IN RE RYAN C.*
(AC 45979)
(AC 46006)

Prescott, Suarez and Seeley, Js.

Syllabus

The respondent father and his minor child appealed separately to this court from the judgment of the trial court granting the motions filed by the child's foster parent to intervene in the dispositional phase of the neglect proceedings as to the child and to transfer guardianship of him to herself, and denying the motions filed by the father and the petitioner, the Commissioner of Children and Families, to revoke the child's commitment to the petitioner and to return him to the father's custody. The child and another of the father's minor children, the child's sister, had been removed from the father's home after the Department of Children and Families was informed that they were living in deplorable conditions. The petitioner filed neglect petitions on behalf of both children. The trial court adjudicated them neglected, and the department placed them with the foster parent. The court thereafter approved the petitioner's plan to reunify the child with the father, and the sister was later returned to the father's custody and cared for by the children's paternal grandparents while the father was at work. In moving to permissively intervene under the rule of practice (§ 35a-4) applicable to hearings concerning neglected children, the foster parent claimed that her intervention was in the child's best interest. The court granted the foster parent's motions, reasoning that cause to continue the child's commitment still existed as to the father and that revocation of commitment to the petitioner was not in the child's best interest. *Held*:

1. The trial court improperly granted the foster parent's motions to intervene and to transfer guardianship of the minor child to herself, which prejudiced the respondent father by tainting the court's consideration of his and the petitioner's motions to revoke the child's commitment and to return him to the father's custody: because the narrowly defined rights of foster parents to participate in neglect proceedings are limited pursuant to statute (§ 46b-129 (p)) to notice and the opportunity to be heard as to the child's best interest, the trial court improperly allowed the foster parent to intervene, to move to transfer guardianship and to object to the motions to revoke commitment, as the general language of the

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

rule of practice applicable to hearings concerning neglected children could not be interpreted to enlarge the foster parent's rights under § 46b-129 (p), which protects the rights of biological parents by limiting foster parents' participation in neglect proceedings; moreover, by improperly failing to consider whether cause for commitment of the child still existed before considering whether revocation of commitment was in the child's best interest, the court altered that legal standard by considering the foster parent's motion to transfer guardianship prior to or in conjunction with the motions to revoke commitment and considered improper factors when determining whether to revoke commitment such as comparing the parenting abilities of the foster parent to those of the father; accordingly, the judgment was reversed and the case was remanded for a new hearing on the motions to revoke commitment.

2. The trial court abused its discretion by precluding evidence pertaining to the sister's mental health and behavior as well as the care provided to her by the respondent father and her paternal grandparents, as that evidence was relevant to the motions filed by the father and the petitioner to revoke the child's commitment:

a. The sister's mental health and behavior were relevant to the trial court's determination of whether revocation of commitment would foster the child's sustained growth, development and well-being, as the court had heard testimony that the sister's mental health and behavior previously had been a barrier to the child's reunification with the father.

b. The trial court improperly concluded that the respondent father's care of the sister was not relevant to the motions to revoke the child's commitment because the children had different needs; evidence pertaining to whether the department had safety concerns relating to the father's care of the sister and whether he had demonstrated that he was a suitable guardian through his care for her were relevant to his abilities to be a parent and to care for the child, and the different needs of the two children affected the weight of that evidence and not its admissibility.

c. Testimony relating to the paternal grandparents' care of the sister while the respondent father was at work was relevant to the trial court's evaluation of whether granting the motions to revoke the child's commitment to the petitioner would be in the child's best interest: because it was reasonable to infer that the grandparents, who would be living with the child, would also care for him while the father was at work, the grandparents' ability to care for the sister was relevant to the court's determination of whether it was in the child's best interest to return him to the father's custody; moreover, in light of testimony by the psychologist who evaluated the child that he could not recommend reunification without assessing the grandparents' ability to care for the child, other evidence relating to the grandparents' abilities as caregivers was all the more relevant to the court's determination of the motions to revoke commitment.

3. This court terminated the stay of execution that ordinarily would take effect upon the release date of this decision, pursuant to the applicable rule of practice (§ 71-6), in light of the need to adjudicate child protection cases expeditiously, to achieve permanency and stability for children, and the unique procedural posture of the present case, in which no appellee participated in the appeal, and this court determined that the foster parent never should have been made a party.

Argued May 8—officially released July 20, 2023**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Frazzini*, *J.*, granted the petitioner's motion for an order of temporary custody and removed the minor child from the respondents' care; thereafter, the order of temporary custody was sustained by agreement of the parties; subsequently, the case was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner; thereafter, the court, *C. Taylor*, *J.*, granted the motions filed by Jeanette P., the foster parent of the minor child, to intervene and to transfer guardianship of the minor child, and denied the motions filed by the petitioner and the respondent father to revoke the commitment of the minor child to the petitioner; subsequently, the respondent father and the minor child filed separate appeals with this court, which were consolidated. *Reversed*; *judgment directed in part*; *new trial.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant in Docket No. AC 45979 (respondent father).

Joshua D. Michtom, senior assistant public defender, for the appellant in Docket No. AC 46006 (minor child).

** July 20, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Evan O'Roark, assistant attorney general, for the appellee in both cases (petitioner).

Opinion

PRESCOTT, J. The respondent father, Chester C., and his minor child, Ryan C., appeal from the judgment of the trial court[1] rendered in favor of Ryan C.'s intervening foster parent, Jeanette P.,[2] denying motions to revoke commitment filed by the respondent and the petitioner, the Commissioner of Children and Families,[3] and granting Jeanette P.'s motion to transfer guardianship of

[1] The minor child, who is represented by counsel, filed a motion to consolidate his appeal (Docket No. AC 46006) with the respondent's appeal (Docket No. AC 45979). The motion was consented to by all parties, and this court granted that motion on January 20, 2023. Subsequently, the respondent father and the minor child filed a joint appellate brief. All references herein to the respondent are to the respondent father.

[2] Jeanette P. has not participated in this appeal and did not file an appellee's brief. On March 31, 2023, this court issued an order, stating: "The intervenor-appellee Jeanette [P.], not having [timely] fil[ed] an appellee's brief on or before March 29, 2023, it is hereby ordered that the appeal shall be considered on the basis of the appellants' brief and the record, as defined by Practice Book § 60-4, only, and oral argument . . . by the appellee will not be permitted."

[3] The petitioner has not appealed from the court's judgment but submitted a letter, stating: "I write to advise the [c]ourt that the [petitioner] takes no position on the appeals filed by the respondent . . . [and] Ryan C. . . . At trial, the [petitioner] asked the court to reunify Ryan [C.] with [the respondent] because [she] believed that [he] had rehabilitated, and that reunification was in Ryan [C.'s] best interest. [The respondent] successfully completed his court-ordered specific steps and already had regained custody and guardianship of one of his other children. Not only was [the respondent] fit to care for Ryan [C.], but Ryan [C.'s] attorney and guardian ad litem supported reunification.

"In its original decision, issued on October 5, 2022, the trial court appeared to err as a matter of law by granting [Jeanette P.'s] motion to transfer guardianship before considering the motions to revoke commitment filed by the respondent father and the [petitioner]. In a custody competition between a biological parent and a foster parent, a court must first decide whether the biological parent is fit to care for their child and whether reunification is in the best interest of the child. See *In re Juvenile Appeal* [(*Anonymous*)], 177 Conn. 648, 662 [420 A.2d 875] (1979) ([i]n any controversy between a parent and a stranger the parent as such should have a strong initial advantage, to be lost only where it is shown that the child's

Ryan C. to herself. The dispositive issue in this appeal is whether the court properly allowed Jeanette P. to intervene in the dispositional phase of the neglect proceeding for the purposes of objecting to the motions to revoke commitment and filing the motion to transfer guardianship.[4] We conclude that, in the circumstances of the present case, the court improperly allowed Jeanette P. to intervene and to file a motion to transfer guardianship and that her intervention improperly tainted the court's adjudication of the motions to revoke commitment. Accordingly, we reverse the judgment of the court and remand the case for a new trial on the motions to revoke commitment.

In addition to the dispositive claim on appeal, we also review the respondent's and Ryan C.'s claim that

welfare plainly requires custody to be placed in the [stranger] [footnote omitted]); cf. *Claffey* v. *Claffey*, 135 Conn. 374, 377 [64 A.2d 540] (1949). If the court determines the biological parent is unfit or that revoking commitment is not in the best interest of the child, only then may it consider whether transferring guardianship to a third party is in the best interest of the child.

"In its written articulation, issued on December 13, 2022, the trial court clarified that it considered the motions to revoke commitment on the merits, including the respondent['s] . . . fitness to care for Ryan [C.], before ultimately transferring guardianship of Ryan [C.] to [Jeanette P.]. The [petitioner] disagrees with how the trial court weighed the evidence and with its conclusions that cause for commitment continued to exist, revocation was not [in] Ryan [C.'s] best interest, and transferring guardianship was in Ryan [C.'s] best interest. But in light of the record as a whole, including the trial court's articulation, the [petitioner] chose not to appeal. The [petitioner] expresses no opinion about the claims [the respondent] and Ryan [C.] raise on appeal. The [petitioner] continues to support Ryan [C.] being reunified with [the respondent] and intends to continue advocating for reunification in the juvenile court." (Internal quotation marks omitted.)

[4] We do not reach two of the respondent's and Ryan C.'s claims on appeal. First, the respondent and Ryan C. claim that, by allowing Jeanette P. to intervene, the court violated their constitutional rights to due process. Second, they claim that the court's factual findings that Jeanette P. was a suitable and worthy guardian and that a cause for commitment still existed as to the respondent were clearly erroneous. Because we reverse the judgment and remand the case for a new trial only on the motions to revoke commitment, we do not reach these claims.

the court improperly precluded on relevancy grounds evidence pertaining to Madison C., Ryan C.'s sister, as that evidentiary claim is likely to arise again on remand.[5] We conclude that evidence relating to Madison C. was relevant to the motions to revoke the commitment pertaining to Ryan C., and, thus, the court abused its discretion by precluding the evidence.

The record reveals the following facts and procedural history. Ryan C. was born in December, 2015. The respondent and Ryan C.'s mother, Patricia K., have two other children together: Madison C., who was born in 2013, and Andrew C., who was born in 2017.

On April 25, 2017, the Department of Children and Families (department) received a referral alleging that Patricia K. and the respondent were allowing Madison C. and Ryan C.[6] to live in deplorable conditions. On May 2, 2017, the petitioner sought and obtained an order of temporary custody for Madison C. and Ryan C., and the children were placed in foster care. On that same day, the petitioner filed neglect petitions on behalf of both children.

Later in 2017, Andrew C. was born. The department sought and obtained an order of temporary custody and filed a neglect petition on behalf of Andrew C. on November 20, 2017. At this time, the department placed Andrew C. in foster care.

On November 30, 2017, the respondent and Patricia K. entered written pleas of nolo contendere as to all three children's neglect petitions, and the children were adjudicated neglected. The court simultaneously issued

[5] As we will discuss in part II of this opinion, the evidence the court precluded relating to Madison C. since she returned to the respondent's custody falls into three categories: evidence regarding her mental health and behavior, evidence regarding the respondent's care of her, and evidence regarding the paternal grandparents' care of her.

[6] Andrew C. was not yet born.

specific steps to the respondent that he should take to be reunified with his children. The department placed Ryan C. and Madison C. with Jeanette P., who was a licensed foster parent. Ryan C. has remained with Jeanette P. since November, 2017.[7]

On February 1, 2019, the petitioner filed petitions to terminate the respondent's and Patricia K.'s parental rights with respect to Madison C., Ryan C., and Andrew C. on the grounds that the children had previously been adjudicated neglected and that the respondent and Patricia K. had failed to achieve a sufficient degree of rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B). The trial on the petitions to terminate parental rights commenced on August 5, 2019. On August 16, 2019, while the trial was still ongoing, the petitioner withdrew the petitions as to the respondent for all three children because the department had failed to make reasonable efforts to reunify the respondent with his children. At this time, the court issued specific steps to the respondent to facilitate his reunification. The trial continued, however, as to Patricia K., and, on November 6, 2019, the court granted the petitions to terminate Patricia K.'s parental rights as to all three children.[8]

On October 30, 2019, the petitioner filed a motion to review the permanency plan relating to Ryan C. On January 2, 2020, the court approved the petitioner's motion and approved a permanency plan of reunification.

[7] Madison C. was removed suddenly from Jeanette P.'s care in March, 2020. Jeanette P. refused to pick her up from school, despite the request of school administrators, and informed the department that she would not continue to foster Madison C. in light of her behavioral issues. Madison C. subsequently was reunified with the respondent.

[8] Patricia K. subsequently appealed from the court's judgments terminating her parental rights as to all three children. This court affirmed the trial court's judgments. See *In re Madison C.*, 201 Conn. App. 184, 196, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020).

On July 8, 2020, Madison C.'s commitment to the petitioner was revoked. She was returned to the respondent's custody with a period of six months of protective supervision.[9]

After delaying Ryan C.'s reunification with the respondent to allow for additional time for Madison C. to adjust to her reunification, the petitioner planned to reunify Ryan C. with the respondent on July 30, 2020. On July 28, 2020, two days before the petitioner planned to reunify Ryan C. with the respondent, Jeanette P. filed an ex parte emergency motion to intervene for the sole purpose of seeking an emergency motion to stay, an ex parte emergency motion to stay the removal of Ryan C. from her home, a motion to intervene for purposes of seeking the transfer of guardianship of Ryan C. to her, and a motion to modify the current disposition of commitment and transfer guardianship to herself (motion to transfer guardianship). On that same day, the respondent filed an objection to Jeanette P.'s motion to transfer guardianship. Also on that same day, the court granted Jeanette P.'s ex parte emergency motion to intervene and ex parte emergency motion to stay. In granting the ex parte emergency motion to stay, the court required that the respondent's visitation with Ryan C. be supervised and prohibited overnight visitation with him until further notice.

On October 22, 2020, the respondent filed a motion to revoke the commitment of Ryan C., requesting that Ryan C. be returned to his custody. On June 22, 2021, Jeanette P. filed an "amended motion to intervene corrected," which sought intervention for the same purposes as the original motion in addition to seeking to object to the respondent's motion to revoke commitment. Subsequently, the petitioner also filed a motion

[9] This period of protective supervision expired on January 8, 2021.

to revoke commitment.[10] In her motion to revoke commitment, the petitioner stated that "[t]he respondent . . . has engaged and participated in services and has continued to develop a better understanding of his children's needs as the case progresses, and he continues to show growth and increased knowledge. . . . The cause for the commitment no longer exists and revocation of commitment is in the best interest of [Ryan C.]."

On June 25, 2021, the court held a hearing on Jeanette P.'s motions to intervene.[11] At the hearing, Jeanette P. argued that she should be allowed to permissively intervene in the matter pursuant to Practice Book § 35a-4, General Statutes § 46b-121, and our Supreme Court's decision in *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020). Jeanette P. argued that the court should, in its discretion, allow her to intervene because it was in the child's best interests. Jeanette P. also argued that the other factors set forth in Practice Book § 35a-4, including the timeliness of the motions, her interest in the case, whether her interest was adequately represented by the existing parties, and whether her intervention may cause delay or other prejudice, all weighed in favor of intervention.

The petitioner, the respondent, counsel for Ryan C., and the guardian ad litem for Ryan C. all opposed the court's granting Jeanette P.'s motions to intervene. The parties opposing the motions to intervene agreed that Jeanette P. had a right to be heard but argued that no legal authority permitted her to intervene and become a party to the proceedings.[12]

[10] The petitioner's motion to revoke commitment was filed on June 25, 2021. On July 28, 2021, Jeanette P. filed a motion to intervene for the purpose of objecting to the petitioner's motion to revoke commitment.

[11] The court granted the petitioner's motion in limine to preclude Jeanette P.'s counsel from presenting evidence at the hearing on the motions to intervene. As a result, the court heard oral argument only on the motions to intervene.

[12] The petitioner, the respondent, counsel for Ryan C., and the guardian ad litem for Ryan C. further argued that, even if Jeanette P.'s intervention

At the conclusion of the hearing, the court, in an oral ruling from the bench, granted Jeanette P.'s motions to intervene for the purposes of filing a motion to transfer guardianship and objecting to the motions to revoke commitment. In granting Jeanette P. intervention, the court stated: "The issue of intervention has gone many different ways, but, in the end, it is up to the discretion of the trial court. Despite what *Horton* v. [*Meskill*, 187 Conn. 187, 445 A.2d 579 (1982)],[13] says . . . *In re Ava W.* [supra, 336 Conn. 545] has quite frankly turned a lot of things into a free-for-all in juvenile court, and, quite frankly, I think has allowed a lot of things to happen that may not have happened in the past. I think, in the end, the motion to intervene certainly is a motion that would come under action based on the best interest of the child. I realize that this is probably going to delay the proceedings. Simply looking at what counsel is prepared to do for today's hearing, it's probably enough to fill any judge with foreboding at the thought. However, I think my hands are fairly tied by *In re Ava W.*" (Footnote added.)

On October 29, 2021, trial commenced on Jeanette P.'s motion to transfer guardianship, the petitioner's motion to revoke commitment, and the respondent's motion to revoke commitment.[14] The trial continued on

was a matter that was properly left to the trial court's discretion, the factors set forth in Practice Book § 35a-4 weighed against her intervention. In particular, the parties opposing the motions to intervene argued that it was not in Ryan C.'s best interests for the court to grant Jeanette P.'s motions to intervene.

[13] *Horton* v. *Meskill*, supra, 187 Conn. 197, sets forth factors similar to those articulated in Practice Book § 35a-4 that the court may consider in granting a party permissive intervention.

[14] Although the court consolidated the hearings on the motions to revoke commitment without formally consolidating the hearings on those motions with the hearing on the motion to transfer guardianship, it is apparent from the record that the parties understood that the court was hearing all three motions together. Moreover, in its October 5, 2022 decision following the evidentiary hearing, the court denied simultaneously the motions to revoke commitment and granted the motion to transfer guardianship.

nonconsecutive days starting on November 1, 2021, and concluding on June 8, 2022. During the trial, Jeanette P. presented testimony from several witnesses, including the respondent; an office director for the department who oversaw Ryan C.'s case; and Derek Franklin, a forensic psychologist who had evaluated Ryan C., the respondent, and Jeanette P. The respondent testified on his own behalf and presented testimony from several witnesses, including social workers for the department who had worked on Ryan C.'s case, and the guardian ad litem, who testified that it was in Ryan C.'s best interests for the court to grant the motions to revoke commitment. The petitioner also presented testimony from several witnesses. Counsel for Ryan C. did not present any witnesses independently but did cross-examine witnesses called by the other parties.

On October 5, 2022, the court granted Jeanette P.'s motion to transfer guardianship and denied the respondent's and the petitioner's motions to revoke commitment. In its memorandum of decision, the court stated: "The court finds that it has been proven by a fair preponderance of the evidence that [the motion to transfer guardianship] is in [Ryan C.'s] best interests. The court will order that the guardianship of Ryan [C.] be transferred to . . . [Jeanette P.]. [Jeanette P.] has provided a loving, trusting and nurturing home for Ryan [C.]. [Jeanette P.] has agreed to serve as [his] legal guardian until he is an adult. The testimonial and documentary evidence presented demonstrates that [she] has been a very worthy and suitable person in caring for Ryan [C.] and attending to his needs. The court finds by clear and convincing evidence that [she] is a suitable and worthy guardian to assume the position as Ryan [C.'s] legal guardian . . . . The court will order a period of protective supervision for one year. The court will promulgate new orders to guide visitation of Ryan [C.] with . . . the respondent . . . . The respondent['s] . . .

motion to revoke commitment is denied. The [petitioner's] motion to revoke commitment is denied."

On October 25, 2022, the petitioner filed a motion for articulation of the October 5, 2022 judgment. In particular, the petitioner requested that the court articulate its factual findings regarding the motions to revoke commitment, including whether the court found that a cause for commitment continued to exist as to the respondent and whether revocation of commitment was in Ryan C.'s best interests. On December 13, 2022, the court articulated its October 5, 2022 decision granting the motion to transfer guardianship and denying the motions to revoke commitment. In its articulation, the court concluded that Jeanette P. had met her burden to demonstrate that she was a suitable and worthy guardian and that transferring guardianship to her was in Ryan C.'s best interests. In regard to the motions to revoke commitment, the court determined that a cause for commitment still existed as to the respondent and that revocation of commitment was not in Ryan C.'s best interests. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first consider whether the court improperly granted Jeanette P.'s motions to permissively intervene for the purposes of filing a motion to transfer guardianship and objecting to the motions to revoke commitment.[15] We conclude that, under the circumstances of the present case, the court improperly granted the motions to intervene and, consequently, improperly adjudicated the motion to transfer guardianship. We

[15] The respondent and Ryan C. claim on appeal that the court improperly relied on *In re Ava W.*, supra, 336 Conn. 545, as the basis for its decision to grant Jeanette P.'s motions to intervene and that, even if the court had properly considered the legal principles applicable to granting Jeanette P.'s motions to intervene, it improperly granted the motions. We treat this as one claim, which we restate for ease of discussion.

further conclude that Jeanette P.'s intervention tainted the court's consideration of the motions to revoke commitment by causing it to consider improper factors.

Because the court granted Jeanette P.'s motions to intervene for the purposes of filing a motion to transfer guardianship and objecting to the motions to revoke commitment, we begin with the legal principles relevant to those motions. A motion to revoke commitment and a motion to transfer guardianship are dispositional motions arising out of a prior adjudication that a child is uncared for, neglected or abused. See Practice Book §§ 35a-12A and 35a-14A. "A motion to revoke commitment is governed by [General Statutes] § 46b-129 (m) and Practice Book § 35a-14A. Section 46b-129 (m) provides: The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. . . . [T]he court, in determining whether cause for commitment no longer exists . . . look[s] to the original cause for commitment to see whether the conduct or circumstances that resulted in commitment continue to exist. . . . The party seeking revocation of commitment has the burden of proof that no cause for commitment exists. If the burden is met, the party opposing the revocation has the burden of proof that revocation would not be in the best interests of the child." (Citations omitted; internal quotation marks omitted.) *In re Marcquan C.*, 212 Conn. App. 564, 572–74, 275 A.3d 1248 (2022).

"The adjudication of a motion to transfer guardianship pursuant to [§ 46b-129 (j)] requires a two step analysis. [T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second] [t]he court must then find that

the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. . . .

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment." (Footnote omitted; internal quotation marks omitted.) *In re Marie J.*, 219 Conn. App. 792, 818–19, A.3d (2023).

We now turn to the legal principles relevant to a court's granting of a motion for permissive intervention in a neglect proceeding. Generally, "questions of permissive intervention are committed to the sound discretion of the trial court . . . . Our cases establish that, in determining whether to grant a request for permissive intervention, a court should consider several factors: the timeliness of the intervention, the proposed intervenor's interest in the controversy, the adequacy of representation of such interests by other parties, the delay in the proceedings or other prejudice to the existing parties the intervention may cause, and the necessity for or value of the intervention in resolving the controversy. . . . A ruling on a motion for permissive intervention would be erroneous only in the rare case where such factors weigh so heavily against the ruling that it would amount to an abuse of the trial court's discretion." (Citations omitted; internal quotation marks omitted.) *In re Baby Girl B.*, 224 Conn. 263, 277–78, 618 A.2d 1 (1992).

Similarly, Practice Book § 35a-4, which governs intervention in hearings concerning neglected, abused and

uncared for children and hearings on petitions to terminate parental rights, sets forth factors that the court may consider when granting a motion to intervene filed by certain persons in these proceedings. Section 35a-4 provides in relevant part: "(c) Other persons unrelated to the child or youth by blood or marriage, or persons related to the child or youth by blood or marriage who are not seeking to serve as a placement, temporary custodian or guardian of the child may move to intervene in the dispositional phase of the case, and the judicial authority may grant said motion if it determines that such intervention is in the best interest of the child or youth or in the interests of justice.

"(d) In making a determination upon a motion to intervene, the judicial authority may consider: the timeliness of the motion as judged by the circumstances of the case; whether the movant has a direct and immediate interest in the case; whether the movant's interest is not adequately represented by existing parties; whether the intervention may cause delay in the proceedings or other prejudice to the existing parties; the necessity for or value of the intervention in terms of resolving the controversy before the judicial authority; and the best interests of the child. . . ."

Section 46b-129 governs hearings on temporary custody matters, revocation of commitment, legal guardianship, and permanent legal guardianship. Section 46b-129 (d) authorizes "any person related to the child or youth by blood or marriage" to file a motion to intervene for the purpose of seeking temporary custody or guardianship of a child and that "granting of such motion shall be solely in the court's discretion . . . ."

The issue before this court, however, implicates the court's authority to grant a foster parent's motion to intervene in the dispositional phase of a neglect proceeding. Therefore, we must consider the motion to

intervene within the limitations placed on the rights of foster parents.

"It is well established that [f]oster families do not have the same rights as biological families or adoptive families. . . . It is unquestioned that [b]iological and adoptive families have a liberty interest in the integrity of their family unit which is part of the fourteenth amendment's right to familial privacy. . . . Foster parents, on the other hand, do not enjoy a liberty interest in the integrity of their family unit. . . . Rather, [t]he rights of foster parents are defined and restricted by statute . . . [and] the expectations and entitlements of foster families can be limited by the state. . . . The statutory scheme provides to foster parents a limited and narrow set of rights regarding foster children. Such a limited and narrow set of rights is consistent with the premise that [f]oster parents are entrusted with foster children on a temporary basis only." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *In re Joshua S.*, 127 Conn. App. 723, 729–30, 14 A.3d 1076 (2011).

Section 46b-129 (p) and Practice Book § 35a-5 specifically limit the rights of foster parents to participate in neglect proceedings. Section 46b-129 (p) provides: "A foster parent, prospective adoptive parent or relative caregiver shall receive notice and *have the right to be heard* for the purposes of this section in Superior Court in any proceeding concerning a foster child living with such foster parent, prospective adoptive parent or relative caregiver. A foster parent, prospective adoptive parent or relative caregiver who has cared for a child or youth shall *have the right to be heard and comment on the best interests of such child or youth* in any proceeding under this section which is brought not more than one year after the last day the foster parent, prospective adoptive parent or relative caregiver provided such care." (Emphasis added.)

Prior to the legislature's adoption of No. 01-142, § 8, of the 2001 Public Acts (P.A. 01-142), § 46b-129 stated that "[a] foster parent shall have standing for the purposes of this section in Superior Court in matters concerning the placement or revocation of commitment of a foster child living with such parent." General Statutes (Rev. to 2001) § 46b-129 (o). Significantly, in 2001, "standing" was replaced with "the right to be heard . . . ." P.A. 01-142, § 8.

The language of § 46b-129 (p) is reflected in Practice Book § 35a-5. Practice Book § 35a-5 provides in relevant part: "(a) Any foster parent, prospective adoptive parent or relative caregiver shall be notified of and have a *right to be heard* in any proceeding held concerning a child or youth living with such foster parent, prospective adoptive parent or relative caregiver . . . ."[16] (Emphasis added.) There is no language in § 46b-129 (p) or Practice Book § 35a-5 that authorizes a foster parent to intervene in the dispositional phase of neglect proceedings.

Finally, because the issue before us requires us to determine whether the applicable provisions of the General Statutes and rules of practice provided the trial court with the authority to allow Jeanette P. to intervene in the present case, we turn to the well settled legal principles pertaining to our interpretation of these provisions and to our standard of review. "[A]lthough [t]he Superior Court is empowered to adopt and promulgate rules regulating pleading, practice and procedure . . . [s]uch rules shall not abridge, enlarge or modify any substantive right . . . . Just as the general assembly lacks the power to enact rules governing procedure that is exclusively within the power of the courts . . .

[16] Practice Book § 35a-5 was adopted in June, 2002, to take effect in January, 2003; see Practice Book (2003) § 35a-5; to reflect the legislature's 2001 amendment to § 46b-129, which replaced a foster parent's standing with a right to be heard. See P.A. 01-142, § 8.

so do the courts lack the power to promulgate rules governing substantive rights and remedies. . . . Finally, the court rules themselves are expressly limited in scope to practice and procedure in the Superior Court . . . and do not purport to reach beyond such limits. . . . Accordingly, although the branches of government frequently overlap, and notwithstanding that the doctrine of the separation of powers cannot be applied rigidly . . . we are obliged to interpret [a section of the rules of practice] so as not to create a new right, but rather to delineate whatever rights may have existed, statutorily or otherwise, at the time of the proceedings . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 639, 847 A.2d 883 (2004).

''The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules].'' (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018).

''[T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction.'' (Internal quotation marks omitted.) *In re William D.*, 284 Conn. 305, 313, 933 A.2d 1147 (2007). Another principle of statutory construction applicable to the circumstances of the present case ''requires

courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute." (Internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 580–81.

