiff withdrew the remaining counts of the operative complaint. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court erred in concluding that continued employment of an at-will employee does not constitute consideration for the execution of a restrictive covenant. Specifically, the plaintiff argues that the court's conclusion runs counter to

[10] Practice Book § 61-4 (a) provides in relevant part: "This section applies to a trial court judgment that disposes of at least one cause of action where the judgment does not dispose of . . . an entire complaint . . . . If the order sought to be appealed does not meet these exact criteria, the trial court is without authority to make the determination necessary to the order's being immediately appealed. . . .

"When the trial court renders a judgment to which this section applies, such judgment shall not ordinarily constitute an appealable final judgment. Such a judgment shall be considered an appealable final judgment only if the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs.

"If the procedure outlined in this section is followed, such judgment shall be an appealable final judgment, regardless of whether judgment was rendered . . . by summary judgment pursuant to Section 17-44 . . . ." (Citations omitted; emphasis omitted.)

binding authority holding that continued employment constitutes consideration for the execution of a restrictive covenant by an at-will employee. We agree.

The general principles governing a trial court's decision on a motion for summary judgment are well established. "On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Because the trial court rendered judgment for the [defendant] as a matter of law, our review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . A material fact is a fact that will make a difference in the outcome of the case. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Madison*, 203 Conn. App. 8, 20–21, 247 A.3d 210 (2021).

"In deciding a motion for summary judgment, [i]ssue-finding, rather than issue-determination, is the key to

the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 168 Conn. App. 354, 375, 147 A.3d 1083 (2016), aff'd, 328 Conn. 172, 177 A.3d 1128 (2018).

Next, we set forth the general legal principles necessary for the resolution of the plaintiff's appeal, which require us to determine whether the nondisclosure agreement could constitute an enforceable contract. To be enforceable, a contract must be supported by consideration. *Tedesco* v. *Agolli*, 182 Conn. App. 291, 303–304, 189 A.3d 672, cert. denied, 330 Conn. 905, 192 A.3d 427 (2018). "The doctrine of consideration is fundamental in the law of contracts, the general rule being that in the absence of consideration an executory promise is unenforceable. . . . Put another way, [u]nder the law of contract, a promise is generally not enforceable unless it is supported by consideration. . . . [C]onsideration is [t]hat which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . We also note that [t]he doctrine of consideration does not require or imply an equal exchange between the contracting parties. . . . Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 829, 277 A.3d 200 (2022); see also *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 70, 38 A.3d 1212 (2012). Whether a particular set of facts constitutes consideration is a question of law subject to plenary review. *Kinity* v. *US Bancorp*, supra, 830.[11] Guided by these general principles, we

[11] We note that "[w]hether an agreement is supported by consideration is a factual inquiry reserved for the trier of fact and subject to review under the clearly erroneous standard." (Internal quotation marks omitted.) *Kinity* v. *US Bancorp*, supra, 212 Conn. App. 830; see also *Thoma* v. *Oxford Performance Materials, Inc.*, supra, 153 Conn. App. 66 ("the record supports the

next turn to the case law regarding the issue of whether continued employment can constitute sufficient consideration to support a restrictive covenant.

We begin our analysis with our Supreme Court's decision in *Roessler* v. *Burwell*, 119 Conn. 289, 176 A. 126 (1934).[12] In *Roessler*, the plaintiff was engaged in the

court's conclusion that the defendant's financing and the plaintiff's continued employment were not predicated on the second agreement's execution"); *Sullo Investments, LLC* v. *Moreau*, 151 Conn. App. 372, 384, 95 A.3d 1144 (2014) ("we conclude that the trial court did not *err* in holding that the consideration underlying the note was the benefit that [the defendant] received in helping [the plaintiff]" (emphasis added)). In the present case, we need decide only whether the legal definition of consideration can include continued employment and whether a genuine issue of material fact exists. Answering those questions in the affirmative, we leave the determination of whether continued employment constituted consideration in this case to the trial court on remand.

[12] In the motion for a determination in favor of immediate appealability, the plaintiff challenged the court's interpretation of *Thoma* v. *Oxford Performance Materials, Inc.*, supra, 153 Conn. App. 50, and also cited to our Supreme Court's decision in *Roessler* v. *Burwell*, supra, 119 Conn. 289, which we discuss in greater detail. Although the plaintiff did not cite specifically to *Roessler* in its opposition to the defendant's motion for summary judgment or at the hearing, we note that this is not an instance in which a party has raised on appeal an entirely new and separate theory of liability that was mentioned only in passing during oral argument before the trial court. Cf. *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 631–32, 99 A.3d 1079 (2014). Rather, although the plaintiff, in opposition to the defendant's motion for summary judgment, argued that the promotion letter and the nondisclosure agreement were supported by consideration in addition to continued employment, it specifically argued in its motion pursuant to Practice Book § 61-4, relying on *Roessler*, that continued employment was sufficient consideration for the nondisclosure agreement. The defendant filed an opposition to the plaintiff's motion for determination in favor of immediate appealability on January 17, 2020, but he did not assert that the plaintiff's reliance on *Roessler* was improper. Furthermore, the court expressly addressed the applicability of *Roessler* in its decision denying the plaintiff's § 61-4 motion.

Consequently, the plaintiff distinctly raised *Roessler* and the issue of continued employment as consideration before the court, and the court addressed the issue and specifically addressed *Roessler*, albeit in a proceeding subsequent to the granting of the defendant's motion for summary judgment. The plaintiff also has relied extensively on *Roessler* in its appellate brief. Mindful that the present appeal involves a motion for summary judgment, which in turn involves our plenary review of whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law; see *Walker* v. *Lombardo*, 2 Conn. App. 266, 269, 477 A.2d 168 (1984); we conclude that the plaintiff's arguments regarding *Roessler*

business of manufacturing delicatessen products and selling them to retail stores in New Haven county. Id., 290. In 1926, the defendant began working for the plaintiff as a salesman for a weekly salary without a written agreement. Id. On October 10, 1929, the parties entered into a written employment agreement. Id. The agreement provided that the plaintiff agreed to employ the defendant as a salesman "indefinitely," that the defendant would be compensated "by such weekly wages as may be mutually agreed upon between the parties from time to time," and that, "in the event the [plaintiff] should discharge or discontinue the services of the [defendant] for any cause whatsoever, the [defendant] would not for a period of one year after severing his connection with the [plaintiff], call upon, or directly or indirectly, in any capacity, solicit the same business from, any of the customers of the [plaintiff] in the locality specified . . . ." (Internal quotation marks omitted.) Id., 290–91.[13] During his employment, the defendant was paid and accepted different amounts as weekly wages. Id., 291.

In January, 1934, the defendant voluntarily left his employment with the plaintiff and began to solicit orders

and whether continued employment, as a matter of law, can be sufficient consideration for a restrictive covenant properly are before this court.

[13] In distinguishing *Roessler* from the present case, the trial court concluded that the defendant in *Roessler* did receive consideration beyond continued employment—"lifetime employment"—when he entered into the written employment agreement. We disagree with the trial court's reading of *Roessler*. The agreement at issue in *Roessler* did not provide the defendant with lifetime employment; it provided only that he would be employed "indefinitely" and could be discharged "for any cause whatsoever . . . ." (Internal quotation marks omitted.) *Roessler* v. *Burwell*, supra, 119 Conn. 290–91. An indeterminate term of employment terminable for any reason is, essentially, the definition of at-will employment. See, e.g., *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697–98, 802 A.2d 731 (2002) (" '[e]mployment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability' ").

from the plaintiff's customers for products similar to those sold by the plaintiff. Id., 291–92. The defendant claimed that he was not bound by the solicitation restriction in his agreement with the plaintiff. Id., 292. The plaintiff brought an action against the defendant in which it sought an injunction "restraining the defendant from solicitating, canvassing or interfering in any way with the plaintiff's customers." Id. The trial court rendered judgment in favor of the plaintiff, "restraining the defendant from directly or indirectly calling upon, soliciting, diverting, or attempting to solicit, divert, or take away certain customers of the plaintiff . . . ." Id. The defendant appealed, claiming that the written agreement "was so vague and uncertain in its terms as not to constitute a contract, and, therefore, furnished no basis for the injunctive relief sought." Id.

Our Supreme Court affirmed the judgment of the trial court. Id., 295. It determined that, although the parties did not appear to have mutually agreed on the salary that was to be paid to the defendant, "the actual payment of various sums to him from time to time and his acceptance thereof without objection, constitute[d] an implied agreement that they were the amounts properly due [to] him under the terms of the agreement. The underlying purpose of the defendant in entering into the agreement was to continue thereafter in the employment of the plaintiff at a mutually agreeable salary; the benefit offered him was such a continuance, in return for which the plaintiff was to receive his services and the benefit of the restrictive covenant in the agreement. The defendant received the benefit he sought in that he was continued in the employment more than four years after the agreement was made, until he voluntarily left it. In such a situation . . . [t]hough there be not mutual promises, yet if, before he calls for the fulfillment of the promise, the promissee do perform that, in consideration of his doing which the promise is made,

there is consideration for the agreement, and it can be enforced. . . . The plaintiff, having paid the defendant a weekly salary satisfactory to him, from the time when the agreement was made, and having continued the defendant in his employment until he voluntarily left, has given to the defendant the benefit for which he bargained, and has, by performance, made certain that which before was uncertain; the restrictive covenant is in itself sufficiently definite; and after the withdrawal of the defendant from the plaintiff's employment, it was founded upon an adequate consideration given." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 292–94. Our Supreme Court agreed with the trial court's conclusion that consideration, namely, continued employment, existed to support the nonsolicitation restriction in the written agreement. Id., 293–94.

In *Torrington Creamery, Inc.* v. *Davenport*, 126 Conn. 515, 520, 12 A.2d 780 (1940), our Supreme Court determined that a restrictive covenant was not "lacking in mutuality" even though the employer could discharge the employee at any time. In that case, the plaintiff employer, The Sunny Valley Corporation, and the defendant employee had a conversation, shortly after March 1, 1938, regarding the possible termination of the defendant's employment, and "the defendant suggested that he had certain plans for the improvement of the business and asked if he could attempt, for a period of five or six months, to carry these plans into effect as a full time manager." Id., 517. On April 15, 1938, the parties entered into a contract whereby the defendant would be employed at a fixed compensation with no specific term of employment. Id., 517–18. The contract included a restrictive covenant prohibiting the defendant from competing with the plaintiff's business for two years after termination of employment. Id., 518.

In October, 1938, the plaintiff sold its business to The Torrington Creamery, and the new owner terminated the defendant's employment. Id., 518–19. Thereafter, the defendant began a business in competition with The Torrington Creamery, which sought to enforce the restrictive covenant executed by the defendant. Id., 519. In upholding the restrictive covenant, the court stated: "While, under the contract, [the plaintiff] could discharge the defendant at any time, this did not make the contract one lacking in mutuality as regards the enforcement of the covenant in question and the [plaintiff] was under no obligation as a condition to enforcing it to offer to continue him in its employ. *Roessler* v. *Burwell*, [supra, 119 Conn. 293]." *Torrington Creamery, Inc.* v. *Davenport*, supra, 126 Conn. 520.

Decisions from the Superior Court similarly have concluded that continued employment of an at-will employee provides the necessary consideration for a restrictive covenant. In *RKR Dance Studios, Inc.* v. *Makowski*, Superior Court, judicial district of Hartford, Docket No. CV-08-4035468 (September 12, 2008) (46 Conn. L. Rptr. 389, 389), the plaintiff employers sought injunctive relief against the named defendant, a dance instructor. In the application for a preliminary injunction, the plaintiffs alleged that the defendant had commenced her employment as an at-will employee on November 29, 2001, and had executed a noncompete agreement at that time. Id. On approximately May 5, 2006, the parties executed a new, more restrictive noncompete agreement. Id. The defendant left her employment with the plaintiffs on September 28, 2007, and, shortly thereafter, began working for a different dance studio. Id.

In response to the plaintiffs' application for a preliminary injunction, the defendant argued that the 2006 noncompete agreement failed due to lack of consideration. Id., 390. The evidence revealed that any employee who did not sign the 2006 noncompete agreement would

be terminated, and, therefore, "[t]he issue before the court . . . is whether . . . [the defendant's] continued employment as an at-will employee obviates the need for overt consideration to support the [2006] noncompete agreement." Id. After setting forth the general principles regarding consideration, the court observed that it was bound by our Supreme Court's decision in *Roessler* v. *Burwell*, supra, 119 Conn. 289. *RKR Dance Studios, Inc.* v. *Makowski*, supra, 46 Conn. L. Rptr. 390. Specifically, it relied on the principle that an employee's continued employment may form the necessary consideration for a covenant not to compete signed after the start of employment, at least where the employee would be discharged, or where he or she actually remained in the plaintiff's employment for a substantial time after the execution of the noncompete agreement. Id., 390–91. To further support its conclusion, the court, inter alia, cited to other decisions from the Superior Court.[14] Id., 391. Ultimately, it concluded that, "[i]n light of what

[14] See, e.g., *Piscitelli* v. *Pepe*, Superior Court, judicial district of New Haven, Docket No. CV-04-4002472-S (November 5, 2004) (38 Conn. L. Rptr. 219); *NewInno, Inc.* v. *Peregrim Development, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-01-0390074-S (December 3, 2002); *R & C Livolsi, Inc.* v. *Campanelli*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV-97-0259105-S (October 8, 1997); *Daniel V. Keane Agency, Inc.* v. *Butterworth*, Superior Court, judicial district of Fairfield, Docket No. 313181 (February 22, 1995); *Russo Associates, Inc.* v. *Cachina*, Superior Court, judicial district of Fairfield, Docket No. 276910 (January 27, 1995) (13 Conn. L. Rptr. 408); *Nurotocco of Mass., Inc.* v. *Kudlach*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-92-0453323-S (October 6, 1993).

Additionally, the plaintiff directs us to additional decisions from the Superior Court that have held that continued employment is adequate consideration to support a restrictive covenant. See, e.g., *Grose* v. *Didi, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-17-6079775-S (April 11, 2018) (66 Conn. L. Rptr. 293); *DelVecchio Reporting Services, LLC* v. *Edwards*, Superior Court, judicial district of New Haven, Docket No. CV-16-6061264-S (July 13, 2017); *Discoverytel SPC, Inc.* v. *Pinho*, Superior Court, judicial district of Hartford, Docket No. CV-10-6011816-S (October 14, 2010); *Blum, Shapiro & Co., P.C.* v. *Searles & Houser, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-99-0586283-S (August 11, 1999); *Lester Telemarketing* v. *Pagliaro*, Superior Court, judicial district of New Haven, Docket No. CV-98-0414347-S (September 3, 1998) (23 Conn. L. Rptr. 21).

this court considers the binding precedent of *Roessler* . . . this court finds adequate consideration to support the 2006 noncompete covenant, given that the defendant was . . . an at-will employee and then voluntarily left [her employment] one year and one half after the agreement was executed." Id., 392; see also *Classic Homemakers, LLC* v. *Coolidge*, Superior Court, judicial district of Windham, Docket No. CV-15-6009733-S (July 28, 2017) (65 Conn. L. Rptr. 6, 7) ("Connecticut law does not preclude continued employment standing alone from being deemed adequate consideration to sustain a covenant not to compete, at least when an affected employee leaves that employment voluntarily").[15]

[15] Federal case law supports the conclusion that continued employment may constitute consideration in this context. In *MacDermid, Inc.* v. *Selle*, 535 F. Supp. 2d 308, 316 (D. Conn. 2008), the United States District Court for the District of Connecticut stated: "[T]he Connecticut Supreme Court has long recognized that continued employment may suffice as adequate consideration to support a covenant in an at-will employment relationship." See also *United Rentals, Inc.* v. *Distefano*, United States District Court, Docket No. 09-CV-958 (PCD) (D. Conn. November 10, 2009); *Home Funding Group, LLC* v. *Kochmann*, United States District Court, Docket No. 3:06CV1234 (HBF) (D. Conn. June 7, 2007); *United Rentals, Inc.* v. *Bastanzi*, United States District Court, Docket No. 3:05CV596 (RNC) (D. Conn. December 22, 2005); *Sartor* v. *Manchester*, 312 F. Supp. 2d 238, 245 (D. Conn. 2004); *Weseley Software Development Corp.* v. *Burdette*, 977 F. Supp. 137, 144 (D. Conn. 1997).

Additionally, courts across the country likewise have determined that continued employment may serve as consideration in this context. See, e.g., *Condelles* v. *Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988); *Lucht's Concrete Pumping, Inc.* v. *Horner*, 255 P.3d 1058, 1059–60 (Colo. 2011); *Breed* v. *National Credit Assn., Inc.*, 211 Ga. 629, 632–33, 88 S.E.2d 15 (1955); *Ins. Associates Corp.* v. *Hansen*, 111 Idaho 206, 207–208, 723 P.2d 190 (App. 1986); *Puritan-Bennett Corp.* v. *Richter*, 8 Kan. App. 2d 311, 314–15, 657 P.2d 589 (1983); *QIS, Inc.* v. *Industrial Quality Control, Inc.*, 262 Mich. App. 592, 594, 686 N.W.2d 788 (2004), appeal denied, 472 Mich. 872, 693 N.W.2d 814 (2005); *Smith, Batchelder & Rugg* v. *Foster*, 119 N.H. 679, 683, 406 A.2d 1310 (1979); *Zellner* v. *Stephen D. Conrad, M.D., P.C.*, 183 App. Div. 2d 250, 255–56, 589 N.Y.S.2d 903 (1992); *Lake Land Employment Group of Akron, LLC* v. *Columber*, 101 Ohio St. 3d 242, 245–48, 804 N.E.2d 27 (2004); *Summits 7, Inc.* v. *Kelly*, 178 Vt. 396, 400–404, 886 A.2d 365 (2005). In explaining the reasoning for this approach, the Wisconsin Supreme Court, in *Runzheimer International, Ltd.* v. *Friedlen*, 362 Wis. 2d 100, 862 N.W.2d 879 (2015), stated: "Jurisdictions that rule forbearance of

The defendant points to decisions of the Superior Court that have concluded that continuing employment cannot constitute consideration for a restrictive covenant for an at-will employee.[16] We agree with the plaintiff, however, that "most of the [Superior Court] decisions indicating [that] the continued employment of an

the right to terminate an at-will employee is lawful consideration . . . typically reason that employees are obtaining the expectation of continued employment, which is not worthless or illusory. The American Law Institute embraces this [majority] view." (Footnote omitted.) Id., 119. The court determined that, in Wisconsin, "[f]orbearance in exercising a legal right is valid consideration"; (internal quotation marks omitted) id., 120; and, therefore, promising not to fire an existing at-will employee in exchange for the employee immediately signing a restrictive covenant was a valid example of forbearance in exercising a legal right. Id., 120–24. It further determined that the court "repeatedly recognized the existence of lawful consideration in the inverse situation—when an at-will employee continues working for the employer in exchange for a modification or addition to the employment agreement. In these situations, the employer is not getting additional consideration for the employee's continued employment, and, in the absence of an employment contract, the employee is still free to leave in the future." (Footnote omitted; internal quotation marks omitted.) Id., 122–23. The court also noted that this view "avoids the temptation for employers to circumvent the law. If we were to hold that consideration beyond continued employment is necessary in cases like this, an employer might simply fire an existing at-will employee and then re-hire the employee the next day with a covenant not to compete." Id., 123.