In the present case, Jeanette P. filed motions to intervene pursuant to Practice Book § 35a-4. Considering the plain language of § 35a-4 alone, this provision could presumably grant the court the authority to, in its discretion, allow a foster parent to intervene in a neglect proceeding. Section 35a-4 (c) permits the intervention, at the court's discretion, of "persons unrelated to the child or youth by blood or marriage" in the dispositional phase of neglect proceedings, and this language may reasonably include a foster parent. The rights of foster parents are narrowly defined, however, and delineated by our statutes. See *Hunte* v. *Blumenthal*, 238 Conn. 146, 164, 680 A.2d 1231 (1996); see also *In re Joshua S.*, supra, 127 Conn. App. 730. When interpreting provisions of the rules of practice and statutes, we must consider the entire statutory scheme and read the relevant provisions together. Therefore, we must turn to the other relevant provisions of the General Statutes and rules of practice in determining the applicability of § 35a-4 to the circumstances of this case.

The General Statutes do not authorize the intervention of persons unrelated to a child or youth in neglect proceedings. See General Statutes § 46b-129. Rather, the General Statutes authorize only the intervention of persons related to a child or youth and, even then, this is a matter left to the court's discretion. See General Statutes § 46b-129. Section 46b-129 (p), which explicitly addresses the rights and extent of participation of foster parents in neglect proceedings, provides foster parents with the right to be heard on the best interests of the child—not the right to intervene. In fact, prior to 2001, foster parents historically had standing to intervene,

but this "standing" was replaced with the "right to be heard . . . ." P.A. 01-142, § 8. "When the legislature amends the language of a statute, it is presumed that it intended to change the meaning of the statute and to accomplish some purpose." *State* v. *Johnson*, 227 Conn. 534, 543, 630 A.2d 1059 (1993). Therefore, by enacting P.A. 01-142, § 8, the legislature purposefully limited a foster parent's participation in neglect proceedings to "the right to be heard . . . ." Accordingly, we must determine the application of Practice Book § 35a-4 to the present case in light of the limitations the legislature has placed on a foster parent's participation in neglect proceedings pursuant to § 46b-129 (p).

Moreover, the language of § 46b-129 (p) takes precedence over the more general language of Practice Book § 35a-4 because § 46b-129 (p) specifically addresses *foster parents' rights* in neglect proceedings. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 498–99, 131 A.3d 240 (2016) (applying text of statute that was more specifically applicable to subject at issue in case). Indeed, provisions of the rules of practice "shall not abridge, enlarge or modify any substantive right," and "we are obliged to interpret a [section of the rules of practice] so as not to create a new right, but rather to delineate whatever rights may have existed . . . ." *In re Samantha C.*, supra, 268 Conn. 639. Therefore, Practice Book § 35a-4 cannot be interpreted in a manner that enlarges a foster parent's rights under § 46b-129 (p). We conclude that, in the present case, the court improperly allowed Jeanette P. to intervene because, by allowing her to file a motion to transfer guardianship to herself and to object to the otherwise uncontested motions to revoke commitment, it provided Jeanette P. with rights beyond an opportunity to be heard as to Ryan C.'s best interests.

Our case law is consistent with this conclusion. Nonrelatives who have a parent-like relationship with a child have been allowed to intervene in the dispositional

phase of neglect proceedings pursuant to Practice Book § 35a-4. See, e.g., *In re Shanaira C.*, 297 Conn. 737, 750–53, 1 A.3d 5 (2010). Section 35a-4 has not, however, been applied to allow the permissive intervention of nonrelative foster parents in the dispositional phase of neglect proceedings. Instead, our case law has repeatedly limited the rights of foster parents, and even those of preadoptive parents, in child custody proceedings. See, e.g., *In re Joshua S.*, supra, 127 Conn. App. 728 (foster parents did not have colorable claim to intervene as matter of right in dispositional phase of neglect proceeding); see also *Eason* v. *Welfare Commissioner*, 171 Conn. 630, 635, 370 A.2d 1082 (1976) (foster parent did not have standing to file motion to revoke commitment), cert. denied sub nom. *Eason* v. *Maloney*, 432 U.S. 907, 97 S. Ct. 2953, 53 L. Ed. 2d 1079 (1977).

In *In re Baby Girl B.*, supra, 224 Conn. 278, our Supreme Court discussed the importance of restricting preadoptive parents' intervention in child custody proceedings.[17] In that case, the preadoptive parents argued that the trial court improperly denied their motion to intervene as a matter of right or, alternatively, abused its discretion in denying them permissive intervention in the termination proceedings. Id., 274. Our Supreme Court affirmed the trial court's denial of the preadoptive parents' motion to intervene and held that the preadoptive parents were not entitled to intervene as a matter of right and that the court did not abuse its discretion in denying them permissive intention. Id.

In holding that the trial court did not abuse its discretion by denying the preadoptive parents' request for permissive intervention, the court in *In re Baby Girl B.* stated: "With respect to the intervention of foster parents in termination proceedings, this court has determined that [t]he intervention of foster parents as parties

[17] Preadoptive parents have a legal status similar to that of foster parents for the purposes of intervention. See *In re Baby Girl B.*, supra, 224 Conn. 276.

at the termination stage will permit them to shape the case in such a way as to introduce an impermissible ingredient into the termination proceedings. Petitions for termination of parental rights are particularly vulnerable to the risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on such comparisons rather than on the statutory criteria. . . . Similarly, the intervention of the preadoptive parents in the termination proceeding might have led to the introduction of impermissible and prejudicial factors. Moreover, because the termination proceeding was concerned only with the statutory criteria alleged as grounds for terminating the mother's parental rights, the preadoptive parents' intervention would have been of little or no value to the court's decision on whether the grounds for termination had been proved." (Citation omitted; internal quotation marks omitted.) Id., 278.

The policy considerations articulated in *In re Baby Girl B.* that weighed against allowing a preadoptive parent permissive intervention in the adjudicatory phase of a termination of parental rights proceeding are similarly relevant to a foster parents' permissive intervention in the dispositional phase of neglect proceedings. In both the adjudicatory phase of termination proceedings and the dispositional phase of neglect proceedings, the biological parents' rights to their children have not yet been terminated. Therefore, the biological parents' rights must be protected by limiting a foster parent's participation in neglect proceedings to ensure that improper and prejudicial factors are not considered by a court. This is especially important in instances in which the court must determine whether the causes that led to a child's commitment to the petitioner no

longer exist and whether the child should be returned to the care and custody of the biological parent.

We have also recognized a distinction between a foster parent's right to be heard and right to intervene. In *In re Vincent D.*, 65 Conn. App. 658, 664, 783 A.2d 534 (2001), this court upheld the trial court's decision to permit foster parents to participate, in a limited manner, in the dispositional phase of a termination of parental rights proceeding. The trial court, rather than granting the foster parents' motion to intervene, recognized "that standing to comment 'is not the same thing as intervention' " and permitted the foster parents to "observe and . . . comment . . . on disposition." (Emphasis omitted.) Id., 667. This court upheld the trial court's decision and concluded that the trial court had properly protected the rights of the respondent parents by limiting the foster parents' participation in the proceedings. See id.

In *In re Joshua S.*, supra, 127 Conn. App. 730, this court held that a child's foster parents did not have a colorable claim to intervene as a matter of right in the dispositional phase of a neglect proceeding, and, therefore, the foster parents were not parties to the proceeding and were not entitled to appeal the court's denial of their motion to intervene. In coming to this conclusion, this court stated: "[F]oster parents have a right under . . . § 46b-129 [p] to receive notice and be heard in any proceeding concerning their foster child. Although this statute explicitly gives foster parents a right to be heard during a proceeding regarding the foster child, neither this statute, nor any other statute, confers on foster parents a right to intervene in a proceeding related to their foster child." (Footnotes omitted; internal quotation marks omitted.) Id.

In the present case, despite the statutory and case law limitations on the right of foster parents to intervene

in neglect proceedings, the trial court relied on *In re Ava W.* and its application of § 46b-121 as the basis for its decision to grant Jeanette P.'s motions to intervene. This reliance was misplaced.

In *In re Ava W.*, our Supreme Court concluded that "trial courts have authority pursuant to § 46b-121 (b) (1)[18] to consider motions for posttermination visitation within the context of a termination proceeding and can order such visitation if necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child." (Footnote added.) *In re Ava W.*, supra, 336 Conn. 549. In coming to this conclusion, our Supreme Court stated: "[Section 46b-121 (b) (1)] broadly enables the court to issue any order that it deems not only necessary but also necessary *or* appropriate . . . . The language also enables the court to issue orders directed at a broad range of actors and does not limit the scope of the statute to biological parents; rather, it extends it to any other adult persons owing some legal duty to a child . . . . Although § 46b-121 (b) (1) does not expressly mention orders for posttermination visitation, neither does it expressly preclude that authority. In our view, a broad statutory grant of authority and a lack of limiting language . . . supports [a] conclusion that the Superior Court has the authority to issue . . . an order [granting a parent posttermination visitation]." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 572–73.

In determining that there was a lack of language that abrogated a court's authority to issue posttermination

[18] General Statutes § 46b-121 (b) (1) provides in relevant part: "In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents, including any person who acknowledges before the court parentage of a child born to parents not married to each other, guardians, custodians or other adult persons owing some legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families. . . ."

visitation orders, our Supreme Court reviewed the related statutory provisions and relevant case law and concluded that there was no "clear intent by the legislature to abrogate the court's authority to issue posttermination visitation orders." Id., 580; see also id., 579–82. Unlike a court's authority to issue posttermination visitation orders, however, its authority to grant a motion to intervene in neglect proceedings is delineated in the General Statutes and rules of practice. As we previously stated, the General Statutes and rules of practice set forth when a motion to intervene must be filed, *who may file it*, and the factors the court should consider in granting it. See General Statutes § 46b-129; Practice Book §§ 35a-4 and 35a-5. If § 46b-121 (b) (1) were interpreted as authorizing a court to grant intervention to any party wholly on the basis of the child's best interests, the other factors set forth in Practice Book § 35a-4 (d) and § 46b-129 that pertain to who may intervene would be rendered meaningless. See, e.g., *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 135, 848 A.2d 451 (2004) ("[s]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" (internal quotation marks omitted)). Consequently, a court's authority to issue posttermination visitation orders is clearly distinguishable from its authority to grant a foster parent's motion to intervene in a neglect proceeding. Therefore, our Supreme Court's application of § 46b-121 (b) (1), as articulated in *In re Ava W.*, cannot reasonably be extended to the circumstances of the present case.[19]

[19] We also are skeptical that orders issued to a foster parent fall within the language of § 46b-121 (b) (1). The statute applies to "orders directed to parents, including any person who acknowledges before the court parentage of a child born to parents not married to each other, guardians, custodians or other adult persons owing some legal duty to a child therein." General Statutes § 46b-121 (b) (1). A child in foster care is in the legal care and custody of the petitioner. Therefore, it is the petitioner who owes a legal duty to a child in foster care placement, rather than the foster parent. "As the guardian of foster children, the commissioner has the obligation of care

By improperly allowing Jeanette P. to intervene, the court improperly adjudicated the motion to transfer guardianship. We further conclude that, as a result of Jeanette P.'s improper intervention and the court's adjudication of the motion to transfer guardianship, the court applied an improper standard and evaluated improper factors in its consideration of the respondent's and the petitioner's otherwise unopposed motions to revoke commitment.

In determining whether to grant a motion to revoke commitment, the court should consider whether a cause for commitment still exists as to the respondent before considering whether revocation of commitment is in the best interests of the child. See *In re Marcquan C.*, supra, 212 Conn. App. 573. In the present case, the court altered this legal standard by considering the motion to transfer guardianship prior to, or at least in conjunction with, the respondent's and the petitioner's motions to revoke commitment.[20] The court evaluated

and control, the right to custody and the duty and authority to make major decisions affecting [the] minor's welfare . . . ." (Emphasis omitted; internal quotation marks omitted.) *Hunte* v. *Blumenthal*, supra, 238 Conn. 155.

[20] It is apparent that the court either considered the motion to transfer guardianship before or in conjunction with the motions to revoke commitment. The court consolidated the hearings on the motion to transfer guardianship with the motions to revoke commitment; see footnote 14 of this opinion; but agreed that it would consider the motion to transfer guardianship first because it was filed first. The court then, in its October 5, 2022 decision, found that Jeanette P. was a suitable and worthy guardian and that it was in Ryan C.'s best interests for guardianship to be transferred to her before it summarily denied the motions to revoke commitment without making further findings on whether a cause for commitment still existed or whether revocation was in Ryan C.'s best interests. The court later articulated its findings pertaining to the motions to revoke commitment on December 13, 2022, but the court again found that transferring guardianship to Jeanette P. was in Ryan C.'s best interests prior to explicitly considering the motions to revoke commitment. To the extent that, in its consideration of the motion to transfer guardianship, the court made findings that pertained to whether a cause for commitment still existed as it pertained to the motions to revoke commitment, this demonstrates that, at the very least, it is likely that the court blurred any distinction between its determinations on the motion to transfer guardianship and the motions to revoke commitment.

what placement was in Ryan C.'s best interests before, or together with, its analysis of whether a cause for commitment still existed as to the respondent. It also considered improper factors in its consideration of the motions to revoke commitment. The court improperly compared Jeanette P.'s parenting abilities against those of the respondent. For instance, in its articulation, the court stated: "The court is confident that [Jeanette P.] will comply with court orders and commonsense parenting in raising Ryan [C.] and will comply to the best of her abilities to have [him] maintain a relationship with [the respondent]. Based upon the evidence produced in this trial, the court lacks the same confidence in [the respondent]." This discussion highlights the prejudice caused to the respondent as a result of the motion to transfer guardianship being improperly before the court. For the foregoing reasons, the court's consideration of the motions to revoke commitment was improperly tainted by Jeanette P.'s intervention. Accordingly, we remand the case for a new trial on the motions to revoke commitment.

II

On appeal, the respondent and Ryan C. also claim that "the trial court repeatedly refused to allow any testimony or other evidence[21] regarding Madison [C.] . . . on the ground that it was not relevant to any material issues . . . ." Although our conclusion that the court improperly permitted Jeanette P. to intervene is dispositive of this appeal, we address this claim of evidentiary error because it is likely to arise again on

[21] Although the respondent and Ryan C. in their joint appellate brief state that "the trial court repeatedly refused to allow any testimony or other evidence," the brief refers only to testimony that the court precluded and does not claim that the court improperly excluded exhibits or other evidence related to Madison C. Therefore, we view this claim as solely challenging the court's preclusion of testimony relating to Madison C.

remand.[22] See *Weaver* v. *McKnight*, 313 Conn. 393, 397, 97 A.3d 920 (2014) (appellate court will "also review certain evidentiary rulings of the trial court that are likely to arise again on remand").

The court's preclusion of testimony relating to Madison C. after she returned to the respondent's custody can be placed into three general categories: the court precluded testimony relating to (1) Madison C.'s mental health and behavior, (2) the respondent's care of Madison C., and (3) the paternal grandparents' care of Madison C.[23] We review the court's evidentiary ruling pertaining to each category of evidence in turn and conclude that the court improperly precluded evidence pertaining to each of these three categories.[24]

We begin, however, with the relevant legal principles and standard of review. Practice Book § 35a-9 provides in relevant part: "The judicial authority may admit into evidence any testimony relevant and material to the issue of the disposition . . . ." Section 4-1 of the Connecticut Code of Evidence defines relevant evidence as "evidence having any tendency to make the existence

[22] In part I of this opinion, we concluded that the motion to transfer guardianship to Jeanette P. was improperly before the court and that we must remand the case for a new trial on the motions to revoke commitment. Therefore, because we are reviewing this claim as an issue likely to arise on remand, we review the relevancy of the testimony only as it relates to the motions to revoke commitment.

[23] Although we recognize that evidence of this nature also was offered by the petitioner, who did not appeal from the trial court's judgment; see footnote 3 of this opinion; the respondent and Ryan C. also offered evidence of this nature. It is clear from our careful review of the record that they objected to the court's preclusion of these categories of evidence and properly preserved their claim of evidentiary error.

[24] Ordinarily, an appellant has the burden to prove that an evidentiary ruling was an abuse of discretion and that this error was harmful in order to demonstrate reversible error. "Because we address this claim as an issue likely to arise on remand, we need not address whether the court's [ruling] was harmful." *Bialik* v. *Bialik*, 215 Conn. App. 559, 577 n.14, 283 A.3d 1062, cert. denied, 345 Conn. 965, 285 A.3d 390 (2022).

of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence."

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree . . . ." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 461, 93 A.3d 1076 (2014). "[T]he proffering party bears the burden of establishing the relevance of the offered testimony. Unless a proper foundation is established, the evidence is irrelevant." (Internal quotation marks omitted.) *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 697, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010).

The court's "evidentiary rulings must be viewed in the context of the proceedings." *In re Natalie J.*, 148 Conn. App. 193, 205, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014). "The trial court has broad discretion in ruling on the admissibility of evidence. The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion . . . ." Id., 209–10.

A

First, we review whether the court's preclusion of testimony regarding Madison C.'s mental health and behavior after returning to the respondent's custody was an abuse of its discretion. We conclude that it was.

The following facts and procedural history are necessary to our resolution of this claim. As previously indicated, Jeanette P. presented testimony from Franklin, a

forensic psychologist. On direct examination, Franklin testified to "a concern with regards to Madison [C.] decompensating" after returning to the respondent's custody. On cross-examination of that witness, the following exchange occurred:

"[The Respondent's Counsel]: If there are no major issues with Madison [C.] . . . would that support an issue of reunification of Ryan [C.]?

"[Jeanette P.'s Counsel]: Objection. Assuming facts not in evidence.

"The Court: [Counsel for Jeanette P.]. . . . More specifically, what facts are you indicating are not in evidence?

"[Jeanette P.'s Counsel]: That there are no issues concerning Madison [C.]. I assume—unless the question is asking what he knew as of the time he did his report, but his report is almost—I think the work he saw with Madison [C.] was in December, which was . . . a long, long time ago.

"[The Respondent's Counsel]: I'm hampered by the fact that I haven't begun to present my case yet, and I fully expect . . . to offer proof that Madison [C.] has been doing very well in the home. So, I can't jump to that and have [this witness] back, I presume. . . .

"The Court: Well, it also has to be put in the proper form as well when one questions an expert. I'm going to sustain the objection. First, it supposes that it would be helpful to me as the trier of fact that the fact that Madison [C.] is in the home is presently relevant as to whether Ryan [C.] should be there or not because that really has not been qualified, should we say, as a ground for me to draw that conclusion. Next question. . . .

"[The Respondent's Counsel]: . . . [D]o you know in relation to . . . the time of your 2021 evaluation how long Madison [C.] had been home?

"[The Witness]: I don't recall. I think it was something like a year.

"[The Respondent's Counsel]: She had been in the family home for a year, you're thinking?

"[The Witness]: No. I'm speculating. I don't recall, but it had been for some period of time. . . .

"[The Respondent's Counsel]: . . . Did you deal with or hear any concerns [regarding Madison C.] in preparing your evaluation for 2021?

"[The Witness]: I—based on [the department's] documentation, yeah. I want some clarity with regards to this because, in the [department's] documentation it indicated that, when I saw her, she was having some behavioral problems, and, later, in subsequent documents for subsequent reports it was noted that she was showing improvement, but nowhere have I been reading, as you've been indicating, that she is like significantly better when my impression is that she still was involved with services because she's not better. Am I mistaken?

"[The Respondent's Counsel]: I'm asking you.

"[The Witness]: Well, is my impression that she's not—

"[Jeanette P.'s Counsel]: I'm going to object. I'm going to object at this time, as I'm unsure of what the question [is] that is before [the witness].

"The Court: [Counsel for the respondent], this is getting a bit far afield because, number one, you haven't established the relevance of Madison [C.] being in the home to the appropriateness of Ryan [C.] being in the home. They are two different children.

"[The Respondent's Counsel]: Well, Your Honor, if we're talking about [the respondent's] work schedule,

grandparents not being known to the evaluator as far as caring for any child in the home, it would seem to me to involve Madison [C.] and the care of Madison [C.] since she's been there, according to [the witness], for about a year. As of that time, I think that's relevant. . . . [T]he . . . biological family has had a child in the home [the witness indicates] for about a year.

"The Court: Yes?

"[Jeanette P.'s Counsel]: Your Honor, I'm just going to object because what [counsel for the respondent] seems to be asking Your Honor to accept is that what work[s] for one child therefore works for another, and I don't know that the foundation has been laid to make any type of automatic conclusions.

"[The Respondent's Counsel]: Well, I'm not asking for an automatic conclusion. . . .

"The Court: I'm sustaining the objection because you haven't laid the foundation.

"[The Respondent's Counsel]: Okay."

The petitioner also called witnesses who testified to having some initial concerns with Madison C.'s mental health and behavior after her return to the respondent's custody. For instance, the supervisor of one of Ryan C.'s social workers testified to the department delaying the intended date of Ryan C.'s reunification with the respondent due to "Madison [C.'s] having a hard time adjusting."

It was established that Ryan C. would be living with Madison C. if the motions to revoke commitment were granted. Furthermore, the court had heard testimony that Madison C.'s mental health and behavior were, at least at one point in time, a barrier to Ryan C.'s reunification with the respondent. Given this evidentiary foundation, testimony relating to Madison C.'s

mental health and behavior since returning to the respondent's care were relevant to the motions to revoke commitment. In considering whether it was in Ryan C.'s best interests to return to the respondent's custody and reside in the same home as Madison C., the court was required to use "its broad discretion to choose a place that [would] foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment." (Internal quotation marks omitted.) *In re Cameron C.*, 103 Conn. App. 746, 759, 930 A.2d 826 (2007), cert. denied, 285 Conn. 906, 942 A.2d 414 (2008). Madison C.'s mental health and behavior, including any improvement of her behavior, was relevant to the court's determination of whether revocation of commitment would foster Ryan C.'s sustained growth, development, and well-being. Accordingly, the court abused its discretion in excluding testimony relating to Madison C.'s mental health and behavior after she returned to the respondent's care.

B

We next address whether the court abused its discretion by precluding testimony relating to the respondent's care of Madison C. since she returned to his custody. We conclude that the court's preclusion of this testimony was an abuse of its discretion.

The following facts and procedural history are necessary to our resolution of this claim. The court repeatedly precluded testimony related to the respondent's care of Madison C. since she returned to his custody. For instance, on April 7, 2022, counsel for the respondent called as a witness a department social worker who had worked on Ryan C.'s case. The following exchange occurred:

"[The Respondent's Counsel]: . . . [H]ow many visits did you make over to the [respondent's] house since you've had the case?

"[The Witness]: I had about three since December.

"[The Respondent's Counsel]: Okay. On the occasions when you went inside, what did you see?

"[The Witness]: The home is very clean, organized, very inviting. It seems very homey. I've observed that Madison [C.] . . . has her own room.

"[Jeanette P.'s Counsel]: Objection. Relevance.

"The Court: Ma'am, there's an objection. Once there's an objection, please wait until I rule on it.

"[Jeanette P.'s Counsel]: Specifically, Your Honor, evidence concerning Madison [C.] and relevance to issuance the trier of fact is addressing.

"The Court: [Counsel for the respondent], do you claim the part concerning Madison [C.]?

"[The Respondent's Counsel]: I do, Your Honor. I'm not asking about the condition of Madison [C.], except, I'm asking about the house and what [the witness] saw in the house and whose rooms are which—

"The Court: What relevance does Madison [C.] have to this issue?

"[The Respondent's Counsel]: Simply that she has a room there that [the witness] saw.

"The Court: Objection sustained. Next question."

On May 19, 2022, the trial continued with the parties' cross-examination of the same department social worker:

"[Ryan C.'s Counsel]: Does the department feel [the respondent] is a suitable and worthy caretaker?

"[The Witness]: Yes.

"[Ryan C.'s Counsel]: Is that because he has Madison [C.] in his care?

"[The Witness]: Yes.

"[Jeanette P.'s Counsel]: Objection. Relevance.

"The Court: Sustained. Stricken. . . .

"[Ryan C.'s Counsel]: Why does the department feel that [the respondent] is a suitable and worthy caretaker?

"[The Witness]: He has shown that he has the ability to provide appropriate care for his child, he—

"[Jeanette P.'s Counsel]: Objection. Relevance, because the court, based on the evidence to date, knows that [the respondent] has not cared for Ryan [C.]. He has not been allowed to be unsupervised with Ryan [C.] since 2020. The answer, the basis for the answer, and, I guess, the objection, also foundation, that this is a roundabout way to introduce information concerning other children.

"The Court: Counselor.

"[Ryan C.'s Counsel]: I would argue that this is not eliciting any information about other children. This is about [the respondent's] ability to care for a child and being a suitable and worthy caretaker, which is, of issue, because we're talking about revoking commitment. . . .

"The Court: Thank you. Objections sustained, I would invite you, [counsel for Ryan C.] to lay an appropriate foundation to ask this question.

"[Ryan C.'s Counsel]: What are the factors that the department considers when revoking commitment and reunifying a child with their parent?

"[The Witness]: So, we look at many factors, including the parents' ability to comply with court-ordered specific steps. We also do some [department] assessments as far as what the safety factors are in the home.

Whether they are low, high. We also look at how the parent is compliant with the treatment goals at the [department] family case plan.

"I would agree that [the respondent] has definitely shown his ability to comply with court-ordered specific steps. He has engaged and completed successfully all recommended services that entail being ready for reunification. Court-ordered specific steps are typically put in place for a parent to comply with to prepare for reunification. When we do our [department] assessments, we assess for any issues in the home, safety and what the risk levels are, and the parents' compliance with treatment goals. [The respondent] has been compliant with all of those factors.

"[Ryan C.'s Counsel]: You testified that [the department] assesses the home. Does [it] also assess who's living in the home?

"[The Witness]: Yes.

"[Ryan C.'s Counsel]: Who's living in [the respondent's] home? If you can remind the court.

"[The Witness]: Paternal grandmother, paternal grandfather, [the respondent], as well as his daughter, Madison [C.].

"[Ryan C.'s Counsel]: How old is Madison [C.]?

"[The Witness]: She is eight.

"[Ryan C.'s Counsel]: Does the department look at safety factors with regard to if there are any children in the home where the child in question is going to be reunifying?

"[The Witness]: Yes.

"[Jeanette P.'s Counsel]: Objection. Relevance. Clearly, this is about Madison [C.].

"[Ryan C.'s Counsel]: Your Honor, it's about the safety factors in the home. It is not specifically about the care of Madison [C.].

"The Court: [Counsel for the petitioner].

"[Jeanette P.'s Counsel]: If the court is receiving the information that the answer has nothing to do with Madison [C.], then so be it, but I believe the question . . . posed as to the foundation was, who lives in the home, last answer Madison [C.], and then it was about safety factors. So, I think it's logical to believe that the witness is answering the next question considering safety factors and Madison [C.].

"The Court: I'll sustain the objection, subject to you laying a foundation . . . that this does not include Madison [C.]. . . .

"[Ryan C.'s Counsel]: So . . . is there a child in [the respondent's] home?

"[The Witness]: Yes.

"[Ryan C.'s Counsel]: How old is that child?

"[The Witness]: Eight.

"[Ryan C.'s Counsel]: Has the department assessed if there were any safety concerns with regard to that child living in [the respondent's] home?

"[Jeanette P.'s Counsel]: Objection. Relevance.

"The Court: Counselor.

"[Ryan C.'s Counsel]: Your Honor, it's relevant because [the respondent] has a child in his home, regardless of who that child is. It is important to the court to know if there are any safety factors with that child, in that home, because we are talking about adding another child to that home.

"The Court: Objections sustained. . . .

"[Ryan C.'s Counsel]: In the past year, have there been any child protection concerns in [the respondent's] home?

"[The Witness]: No.

"[Jeanette P.'s Counsel]: Objection. Relevance.

"The Court: Sustained. Stricken."

The court concluded that, because Ryan C. and Madison C. are two different children with different needs, the respondent's care of Madison C. was not relevant to the motions to revoke the commitment of Ryan C. In order to render judgment on the motions to revoke commitment, however, the court needed to determine whether a cause for commitment still existed as to the respondent and whether revoking commitment was in Ryan C.'s best interests.

The respondent's care of Madison C., albeit not determinative, is relevant to both determinations. See *Champagne* v. *Champagne*, 85 Conn. App. 872, 881, 859 A.2d 942 (2004) ("[e]vidence is not rendered inadmissible because it is not conclusive" (internal quotation marks omitted)). Because Madison C. had been in the respondent's care and custody since March 24, 2020, evidence relating to the department's assessment of his care of Madison C. was clearly relevant to whether the respondent had successfully addressed any previous parenting deficiencies that were a cause for commitment. Specifically, evidence pertaining to whether the department had any safety concerns relating to the respondent's care of Madison C. and whether he had demonstrated that he was a suitable and worthy guardian through his care of Madison C. was relevant to his current abilities to be a parent and to care for Ryan C. Although we acknowledge that Madison C. and Ryan C. are two different children, and it reasonably follows that the parenting abilities that the respondent may need to care

for Madison C. may be different from those he needs to care for Ryan C., these differences between the needs of the children affect the weight of this evidence and not its admissibility. Accordingly, we conclude that testimony relating to the respondent's care of Madison C. was relevant to the motions to revoke commitment and that the court abused its discretion by precluding it.

C

Finally, we consider whether the court abused its discretion by precluding testimony relating to the paternal grandparents' care of Madison C. since she returned to the respondent's custody. We conclude that the court's preclusion of this testimony was also an abuse of its discretion.

The following additional facts and procedural history are necessary to our resolution of this claim. Jeanette P. presented witnesses who testified to the respondent's long work hours and that the paternal grandparents were primarily caring for Madison C. when the respondent was at work.[25] Jeanette P. also called Franklin to testify. He testified to his concerns with the respondent's long work hours and the amount of care he perceived the paternal grandparents to be providing to Madison C. On the basis of these facts, he testified to his inability to recommend that Ryan C. be reunified with the respondent because he would need to assess the paternal grandparents' ability to be appropriate caregivers to Ryan C. The court precluded other testimony, however, related to the paternal grandparents'

[25] For instance, when Jeanette P. called the respondent to testify, he testified to going into work on weekdays at 5 a.m. or 6 a.m. and returning home at 4 p.m. or 5 p.m. The respondent also worked approximately six overtime hours on the weekends, usually on Saturday morning. The respondent further testified that, while he was at work, the paternal grandparents helped him care for Madison C. and got her ready for school.

care of Madison C., including the department's assessment of the quality of care the paternal grandparents have provided to Madison C.

For instance, on May 19, 2022, during the petitioner's cross-examination of a department social worker who had worked on Ryan C.'s case, the following exchange occurred:

"[The Petitioner's Counsel]: Okay. Currently, since you've had the case, have the grandparents been compliant with your request[s] of them?

"[The Witness]: Yes.

"[The Petitioner's Counsel]: Okay. So, when assessing their appropriateness as potential caregivers for Ryan [C.] specifically, do you take into account the changes in their perspective, or the changes in their attitude or presentation from 2017 [to] 2022?

"[The Witness]: Yes.

"[The Petitioner's Counsel]: So, when you say that there are no child protection concerns regarding the grandparents as caretakers. What goes into that assessment for you?

"[The Witness]: There have not been any reports made to [the department] regarding their caregiver role, I would say.

"[Jeanette P.'s Counsel]: Objection.

"The Court: Hold on for a second. Nature of the objection.

"[Jeanette P.'s Counsel]: Caregiver role as to whom, and if it's about Madison [C.], if the answer is sighting Madison [C.], then it's not relevant.

"[The Petitioner's Counsel]: Well, Your Honor, if there had been a Careline report regarding the grandparents

as to Madison [C.], I think we would have a little bit of a different point of view from [counsel for Jeanette P.] on its relevance.

"The Court: [Counsel for the petitioner] are you trying to get in through the back door when you can't get in through the front door?

"[The Petitioner's Counsel]: I am not. I'm merely asking if there are any child protection concerns and what's that based on. I'm not asking about Madison's specific needs in any way.

"The Court: I will allow only what has been responded to, that there have been no reports, and that's as far as it's going. Next question. I will both sustain and overrule the objection in part. Next question."

On the basis of the evidence before the court, we conclude that testimony relating to the paternal grandparents' care of Madison C. since she returned to the respondent's custody was relevant to the motions to revoke commitment. The evidence before the court established that the paternal grandparents aided the respondent by caring for Madison C. while he was at work. It was reasonable to infer from the evidence before the court that a similar arrangement would occur if Ryan C. was returned to the respondent's custody. Therefore, because the paternal grandparents would be living in the home with Ryan C., acting as a support for the respondent, and likely caring for Ryan C. while the respondent was at work, the paternal grandparents' ability to care for a child, as exemplified by their care of Madison C., was relevant to the court in determining whether returning to the respondent's custody was in Ryan C.'s best interests. Furthermore, after Franklin testified that, in his opinion, the paternal grandparents' care of Ryan C. was a barrier to his reunification with the respondent because he had not been able to assess their parenting abilities, other evidence relating to the

grandparents' ability to appropriately care for a child was all the more relevant to the motions to revoke commitment. Accordingly, testimony pertaining to the paternal grandparents' care of Madison C. was relevant to the court's evaluation of whether granting the motions to revoke commitment would be in Ryan C.'s best interests.

III

Although no stay of proceedings was in effect during the pendency of this appeal and our decision changes the parties' positions, we also order that the stay of execution that would ordinarily go into effect upon the release date of this opinion pursuant to Practice Book § 71-6[26] is terminated in light of the need to adjudicate a child protection case expeditiously and to achieve permanency and stability for children. See Practice Book § 60-2; see also *In re Amias I.*, 343 Conn. 816, 842, 276 A.3d 955 (2022) (" '[t]ime is of the essence in child custody cases' "). This order is further justified in light of the unique procedural posture of this case in which no appellee has participated in this appeal and because we have concluded that Jeanette P. never should have been made a party to this case.

The judgment is reversed and the case is remanded with direction to deny the motions to intervene and to dismiss Jeannette P.'s motion to transfer guardianship and for a new trial on the motions to revoke commitment.

In this opinion the other judges concurred.

[26] Practice Book § 71-6 provides in relevant part: "If no stay of proceedings was in effect during the pendency of the appeal and the decision of the court having appellate jurisdiction would change the position of any party from its position during the pendency of the appeal, all proceedings to enforce or carry out the decision of the court having appellate jurisdiction shall be stayed until the time for filing a motion for reconsideration has expired, and, if a motion is filed, until twenty days after its disposition, and, if it is granted, until the appeal is finally determined."

STATE OF CONNECTICUT *v.* ROBERT KING
(AC 45288)

Elgo, Cradle and Keller, Js.

Syllabus

Convicted, on a plea of guilty, of the crime of conspiracy to commit trafficking in persons, the defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. At the defendant's sentencing hearing, the state requested that the court, inter alia, require the defendant to register as a sex offender pursuant to statute (§ 54-254 (a)). The defendant did not object to the state's request, and defense counsel confirmed on the record the length of the defendant's period on the registry. Thereafter, the court imposed the requirement that the defendant register as a sex offender as a special condition of his probation. Subsequently, the defendant filed a motion to correct an illegal sentence, claiming that the sentencing court had required him to register as a sex offender illegally because, prior to accepting his guilty plea at his plea acceptance hearing, the court had not advised him that he would be required to register as a sex offender, as required by § 54-254 (a), and there had been no finding that his crime was committed for a sexual purpose. The court found that, although the defendant's sentence was imposed in an illegal manner because the necessary finding and canvass required by § 54-254 never occurred, the defendant's failure to object at the sentencing hearing constituted an acquiescence with its order and a waiver of his right to a hearing on the issue of whether he committed the crime with a sexual purpose. *Held* that the trial court lacked subject matter jurisdiction over the defendant's motion to correct because it did not plausibly challenge his sentence or the manner in which his sentence was imposed: the requirement that the defendant register as a sex offender was not part of his sentence but, rather, was a separate regulatory incident of the criminal judgment of conviction and was not punitive in nature; moreover, the fact that the court imposed the registration requirement as a special condition of the defendant's probation did not make that condition part of his sentence because our Supreme Court held in *State* v. *Waterman* (264 Conn. 484) that such a condition is not punitive; furthermore, the motion to correct challenged alleged flaws in the plea process in that the court accepted the defendant's plea without first canvassing him in compliance with § 54-254, thus, the motion was a collateral attack on the plea process rather than a true challenge to the legality of his sentence or the manner in which the sentence was imposed; accordingly, the trial court should have dismissed the defendant's motion to correct an illegal sentence.

Argued March 20—officially released July 25, 2023

Procedural History

Substitute information charging the defendant with the crime of conspiracy to commit trafficking in persons, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the defendant was presented to the court, *Hon. Susan S. Reynolds*, judge trial referee, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *D'Andrea, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Tamar R. Birckhead, assigned counsel, for the appellant (defendant).

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, *Stephen J. Sedensky III*, special assistant state's attorney, and *Mary-Caitlin Harding*, deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Robert King, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly denied that motion, which challenged the sentencing court's imposition of a special condition of probation that he register as a sex offender pursuant to General Statutes § 54-254 (a).[1]

[1] General Statutes § 54-254 (a) provides in relevant part: "Any person who has been convicted . . . of any felony that the court finds was committed for a sexual purpose, may be required by the court upon release into the community or, if such person is in the custody of the Commissioner of Correction, at such time prior to release as the commissioner shall direct to register such person's name, identifying factors, criminal history record, residence address and electronic mail address, instant message address or other similar Internet communication identifier, if any, with the Commissioner of Emergency Services and Public Protection, on such forms and in such locations as the commissioner shall direct, and to maintain such registration for ten years from the date of such person's release into the

In response, the state argues, inter alia, that the trial court lacked subject matter jurisdiction over the defendant's motion to correct because the requirement that the defendant register as a sex offender was not part of his sentence. We agree with the state and, accordingly, we reverse the judgment of the trial court and remand the case with direction to dismiss the motion to correct.

The following procedural history and facts, as undisputed or made a part of the record at the time the defendant entered his plea, are relevant to this appeal. Between 2012 and 2016, the defendant operated a prostitution ring in the Danbury area. Specifically, the defendant recruited and delivered fifteen male victims to meet with either William Trefzger or Bruce Bemer,[2] who paid the victims directly in exchange for sexual contact. The victims then shared with the defendant a portion of the money given by either Trefzger or Bemer. All of the fifteen victims suffered from mental health issues or substance abuse issues.

community. If the court finds that a person has committed a felony for a sexual purpose and intends to require such person to register under this section, prior to accepting a plea of guilty or nolo contendere from such person with respect to such felony, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully understands the consequences of the plea. . . ."

[2] William Trefzger pleaded guilty to patronizing a prostitute pursuant to General Statutes (Rev. to 2015) § 53a-83 (c), and was sentenced to ten years of incarceration, execution suspended after one year, followed by ten years of probation.

A jury found Bruce Bemer guilty of four counts of patronizing a prostitute in violation of General Statutes (Rev. to 2015) § 53a-83 (c), and one count of trafficking in persons as an accessory in violation of General Statutes (Supp. 2016) § 53a-192a and General Statutes § 53a-8. On appeal, our Supreme Court held that the state presented insufficient evidence to establish that Bemer had the requisite knowledge or intent to support the charged counts. *State* v. *Bemer*, 340 Conn. 804, 807, 266 A.3d 116 (2021). Thus, our Supreme Court reversed the judgment of conviction and remanded the case with direction to render judgment of not guilty. Id., 822.

On August 13, 2016, the defendant was arrested and charged with promoting prostitution in the second degree in violation of General Statutes § 53a-87 and tampering with a witness in violation of General Statutes § 53a-151. See *State* v. *King*, Superior Court, judicial district of Danbury, Docket No. CR-16-0153866-S. On March 31, 2017, the defendant was arrested and charged with conspiracy to commit trafficking in persons in violation of General Statutes (Supp. 2016) § 53a-192a and General Statutes § 53a-48. See *State* v. *King*, Superior Court, judicial district of Danbury, Docket No. CR-17-0155231-S.

On August 24, 2018, the court held a hearing at which the defendant pleaded guilty to the charge of conspiracy to commit trafficking in persons in violation General Statutes (Supp. 2016) § 53a-192a and § 53a-48. The defendant entered his guilty plea pursuant to a plea agreement in which the state agreed to nolle the charges brought against him in Docket No. CR-16-0153866-S. In exchange, the defendant agreed to fully cooperate with the state in its case against Bemer and to be sentenced to twenty years of incarceration, suspended after four and one-half years, and thirty-five years of probation. The court canvassed the defendant and confirmed that he understood the plea proceedings, previously discussed the case with his attorney, knew the elements of the charged offense, understood the plea agreement, and was satisfied with the service of his attorneys. The court confirmed that the defendant was aware that his plea would result in him giving up his rights to remain silent, to continue pleading not guilty, to receive a trial by court or jury, to cross-examine the state's witnesses and evidence, and to present his own witnesses and evidence. The court also confirmed that no one had threatened or forced the defendant to plead guilty. The court accepted the defendant's plea and determined that it was freely, voluntarily, and intelligently made.

There was no mention at the plea hearing as to whether the defendant was, or should be, required to register as a sex offender.

On June 19, 2019, the court held the defendant's sentencing hearing. At the outset, the court recalled that the plea agreement provided for thirty-five years of probation. Nevertheless, the court noted that, as a result of a 2017 amendment to § 53a-192a,[3] the maximum period of probation was five years. Both parties agreed with the court's representation. The court stated that, despite the fact that it was "not happy about it," the court would reduce the period of probation from thirty-five years to five years. Defense counsel confirmed that was the plea deal that the defendant wanted and that the defendant did not want to withdraw his plea and start over.

The state then requested that the court impose the four special conditions of probation recommended by the presentence investigation report (PSI): (1) sexual offender evaluation and treatment; (2) mental health evaluation and treatment; (3) no contact with Bemer and Trefzger; and (4) no contact with the victims. The

[3] In 2017, our legislature amended § 53a-192a to reclassify the offense from a class B felony to a class A felony. See Public Acts 2017, No. 17-32, § 2. We are not convinced that the reclassification of § 53a-192a in 2017 changed the maximum allowable sentence of probation for an offense of conspiracy to commit trafficking in persons in violation of General Statutes §§ 53a-192a and 53a-48. Pursuant to General Statutes § 53a-29 (d), the maximum sentence of probation for a class B felony is not more than five years. As the trial court and the parties agreed, conspiracy to commit trafficking in persons in violation of General Statutes (Supp. 2016) § 53a-192a and § 53a-48, was a class B felony *prior to 2017*. *After 2017*, conspiracy to commit trafficking in persons in violation of §§ 53a-192a and 53a-48, also was a class B felony because, although § 53a-192a was now a class A felony, General Statutes § 53a-51 reduced the classification of conspiracy to commit that crime to a class B felony. See General Statutes § 53a-51 ("[a]ttempt and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony").

state further requested that the court require the defendant to register as a sex offender because "this was a crime committed for sexual purposes."[4]

After hearing from certain victims and their representatives, the court offered defense counsel the opportunity to respond. Neither the defendant nor defense counsel objected to, or otherwise opposed, the state's request that the defendant be required to register as a sex offender. Rather, defense counsel spoke briefly about how the defendant cooperated with the state in its case against Bemer and the reduction in the period of probation. Defense counsel concluded by "ask[ing] the court impose the sentence as [he] think[s] the court is inclined to doing . . . ."

The court then sentenced the defendant to twenty years of incarceration, suspended after four and one-half years, and five years of probation. In accordance with the recommendations in the PSI and by the state, the court also stated, "Specifically to that probation, in addition to anything else probation deems necessary, is that you will participate in sex offender evaluation and treatment. You will register on the sex offender registry. You will submit to mental health evaluation and treatment. You will have no contact at all with either Mr. Bemer or Mr. Trefzger. You will have absolutely no contact whatsoever with any of the victims that you have been given the list of—there's seventeen of them, if you're ever in doubt, you should contact probation and find out—or their families. You are not to contact Ability Beyond or go to any of its properties, no alcohol,

[4] The state also requested that the court impose two more restrictions on the defendant: (1) that the "court add with condition number four no contact with the victims or their families. Victims number four and thirteen are deceased, but their family members are still alive and they do not want any contact with this defendant"; and (2) "that the defendant possess no alcohol and no drugs and that he have no contact with Ability Beyond or any other [of its] properties."

no drugs and you are to—oh, I did that, registration, you're to go on the re—the sex offender registry."

Following the imposition of the sentence, neither the defendant nor defense counsel took exception to the court requiring that the defendant register as a sex offender. Instead, defense counsel confirmed the length of the time period that the defendant must register as a sex offender. Specifically, the court asked, "Counsel, what else do I have to do?" Defense counsel responded, "I think the period of the registration, Your Honor." The court stated, "Oh, that's a ten year, isn't it?" The state confirmed, "Yes, Your Honor," and the court stated, "It's a ten year registration. I have that written down right here." The written order of probation, filed on June 20, 2019, evinces that the court imposed the requirement that the defendant register as a sex offender as a special condition of probation pursuant to General Statutes § 54-251. The defendant did not file a direct appeal from his conviction, and he did not file a motion to vacate or withdraw his guilty plea.

Two years later, on July 15, 2021, the defendant filed a motion to correct an illegal sentence and a memorandum of law in support thereof. The defendant argued that the sentencing court illegally required him to register as a sex offender because the court, prior to accepting his plea, failed to comply with § 54-254 (a), which provides in relevant part: "If the court finds that a person has committed a felony *for a sexual purpose* and intends to require such person to register under this section, prior to accepting a plea of guilty or nolo contendere from such person with respect to such felony, the court shall (1) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (2) determine that the person fully

understands the consequences of the plea. . . .”[5] (Emphasis added.) The defendant argued that “there was no mention at all of the sex offender registration requirement of § 54-254 (a) during the defendant’s plea acceptance hearing. At no time during the plea acceptance was the defendant advised he would be required to register as a sex offender as is required by § 54-254. The first mention of sex offender registration was at the defendant’s sentencing, when [the state] asked the judge to impose registration in accordance with § 54-254. There was also no formal finding that the defendant had committed conspiracy to commit human trafficking for a sexual purpose.” As for relief, the defendant requested that the court “correct the defendant’s illegal sentence, vacate the defendant’s sentence, and order him resentenced under the terms of his plea agreement.”

On August 13, 2021, the state filed a motion to dismiss and an objection to the defendant’s motion to correct. On September 8, 2021, the state filed a memorandum of law in support of its motion and its objection in which it made two principal arguments.[6] First, the state contended that the court lacked subject matter jurisdiction pursuant to Practice Book § 43-22 because the defendant’s motion to correct contested the requirement that he register as a sex offender, which was

[5] General Statutes § 54-250 (12) defines the phrase “sexual purpose” to mean “that a purpose of the defendant in committing the felony was to engage in sexual contact or sexual intercourse with another person without that person’s consent. A sexual purpose need not be the sole purpose of the commission of the felony. The sexual purpose may arise at any time in the course of the commission of the felony.”

[6] The state also argued that the sentencing court did not err because the defendant was required to register as a sex offender because his plea of guilty to conspiracy to commit human trafficking triggered the automatic registration requirement of § 54-251 (a), requiring “[a]ny person who has been convicted or found not guilty by reason of mental disease or defect of a criminal offense against a victim who is a minor or a nonviolent sexual offense” to register as a sex offender. The state does not renew this argument on appeal, likely because none of the fifteen victims were minors.

separate from his sentence. Second, the state argued that the court should deny the defendant's motion to correct because the defendant, and/or his counsel, was well aware of the requirement that he register as a sex offender when he pleaded guilty.

On September 10, 2021, the court held a hearing on the defendant's motion to correct. Defense counsel argued that the defendant's sentence was imposed in an illegal manner because the court at sentencing required him to register as a sex offender without first canvassing him at his plea hearing in compliance with § 54-254. The state argued that the court lacked subject matter jurisdiction over the defendant's motion to correct because he challenged only the sex offender registration requirement, which is distinct from his actual sentence. The state also argued that the court should deny the motion to correct on the ground that the defendant consented to the registration requirement because neither the defendant nor defense counsel objected to the court's imposition of this requirement at the sentencing hearing. In response to the state's jurisdictional argument, defense counsel argued that "[t]he issue is that, at the time of the plea acceptance, he was not advised that that would be part of the plea. And . . . there should have been a finding at that time that it was for a sexual purpose, not at the time of sentencing. . . . What happened at [the] time of sentencing has nothing to do with what we're claiming here, other than that is where . . . the registration first appears in this case."

On November 16, 2021, the court issued a memorandum of decision denying the defendant's motion to correct. The court held that the defendant's sentence was imposed in an illegal manner because the necessary finding and canvass required by § 54-254 never occurred, and, thus, the sentencing court improperly required him to register as a sex offender. Nevertheless, the court denied the defendant's motion to correct

because defense counsel failed to object at the sentencing hearing to the state's request that the defendant register as a sex offender and, thus, "the defendant's silence is the full functional equivalent of acquiescence to the court's order and a waiver of the right to a hearing on the issue as to whether the defendant committed the act for a sexual purpose." Moreover, although the court did not squarely address the state's argument that it lacked subject matter jurisdiction, the court implicitly rejected that argument by addressing the merits of the defendant's motion and ruling that the defendant's sentence was imposed in an illegal manner but that the defendant, by and through his counsel, waived this claim by failing to object at the sentencing hearing.[7] This appeal followed.[8]

[7] Although the court did not expressly address the state's subject matter jurisdiction argument, this does not preclude our resolution of that claim on appeal because "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal . . . ." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020).

[8] After oral argument, this court, sua sponte, ordered the parties to file supplemental briefs "addressing whether: [1] The trial court had subject matter jurisdiction over the defendant's motion to correct an illegal sentence because that motion challenged whether the sentencing court improperly imposed registration as a sex offender as a condition of probation; and [2] If the defendant filed a motion to modify probation, the trial court would have subject matter jurisdiction to review the claimed illegality of the sex offender registration requirement because it has continuing jurisdiction to modify conditions of probation pursuant to General Statutes § 53a-30."

With respect to the first question, the defendant contended that the court had subject matter jurisdiction because the court's imposition of the special condition of probation that he register as a sex offender is considered part of his sentence pursuant to *State* v. *Koslik*, 116 Conn. App. 693, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009). Conversely, the state contended that the court lacked subject matter jurisdiction because the defendant's motion to correct did not challenge the conditions of his probation and, even if it did, the requirement that the defendant register as a sex offender is not part of his sentence because it is not punitive pursuant to *State* v. *Fowlkes*, 283 Conn. 735, 930 A.2d 644 (2007). With respect to the second question, both parties agreed that the court would have subject matter jurisdiction to modify the defendant's special conditions of probation

The principal issue in this appeal is whether a motion to correct an illegal sentence is a jurisdictionally proper vehicle by which to challenge the propriety of the sentencing court's imposition of the requirement that a defendant register as a sex offender. The state contends that the court lacked subject matter jurisdiction over the defendant's motion to correct because that motion did not contest his sentence or the manner in which his sentence was imposed. Specifically, the state argues that the requirement that the defendant register as a sex offender is not part of his sentence because it is a separate regulatory incident of the criminal judgment of conviction and is not punitive in nature. The state further argues that the defendant's motion to correct an illegal sentence challenged the plea process, not the sentencing proceeding. In response, the defendant argues that the court had subject matter jurisdiction because the court's imposition of the special condition of probation that he register as a sex offender is considered part of his sentence. He further argues that the court had subject matter jurisdiction because his motion challenged the illegal manner in which the court imposed his sentence.[9] We agree with the state.

We first set forth our standard of review and relevant legal principles governing the court's subject matter jurisdiction over a motion to correct an illegal sentence.

if he were to prospectively file a motion to modify his special conditions of probation pursuant to § 53a-30 (c).

[9] The defendant also argued for the first time in his appellate reply brief that the sentencing court's order requiring him to register as a sex offender constituted "any other disposition made in an illegal manner" pursuant to Practice Book § 43-22. We decline to review this argument because the defendant raised it for the first time on appeal in his appellate reply brief. See *State* v. *Griffin*, 217 Conn. App. 358, 375 n.9, 288 A.3d 653 ("it is well established that we do not entertain arguments raised for the first time in a reply brief"), cert. denied, 346 Conn. 917, 290 A.3d 799 (2023); *Jaynes* v. *Commissioner of Correction*, 216 Conn. App. 412, 419, 285 A.3d 412 (2022) ("'[a]rguments asserted in support of a claim for the first time on appeal are not preserved' "), cert. denied, 345 Conn. 972, 286 A.3d 906 (2023).

"A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner." (Internal quotation marks omitted.) *State* v. *Myers*, 343 Conn. 447, 459, 274 A.3d 100 (2022). Practice Book § 43-22, which codifies this common-law rule, provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "Therefore, we must decide whether the defendant has raised a colorable claim within the scope of . . . § 43-22. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction. . . . We have emphasized, however, that [t]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it. . . . In examining whether a claim is colorable, therefore, the jurisdictional inquiry is guided by the plausibility that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness." (Citations omitted; internal quotation marks omitted.) *State* v. *Myers*, supra, 459.

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison

time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . We have emphasized that, in order to invoke the jurisdiction of the trial court, a challenge to the legality of a sentence must challenge the sentencing proceeding itself." (Citation omitted; internal quotation marks omitted.) Id., 459–60. "Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . ." (Internal quotation marks omitted.) *State* v. *Francis*, 322 Conn. 247, 264–65, 140 A.3d 927 (2016). "Whether the trial court had subject matter jurisdiction over the defendant's motion to correct an illegal sentence is a question of law, and our review is plenary." *State* v. *Ward*, 341 Conn. 142, 149, 266 A.3d 807 (2021).

We conclude that the court lacked subject matter jurisdiction over the defendant's motion to correct because it did not plausibly challenge his sentence or the manner in which his sentence was imposed. First, the defendant's motion to correct did not plausibly challenge his sentence. Our Supreme Court consistently has held that the requirement that a defendant register as a sex offender is not part of a sentence because it is a separate regulatory incident of the criminal judgment of conviction and is not punitive in nature. See, e.g., *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 531, 267 A.3d 831 (2021) ("the requirement that the petitioner register as a sex offender is a collateral consequence of his 1996 conviction, not part of the sentence"); *State* v. *Pierce*, 269 Conn. 442, 448 n.5, 849 A.2d 375 (2004) (sex offender registration requirement

pursuant to § 54-254 (a) "is a separate regulatory incident of the criminal judgment of conviction" and "making the factual finding and informing the defendant of the registration requirement did not necessitate any modification, opening or correction of the defendant's sentence"); *State* v. *Waterman*, 264 Conn. 484, 497, 498, 825 A.2d 63 (2003) (because sex offender registration statute is regulatory and not punitive in nature, application of statute to defendant "did not necessitate any modification, opening or correction of [his] sentence" and holding that " 'we are not dealing with a sentencing factor or a sentencing enhancement, but with a finding to be made after conviction that has no effect until after a defendant's sentence has been served' "). Moreover, the fact that the court imposed the sex offender registration requirement as a special condition of probation does not make that condition part of the defendant's sentence because *Waterman* held that such a condition is not punitive. See, e.g., *State* v. *Fowlkes*, 283 Conn. 735, 737–39, 930 A.2d 644 (2007) (holding that nonpunitive conditions of probation do not affect defendant's sentence); *State* v. *Waterman*, supra, 497 (requirement that defendant register as sex offender was not punitive in nature). The defendant cites no appellate case, and we are not aware of any, holding that a trial court has subject matter jurisdiction over a motion to correct an illegal sentence challenging the court's requirement that the defendant register as a sex offender.[10]

[10] In his supplemental brief, the defendant primarily relies on *State* v. *Koslik*, 116 Conn. App. 693, 700, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009), in which this court determined that the trial court had subject matter jurisdiction over a motion to correct an illegal sentence in which the defendant argued that his sentence of three years of probation exceeded the relevant statutory maximum of two years of probation. We are not persuaded that *Koslik* is applicable here because the present motion to correct challenged the sentencing court's imposition of a special condition of probation on the ground that the court at the plea hearing failed to make a required finding. In contrast, the claim in *Koslik* that the sentence exceeded the statutory maximum clearly falls within the prescribed categories that a trial court retains jurisdiction to correct. See, e.g., *State* v. *Francis*, supra,

Second, rather than challenging the manner in which the court imposed his sentence, the defendant challenges the court's conduct *relative to his plea*. Specifically, he asserts that the court failed to make the required findings and conduct a canvass pursuant to § 54-254 *prior to accepting his guilty plea*. Our appellate courts have held that a trial court lacks subject matter jurisdiction over a motion to correct challenging alleged flaws in the plea process. See, e.g., *State* v. *Das*, 291 Conn. 356, 363 n.3, 968 A.2d 367 (2009) (because "defendant's claims are based on alleged flaws in the court's acceptance of his plea, Practice Book § 43-22 *is clearly inapplicable*" (emphasis added)); *State* v. *Boyd*, 204 Conn. App. 446, 456–57, 253 A.3d 988 (trial court lacked subject matter jurisdiction over motion to correct because it was "nothing more than a collateral attack on the plea underlying the defendant's conviction rather than a true challenge to the legality of the sentence imposed or to the sentencing proceedings"), cert. denied, 336 Conn. 951, 251 A.3d 617 (2021); *State* v. *Robles*, 169 Conn. App. 127, 133, 150 A.3d 687 (2016) (trial court lacked subject matter jurisdiction over motion to correct because defendant's claims challenged "the validity of his plea, and subsequent conviction, on the kidnapping charges and, therefore, do not fall" within purview of § 43-22), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017); *State* v. *McPherson*, 169 Conn. App. 100, 102, 148 A.3d 630 ("the court properly dismissed the defendant's motion to correct an illegal sentence because the defendant sought to attack the validity of his guilty pleas . . . rather than attacking the legality of the sentencing proceeding or the sentence itself"), cert. denied, 323 Conn. 950, 151 A.3d 847 (2016); *State* v. *Monge*, 165 Conn. App. 36, 43, 138 A.3d 450 (trial

322 Conn. 264 (trial court has subject matter jurisdiction over motion to correct in which defendant argues that sentence exceeds applicable statutory maximum limits).

court lacked subject matter jurisdiction over motion, construed as seeking to correct an illegal sentence, alleging that defendant's pleas were not knowing and voluntary), cert. denied, 321 Conn. 924, 138 A.3d 284 (2016); *State* v. *Casiano*, 122 Conn. App. 61, 68, 998 A.2d 792 (trial court lacked subject matter jurisdiction over motion to correct because defendant's claim did not attack validity of sentence and, instead, pertained to his trial attorney's effectiveness during plea negotiations and alleged flaws in court's acceptance of plea), cert. denied, 298 Conn. 931, 5 A.3d 491 (2010).