In contrast, other states have adopted the minority approach, holding that continued employment does not constitute consideration for a restrictive covenant. For example, the Minnesota Supreme Court, in *Davies & Davies Agency, Inc.* v. *Davies*, 298 N.W.2d 127, 130 (Minn. 1980), explained that "cases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced. By signing a noncompetition agreement, the employee gets no more from his employer than he already has, and in such cases there is a danger that an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere." See also *Hejl* v. *Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 304–305, 674 S.E.2d 425 (2009) (restrictive covenant entered into after already existing employment relationship must be supported by new consideration); *Socko* v. *Mid-Atlantic Systems of CPA, Inc.*, 633 Pa. 555, 570, 126 A.3d 1266 (2015) (same); *Labriola* v. *Pollard Group, Inc.*, 152 Wn. 2d 828, 834–36, 100 P.3d 791 (2004) (noncompete agreement entered into after employment must be supported by independent consideration, such as increased wages, promotion, bonus, fixed term of employment or, perhaps, access to protected information; continued employment alone is insufficient).

[16] See, e.g., *Classic Homemakers, LLC* v. *Coolidge*, supra, 65 Conn. L. Rptr. 7 (decisions of Superior Court between 1985 and 2008 go "both ways"

at-will employee does not constitute consideration for a restrictive covenant fail to consider *Roessler* [v. *Burwell*, supra, 119 Conn. 289]. Those that do consider *Roessler* distinguish it based on circumstances inapplicable to the present case . . . .'' See *Fairfield County Bank Ins. Services, LLC* v. *Welsch*, Superior Court, judicial district of Danbury, Docket No. CV-19-6033568-S (March 11, 2020) (concluding that continued employment is inadequate consideration for noncompete agreement and distinguishing line of cases following *Roessler* in which continued employment constitutes consideration for restrictive covenants on grounds that, in many of those cases, employee was at will and left employment voluntarily); *J.M. Layton & Co.* v. *Millar*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-04-0084446-S (August 9, 2004) (37 Conn. L. Rptr. 649, 651) (The trial court did not address *Roessler* but stated that ''[i]t is well settled law in Connecticut . . . that continued employment is not consideration for a covenant not to compete entered into after the beginning of the employment. . . . In the context of either non-compete or non-solicit agreements, continued employment is an inadequate consideration to support such contracts.'' (Citation omitted; internal quotation marks omitted.)); *Hoffnagle* v. *Henderson*, Superior Court, judicial district of Hartford, Docket No. CV-02-0813972 (April 17, 2003) (court stated that ''[i]t is well established that continued employment, as opposed to new employment, is not adequate consideration'' to support noncompete agreement but did not address *Roessler*); *Cost Management Incentives, Inc.* v. *London-Osborne*, Superior Court, judicial district of New Haven, Docket No. CV-02-0463081 (December 5, 2002) (concluding that continued employment was not sufficient consideration for restrictive covenants and

on whether continued employment constitutes consideration for at-will employee in context of restrictive covenant).

distinguishing *Roessler* by reasoning that, in present case, "neither of the defendants voluntarily left their employment," and, "[t]herefore, it is the plaintiff itself which has broken the bargain, or, withdrawn the consideration it cites for the agreements").

Some Superior Court cases have cited *Van Dyck Printing Co.* v. *DiNicola*, 43 Conn. Supp. 191, 648 A.2d 898 (1993), aff'd, 231 Conn. 272, 648 A.2d 877 (1994) (*Van Dyck*), or *Dick* v. *Dick*, 167 Conn. 210, 355 A.2d 110 (1974), to support the proposition that continued employment is inadequate consideration for a restrictive covenant. Both cases are distinguishable from the present case, and, therefore, we are not persuaded by the reasoning of the Superior Court decisions that relied on these cases. In *Van Dyck*, the plaintiff employer brought an action against the defendant employee for breach of a covenant not to compete after the defendant's employment was terminated. *Van Dyck Printing Co.* v. *DiNicola*, supra, 191. The defendant claimed, inter alia, that the agreement not to compete was unenforceable because he signed it after starting employment and "an employee who has already commenced employment and receives no additional consideration for signing a covenant not to compete is not subject to enforcement of the covenant because past consideration cannot support the imposition of a new obligation. *Dick* v. *Dick* [supra, 224]." *Van Dyck Printing Co.* v. *DiNicola*, supra, 195. The court explained that "[t]his general proposition is not, however, applicable to the situation presented" because when the defendant began working for the plaintiff, there was no completed employment contract in place. Id., 195–96. At the start of the defendant's employment, the agreement contained neither the defendant's precise compensation rate nor the nature of the " 'protection' " obtained by the plaintiff for entrusting the sales role to the defendant. Id., 196.

The court ultimately concluded that there existed sufficient consideration to support the restrictive covenant. Id.

Our Supreme Court in *Dick* v. *Dick*, supra, 167 Conn. 223–24, applied New York law to determine whether a contract made between the parties was supported by consideration. In dicta, the court stated: "[I]t is obvious that, if the contract were to be governed by Connecticut law, it would not be valid in that the consideration is past consideration which will not support a promise." (Internal quotation marks omitted.) Id., 224. Notably, that case did not involve at-will employment or a determination as to whether continued employment constituted consideration. Rather, the claimed consideration was a sum of money alleged to have been paid to the defendant in addition to the plaintiff's forbearance from suing the defendant. Id., 223. *Dick*, therefore, is inapplicable to the facts and circumstances of the present case.

We conclude that *Roessler* is applicable to the facts and circumstances of the present case. Its holding that consideration in the form of continued employment for at-will employees can be sufficient to make enforceable a restrictive covenant agreed to by the parties at some point after the commencement of employment remains binding precedent. Further, the facts of the present case are similar to those found in *Roessler*. The parties do not dispute that the defendant was an at-will employee both before and after signing the nondisclosure agreement and that he voluntarily left the employ of the plaintiff and joined a competitor approximately four years after signing the nondisclosure agreement and the promotion letter. Because he was an at-will employee, the defendant's employment could be terminated at the plaintiff's discretion, and, therefore, the defendant's continued employment could constitute consideration for the promotion letter and the nondisclosure agreement. Furthermore, the promotion letter

explicitly stated that the defendant's execution of the nondisclosure agreement was "a condition of [his] continued employment by the [plaintiff] . . . ." Thus, the evidence before the trial court, viewed in the light most favorable to the plaintiff, showed that, by signing the nondisclosure agreement, the plaintiff received the benefit of the defendant's services and the benefit of the restrictive covenant and the defendant received the benefit of continued employment. See *Roessler* v. *Burwell*, supra, 119 Conn. 293. Because *Roessler* applies, as an intermediate appellate court, we are bound by controlling precedent from our Supreme Court. See *State* v. *Madera*, 160 Conn. App. 851, 861–62, 125 A.3d 1071 (2015). We conclude, therefore, that there is at least a genuine issue of material fact that the defendant's continued employment alone was sufficient consideration to support the nondisclosure agreement.

Additionally, we disagree with the trial court's reliance on this court's decision in *Thoma* v. *Oxford Performance Materials, Inc.*, supra, 153 Conn. App. 50, to support its determination that continued employment of an at-will employee cannot, as a matter of law, constitute consideration for a restrictive covenant signed after the starting date of employment. In *Thoma*, the plaintiff employee was hired in February, 2003, by the defendant, a manufacturer of high performance polymers. Id., 52. In May or June, 2006, the defendant pursued new financing, and one investor requested that certain employees execute employment contracts to ensure continuity. Id. As a result, the plaintiff entered into an employment agreement with the defendant on June 12, 2006. Id. The agreement set forth the plaintiff's annual salary and benefits, created a twenty-four month employment period, subject to an automatic renewal for additional twelve month terms, provided that the defendant could terminate her employment without cause with sixty days notice, and, in the event of such termination, the

defendant was required to pay the plaintiff all accrued and unpaid compensation, plus her base salary for a period of time. Id. Finally, the plaintiff was prohibited from seeking employment with a competitor of the defendant during her employment with the defendant and for six months after her employment had ended. Id., 52–53.

A second employment agreement, executed on June 20, 2006, altered the terms of the first agreement, so as to render the plaintiff an at-will employee, and eliminated the defendant's posttermination compensation obligation. Id., 53–54. The defendant terminated the plaintiff's employment on November 20, 2007. Id., 54. The plaintiff then commenced an action sounding in breach of contract and fraud. Id. The trial court determined that the first agreement was valid and supported by consideration but that the second agreement lacked consideration, and, therefore, the terms of the first agreement applied. Id., 54–55.

On appeal, the defendant contended that the court improperly had concluded that the second agreement was not supported by consideration. Id., 55. Specifically, it claimed, inter alia, that the elimination of the plaintiff's six month noncompete clause and her increased chance for continued employment served as consideration to support the second agreement. Id. In rejecting the defendant's first claim, this court noted that the trial court had concluded that it was ambiguous whether the noncompetition clause in the second agreement continued indefinitely or ended at the time of the termination of the plaintiff's employment. Id., 57. "Here, § 1.1 [of the second agreement] provided an indefinite noncompetition duration and specifically cross-referenced § 1.2 [of the second agreement], which provided a time frame limited to the plaintiff's employment. . . . Therefore, the language in each clause of the noncompetition restriction was not sufficiently clear for the

court to reconcile them." (Citation omitted.) Id., 61. The trial court applied the rules of contract interpretation and determined that, in the second agreement, " 'the plaintiff lost her rights to termination pay and gained nothing in return.' " Id., 57. This court agreed with the analysis and determined that, under these facts and circumstances, the court properly found that the ambiguous noncompetition restriction, which still could restrict the plaintiff's postemployment activities, did not constitute consideration to support the second agreement. Id., 65.

The defendant next claimed that the court improperly had concluded that the plaintiff's improved chances for continued employment did not constitute consideration for the second agreement. The court reasoned: "The [second] agreement clearly interferes with the plaintiff's rights as promised in the [first] agreement in that *it eliminates the plaintiff's contractual right to collect termination compensation*. . . . [T]here must be valid and adequate consideration for the less advantageous terms of employment contained in the [second] agreement, other than continued employment of the plaintiff." (Emphasis added; internal quotation marks omitted.) Id. This court agreed that the facts supported the court's determination that the financing sought by the defendant was not dependent on the execution of the second employment agreement. Id., 66. "Consequently, the record supports the court's conclusion that the defendant's financing and the plaintiff's continued employment were not predicated on the second agreement's execution. *As a result, the court reasonably concluded that the plaintiff's continued employment, for which the first agreement already provided, did not constitute valid consideration to support the second agreement.* See *Brian Construction & Development Co.* v. *Brighenti*, 176 Conn. 162, 166, 405 A.2d 72 (1978) (when a party agrees to perform an obligation for

another to whom that obligation is already owed, although for lesser renumeration, the second agreement does not constitute a valid, binding contract)." (Emphasis added; footnote omitted; internal quotation marks omitted.) *Thoma* v. *Oxford Performance Materials, Inc.*, supra, 153 Conn. App. 66–67. Thus, this court's decision in *Thoma* was limited to the facts of that case, specifically to the court's findings after a trial that the second agreement eliminated the plaintiff's contractual right to severance pay and that the plaintiff's continued employment was not predicated on execution of the second agreement. See id. The court in no way concluded or even suggested that continued employment cannot, as a matter of law, constitute adequate consideration for a restrictive covenant. Consequently, the holding in *Thoma* is neither inconsistent with nor undermines the reasoning of *Roessler* v. *Burwell*, supra, 119 Conn. 289. Accordingly, we conclude that the trial court's reliance on *Thoma* in granting the defendant's motion for summary judgment was misplaced. This is especially true given that the plaintiff in the present case presented evidence that execution of the nondisclosure agreement was a condition of the defendant's continued employment, and the court was required to view that evidence in the light most favorable to the plaintiff when ruling on the defendant's motion.

On the basis of the evidence before the trial court and the procedural posture of the present case, and mindful of our Supreme Court's decision in *Roessler*, we conclude that there is at least a genuine issue of material fact as to whether the defendant's continued employment constituted consideration for the nondisclosure agreement. The plaintiff presented evidence in opposition to the defendant's motion for summary judgment that the defendant was an at-will employee both prior to and after being promoted to managing director and executing the nondisclosure agreement. Because he was an at-will employee, the defendant's employ-

ment could have been terminated by the plaintiff at any time, and, thus, the defendant's continued employment could constitute sufficient consideration to support the nondisclosure agreement. Additionally, the defendant voluntarily resigned from his employment with the plaintiff four years after executing the nondisclosure agreement. At trial, as the plaintiff did in *Thoma*, the defendant may present evidence that there was no connection between the nondisclosure agreement and his continued employment; but, if connected, continued employment can be sufficient consideration for a restrictive covenant. Accordingly, we conclude that the court erred in granting the defendant's motion for summary judgment on the basis that the nondisclosure agreement was unenforceable because, as a matter of law, it lacked consideration.[17]

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

In this opinion the other judges concurred.

[17] The plaintiff also claims that, even if continued employment is not sufficient consideration for a restrictive covenant, there is still a genuine issue of material fact as to whether the promotion, and its corresponding financial benefits and additional employment opportunities for the defendant, constituted sufficient consideration to support the nondisclosure agreement, and, therefore, the court erred in determining that no such consideration existed. We agree with the plaintiff. See, e.g., *A.H. Harris & Sons, Inc.* v. *Naso*, 94 F. Supp. 3d 280, 292–93 (D. Conn. 2015); *Weseley Software Development Corp.* v. *Burdette*, 977 F. Supp. 137, 144 (D. Conn. 1997); *Van Dyck Printing Co.* v. *DiNicola*, supra, 43 Conn. Supp. 195–96. We emphasize that the terms of the promotion letter required the defendant to sign the nondisclosure agreement. Additionally, we note that the defendant signed the nondisclosure agreement and the promotion letter sufficiently contemporaneous with the effective date of the promotion, such that a genuine issue of material fact exists as to whether the promotion constituted additional consideration for the nondisclosure agreement. See *Home Funding Group, LLC* v. *Kochmann*, United States District Court, Docket No. 3:06CV1234 (HBF) (D. Conn. June 7, 2007). We need not address this claim further in light of our conclusion that the court incorrectly granted summary judgment on the basis that the restrictive covenant was unenforceable because it lacked consideration.

HEDYEH RENSTRUP *v.* JENS RENSTRUP
(AC 44489)

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

Syllabus

The defendant appealed from the trial court's financial orders issued in connection with the judgment dissolving his marriage to the plaintiff. During the parties' marriage, the defendant was the primary wage earner for the family while the plaintiff remained at home and raised their two minor children. At the time of dissolution, the defendant earned, inter alia, a base salary and was eligible for a cash bonus targeted at 30 percent of his base salary. The defendant's weekly net income exceeded $4000. The trial court attributed to the plaintiff an earning capacity of $40,000 per year, and, in light of the plaintiff's earning capacity, a deviation criterion under the Child Support and Arrearage Guidelines set forth in the applicable regulations (§ 46b-215a-1 et seq.), the court used that deviation in its calculation of the defendant's child support obligation. The court added the plaintiff's earning capacity to the defendant's net weekly income to arrive at a new, combined weekly income and used the guidelines to determine a basic child support range. Rather than adjusting the defendant's basic child support obligation downward from the original range to account for the plaintiff's earning capacity, the court ordered the defendant, the noncustodial parent, to pay a weekly child support award of $1000 per week, which reflected a 5 percent deviation upward from the top of the basic child support range based on the parties' combined weekly income. The court also ordered the defendant to pay a supplemental child support payment equal to 17.71 percent of the after-tax amounts of any bonuses and other income he earned. The court awarded the plaintiff alimony and a supplemental alimony award in the amount of 17.71 percent of the after-tax amounts of any bonuses and other income earned by the defendant in any year in which he has an alimony obligation to the plaintiff. *Held*:

1. The trial court abused its discretion in calculating the defendant's initial child support obligation:

   a. The trial court erred by increasing, rather than reducing, the defendant's obligation based on the plaintiff's earning capacity; although the court was permitted in its application of the deviation criteria to consider the plaintiff's earning capacity, its application of the criteria was inconsistent with its reason for the deviation and with the principles on which the guidelines are based, which contemplate that the noncustodial parent's basic child support obligation will account for each party's pro rata share of child support as calculated by the guidelines and should not reflect the parties' total child support obligation; moreover, once the court decided to factor in the plaintiff's earning capacity to determine

the parties' child support obligations, it should have assigned at least a portion of the joint obligation to the plaintiff based on her earning capacity, rather than assigning the entire child support obligation to the defendant.

b. The trial court abused its discretion in ordering the defendant to pay the plaintiff $1000 per week as basic child support as part of its initial child support order without making the required findings to support its application of the deviation criteria: although the court made a finding of the presumptive child support amount in which consideration of the plaintiff's earning capacity erroneously justified an upward deviation in the defendant's basic child support obligation from $705 to $955 per week, it did not make a specific finding to justify its further increase of the defendant's obligation from $955 to $1000 per week, and failed to provide an explanation as to the deviation criteria on which it relied; moreover, the court's reliance on a statute (§ 46b-86) in finding that the upward deviation from $955 to $1000 per week was permitted, as it represented a deviation of less than 15 percent of the total amount, was improper, as § 46b-86 governs modification of child support orders, not initial child support orders.

2. The trial court's supplemental child support order, which awarded the plaintiff 17.71 percent of the defendant's undetermined future income above his base salary, was based on a clearly erroneous factual finding and was in error: in the present case, although it was within the court's discretion to make a supplemental order with respect to income of an indeterminate amount as the parents' net weekly income exceeded $4000, the error was not the amount awarded in the court's order but, rather, the court's failure to provide an explicit justification as to how the additional funds would be used for the benefit of the children and how the award was related to the factors identified in the applicable statute (§ 46b-84 (d)); moreover, there was no evidence in the record to support the trial court's factual finding that the defendant's annual cash bonus was "capped" at 30 percent of his base salary, as that finding conflicted with the only evidence presented on that issue, the defendant's employment contract, and, thus, the court's finding was clearly erroneous.

3. This court concluded that the trial court's supplemental alimony award failed for the same reason the supplemental child support award failed, namely, because the order was based, in part, on the trial court's erroneous finding that the defendant's annual bonus was capped at 30 percent of his annual salary; there was no evidence in the record to support the court's finding that the defendant's bonus was capped at 30 percent of his annual salary and, thus, the supplemental alimony order did not have a reasonable basis in fact.

4. This court concluded that, because the trial court's error with respect to the supplemental alimony award was not severable from that court's property distribution, on remand, the court must reconsider the entirety

of the mosaic of financial orders: although under some circumstances a child support award may be severable from the other financial orders, in the present case, the court misapplied the child support guidelines and improperly ordered supplemental child support and alimony awards on an erroneous finding of fact, and, given the potential size of the supplemental child support order and its link to the supplemental alimony order, the court's child support orders also were part of the mosaic of financial orders issued by the court; accordingly, because it was uncertain whether the court's other financial awards would remain intact after the court reconsidered the child support orders and the supplemental alimony order in a manner consistent with this court's opinion, the trial court, on remand, must reconsider all of the financial orders, including the property distribution orders.

Argued September 13, 2022—officially released January 17, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Gerard I. Adelman*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Campbell D. Barrett, with whom were *Stacie L. Provencher*, and, on the brief, *Johanna S. Katz*, *Jon T. Kukucka* and *Kelly A. Scott*, for the appellant (defendant).

Kenneth J. Bartschi, with whom was *Michael S. Taylor*, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant, Jens Renstrup, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Hedyeh Renstrup, and entering certain financial orders. On appeal, the defendant claims that the court improperly (1) calculated its basic child support award, (2) issued an open-ended, uncapped percentage based supplemental child support award, (3) issued an open-ended, uncapped supplemental alimony award, (4) based both of its supplemental awards

on a clearly erroneous finding that the defendant's bonus income had a "cap" of 30 percent of his base salary, and (5) included certain unvested shares and stock options in its distribution of marital property.[1] We conclude that the court erred in its child support and alimony orders and, accordingly, reverse in part the judgment of the trial court and remand the matter for a new trial on all financial orders.[2]

The following facts and procedural history are relevant to our resolution of the present appeal. The defendant was fifty-five years old at the time of trial. He holds a medical degree, earned in 1991, as well as a master's degree in business, earned in 1993. The plaintiff was thirty-eight years old at the time of trial. She earned a bachelor's degree in information technology in 2004.

In its corrected memorandum of decision, the court found the following facts. "The parties first met each

[1] The defendant claims that the court's property distribution orders, which classified the unvested shares and unvested stock options that the defendant received from his employer, Springworks Therapeutics, Inc. (Springworks), as marital property, were contrary to General Statutes § 46b-81 and relevant decisional law. He further claims that the court improperly created a rebuttable presumption that, should the defendant's employment at Springworks terminate, the defendant would be obligated to pay to the plaintiff an amount equal to the value of the plaintiff's interest in the Springworks shares and/or options as if they had vested in full.

[2] Because we conclude that the court erred with respect to the child support and alimony orders, we need not reach the defendant's claims related to the court's division of property orders. See part III of this opinion. Furthermore, at oral argument before this court, the defendant conceded that, should the case be remanded for a new trial on the financial orders, the question of whether the stock options were compensation for future performance or for past performance, and, therefore, whether they are properly classified as marital property, would be a question of fact for the court to consider anew. See, e.g., *Bornemann* v. *Bornemann*, 245 Conn. 508, 525, 752 A.2d 978 (1998); *Hopfer* v. *Hopfer*, 59 Conn. App. 452, 458, 757 A.2d 673 (2000). Consequently, we need not address whether the court's finding that the unvested stock options and shares were marital property to be distributed was clearly erroneous. Finally, because the defendant no longer works for Springworks, the hypothetical aspect of the property order challenged on appeal; see footnote 1 of this opinion; is unlikely to arise on remand. Therefore, we do not reach that issue.

other in Denmark in 2005, and thereafter began dating and living together in that country. They subsequently moved to New Jersey when the defendant accepted an employment offer in the United States. In 2008, the parties very briefly returned to Denmark for their wedding ceremony, which took place on August 16. In 2010, the defendant accepted an offer of employment from . . . a pharmaceutical company. As a result, the parties relocated to Belgium for five years. The parties had two children born issue of the marriage while residing in Belgium. . . .

"In 2015, the parties and their children returned to the United States when the defendant secured employment with Alexion Pharmaceuticals, Inc. (Alexion), located in New Haven, Connecticut. The defendant was hired as the head of the company's global affairs. He held that position for close to three years until the company laid him off as part of a management change. His period of unemployment coincided with [his] diagnosis of . . . heart issues, and he received disability benefits for several months. Once he had recovered, the defendant was hired as the chief medical officer by Springworks Therapeutics, Inc. (Springworks), a relatively new pharmaceutical company located in Stamford, Connecticut. Springworks went public on the NASDAQ exchange on Friday, September 13, 2019."

Pursuant to the defendant's written employment agreement with Springworks, he was to receive a base salary, an annual performance bonus, and incentive equity in Springworks in the form of stock options. The defendant's base salary for 2019 was $403,650 and he was eligible for a cash bonus targeted at 30 percent of his base income, although Springworks could "make upward adjustments in the targeted amount of [the] annual performance bonus." The defendant also received 1,608,556 stock options. The defendant was awarded 25 percent of his stock options on July 16, 2019,

and was entitled to receive the remaining 75 percent in thirty-six equal monthly installments, so long as he remained employed by Springworks. The defendant also was awarded 92,775 shares of stock options per the option grant dated March 28, 2019, and 620,602 stock options per the option granted April 22, 2019, with a vesting commencement date of April 22, 2019. Pursuant to the public offering of Springworks, at the time of trial the defendant had rights to 244,424 shares, 14,097 stock options, and 94,302 stock options in Springworks' publicly traded stock. In addition to income from employment, the defendant also received annual income from a 25 percent ownership of a real estate investment property. The plaintiff had not worked outside of the home since March, 2009.[3]

On August 22, 2017, the plaintiff commenced the underlying dissolution action against the defendant. The matter was tried to the court, *Hon. Gerard I. Adelman*, judge trial referee, over the course of four days, beginning on August 27, 2019, and concluding on September 18, 2019.[4]

In its memorandum of decision,[5] the court dissolved the parties' marriage and entered child custody and

[3] According to the defendant's testimony, which the plaintiff did not refute, the university from which the plaintiff graduated was considered the "M.I.T. of Scandinavia." The plaintiff also earned what has been characterized as a master's degree in production from the same school.

[4] Several pendente lite motions were heard in 2019. A mistrial of those motions was declared after the hearing judge was injured in an accident and was unable to issue a decision. The motions were reserved to be heard at trial. The resolution of those motions is not at issue in this appeal.

[5] After the court issued its initial memorandum of decision on January 6, 2020, the parties filed motions to reargue/reconsider the judgment. The court granted both motions and held a hearing in February, 2020. At the hearing, the court agreed with some of the issues raised and told the parties that it would issue a corrected memorandum of decision. Due to the COVID-19 pandemic and the attendant restrictions, the court did not issue its corrected memorandum of decision until December 21, 2020. In this opinion, references to the court's memorandum of decision refer to the December 21, 2020 corrected memorandum of decision.

financial orders.[6] As to custody, the court awarded the parties joint legal custody of their two minor children and ordered that the children's primary residence be with the plaintiff. As to child support, the court ordered the defendant to pay the plaintiff (1) basic child support in the amount of $1000 per week and (2) supplemental child support equal to 17.71 percent of the after-tax amounts of any bonuses and other income earned by the defendant.

The court awarded the plaintiff alimony for a period of ten years, ordering the defendant to pay the plaintiff $1750 per week for the first 104 weeks, $1500 per week for the next 104 weeks, and $1000 per week for the remaining 312 weeks. In addition, the court ordered the defendant to pay the plaintiff supplemental alimony in the amount of 17.71 percent of the after-tax amounts of any bonuses and other income earned by the defendant in any year in which he has an alimony obligation to the plaintiff.

In dividing the marital property, the court determined that the defendant's unvested Springworks shares and stock options were marital property subject to distribution. The court awarded the plaintiff "50 percent of [the defendant's] remaining unvested Springworks stock, or 91,656 unvested shares, and 60 percent . . . of 14,097 stock options dated March 29, 2019, and 60 percent of his 94,302 stock options dated April 22, 2019 . . . more specifically 8458 and 56,581." The court further ordered that, if the defendant's employment with Springworks terminated before all of the unvested shares or stock

[6] The court first determined that the parties' prenuptial agreement, which was drafted pursuant to Danish law and which was executed in Denmark, was unenforceable pursuant to the Connecticut Premarital Agreement Act, General Statutes § 46b-36a et seq. That conclusion is not challenged on appeal.

options to which he was entitled pursuant to his employment agreement vested, "then there shall be a rebuttable presumption that any employment that the defendant subsequently obtains with a new employer includes compensation to the defendant for his Springworks shares and/or options, and the defendant shall be obligated to pay to the plaintiff an amount equal to the value of the plaintiff's interest in the [unvested] Springworks shares and/or options as if they had vested in full." This appeal followed. Additional facts will be set forth as necessary.

"The standard of review in domestic relations cases is well established. [T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law. . . . The question of whether, and to what extent, the child support guidelines apply, however, is a question of law over which this court should exercise plenary review." (Citations omitted; internal quotation marks omitted.) *Zheng* v. *Xia*, 204 Conn. App. 302, 309, 253 A.3d 69 (2021); see also *Dowling* v. *Szymczak*, 309 Conn. 390, 399, 72 A.3d 1 (2013). Furthermore, although the trial court is vested with broad discretion in domestic relations matters, with respect to child support, "the parameters of the court's discretion have been somewhat limited by the factors set forth in the

child support guidelines." (Internal quotation marks omitted.) *Colbert* v. *Carr*, 140 Conn. App. 229, 240, 57 A.3d 878, cert. denied, 308 Conn. 926, 64 A.3d 333 (2013).

I

On appeal, the defendant claims that the court erred in crafting its child support orders. Specifically, the defendant claims that the court improperly (1) calculated his basic child support obligation by failing to allocate properly the total amount of child support among the parties as required by the child support guidelines, (2) deviated from the child support guidelines without making the requisite findings, and (3) ordered an open-ended, uncapped percentage based supplemental child support award. We agree with all of the defendant's claims.

We begin with the child support guidelines; Regs., Conn. State Agencies § 46b-215a-1 et seq.; and our case law interpreting the guidelines. General Statutes § 46b-84 provides in relevant part: "(a) Upon or subsequent to the . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. Any post judgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of child support. . . .

"(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation,

amount and sources of income, vocational skills, employability, estate and needs of the child. . . .''

General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines, which must be updated every four years, ''to ensure the appropriateness of criteria for the establishment of child support awards.'' General Statutes § 46b-215b provides in relevant part: ''(a) The . . . guidelines issued pursuant to section 46b-215a . . . and in effect on the date of the support determination shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case.'' See also *Maturo* v. *Maturo*, 296 Conn. 80, 118, 995 A.2d 1 (2010) (''[t]he . . . guidelines shall be considered in *all* determinations of child support amounts within the state'' (emphasis in original; internal quotation marks omitted)).

The guidelines consist of ''the rules, schedule and worksheet established under [the applicable sections] of the Regulations of Connecticut State Agencies for the determination of an appropriate child support award . . . .'' Regs., Conn. State Agencies § 46b-215a-1 (5). The guidelines are accompanied by a preamble that is not part of the regulations but is intended to assist in their interpretation. See Child Support and Arrearage Guidelines (2015), preamble. The preamble states that the primary purpose of the guidelines is

"[t]o provide uniform procedures for establishing an adequate level of support for children"; id., § (c) (1), p. v; and "[t]o make awards more equitable by ensuring the consistent treatment of persons in similar circumstances." Id., § (c) (2), p. v.

Moreover, "[§] 46b-215a-5c (a) of the Regulations of Connecticut State Agencies provides in relevant part: 'The current support . . . contribution amounts calculated under [the child support guidelines] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. Only the deviation criteria stated in . . . subdivisions (1) to (6), inclusive, of subsection (b) of this section . . . shall establish sufficient bases for such findings.'[7]

"Our courts have interpreted this statutory and regulatory language as requiring three distinct findings in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." (Footnote added; footnote omitted.) *Righi* v.

[7] The criteria enumerated in § 46b-215a-5c (b) of the regulations are: "(1) Other financial resources available to a parent . . . (2) [e]xtraordinary expenses for care and maintenance of the child . . . (3) [e]xtraordinary parental expenses . . . (4) [n]eeds of a parent's other dependents . . . (5) [c]oordination of total family support . . . [and] (6) [s]pecial circumstances . . . ."

Relevant to this appeal, a parent's earning capacity is considered part of the "[o]ther financial resources available to a parent" that would justify a deviation. See Regs., Conn. State Agencies § 46b-215a-5c (b) (1) (B).

Righi, 172 Conn. App. 427, 436–37, 160 A.3d 1094 (2017).

In *Dowling* v. *Szymczak*, supra, 309 Conn. 390, our Supreme Court provided clear guidance for determining child support obligations in high income situations. The court explained that "the schedule sets forth a presumptive percentage and resultant amount corresponding to specific levels of combined net weekly income; the schedule begins at $50 and continues in progressively higher $10 increments, terminating at $4000. . . . This court has recognized that the guidelines nonetheless apply to combined net weekly income in excess of that maximum amount. . . . Indeed, the regulations direct that, [w]hen the parents' combined net weekly income exceeds [$4000], child support awards shall be determined on a case-by-case basis, and the current support prescribed at the [$4000] net weekly income level shall be the minimum presumptive amount. . . .

"While the regulations clearly demarcate the presumptive minimum amount of the award in high income cases, they do not address the maximum permissible amount that may be assigned under a proper exercise of the court's discretion. . . . [T]his court has remained mindful that the guidelines . . . indicate that such awards should follow the principle expressly acknowledged in the preamble [to the guidelines] and reflected in the schedule that the child support obligation as a percentage of the combined net weekly income should decline as the income level rises. . . . We therefore have determined that child support payments . . . should presumptively not exceed the [maximum] percent [set forth in the schedule] when the combined net weekly income of the family exceeds $4000, and, in most cases, should reflect less than that amount. . . .

"Either the presumptive ceiling of income percentage or presumptive floor of dollar amount on any given

child support obligation, however, may be rebutted by application of the deviation criteria enumerated in the guidelines and by the statutory factors set forth in § 46b-84 (d). . . . In order to justify deviation from this range, the court must first make a finding on the record as to why the guidelines were inequitable or inappropriate . . . . Thus, this court unambiguously has stated that, when a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d)." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 400–402; see also Regs., Conn. State Agencies § 46b-215a-2c (a) (2).[8]

The guidelines also permit courts, in appropriate cases, to enter "a supplemental order . . . to pay a percentage of a future lump sum payment, such as a bonus. Such supplemental orders shall be entered when a specific dollar amount of the future lump sum payment has not been ordered and such payment is of an indeterminate amount, subject to clauses (i) and (ii) in this subparagraph . . . (ii) for combined net weekly incomes over $4000, the order shall be determined on a case by case basis consistent with applicable statutes." Regs., Conn. State Agencies § 46b-215a-2c (c) (1) (B). "A supplemental order treats the unknown future lump

[8] "When the parents' combined net weekly income exceeds $4,000, child support awards shall be determined on a case-by-case basis, consistent with statutory criteria, including that which is described in subsection (d) of section 46b-84 of the Connecticut General Statutes. The amount shown at the $4,000 net weekly income level shall be the minimum presumptive support obligation. The maximum presumptive support obligation shall be determined by multiplying the combined net weekly income by the applicable percentage shown at the $4,000 net income level." Regs., Conn. State Agencies § 46b-215a-2c (a) (2).

sum payment separately from the basic current support order and is intended to account only for those instances in which the parties have knowledge of an anticipated future lump sum payment of an unknown amount, such as a bonus." (Internal quotation marks omitted.) *Gentile* v. *Carneiro*, 107 Conn. App. 630, 643, 946 A.2d 871 (2008).

The following additional facts and procedural history are relevant to the defendant's claims. The court awarded the parties joint legal custody of their two children and granted the plaintiff primary physical custody of them. The court consequently turned to the calculation of the defendant's child support obligation. Because the plaintiff was not employed, the court first calculated the basic child support range using only the defendant's income. The court, relying on the defendant's net weekly base salary from Springworks plus the weekly income he receives from his 25 percent interest in a real estate investment, determined that the parties' joint net weekly income, assuming no income for the plaintiff, was $4630. In calculating basic child support, the court did not consider any bonuses the defendant might receive from Springworks, which the court described as both "a maximum annual cash bonus of 30 percent" and "an annual cash bonus capped at 30 percent of the [defendant's] base salary." The court stated that it would "use the defendant's net weekly income from any bonuses and other sources to calculate a supplemental child support obligation as a percentage of all other income."

Because the combined income the court calculated for the purpose of basic child support was greater than $4000, the court, using the guidelines, calculated a range of basic child support, the low end of which was the "dollar amount shown [in the guidelines] at the $4000 level for two children" and the high end of which was "the percentage amount at that level for two children,

i.e., 17.71 percent." Using this methodology, the court calculated a range of basic child support between $708 and $820 per week.

The court then concluded that it should deviate from the guidelines because the plaintiff has an earning capacity of "$40,000 gross per annum." The court, in light of the plaintiff's earning capacity, found "that it would be inequitable and inappropriate to award the presumptive amount." The court then added the plaintiff's earning capacity to the defendant's net weekly income of $4630 to arrive at a new combined weekly "income" of $5390. The court then used the same methodology it had originally used in applying the guidelines to determine a basic child support range. The bottom of the range remained at $708 per week, but the top of the range increased to "$955 per week (17.71 [percent] of $5390)." Rather than adjusting the defendant's basic child support obligation downward from the original range it had calculated to account for the plaintiff's earning capacity, the court "in its discretion" ordered the defendant to pay weekly basic child support of $1000, which the court described as "a deviation of less than 5 percent." The court further ordered the defendant to "make a weekly supplemental child support payment equal to 17.71 percent of the after-tax amounts of any bonuses and other income."