In the present case, the defendant's motion to correct and his oral argument in support of that motion made clear that his challenge was to the court's acceptance of his plea without first complying with § 54-254. In his motion to correct, the gravamen of his argument challenged the plea process, and he concluded his motion by arguing that "there was no mention at all of the sex offender registration requirement of § 54-254 (a) during the defendant's *plea acceptance hearing*. At no time during the *plea acceptance* was the defendant advised he would be required to register as a sex offender as is required by § 54-254. The first mention of sex offender registration was at the defendant's sentencing, when [the state] asked the judge to impose registration in accordance with § 54-254. There was also no formal finding that the defendant had committed conspiracy to commit human trafficking for a sexual purpose." (Emphasis added.) At oral argument in support of the motion to correct, defense counsel repeatedly emphasized that the basis for his motion to correct stemmed from the fact that, at the plea hearing, the court failed to comply with § 54-254. Specifically, defense counsel argued that "[t]he issue is that at the time of the *plea acceptance*, he was not advised that that would be part of the plea. And . . . there should have been a finding *at that time* that it was for a sexual

purpose, not at the time of sentencing. . . . *What happened at* [*the*] *time of sentencing has nothing to do with what we're claiming here*, other than that is where . . . the registration first appears in this case." (Emphasis added.) The defendant also confirmed to the court that the required findings pursuant to § 54-254 must be made prior to the court's acceptance of the plea and cannot be made by the court at sentencing.[11] Despite his attempt on appeal to characterize his motion as challenging the manner in which his sentence was imposed, the defendant's argument to the trial court made clear that the genesis of his claim was the alleged improprieties at the plea hearing. Therefore, we conclude that the court lacked subject matter jurisdiction because the defendant's motion to correct is a collateral attack on the plea process rather than a true challenge to the legality of his sentence or the manner in which his sentence was imposed.

Finally, we make clear that our decision is limited to considering the plausibility that the defendant's motion challenged his sentence, and we do not reach the merits of his claim that he improperly was required to register as a sex offender in violation of § 54-254. It is possible that the defendant has procedural mechanisms, other than a motion to correct an illegal sentence, to obtain an adjudication of his claim. As the state recognized in its supplemental brief, the court would have subject

[11] Additionally, the defendant in his motion and at oral argument before the trial court primarily relied on *State* v. *Davenport*, 127 Conn. App. 760, 763, 15 A.3d 1154, cert. denied, 301 Conn. 917, 21 A.3d 464 (2011), in which this court, on appeal from the judgment of conviction rendered after the defendant's plea, held that it was plain error for the court to accept the defendant's plea without first complying with the mandates of § 54-251 (a). The *Davenport* decision dealt only with the plea process, and did not concern sentencing, jurisdiction, or a motion to correct an illegal sentence. Accordingly, not only his argument, but also the substantive authority supporting his argument, evinces that the defendant's challenge was to the plea process, not to his sentence.

matter jurisdiction if the defendant were to file a motion to modify, pursuant to General Statutes § 53a-30 (c), challenging the legality of the court's requirement that the defendant register as a sex offender as a special condition of his probation.[12] See, e.g., *State* v. *Suzanne P.*, 208 Conn. App. 592, 609–10, 265 A.3d 951 (2021) (outlining procedure for modifying conditions of probation pursuant to § 53a-30 (c)); see also footnote 8 of this opinion. The state in the present case also recognized that the defendant has the opportunity to file a habeas corpus action to challenge the effectiveness of his counsel. See, e.g., *State* v. *Parker*, 295 Conn. 825, 851–52, 992 A.2d 1103 (2010) (affirming trial court's dismissal of motion to correct challenging actions of defense counsel at sentencing, and indicating that "exclusive forum for adjudicating ineffective assistance of counsel claims is by way of habeas proceedings"); *State* v. *Brescia*, 122 Conn. App. 601, 607 n.4, 999 A.2d 848 (2010) (noting that, although trial court lacked subject matter jurisdiction over motion to correct, defendant had ability to raise claim in habeas corpus proceeding).

The judgment is reversed and the case is remanded with direction to dismiss the defendant's motion to correct an illegal sentence.

In this opinion the other judges concurred.

[12] To be clear, the state contends that the court would have subject matter jurisdiction over the defendant's prospective motion to modify the conditions of his probation pursuant to § 53a-30, not that the defendant would prevail on the merits of such a motion. Indeed, the state in its supplemental brief expressly reserved its right to contest any future motion to modify on the merits, including but not limited to the grounds that (1) the canvass and findings required by § 54-254 do not implicate a constitutional right that the defendant must personally waive, (2) the defendant was afforded any process constitutionally due, and (3) the defendant and/or his counsel waived any right to the § 54-254 findings and canvass. See, e.g., *State* v. *Morel-Vargas*, 343 Conn. 247, 253–54, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022); *State* v. *Arthur H.*, 288 Conn. 582, 602–609, 953 A.2d 630 (2008).

SHAWN CROCKER *v.* COMMISSIONER OF CORRECTION (AC 45232)

Prescott, Moll and Cradle, Js.

Syllabus

The petitioner sought habeas relief in a fourth petition for a writ of habeas corpus, claiming that his counsel in two previous habeas actions provided ineffective assistance by failing to raise claims that his criminal trial counsel, A, rendered ineffective assistance by not conducting a proper investigation to identify exculpatory witnesses and/or by failing to call certain allegedly exculpatory witnesses, H, V, T and Y, who testified for the first time at the habeas trial, to testify at his criminal trial. The habeas court rendered judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The habeas court did not improperly deny the petition for a writ of habeas corpus with respect to the petitioner's claims of ineffective assistance of both prior habeas counsel, the petitioner having failed to meet his burden of demonstrating deficient performance by A in failing to conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses: the petitioner failed to meet his burden of rebutting the presumption of competent performance by A, because although A was called as a witness at the habeas trial, the petitioner never asked him any questions about the nature and scope of his investigatory efforts, either generally or with respect to any particular witness or about his reasons for calling or not calling particular witnesses; moreover, the petitioner presented no other evidence that would have supported a finding that A failed to conduct an objectively reasonable investigation; furthermore, the petitioner's own legal expert was not asked and did not opine that A conducted a constitutionally deficient investigation and testified only that A's failure to call Y, assuming A was aware of him, constituted deficient performance, and was asked no questions and offered no opinion regarding the three other potential witnesses.

2. The habeas court did not improperly deny the petition with respect to the petitioner's claims of ineffective assistance of both prior habeas counsel, the petitioner having failing to meet his burden of demonstrating deficient performance by A in failing to call certain allegedly exculpatory witnesses to testify at his criminal trial: it was undisputed that neither V nor H had ever given a statement to the police, the petitioner did not present evidence that either man had spoken to an investigator or was otherwise discoverable by A prior to the criminal trial, and the petitioner

did not direct this court's attention to any evidence in the record demonstrating that A or anyone associated with the defense could have identified either of them in the course of a reasonably competent investigation; moreover, with regard to T, there were several objectively reasonable strategic reasons why A might have elected not to call him as a witness, including that he was unable to identify the shooter in the underlying incident either by name or by description, his testimony would have conflicted with the petitioner's own trial testimony in which he admitted to being in the area at the time of the shooting, his testimony would have undermined the testimony of another important exculpatory witness, and T testified that he was smoking marijuana at the time of the shooting, which could have been used on cross-examination to undermine his ability to accurately perceive and recall details; furthermore, with regard to Y, the record revealed a number of objectively reasonable strategic reasons why A may have chosen not to call Y as a witness despite the potential exculpatory nature of his testimony, as Y's testimony and prior statement would have contradicted testimony by other witnesses important to the defense, including the petitioner's own testimony, and the credibility of Y's testimony could have been significantly undermined for a number of reasons, potentially further reducing his desirability to A as a witness.

Argued March 7—officially released July 25, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *John P. Doyle*, *Jr.*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Shawn Crocker, appeals from the judgment of the habeas court granting

in part and denying in part his petition for a writ of habeas corpus.[1] The petitioner claims on appeal that the court improperly rejected his claims that counsel in two previous habeas actions provided ineffective assistance of counsel by failing to raise claims that his criminal trial counsel rendered ineffective assistance by not conducting a proper investigation to identify exculpatory witnesses and/or by failing to call exculpatory witnesses to testify at his criminal trial. We disagree. Accordingly, we affirm the judgment of the habeas court.

The following facts underlying the petitioner's criminal conviction, which the jury reasonably could have found on the basis of the evidence admitted at trial, were set forth previously by this court in *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). "Shortly before 7:30 p.m. on October 27, 1997, George David Wright drove a stolen Jeep Cherokee [Jeep] to the Quinnipiac Terrace housing complex in New Haven, also known as the Island. . . . [Daryl Price] was in the [front] passenger seat of the Jeep, and Calvin Taylor was seated in the back. At the housing complex, Wright and Taylor exited the vehicle, and Tacuma Grear [Tacuma] approached the Jeep to talk to [Price]. They talked about the [fatal shooting by Price] of [Tacuma's] brother, Corey Grear [Corey] . . . which had occurred approximately one week earlier, for which [Price] . . . apologized. [Corey] was a friend of the [petitioner], and the [petitioner] had held [Corey] in his arms after [Corey] was fatally shot by [Price]. The [petitioner] had witnessed [Price] shoot [Corey]. [Corey] was . . . a member, as was the [petitioner], of the Island Brothers, a street gang into which [Price] had been introduced and sponsored by the [petitioner]. As his sponsor, the [petitioner] was responsible for

[1] The habeas court granted certification to appeal.

disciplining [Price] should [Price] kill a fellow gang member. As [Tacuma] walked away from the Jeep, the [petitioner] had come up to the driver's side of the Jeep carrying a handgun. He then leaned into the Jeep and fired four times into the vehicle. Two .45 caliber bullets hit [Price], killing him . . . ." (Internal quotation marks omitted.) Id., 113–14.

The petitioner subsequently was arrested and charged, inter alia, with murder in violation of General Statutes (Rev. to 1997) § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 1997) § 53a-217.[2] Id., 114. His first trial ended in a mistrial because the jury was unable to reach a unanimous verdict. Following a second jury trial, however, he was found guilty of murder and criminal possession of a firearm. At each trial, the jury heard conflicting testimony from witnesses regarding the events surrounding the shooting and the culpability of the petitioner.

As recognized by the habeas court in the present action, Tacuma was an important witness for the state because he was present when Price was shot and killed, and his testimony directly implicated the petitioner as the shooter. Tacuma testified at two probable cause hearings and at both criminal trials. At the second criminal trial, Tacuma "testified for the state that he talked to the police two days after the shooting and again on June 18, 1998, when he gave the police a tape-recorded statement, which was introduced into evidence. . . . [Tacuma admitted to telling the police] that when four to five gunshots were fired, he saw someone who looked like the [petitioner] leaning toward the driver's side window of the vehicle in which the victim was a passenger and saw flashes." *State* v. *Crocker*, 83 Conn.

[2] The petitioner also was charged with manslaughter in the first degree with a firearm in violation of General Statutes (Rev. to 1997) § 53a-55a.

App. 615, 623, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004). Tacuma, however, was unwilling to testify directly that he in fact saw the petitioner shoot Price despite having previously told the police otherwise.

Wright also was an important witness for the state. Although he refused to testify at both trials despite offers of immunity and threats of contempt, his prior testimony from the first probable cause hearing was admitted at the second trial over the objection of the petitioner. Id., 645–46. Specifically, "Wright had testified at the probable cause hearing that he saw someone fire gunshots from a .45 caliber semiautomatic pistol into the Jeep in which [Price] was sitting. As that person walked away, Wright recognized the [petitioner's] limp. Wright had known the [petitioner] for eight years. Wright also saw that that person was dressed in the same clothes Wright had seen the [petitioner] wearing approximately twenty minutes before the shooting. Wright testified that he told the police two days after the shooting that he was sure that it was the [petitioner] who had shot [Price]." Id., 646.

Travis Jenkins, who had testified during the first criminal trial, was unavailable to testify at the second criminal trial. As a result, the court presiding over the second criminal trial permitted the state to read into the record (1) Jenkins' testimony from the first trial and (2) the substance of a prior inconsistent statement that Jenkins had made to the police and that had been admitted for substantive purposes under *Whelan*[3] at the first criminal trial. See id., 651–53. In his prior trial testimony, Jenkins acknowledged having told the police that he had witnessed the events leading up to the shooting and that the petitioner was the shooter. Jenkins also asserted,

[3] See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

however, that his prior statement to the police was not true and that he had made the statement only because the police had threatened to charge him with conspiracy to murder Price. Id., 652–53.

The defense called various witnesses at the second criminal trial to rebut the testimony by Tacuma, Wright, and Jenkins, each of whom directly or indirectly identified the petitioner as the shooter. Darrel Belton was the first defense witness to testify at the second trial. He testified that he was with Tacuma the entire day of the shooting. Belton asserted that he observed the scene from a distance while Tacuma spoke with Price, who was inside the Jeep. Belton testified that, after they spoke for a few minutes, he saw Tacuma back away from the Jeep and raise his hands in the air. Belton then heard shots fired, ducked for cover, and ran up a nearby hill. He did not see the shooter. Belton testified, however, that when he got to the top of the hill, the petitioner, whom Belton knew from childhood, was already there, the implication being that he could not have been the shooter. According to Belton, he had seen the petitioner earlier that day when the petitioner had approached the Jeep and spoke with Wright before the shooting. Belton explained that the petitioner appeared to ask Wright a question and, in response, Wright pointed toward the top of the nearby hill, and the petitioner walked away in that direction. Belton also stated that he did not see the petitioner carrying a gun.[4]

Linwood Stevenson, who lived at the housing complex where the shooting occurred and was outside fixing his car at the time of the shooting, also testified at

[4] Several days after the shooting, Belton spoke with police detectives, who indicated that they wanted to talk to any individuals who were in the area at the time of the shooting. At that time, Belton, contrary to his subsequent trial testimony, told the police that he was not present during the shooting. Belton nevertheless identified by name a number of other individuals from photographs shown to him by the police whom the police wanted to question about the shooting, including the petitioner and Tacuma.

the second criminal trial that the petitioner was not the shooter. Unlike many of the other witnesses who testified during the criminal trial, Stevenson had no personal connection to the petitioner or any of the other persons present at the shooting. The habeas court summarized Stevenson's testimony as follows: "[H]e saw the [Jeep] with two people inside, several individuals near the vehicle, and one person [coming] down the hill to approach the Jeep. That individual walked toward the Jeep's rear, walked around the Jeep, and fired shots. Stevenson . . . described the shooter as being short, about five feet tall, medium build, dark skin, with a clean-cut head. After firing the shots, the short individual turned and walked back up the hill where he had come from.

"Stevenson saw people around the Jeep immediately after the shooting. Stevenson saw someone standing not too far from him, someone he said had been standing there, toward the front of the Jeep, even before the shots occurred. According to Stevenson, that individual turned around and walked to the Jeep, looked inside, and then walked back to where he had been standing. Stevenson identified [the petitioner] as being that individual. Stevenson testified that [the petitioner] was not the person who fired shots into the vehicle and then walked up the hill. The police interviewed Stevenson [on] the evening of the shooting, and Stevenson conveyed his observations and the shooter's description to the police. According to Stevenson, the police never asked him to identify the shooter or look at a photographic board/lineup. Stevenson testified that at the time of the shooting, his cousin was the chief of the New Haven homicide unit. Stevenson spoke with his cousin and told him the same information he provided in his court testimony."

The defense also called James Benson as a witness. Benson asserted that he was not a witness to the shooting and provided no testimony regarding the identity

of the shooter. The purpose of Benson's testimony was to establish that Jenkins had been with Benson at the time of the shooting and thus could not have seen the petitioner shoot Price.[5]

During his closing argument, the petitioner's trial counsel, Leo Ahern, pointed out the disparities between the various witnesses' accounts of the shooting to demonstrate that there was reasonable doubt about the identity of the shooter. He highlighted, in particular, the fact that, although Tacuma had identified the petitioner as the shooter in his statement to the police, he was unwilling to do so during his trial testimony.

Following his conviction, the petitioner filed a direct appeal,[6] and this court affirmed the judgment of conviction. *State* v. *Crocker*, supra, 83 Conn. App. 618. Attorney Adele V. Patterson, an assistant public defender, represented the petitioner during his direct appeal. The petitioner claimed that the trial court improperly disqualified his initial defense counsel, Attorney Michael Dolan, on the basis of a conflict of interest; permitted expert testimony regarding street gangs; and permitted the state to introduce inflammatory and prejudicial testimony concerning gang activities. He also claimed that the court violated his right to confrontation by admitting Wright's and Jenkins' prior testimony and that the state had engaged in prosecutorial impropriety during closing arguments. Id.

Following his unsuccessful direct appeal, the petitioner commenced his first habeas action, "alleging,

[5] In recounting Benson's testimony in its memorandum of decision, the habeas court seems to confuse factual elements of Benson's testimony with testimony given by the somewhat similarly named Belton. The petitioner has not raised the court's recounting of Benson's testimony as a claim of error, nor does it appear that the court materially relied upon its understanding of Benson's testimony in its analysis of the petitioner's claims.

[6] Pursuant to Practice Book § 65-1, our Supreme Court transferred the matter to this court.

inter alia, ineffective assistance of his [criminal] trial counsel, [Attorney] Leo Ahern, who had represented the petitioner throughout his first criminal trial . . . and then again in his second trial. . . . In the first habeas [action], the petitioner claimed that Ahern rendered ineffective assistance by failing to object to the admission of the transcript testimony of [Jenkins] . . . and [failing] to investigate or to obtain evidence prior to the start of the second criminal trial. . . . The petitioner argued that Jenkins' testimony was inadmissible because he was unavailable for cross-examination at the second criminal trial. . . .

"At the conclusion of his first habeas trial, the court rejected the petitioner's claims of ineffective assistance of counsel, and this court affirmed that judgment . . . [concluding] that the petitioner had failed to demonstrate that there [was] a reasonable probability that, but for the admission of the Jenkins transcript, the result of the trial would have been different. . . .

"[While the appeal in his first habeas action was pending, the petitioner commenced a second habeas action], claiming . . . that his first habeas counsel, [A]ttorney Genevieve Salvatore, rendered ineffective assistance. . . . [H]e claimed, inter alia, that Salvatore rendered ineffective assistance by failing: (1) to raise various claims of ineffective assistance of the petitioner's trial and appellate counsel, (2) to investigate potentially exculpatory information, (3) to raise a claim that the prosecution did not disclose exculpatory evidence and (4) to raise a claim that the petitioner's second criminal trial violated double jeopardy. . . . [Following a trial, the habeas court, *A. Santos*, *J.*] denied the petitioner's claims of ineffective assistance of counsel." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, supra, 126 Conn. App. 114–16. This court thereafter affirmed the judgment of the habeas court. Id., 113.

On June 17, 2013, the petitioner initiated his second "habeas on a habeas" action,[7] which is the action that underlies the present appeal.[8] The operative second amended petition was filed on August 31, 2018. The petitioner alleged in part that his two prior habeas counsel, Salvatore and Attorney Joseph Visone, provided ineffective assistance by failing to raise claims that Ahern was ineffective by failing (1) to file a motion in limine to preclude introduction of evidence of gang activity or prior shootings, (2) to object to the admission of out-of-court statements made by Wright and Jenkins, (3) to challenge the state's argument that Jenkins was unavailable and thus that his statement was admissible under *Whelan*, (4) to cross-examine witnesses regarding motive, interests, and credibility, (5) to prepare the petitioner to testify, (6) to object to the cross-examination of the petitioner regarding his gang affiliation, prior experience with firearms, and other issues, (7) to object to the state's closing arguments, (8) to investigate and locate exculpatory witnesses, (9) to present mitigation evidence at sentencing, (10) to advise the petitioner regarding his sentence review rights, and (11) to present expert testimony regarding the identification process.[9]

[7] A "habeas on a habeas" action refers to a habeas proceeding in which a petitioner claims that habeas counsel in a prior proceeding provided ineffective assistance of counsel. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992); see also *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550–51, 153 A.3d 1233 (2017) (expanding *Lozada*'s holding to permit third petition for writ of habeas corpus to vindicate claim of ineffective assistance of habeas counsel arising out of prior "habeas on a habeas").

[8] The present habeas action appears to be the fourth in which the petitioner seeks postconviction review of his criminal conviction. In addition to the two prior actions already mentioned, the petitioner commenced a third habeas action in 2009, which was withdrawn in 2013 prior to a trial on the merits.

[9] The petitioner withdrew a number of additional specifications of ineffective assistance in his posttrial brief. He also withdrew count two of the petition, in which he alleged claims of ineffective assistance by his appellate counsel in his first habeas appeal, Attorney Joseph Jaumann. Prior to trial, the court granted the motion filed by the respondent, the Commissioner of

The petitioner further alleged that his right to due process was violated by the state's failure to disclose agreements that it entered into with certain witnesses, particularly Tacuma and Jenkins. In addition to asking the court to vacate his conviction and sentence, the petitioner asked the court to reinstate his right to sentence review and his right to appellate review of the judgment rendered by the first habeas court.

The respondent, the Commissioner of Correction, filed a return denying the allegations in the operative petition or leaving the petitioner to his proof. The respondent also raised defenses of procedural default, res judicata, and abuse of the writ. The habeas court, *Bhatt*, *J.*, conducted a trial over five days from October 4, 2018, to January 14, 2020.

During the habeas trial, the court heard testimony from the petitioner; Ahern; Salvatore; Attorney Joseph Jaumann; Jenkins; Tacuma; the petitioner's legal expert, Attorney Gary Mastronardi; and Attorney David Strollo, who had prosecuted the underlying criminal case on behalf of the state. Most germane to the present appeal, the court also heard testimony from four witnesses—Ernest Henry, Shawn Harris, Eric Vidro, and Taylor—none of whom had testified previously, either at the petitioner's criminal trials or in his prior habeas actions. The petitioner offered their testimony in support of his claim that Ahern had failed to conduct a proper investigation to identify and secure the testimony of exculpatory witnesses and, accordingly, that his prior habeas counsel had provided ineffective assistance by failing to raise the claim that Ahern's failure to investigate constituted ineffective assistance of counsel.[10]

Correction, to dismiss count four of the petition, which alleged due process and equal protection violations.

[10] The operative petition stated that "trial counsel failed to investigate and locate exculpatory witnesses; such as: Yvonne Tyson and other witnesses . . . ." As noted by the habeas court, none of the new witnesses who testified at the habeas trial were named in the operative petition, and Yvonne Tyson, who was named, was not among the witnesses that the petitioner called to

Henry testified that he was familiar with the petitioner because they both lived at the Quinnipiac Terrace housing complex but could not recall seeing him in the area on the date of the shooting. Henry also testified that he witnessed the shooting from the porch of his apartment near the parking lot where the shooting occurred and saw the actual shooter, whom he asserted was not the petitioner. Because the shooting occurred in the evening, he could not see features, only silhouettes. According to Henry, the shooter was among a group of four or five persons standing in front of the Jeep, and the shooter began firing at the front of the Jeep. He described the shooter as being short and stocky, which description did not match the petitioner, whom he described as tall and slim and someone who walked with a limp. Henry indicated that he never called 911 or spoke with police about what he had seen.

Henry also testified that he remembered giving a statement to an investigator who spoke with him at his apartment one or two months after the shooting. He could not recall for whom the investigator had worked but remembered that his statement contained essentially the same information to which he testified at the habeas trial.[11] He was never contacted again. When asked why, despite knowing of the murder trial, he did not come forward to alert authorities that the petitioner was being wrongly accused, he stated that "because nobody never asked me and, then again, in my opinion, I know—I believe I was on parole and probably was wanted at the time." Henry testified that, if someone had approached him or subpoenaed him to appear at

testify at the habeas trial. The habeas court denied "[a]ny claim as to [Yvonne Tyson]," and the petitioner does not challenge that aspect of the court's decision on appeal.

[11] A copy of the sworn statement signed by Henry and dated January 16, 1998, was admitted as a full exhibit at the habeas trial. The statement indicates that the investigator who took the statement was hired by the petitioner's first defense counsel, Attorney Michael Dolan.

the criminal trial, he would have testified. Henry also testified that he was never subpoenaed to testify at the petitioner's prior habeas trials.[12]

Harris testified that he knew both the petitioner and Price from "hanging out" at the Quinnipiac Terrace housing complex. He did not witness the shooting, having left the area one hour before the incident happened. He stated that he could not remember seeing the petitioner at the housing complex that day but that, given its size, "[y]ou could be in the projects and not see each other . . . ." Harris nevertheless testified that a cousin of Jenkins, Albert Jenkins, known as Tre, later admitted to Harris that he, Tre, was responsible for the killing of

[12] In the petitioner's second habeas action, the habeas court, *A. Santos, J.*, specifically rejected the petitioner's claim that prior habeas counsel, Salvatore, rendered deficient performance by not investigating witnesses with potentially exculpatory information, including Henry. See *Crocker* v. *Warden*, Docket No. CV-05-4000431-S, 2009 WL 455529, *10 (Conn. Super. January 26, 2009), aff'd sub nom. *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Salvatore testified that she was aware of Henry's statement to the investigator but that she made a "tactical determination that it was not helpful for the habeas petition." Id., *9. In holding that Salvatore's decision fell "within the wide range of professionally competent assistance," the court made the following findings: "Henry's [written] statement not only contradicted several of the other trial witnesses but also contradicted the petitioner's own testimony, both in the particulars of the shooting and the fact that [the petitioner] admitted to being in the area. Henry also claimed the shooting occurred around [9] or [9:30 p.m.] while other witnesses almost unanimously maintained that it occurred sometime between [7:30] and [8 p.m.] No other witnesses placed Henry on the scene at the time of the shooting. Thus, a claim that Attorney Ahern was ineffective for failing to investigate or call Henry was not likely to succeed at the first habeas trial, and Attorney Salvatore was not deficient in failing to investigate this possible avenue of inquiry." (Internal quotation marks omitted.) Id., *10.

The respondent asserted res judicata as a special defense in the present habeas action, but the habeas court rejected it, concluding that the claims raised in the present action were not precluded because they were not identical to those raised in the prior habeas actions. The respondent has not briefed the court's denial of its res judicata defense as an alternative ground for affirmance and thus is deemed to have abandoned it. See *State* v. *Rowe*, 279 Conn. 139, 143 n.1, 900 A.2d 1276 (2006).

Price. Harris described Tre as short and stocky. Harris explained that he did not disclose this information previously to the petitioner or the police because of his close relationship with Tre and his not wanting to implicate him in a murder. He claimed that he only agreed to testify at the latest habeas trial because Tre was now deceased and because he had been subpoenaed.

Vidro testified that he knew the petitioner, having met him through Corey. He was at the Quinnipiac Terrace housing complex at the time of the shooting and heard gunshots, but he did not witness the shooting. Vidro testified that, after Price was shot, he saw Tre in the vicinity of the shooting.

Taylor testified that he and Price were passengers in the Jeep driven by Wright on the day of the shooting. He exited the Jeep just prior to the shooting, but remained close by, noting that a lot of people were outside that night. Taylor knew the petitioner from living in the neighborhood, whom he described as tall, slim and someone who walked with a limp. Taylor testified that the petitioner was not among the people at the scene. Taylor observed Tacuma speaking with Price. Shortly thereafter, he heard gunshots and ran toward his home. Taylor testified that he did not see the person who fired the shots. Taylor also testified that he was contacted once by the New Haven police and provided a statement but was never contacted by an attorney or investigator prior to the present habeas action.

Ahern testified at the habeas trial about his background as an experienced criminal defense attorney and about his limited recollections of the petitioner's case. He recalled that the primary theory of defense during the criminal trial was that the petitioner was not the shooter and that the state could not prove its case beyond a reasonable doubt. The petitioner elicited from

Ahern that he had engaged the services of an investigator, Leon O'Connor, and that O'Connor had located one witness who later testified at trial. Ahern could not recall whether O'Connor met with the petitioner. The petitioner never asked Ahern to describe what efforts, if any, he or his investigator had undertaken to discover and locate other exculpatory witnesses for trial. Although Henry had given a written statement to an investigator working for Ahern's predecessor a short time after the shooting and Taylor had given a statement to the police investigating the shooting, the petitioner never asked Ahern about his knowledge of the contents of Henry's or Taylor's statements, how he had chosen which witnesses to call at trial, or whether he had a strategic reason for not calling Henry or Taylor to testify during the criminal trial.

Following the habeas trial, the petitioner and the respondent each filed posttrial briefs. The petitioner argued in relevant part that "trial counsel did not effectively prepare his defense and investigate his case because crucial witnesses who were available and known to trial counsel were not presented on behalf of the petitioner's defense." The habeas court issued a memorandum of decision on November 2, 2021, denying the petition except with respect to the petitioner's claim regarding his right to apply for sentence review, which the court ordered restored.