A

The defendant first claims that the court abused its discretion in calculating his child support obligation by increasing, rather than reducing, his obligation based on the plaintiff's earning capacity. We agree.

The child support guidelines set forth a worksheet that provides specific instructions for calculating child support. The worksheet explains that "each parent's share of the basic child support obligation is determined by calculating each parent's share of the combined net

weekly income . . . and multiplying the result for each parent by the basic child support obligation." Regs., Conn. State Agencies § 46b-215a-2c (a) (4). The guidelines specifically provide that the court should: "(B) Determine each parent's percentage share of the combined net weekly income by dividing the [net weekly income] amount for each parent by the [total combined net weekly income] and multiplying by one hundred percent. . . . (C) Multiply [the amount as calculated in (B), rounded to the nearest whole percentage] for each parent by the [basic child support obligation (from the Schedule of Basic Child Support Obligations)]. . . . These amounts are each parent's share of the basic child support obligation." Id., § 46b-215a-2c (a) (4).

Accordingly, the child support guidelines specifically contemplate that the noncustodial parent's basic child support obligation will account for each party's pro rata share of child support as calculated by the guidelines. Put another way, the noncustodial parent's child support obligation should not reflect the parties' total child support obligation as calculated by the guidelines, but only each parent's pro rata share of the total.

The plaintiff does not dispute that this pro rata methodology must be followed when the child support calculations are based on both parties' income. Rather, she argues: "Unlike the calculation of the presumptive amount of support based on income, § 46b-215a-5c (b) (1) (B) [of the regulations], which delineates earning capacity as a deviation criterion, does not direct the court in how that deviation criteria should be applied. Consequently, the court, in exercising its discretion afforded by the deviation criteria and § 46b-84 (d), was not . . . bound by the presumptive amount of support pursuant to the guidelines." We are not persuaded.

We recognize that "[i]t is well established that the trial court may under appropriate circumstances in a

marital dissolution proceeding base financial awards [pursuant to General Statutes §§ 46b-82 (a) and 46b-86] on the earning capacity of the parties rather than on actual earned income." (Footnote omitted; internal quotation marks omitted.) *Tanzman* v. *Meurer*, 309 Conn. 105, 113–14, 70 A.3d 13 (2013). "A party's earning capacity is a deviation criterion under the guidelines, and, therefore, a court must specifically invoke the criterion and specifically explain its justification for calculating a party's child support obligation by virtue of the criterion instead of by virtue of the procedures outlined in the guidelines." *Fox* v. *Fox*, 152 Conn. App. 611, 633, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014).

In the present case, the defendant asked the court to deviate from the guidelines because the plaintiff had engineering degrees from a prestigious university and, hence, a significant earning capacity. Thus, the defendant sought to reduce his child support obligation, which otherwise would be based solely on his income, by considering the plaintiff's ability to earn income to contribute to the financial support of their children. The court, after hearing testimony regarding the plaintiff's earning capacity, found that the plaintiff had a gross earning capacity of approximately $40,000 per year. The court further found "that it would be inappropriate and inequitable to perform the child support calculations with no income attributed to the plaintiff." Given these findings, the expected outcome would be that the court deviate from the guidelines downward to calculate the defendant's basic child support obligation. Applying the principles behind the guidelines, once the court decided to factor in the plaintiff's earning capacity to determine the parties' child support obligations, it should have assigned at least a portion of the joint obligation to the plaintiff based on her earning capacity. In fact, the record reflects that, after the court found that the plaintiff had an earning capacity of $40,000 per year, it treated

that figure as income to recalculate the parties' joint child support obligations. When including this additional "income" in its calculation, it increased the parties' joint basic child support obligation under the guidelines from $820 per week to $955 per week. Rather than determining each party's pro rata share of that amount, however, the court simply assigned the entire child support obligation to the defendant.

Although the court was permitted to deviate from the guidelines to consider the plaintiff's earning capacity, its application of the deviation in this case was inconsistent with its reason for the deviation and inconsistent with the principles on which the guidelines are based. Consequently, the court abused its discretion in the way it determined the defendant's basic child support obligation given its findings that the plaintiff had an earning capacity of $40,000 per year and that it would be inappropriate and inequitable not to consider that earning capacity when calculating the parties' basic child support obligations.

B

The defendant next claims that the court "compounded [its calculation error] by deviating upward yet again, this time based only on [its] 'discretion.' " In particular, the defendant claims that the court failed to provide a justification for its departure from the top end of its recalculated basic child support range of $955 per week to the $1000 per week it ordered the defendant to pay. As noted previously in this opinion, the court used the plaintiff's earning capacity and the defendant's income to calculate a support range of $708 to $955 per week. After assigning this entire support obligation to the defendant, the court ordered the defendant to pay an amount above the upper end of the range, stating: "In its discretion, the court orders the defendant to pay $1000 per week as basic child support, a deviation of

less than 5 percent." As a result, the defendant's child support obligation was approximately 21.6 percent of his net weekly income, 3.89 percent above the presumptive ceiling of 17.71 percent set forth in the guidelines.[9]

The court stated that "[t]he $45 difference between the calculated high end of the guideline amount for a family that exceeds the $4000 per week net combined income represents a 5 percent increase over the $955 amount. The court has the discretion to increase or decrease the calculated amount as long as it does not exceed 15 percent of the original order amount." The defendant argues that the court had no such discretion, in the absence of a finding—which the court did not make—that the deviation is justified by one of the deviation criteria set forth in § 46b-215a-5c (b) of the regulations. The plaintiff argues that the court's finding that her earning capacity warranted a departure from the guidelines supports the upward deviation in the court's basic child support order. We conclude that the court's second upward deviation, in the absence of a finding that it was justified by one of the regulatory criteria, was in error.

First, it appears that when the court stated that it had the discretion to increase or decrease the presumptive basic child support amount, so long as it did not exceed 15 percent of that amount, it was relying on § 46b-86, governing modification of alimony and child support orders, which provides in relevant part: "There shall be a rebuttable presumption that any deviation of less than fifteen percent from the child support guidelines is not substantial and any deviation of fifteen percent or more from the guidelines is substantial. . . ." General Statutes § 46b-86 (a). Section 46b-86, however, is not applicable to the present case, in which the court was entering the initial child support award. That a certain

[9] As noted previously in this opinion, the upper end of the range was calculated using the percentage—17.71 percent—set forth in the guidelines for parents with a combined net weekly income exceeding $4000.

deviation from the child support guidelines is not "substantial," such that it may justify a *modification* of child support, does not mean the court may disregard the guidelines when ordering an *initial* child support obligation.

Second, § 46b-215a-5c (a) of the regulations provides in relevant part: "The current support . . . contribution amounts calculated under [the child support guidelines] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. Only the deviation criteria stated in . . . subdivisions (1) to (6), inclusive, of subsection (b) of this section . . . shall establish sufficient bases for such findings." It is firmly established that "when a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d)." *Maturo* v. *Maturo*, supra, 296 Conn. 106. Our case law makes clear that said criteria must be explicitly stated in the court's analysis. See *Zheng* v. *Xia*, supra, 204 Conn. App. 311 ("*any* deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child" (emphasis added; internal quotation marks omitted)); see also *Fox* v. *Fox*, supra, 152 Conn. App. 633. Thus, for the court to deviate as it did, it was required to make three distinct findings:

"(1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." *Righi* v. *Righi*, supra, 172 Conn. App. 436–37. A court's failure to substantiate its decision to adjust the presumptive basic child support order by making the explicit findings in the record that are expressly required by the guidelines constitutes an incorrect application of the law and, therefore, an abuse of discretion. See *Unkelbach* v. *McNary*, 244 Conn. 350, 367, 710 A.2d 717 (1998); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 366, 370, 999 A.2d 721 (2010) (trial court abused its discretion in awarding child support when it did not make finding on record as to why guidelines were inequitable or inappropriate and its application of deviation criteria was improper); *Maturo* v. *Maturo*, supra, 296 Conn. 89, 99–101 (same); *Zheng* v. *Xia*, supra, 204 Conn. App. 308, 312 (trial court abused its discretion when its reason for deviating from child support guidelines failed as matter of law and court made no other specific finding as to why child support guidelines were inequitable and inappropriate).

In the present case, although the court made a finding of the presumptive child support amount and stated that the plaintiff's earning capacity justified an upward deviation in the defendant's basic child support obligation to $955 per week, it did not make a specific finding to justify its further increase of the defendant's obligation to $1000 per week. Aside from referencing its "discretion," the court failed to provide an explanation as to which deviation criteria it was relying on to justify its second upward deviation from $955 to $1000 per week. Therefore, we conclude that the court abused its discretion when it ordered the defendant to pay the

plaintiff $1000 per week as basic child support without making the required findings.

Finally, we are unpersuaded by the plaintiff's argument that the court's finding that her earning capacity warranted a deviation from the guidelines was sufficient to justify any departure from the revised guideline amount of $955 per week to $1000 per week. First, for the reasons set forth in part I A of this opinion, use of the plaintiff's earning capacity to increase the defendant's child support obligation is illogical. Second, the court did not base its upward deviation from $955 to $1000 on the plaintiff's earning capacity. The plaintiff's earning capacity was used only to justify a departure from the guidelines from the top end of the range of $820 per week to $955 per week. The court's further adjustment to $1000 per week appears to be based on the court's erroneous reliance on § 46b-86.

C

The defendant next claims that the court improperly ordered "an open-ended, uncapped percentage based supplemental child support award." In particular, the defendant claims that the order "conflicts with [our] Supreme Court's holding in *Maturo* v. *Maturo*, [supra, 296 Conn. 108] that . . . a supplemental award 'must be capped at a sum bearing some rational relation to the "estate and needs of the child." ' " (Emphasis omitted.) The plaintiff disagrees, claiming that the court followed the applicable guidelines in ordering the defendant to pay 17.71 percent of his net bonus, which was capped at 30 percent of his annual salary.

Our review of the record and applicable principles leads us to conclude that the court's supplemental child support order, awarding the plaintiff 17.71 percent of the defendant's undetermined future income above his base salary, was based on a clearly erroneous finding and otherwise was in error.

1

In adjudicating child support cases, our courts have been reminded to avoid wealth transfers when awarding child support. In *Maturo*, for example, our Supreme Court expressly warned against wealth transfers or disguised alimony awards, explaining that "[t]he effect of unrestrained child support awards in high income cases is a potential windfall that transfers *wealth* from one spouse to another or from one spouse to the children under the guise of child support." (Emphasis in original.) *Maturo* v. *Maturo*, supra, 296 Conn. 105.

In *Maturo*, the dissolution court awarded a supplemental child support award of 20 percent of the defendant's indeterminate annual bonus but failed to provide any justification related to the needs of the children. Id., 88–89. Our Supreme Court determined that it was error for the dissolution court to fail to provide "any explicit justification for the award of bonus income that was related to the financial *or* nonfinancial needs or characteristics of the children under . . . § 46b-84 (d) . . . . In fact, there is no evidence that the court considered *anything* other than the defendant's income and earning capacity in making the child support award. Thus, absent a finding as to how the additional funds would be used for the benefit of the children and how the award was related to the factors identified in § 46b-84 (d), we conclude that the court exceeded its legitimate discretion." (Emphasis in original.) Id., 103.

Further, in *Maturo*, our Supreme Court distinguished between two types of bonus income, stating: "[W]hen there is a proven, routine consistency in annual bonus income, as when a bonus is based on an established percentage of a party's steady income, an additional award of child support that represents a percentage of the net cash bonus also may be appropriate if justified by the needs of the child. When there is a history of

wildly fluctuating bonuses, however, or a reasonable expectation that future bonuses will vary substantially . . . an award based on a fixed percentage of the net cash bonus is impermissible *unless* it can be linked to the child's characteristics and demonstrated needs." (Emphasis in original.) Id., 106.

In the present case, the defendant does not dispute that his bonus income should be considered in determining his child support obligation. He also does not argue that the court should not have ordered any supplemental child support order tied to his bonuses and additional income. Rather, he claims that the court improperly entered an open-ended supplemental order without making any findings that the order was related to the characteristics and needs of the children.

The court ordered the defendant to pay the plaintiff "a supplemental child support amount equal to 17.71 percent of all after-tax income from bonuses and other sources, pursuant to the provisions of . . . § 46b-84." Because the parties' combined net weekly income, using the defendant's base salary income alone, exceeded $4000, it was within the court's discretion to make a supplemental order with respect to income of an indeterminate amount, as such orders in cases in which the net weekly income exceeds $4000 are to be determined on a case-by-case basis. See Regs., Conn. State Agencies § 46b-215a-2c (c) (1) (B) (ii). In addition, the percentage used, 17.71, was consistent with that called for in the schedule for net weekly incomes greater than $4000.

The court, however, failed to provide any explicit justification for the award of bonus income that was related to the financial or nonfinancial needs or characteristics of the children under § 46b-84 (d). The court simply stated that the supplemental award was "pursuant to the provisions of . . . § 46b-84." Therefore, in

the absence of a finding as to how the additional funds would be used for the benefit of the children and how the award was related to the factors identified in § 46b-84 (d), we conclude that the court exceeded its legitimate discretion. See *Maturo* v. *Maturo*, supra, 296 Conn. 103; see also *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 217, 118 A.3d 657 ("[w]e conclude that the court erred by failing to make explicit findings as to how the additional funds would benefit the children and how the supplemental award was related to the factors identified in § 46b-84 (d)"), cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

The plaintiff argues that, to the extent that our Supreme Court's decisions in *Maturo* and *Dowling* precluded open-ended supplemental child support orders, they have been superseded by the 2015 amendments to the guidelines. She notes that the preamble to the amended guidelines specifically provides in relevant part: "In recognition of recent Supreme and Appellate Court case law addressing households with combined net weekly income of over $4,000 and further in recognition of the lack of sufficient economic data, courts should exercise their discretion consistent with the income scope as set forth in [§] 46b-215a-2c (a) (2) [of the regulations] on a case by case basis where the combined income exceeds the range of the schedule. When the combined net weekly income exceeds $4,000, the presumptive support amount shall range from the dollar amount at the $4,000 level to the percentage amount at that level applied to the combined net weekly income consistent with statutory criteria, including [General Statutes] § 46b-84 (d). . . . In exercising discretion in any given case, the magistrate or trial judge should consider evidence submitted by the parties regarding actual past and projected child support expenditures to determine the appropriate order." Child Support and Arrearage Guidelines (2015), preamble,

§ (e) (5), p. ix. She further relies on § (b) (6) of the preamble, which provides: "Future income of unknown amounts such as bonuses and other incentive based compensation that is awarded in future years, or vests in future years, or can be exercised in future years, is required to be part of the child support award to be included in the award for the year in which such amounts are includible in income for tax purposes through the use of supplemental orders." Id., § (b) (6), p. iii.

The plaintiff argues that the preamble makes clear that the commission was fully aware of *Maturo* and *Dowling* when it revised the guidelines, and "[t]hat the commission declined to include a requirement for a cap . . . indicates that the commission concluded such [a requirement was] not necessary to accomplish the purpose of the guidelines." She further argues that the court precisely followed the direction in the preamble by including the defendant's unknown future bonuses in the supplemental order. We are not persuaded.

We agree with the plaintiff that, as to high income families, the current guidelines no longer follow the principle that the percentage of family income expected to be spent on childcare declines as income rises. As to that general principle, which the guidelines still follow for families with income less than $4000 per week, the preamble to the guidelines provides: "[T]he commission [has] no economic data that supports a conclusion that this pattern continues when parents' net weekly income exceeds $4,000. This commission therefore decided to not extend either the range of the schedule or the application of the concept of declining percentages beyond its current $4,000 upper limit." Child Support Arrearage Guidelines (2015), preamble, § (d), p. vi. Thus, the trial court was not required, as the defendant suggests, to use a declining percentage in calculating the defendant's supplemental support obligation. As

noted previously in this opinion, the court had the discretion to enter a supplemental order based on the applicable percentage of 17.71 percent. Nevertheless, the issue is not the amount awarded in the court's order but, instead, the court's failure to provide an explicit justification for entering it as required by *Maturo*. See *Maturo* v. *Maturo*, supra, 296 Conn. 103.

There is no indication that the commission intended to overrule *Maturo*'s statutory analysis that was the basis of its requirement that the court must make explicit findings of the connection between the supplemental order and the needs and characteristics of the children. To the contrary, the commission stated that it was providing guidance "[i]n recognition" of recent cases from the Supreme Court and this court. See Child Support Arrearage Guidelines (2015), preamble, § (e) (5), p. ix. We acknowledge that "[t]he task of promulgating provisions to cover [high income] situation[s] lies with the legislature or its commission, [and] not with the court." (Internal quotation marks omitted.) *Dowling* v. *Szymczak*, supra, 309 Conn. 402. Indeed, as the court noted in *Dowling*: "It may be that the commission, which updates the guidelines every four years . . . will account for the exceptionally affluent families in this state in future revisions to the guidelines. Until that day, however, the uppermost multiplier will provide the presumptive ceiling that will guide the trial courts in determining an appropriate child support award 'on a case-by-case basis'; Regs., Conn. State Agencies § 46b-215a-2b (a) (2); without the need to resort to deviation criteria. We underscore, however, that, in exercising discretion in any given case, the magistrate or trial court should consider evidence submitted by the parties regarding actual past and projected child support expenditures to determine the appropriate award, with due regard for the principle that such expenditures generally decline as income rises." (Emphasis omitted;

citations omitted.) *Dowling* v. *Szymczak*, supra, 402–403.

It appears that the commission, in response to *Maturo* and *Dowling*, studied whether the principle that expenditures generally decline as income rises applied with respect to high income families, and concluded that it did not. Consequently, the commission provided that explicit guidance in the preamble to the guidelines. Significantly though, the commission did nothing to suggest that trial courts do not need to make the explicit finding as to the needs of the children required by *Maturo*. Furthermore, the guidelines require that any supplemental order be "consistent with applicable statutes." Regs., Conn. State Agencies § 46b-215a-2c (c) (1) (B) (ii). In *Maturo*, our Supreme Court premised its conclusion that a supplemental child support order must be tied to the needs of the child on § 46b-84 (d), which requires a court to "consider various characteristics and needs of the child in determining whether support is required, the amount of support to be awarded and the respective abilities of the parents to provide such support." *Maturo* v. *Maturo*, supra, 296 Conn. 95. There is nothing in the current guidelines that suggests that the commission disagreed with the Supreme Court's interpretation of § 46b-84 (d) when it required that any supplemental child support order be consistent with applicable statutes.

Consequently, the court abused its discretion in issuing its supplemental child support order without making an explicit finding connecting it to the characteristics or needs of the children.[10]

[10] In reaching this conclusion, we do not suggest that a trial court is required to engage in detailed mathematical calculations to tie every dollar of supplemental child support to some characteristic or need of the children. All that is required is an explicit finding connecting the supplemental order in some way to the children. Nevertheless, the court must do more than merely mention § 46b-84 (d). The court should discuss "how the supplemental award was related to the factors identified in § 46b-84 (d)." *Barcelo* v. *Barcelo*, supra, 158 Conn. App. 217. Pursuant to the guidelines, the court

The defendant also claims that the court's finding that the defendant's eligibility for an annual cash bonus was "capped" at 30 percent of his base salary is clearly erroneous. The defendant argues that this finding "clearly infected [the court's] alimony and child support supplemental award[s]" and, accordingly, those supplemental orders must be reversed. The plaintiff argues that there is sufficient evidence in the record to support the court's conclusion that the defendant's "eligibility for an annual cash bonus [was] capped at 30 percent of his base salary," and therefore the supplemental award was not uncapped. We agree with the defendant.

"[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts." (Internal quotation marks omitted.) *Zheng* v. *Xia*, supra, 204 Conn. App. 309. "The trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 200 Conn. App. 229, 246, 240 A.3d 688 (2020), cert. denied, 336 Conn. 909, 244 A.3d 561 (2021).

also "should consider evidence submitted by the parties regarding actual past and projected child support expenditures to determine the appropriate order." Child Support Arrearage Guidelines (2015), preamble, § (e) (5), p. ix. Although the plaintiff argues that there is evidence in the record showing that the court's entire child support order, including the supplemental order, required the defendant to pay less than what the parties collectively pay for child expenses, the court did not mention this evidence in its comprehensive memorandum of decision. Thus, we have no way of knowing if the court credited this evidence or relied on it.

It is clear from the court's reasoning that the defendant's "capped" bonus was a factor it considered in crafting the child support order. In determining the defendant's income, the court stated: "The defendant's income is a little more complicated to calculate. As previously stated, he is presently employed by Springworks . . . . *His base salary for 2019 is $403,650 and he is eligible to receive a maximum annual cash bonus of 30 percent.* . . . The court will use the defendant's net weekly income from any bonuses and other sources to calculate a supplemental child support obligation as a percentage of all other income." (Emphasis added.) In describing the defendant's income, the court also described his bonus from Springworks as "capped at 30 percent of his base salary." The court then ordered "[t]he defendant [to] pay to the plaintiff a base child support amount of $1000 per week for the two minor children, plus a supplemental child support amount equal to 17.71 percent of all after-tax income from bonuses and other sources, pursuant to the provisions of . . . § 46b-84." (Footnote omitted.)

Affording the appropriate deference to the court's findings of fact, we conclude that there was no evidence in the record to support the court's finding that the defendant's annual cash bonus was capped at 30 percent of his base salary. The defendant's employment contract with Springworks stated: "You will be eligible to receive an annual performance bonus. The Company will *target* the bonus at up to 30 [percent] of your annual salary rate. The actual bonus percentage is discretionary and will be subject to the Company's assessment of your performance, as well as the business conditions at the company. The bonus will also be subject to your employment for the full period covered by the bonus, approval by and adjustment at the discretion of the Company's board of directors and the terms of any

applicable bonus plan. . . . *The Company also may make upward adjustments in the targeted amount of your annual performance bonus*." (Emphasis added.)

There was no further evidence or testimony contradicting the employment contract. Accordingly, the court's factual finding that the defendant's annual bonus was "capped at 30 percent of his base salary" conflicts with the only evidence on the issue. Thus, the finding was clearly erroneous.

Therefore, the court's supplemental child support order did not have a reasonable basis in fact. We thus conclude that the supplemental child support order cannot stand.

II

The defendant also claims that the court improperly ordered an open-ended, uncapped percentage based supplemental alimony award. Specifically, the defendant argues that the supplemental alimony award fails for the same reason the supplemental child support award fails, namely, the order was based on a clearly erroneous finding of fact.[11] We agree.

[11] We note that the defendant also claims that the court's supplemental alimony award runs afoul of the principle articulated in *Dan* v. *Dan*, 315 Conn. 1, 11, 105 A.3d 118 (2014), in which our Supreme Court held that "[t]here is little, if any, legal or logical support . . . for the proposition that a legitimate purpose of alimony is to allow the supported spouse's standard of living to match the supporting spouse's standard of living *after* the divorce, when the supported spouse is no longer contributing to the supporting spouse's income earning efforts." (Emphasis in original.) *Dan*, however, is inapplicable as that case involved a modification of an alimony award, not the initial award itself.

In addition, this court has affirmed the use of supplemental alimony orders based on future earnings. See *Finan* v. *Finan*, 100 Conn. App. 297, 306, 918 A.2d 910 (2007), rev'd on other grounds, 287 Conn. 491, 949 A.2d 468 (2008); *Burns* v. *Burns*, 41 Conn. App. 716, 727–28, 677 A.2d 971, cert. denied, 239 Conn. 906, 682 A.2d 997 (1996); *Lawler* v. *Lawler*, 16 Conn. App. 193, 196–97, 547 A.2d 89 (1988), appeal dismissed, 212 Conn. 117, 561 A.2d 128 (1989). Therefore, this claim is without merit.

In fashioning alimony awards, the court is required to consider the criteria set forth in § 46b-82 (a), which provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment." Further, the failure to include bonuses in the determination of income is error. See *Bartel* v. *Bartel*, 98 Conn. App. 706, 712–13, 911 A.2d 1134 (2006).

In the present case, the court ordered that, "[i]n addition to the base alimony previously ordered, the defendant shall pay to the plaintiff, as supplemental alimony, 17.71 percent of all after-tax income from his employment above his base salary in any year in which he has an alimony obligation to the plaintiff." The court reasoned that "[a] period of [ten] years of alimony would assist the plaintiff to enter the work world in a meaningful way especially while the two minor children were young. A declining amount would encourage the plaintiff to seek significant employment as the children grew older and no longer needed as much daily care. A supplemental order based on bonus payments would fairly assist the plaintiff without burdening the defendant with an excessive weekly order based on amounts paid only once a year or sporadically."

As stated previously, the court's supplemental alimony award was based, at least in part, on its finding that the defendant's annual bonus was capped at 30

percent of his annual salary. For the reasons set forth in part I C 2 of this opinion, that finding was clearly erroneous. Thus, the court's supplemental alimony order did not have a reasonable basis in fact. Accordingly, we conclude that the supplemental alimony order must be reversed.

III

We turn now to the appropriate relief. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards. . . .

"Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Citations omitted; internal quotation marks omitted.) *Barcelo* v. *Barcelo*, supra, 158 Conn. App. 226–27.

"Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013).

In the present case, we have concluded that the trial court misapplied the child support guidelines in fashioning its basic child support order and, further, that it improperly ordered supplemental child support and alimony based on an erroneous finding of fact. Given that the plaintiff was awarded ten years of alimony that included a significant supplemental alimony award, we conclude that the court's error with respect to that award is not severable from the court's property distribution. Furthermore, although this court and our Supreme Court have held that, under some circumstances, a child support award may be severable from the other financial orders; see *Blondeau* v. *Baltierra*, 337 Conn. 127, 174–75, 252 A.3d 317 (2020); *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 390; *Maturo* v. *Maturo*, supra, 296 Conn. 124–25; *Kavanah* v. *Kavanah*, 142 Conn. App. 775, 785, 66 A.3d 922 (2013); *Gentile* v. *Carneiro*, supra, 107 Conn. App. 650–51; this is not such a case. The court issued a significant supplemental child support order requiring the defendant to pay as supplemental child support 17.71 percent of any bonuses and other income. The court then used this same 17.71 percent as the basis for its supplemental alimony order. Given the potential size of the supplemental child support order and its link to the supplemental alimony order, the court's child support orders also are part of the mosaic of financial orders issued by the court. Because it is uncertain whether the court's other financial awards will remain intact after reconsidering the child support orders and the supplemental alimony order in a manner consistent with this opinion, we conclude that the entirety of the mosaic must be refashioned. See, e.g., *Tuckman* v. *Tuckman*, supra, 308 Conn. 214–15; *Finan* v. *Finan*, 287 Conn. 491, 509, 949 A.2d 468 (2008). Accordingly, on remand, the court must reconsider all of the financial orders, including the property distribution orders.

The judgment is reversed only as to all financial orders, and the case is remanded for a new trial on all financial issues; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JERMAINE ROSS *v.* COMMISSIONER OF CORRECTION (AC 45062)

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

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crime of kidnapping in the second degree, sought a writ of habeas corpus, claiming, inter alia, that he was actually innocent and that his court-appointed standby counsel, R, had rendered ineffective assistance when the petitioner represented himself during his second criminal trial. At the petitioner's first criminal trial, the state introduced evidence that the petitioner had lured the victim into his car by promising her money in exchange for sex and then drove to a market where video footage from two surveillance cameras showed the victim getting out of the car, entering the market to make a purchase and then reentering the car before it was driven away. When the victim told the petitioner that she had changed her mind and asked that he drop her off, he refused and drove to a parking lot where he sexually assaulted her. After the petitioner's first criminal trial ended in a mistrial, the petitioner invoked his right to represent himself at his retrial and proceeded with R acting as standby counsel. During jury selection, the trial court ordered the petitioner removed from the courtroom because of his belligerent conduct and directed R to continue with jury selection. The petitioner resumed self-representation before the completion of jury selection and his acceptance of the state's plea offer. The habeas court granted in part the motion filed by the respondent Commissioner of Correction to dismiss the petitioner's habeas petition. At the habeas trial, the petitioner claimed, inter alia, that inconsistencies in the victim's recounting of events and discrepancies in the video surveillance footage that undermined the victim's testimony that she was at the market with him constituted newly discovered evidence that established his claim of actual innocence. The petitioner further claimed that R had rendered ineffective assistance by failing to inform him of a potential legal claim pertaining to the interception by the Department of Correction of his mail that contained his defense strategy, which thereafter was provided to the

state's attorney. The habeas court denied the petitioner's actual innocence claim, concluding that he had not presented any newly discovered evidence that was not available at the time of the underlying criminal proceedings. The court also determined that the petitioner's ineffective assistance claim was without merit, reasoning that, once he decided to represent himself, he had no right to the effective assistance of counsel in any capacity. The habeas court thereafter rendered judgment dismissing the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court did not err in rejecting the petitioner's claim that he was actually innocent, as he failed to present any newly discovered evidence to establish his innocence by clear and convincing evidence:
   a. This court rejected the petitioner's assertion that evidence need not be newly discovered to establish a claim of actual innocence, as that assertion was flatly contradictory to this court's binding precedent that an actual innocence claim must be based on newly discovered evidence.
   b. This court concluded that, even if there were no requirement that evidence must be newly discovered to establish an actual innocence claim, the petitioner's efforts to undermine the credibility of the victim's testimony by calling into question the reliability of the surveillance video was unavailing, because, even if the reliability of the surveillance video were called into question, undermining one piece of evidence did not constitute affirmative evidence of his actual innocence; moreover, the evidence the petitioner adduced concerning the surveillance video merely attempted to discredit a portion of the state's evidence at his underlying criminal trial and would not negate the other ample evidence of his guilt that was admitted at that trial, which included evidence that his DNA was found in the victim, evidence of tire marks at the crime scene that matched the petitioner's vehicle, cell phone location data placing him near the scene at the relevant time, and evidence that the police found him in the same location several days later with another sex worker in a car that matched the vehicle described by the victim.
2. There was no merit to the petitioner's claim that the habeas court improperly failed to conclude that R had rendered ineffective assistance in his role as standby counsel, as the petitioner had no right to the effective assistance of counsel in any capacity after he waived his sixth amendment right to counsel and exercised his right to represent himself: the petitioner cited no legal authority to support his contention that R had a duty to inform him of potential legal issues in connection with his intercepted prison mail, the evidence showed that R's role as standby counsel was limited in that he neither examined witnesses nor argued to the jury but mostly responded to requests from the petitioner, R's actions readily fell into the category of assisting the petitioner with overcoming routine procedural obstacles to the completion of tasks the petitioner wanted to complete, and, despite the assistance R provided by offering the petitioner unsolicited advice and conducting voir dire

on the day the petitioner was removed from the courtroom, the petitioner unmistakably represented himself through the conclusion of his criminal matter, during which he filed and argued numerous motions, represented himself at multiple hearings and, on several occasions, reaffirmed to the trial court his desire to represent himself; moreover, nothing in the record indicated that the petitioner was confused about the role of standby counsel, he never expressed to the trial court any uncertainty about R's role, and he presented no evidence to the habeas court that he relied on R to provide unsolicited advice or to identify and inform him of potential legal issues.

3. The petitioner could not prevail on his claim that the habeas court improperly dismissed that count of his habeas petition in which he alleged that his rights to due process and the assistance of counsel were violated as a result of the interception of his prison mail: contrary to the petitioner's contention that those allegations related to the knowing and voluntary nature of his guilty plea, they did not sufficiently demonstrate an interrelationship between the plea and the alleged ineffective assistance by R such that it could be said that the plea was not made knowingly and voluntarily, as there could be no ineffective assistance of counsel because the petitioner represented himself, the count at issue could not reasonably be read to set forth a claim that the plea was not made knowingly and voluntarily, and this court declined to consider the petitioner's memorandum of law opposing the respondent's motion to dismiss, in which he argued for the first time that his plea was not made knowingly or voluntarily, as a memorandum of law is not a proper vehicle for supplementing factual allegations in a habeas petition; moreover, a plain reading of the allegations at issue showed that they asserted only a claim that the petitioner had lost an opportunity to have the charges against him dismissed because of the interception of his mail, as the count at issue contained no allegations relating to the knowing and voluntary nature of his guilty plea, at no point did he amend his habeas petition to allege that the plea was unknowingly and involuntarily made due to the interception of his mail, and, as alleged in the count at issue, the petitioner was fully aware of the interception of his mail prior to entering his guilty plea; furthermore, because a plea is made knowingly and voluntarily regardless of whether a defendant is made aware of every motion being waived by entering the plea, the petitioner knowingly and willingly assumed that risk and had been advised of it by the trial court when he chose to represent himself.

Argued October 3, 2022—officially released January 17, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Chaplin*, *J.*, granted in part

the motion to dismiss filed by the respondent Commissioner of Correction; thereafter, the petitioner withdrew the petition in part; subsequently, the case was tried to the court, *Oliver*, *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 *Matthew C. Gedansky*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. Following the granting of certification to appeal, the petitioner, Jermaine Ross, appeals from the judgment of the habeas court denying his second revised, amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly (1) rejected his actual innocence claim, (2) concluded that he failed to establish that standby counsel provided ineffective assistance, and (3) dismissed count two of the habeas petition.[1] We disagree and, accordingly, affirm the judgment of the habeas court.

[1] In his appellate brief, the petitioner also claimed that the habeas court erred in dismissing count four of the amended petition. In particular, the petitioner argued that the court improperly dismissed his claim in count four that his guilty plea was not knowing and voluntary because he was not informed that he would be ordered to participate in sex offender treatment as a result of his plea. In his appellate brief, the respondent, the Commissioner of Correction, argued that the habeas court did not dismiss the sex offender treatment claim but dismissed only the portion of count four that alleged a due process violation regarding jury selection, which occurred before the petitioner entered his guilty plea. At oral argument before this court, the petitioner's counsel abandoned the sex offender treatment claim. Consequently, we do not address it further. See, e.g., *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 65 n.1, 223 A.3d 85 (2019) (declining to review claims counsel expressly abandoned at oral argument), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020). Furthermore, because the petitioner mentioned but did not otherwise address in his brief the habeas court's dismissal of the jury selection claim, we deem any claim related to

The habeas court set forth the following relevant factual and procedural background in its memorandum of decision. "The petitioner was the defendant in *State* v. *Ross*, Docket No. CR-10-0642126-S, in the judicial district of Hartford. The petitioner was charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), and one count of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). Although the petitioner was initially represented by two different attorneys prior to trial, he exercised his right to represent himself. The petitioner's first criminal trial proceeded as far as jury deliberations but resulted in a mistrial after the jury was unable to reach a unanimous verdict. After the mistrial, the petitioner was briefly represented by a third attorney, who was discharged, and the petitioner [was assigned] his fourth counsel, Attorney Aaron Romano. The petitioner again invoked his right to represent himself, which was granted [after he was fully canvassed by the court, *Dewey*, *J.*], and he proceeded with the assistance of Romano acting in the capacity of standby counsel.

"Jury selection for a second trial commenced with the petitioner representing himself and Romano [acting] as standby counsel. However, after the petitioner indicated on June 4, 2013, that he did not want to proceed with the trial that day, he was ordered removed from the courtroom. Romano took over representation and continued with the jury selection, although the petitioner resumed representing himself before jury selection completed. On January 24, 2014, the state conveyed

that ruling abandoned. See, e.g., *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 80–81, 256 A.3d 684 ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 339 Conn. 909, 261 A.2d 744 (2021).

a plea offer to the petitioner, which he accepted that day. In exchange for pleading guilty to one count of kidnapping in the second degree in violation of General Statutes § 53a-94, the petitioner would receive a total effective sentence of ten years of incarceration, suspended after the service of five years, followed by five years of probation. . . . The petitioner pleaded guilty pursuant to the *Alford* doctrine[2] and, after a thorough canvass by the court, *Alexander*, *J.*, was sentenced in accordance with the plea agreement.

"The prosecutor put the following facts on the record to support the petitioner's guilty plea: '[T]his occurred on [November 22, 2009]. The [petitioner] had picked up a woman on Webster Street in Hartford, who admitted to the police that she was working as a [sex worker] at the time. He had lured her into his car with the promise of money in exchange for sex [and] began driving her to another location. Along the way, she changed her mind [and] asked to be brought back to Hartford. He did not follow those wishes [and] took her to Farmington where the other events unfolded.' . . . The court then described to the petitioner the elements of kidnapping in the second degree and canvassed him to determine whether he understood what the state would have to prove at trial. The petitioner acknowledged that he understood the court's explanation." (Citations omitted; footnote in original.)