In addressing whether the petitioner's criminal trial counsel provided ineffective assistance by failing to discover and/or call the four witnesses who had not testified previously in this matter, the habeas court concluded that the petitioner had failed to demonstrate that Ahern rendered deficient performance, which ultimately was dispositive of the petitioner's claims against former habeas counsel. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992) (emphasizing that petitioner asserting "habeas on a habeas" faces

herculean task of proving, in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both that habeas counsel was ineffective and that trial counsel was ineffective). The habeas court indicated that neither Harris nor Vidro had given a statement to the police at the time of the murder, and, therefore, it was unclear from the record how Ahern reasonably would have discovered them in order to conduct interviews and obtain statements.[13] With respect to Henry, the habeas court stated that Ahern's failure to call him to testify presented the closest call regarding the issue of deficient performance because, unlike Harris and Vidro, Henry's name and statement to the investigator were contained in the case file he obtained from the petitioner's prior defense counsel. Nevertheless, with respect to both Henry and Taylor, the court concluded that the petitioner had failed to overcome the strong presumption that trial counsel had provided competent representation because the petitioner had not elicited any evidence from Ahern regarding what reasons, if any, he may have had for not further investigating Taylor or Henry or calling them as witnesses.

This appeal followed. Additional facts and procedural history will be set forth as necessary.

The petitioner claims on appeal that the habeas court improperly denied his petition for a writ of habeas corpus with respect to his claims of ineffective assistance of both prior habeas counsel. According to the petitioner, his prior habeas counsel engaged in deficient

[13] The habeas court indicated that, even if Ahern had learned about Harris and Vidro, the petitioner could not demonstrate how he was prejudiced by Ahern's failure to call them as witnesses. Vidro had not been present at the scene at the time of the shooting, and Harris testified at the present habeas trial that he would not have revealed Tre's purported confession prior to Tre's death. Despite this testimony, he subsequently testified that he would have revealed the alleged confession under subpoena. The habeas court specifically found the latter testimony to be not credible.

performance by failing to raise claims that his criminal trial counsel, Ahern, had provided ineffective assistance by failing to call Harris, Vidro, Taylor, and Henry to testify at his criminal trial, each of whom the petitioner maintains were "critical witnesses" who "were available and able to provide exculpatory evidence . . . ." The respondent counters that the habeas court properly determined that the petitioner failed to meet his burden of showing that Ahern's performance fell below the minimum standard of professional competency, which necessarily was also fatal to his claims against prior habeas counsel. See *Lozada* v. *Warden*, supra, 223 Conn. 842–43. For the reasons that follow, we agree with the respondent.

We begin with well settled legal principles, including our standard of review. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).[14]

[14] In evaluating the prejudice prong, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . Some errors will have had a pervasive effect on the inferences to be

With respect to the performance prong, the court in *Strickland* further elaborated as follows: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citation omitted; internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689. Our Supreme Court has stated that "to establish deficient performance by counsel, a [petitioner] must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, 188 A.3d 1 (2018),

drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland* v. *Washington*, supra, 466 U.S. 695–96. Because, in the present case, we affirm the habeas court's ruling on the basis that the petitioner's claim fails under the performance prong of *Strickland*, we need not engage in further discussion of the prejudice prong.

cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"[T]he strong presumption of *Strickland* that counsel exercised reasonable professional judgment requires the habeas court to affirmatively entertain the range of possible reasons trial counsel might have had for the challenged action." (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 290, 267 A.3d 120 (2021). Nevertheless, this court has recognized that, because "[t]he law presumes that counsel is competent until evidence has been introduced to the contrary"; (internal quotation marks omitted) *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 776, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021); a petitioner who fails to call the attorney in question to testify at the habeas trial may face considerable "difficulty in overcoming the presumption of competence . . . ." Id., 775. In short, although not automatically fatal to a petitioner's claim, failure to elicit testimony from counsel about trial strategy renders it less likely that the petitioner can prevail with respect to his burden to demonstrate deficient performance.

"Our Supreme Court, in *Lozada* v. *Warden*, [supra, 223 Conn. 843], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018). Our Supreme Court subsequently expanded *Lozada*'s holding to encompass third habeas petitions challenging the

performance of second habeas counsel. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550–51, 153 A.3d 1233 (2017). "Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . .

"Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 178 Conn. App. 319–20.

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are entitled to great weight. . . . [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. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 346–47, 221 A.3d 81 (2019). Whether a petitioner received constitutionally inadequate representation is a mixed question of law and fact that requires plenary review. *Diaz* v. *Commissioner of Correction*, 214 Conn.

App. 199, 212, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

The petitioner in the present case maintained throughout the underlying criminal proceedings and subsequent collateral actions that he was not the person who shot and killed Price. Thus, an essential part of establishing reasonable doubt included introducing evidence at trial that would tend to raise questions about the petitioner's identity as the shooter and/or implicate someone other than the petitioner as the shooter. The petitioner argues that each of the four witnesses whom Ahern did not call to testify at the petitioner's criminal trial—Henry, Taylor, Vidro, and Harris—could have provided such evidence and would have supported the petitioner's strategy. Although the petitioner admits in his appellate brief that the decision to call any particular witness "is up to trial counsel as a part of trial strategy," the petitioner also argues that not every such decision necessarily is a sound one. The habeas court nonetheless rejected the petitioner's claims of ineffective assistance on the ground that, as to each of these potential witnesses, the petitioner failed to demonstrate that Ahern's failure to call them as a witness constituted deficient performance.

In his appellate brief, the petitioner frames his habeas claim as follows: "In regard to each of the four critical missing witnesses—Henry, Taylor, Vidro, and Harris—Ahern was ineffective for failing to investigate each man and introduce their testimony to the second criminal jury that convicted [the petitioner]." Thus, construed broadly, there appears to be two aspects to the petitioner's claim of ineffective assistance: a general failure to investigate and a failure to call exculpatory witnesses.

First, to the extent that the petitioner is claiming that Ahern's performance was deficient because he failed to

conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses, he has failed to meet his burden of rebutting the presumption of competent performance. It is undeniable that in all instances, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012). Certainly, "[b]ecause a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case . . . . [Nonetheless], counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Citations omitted; internal quotation marks omitted.) *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 721, 789 A.2d 1046 (2002).

Here, the evidence before the habeas court demonstrated that Ahern took over the case from prior defense counsel. Ahern relied in part on the investigation conducted by prior counsel and on the information found in prior counsel's file. He also spoke with prior defense counsel about the case. In addition, Ahern testified that he had engaged his own investigator in this case. It is undisputed that Ahern produced several witnesses at trial whose testimony, if believed by the jury, raised doubts about the identity of the shooter. In fact, the petitioner's first trial ended in a hung jury, strongly suggesting that Ahern's investigatory efforts and trial strategy were not ineffective.

Significantly, although Ahern was called as a witness at the latest habeas trial, the petitioner never asked Ahern any questions about the nature and scope of his investigatory efforts, either generally or with respect to any particular witness or about his reasons for calling or not calling particular witnesses. The petitioner presented no other evidence that would support a finding that Ahern failed to conduct an objectively reasonable investigation. Although not dispositive, the petitioner's own legal expert, Mastronardi, was not asked and did not opine that Ahern conducted a constitutionally deficient investigation. Rather, he testified only that Ahern's failure to call Henry as a witness, assuming he was aware of him, constituted deficient performance. Mastronardi was asked no questions and offered no opinion regarding the other three "new" witnesses. The petitioner simply failed to demonstrate that Ahern did not conduct a reasonable pretrial investigation to uncover potentially exculpatory witnesses.

The remaining aspect of the petitioner's claim is that Ahern engaged in deficient performance by failing to call each of the four witnesses who testified for the first time in the present habeas action. He asserts that each such failure constituted a separate and distinct instance of ineffective assistance of counsel. Accordingly, we look to the facts and circumstances surrounding each witness to evaluate whether Ahern's performance was deficient.

With respect to Harris and Vidro, a lengthy analysis is not warranted. We agree with the habeas court's assessment that the petitioner clearly failed to demonstrate deficient performance by Ahern with respect to both. It is undisputed that neither Vidro nor Harris ever gave a statement to the police nor did the petitioner present evidence that either man had spoken to an investigator or was otherwise discoverable by Ahern prior to trial. In other words, the petitioner has not

directed our attention to any evidence in the record demonstrating that Ahern or anyone associated with the defense could have identified either of them in the course of a reasonably competent investigation. If it was not deficient performance to have failed to identify these witnesses, it cannot, as a matter of logic, have been deficient performance not to call them as witnesses at trial.

With respect to Vidro specifically, the petitioner argues in his appellate brief only that Vidro testified that he spoke with the petitioner in jail, "and his importance to the defense case *excuses any possible failure by* [*the petitioner*] *to give Vidro's name specifically to Ahern* . . . ." (Emphasis added.) The petitioner does not explain, however, what Ahern could have done, in the absence of the petitioner's disclosure, to discover Vidro's name. Instead, the remainder of the petitioner's appellate argument focuses on the import of Vidro's testimony that the petitioner was not the shooter, which does not implicate the performance prong of *Strickland* but rather the prejudice prong. Failure to prove either prong, however, is fatal to the petitioner's claim.

Similarly, the petitioner offers nothing to support his contention that the habeas court made a clearly erroneous finding that Harris was undiscoverable by Ahern. Furthermore, the habeas court found that, even if Ahern knew of Harris, Harris had made clear that he would not have revealed Tre's alleged confession to the shooting while Tre was alive. Although Harris testified that he would have disclosed Tre's alleged confession if trial counsel had subpoenaed him to testify at the criminal trial, the habeas court found that assertion not credible. It is axiomatic that we defer to the habeas court's assessment of the credibility of a witness made on the basis of its firsthand observation of the witness' conduct, demeanor, and attitude. See *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954

(2014). The petitioner simply has failed to meet his burden of demonstrating that Ahern's performance was deficient with respect to either Vidro or Harris.

Unlike Vidro and Harris, however, Ahern presumably would have been aware from his review of the state's file and former defense counsel's file that Henry and Taylor were potential witnesses to the shooting and surrounding events. Henry gave a written sworn statement to a defense investigator and Taylor was interviewed by the police and provided a statement. Taylor also was described by other witnesses as having been a passenger in the vehicle with Price and Wright just prior to the shooting.

"[A]n attorney's failure to present available exculpatory evidence is ordinarily deficient, *unless some cogent tactical or other consideration justified it*." (Emphasis added; internal quotation marks omitted.) *Pavel* v. *Hollins*, 261 F.3d 210, 220 (2d Cir. 2001). It is certainly not the burden of the respondent, however, to demonstrate that a particular reasonable trial tactic existed for not calling a particular witness. Rather, as the petitioner acknowledges in his appellate brief, to overcome the presumption that defense counsel exercised reasonable professional judgment, the petitioner had the burden to present "adequate proof of sufficient facts indicating less than competent performance by counsel." *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004); see also *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 81, 174 A.3d 206 (2017) ("petitioner in a habeas proceeding cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead *offer demonstrable evidence in support of his claim*" (emphasis added; internal quotation marks omitted)). Therefore, the real inquiry with respect to deficient performance regarding Ahern's decision not to call Taylor or Henry to testify

at the second criminal trial is whether Ahern had some reasonable strategic reason for choosing not to call them. As to that inquiry, the petitioner simply failed to meet his burden of persuasion.

"Although [counsel's] testimony is not necessary to [a] determination that a particular decision might be considered sound trial strategy . . . [a] habeas petitioner's failure to present [counsel's] testimony as to the strategy employed . . . hampers both the court at the habeas trial and the reviewing court in their assessments of [strategy]." (Internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, supra, 203 Conn. App. 776–77. Logically, the same conclusion is true if a petitioner, having called counsel to testify, fails to make any inquiry into the reasoning behind counsel's actions or inactions that the petitioner claims were objectively unreasonable and, thus, constitutionally deficient.

"In a typical habeas trial for a claim of ineffective assistance, the petitioner's criminal trial counsel would testify about whether the challenged action was part of a strategic decision or litigation tactic, rather than a result of inadvertence or sheer neglect. . . . Assuming the habeas court finds testimony regarding trial counsel's strategy credible, the petitioner would then attempt to overcome the strong presumption that the asserted strategy was objectively reasonable." (Citations omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 289. In the absence of evidence of counsel's actual strategic reasoning for the choices challenged by the petitioner, the petitioner is left to demonstrate, essentially, that no possible objectively reasonable strategy or tactic existed that would justify counsel's choices. See id., 291–92. Our review of the underlying record reveals that objectively reasonable strategic reasons existed that would justify Ahern's decision not to call Henry

or Taylor as witnesses at the second criminal trial and these reasons are fatal to the petitioner's claim of deficient performance.[15]

With regard to Taylor, there are several objectively reasonable strategic reasons why Ahern might have elected not to call him as a witness. First, Taylor did not see the shooting. Therefore, he was unable to identify the shooter either by name or by description. Ahern called two other witnesses who testified that another individual was the shooter and directly contradicted the state's witnesses who identified the petitioner as

[15] The petitioner relies on *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 664, to argue that it was not necessary for him to adduce from Ahern what strategic reason, if any, he had for not calling Henry. The petitioner argues that any reason would be immaterial because the failure to call him was essentially per se deficient performance. We conclude that *Gaines* is distinguishable from the present case. In *Gaines*, the petitioner had provided his criminal defense counsel with the name of a witness who, it later was determined, would have been a credible alibi witness for the petitioner and could have led to the discovery of a second credible alibi witness. Id., 683. At the habeas trial, defense counsel, *when asked*, was unable to provide any explanation for why he failed to investigate the name the petitioner had provided to him. Id. Our Supreme Court determined that counsel's failure to investigate and to call the witnesses "was not based on a reasonable professional judgment that their testimony would be either irrelevant or harmful to [the petitioner's] case" and that the "customary deference to trial strategy does not save [defense counsel's] actions because that decision was not one that was strategically based and, therefore, ordinarily left to the discretion of trial counsel." Id., 683–84. Thus, unlike in the present case, in which Ahern was never even asked about what strategic basis he had, if any, for not calling witnesses, counsel in *Gaines* was asked and was unable to proffer any strategic basis for his actions. As the respondent aptly points out in his brief, the court in *Gaines* never stated that trial counsel's explanation would not have mattered for purposes of a *Strickland* analysis because our court's review of trial strategy decisions is highly deferential and "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 628, 212 A.3d 678 (2019). We agree with the respondent that "[t]he petitioner skirted around the issues of Ahern's trial strategy at his own peril, because he carried the heavy burden of proving that counsel's action or inaction was unreasonable under the circumstances."

the shooter. Second, although Taylor could have testified, as he did during the habeas trial, that he did not see the petitioner in the area at the time of the shooting, that testimony would have conflicted with the petitioner's own trial testimony in which he admitted to being in the area at the time of the shooting.

Taylor's testimony also would have undermined the testimony of Stevenson, who the petitioner had called as an important exculpatory witness at his criminal trial. As previously stated, Stevenson testified that the petitioner was present at the scene but was not the person whom Stevenson saw approach the Jeep and shoot Price. Because it was crucial to Ahern's defense strategy that the jury find both the petitioner and Stevenson credible, it was objectively reasonable for Ahern not to call a witness who would have contradicted their testimony and undermined their credibility. See *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82 ("our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to . . . call certain witnesses . . . such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is . . . potentially harmful to the case"). Lastly, Taylor testified that he was smoking marijuana at the time of the shooting, a fact that could have been used on cross-examination to undermine his ability to accurately perceive and recall details. In sum, the habeas court correctly concluded that the petitioner failed to demonstrate that Ahern provided deficient performance by not calling Taylor as a witness.

With regard to Henry, the record reveals a number of objectively reasonable strategic reasons why Ahern may have chosen not to call Henry as a witness despite the potential exculpatory nature of his testimony.[16]

[16] The habeas court, in its memorandum of decision, resolved the claim as to Henry by stating that there was "simply no evidence before this court from which it can conclude that Ahern's decision [not to call Henry to

First, as Judge Santos found in the petitioner's prior habeas action; see footnote 12 of this opinion; Henry's testimony and prior statement, like Taylor's, would have contradicted testimony by other witnesses important to the defense, including the petitioner's own testimony. Henry stated that the petitioner was not in the area at the time of the shooting but, as we have already indicated, the petitioner admitted to the jury that he was there. Henry also claimed the shooting occurred around 9 or 9:30 p.m., while other witnesses almost unanimously maintained that it occurred sometime between 7:30 and 8 p.m.

Second, the credibility of Henry's testimony could have been significantly undermined for a number of reasons, potentially further reducing his desirability to Ahern as a witness. Unlike Stevenson, whose testimony Ahern chose to present to the jury, Henry was not a disinterested or neutral witness. He knew the petitioner and considered him a friend. He was also associated with the Island Brothers. Moreover, he admitted to having been drinking alcohol at the time he allegedly witnessed the shooting from some distance away on his porch and to being a drug dealer and on parole at the time of the shooting. Finally, there were no other witnesses who corroborated that Henry was anywhere near the scene at the time of the shooting.

In light of these facts, and in light of the petitioner's failure to present any evidence or adduce any testimony from Ahern that he lacked an objectively reasonable strategic reason for not calling Henry as a witness, we conclude that the petitioner has failed to meet his

testify]—whatever that may have been based on—was below the standard of reasonableness." Although the court seemed to imply that it was not required to "speculate" about the reason for Ahern's decision, it nevertheless did credit and adopt the reasoning of the prior habeas court, which had concluded that it was not deficient performance not to call Henry as a witness at the petitioner's prior habeas trial.

burden of demonstrating deficient performance. Accordingly, for all the reasons set forth previously, we affirm the judgment of the habeas court denying in part the petitioner's latest petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

PACIFIC FUNDING TRUST 1002 *v.* STEPHENSON RESIDENTIAL SERVICES, LLC
(AC 45425)

PS FUNDING, INC. *v.* STEPHENSON RESIDENTIAL SERVICES, LLC, ET AL.
(AC 45426)

PS FUNDING, INC. *v.* STEPHENSON RESIDENTIAL SERVICES, LLC
(AC 45462)

Moll, Cradle and DiPentima, Js.

Syllabus

The plaintiff in each of three cases sought to foreclose a mortgage on a commercial property owned by the defendant after the defendant defaulted by failing to make payments. The plaintiff in each of the three cases filed, inter alia, a motion for a judgment of strict foreclosure and an affidavit of debt and, thereafter, a motion for default for failure to plead. In each case, after the motion for default was granted, the defendant filed an objection to the motion for a judgment of strict foreclosure and an answer and special defenses. In the third case, the defendant also filed a motion to open the default. The trial court denied the defendant's motion to open the default in the third case, and, in each of the three cases, the court rendered a judgment of foreclosure by sale with respect to the subject property. The defendant filed a separate appeal to this court in each of the three cases. *Held*:

1. This court declined to address the merits of the defendant's claim that the trial court improperly determined that its special defenses were legally insufficient to present a valid defense to a matured mortgage, as the special defenses were not properly before the trial court: in the

first two cases, because motions for a judgment of strict foreclosure had been filed at the time the defendant was defaulted for failure to plead, the only way the defaults could be set aside was by the judicial authority, and, because the defendant did not file a motion or ask the judicial authority to open or set aside the default in either case, the defendant remained in default at the time judgment was rendered against it and when it attempted to file its answer and special defenses, which precluded the defendant from making any further defense concerning liability; moreover, in the third case, because the defendant did not raise any claim in its appeal challenging the trial court's decision denying its motion to open the default, the defendant remained in default at the time judgment was rendered against it and when it attempted to file its answer and special defenses, which it was not allowed to file under the rules of practice.

2. The defendant could not prevail on its claim that, even if its special defenses were not properly part of the record, they sufficiently apprised the trial court that it was raising a challenge or objection to the amounts of the debts, which thereby required an evidentiary hearing and precluded the court from determining the amounts of the debts by affidavit: a defense challenging the amount of the debt must be actively made in order to prevent the application of the rule of practice (§ 23-18 (a)) that provides that the amount of debt can be established by affidavit of debt when there is no defense as to the amount of the mortgage debt, such a defense must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt, and, in all three cases, the defendant's special defenses were not properly before the court; moreover, even if the special defenses were taken into consideration, the defendant did not sufficiently raise a defense to the amounts of the debts, either in the special defenses or at any time before the trial court, to prohibit the admission of the affidavits of debt pursuant to Practice Book § 23-18 (a).

Argued May 17—officially released July 25, 2023

Procedural History

Action, in two cases, to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant was defaulted for failure to plead, and action, in a third case, to foreclose a mortgage on certain real property of the defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where

the defendant was defaulted for failure to plead; thereafter, in the third case, the court, *Spader*, *J.*, denied the defendant's motion to open the default; subsequently, in each case, the court, *Spader*, *J.*, rendered a judgment of foreclosure by sale, from which the defendant in Docket Nos. 45425 and 45462 and the named defendant in Docket No. 45426 filed separate appeals to this court. *Affirmed.*

Joseph L. Rini, for the appellants (defendant in Docket Nos. AC 45425 and AC 45462 and named defendant in Docket No. AC 45426).

Elizabeth M. Cristofaro, for the appellees (plaintiff in each case).

Opinion

DiPENTIMA, J. In these three appeals,[1] the named defendant in each case, Stephenson Residential Services, LLC,[2] appeals from the judgments of foreclosure by sale rendered in favor of the plaintiff in the first case, Pacific Funding Trust 1002 (Pacific Funding), and the plaintiff in the second and third cases, PS Funding, Inc. (PS Funding), after the defendant was defaulted in each case. The defendant filed nearly identical appellate briefs and raises the same claims in all three appeals, namely, (1) that the court improperly determined that the defendant's special defenses, as set forth in a pleading it purported to file in each case titled "defendant's answer, special defenses/matters in avoidance and setoffs" (answer and special defenses), were legally insufficient to present a valid defense to a matured mortgage,

[1] Although the three cases and appeals have not officially been consolidated, we write one opinion for purposes of judicial economy in which we assess the claims made in all three appeals.

[2] In the appeal in Docket No. AC 45426, First Fairlawn Condominium, Inc., also was named as a defendant but is not involved in that appeal. In this opinion, our references to the defendant with respect to all three appeals are to Stephenson Residential Services, LLC.

and (2) whether the special defenses, even if not properly part of the record, sufficiently apprised the court that the defendant was raising a challenge or objection to the amount of the debt, thereby requiring an evidentiary hearing and precluding the court from determining the amount of the debt by affidavit pursuant to Practice Book § 23-18 (a). We affirm the judgment in each appeal.

The following undisputed facts and procedural history are relevant to the defendant's three appeals, all of which involve short-term commercial mortgages. We first set forth the procedural posture of the case underlying the first appeal, Docket No. AC 45425 (first case), and that of the case underlying the second appeal, Docket No. AC 45426 (second case). The first case concerns real property owned by the defendant located at 8 Hillside Avenue in Stamford. On or about July 26, 2018, the defendant executed and delivered to PS Funding a mortgage on the subject property as security for a note executed that same day in favor of PS Funding in the amount of $321,750. The mortgage subsequently was assigned to Pacific Funding, which is the current holder of the note and mortgage. The note matured on September 1, 2020, and the defendant defaulted by failing to make the payment due upon maturity and, thereafter, refused to cure the default despite demands made by Pacific Funding, which commenced a foreclosure action against the defendant on November 12, 2021.

The second case, which is procedurally similar to the first case, concerns real property owned by the defendant located at 11 Revere Drive in Stamford. With respect to that property, the defendant similarly executed and delivered to PS Funding a mortgage on the property as security for a note in favor of PS Funding in the amount of $100,100, both of which were executed on or about March 28, 2018. PS Funding is the holder and owner of the mortgage and the note, which matured on April 1, 2020. The defendant defaulted by failing to

make the payment due at maturity or any payments thereafter upon demand from PS Funding, which commenced a foreclosure action against the defendant on November 12, 2021, the same date as the first case.

On December 9, 2021, Pacific Funding and PS Funding filed motions for default for failure to appear in the first and second cases, both of which were granted by the court clerk on December 20, 2021. In each of those cases, on January 21, 2022, Pacific Funding and PS Funding filed motions for a judgment of strict foreclosure, and, thereafter, on February 2, 2022, each filed a number of documents, including a bill of costs, an affidavit regarding attorney's fees, an appraisal, an affidavit of debt, and a foreclosure worksheet. Subsequently, on February 7, 2022, counsel for the defendant filed appearances in both cases, along with motions for a judgment of foreclosure by sale. On February 10, 2022, in the first and second cases Pacific Funding and PS Funding filed motions for default for failure to plead, both of which were granted by the court clerk on February 28, 2022. The defendant followed by filing objections in both cases to the motions for a judgment of strict foreclosure on March 8, 2022, as well as its answer and special defenses in each case on March 10 and 11, 2022, respectively. Updated affidavits of debt and foreclosure worksheets were filed by Pacific Funding and PS Funding in each case on March 22, 2022, and a joint hearing on both foreclosure matters was held on March 23, 2022, at which the court rendered judgments of foreclosure by sale with respect to both properties.

The case underlying the third appeal, Docket No. AC 45462 (third case), concerns real property owned by the defendant located at 45 Riverside Lane in Easton. With respect to that property, the defendant similarly executed and delivered to PS Funding a mortgage on the property as security for a note in favor of PS Funding in the amount of $396,500. The note and mortgage were

executed on or about April 5, 2018. PS Funding is the holder and owner of the mortgage and the note, which matured on May 1, 2019. Again, as with the other two mortgages, the defendant defaulted by failing to make the payment due at maturity or any payments thereafter upon demand from PS Funding, which commenced a foreclosure action against the defendant on November 12, 2021, the same day as the first and second cases.

On December 9, 2021, PS Funding filed a motion for default for failure to appear in the third case, which was not acted on until February 7, 2022, when the court denied the motion, as counsel for the defendant filed an appearance that same day along with a motion for a judgment of foreclosure by sale. Prior to that ruling, on January 21, 2022, PS Funding had filed a motion for a judgment of strict foreclosure, and it filed a number of documents on February 2, 2022, which included a bill of costs, an affidavit regarding attorney's fees, an appraisal, an affidavit of debt, and a foreclosure worksheet. PS Funding thereafter filed a motion for default for failure to plead on February 10, 2022, which was granted by the court clerk on February 18, 2022. On March 8, 2022, the defendant filed an objection to the motion for a judgment of strict foreclosure, followed by its answer and special defenses on March 11, 2022. PS Funding filed an updated affidavit of debt and foreclosure worksheet on March 28, 2022. Subsequently, on March 30, 2022, the defendant filed a motion to open the default and to acknowledge its answer and special defenses, along with an objection to the motions for a judgment of foreclosure being acted on prior to the court's resolution of the motion to open and acknowledge the answer. In response, PS Funding filed an objection to the defendant's motion to open on March 31, 2022. At a hearing on the matter held on April 8, 2022, the court denied the defendant's motion to open and rendered judgment of foreclosure by sale with respect

to the subject property. These appeals followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim in all three appeals is that the court improperly determined that its special defenses, as set forth in the answer and special defenses it purported to file in each case, were legally insufficient to present a valid defense to a matured mortgage. In light of the procedural posture of the first and second cases, and because the defendant has not challenged the denial of its motion to open the default in the third case, we do not address the merits of the first claim raised by the defendant in all three appeals.

At the outset, we note that, because our resolution concerning the defendant's first claim in all three appeals involves the construction of relevant rules of practice, our review is plenary. See *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 655, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013). Moreover, because the first and second cases have a similar procedural history, we address them together first. The record shows that, in both the first and second cases, the defendant was defaulted for failure to plead while a motion for a judgment of foreclosure was pending. Such circumstances are governed by Practice Book § 17-32. Pursuant to subsection (a) of § 17-32, "[w]here a defendant is in default for failure to plead . . . the plaintiff may file a written motion for default which shall be acted on by the clerk," which occurred in both cases. Subsection (b) of § 17-32 provides in relevant part: "If a party who has been defaulted under this section files an answer before a judgment after default has been rendered by the judicial authority, the default shall automatically be set aside by operation of law *unless* a claim for a hearing in

damages or a motion for judgment has been filed. If a claim for a hearing in damages or a motion for judgment has been filed, the default may be set aside only by the judicial authority. . . .'' (Emphasis added.)

Because, in each of the first two cases, motions for a judgment of strict foreclosure had been filed at the time the defendant was defaulted for failure to plead, the only way the defaults could be set aside was by the judicial authority. Thus, the defendant's answers in each case did not automatically set aside the defaults. Moreover, the defendant never filed a motion or asked the judicial authority to open or set aside the defaults in either case. Accordingly, the defendant remained in default at the time judgment was rendered against it in each of the first two cases, as well as when it attempted to file its answer and special defenses. As a result of the defaults, the defendant was precluded in both cases from making any further defense concerning liability; see *Bank of New York Mellon* v. *Talbot*, 174 Conn. App. 377, 383, 165 A.3d 1253 (2017); which meant that it was not allowed under the rules of practice to file the answer and special defenses that it had purported to file in each case unless and until the default was vacated or set aside. See *Willamette Management Associates*, *Inc.* v. *Palczynski*, 134 Conn. App. 58, 62 n.4, 38 A.3d 1212 (2012); see also Practice Book § 17-33 (b) (''the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned''). Therefore, because the special defenses were not properly before the court, we do not reach the merits of the defendant's first claim in the first two cases,[3] which relates directly to the special defenses and challenges the court's statement that the special defenses were not valid with respect to matured mortgages.