On May 1, 2014, the petitioner filed the underlying habeas petition as a self-represented party. The court

[2] "*North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, L. Ed. 2d 162 (1970). 'Under *North Carolina* v. *Alford*, [supra, 37] . . . a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless.' (Emphasis omitted.) *State* v. *Wheatland*, 93 Conn. App. 232, 234 n.1, 888 A.2d 1098, cert. denied, 277 Conn. 919, 895 A.2d 793 (2006)."

subsequently appointed counsel to represent the petitioner, and assigned counsel filed the operative second revised, amended petition. In the operative petition, which included eight counts, the petitioner alleged that (1) he is actually innocent, (2) his right to due process and his right to counsel were violated by the Department of Correction's having intercepted mail intended for his attorney that contained his defense strategy, (3) his rights to due process and to a fair trial were violated by the prosecutor's alleged *Brady*[3] violation, (4) his right to due process was violated (a) when the criminal proceedings against him continued without his presence after he was removed from the courtroom and standby counsel took over representation, and (b) because the petitioner's decision to plead guilty to kidnapping in the second degree was not made knowingly, intelligently, and voluntarily, as he did not know or understand that sex offender treatment would be a condition of his probation, (5) his right to self-representation was violated, (6) his right to the effective assistance of standby counsel was violated, (7) his right to the effective assistance of counsel was violated constructively, and (8) his right to counsel was violated because his waiver of that right was ineffective.

On June 3, 2019, the respondent, the Commissioner of Correction, pursuant to Practice Book § 23-29, filed a motion to dismiss counts one, two, three, five, six, seven, and the portion of count four involving the continuation of jury selection in the petitioner's criminal trial after he had been removed from the courtroom. On June 25, 2019, the petitioner filed a memorandum of law in opposition to the motion, and the parties appeared in court and argued the motion to dismiss

[3] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (suppression by prosecution of evidence favorable to accused upon request violates due process when evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution).

and the opposition thereto on September 5, 2019. At the hearing, the respondent's counsel clarified that she was not moving to dismiss the portion of count four relating to sex offender treatment. Further, habeas counsel represented to the court that he had filed a motion in the petitioner's criminal case requesting that the trial court preclude the imposition of sex offender treatment and stated that the issue would "very likely become moot if this case goes forward . . . ." The habeas court responded that, until the trial court addressed the pending motion regarding sex offender treatment, "there is nothing for this court to address on that point . . . ."

Following the hearing, the court, *Chaplin*, *J.*, issued a memorandum of decision granting the respondent's motion to dismiss as to counts two, three, five, seven, and the challenged portion of count four pertaining to the petitioner's removal from the courtroom on June 4, 2013,[4] and denying the motion as to counts one and six. The petitioner subsequently withdrew count eight, and the matter proceeded to trial on count one, in which the petitioner claimed that he was actually innocent, and on count six, in which he alleged ineffective assistance of standby counsel.[5]

A two day habeas trial was held on January 15 and February 4, 2021. In a memorandum of decision filed July 8, 2021, the court, *Oliver*, *J.*, denied the petition. The court stated: "The petitioner testified in support

[4] See footnote 1 of this opinion.

[5] Although the court never dismissed the portion of count four of the second revised, amended petition, which alleged that the petitioner's guilty plea was not knowingly and voluntarily made because he had not been informed that his plea would result in sex offender treatment, the petitioner did not pursue that claim at trial and apparently abandoned it in light of his pursuit of relief from that requirement in the criminal court. In any event, as previously noted, during oral argument before this court, the petitioner's appellate counsel expressly abandoned any claim related to sex offender treatment. See footnote 1 of this opinion.

of his claims and presented the testimony of former Detective Tracy Enns . . . Romano, and Victor Sanchez. The petitioner entered documents, mostly consisting of transcripts, into evidence, as well as a flash drive containing two videos. The respondent entered one exhibit into evidence. The petitioner and the respondent filed posttrial briefs."

The court denied the petitioner's actual innocence claim on the grounds that "the petitioner [had] failed to present any newly discovered evidence that was not available at the time of the criminal proceedings," and that "[t]here [was] no evidence affirmatively establishing that the petitioner did not commit the charged offense and is actually innocent." As to the petitioner's ineffective assistance of counsel claim, the court, quoting *State* v. *Oliphant*, 47 Conn. App. 271, 281, 702 A.2d 1206 (1997), cert. denied, 244 Conn. 904, 714 A.2d 3 (1998), found that the claim was "without merit because after deciding to proceed pro se, [the petitioner had] no constitutional right to the effective assistance of counsel in any capacity"; (internal quotation marks omitted); and, because there is no constitutional right to standby counsel, the petitioner could not prove that standby counsel was ineffective. The court further concluded that the petitioner had failed to prove that Romano failed to perform his limited standby counsel duties or that Romano had assumed the role of counsel other than briefly during voir dire of potential jurors. Finally, the court concluded that there was "no other credible evidence that Romano overrode or infringed upon the petitioner's right to represent himself." On July 19, 2021, the petitioner filed a petition for certification to appeal, which the habeas court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly denied his actual innocence claim. This claim is without merit.

We begin by setting forth the law governing claims of actual innocence and the corresponding standard of review. "Actual innocence, also referred to as factual innocence . . . is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . .

"[T]he proper standard for evaluating a freestanding claim of actual innocence . . . is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime. . . .

"Our Supreme Court . . . clarified the actual innocence standard in *Gould* [v. *Commissioner of Correction*, 301 Conn. 544, 560–61, 22 A.3d 1196 (2011)]. In *Gould*, the habeas court found that the petitioner was entitled to relief on his actual innocence claim after the recantations of testimony that was the sole evidence of [the petitioner's] guilt. . . . On appeal, our Supreme Court held that the clear and convincing burden . . . requires more than casting doubt on evidence presented

at trial and the burden requires the petitioner to demonstrate actual innocence through affirmative evidence that the petitioner did not commit the crime. . . .

"Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred. . . . Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility. . . .

"With respect to the first component of the petitioner's burden, namely, the factual finding of actual innocence by clear and convincing evidence . . . [t]he appropriate scope of review is whether, after an independent and scrupulous examination of the entire record, we are convinced that the finding of the habeas court that the petitioner is actually innocent is supported by substantial evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 706–707, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, 580 U.S. 1035, 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016); see also *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92, 700 A.2d 1108 (1997); *Myers* v. *Commissioner of Correction*, 215 Conn. App. 592, 614, 284 A.3d 309 (2022); *Ortiz* v. *Commissioner of Correction*, 166 Conn. App. 635, 659–60, 145 A.3d 937, cert. denied, 323 Conn. 906, 150 A.3d 680 (2016).

Although our Supreme Court has yet to address the issue of whether an actual innocence claim must be supported by newly discovered evidence; see *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 551 n.8; this court has consistently held that "[a] claim of actual

innocence must be based on newly discovered evidence. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 687, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017).

The following additional facts and procedural history are relevant to our resolution of this claim. At the petitioner's first criminal trial, the victim testified that, on the evening of November 22, 2009, she met a man she later identified as the petitioner in Hartford, where she was working as a sex worker. She agreed to get into the petitioner's car after he told her he would pay her forty dollars in exchange for sex. The petitioner then drove to Victoria's Market where the victim purchased a condom. The victim then returned to the car with the condom, got into the passenger seat, and the petitioner began driving. The state introduced video surveillance footage from Victoria's Market of the victim exiting the petitioner's vehicle, entering the store, and making a purchase on that evening.

The victim testified that, during the drive, she told the petitioner that she wanted to go home and asked that he drop her off. The petitioner refused and became agitated. The petitioner took her against her will to the parking lot of a landscaping company where he proceeded to sexually assault her. The petitioner thereafter removed the victim from his car and drove away. The victim then made her way out to the road where she flagged down a passing motorist for assistance.

While the victim was speaking with the motorist, a Farmington police officer pulled over to assist. The victim informed the officer that she had been sexually

assaulted and accompanied the officer in his police cruiser to the location where the assault had occurred. She informed the officer that her assailant had been driving a black Nissan Maxima. The victim was eventually taken to the University of Connecticut Medical Center emergency department where she was examined by medical personnel who administered a sexual assault kit and gathered physical evidence from her body.

At trial, the state introduced evidence establishing that the petitioner's DNA matched DNA of spermatozoa recovered from the victim, that the tires on the petitioner's vehicle matched the tire marks at the crime scene, and that the petitioner's cell phone was in the area of the assault at the relevant time. The state also introduced evidence that, on November 27, 2009, five nights after the assault, Farmington police located the petitioner parked in the same location where the assault had occurred. The petitioner was seated in his black Nissan Maxima with another sex worker.

In count one of the habeas petition, the petitioner alleged that newly discovered evidence in the form of cell phone records, computer records, and "challenges to the reliability of the forensic evidence" established that he was actually innocent of the charge of kidnapping in the second degree. At the habeas trial, the petitioner testified in support of his claim and presented the testimony of Sanchez, whose family owned Victoria's Market, and Enns, who, at the time of the events at issue, was employed in the Farmington Police Department. The petitioner also introduced the transcripts from the original criminal trial and two surveillance videos from Victoria's Market, which had been introduced at trial. The first video captures the interior of Victoria's Market and shows the victim entering the market and making a purchase. The second video depicts a view looking out into the parking area of Victoria's Market and shows the victim exiting a vehicle

that matched the victim's description of the petitioner's vehicle and then entering the market.

At the habeas trial, Enns testified that she retrieved the video evidence directly from Victoria's Market and downloaded it onto a flash drive. She obtained the video to "corroborate what the victim was telling us in the case . . . ." Enns confirmed that the videos did corroborate a portion of the victim's statement and that the videos were introduced at the petitioner's criminal trial for that purpose.

In an effort to call into question the authenticity of the Victoria's Market videos, the petitioner called Sanchez as a witness at the habeas trial. Sanchez testified that there had never been a camera located outside of Victoria's Market, but he could not recall the exact location of the security cameras in 2009 and acknowledged that the cameras had been replaced and that the camera angles may have changed. Before the video evidence was shown to Sanchez and the court, habeas counsel asked Sanchez: "Would it have been possible for someone to produce camera footage from outside the store in 2009?" Sanchez responded: "How can—how can you do that? There's no camera outside." After he was shown the video of the exterior of the market, Sanchez initially stated that he "[didn't] think" he was familiar with the camera angle depicted in that video. On cross-examination, however, Sanchez clarified that there was a security camera located inside Victoria's Market that captured the front of the store, cars outside the front door, the street outside, and people coming into the store. Upon viewing the video of the exterior of the market again, Sanchez confirmed that the images shown in that video looked like what one could see from an interior camera in 2009. On redirect examination, habeas counsel asked Sanchez: "Is there something that makes you question that [the video of the exterior of

the market] might not be from the store or from the cameras?" Sanchez responded: "No, no."

Although the petitioner claimed in his habeas petition that his cell phone and computer records would prove he was innocent, no such records were offered at his habeas trial. The petitioner also did not challenge the DNA evidence introduced at his first criminal trial. The petitioner did testify, however, that, on the night of the kidnapping, November 22, 2009, he was in Bristol working on several school papers and that, just after midnight, he was on the phone with the Department of Labor filing an unemployment claim.

The petitioner argued that questions about the surveillance video undermined the victim's testimony that she was at Victoria's Market with him. In particular, he pointed to Sanchez' testimony that there was no camera on the outside of Victoria's Market and that Sanchez, on direct examination, did not recognize the camera angle in the video displaying the petitioner's car in the parking lot of Victoria's Market. The petitioner also asserted that "a review of the video exhibits that were entered into evidence as the surveillance videos seized by police and played by the prosecuting authority at the petitioner's criminal trial makes it clear that the two videos do not meaningfully correspond. Individuals that enter and leave the market on the in-store camera are not seen outside in the parking lot on the other video." According to the petitioner, "[i]f [the videos] could have been undermined as false or fabricated, a jury would have been left with a firm conviction that the alleged victim's version of events had been falsified. This, in conjunction with the petitioner's testimony that he was at home doing schoolwork on the evening of the alleged incident, would display convincingly that the petitioner did not commit the crime or that no crime was committed."

The habeas court rejected the petitioner's actual innocence claim, concluding that the petitioner "failed to present any newly discovered evidence that was not available at the time of the criminal proceedings," and that there was "no evidence affirmatively establishing that the petitioner did not commit the charged offense and is actually innocent."

On appeal, the petitioner claims that the evidence introduced at the habeas trial relating to the video from Victoria's Market constitutes sufficient affirmative evidence of his actual innocence. In advancing his claim, the petitioner challenges the requirement that evidence must be newly discovered to support a claim of actual innocence. He argues that, because a writ of habeas corpus acts as a " 'bulwark against convictions that violate fundamental fairness' "; *Engle* v. *Isaac*, 456 U.S. 107, 126, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); "there is simply no reasoned basis to require that evidence must be newly discovered in order for a petitioner to establish his claim of actual innocence." The respondent, conversely, argues that the habeas court, following the well settled precedent of this court, correctly concluded that the petitioner failed to present any newly discovered evidence in support of his claim of actual innocence. The respondent further claims that, regardless of whether it was newly discovered, the evidence presented by the petitioner at the habeas trial fell below the standard required to demonstrate actual innocence. We agree with the respondent.

A

On appeal, the petitioner does not meaningfully challenge the habeas court's conclusion that the evidence relating to the video from Victoria's Market was not newly discovered. The videos were admitted as evidence at the petitioner's first criminal trial, and there is no evidence that Sanchez was not available to testify

at that trial. Rather, the petitioner argues that "the question should [not be] whether the evidence is newly discovered but whether [the petitioner] is actually innocent of the crime for which he stands convicted."[6] We reject the petitioner's argument because it is flatly contradictory to our binding precedent.

This court has held repeatedly that an actual innocence claim must be based on newly discovered evidence. See, e.g., *Outing* v. *Commissioner of Correction*, 190 Conn. App. 510, 540, 211 A.3d 1053, cert. denied, 333 Conn. 903, 214 A.3d 382 (2019), cert. denied sub nom. *Outing* v. *Cardona*, U.S. , 140 S. Ct. 1166, 206 L. Ed. 2d 212 (2020); *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 118–19, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009); *Williams* v. *Commissioner of Correction*, 41 Conn. App. 515, 523–29, 677 A.2d 1 (1996), appeal dismissed, 240 Conn. 547, 692 A.2d 1231 (1997); *Thompson* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-12-4004330 (August 4, 2014) (reprinted at 172 Conn. App. 141, 157–58, 158 A.3d 815), appeal dismissed, 172 Conn. App. 139, 158 A.3d 814, cert. denied, 325 Conn. 927, 169 A.3d 232 (2017). "[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding." *Connelly* v. *Commissioner of Correction*, 149 Conn. App. 808, 815, 89 A.3d 468 (2014); see also *State* v. *Houghtaling*, 326 Conn. 330, 343, 163 A.3d 563 (2017) ("Appellate Court panel appropriately considered itself bound by its own precedent"), cert.

[6] The petitioner argues that the newly discovered evidence requirement "is especially concerning for individuals situated as [is the petitioner], who was incarcerated and proceeded pro se in the underlying criminal matter." To the extent that the petitioner is suggesting that we should abandon the newly discovered evidence requirement for self-represented petitioners, we decline to do so. "[T]he right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 549, 911 A.2d 712 (2006).

denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). Because this court is bound to follow the precedent from other panels of this court, the petitioner's claim that newly discovered evidence should not be required to establish a claim of actual innocence must be rejected.[7] Consequently, because the petitioner failed to present any newly discovered evidence in support of his actual innocence claim, the habeas court properly rendered judgment in favor of the respondent on count one of the habeas petition.

B

Furthermore, even if there was no newly discovered evidence requirement, we agree with the habeas court's conclusion that the petitioner's claim fails because the supporting evidence he presented did not constitute clear and convincing affirmative evidence of his actual innocence. See, e.g., *Jackson* v. *Commissioner of Correction*, supra, 149 Conn. App. 706 ("the clear and convincing burden . . . requires the petitioner to demonstrate actual innocence through affirmative evidence that the petitioner did not commit the crime" (internal quotation marks omitted)).

On appeal, the petitioner argues that Sanchez' testimony and the alleged discrepancies in the surveillance videos undermine the credibility of the victim's testimony, leaving the petitioner's alibi testimony as the only credible evidence as to whether he was involved in any kidnapping and sexual assault of the victim. In further support of his claim, the petitioner points to several inconsistencies in the evidence regarding the victim's recounting of events. Specifically, he points to

[7] In his appellate brief, the petitioner acknowledges this court's binding precedent that newly discovered evidence is required to succeed on a claim of actual innocence. He maintains, however, that this precedent "remains an open question in the Connecticut Supreme Court." During oral argument before this court, the petitioner's appellate counsel stated that she raised the claim solely to preserve it for review by our Supreme Court.

the testimony of the motorist that the victim had said she was thrown out of a truck and, by contrast, to the testimony of one of the responding police officers that the victim said she had been pushed out of a Nissan Maxima. The petitioner also relies on the fact that the victim informed the police officers that she had been sexually assaulted outside the car on the pavement, whereas she later reported and testified that the assault took place in the backseat of the car. The petitioner then points to the testimony of a police officer that it had been raining on the day of the assault and that he did not recall seeing any mud on the victim. On the basis of these inconsistencies, the petitioner argues: "As . . . Enns testified, the purpose of the surveillance video was to provide independent corroboration for the [victim's] allegations. . . . [The victim's] credibility at the [first] criminal trial was already severely impeached, the jury [having been] unable to reach a verdict of guilty. The surveillance video and corresponding identification of the [victim] by . . . Enns bolstered the [victim's] testimony, providing extrinsic support of veracity." (Citation omitted.) Without such corroboration, the petitioner asserts, the respondent cannot surmount the inconsistencies within the victim's testimony. Thus, "[w]hen the evidence presented at the criminal trial is coupled with . . . Sanchez' testimony at the habeas trial, this evidence is sufficient to 'induce in the mind of the trier a reasonable belief' that [the petitioner] is actually innocent." We are not persuaded.

Initially, we agree with the habeas court that the evidence adduced at the habeas trial did not undermine the reliability of the video depicting the exterior of Victoria's Market. Although Sanchez initially testified that there was no camera located outside of Victoria's Market, after viewing the actual video in question, he clarified that there was a camera mounted inside Victoria's Market that looked out to the parking lot and that

the images on the video of the exterior depicted what one would see from that camera in 2009. Further, as determined by the habeas court, the activities captured by both surveillance videos depict a consistent "chronological flow: the car arrives (outside view 02:16:17); the individual exits the car and begins walking to the store (outside view 02:16:27); the entrance door opens and the individual enters the store (inside view 02:16:41); the individual exits the store (inside view 02:16:55); the individual passes in front of the camera and goes to the waiting vehicle (outside view 02:17:05); and the vehicle leaves the parking lot (outside view 02:17:33)." There are no apparent inconsistencies between the two videos.