[3] We note that, in its principal appellate briefs for all three appeals, the defendant did not address the effect of its default status, claim that the defaults had been opened, or argue that the court abused its discretion in denying its motion to open the default in the third case. As Pacific Funding

and PS Funding point out in their appellate briefs for the first two appeals, "[a]lthough the defendant frames its appeal[s] primarily as a challenge to the trial court's comments about the validity of the special defenses it filed, this ignores the fact that, procedurally, the trial court entered judgment [in the first two cases] after the defendant was defaulted for failure to plead, with the trial court finding that the defendant was in default status and with the defendant failing to make any oral argument that the default should be opened resulting, in essence, in striking the answer and special defenses from the docket." In its appellate brief for the third appeal, PS Funding further argues that the "court entered judgment after the defendant was defaulted for failure to plead, with the trial court denying the defendant's motion to open the default and, in essence, striking the answer and special defenses from the docket."

In its reply briefs for all three appeals, however, the defendant raises the argument that, pursuant to Practice Book § 17-32 (b), the defaults were opened automatically by its filing answers and special defenses within fifteen days of the date notice of its defaults issued. In making this argument, the defendant relies on the language of subsection (b) of § 17-32 providing that "[a] claim for a hearing in damages or motion for judgment shall not be filed before the expiration of fifteen days from the date of notice of issuance of the default under this subsection." According to the defendant, it never filed motions to open the defaults in the first two cases because it filed its answers and special defenses within the fifteen day period set forth in § 17-32 (b), and the court, nevertheless, should have allowed the special defenses to be considered in all three cases.

The defendant's argument, however, fails for two reasons. First, although the defendant raised this argument before the trial court, which rejected it in all three cases, the defendant never made the argument in its principal appellate briefs for all three appeals. It is well settled that "[a party] cannot use his reply brief to resurrect a claim that he has abandoned by failing to adequately brief it in his principal appellate brief." *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 613 n.23, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021). We, therefore, decline to consider the argument. See *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 822, 263 A.3d 972, cert. denied, 340 Conn. 905, 263 A.3d 821 (2021). Second, even if we were to resolve the argument on the merits, it fails in light of this court's holding in *Deutsche Bank National Trust Co.* v. *Bertrand*, supra, 140 Conn. App. 661. Specifically, in that case, this court stated: "[T]o the extent that Practice Book § 17-32 (b) can be read to imply that some amount of time must be permitted after the entry of a default in order to permit a defaulted defendant an opportunity to plead, Practice Book § 17-33 [which allows a court to render judgment at or after the time it renders the default] expressly exempts the judicial authority from complying with Practice Book § 17-32 (b) in foreclosure proceedings and permits the court to render a default and a judgment thereon simultaneously." Id.; see also *U.S. Bank National Assn.* v. *Weinbaum*, 219 Conn. App. 597, 604–606, 609, A.3d (2023) (addressing interplay between Practice Book §§ 17-32 (b) and 17-33 and concluding that fifteen day filing limitation in Practice Book § 17-32 (b) is not controlling in foreclosure proceedings).

The third case differs from the first two in that the defendant did file a motion to open the default in the third case, which the court denied. The defendant, however, has not raised any claim in its third appeal challenging the court's decision denying its motion to open the default. See footnote 3 of this opinion; see also *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 120 n.1, 261 A.3d 1 (2021) (because appellate brief failed to provide any analysis concerning trial court's ruling denying motion to reargue, any claim concerning that ruling was deemed abandoned). As a result, as with the first two cases, in the third case the defendant remained in default at the time judgment was rendered against it, as well as when it attempted to file its answer and special defenses, which it was not allowed to file under the rules of practice. Accordingly, we do not address the defendant's first claim as it relates to the third case, as it also concerns the special defenses and challenges statements made by the court regarding the validity of the special defenses in relation to a matured mortgage.[4]

II

The defendant's second claim in all three appeals is that, even if its special defenses were not properly part of the record, they sufficiently apprised the court that the defendant was raising a challenge or objection to

[4] We note that, even if the defendant's arguments on appeal could be construed as a challenge to the court's denial of its motion to open the default, the record demonstrates that the court acted within its discretion in denying that motion. See *U.S. Bank National Assn.* v. *Weinbaum*, 219 Conn. App. 597, 612, A.3d (2023) ("[the] determination of whether to set aside [a] default is within the discretion of the trial court . . . [and] such a determination will not be disturbed unless that discretion has been abused or where injustice will result" (internal quotation marks omitted)). In its motion to open the default, the defendant, in a single sentence, simply requested that the court open the default and acknowledge the answer and special defenses it had purported to file. The defendant did not present the court with any argument or evidence, either in its motion or at the hearing on the motion for a judgment of strict foreclosure, establishing good cause for the court to grant its motion as required under Practice Book § 17-42.

the amount of the debt, which thereby required an evidentiary hearing and precluded the court from determining the amount of the debt by affidavit pursuant to Practice Book § 23-18 (a). We consider and reject this claim.

We first set forth the standard of review applicable to this claim. "[T]he proper characterization of the trial court's ruling is clarified by examining the nature of an affidavit of debt and the function of Practice Book § 23-18 (a) in foreclosures. Without question, an affidavit of debt is hearsay evidence because it is an out-of-court statement, by an absent witness, that is offered to prove the truth of the amount of the debt averred in the affidavit. . . . [T]he purpose of § 23-18 (a) is to serve as an exception to the general prohibition of hearsay evidence when appropriate circumstances arise, namely, that the amount of the debt is not in dispute. . . . Therefore, the defendant's claim that the trial court erred in determining that § 23-18 (a) applies is most properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies to the affidavit of debt." (Citations omitted.) *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 483–84, 166 A.3d 670 (2017).

"A trial court's decision to admit evidence, if premised on a correct view of the law . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made a legal determination that a particular statement . . . is subject to a hearsay exception . . . is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. . . . Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary." (Citation omitted; emphasis omitted;

internal quotation marks omitted.) *HSBC Bank USA, National Assn.* v. *Gilbert*, 200 Conn. App. 335, 353, 238 A.3d 784 (2020).

Practice Book § 23-18 (a) provides: "In any action to foreclose a mortgage *where no defense as to the amount of the mortgage debt is interposed*, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto." (Emphasis added.)

Our "case law is clear that a defense challenging the amount of the debt must be actively made in order to prevent the application of [Practice Book] § 23-18 (a). [A] mere claim of insufficient knowledge as to the correctness of the amount stated in the affidavit of debt is not a defense for purposes of [§ 23-18 (a)]. . . . It is axiomatic that such a defense may be raised by pleading a special defense attacking the amount of the debt claimed, but it may also be raised by objection, supported with evidence and arguments challenging the amount of the debt, upon the attempted introduction of the affidavit in court. See, e.g., *Suffield Bank* v. *Berman*, 25 Conn. App. 369, 372–74, 594 A.2d 493 (challenge to amount of debt, unlike defense to liability, need not be disclosed prior to judgment hearing), cert. dismissed, 220 Conn. 913, 597 A.2d 339, cert. denied, 220 Conn. 914, 597 A.2d 340 (1991). A defense, however raised, *must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt*, such as whether the loan is in default, which is a matter of liability, or challenges that attack the credibility of the affiant or defects in the execution of the affidavit itself. See . . . *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability does not implicate amount of debt),

cert. denied, 236 Conn. 903, 670 A.2d 321 (1996)." (Citations omitted; emphasis added; internal quotation marks omitted.) *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 486–87; see also *JPMorgan Chase Bank, National Assn.* v. *Malick*, 208 Conn. App. 38, 43, 263 A.3d 920 (2021) ("[i]n a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact" (internal quotation marks omitted)), aff'd, 347 Conn. 155, A.3d (2023).

In the present case, the defendant essentially claims that it asserted a defense to the amounts of the debts via its special defenses, which, even if not part of the record or considered to be valid defenses to a matured mortgage, should have been considered by the court "as objections to the computation of the debt" and, at a minimum, put the court on notice that the defendant was challenging the affidavits of debt. In its principal appellate briefs for all three appeals, the defendant argues: "[The] amount of the debt was directly put into issue by the defendant's answer, special defenses/matters in avoidance and setoffs . . . [which] constitute[d] [an] objection to the amount of the debt and certainly constitute[d] notice of a challenge to the affidavit of debt." For that reason, the defendant argues, Practice Book § 23-18 (a) did not apply and the court erred in failing to hold an evidentiary hearing regarding the amounts of the debts.

The flaw in the defendant's argument, however, first lies in the fact that the special defenses were not properly before the court. It necessarily follows that the court could not have erred in failing to consider special defenses that were not properly before it, nor can we conclude that disallowed special defenses can meet the standard set forth in case law to constitute a valid defense to the debt for purposes of Practice Book § 23-18 (a).

Even if the special defenses are taken into consideration,[5] we conclude that, under the circumstances of these cases, the defendant did not sufficiently raise a defense to the amounts of the debts, either in the special defenses or at any time before the trial court, to prohibit the application of Practice Book § 23-18 (a) and the admission of the affidavits of debt. In each of the three cases, the defendant attempted to file identical special defenses in its answer and special defenses. In the first special defense, the defendant asserted that "[e]quity abhors forfeiture" and that the "[p]laintiff [in each case] acted in a manner to cause prior defaults to be claimed by not timely nor appropriately allocating and/or dispersing payments when the defendant was not in default and by maintaining foreclosure preventing refinance prior to the maturity date of the note even though the plaintiff was aware refinance was imminent." The allegation in the second special defense that the "[p]laintiff should not be awarded attorney's fees" stemmed from the allegation of inappropriate conduct by Pacific Funding and PS Funding prior to the institution of the foreclosure actions. The third special defense restated the allegations of the second special defense and further alleged that the "[p]laintiff has unclean hands and th[e] foreclosure should be dismissed and the lis pendens released with an order prohibiting the plaintiff from commencing another foreclosure for four months to refinance."

We recognize that a misallocation of payments and the amount of attorney's fees awarded may affect the

[5] We note that, at the March 23, 2022 hearing, the court stated that, even though it determined that the defendant's answers did not automatically open the defaults, it was still going to read the answers and special defenses and think about how "it would react to the debt and the claims" made by the defendant. It appears, therefore, that the court did take the allegations of the special defenses into consideration when making its determination of the amounts of the debts and did not construe them as a challenge or objection to the amounts of the debts.

amount of the debt due. The first special defense, however, alleges that the misallocation of payments caused prior defaults and the prior foreclosure actions were maintained to prevent the defendant from being able to refinance, and the second special defense simply realleges the allegations of the first defense to assert that no attorney's fees should be allowed. Neither special defense attacks or squarely focuses on the amounts of the debts; instead, both relate to ancillary matters, namely, alleged improper conduct by Pacific Funding and PS Funding prior to the commencement of the foreclosure actions.[6] Moreover, they were asserted to challenge the enforceability of the notes and mortgages, not the amounts of the debts, as evidenced by the argument in the defendant's appellate briefs that the allegations of the special defenses—that Pacific Funding and PS Funding had engaged in inequitable conduct prior to the foreclosure proceedings that increased the mortgage debt—related directly to the *enforcement* of the notes and mortgages. Finally, the third special defense alleging unclean hands cannot reasonably be construed as a challenge to the amounts of the debts.

Additionally, at no time during the hearings on March 23 and April 8 did the defendant object when the court determined the amounts of the debts due Pacific Funding and PS Funding, nor did the defendant argue that the court should consider its special defenses as an objection or defense to the amounts of the debts or

[6] We note that, at the March 23, 2022 hearing concerning the two Stamford properties, the defendant's counsel stated that "[t]he defenses relate to [the defendant's] belief that stuff that occurred earlier in the original foreclosures, that were withdrawn, caused the defendant to be unable to refinance and pay [the mortgages] off prior to maturity." The defendant's counsel also described the special defenses at the April 8, 2022 hearing concerning the Easton property, stating that they "dealt with actions of the bank before the maturity of the loan . . . ." The record is devoid of any comments or argument by the defendant even suggesting that the special defenses were challenging the amounts of the debts.

mention Practice Book § 23-18. In fact, at no time at either hearing did the defendant indicate to the court that the amount of debt was in dispute or that it was seeking an evidentiary hearing thereon, which, at a minimum, might have alerted the court that it was contesting the amounts of the debts. Additionally, in all three cases, the defendant did not file objections to the updated affidavits of debt and foreclosure worksheets filed by Pacific Funding and PS Funding, either prior to or at the hearings in each case on the motions for judgment, nor did the defendant offer or reference any evidence contesting the amounts of the debts in advance of or at those hearings. Compare *U.S. Bank National Assn.* v. *Bennett*, 195 Conn. App. 96, 112, 223 A.3d 381 (2019) (request for hearing as to debt was not based on articulated legal reason or fact when defendant did not file objection to evidence of debt or submit evidence contesting amount of debt, and request for hearing on debt lacked specificity by failing to indicate basis for objection to debt), with *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 171, 178, A.3d (2023) (affirming Appellate Court's conclusion that trial court's application of Practice Book § 23-18 (a) in establishing amount of debt was improper when defendant raised specific objection concerning amount of mortgage debt).

Although on appeal the defendant now argues that the court should have known that its claims of misallocated payments and the inappropriateness of attorney's fees related to the amounts of the debts, it never alerted the court that it was making such an argument. Moreover, the allegations of the special defenses do not clearly challenge the amounts of the debts. In none of the three cases did the special defenses clearly allege a challenge to the amount of debt, nor did the defendant object at the hearings to the court's determinations of the amounts of the debts due, object prior to or at the

hearings to the updated affidavits of debt and foreclosure worksheets that had been filed, or alert the court that it was seeking a hearing as to the amounts of the debts. Thus, we cannot conclude that the defendant raised a defense in each case to the amount of the debt sufficient to prohibit the application of Practice Book § 23-18 (a) and the admission of the affidavits of debt thereunder. See *HSBC Bank USA, National Assn.* v. *Gilbert*, supra, 200 Conn. App. 354. "If a proper defense as to the amount of the debt is not pursued . . . § 23-18 (a), which authorizes the plaintiff to prove the amount of the debt through affidavit and documentary submissions, is applicable." *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 427 n.5, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018). Therefore, the court's application of § 23-18 (a) was proper.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARK J. DESPRES
(AC 45614)

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

Syllabus

The defendant, who had been convicted, on a plea of guilty, of murder and conspiracy to commit murder, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. The defendant claimed that his sentence was imposed in an illegal manner pursuant to the applicable rule of practice (§ 43-22) because the trial court had denied his motion to represent himself at his sentencing hearing and because F, his defense counsel, had failed to provide him with certain documents related to his defense. *Held*:

1. The trial court correctly concluded that it lacked subject matter jurisdiction with respect to the defendant's claim regarding F's failure to provide him with certain documents related to his defense and properly dismissed the defendant's motion to correct an illegal sentence with respect to that claim; the defendant's claim was not a colorable claim under Practice Book § 43-22, as it was a claim of ineffective assistance of

counsel and did not challenge the defendant's sentence or sentencing proceedings.

2. The trial court erred in its determination that it lacked subject matter jurisdiction with respect to the defendant's claim regarding the denial of his right to self-representation at his sentencing hearing, and, consequently, it improperly dismissed his motion to correct with respect to that claim: pursuant to the sixth amendment to the United States constitution, a defendant has the right to represent himself at all critical stages of the criminal proceedings and, because the sentencing hearing is a critical stage of the criminal proceedings, the defendant's claim that the court impermissibly failed to allow him to represent himself at the sentencing hearing plausibly challenged the sentencing proceeding itself, rather than the defendant's underlying conviction, and, as such, satisfied the threshold for subject matter jurisdiction set forth in *State* v. *Ward* (341 Conn. 142); accordingly, the case was remanded to the trial court to make factual determinations relating to the merits of that claim.

Argued April 10—officially released July 25, 2023

Procedural History

Substitute information charging the defendant with the crimes of capital felony murder, murder, and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the defendant was presented to the court, *Clifford, J.*, on a plea of guilty to the charges of murder and conspiracy to commit murder; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the charge of capital felony murder; subsequently, the court, *Clifford, J.*, denied the defendant's motion to represent himself at his sentencing hearing; thereafter, the court, *Strackbein, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Mark J. Despres, self-represented, the appellant (defendant).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, was *Paul Narducci*, state's attorney, for the appellee (state).

Opinion

SEELEY, J. The self-represented defendant, Mark J. Despres, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22.[1] On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to hear his motion. Specifically, the defendant argues that the court improperly determined that his claims regarding the sentencing court's denial of his motion to represent himself at that proceeding and his attorney's failure to turn over documents did not fall within the ambit of Practice Book § 43-22. We agree with the defendant that the trial court improperly concluded that it lacked jurisdiction with respect to his claim regarding the denial of his request for self-representation and disagree with respect to his claim regarding his attorney's failure to turn over the aforementioned documents. Accordingly, we affirm in part and reverse in part the judgment of the court.

The following facts, either as set forth by this court in a prior appeal or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On March 10, 1994, the defendant shot and killed Anson B. Clinton III, as part of a conspiracy with Beth Ann Carpenter and Haiman Long Clein. The defendant was charged with capital felony murder, murder, and conspiracy to commit murder. On March 25, 1996, Attorney Michael Fitzpatrick was appointed as counsel for the defendant. In May, 1997, the defendant entered into an agreement with the state to plead guilty to murder and conspiracy to commit murder. As part of the plea agreement, the defendant agreed to cooperate fully with

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

the state, including by "testifying truthfully in any subsequent trial or hearing arising from the death of . . . Clinton . . . ." The state agreed not to prosecute the capital felony murder charge and to recommend a sentence of forty-five years of incarceration, while allowing the defendant the right to argue for a lesser sentence.

The defendant subsequently filed multiple motions to withdraw his guilty plea between 1997 and 2002. The defendant refused to testify at Carpenter's trial when she was prosecuted for her role in Clinton's death. *Despres* v. *Commissioner of Correction*, 166 Conn. App. 572, 577, 142 A.3d 400, cert. denied, 323 Conn. 916, 149 A.3d 498 (2016). As a result, on April 22, 2002, the prosecutor notified the defendant that he had violated the terms of the plea agreement. On June 28, 2002, the defendant filed a motion to dismiss Fitzpatrick and to represent himself in anticipation of the upcoming sentencing hearing. At the bottom of the motion, the defendant wrote: "Can I please get an appearance form to file to take my case over? Also can you please send me the next court date for this motion . . . ." On July 2, 2002, Fitzpatrick filed a motion to withdraw.

On September 12, 2002, Fitzpatrick withdrew his motion, and the court, *Clifford*, *J.*, denied the defendant's motion to represent himself. During that hearing, Judge Clifford asked the defendant: "Are you asking to represent yourself at the sentencing hearing?" The defendant replied, "[y]es." The court did not canvass the defendant[2] regarding his invocation of the right of

[2] "[W]hen a defendant clearly and unequivocally has invoked his right to self-representation after the trial has begun, the trial court must consider: (1) the defendant's reasons for the self-representation request; (2) the quality of the defendant's counsel; and (3) the defendant's prior proclivity to substitute counsel. If, after a thorough consideration of these factors, the trial court determines, in its discretion, that the balance weighs in favor of the defendant's interest in self-representation, the court must then proceed to canvass the defendant in accordance with Practice Book § 44-3 to ensure that the defendant's choice to [represent himself] has been made in a knowing

self-representation but, rather, stated: "I don't know if it really matters whether you represent yourself or [whether] you have an attorney because the attorney can address me and, you know, have me consider any information and so can you. So, it really doesn't make a difference." In ruling on the motion, the court stated: "I'm going to deny your request to have . . . Fitzpatrick . . . fired at this point and to represent yourself because basically at the time of sentencing, you can—as I said, you can indicate to me anything you want. It's almost as if you're representing yourself anyway because that's what a sentencing is."

During that same hearing, the defendant also raised with the court a separate issue regarding documents that he alleged Fitzpatrick had failed to turn over to him, including a statement given by Clein as part of Clein's plea agreement. In response, Fitzpatrick stated to the court that his law firm had given the defendant a copy of the relevant documents, which subsequently were lost. Fitzpatrick stated that he also gave the defendant a second, complete set of the documents. Fitzpatrick acknowledged, however, that he had not specifically handed over a copy of Clein's statement, and he agreed to do so.

and intelligent fashion." *State* v. *Flanagan*, 293 Conn. 406, 433, 978 A.2d 64 (2009).

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."

Sometime after Judge Clifford had denied his motion for self-representation, the defendant hired Attorney Jon Schoenhorn to resurrect the plea agreement and to represent him at his sentencing hearing, which Schoenhorn did. See *Despres* v. *Commissioner of Correction*, supra, 166 Conn. App. 577–78. On December 4, 2003, Judge Clifford sentenced the defendant to forty-five years of incarceration, in part, because of the defendant's refusal to adhere to his plea agreement and to cooperate with the state during Carpenter's trial. See id., 578.

On July 22, 2021, the defendant filed a motion to correct an illegal sentence.[3] He argued in his motion that the sentence imposed by Judge Clifford was illegal under Practice Book § 43-22. Specifically, the defendant claimed that imposing the sentence after denying his motion to represent himself resulted in an illegal sentence. The defendant further argued that the sentence was illegal because of Fitzpatrick's alleged failure to provide the defendant with certain documents related to his defense. The state filed its objection to the defendant's motion to correct an illegal sentence on August 12, 2021, in which it argued that the court lacked jurisdiction to hear the defendant's motion because the defendant's claims did not attack the sentencing proceeding itself but, rather, related to his frustrations with his attorney and the fact that he had not been permitted by the court to represent himself at the sentencing hearing. The state further argued that, even if the court determined that it did have jurisdiction, the motion should be denied because the defendant had not established that his rights were violated.

[3] This was the defendant's second motion to correct an illegal sentence. His first motion was filed in November, 2005, and was based on, inter alia, double jeopardy grounds. It was denied by the trial court, and this court affirmed that judgment in *State* v. *Despres*, 107 Conn. App. 164, 166–67, 944 A.2d 989, cert. denied, 288 Conn. 904, 953 A.2d 649 (2008).

After hearing from both parties on May 4, 2022, the court, *Strackbein*, *J.*, subsequently issued a memorandum of decision. The court concluded that the defendant's claim did not attack the sentencing proceeding itself and, accordingly, dismissed the defendant's motion for lack of jurisdiction. In its memorandum of decision, the court agreed with the state's assertion that the defendant's claim "does not attack the sentencing proceeding, but rather his dissatisfaction with counsel and the trial court's refusal [to] allow him to proceed [as a self-represented defendant] at sentencing." The court, however, went on to address the merits of the claim raised and concluded that, if this court were to determine on appeal that there was jurisdiction, then the motion to correct should be denied on the merits because the defendant failed to establish that his underlying sentence was imposed in an illegal manner. This appeal followed.[4]

On appeal, the defendant claims that the court improperly dismissed his motion to correct an illegal sentence.[5] Specifically, he argues that he raised a colorable claim under Practice Book § 43-22 and, therefore, dismissal of this claim for lack of jurisdiction was improper. We agree with the defendant that he raised a colorable claim under § 43-22 with respect to his argument that he was entitled to represent himself at sentencing. We disagree, however, with his argument that

[4] The defendant also claims on appeal that (1) Judge Clifford erred when he did not recuse himself before the 2003 sentencing hearing, (2) the denial of his motion to represent himself violated his constitutional right to self-representation, and (3) the denial of his request to represent himself violated his right to a fair and impartial sentencing hearing. Because each of these claims goes to the merits of the defendant's motion and not the court's jurisdiction, we do not reach them and leave them for the trial court to address on remand.

[5] The defendant claims that the court improperly dismissed his motion to correct an illegal sentence for failure to state a colorable claim and that the court incorrectly determined that his motion did not attack the sentencing itself, as opposed to the underlying conviction. Because these two issues are inextricably intertwined, we discuss them together.

counsel's failure to provide him with copies of certain documents is an appropriate basis under § 43-22 for correcting an illegal sentence.

We begin by setting forth the relevant standard of review and legal principles. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22, involves a determination of the trial court's subject matter jurisdiction and, as such, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Turner*, 214 Conn. App. 584, 589, 280 A.3d 1278 (2022).

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State* v. *McCleese*, 333 Conn. 378, 386, 215 A.3d 1154 (2019). "A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner." Id. This common-law rule was codified by Practice Book § 43-22. See *State* v. *Myers*, 343 Conn. 447, 459, 274 A.3d 100 (2022).

The issue of whether a trial court has subject matter jurisdiction to correct an illegal sentence rests upon "whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 . . . ." (Internal quotation marks omitted.) Id. "[T]o raise a colorable claim within the scope of . . . § 43-22, the legal claim and factual allegations must demonstrate a possibility that the defendant's claim challenges his or her sentence or sentencing proceedings, not the underlying conviction. The ultimate legal correctness of the claim is not relevant to our jurisdictional analysis." *State* v. *Ward*, 341 Conn. 142, 153, 266 A.3d 807 (2021). Put another way, "where a defendant's motion to correct

plausibly [challenges] the defendant's sentence, that claim is colorable, and the court has subject matter jurisdiction over that claim *even where the* [*claim has*] *no merit.*" (Emphasis in original; internal quotation marks omitted.) *State* v. *Turner*, supra, 214 Conn. App. 590.

Pursuant to Practice Book § 43-22, a court may correct an illegal sentence[6] or a sentence imposed in an illegal manner. In the present case, the defendant claims that his sentence was imposed in an illegal manner. A sentence imposed in an illegal manner has "been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Internal quotation marks omitted.) *State* v. *Anderson*, 187 Conn. App. 569, 583–84, 203 A.3d 683, cert. denied, 331 Conn. 922, 206 A.3d 764 (2019). Furthermore, the protection against imposing a sentence in an illegal manner "reflects the fundamental proposition

[6] "[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Internal quotation marks omitted.) *State* v. *Myers*, supra, 343 Conn. 459–60.

that [t]he defendant has a legitimate interest in the character of the procedure [that] leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Internal quotation marks omitted.) *State* v. *Belcher*, 342 Conn. 1, 12, 268 A.3d 616 (2022).

We will first address the portion of the defendant's claim relating to the documents that Fitzpatrick allegedly failed to provide to the defendant. The defendant argues that this claim plausibly challenges the sentence itself. We are not persuaded.

Our Supreme Court has held that "the exclusive forum for adjudicating ineffective assistance of counsel claims is by way of habeas proceedings. . . . There is no specific rule authorizing a defendant to bring his ineffective assistance of counsel claim by way of a motion to correct." (Citations omitted; footnote omitted.) *State* v. *Parker*, 295 Conn. 825, 851–52, 992 A.2d 1103 (2010). In the present case, the defendant's claim regarding Fitzpatrick's failure to turn over certain documents is one of ineffective assistance of counsel, and, therefore, it does not raise a colorable claim for a motion to correct under Practice Book § 43-22. None of the defendant's contentions about the exchange of documents between him and Fitzpatrick attacks the sentencing itself. This particular claim relates to the communication difficulties between the defendant and his attorney and does not challenge his sentence or the sentencing proceedings. Accordingly, we conclude that the court properly dismissed the defendant's motion to correct an illegal sentence with respect to the claim that Fitzpatrick's failure to provide the defendant with certain documents resulted in an illegally imposed sentence under § 43-22.

We next turn to the defendant's assertion that the court improperly dismissed his motion to correct with

respect to his claim that his sentence was imposed in an illegal manner because he was denied the right to represent himself at his sentencing hearing. The state concedes,[7] and we agree, that the court had jurisdiction to decide this claim because "the legal claim and factual allegations . . . demonstrate a possibility that the defendant's claim challenges his . . . sentence or sentencing proceedings . . . ." *State* v. *Ward*, supra, 341 Conn. 153.

The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. In *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court concluded that the sixth amendment to the United States constitution embodies a right to self-representation and that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so."[8] (Emphasis in original.) Id., 807; see also *State* v. *Braswell*, 318 Conn. 815, 827, 123 A.3d 835 (2015). Our Supreme Court "consistently has recognized the inviolability of the right of self-representation . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Flanagan*, 293 Conn. 406, 418, 978 A.2d 64 (2009). "The

[7] As discussed previously in this opinion, the state argued in its objection to the defendant's motion to correct that the court lacked jurisdiction because the defendant's claims, including the claim concerning the denial of his motion to represent himself at the sentencing hearing, did not attack the sentencing proceeding itself. In its appellate brief and at oral argument before this court, however, the state conceded this point, agreeing that "the trial court had jurisdiction to decide the defendant's motion to correct an illegal sentence as it pertains to his right to self-representation at sentencing."

[8] "[T]he right to counsel and the right to self-representation present 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. *Pires*, 310 Conn. 222, 230, 77 A.3d 87 (2013).

right to represent oneself is not only exercisable when a defendant is dissatisfied with counsel. It also protects a defendant's interest in autonomy and his right to put on his own defense, at *all* critical stages of the proceedings." (Emphasis added.) *State* v. *Braswell*, supra, 834.