Moreover, even if we assume, arguendo, that the evidence introduced at the habeas trial did call into question the reliability of the videos, undermining one piece of evidence against the petitioner does not constitute "affirmative evidence" that he is actually innocent. See *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 561. To prove an actual innocence claim, "petitioners must affirmatively demonstrate that they are in fact innocent" by establishing, through clear and convincing evidence, that they did not commit the crime, a third party committed the crime, or no crime occurred. (Emphasis omitted.) Id. This burden is not met by simply "[d]iscrediting the evidence on which the conviction rested . . . ." Id., 567; see also *Myers* v. *Commissioner of Correction*, supra, 215 Conn. App. 616–17.

The evidence produced at the petitioner's habeas trial did not unquestionably establish the petitioner's innocence but was offered merely to attempt to discredit a portion of the state's evidence at the underlying criminal trial. Thus, the petitioner did not satisfy the clear and convincing standard. Undermining the credibility of the victim's testimony by questioning the reliability of the surveillance video would not negate the other ample

evidence of the petitioner's guilt that was admitted at his criminal trial, which included evidence that the petitioner's DNA was found in the victim, evidence that tire marks at the crime scene matched the petitioner's vehicle, cell phone location data placing him near the scene at the relevant time, and evidence that the petitioner was found in the same location several days later with another sex worker in a car matching the vehicle described by the victim. At most, undermining the credibility of the victim's testimony could have raised a reasonable doubt in the minds of the jury. That, however, is not enough to satisfy the clear and convincing standard under *Gould* and *Miller*. See *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 560–61 ("Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime." (Citations omitted.)); *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 795 ("the clear and convincing evidence standard . . . *forbids relief whenever the evidence is* loose, equivocal or *contradictory*" (emphasis added; internal quotation marks omitted)).

Accordingly, for the foregoing reasons, we conclude that the habeas court did not err in rejecting the petitioner's actual innocence claim.

II

The petitioner next claims that the habeas court improperly concluded that he failed to prove that his standby counsel, Romano, had provided ineffective assistance. In particular, the petitioner argues, "the actions of standby counsel . . . served to distort and blur the lines [between retained or assigned] counsel and standby counsel, and the result was that the petitioner was placed in a position where it was impossible

for him to discern what was within and what was beyond the scope of that relationship." (Internal quotation marks omitted.) He argues that, as a result of Romano's overreach in his role as standby counsel to that of acting as retained or assigned counsel, Romano had a duty to inform the petitioner of a potential legal claim under *State* v. *Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011), cert. denied, 565 U.S. 1156, 132 S. Ct. 1095, 181 L. Ed. 2d 977 (2012),[8] which arose from the interception of the petitioner's prison correspondence prior to the petitioner's first criminal trial. The respondent argues that, "by knowingly and intelligently waiving his sixth amendment right to counsel and electing to represent himself, the petitioner no longer had a right to effective representation of any kind and cannot obtain habeas relief based on a claim that standby counsel rendered deficient performance." We agree with the respondent.

A sixth amendment claim of ineffective assistance of counsel is necessarily premised on the fact that the petitioner was represented by counsel. In addition to the right to effective assistance of counsel, the sixth amendment also embodies a right to self-representation. See *Faretta* v. *California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Notably, "[t]he right to counsel and the right to self-representation present

[8] In *State* v. *Lenarz*, supra, 301 Conn. 419, our Supreme Court held that, when a "case is irreversibly tainted by the prosecutor's intrusion into the privileged communications [between a defendant and his attorney], the only available appropriate remedy is dismissal of the charge of which he was convicted." The court explained "generally that prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney-client privilege was intentional. We further conclude that the state may rebut that presumption by clear and convincing evidence. Finally, we conclude that, when a prosecutor has intruded into privileged communications containing a defendant's trial strategy and the state has failed to rebut the presumption of prejudice, the court, sua sponte, must immediately provide appropriate relief to prevent prejudice to the defendant." Id., 425–26.

mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 508, 973 A.2d 627 (2009). Therefore, when a defendant voluntarily and intelligently exercises his right to self-representation, he waives his sixth amendment right to counsel. See id. A defendant has a right to either represent himself or to be represented by counsel, but he does not have any right, under the federal or Connecticut constitutions, to hybrid representation. See, e.g., *State* v. *Gethers*, 197 Conn. 369, 384–87, 497 A.2d 408 (1985).

Pursuant to Practice Book § 44-4,[9] the court has discretion to appoint standby counsel for self-represented defendants in criminal matters. Although a court may appoint standby counsel, "a defendant does not have a state or federal constitutional right to standby counsel." *State* v. *Oliphant*, supra, 47 Conn. App. 281. "Absent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective." *United States* v. *Schmidt*, 105 F.3d 82, 90 (2d Cir.), cert. denied, 522 U.S. 846, 118 S. Ct. 130, 139 L. Ed. 2d 80 (1997). It follows that a self-represented petitioner has no grounds on which to claim ineffective assistance of standby counsel "because after deciding to proceed pro se, he [has] no constitutional right to the effective assistance of counsel in any capacity." *State* v. *Oliphant*, supra, 281; see also *State* v. *Kenney*,

[9] Practice Book § 44-4 provides in relevant part: "When a defendant has been permitted to proceed without the assistance of counsel, the judicial authority may appoint standby counsel, especially in cases expected to be long or complicated or in which there are multiple defendants. A public defender or special public defender may be appointed as standby counsel only if the defendant is indigent and qualifies for appointment of counsel under General Statutes § 51-296, except that in extraordinary circumstances the judicial authority, in its discretion, may appoint a special public defender for a defendant who is not indigent."

53 Conn. App. 305, 327, 730 A.2d 119 (having chosen to represent himself, "defendant is the master of his fate and cannot . . . complain that he was denied the effective assistance of counsel"), cert. denied, 249 Conn. 930, 733 A.2d 851 (1999).

As this court noted in *Oliphant*, the United States Supreme Court has recognized an exception to this rule that allows a petitioner to assert a sixth amendment claim when standby counsel's actions interfered with the petitioner's right of self-representation, including his right to make tactical decisions and to maintain the appearance before the jury of one who is defending himself. See *State* v. *Oliphant*, supra, 47 Conn. App. 281, citing *McKaskle* v. *Wiggins*, 465 U.S. 168, 177–79, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). In the present case, the petitioner does not claim that Romano, as standby counsel, did too much and, hence, interfered with his right of self-representation. Instead, he claims that Romano did too little *after* giving the petitioner the impression that he would provide legal advice typically provided by retained or appointed counsel. We are not persuaded.

The following additional facts are relevant to our review of this claim. Following the mistrial of the petitioner's first criminal trial, Romano was appointed to represent the petitioner. On September 7, 2012, the petitioner informed the court that he wanted to discharge Romano and represent himself. That same day, due to the petitioner's disruptive behavior, the court, *Alexander*, *J.*, ordered a competency evaluation pursuant to General Statutes § 54-56d.[10] On the basis of the petitioner's evaluation, the court, *Dewey*, *J.*, found him competent on October 23, 2012. The court, *Dewey*, *J.*, thereafter canvassed the petitioner to ensure that he was knowingly and voluntarily waiving his right to counsel

[10] General Statutes § 54-56d provides in relevant part: "(a) A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a defendant is not competent if the

and advised him of the risks associated with self-representation. The petitioner stated that he understood the risks and still wanted to represent himself. The court then granted the petitioner's request, ordered Romano to act as standby counsel, and explained to the petitioner standby counsel's limited role.[11] The petitioner

defendant is unable to understand the proceedings against him or her or to assist in his or her own defense. . . .

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

Although the focus of the competency evaluation is the defendant's competency to stand trial, the court stated that it was ordering the evaluation "specifically for the purpose of determining [the petitioner's] competence to represent himself at trial . . . ." We note that, strictly speaking, once a defendant is found competent to stand trial, the rules do not provide for a separate competency determination as to the waiver of the right to counsel and the right to self-representation. Instead, Practice Book § 44-3 provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

"(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

"(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

"(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

"(4) Has been made aware of the dangers and disadvantages of self-representation."

Nevertheless, the petitioner made no claim in his habeas petition regarding the court's use of a § 54-56d competency evaluation in connection with his request to waive his right to counsel and to represent himself.

[11] The following colloquy occurred between the court and the petitioner:

"The Court: Now, you want to proceed without an attorney. Is that what you indicated?

"[The Petitioner]: Yes, Your Honor.

"The Court: Do you want an attorney to be on standby to help you file the legal motions, sir? You can have that option.

"[The Petitioner]: Okay. I'm not sure at this point, to be quite honest with you.

"The Court: Well, what I'll do is, I'll appoint one for standby just to assist you in the law. Do you understand that?

went on to represent himself at multiple hearings, filed and argued numerous motions and, on several occasions, reaffirmed his desire to continue to represent himself.

On June 4, 2013, the parties appeared in court for jury selection for the petitioner's retrial. During that day's proceedings, the petitioner refused to participate in jury selection. Because the petitioner had twice attempted to leave the courtroom and had acted in a belligerent fashion toward the court, the court ordered the petitioner removed from the courtroom. Despite the petitioner's statement that he did not want "Romano to be on my case, I don't want him as a standby," the court ordered Romano to act as full counsel to proceed with jury selection.[12] Romano conducted voir dire in the petitioner's absence for the remainder of the day. The following day, June 5, 2013, the petitioner returned to the courtroom and renewed his request to represent himself. Romano thereafter resumed his role as standby

"[The Petitioner]: Okay.

"The Court: But it's—the attorney will be assisting you in the legal aspect of it. Do you understand?

"[The Petitioner]: Okay. . . .

"The Court: What I'm going to do is order standby counsel, order Attorney Romano to do that. You are to consult with him whenever you need assistance in filing those legal motions that you have. Do you understand that? And that's assistance, so that you don't do something in the motion that's going to cause the motion not to be heard or not to be properly filed, so that you have the basis of the law covered in the motion, so that you're preserving your record. Do you understand that, sir?

"[The Petitioner]: Yes, I understand that, ma'am."

[12] The following colloquy occurred between the court and Romano:

"The Court: You are standby, counsel. You're the only one prepared to go forward right now. Bring in the jury. . . .

"[Romano]: Your Honor, I do have another request, if I may?

"The Court: Yes.

"[Romano]: The request is, if Your Honor is—am I right in assuming that you're directing me to go forward in abstentia as standby—

"The Court: Yes.

"[Romano]: —counsel? Are you now appointing me as full?

"The Court: Yes."

counsel, and the petitioner represented himself for the remainder of jury selection. The petitioner then fell ill and the matter was suspended.[13] On January 24, 2014, the petitioner entered a guilty plea pursuant to the *Alford* doctrine to one count of kidnapping in the second degree. The petitioner represented himself at the plea hearing with Romano acting as standby counsel.

At the habeas trial, Romano testified that he had assisted the petitioner as standby counsel by researching law, drafting and filing motions, and finding addresses and contact information for potential witnesses, as well as being the petitioner's means of interacting with experts and investigators. Romano also recalled discussing with the petitioner cell phone records, tire mark evidence, experts, the Victoria's Market surveillance videos, and how to authenticate records.

Romano further testified that he explained to the petitioner his limitations in acting as standby counsel "in terms of what [he] could do with respect to [the petitioner's] requests." Romano testified, however, that he viewed it as his duty to apprise the petitioner of a potential issue or legal claim if one became apparent to him, even if it had not been raised by the petitioner. For example, Romano discussed immigration and deportation issues with the petitioner that could result from his conviction.

On cross-examination, Romano reiterated that, as standby counsel, he answered whatever questions the petitioner raised or asked him, tried to help engage experts, and approached the prosecutor at the petitioner's request to resolve the case via a plea agreement. Romano provided the petitioner with all of the discovery he received but complied with any court instructions that limited specific information (e.g., the redaction of the victim's name). After his role as standby

[13] The record is unclear as to whether a mistrial was declared. Nevertheless, jury selection was not completed, and a jury was not empaneled.

counsel ceased, Romano refused to answer questions posed by the petitioner when the petitioner contacted his office seeking materials, case law or other items of interest. Romano informed the petitioner that he could provide him with names of attorneys the petitioner could consult for further legal advice. Nevertheless, Romano did assist the petitioner to some degree after the plea and sentencing by gathering parts of his file and some evidence.

At the habeas trial, the petitioner testified that his relationship with Romano "was respectful, but as far as helping [him] to pursue what [he] wanted to pursue . . . [Romano] wasn't helpful." The petitioner testified that, from the beginning, he had concerns about Romano's involvement in his case because Romano's reputation was not "good" among the petitioner's fellow inmates. The petitioner further testified that, initially, there was some confusion as to Romano's status as standby counsel, stemming from the fact that he had objected to Romano's being appointed as standby counsel, "but after considering how much work and . . . how [he was] going to go about doing stuff, [he] realized having someone, even though [he] may not like . . . even though [he] may disagree with this person . . . is better than having no one at all."

The petitioner recalled that his issues with his prior attorneys related to the fact that they did not seem "interested in" obtaining certain records that he believed would demonstrate his innocence. Similarly, in relation to Romano's actions as standby counsel, the petitioner testified that "there were several things [he had] asked . . . Romano to do in the course of . . . being [his] standby counsel. And, again, they weren't done." In particular, the petitioner testified that he had asked Romano to send an investigator to Victoria's Market to take photographs of the building to demonstrate that there were no surveillance cameras in the parking

lot but that Romano had not done so. The petitioner further testified that, although he discussed the plea with Romano, he discussed neither potential legal claims on appeal or on habeas, nor the elements of kidnapping with Romano.

In addition, the petitioner testified about a letter intercepted by the Department of Correction in November, 2010, prior to the first criminal trial. According to the petitioner, he was attempting to contact attorneys who might represent him. The letter detailed the procedural history and facts related to the petitioner's then pending charges and asked for assistance in his case. The intended recipient was "Mr. Michael Banks" in Philadelphia, Pennsylvania. Although the petitioner signed the letter with his own name, the return address on the envelope in which the letter was enclosed was "William Patterson, #259062, Walker C.I., 1153 East Street, South, Suffield, CT 06080."

At the habeas trial, Enns explained that, as part of the criminal investigation, Farmington police made a request to the Department of Correction, pursuant to established procedures, to review the correspondence the petitioner had sent while incarcerated. Enns noted that there is a procedure through which the petitioner could send legal correspondence while incarcerated, that the petitioner was made aware of the procedure, and that, if the petitioner had followed that procedure, any legal correspondence would not have been intercepted or reviewed by the Department of Correction. On cross-examination, the petitioner acknowledged sending letters in violation of Department of Correction regulations regarding legal correspondence.

As a result of the mail review, the Department of Correction provided the intercepted letter to the police and, consequently, to the state's attorney. The letter and a police report generated regarding the letter were

submitted as evidence at the habeas trial. The report provided to the state's attorney reads: "This fax included a copy of an envelope addressed to Mr. Michael Banks with a return name of William Patterson #259062, and a letter written by [the petitioner]. In this letter he admits to using a ['friend's'] information to send this letter, because his mail is monitored and held. He is requesting assistance from Banks law firm, [denies] being involved in the sexual assaults, and details his case."

The letter was contained in the discovery materials given to Romano when he was acting as standby counsel for the petitioner. At the habeas trial, Romano testified that he did not independently recall receiving in hand the state's discovery materials or providing them to the petitioner but, after reviewing his records, concluded that he had done so. Romano testified that, because the role of standby counsel is limited, when acting as standby counsel, he does not review discovery materials unless a defendant were to request that he do so. Therefore, Romano had no specific recollection of reviewing the discovery materials he provided to the petitioner and could not recall the letter or issues pertaining to the Department of Correction's interception of the letter.

On appeal, the petitioner claims that, because Romano took on more responsibility than that required of standby counsel, Romano "derivatively had a duty to inform the petitioner of potential legal issues arising from the petitioner's intercepted prison correspondence." The petitioner claims that, by failing to inform the petitioner of those potential legal issues, Romano "rendered deficient performance." In support of this argument, the petitioner points to Romano's testimony that he thought he may have given the petitioner guidance about matters that were "outside of the confines of issues [the petitioner] strictly brought" to him as

requests for assistance, as well as Romano's statement that he believed it would be his "duty to inform [the petitioner] about a potential [legal issue]" outside of what the petitioner had discussed with him. The petitioner's claim is without merit.

The petitioner voluntarily and intelligently exercised his right to self-representation, waiving his sixth amendment right to counsel. Accordingly, the petitioner had no constitutional right to the effective assistance of counsel in any capacity. See, e.g., *State* v. *Wang*, 312 Conn. 222, 262–63 n.37, 92 A.3d 220 (2014); *State* v. *Oliphant*, supra, 47 Conn. App. 281; see also *State* v. *Kenney*, supra, 53 Conn. App. 327.

The petitioner cites no legal authority supporting this claim, nor does he identify a legal source of the "duty" that standby counsel allegedly had to inform the petitioner of all potential motions. No such duty is set forth in Practice Book § 44-5, which provides: "*If requested to do so by the defendant*, the standby counsel shall advise the defendant as to legal and procedural matters. If there is no objection by the defendant, such counsel may also call the judicial authority's attention to matters favorable to the defendant. Such counsel shall not interfere with the defendant's presentation of the case and *may give advice only upon request*." (Emphasis added.)

Although the petitioner has not pointed us to any authority for his ineffective assistance of counsel claim against Romano, we find the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Schmidt*, supra, 105 F.3d 82, instructive. In *Schmidt*, the self-represented defendant claimed that her standby counsel's representation at her criminal trial "was so deficient and prejudicial to her that it constituted ineffective assistance of counsel. Specifically, she criticize[d] his failure to call witnesses and

present documentary evidence in support of her diminished capacity defense." Id., 89. In addressing the defendant's claim, the court first noted that the defendant had exercised her sixth amendment right to represent herself, that there is no constitutional right to hybrid representation and that standby counsel's duties "are considerably more limited than the obligations of retained or appointed counsel." Id., 90. Nevertheless, the court posited: "Perhaps in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, we would consider a claim of ineffective assistance of standby counsel." Id. It then considered the tasks standby counsel performed during the defendant's criminal trial and concluded that such a line had not been crossed. Id., 90–91. In particular, the court noted that, during the trial, standby counsel had examined and cross-examined witnesses and delivered the closing argument. Id., 90. The court further noted that, "[a]lthough [standby counsel's] role expanded as the case continued, he did not play the same role that defense counsel normally would in preparing the strategy for a criminal defense." Id. Consequently, the court concluded that, "[b]ecause [the defendant] proceeded pro se, she may not now assign blame for her conviction to standby counsel." Id.