The United States Supreme Court has recognized that, "[e]ven though [a] defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding[s] . . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Citations omitted.) *Gardner* v. *Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); see *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 568, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016); see also *Copas* v. *Warden*, 30 Conn. App. 677, 682, 621 A.2d 1378 (recognizing sentencing is critical stage of criminal proceedings), cert. denied, 226 Conn. 901, 625 A.2d 1374 (1993). Because a sentencing hearing *is* a critical stage of the criminal proceedings, the defendant's claim that the court impermissibly failed to allow him to represent himself at the sentencing hearing plausibly challenges the sentencing proceeding, rather than his underlying conviction. Under *Ward*, this meets the threshold for subject matter jurisdiction with respect to a motion to correct an illegal sentence. See *State* v. *Ward*, supra, 341 Conn. 153.

Accordingly, we conclude that the court erred in its determination that it lacked subject matter jurisdiction and, consequently, improperly dismissed the defendant's motion to correct relating to the self-representation claim.[9]

[9] As previously noted in this opinion, after the court concluded that it did not have jurisdiction to address the motion to correct, it alternatively stated

We acknowledge that in *State* v. *Ebron*, 219 Conn. App. 228, 240, 295 A.3d 112, cert. denied, 347 Conn. 902, A.3d (2023), this court concluded that, although "the defendant set forth a colorable claim for purposes of establishing the court's jurisdiction over his motion to correct, and although we typically remand cases for a consideration of their merits if we determine that they were improperly dismissed for a lack of subject matter jurisdiction, where a defendant's claim fails as a matter of law, a remand for further consideration of the merits would serve no useful purpose." (Internal quotation marks omitted.) This court, in *Ebron*, therefore, considered the merits of the motion on appeal and ultimately concluded that the defendant's claim failed as a matter of law.[10] Id., 240–45. On the basis of the facts alleged

that, "[s]hould the Appellate Court determine that the Superior Court has jurisdiction to decide the motion on the merits, the court would then deny the motion for failing to establish that his underlying sentence was illegal." However, it is well settled that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006). Rather, "[w]henever a court finds that it has no jurisdiction, it must dismiss the case . . . ." (Internal quotation marks omitted.) Id. In other words, "[i]t is well established that a court is without power to render a judgment if it lacks jurisdiction and that everything done under the judicial process of courts not having jurisdiction is, ipso facto, void." (Internal quotation marks omitted.) *American Tax Funding, LLC* v. *Design Land Developers of Newtown, Inc.*, 200 Conn. App. 837, 847, 240 A.3d 678 (2020). In the present case, because the court had determined, albeit improperly, that it did not have subject matter jurisdiction, it therefore should not have addressed the claim on the merits, and the court's analysis and conclusion regarding the merits of the defendant's arguments constitute dicta. See *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 246, 558 A.2d 986 (1989).

[10] In *Ebron*, the issue presented to the court was whether the defendant's sentence was illegal under the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), in which the court held that the prohibition on cruel and unusual punishments set forth in the eighth amendment to the United States constitution forbids the imposition of mandatory sentences for life imprisonment without the possibility of parole when the crime was committed by an offender under the age of eighteen. *State* v. *Ebron*, supra, 219 Conn. App. 241–42. In *Ebron*, the defendant argued that, because the court did not

by the defendant in connection with his motion to correct an illegal sentence, we do not reach the same conclusion in the present case. On remand, the trial court will be required to make factual determinations relating to the merits of the defendant's claim that the sentencing court's denial of his motion for self-representation resulted in a sentence imposed in an illegal manner under Practice Book § 43-22.

The judgment is reversed with respect to the defendant's claim in his motion to correct relating to self-representation and the case is remanded for a hearing on the merits of that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BAYVIEW LOAN SERVICING, LLC *v.* YOKO ISHIKAWA ET AL.
(AC 45926)

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

Syllabus

The substitute plaintiff, L Co., sought to foreclose a residential mortgage on certain real property owned by the defendant Y. The defendant H, Y's former spouse, and Y executed a promissory note secured by the mortgage, and, several years later, but prior to the commencement of the foreclosure action, H quitclaimed his interest in the property to Y and left the residence. After H had been defaulted for failure to appear and Y had been defaulted for failure to plead, the trial court granted the original plaintiff's motion for a judgment of strict foreclosure. After another party was substituted as the plaintiff and its motion to open the judgment was pending, Y filed an answer and special defenses, asserting, inter alia, that the complaint failed to allege that notice of

---

properly consider his youth as a mitigating factor, his sentencing proceeding violated the prohibition against cruel and unusual punishment and the right to due process under the state constitution. Id., 240–41. This court determined that, because the defendant's sentence was thirty-two years, with the possibility of parole after twenty-seven years, his claim fell outside the scope of *Miller* and, therefore, necessarily failed as a matter of law. Id.

the default and acceleration had been provided to both Y and H, as required by federal regulation (24 C.F.R. § 201.50). Subsequently, L Co. filed a motion for strict foreclosure as to liability only, claiming that notice had been provided to Y and H, and that 24 C.F.R § 201.50 was inapplicable. Y objected, claiming that H had not received notice, that the receipt of notice by H was a condition precedent to bringing the foreclosure action, and that there was a genuine issue of material fact concerning H's receipt of notice such that L Co. was not entitled to summary judgment. The trial court granted L Co.'s motion for summary judgment as to liability only, determining that there were no genuine issues of material fact and that L Co. was entitled to summary judgment as to liability. The court further concluded that it was unaware of any authority that would permit Y to raise her special defense on behalf of H and that, even if she could, the defense still failed, as 24 C.F.R. § 201.50 was inapplicable, and, further, even if it had applied, notice had been provided to H in compliance with the regulation and the notice provision of the mortgage. On Y's appeal to this court, held that the trial court properly granted L Co.'s motion for summary judgment as to liability only because there were no genuine issues of material fact as to whether H had received proper notice: the trial court properly rejected Y's special defense of lack of notice as to H, as research revealed no authority demonstrating that Y was the proper party to assert a special defense, even if viable, that was personal to H; moreover, Y's claim that she had standing to pursue her special defense based on L Co.'s alleged failure to provide notice to both her and H, and, thus, a condition precedent to the commencement of the foreclosure action had not been complied with, was without merit, because once H executed the quitclaim deed, H had no legal interest in the property securing the note and had no equitable or statutory right of redemption in the property, and it would have been illogical to permit Y to rely on H's alleged failure to receive notice to defend against L Co.'s foreclosure action against her.

Argued May 15—officially released July 25, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where Limosa, LLC, was substituted as the plaintiff; thereafter, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the substitute plaintiff's motion for summary judgment as to liability only and rendered a judgment of strict foreclosure, from

which the named defendant appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

MOLL, J. In this residential mortgage foreclosure action, the defendant Yoko Ishikawa[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Limosa, LLC.[2] On appeal, the defendant claims that the court improperly granted the plaintiff's motion for summary judgment as to liability only because it erred in determining that there were no genuine issues of material fact as to the defendant's special defense alleging that Robert D. Hackett, the defendant's former spouse and a co-obligor on the underlying note and mortgage, had not been given notice of default and acceleration pursuant to 24 C.F.R. § 201.50. We affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. On March 25, 2017, Bayview Loan Servicing, LLC (Bayview), commenced the present foreclosure action against the defendant and Hackett. In its complaint, Bayview alleged as follows. On December 22, 2011, the defendant and Hackett were indebted

[1] Robert D. Hackett, Yoko Ishikawa's former spouse, was named as a defendant in the complaint filed by the original plaintiff, Bayview Loan Servicing, LLC. Hackett, who was defaulted for failure to appear and against whom judgment was rendered, is not participating in this appeal. Accordingly, we refer to Yoko Ishikawa as the defendant and to Robert D. Hackett by his surname.

[2] This action was originally brought by Bayview Loan Servicing, LLC. On October 4, 2021, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted a motion to substitute Limosa, LLC, as the plaintiff following certain assignments of the mortgage. Accordingly, we refer to Limosa, LLC, as the plaintiff.

in the amount of $335,443 to Bank of America, N.A., in connection with a promissory note executed in favor thereof. The note was secured by a mortgage executed by the defendant and Hackett on residential property located at 318 Sarah Circle in Orange. By way of a quitclaim deed dated December 15, 2013, and recorded on the Orange land records on February 4, 2014, Hackett conveyed his interest in the property to the defendant. Following certain assignments, Bayview became the holder of the note and the mortgage in 2016. The last installment of principal and interest received on the note was for the payment due on or before July 1, 2016. Finally, Bayview alleged that the principal balance due on the note was $362,488.87.

On July 12, 2018, after Hackett had been defaulted for failure to appear and the defendant had been defaulted for failure to plead, the trial court, *Moran*, *J.*, granted Bayview's motion for a judgment of strict foreclosure, with the law days commencing on September 17, 2018. Thereafter, the court opened the judgment on September 17, 2018, and again on October 22, 2018, to extend the law days. Pursuant to the October 22, 2018 order, the court extended the law days to commence on January 7, 2019.

On January 2, 2019, pursuant to Practice Book § 14-1, the defendant filed a claim for a statutory stay on the basis of a Chapter 7 bankruptcy petition that she had filed on the same day. On September 3, 2019, Bayview filed a notice reflecting that the United States Bankruptcy Court for the District of Connecticut had closed the defendant's bankruptcy case on April 12, 2019, thereby terminating the automatic bankruptcy stay. The same day, Anthium, LLC (Anthium), filed a motion to open the judgment of strict foreclosure in order for the court (1) to substitute it as the plaintiff following certain assignments of the mortgage, (2) to permit it to amend the complaint filed by Bayview to

reflect the substitution, and (3) to reenter a judgment of strict foreclosure with new law days. On December 23, 2019, the court simply ordered that Anthium was substituted as the plaintiff in lieu of Bayview.

On September 13, 2019, while Anthium's September 3, 2019 motion to open was pending, the defendant filed an answer and special defenses directed to the "amended complaint," which we construe to mean the original complaint filed by Bayview.[3] Other than admitting to the allegation that Hackett had quitclaimed his interest in the property to her, the defendant denied having knowledge or information sufficient to respond to the remaining allegations in the complaint. In addition, relevant to this appeal, the defendant's second special defense[4] asserted that the complaint failed to allege that notice of default and acceleration (notice) had been given to her and to Hackett as required by 24 C.F.R. § 201.50.[5]

[3] The only complaint in the record is the complaint filed by Bayview. As this court has stated, "when, in an action to foreclose a mortgage, there is a substitution of a new plaintiff arising out of the assignment of the underlying debt and security, it is not necessary for the substitute plaintiff to file an amended complaint." *F.P., Inc.* v. *Collegium & Wethersfield Ltd. Partnership*, 33 Conn. App. 826, 831, 639 A.2d 527, cert. denied, 229 Conn. 917, 642 A.2d 1211 (1994).

[4] The defendant's first special defense asserted that the complaint failed to allege encumbrances as required by Practice Book § 10-69.

[5] Title 24 of the Code of Federal Regulations, § 201.50 (b), provides: "Notice of default and acceleration. Unless the borrower cures the default or agrees to a modification agreement or repayment plan, the lender shall provide the borrower with written notice that the loan is in default and that the loan maturity is to be accelerated. In addition to complying with applicable State or local notice requirements, the notice shall be sent by certified mail and shall contain:

"(1) A description of the obligation or security interest held by the lender;

"(2) A statement of the nature of the default and of the amount due to the lender as unpaid principal and earned interest on the note as of the date 30 days from the date of the notice;

"(3) A demand upon the borrower either to cure the default (by bringing the loan current or by refinancing the loan) or to agree to a modification agreement or a repayment plan, by not later than the date 30 days from the date of the notice;

On October 21, 2021, the plaintiff filed a motion for summary judgment as to liability only against both Hackett and the defendant. In its accompanying supporting memorandum of law, the plaintiff asserted that (1) it had established a prima facie case of foreclosure and (2) the defendant's special defenses were untenable. With respect to the defendant's second special defense, the plaintiff argued that (1) insofar as the note and the mortgage required it to provide notice,[6] which it did not concede, such notice had been given, as the plaintiff had sent notice of default to the defendant and Hackett by first class mail, postage prepaid, as well as by certified mail, to the property address on October 20, 2016, as reflected in a supporting affidavit, and (2) 24 C.F.R. § 201.50 was inapplicable. On December 30, 2021, the defendant filed an objection, arguing only that Hackett did not receive notice of default, as he had left the residence in 2008, and that the note required compliance with 24 C.F.R. § 201.50, which, according

"(4) A statement that if the borrower fails either to cure the default or to agree to a modification agreement or a repayment plan by the date 30 days from the date of the notice, then, as of the date 30 days from the date of the notice, the maturity of the loan is accelerated and full payment of all amounts due under the loan is required;

"(5) A statement that if the default persists the lender will report the default to an appropriate credit reporting agency; and

"(6) Any other requirements prescribed by the Secretary [of Housing and Urban Development]."

[6] Paragraph 8 of the note provides in relevant part: "Giving of Notices. Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address. . . ."

Paragraph 13 of the mortgage provides in relevant part: "Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. . . . Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph."

to the defendant, was a condition precedent to bringing the present foreclosure action.[7] On April 29, 2022, after hearing argument on April 28, 2022, the court, *Hon. Arthur A. Hiller*, judge trial referee, ordered additional briefing on the notice issue. In its posthearing brief, the plaintiff argued that the defendant could not, as a matter of law, assert on behalf of Hackett that he had failed to receive notice. Alternatively, the plaintiff (1) maintained that 24 C.F.R. § 201.50 did not apply and (2) argued that, if the regulation were applicable, then it had complied with the regulation. In her posthearing brief, the defendant contended that (1) receipt of notice by Hackett was a condition precedent to bringing the present foreclosure action and (2) there was a genuine issue of material fact concerning Hackett's receipt of notice, such that the plaintiff was not entitled to summary judgment as to liability only.

On May 9, 2022, the court issued an order granting the plaintiff's motion for summary judgment as to liability only against the defendant and Hackett. The court determined that the plaintiff had established its prima facie case to foreclose the mortgage. With respect to the defendant's second special defense, the court concluded that (1) it was "not aware of any authority that would allow the defendant to raise this defense on behalf of Hackett," and (2) "[e]ven if [she] could raise this defense, it still fails."[8] With regard to the latter, the court determined that 24 C.F.R. § 201.50 was inapplicable and, even if the regulation applied, notice was provided to Hackett in compliance with the regulation, as well as the notice provision of the mortgage. In light

[7] In objecting to the plaintiff's motion for summary judgment as to liability only, the defendant did not contend that *she* had failed to receive any required notice of default.

[8] We construe the court's decision to reflect that the court rejected the defendant's first special defense. See footnote 4 of this opinion. The defendant does not raise a claim of error on appeal regarding her first special defense.

of its determinations, the court concluded that there were no genuine issues of material fact and that the plaintiff was entitled to summary judgment as to liability only. On September 30, 2022, the court rendered a judgment of strict foreclosure, setting the law days to commence on November 29, 2022. This appeal followed.[9]

The defendant claims that the court improperly granted the plaintiff's motion for summary judgment as to liability only because there is a genuine issue of material fact as to whether Hackett had received the notice. In response, in addition to addressing the merits of the defendant's claim, the plaintiff argues that the defendant lacks standing to assert, as a defense to the foreclosure action against her, that Hackett had failed to receive the notice. The defendant counters that she has standing to raise her second special defense because the actual receipt of the notice by Hackett was a condition precedent to bringing the present foreclosure action. We agree with the plaintiff that the defendant lacks standing to raise her second special defense, and, therefore, we need not address the merits of the defendant's claim.

We begin by setting forth the applicable standard of review. "A determination regarding standing concerns a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Caliber Home Loans, Inc.* v. *Zeller*, 205 Conn. App. 642, 650, 259 A.3d 1, cert. denied, 338 Conn. 914, 259 A.3d 1179 (2021). "When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 525, 119 A.3d 541 (2015).

[9] On October 20, 2022, the plaintiff filed a motion to dismiss this appeal on the basis that the appeal was late and/or frivolous, which this court denied.

Put simply, as the court determined, the defendant cannot maintain a defense to the plaintiff's foreclosure action against her predicated on the plaintiff's alleged failure to deliver the notice to Hackett. The defendant has not cited, and our research has not revealed, any authority demonstrating that she is the proper party to assert a special defense, even if viable, that is personal to Hackett. See *Stamford Hospital* v. *Vega*, 236 Conn. 646, 657, 674 A.2d 821 (1996) ("[i]n general, a party does not have standing to raise rights belonging to another"); *Megin* v. *New Milford*, 125 Conn. App. 35, 37–38, 6 A.3d 1176 (2010) ("[t]he general rule is that one party has no standing to raise another's rights" (internal quotation marks omitted)).[10]

The defendant maintains that she has standing to pursue her second special defense because "[i]f notice was not given to both borrowers, the condition precedent was not complied with." At the same time, however, she concedes that "by virtue of [the] quitclaim deed from . . . Hackett to [the defendant] . . . they were no longer joint tenants. As estranged former

[10] As the United Supreme Court has noted, although questions of standing usually arise as to a plaintiff's standing to assert a claim, "[a] similar standing issue arises when the litigant asserts the rights of third parties defensively, as a bar to judgment against him. . . . In such circumstances, there is no [Article] III standing problem; but the prudential question is governed by considerations closely related to the question [of] whether a person in the litigant's position would have a right of action on the claim." (Citations omitted.) *Warth* v. *Seldin*, 422 U.S. 490, 500 n.12, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the [c]ourt may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). Similarly, although the standing issue in the present case does not implicate the court's subject matter jurisdiction to resolve the underlying dispute between the plaintiff and the defendant, our conclusion that the defendant cannot raise a defense personal to Hackett is governed by the same prudential limitation.

spouses, they were not engaged in a common enterprise." This argument cuts against her position that she has standing to raise her second special defense. A duly executed quitclaim deed "has the force and effect of a conveyance to the releasee of all the releasor's right, title and interest in and to the property described . . . . [It] may be used as a release of a mortgage, attachment, judgment lien or any other interest in real property." General Statutes § 47-36f. By virtue of the quitclaim deed, Hackett had no legal interest in the property securing the note and no equitable or statutory right of redemption in the property. See *Twichell* v. *Guite*, 53 Conn. App. 42, 53, 728 A.2d 1121 (1999) (defendant had "no present interest in the property in question" in light of quitclaim deed). Under these circumstances, it would strain logic to permit the defendant to rely on Hackett's alleged failure to receive the notice to defend against the plaintiff's foreclosure action against her.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

ERIC STEVENS *v.* EDWARD KHALILY ET AL.
(AC 45400)

Alvord, Prescott and Clark, Js.

Syllabus

After the dissolution of the plaintiff's marriage to his former spouse, T, the plaintiff brought an action against the defendants, T's mother and stepfather, seeking damages for, inter alia, defamation. The defendants filed a motion to strike all counts of the complaint. The trial court granted the defendants' motion to strike as to all counts, finding, inter alia, that, even when construed broadly and realistically, the plaintiff's defamation allegations failed to sufficiently allege a claim for defamation with the requisite specificity. On appeal to this court, the plaintiff claims only that the trial court improperly struck the defamation counts of his complaint. *Held* that this court affirmed the trial court's judgment granting the defendants' motion to strike on the alternative ground that

the plaintiff failed to allege reputational harm, one of the four elements necessary to establish a prima facie case of defamation per quod, and, because the plaintiff failed to plead all elements of defamation, the defamation counts were properly stricken.

Argued May 9—officially released July 25, 2023

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.* granted the motion to dismiss filed by the named defendant et al. and rendered judgment thereon; thereafter, the court, *Sheridan*, *J.*, granted the motion to strike filed by the defendant Shahram Rabbani et al., and the plaintiff appealed to this court; subsequently, the court, *Cobb*, *J.*, granted the plaintiff's motion for judgment and rendered judgment for the defendant Shahram Rabbani et al., from which the plaintiff filed an amended appeal. *Affirmed.*

Christopher T. DeMatteo, with whom, on the brief, was *Norman A. Pattis*, for the appellant (plaintiff).

Cristin E. Sheehan, for the appellees (defendant Shahram Rabbani et al.).

Opinion

PRESCOTT, J. The plaintiff, Eric Stevens, appeals from the judgment of the trial court rendered in favor of the defendants Shahram Rabbani (Shahram) and Diana Rabbani (Diana),[1] following the court's granting of the defendants' motion to strike all counts of the complaint brought against them. On appeal, the plaintiff claims that the court improperly struck counts nine and twelve, which alleged

[1] Edward Khalily and Tiffany Khalily were also named as defendants in the underlying matter. All counts against them, however, were dismissed on June 12, 2018, for insufficient service of process. See *Stevens* v. *Khalily*, 194 Conn. App. 626, 222 A.3d 132 (2019) (affirming judgment of dismissal), cert. denied, 334 Conn. 918, 222 A.3d 104 (2020). Accordingly, all references to the defendants in this opinion are to Shahram Rabbani and Diana Rabbani only.

defamation against Shahram and Diana respectively, for failure to plead defamation with the requisite specificity.[2] The plaintiff argues that counts nine and twelve of the operative complaint[3] "adequately identify the alleged defamatory statements, who made them and to whom they were made, which is what is required of defamation pleadings under Connecticut law and practice." We conclude that the court properly granted the motion to strike counts nine and twelve because the plaintiff has failed to plead reputational harm, an element required to establish a prima facie case of defamation at common law. Because the plaintiff has failed to plead all four elements of defamation, we need not reach the plaintiff's claim that the court improperly granted the motion to strike on the grounds that he failed to plead the elements of defamation with the requisite specificity. We affirm the judgment of the court.

The following facts, as alleged in the operative complaint, and procedural history are relevant to the plaintiff's claim on appeal. The plaintiff previously was married to Tiffany Khalily, with whom he had a child. The defendants are Tiffany Khalily's mother and stepfather. On May 21, 2009, the plaintiff initiated a marital dissolution action against Tiffany Khalily. The court rendered a judgment of dissolution of marriage on September 6, 2011, that incorporated the parties' marital separation agreement. Pursuant

[2] The plaintiff has not appealed from that portion of the court's judgment rendered following its granting of the motion to strike with respect to the remaining counts brought against the defendants, which alleged intentional infliction of emotional distress and prima facie tort.

[3] The plaintiff filed a revised complaint on March 1, 2019, which is the operative complaint for purposes of this appeal. Counts one through six of the operative complaint were brought against Edward Khalily and Tiffany Khalily and were dismissed by the court on June 12, 2018. Counts seven through twelve of the operative complaint are alleged against the defendants. Count seven alleges intentional infliction of emotional distress against Shahram. Count eight alleges prima facie tort against Shahram. Count nine alleges defamation against Shahram. Count ten alleges intentional infliction of emotional distress against Diana. Count eleven alleges prima facie tort against Diana. Count twelve alleges defamation against Diana.

to the judgment, Tiffany Khalily was granted full legal and physical custody of their daughter, and the plaintiff was granted visitation. Bitter postdissolution proceedings followed regarding custody of and visitation with their child. While the parties were involved in this contentious dispute, the defendants made allegedly defamatory statements to agents of the Department of Children and Families (department) regarding the plaintiff.[4]

The plaintiff commenced this action on October 16, 2017. On March 1, 2019, the plaintiff filed the operative revised complaint. The counts relevant to this appeal are nine and twelve, which, as previously noted, allege defamation by the defendants. In particular, the plaintiff alleged in count nine that Shahram made statements to the department about the plaintiff, including that the plaintiff was in the habit of sleeping with transvestite prostitutes.

In count twelve, the plaintiff alleged that Diana told the department that the plaintiff had engaged in physical violence,[5] had no interest in seeing or spending time with his daughter, was only interested in seeing his child to the extent that she was the beneficiary of a $50 million trust, lived a dangerous lifestyle, and was so desperate for money that he would prostitute his daughter.

In response to the revised complaint, the defendants, pursuant to Practice Book § 10-39, filed a motion to strike all counts brought against them.[6] In support of their motion to strike, the defendants argued in relevant part that the "plaintiff's claims of defamation within counts nine and twelve fail to allege sufficient facts to comply with the

[4] The plaintiff's operative complaint does not allege with specificity when the defendants made the allegedly defamatory statements.

[5] The plaintiff's operative complaint does not allege with whom the plaintiff engaged in physical violence.

[6] Practice Book § 10-39 provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ."

heightened pleading requirements for such claims." The defendants also argued that the intentional infliction of emotional distress claims against them, counts seven and ten, failed to state a claim because the plaintiff did not allege that they engaged in any outrageous or extreme conduct. The defendants argued that the prima facie tort claims against them, counts eight and eleven, should also be stricken because "the allegations supporting the claims are already addressed by other causes of action."

The plaintiff filed an objection to the motion to strike. The plaintiff argued that he should be afforded and is entitled to every reasonable inference drawn from the pleadings at that stage and that those inferences support the claims for intentional infliction of emotional distress, defamation and prima facie tort. The plaintiff argued that, "[a]t a minimum, there is evidence to support the claims that the . . . defendants conspired to [and/or] directly acted to deprive the plaintiff of substantial real estate holdings and millions of dollars and conspired to and directly acted to defame the plaintiff and to deprive him of a relationship with his daughter, notwithstanding court orders allowing the plaintiff regular visitation."

In response to the plaintiff's objection, the defendants filed a reply, arguing that the "plaintiff has only made dramatic conclusions that the [defendants] slandered him in discussions with [the department] and fails to allege any facts supporting when these statements were published, to whom they were published, or *how his reputation was damaged*. . . . The complaint should be stricken due to the lack of the requisite factual allegations within the complaint coupled with the admission that the plaintiff needs to conduct discovery to find the basic information required to properly plead this cause of action." (Citations omitted; emphasis added.)

On August 21, 2019, the trial court, *Sheridan, J.*, issued a memorandum of decision granting the motion to strike

as to counts seven, eight, ten and eleven but denying the motion to strike as to counts nine and twelve, the defamation counts. With respect to counts nine and twelve, the court analyzed the sufficiency of the allegations contained in the original complaint, not the operative revised complaint.

On August 28, 2019, the defendants filed a motion for reargument and reconsideration. The defendants argued that the court's decision in regard to counts nine and twelve should be reconsidered because controlling appellate authority requires that defamation must be pleaded with specificity. As a result, the defendants argued, "the instant decision is inconsistent with controlling precedent and should be reconsidered." Additionally, the defendants argued that the court improperly analyzed the sufficiency of the original complaint dated October 6, 2017, rather than the sufficiency of the revised complaint dated March 1, 2019. The court denied the defendants' motion without comment on November 19, 2019.

The defendants then filed a motion for clarification and/or articulation, again raising that the court's August 21, 2019 ruling on the motion to strike had improperly analyzed the sufficiency of the original complaint, rather than the operative complaint. In response to the defendants' motion, the court issued a decision on March 14, 2022, in which it reconsidered its August 21, 2019 ruling on the motion to strike with respect to counts nine and twelve. After setting forth the relevant allegations from the operative complaint, the court concluded in relevant part that, "even when construed broadly and realistically, the allegations in count[s] nine and twelve fail[ed] to sufficiently allege a claim for defamation with the requisite specificity as described in the relevant case law."[7] Accordingly, the

[7] The court relied upon *Stevens* v. *Helming*, 163 Conn. App. 241, 247 n.3, 135 A.3d 728 (2016), for the proposition that the plaintiff's pleadings failed to meet the level of specificity required to plead defamation. We discuss that case in greater depth subsequently in this opinion.

court effectively set aside its prior ruling and struck counts nine and twelve.

On March 24, 2022, the plaintiff filed a motion for judgment pursuant to Practice Book § 10-44,[8] stating that he declines to replead and asking the court to enter judgment on all counts brought against the defendants. On March 31, 2022, before the trial court acted on the plaintiff's motion for judgment, the plaintiff filed an appeal with this court challenging the court's March 14, 2022 order striking counts nine and twelve. The trial court subsequently granted the plaintiff's motion for judgment and ordered that "judgment is entered in favor of the defendant[s] on counts nine and twelve of the [operative] complaint."

This court, sua sponte, issued the following order on June 22, 2022: "The parties are hereby ordered to file memoranda . . . and give reasons, if any, why the appeal should not be dismissed for lack of a final judgment because judgment had not been rendered on any of the stricken counts of the amended complaint when the appeal was filed; see Practice Book §§ 10-44 and 61-3; *Pellecchia* v. *Connecticut Light & Power Co.*, 139 Conn. App. 88, 90–91 [54 A.3d 658] (2012), cert. denied, 307 Conn. [9]50 [60 A.3d 740] (2013); unless judgment is rendered on all of the stricken counts of the amended complaint as to the defendants-appellees Diana Rabbani and Shahram Rabbani and the plaintiff-appellant files an amended appeal. See Practice Book § 61-9."

Thereafter, the plaintiff filed a motion for judgment with the trial court with respect to the remaining stricken

[8] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; providing that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . ."

counts brought against the defendants. On June 27, 2022, the court, *Cobb*, *J.*, granted the plaintiff's motion and rendered judgment on all counts brought against the defendants. The plaintiff filed a response to this court's motion to dismiss, informing the court that he had obtained a final judgment and filed an amended appeal in accordance with Practice Book § 61-9.[9]

In his amended appeal, the plaintiff claims that the court improperly struck counts nine and twelve of the operative complaint for failure to plead defamation with the requisite pleading specificity. According to the plaintiff, counts nine and twelve of the operative complaint "adequately identify the alleged defamatory statements, who made them and to whom they were made, which is what is required of defamation pleadings under Connecticut law and practice." The defendants counter that "[t]he trial court properly determined that the allegations in counts nine and twelve of the operative complaint fell short of the pleading standard for defamation."