In the present case, the evidence reflects that Romano had a much more limited role than did standby counsel in *Schmidt*. He neither examined witnesses nor argued before the jury. Aside from a motion for disclosure pursuant to the petitioner's request that Romano contact a DNA expert, Romano did not argue any motions before the court. Romano testified that he mostly responded to requests from the petitioner, as is typical of standby counsel. The fact that Romano may have, on occasion, offered unsolicited advice does not mean that he undertook to represent the petitioner as

retained or appointed counsel or somehow changed the petitioner's status from self-represented to represented by counsel. Further, the only instance in which Romano assumed the role of "full" counsel was when the court ordered the petitioner removed from jury selection on June 4, 2013, and Romano conducted voir dire of potential jurors until the petitioner resumed representing himself.[14] This interruption in self-representation lasted just one day before the petitioner, representing himself, continued with voir dire on June 5, 2013. Significantly, before jury selection resumed on June 5, 2013, the court specifically reaffirmed that Romano's role was that of standby counsel only.[15]

In addition, nothing in the record indicates that the petitioner was confused about the role of standby counsel. The court explained to the petitioner the limited role of standby counsel when it granted his motion to represent himself. Thereafter, the petitioner never expressed to the court any uncertainty about Romano's role. In addition, the petitioner presented no evidence

[14] The petitioner does not raise a claim of ineffective assistance of counsel with respect to the manner in which Romano conducted voir dire on June 4, 2013.

[15] The following colloquy occurred between the court and Romano:

"[Romano]: Your Honor, if—just a question with respect to the procedures. If at any point during the voir dire [the petitioner] has questions of me, how would you like to field that?

"The Court: At the end of his voir dire, he can ask whatever questions he wishes of you, briefly, but we're not going to have two attorneys. He's representing himself.

"[Romano]: I understand.

"The Court: Yes.

"[Romano]: I just wanted to clear up the procedures so he understands and I know what my role is and he knows what his role is—

"The Court: His role is—

"[Romano]: —and it's clearly defined.

"The Court: —to conduct the voir dire. Your role is standby counsel—

"[Romano]: Thank you very much.

"The Court: —to address legal questions, not factual questions, legal questions."

to the habeas court that he relied on Romano to provide unsolicited legal advice or to identify legal issues and bring them to the petitioner's attention.

As was true in *Schmidt*, Romano did not play the same role that defense counsel normally would play. Romano's actions readily fell into the category of "assist[ing] the pro se defendant in overcoming routine procedural . . . obstacles to the completion of some specific task . . . that the defendant has clearly shown that he wishes to complete." *McKaskle* v. *Wiggins*, supra, 465 U.S. 183. In fact, despite whatever assistance Romano provided to him, the petitioner unmistakably was representing himself through the conclusion of his criminal matter. As was true of the defendant in *Schmidt*, the petitioner in the present case repeatedly affirmed to the court that he was representing himself. "Having chosen to represent [himself, the petitioner] may not now be heard to complain that [his] own shortcomings spell out some sort of constitutional deprivation." *United States* v. *Schmidt*, supra, 105 F.3d 90; see also *United States* v. *Archambault*, 740 Fed. Appx. 195, 199 (2d Cir. 2018) (defendant who made opening and closing arguments to jury and examined witnesses could not assert claim of ineffective assistance as to standby counsel); *United States* v. *Morrison*, 153 F.3d 34, 55 (2d Cir. 1998) (defendant's ineffective assistance of standby counsel claim failed because defendant "retained control of his own defense throughout the proceedings"); *People* v. *Kevorkian*, 248 Mich. App. 373, 426, 639 N.W.2d 291 (2001) (ineffective assistance of standby counsel claim failed because standby counsel "did nothing to interfere with [the] defendant's right to control the case or to alter the jury's perception that [the] defendant was representing himself"), appeal denied, 465 Mich. 973, 642 N.W.2d 681, cert. denied, 537 U.S. 881, 123 S. Ct. 90, 154 L. Ed. 2d 137 (2002). Consequently, Romano was standby counsel in reality,

as well as in name, and the habeas court properly denied the petitioner's claim of ineffective assistance of counsel in count six of his amended petition.

III

The petitioner last claims that the court improperly dismissed count two of his habeas petition pursuant to Practice Book § 23-29 (2) and (5)[16] because "[this] claim [goes] to the knowing and voluntary nature of the plea, [and is] thus not waived by [the petitioner's] *Alford* plea and would provide a basis for relief." The respondent disagrees, arguing that the habeas court correctly held that the petitioner's due process claim in count two of the habeas petition related solely to a pretrial constitutional defect and, therefore, was waived by the petitioner's guilty plea. We agree with the respondent.

"The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a [habeas petition] survives a motion to dismiss, a court must take the facts to be those alleged in the [petition], including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The conclusions reached by the [habeas] court in its decision to dismiss the habeas petition are matters of law, subject to plenary review. . . . Thus, [w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts in the record. . . .

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it

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

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

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

should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 276–77, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "Thus, as it would do in evaluating the allegations in a civil complaint, in evaluating the legal sufficiency of allegations in a habeas petition, a court must view the allegations in the light most favorable to the petitioner, which includes all facts necessarily implied from the allegations." *Finney* v. *Commissioner of Correction*, 207 Conn. App. 133, 142, 261 A.3d 778, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021).

"As a general rule, an unconditional plea of guilty or nolo contendere, intelligently and voluntarily made, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. . . . Therefore, only those issues fully disclosed in the record which relate either to the exercise of jurisdiction by the court or to the voluntary and intelligent nature of the plea are ordinarily appealable after a plea of guilty or nolo contendere." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Christensen*, 157 Conn. App. 290, 295–96, 115 A.3d 1138 (2015); see also *Tollett* v. *Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973) ("[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea"). Thus, to obtain review of a nonjurisdictional claim, a petitioner must demonstrate that there

is "such an interrelationship" between the claimed error "and the plea that it can be said [that] the plea was not voluntary and intelligent because of" the error. *Dukes* v. *Warden*, 161 Conn. 337, 344, 288 A.2d 58 (1971), aff'd, 406 U.S. 250, 92 S. Ct. 1551, 32 L. Ed. 2d 45 (1972); see also *Mincewicz* v. *Commissioner of Correction*, 162 Conn. App. 109, 116, 129 A.3d 791 (2015).

On appeal, the petitioner claims that count two of his petition, if properly construed and read in the light most favorable to him, stated a claim for habeas relief because it challenged the knowing and voluntary nature of his guilty plea and, therefore, should not have been dismissed prior to a habeas trial or proceedings at which the petitioner would have had some opportunity to present evidence potentially linking his allegations with whether his decision to enter a guilty plea was knowingly and voluntarily made. Specifically, the petitioner argues that "[a] fair reading of [his] petition and counsel's arguments clearly indicate that [the petitioner] is challenging the knowing and voluntary nature of his plea [because] . . . had the state not learned of his defense strategy, [the petitioner] would not have plead[ed] guilty but, instead, would have proceeded to trial." To resolve this claim we must examine the allegations in count two of the habeas petition to determine if they properly challenged the knowing and voluntary nature of the petitioner's guilty plea, thus stating a cognizable claim for habeas relief.

In count two of the petition, the petitioner alleged that his "constitutional right to due process and the assistance of counsel [were] violated by the state's interception and possession of documents outlining the petitioner's defense strategy." Notably, the allegations did not specify *how* the interception of these documents resulted in a violation of the petitioner's rights to due process and the assistance of counsel. Nevertheless, a plain reading of the petitioner's allegations in count two,

in the context of his entire second revised, amended petition, leads us to conclude that they are properly understood as asserting only a claim that, due to standby counsel's ineffective assistance, the petitioner lost the opportunity to have the charges against him dismissed based on *State* v. *Lenarz*, supra, 301 Conn. 419.[17] After setting forth the allegations regarding the interception of his correspondence, the petitioner alleged: "No attorney ever placed on the record the fact that the petitioner's privileged and confidential defense strategy had been intercepted by the prosecuting authority." The petitioner then concluded count two by alleging: "No motion to dismiss or other challenge to the violation of the petitioner's right to counsel was raised before the petitioner's guilty plea." Thus, the petitioner's complaint was not that his guilty plea was involuntary and unknowing but that the charges against him should have been dismissed.

Further, count two did not contain any allegations relating to the knowing and voluntary nature of the petitioner's guilty plea. The petitioner's allegations in count two stand in stark contrast to his allegations in count four, in which he specifically alleged that his guilty plea "was not made knowingly, intelligently, and voluntarily" because he had not been informed that sex offender treatment would be required as a result of his plea. Clearly, the petitioner and his counsel understood how to assert a claim that his guilty plea was not knowing and voluntary. They did so in count four but failed to do so in count two.

The first time the petitioner specifically argued that his guilty plea was not knowing or voluntary was in his memorandum of law in opposition to the respondent's motion to dismiss, in which the petitioner argued: "Because each alleged violation included in the amended

[17] See footnote 8 of this opinion.

petition is a reflection of the alleged corruption of the judicial process that induced the petitioner to enter an unintelligent and involuntary plea, none of these claims are waived by the petitioner's guilty plea that was induced by those errors. . . . Where a criminal defendant believes that it will be impossible to proceed to trial because the prosecuting authority is in possession of his entire defense strategy, a guilty plea under those circumstances can hardly be knowing, intelligent, and voluntary."

Our Supreme Court, however, has held that "a memorandum of law is not a proper vehicle for supplementing the factual allegations in a complaint . . . and we do not believe that a different rule should pertain to habeas petitions." (Citations omitted.) *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 781–82, 167 A.3d 952 (2017). Therefore, we do not consider the petitioner's memorandum of law in opposition to the motion to dismiss in determining whether count two sufficiently challenged the knowing and voluntary nature of the petitioner's guilty plea.

Moreover, at no point in the proceedings did the petitioner amend his petition to allege that his guilty plea had been made unknowingly or involuntarily due to the interception of his legal correspondence. Thus, as the respondent's counsel stated at the hearing on the motion to dismiss, "although the petitioner . . . made a number of allegations about how his will was overborne and he finally gave in . . . and [pleaded] guilty . . . [the petitioner has] raised seven counts and not a single one . . . allege[s] that his plea was not knowing and voluntarily entered."[18]

[18] As we previously noted, this statement is not accurate, as the petitioner did allege in count four that his plea was not knowingly and voluntarily made because he had not been adequately advised of the requirement that he undergo sex offender treatment.

The petitioner tries to overcome this omission as it relates to count two by relying on *Finney* v. *Commissioner of Correction*, supra, 207 Conn. App. 133. In *Finney*, this court addressed the issue of "whether [a] petition should be dismissed for failing to state a claim upon which habeas relief can be granted because the petitioner's guilty plea waived collateral attacks on his conviction that do not go to the voluntary, knowing and intelligent nature of the plea, and [the] petition [failed] to make such a claim . . . ." (Internal quotation marks omitted.) Id., 139.

In *Finney*, the self-represented petitioner filed a petition for a writ of habeas corpus, alleging that he had been improperly convicted because his trial counsel had provided him with constitutionally ineffective assistance. Id., 136–37. By way of relief, the petitioner sought to have the court allow him to withdraw his guilty plea. Id., 137. Ultimately, this court determined that, "although . . . the petition [failed] to connect expressly the asserted allegations of ineffective assistance of counsel directly to whether the petitioner's decision to enter a guilty plea was knowing and voluntary . . . it [was] reasonable to infer such an interrelationship from the allegations."[19] Id., 144. "Although ultimately it may prove that the petitioner is unable to produce evidence to support his allegations of ineffective assistance or to demonstrate any causal connection linking those allegations with his decision to enter a guilty plea, such speculation cannot support the granting of a motion to dismiss." Id.

This court in *Finney* explained that "[t]he allegations of ineffective assistance of counsel . . . reasonably [could] be construed as asserting—not expressly, but

[19] This inference was "particularly true given the early stage of the proceedings and the fact that the petition was filed by a self-represented party." *Finney* v. *Commissioner of Correction*, supra, 207 Conn. App. 144.

by implication—that the petitioner's decision to plead guilty was not knowingly made because his trial counsel had failed to investigate his case properly, to review the evidence against him or to consider whether a viable trial strategy existed. In other words, the allegations, read in the light most favorable to the petitioner as is required at the pleading stage, suggest that counsel failed to prepare the case adequately so that the petitioner *could have sufficient knowledge* of the strength of the case and could *make an informed decision* as to whether to plead guilty. If proven, the petitioner could be permitted to withdraw the guilty plea, which is the only relief requested in the petition. In short, read in the context of the petition as a whole, including the relief requested, we conclude that the petitioner has raised allegations that implicitly challenge whether he knowingly and voluntarily entered a guilty plea, which states a cognizable claim for habeas relief. Accordingly, the habeas court improperly granted its own motion to dismiss." (Emphasis added; footnote omitted.) Id., 146–47.

As in *Finney*, the petitioner in the present case framed count two of his petition as a sixth amendment ineffective assistance of counsel claim. Nevertheless, we conclude that, unlike in *Finney*, the allegations in count two of the habeas petition did not sufficiently demonstrate an interrelationship between the ineffective assistance of counsel and the petitioner's guilty plea such that it can be said that the plea was not made knowingly and voluntarily. See id., 143; *Mincewicz* v. *Commissioner of Correction*, supra, 162 Conn. App. 116.

First, as discussed in part II of this opinion, the petitioner represented himself. Accordingly, because there was no counsel representing the petitioner, there can be no ineffective assistance of counsel. Thus, the allegations of ineffective assistance of counsel in count two

cannot demonstrate such an interrelationship between the nonexistent ineffective assistance of counsel and the guilty plea such that it can be said that the plea was not made knowingly and voluntarily. In addition, as previously noted, unlike in *Finney*, count two of the petitioner's second revised, amended petition, drafted by counsel, cannot reasonably be read as setting forth a claim that his guilty plea was not made knowingly and voluntarily.[20]

We also find it significant that the petitioner's appellate brief blends the arguments relating to his claim of ineffective assistance of standby counsel with his claim that count two was improperly dismissed: "[W]hile standby counsel did not have a duty to pursue a motion to dismiss based upon the interception of the petitioner's legal mail, he did have a duty, within the role that he created during the representation, to inform the petitioner about the significance of the issue. This was necessary in order for the petitioner to consider pursuing the issue through a motion, and *it was necessary for the petitioner to understand the implications of his guilty plea*." (Emphasis added; internal quotation marks omitted.) Perhaps more strikingly, the petitioner argues on appeal that, "[h]ad [he] been advised by . . . Romano that a motion in accordance with *Lenarz* could be filed and that prejudice could be presumed, resulting in the dismissal of the charges against him, as [the

[20] In reaching our decision, we are mindful that, unlike in *Finney*, the petitioner in the present case was represented by counsel when he filed the second revised, amended habeas petition. Accordingly, there is no reason to construe the allegations in the petition with the same degree of leniency this court used in *Finney*. Cf. *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 560, 223 A.3d 368 (2020) ("when a petitioner has proceeded [as a self-represented party] . . . courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed" (internal quotation marks omitted)); *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 140, 7 A.3d 911 (2010) (cautioning that courts "should be solicitous to [self-represented] petitioners and construe their pleadings liberally in light of the limited legal knowledge they possess").

petitioner] testified, he would have filed such a motion. . . . *Absent a showing that* [*the petitioner*] *knew of his right to pursue a motion to dismiss on this ground, and subsequently declined to proceed with its filing, it cannot be said that his plea was truly knowing and voluntary*." (Citation omitted; emphasis added.)

It is well settled, however, that a plea is made knowingly, voluntarily, and intelligently regardless of whether the defendant was made aware of every possible motion he would be waiving as a result thereof. See, e.g., *State* v. *Johnson*, 253 Conn. 1, 42, 751 A.2d 298 (2000) ("[i]t is . . . not necessary for the trial court to canvass the defendant to determine that [he] understands that [his] plea of guilty or nolo contendere operates as a waiver of any challenge to pretrial proceedings" (internal quotation marks omitted)); *State* v. *Gilnite*, 202 Conn. 369, 383, 521 A.2d 547 (1987) ("[t]here is no requirement . . . that the defendant be advised of every possible consequence of such a plea"). Furthermore, not knowing which motions he was able to file is exactly the kind of risk the petitioner knowingly and willingly assumed when he chose to represent himself. In fact, the trial court specifically advised him of this very risk by informing the petitioner during its canvass that there "are legal consequences if you don't file the right motions at the right time . . . ."

More to the point, as acknowledged in count two of his petition, the petitioner was fully aware of the intercepted legal mail prior to pleading guilty. In fact, he stated at his plea proceeding and sentencing hearing that, "[f]rom the inception of these charges, the Department of Correction has been holding on to my mails, turning [them] over to the prosecutor." In cases involving the claim that a guilty plea was made unknowingly or involuntarily, the petitioner typically must demonstrate unawareness of certain facts or issues when pleading

guilty. For example, in *Finney*, the petitioner's allegations specifically referenced counsel's failure to prepare the case adequately so that the petitioner could have *sufficient knowledge* of the strength of the case and could *make an informed decision* as to whether to plead guilty. See *Finney* v. *Commissioner of Correction*, supra, 207 Conn. App. 146–47; see also *Dukes* v. *Warden*, supra, 161 Conn. 345 (court did not err in concluding that plea was not rendered involuntary and unintelligent as result of alleged conflict of interest when petitioner knew when he engaged counsel that counsel was representing two defendants in unrelated case in which petitioner was codefendant); *Mincewicz* v. *Commissioner of Correction*, supra, 162 Conn. App. 116–17 ("[i]f any ineffective assistance conceivably occurred, it was *antecedent to the plea* hearing and *known by the petitioner* and, as such, was effectively waived upon entry of the plea" (emphasis added)); accord *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 799, 189 A.3d 135 (same), cert. denied, 329 Conn. 911, 186 A.3d 707 (2018). Accordingly, the petitioner's plea was in fact made knowingly and voluntarily even if he was unaware that he could file a motion to dismiss based on *Lenarz*.

We therefore conclude that, read in the context of the habeas petition as a whole, including the relief requested, count two of the second revised, amended petition failed to allege facts that directly or implicitly demonstrated "an interrelationship" between the claimed ineffective assistance of counsel and the guilty plea such that it can be said that the plea was not made knowingly and voluntarily. The petitioner thus did not state a cognizable claim for relief. Accordingly, the habeas court properly dismissed count two of the petition.

The judgment is affirmed.

In this opinion the other judges concurred.