We begin by setting forth the controlling legal principles, the elements of defamation and the pleading requisites that relate to such. "A defamatory statement is defined as a communication that tends to harm the reputation of

[9] Practice Book § 61-9 provides in relevant part: "Should the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1. . . . If the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed. . . ."

The plaintiff filed his original appeal from an order granting a motion to strike. The granting of a motion to strike is not a final judgment. *Gold* v. *Rowland*, 296 Conn. 186, 242, 994 A.2d 106 (2010). The plaintiff then filed an amended appeal from the court's granting of the plaintiff's motion for judgment. Although the plaintiff's original appeal was jurisdictionally defective for a lack of a final judgment, he properly filed an amended appeal under Practice Book § 61-9 from a judgment from which an original appeal could have been filed. Accordingly, we dismiss the original appeal for a lack of subject matter jurisdiction. The amended appeal is properly before this court.

another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . .'' (Internal quotation marks omitted.) *NetScout Systems*, *Inc.* v. *Gartner*, *Inc.*, 334 Conn. 396, 410, 223 A.3d 37 (2020). ''Defamation is comprised of the torts of libel and slander: slander is oral defamation and libel is written defamation.''[10] (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 430 n.30, 125 A.3d 920 (2015).

''At common law, [t]o establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) *the plaintiff's reputation suffered injury as a result of the statement*.'' (Emphasis added; internal quotation marks omitted.) *NetScout Systems*, *Inc.* v. *Gartner*, *Inc.*, supra, 334 Conn. 410. ''Each statement furnishes a separate cause of action and requires proof of each of the elements for defamation.'' *Gleason* v. *Smolinski*, supra, 319 Conn. 431.

The court, in granting the defendants' motion to strike, determined that, ''even when construed broadly and realistically, the allegations in count[s] nine and twelve fail to sufficiently allege a claim for defamation with the requisite specificity as described in the relevant case law.'' In so holding, the court relied on language in *Stevens* v. *Helming*, 163 Conn. App. 241, 247 n.3, 135 A.3d 728 (2016) (*Helming*), regarding the level of specificity required to plead defamation. The defendants argue that *Helming* ''required specificity in pleading [defamation].'' The defendants assert that to plead defamation with sufficient specificity, the plaintiff must ''identify the statements, the third

[10] The same analysis applies to both slander and libel. *DeMorais* v. *Wisniowski*, 81 Conn. App. 595, 603 n.6, 841 A.2d 226, cert. denied, 268 Conn. 923, 848 A.2d 472 (2004).

parties to whom the allegedly defamatory statements were made and when the statements were made within the complaint." The plaintiff counters that under *Helming*, a defamation pleading is sufficient if it is detailed enough to afford the defendant sufficient notice of the communications and enable him to defend himself. He asserts that "[a] defamation pleading should be held sufficiently specific when it identifies the speaker, recipient and nature of the alleged defamatory statements."

In *Helming*, the plaintiff in a defamation action appealed from the court's granting of summary judgment in favor of the defendants. *Stevens* v. *Helming*, supra, 163 Conn. App. 242. The plaintiff claimed that the court improperly failed to consider an allegation concerning a defamatory statement made by the individual defendant that was not specifically pleaded in the complaint but was raised for the first time in the plaintiff's surreply to the defendants' motion for summary judgment. Id., 244. This court affirmed the trial court's granting of summary judgment in favor of the defendants on the narrow ground that the trial court, in ruling on the defendants' motion for summary judgment, was limited to consideration of those facts alleged in the complaint standing alone, which could not fairly be read to include the alleged defamatory statement raised for the first time in a surreply brief. Id., 246. This court noted that the failure to include the allegation in the complaint could not be overlooked under the rubric that we read pleadings broadly and realistically, as that rule "is not a panacea for every instance where a party fails to adhere to the basic procedural requirements of pleading, especially in the context of a defamation [count]." Id., 246–47.

Although not necessary to its holding, the court added the following by way of a footnote: "Although this court has not addressed the issue, we find persuasive the reasoning of various Superior Courts in requiring specificity in pleading defamation. A claim of [defamation] must be pl[eaded] with specificity, as the precise meaning and

choice of words employed is a crucial factor in any evaluation of falsity. The allegations should set forth facts . . . sufficient to apprise the defendant of the claim made against him . . . . [A] complaint for defamation must, on its face, specifically identify what allegedly defamatory statements were made, by whom, and to whom . . . .'' (Internal quotation marks omitted.) Id., 247 n.3. Because *Helming* was decided on separate, unrelated grounds, this language regarding the specificity of pleadings in defamation actions is dicta.[11] See *Healey* v. *Mantell*, 216 Conn. App. 514, 526, 285 A.3d 823 (2022) (''[d]ictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case'' (internal quotation marks omitted)).

We need not reach the question of the degree of particularity required to plead defamation because the plaintiff has utterly failed to allege reputational harm, an element required to establish a prima facie case of defamation. This court has held that we ''may affirm a trial court's decision that reaches the right result, albeit for [a different] reason.'' (Internal quotation marks omitted.) *Fairfield Shores, LLC* v. *DeSalvo*, 205 Conn. App. 96, 111, 256 A.3d 716 (2021) (affirming judgment of trial court when this court agreed with alternative ground offered by party in support of affirming judgment).

The defendants assert in their principal appellate brief that the plaintiff's allegations of defamation ''do not suffice

[11] We note that Superior Court decisions post-*Helming* are split as to the specificity required to plead defamation. See, e.g., *A Better Way Wholesale Autos, Inc.* v. *Better Business Bureau of Connecticut*, Superior Court, judicial district of Waterbury, Docket No. CV-14-6025379-S (October 19, 2021) (granting summary judgment when ''[t]he operative complaint . . . neglect[ed] to identify any specific words used, the date on which those words were uttered or published, or the specific individual or entity that employed the allegedly offending words''); *Bartucca* v. *Career Team, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-16-6068094-S (August 4, 2017) (denying motion to strike when plaintiff pleaded subject matter of defamatory statements, who made statements, and to whom statements were made).

as assertions of . . . how his reputation was damaged. . . . Moreover, the plaintiff simply claims fear, terror, and emotional distress but never alleges any facts showing how his reputation was . . . damaged as a result of the . . . alleged communications to [the department]."[12] (Citations omitted; internal quotation marks omitted.) Thus, the defendants have proffered that the plaintiff failed to allege reputational harm, an element necessary to establish a prima facie case of defamation, as an alternative ground to affirm the court's judgment.[13] Failure to plead all elements of a claim is dispositive of the action. *Mercer* v. *Champion*, 139 Conn. App. 216, 235, 55 A.3d 772 (2012). Accordingly, for the reasons that follow, we affirm the court's decision to grant the defendants' motion to strike.

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts

[12] Although the defendants' brief put the plaintiff on notice of this alternative ground for affirming the court's judgment, he failed to respond or to allege any reputational harm in his reply brief.

[13] In neither his brief nor at oral argument before this court did the plaintiff assert that he was denied the opportunity to replead his cause of action after the court had granted the defendants' motion to strike. Rather than asking to replead, the plaintiff simply has continued to assert that the operative complaint sufficiently alleged a cause of action for defamation. Regarding the element of reputational harm, the plaintiff's counsel insisted at oral argument that reputational harm can be reasonably inferred, given the context, from the facts pertaining to harm that the plaintiff pleaded.

alleged." (Internal quotation marks omitted.) *Campbell* v. *Porter*, 212 Conn. App. 377, 397–98, 275 A.3d 684 (2022). A motion to strike is also properly granted if the complaint lacks sufficient factual allegations that, if proven, would satisfy all of the elements of the cause of action asserted. See *Mercer* v. *Champion*, supra, 139 Conn. App. 235.

Whether a party must expressly allege facts sufficient to prove the last common-law element of defamation, reputational harm, turns on the type of defamation asserted, defamation per se or defamation per quod. "While all libel was once actionable without proof of special damages, a distinction arose between libel per se and libel per quod. . . . A libel per quod is not libelous on the face of the communication, but becomes libelous in light of extrinsic facts known by the recipient of the communication. . . . When a plaintiff brings an action in libel per quod, he must plead and prove actual damages in order to recover. . . .

"Libel per se, on the other hand, is a libel the defamatory meaning of which is apparent on the face of the statement and is actionable without proof of actual damages. . . . When the defamatory words are actionable per se, the law conclusively presumes the existence of injury to the plaintiff's reputation. He is required neither to plead nor to prove it." (Internal quotation marks omitted.) *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, 77 Conn. App. 846, 852, 825 A.2d 827, cert. denied, 267 Conn. 901, 838 A.2d 210 (2003).

"Statements deemed defamatory per se are ones in which the defamatory meaning of the speech is apparent on the face of the statement. . . . Our state has generally recognized two classes of defamation per se: (1) statements that accuse a party of a crime involving moral turpitude or to which an infamous penalty is attached, and (2) statements that accuse a party of improper conduct or lack of skill or integrity in his or her profession or business and the statement is calculated to cause injury

to that party in such profession or business." (Internal quotation marks omitted.) *Silano* v. *Cooney*, 189 Conn. App. 235, 242, 207 A.3d 84 (2019).

By contrast, there is no such presumption of reputational harm for defamation per quod. *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, supra, 77 Conn. App. 852. "A libel per quod is not libelous on the face of the communication, but becomes libelous in light of extrinsic facts known by the recipient of the communication. . . . When a plaintiff brings an action in libel per quod, he must plead and prove actual damages in order to recover." Id.

Whether the plaintiff here was required to plead reputational harm turns on whether the allegedly defamatory statements are defamation per se or defamation per quod. The plaintiff has not demonstrated that the alleged defamatory statements fall within either category of defamation per se. The plaintiff alleged that Shahram told the department "that the plaintiff was in the habit of sleeping with transvestite prostitutes . . . ." The plaintiff alleged that Diana told the department "that [the plaintiff] engaged in physical violence, that [the plaintiff] had no interest in seeing or spending time with . . . his daughter, that the plaintiff's only interest in [his child] was that [his child] was the beneficiary of a $50 million trust, that the plaintiff was so desperate for money that he would prostitute [his child] . . . and . . . that the plaintiff lives a dangerous lifestyle . . . ." The plaintiff did not rely upon the defamation per se presumption either in the trial court or on appeal. His brief contains no analysis of that issue and his counsel conceded at oral argument that these statements are not defamatory per se.[14] As such, the alleged statements, if defamatory, must be defamation per quod.

We now turn to the facts pleaded in the operative complaint. To state a claim of defamation per quod, the plaintiff

[14] In light of the plaintiff's failure to analyze this question, we express no view regarding whether any of the alleged defamatory statements constitute defamation per se.

must have alleged, among other elements, that he suffered an injury of reputational harm as a result of the allegedly defamatory statement. If the plaintiff has not properly pleaded all four elements of defamation, the defamation count is properly stricken. *Mercer* v. *Champion*, supra, 139 Conn. App. 235 (affirming court's striking of counts when plaintiff's complaint lacked sufficient factual allegations to satisfy all elements of cause of action). The plaintiff argues in his operative complaint only that he suffered fear, terror and emotional distress as a result of the alleged defamatory statements made by the defendants.[15] The plaintiff has pleaded no other harm; at oral argument before this court, the plaintiff's counsel only argued that the court may reasonably infer reputational harm from the harms pleaded. Neither fear, terror nor emotional distress, however, relate to the community perception of the plaintiff, as is required to plead reputational harm. *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 410. None of the harms alleged lend themselves to the conclusion that, as a result of the statements made by the defendants, the plaintiff's reputation or standing in the community suffered or that any third person was deterred from associating or dealing with him. Although the plaintiff's counsel argued at oral argument before this court that reputational harm reasonably can be inferred from the harms pleaded, he conceded that neither fear nor terror nor emotional distress are reputational harms. Even viewing all well pleaded facts and reasonable inferences in favor of the plaintiff, he has failed to meet his requirement of pleading reputational harm.[16]

[15] In relevant part, count nine of the operative complaint states: "As a direct and proximate result of the acts and omissions described herein the plaintiff suffered fear, terror, and extreme emotional distress for which he seeks money damages from the defendant Shahram Rabbani." In relevant part, count twelve of the operative complaint states: "As a direct and proximate result of the acts and omissions described herein, the plaintiff suffered fear, terror and emotional distress." This is the only language of the operative complaint alleging harm against the defendants.

[16] We note that the plaintiff did plead reputational harm in count two of his operative complaint, which alleges a defamation claim against Edward Khalily.

In sum, the plaintiff was required to plead that his reputation suffered injury as a result of the allegedly defamatory statements in order to have sufficiently stated a claim for defamation per quod. The plaintiff's complaint is utterly devoid of any allegations of harm that he suffered to his reputation as a result of the allegedly defamatory statements made by the defendants. Accordingly, the court properly granted the defendants' motion to strike.

The judgment is affirmed.

In this opinion the other judges concurred.

JANETTA MARRERO *v.* HOFFMAN OF SIMSBURY, INC.
(AC 45471)

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

Syllabus

The plaintiff sought to recover damages for the alleged wrongful termination of her employment by the defendant, which she claimed was the result of pregnancy discrimination and gender discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The plaintiff began working for the defendant in 2010 as a service advisor. Although she was a good salesperson, all of her supervisors had documented ongoing concerns regarding her attitude and conduct, and she had received six separate written warnings relating to incidents in which she demonstrated a bad attitude, bad conduct or insubordination. One such warning, which she received in April, 2018, indicated that her employment would be terminated if she continued to behave in an insubordinate manner. In October, 2018, the plaintiff's supervisor, B, called her into his office to discuss his concerns regarding her sales numbers and customer service. The plaintiff responded by criticizing

---

In count two, the plaintiff alleged that "[t]he statements . . . [made by] Edward Khalily . . . were untrue and defamatory and *damaged the reputation of the plaintiff by making him seem unfit to parent his minor child* . . . ." (Emphasis added.) By contrast, in counts nine and twelve, the plaintiff failed to allege that he suffered *any* reputational harm as a result of the defendants' allegedly defamatory statements. Instead, he argued only that he suffered fear, terror and emotional harm, none of which reasonably construed assert the required harm to his reputation.

B's management of their department. She then asked B if he had raised his concerns because she was pregnant or because she had not told him that she was pregnant. When, in response, B asked the plaintiff if she was pregnant, she replied, "That's none of your business." B then told the plaintiff to leave his office before the conversation became hostile. She refused, remaining there for approximately one hour until another employee intervened. The next day, the plaintiff was dismissed, purportedly for reasons of insubordination and creating a hostile work environment. At the time, she was six weeks pregnant. In January, 2019, the plaintiff initiated a complaint with the Commission on Human Rights and Opportunities (CHRO), which later issued a release of jurisdiction letter, following which the plaintiff commenced this action. In February, 2019, the defendant promoted another employee, who also was female, to replace the plaintiff. At that time, B did not believe that this employee was pregnant; however, the record was otherwise silent as to whether the employee was pregnant, was planning to become pregnant or was of childbearing age. The defendant filed a motion for summary judgment, claiming that the plaintiff had failed to make a prima facie case for pregnancy or gender discrimination, that her employment was terminated for a legitimate, nondiscriminatory reason, and that she failed to show that such reason was a pretext for discrimination. The trial court granted the motion and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's claim of gender discrimination: the plaintiff failed to demonstrate a genuine issue of material fact as to the inference of nondiscrimination arising from the defendant's promotion of the plaintiff's replacement from the same protected class as the plaintiff, despite her claim that the promotion was in response to the defendant learning of her CHRO complaint, because there was no evidence in the record indicating when the defendant had received notice of such complaint; moreover, the only evidence the plaintiff offered to overcome the inference of nondiscrimination, namely, that B regularly went out for drinks with his male colleagues but did not invite her, was insufficient to raise a genuine issue of material fact of an intent to discriminate; accordingly, the plaintiff failed to present evidence sufficient to establish a prima facie case of gender discrimination, and, consequently, this court did not need to address whether she presented sufficient evidence to raise a genuine issue of material fact that the defendant's stated reason for her dismissal was a pretext for gender discrimination.
2. The trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's claim of pregnancy discrimination: the plaintiff's claim that the trial court erred in crediting B's statement that he did not know that the plaintiff was pregnant when he terminated her employment over her own testimony that she told B that

she was pregnant during their confrontation the day before her dismissal was unavailing because the record reflected that the plaintiff testified that she never told B, her supervisor, or any other employee that she was pregnant and, instead, when asked about the matter, told B that it was none of his business; moreover, even if this court assumed that the plaintiff had presented evidence sufficient to establish a prima facie case of pregnancy discrimination, she failed to present evidence sufficient to raise a genuine issue of material fact that the defendant's nondiscriminatory reason for her dismissal was pretextual, as the plaintiff did not seriously dispute that the defendant had submitted evidence of a legitimate, nondiscriminatory reason for her dismissal in support of its motion for summary judgment, including her performance reviews and warnings that she had received regarding, inter alia, her insubordination, conduct and attitude, nor did she dispute that several of her supervisors had issues with her attitude throughout her tenure with the defendant, even prior to her pregnancy; furthermore, contrary to the plaintiff's assertions, the temporal proximity between B allegedly learning of her pregnancy and her dismissal was insufficient, on its own, to support a claim of pretext; additionally, evidence that the plaintiff was a profitable producer and that a male coworker, C, whom the plaintiff claimed was similarly situated, was not dismissed from his position, was insufficient to demonstrate that the defendant's reason for terminating her employment was pretextual because evidence that the plaintiff performed some job duties well did not contradict the substantial evidence of her other job deficiencies and the plaintiff and C had very different discipline histories.

Argued May 11—officially released July 25, 2023

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sicilian, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Carolyn A. Trotta, with whom was *David R. Golder*, for the appellee (defendant).

Opinion

BRIGHT, C. J. In this employment discrimination action, the plaintiff, Janetta Marrero, claims on appeal

that the trial court improperly rendered summary judgment in favor of the defendant, Hoffman of Simsbury, Inc., her former employer, on her complaint sounding in pregnancy discrimination and gender discrimination in violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. We affirm the judgment of the trial court.

The record reveals the following facts, viewed in the light most favorable to the plaintiff, and procedural history. The plaintiff, who is a woman, began working for the defendant in September, 2010, as a service advisor at Hoffman Honda, one of the defendant's car dealerships. Sometime in 2014, the plaintiff was transferred to Hoffman Ford, another dealership owned by the defendant. In or around May, 2015, the plaintiff was transferred back to Hoffman Honda. Although the plaintiff had strong sales numbers and was a good salesperson in many respects, throughout her tenure with the defendant she demonstrated what colleagues and customers described as a "poor attitude" and rudeness. Each of the plaintiff's four supervisors documented ongoing concerns regarding her attitude and conduct. The plaintiff received six separate written warnings over the course of her employment with the defendant, each documenting an incident or incidents in which the plaintiff demonstrated a bad attitude, bad conduct, or insubordination. For example, in 2017, the plaintiff was suspended for three days for "[s]ubstandard work," "[c]onduct," "[a]ttitude," and "[c]arelessness" after her supervisor, Jim Berube, received complaints from two customers regarding the plaintiff's rude conduct while interacting with them. On April 27, 2018, Berube came into the dealership and walked into the plaintiff's office to discuss a Yelp review. He noticed the plaintiff was writing an email to him and asked her what was the subject of the email. The plaintiff informed Berube that the email was "for a goodwill request." Berube then

noticed a waiting customer and asked the plaintiff whether the customer was being helped. In response, the plaintiff told Berube that he "should not tell her how to do her job" and should not look at her computer as it could display personal information. As a result, the plaintiff received a written warning informing her that she faced termination of her employment if she continued to behave in such an insubordinate manner.

On October 18, 2018, Berube called the plaintiff into his office to discuss two work-related issues—her sales numbers and her customer service. The plaintiff responded by telling Berube that her sales numbers and customer service ratings were the highest of the defendant's service advisors. The plaintiff then asked Berube, "[W]hat is this really about?" She then told him, "You have nothing on me." The plaintiff also criticized Berube's management of the department, telling him that he did not "have things in place . . . ." Berube responded by telling the plaintiff, "This is getting too hostile." The plaintiff then asked Berube if he brought her into his office and raised these issues because she was pregnant or because she had not informed Berube that she was pregnant. In response, Berube asked the plaintiff if she was pregnant, to which she replied, "That's none of your business." Berube then told the plaintiff that she had to leave the office before the conversation became hostile. The plaintiff refused to leave Berube's office for approximately one hour until another employee, Meri Robert, spoke with her and agreed to be a witness to the fact that the plaintiff did not quit her job. The defendant fired the plaintiff the next day for insubordination and for creating a hostile work environment. At that time, the plaintiff was six weeks pregnant.

Approximately four months later, on February 18, 2019, the defendant promoted another employee, who also was female, to replace the plaintiff. At the time

that he promoted the plaintiff's replacement, Berube did not believe that she was pregnant. Other than Berube's belief, the record is silent as to whether the plaintiff's replacement actually was pregnant, planning to become pregnant, or of childbearing age when she was promoted.

On or about January 7, 2019, the plaintiff initiated a complaint with the Commission on Human Rights and Opportunities (CHRO), which issued a release of jurisdiction letter on March 27, 2020. The plaintiff then commenced an action in the Superior Court. In her complaint, the plaintiff asserted one count each of pregnancy discrimination and gender discrimination. On August 27, 2020, the defendant filed its answer and special defenses to the plaintiff's complaint. On November 17, 2021, the defendant filed a motion for summary judgment, attaching to its accompanying memorandum of law various documents in support thereof, including portions of the deposition testimony of the plaintiff; Berube; Daniel Covalli, one of the plaintiff's coworkers; and Dwight Dery, the plaintiff's first supervisor. The documents also consisted of several performance reviews and written warnings the plaintiff received during her tenure with the defendant and affidavits from Robert and Berube.

The defendant argued that, on the basis of the plaintiff's deposition testimony and other evidence, there was no genuine issue of material fact that it was entitled to judgment as a matter of law on the plaintiff's discrimination claims because (1) the plaintiff failed to make a prima facie case for pregnancy or gender discrimination,[1] (2) her employment was terminated for a legitimate, nondiscriminatory reason—her bad attitude and

[1] The defendant argued, inter alia, that the plaintiff failed to establish a prima facie case of pregnancy discrimination because Berube did not know that the plaintiff was pregnant. As to gender discrimination, the defendant argued, inter alia, that the plaintiff could not establish a prima facie case because the defendant had replaced her with another female.

insubordination—and (3) the plaintiff failed to show that the defendant's reason for terminating her employment was a pretext for discrimination.

On February 2, 2022, the plaintiff filed her objection to the defendant's motion for summary judgment, including several exhibits, and argued that she had established a prima facie case of discrimination and that genuine issues of material fact existed as to whether the plaintiff's dismissal was motivated by discrimination. On February 15, 2022, the defendant filed its reply.

The court heard argument on the defendant's motion for summary judgment on March 14, 2022, and it issued a memorandum of decision granting the defendant's motion on April 14, 2022. At the outset of its decision, the court set forth the standard of review governing summary judgment motions and properly determined that the plaintiff's claims fell under the burden shifting framework adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*), pursuant to which "the employee must first make a prima facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Rossova* v. *Charter Communications, LLC*, 211 Conn. App. 676, 684–85, 273 A.3d 697 (2022). "In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an

inference of discrimination." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

With regard to the plaintiff's gender discrimination claim, the court concluded that, although the plaintiff established the first three elements of a prima facie case, she had failed to show that her dismissal occurred under circumstances that gave rise to an inference of discrimination. The court reasoned that, because Berube hired a female to replace the plaintiff, an inference against discrimination was appropriate. See *Fleming* v. *MaxMara USA, Inc.*, 371 Fed. Appx. 115, 116–17 (2d Cir. 2010) (affirming summary judgment in favor of defendant employer in racial discrimination case because no inference of discrimination could be drawn when Black female plaintiff was replaced by Black female); *Rodriguez* v. *New York City Health & Hospitals Corp.*, United States District Court, Docket No. 14 Civ. 4960 (BMC) (E.D.N.Y. September 8, 2015) ("[i]t is extremely difficult, if not practically impossible to establish discrimination where, as here, plaintiff was passed over so an employer can hire another member of plaintiff's same protected class" (internal quotation marks omitted)).[2] In addition, the court was unpersuaded by the plaintiff's argument that evidence that Berube and other male service advisors routinely went out for drinks after work on Fridays, and that the plaintiff was never invited, was sufficient to create an inference of discrimination. See *Meyer* v. *McDonald*, 241 F. Supp. 3d 379, 391 (E.D.N.Y. 2017) ("[t]he inference [against discrimination] is not dispositive, but plaintiff must overcome it in order to establish an inference of discrimination"), aff'd sub nom. *Meyer* v. *Shulkin*, 722

[2] "[I]t is well settled that '[w]e look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both.' " *Tomick* v. *United Parcel Service, Inc.*, 157 Conn. App. 312, 326, 115 A.3d 1143 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016).

Fed. Appx. 26 (2d Cir. 2018), cert. denied sub nom. *Meyer* v. *Wilkie*, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018).

The court further held that, "[e]ven if one were to assume that the plaintiff could satisfy the first prong of the *McDonnell Douglas* test, the defendant has offered substantial evidence of a legitimate, nondiscriminatory basis for her termination. The evidence demonstrates a history of concern about the plaintiff's attitude and interaction with her supervisor, her coworkers, and the defendant's customers. Concerns about attitude and insubordination are legitimate reasons for adverse employment actions." The court thereafter concluded that "the plaintiff's evidence falls significantly short of evidence that could support a rational finding that the defendant's legitimate, nondiscriminatory reason for the termination was a pretext for discrimination. The defendant acknowledges that the plaintiff's sales numbers were strong and that a vice president acknowledged as much. However, evidence that the plaintiff was a profitable producer does not contradict the substantial evidence of the plaintiff's history of poor attitude, confrontational personality, including with customers, and insubordination, nor does it render the defendant's reasons for terminating the plaintiff implausible. . . . The plaintiff's claim that a male colleague was not similarly disciplined is based only on her testimony that the colleague had a single confrontation with his supervisor. There is no evidence that the colleague had a similar history of complaints, coaching, and warnings about attitude and behavior. Finally, there is no evidence that the plaintiff was not promoted to manager because of her gender. The evidence demonstrates that neither the plaintiff nor any . . . male service advisor was promoted to the position of service manager, but instead the defendant filled the positions with external candidates. There is no evidence that the plaintiff was

treated differently than similarly situated male colleagues." (Citation omitted.)

Similarly, the court determined that "[t]he record is, at best, unclear as to whether there is any evidence that the plaintiff's supervisor was aware of the plaintiff's pregnancy." The court concluded that, "there is a dearth of evidence, other than the plaintiff's speculation, that her pregnancy had anything to do with her termination. As reflected above, even if the court were to assume that the plaintiff had established a prima facie case that her termination was based on her pregnancy, the defendant has demonstrated through substantial, unrebutted evidence that there was a nondiscriminatory reason for the plaintiff's termination and the plaintiff has failed to offer evidence that casts doubt on the plausibility of the defendant's reason or that would support a reasonable inference that the defendant's stated reason was a pretext masking a discriminatory purpose or intent." Accordingly, the court rendered summary judgment in favor of the defendant. This appeal followed. Additional facts will be set forth as necessary to our analysis of the plaintiff's claims.

On appeal, the plaintiff claims that the court erred in rendering summary judgment on her gender and pregnancy discrimination claims, arguing that she both established prima facie cases of pregnancy and gender discrimination and presented evidence sufficient to demonstrate the existence of a genuine issue of material fact as to whether the defendant's purported nondiscriminatory justification for her discharge was a pretext for unlawful discrimination.

The standard of review of a trial court's ruling on summary judgment is well established. "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. . . . Our review of the trial court's decision to [deny] the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Miller* v. *Doe*, 214 Conn. App. 35, 44–45, 279 A.3d 286 (2022).

I

The plaintiff first claims, with respect to her gender discrimination allegations, that the court erred in concluding that she had failed to present sufficient evidence of an inference of discrimination and of pretext.[3] We are not persuaded.

As to evidence of an inference of discrimination necessary to set forth a prima facie case, the plaintiff argues that the court erred by giving "significant weight to the evidence of the defendant hiring a nonpregnant female to replace the plaintiff." In support of her argument, the plaintiff relies on *Miles* v. *Dell, Inc.*, 429 F.3d 480, 488 (4th Cir. 2005), in which the United States Court of Appeals for the Fourth Circuit acknowledged that an employer "hir[ing] someone from within the plaintiff's protected class in order 'to disguise [an] act of discrimination toward the plaintiff' " is "[o]ne clear example" of a replacement within the plaintiff's protected class that does not give rise to an inference of nondiscrimination. Id. The plaintiff argues that, because Berube did

[3] The plaintiff's principal appellate brief presents her pregnancy discrimination claim first. Because the trial court addressed the plaintiff's gender discrimination claim first, so too do we.

not promote the plaintiff's replacement until February 18, 2019, more than one month after she had filed her CHRO complaint, "[r]ather than undermining the plaintiff's gender discrimination claim, Berube's [promotion] of a female replacement supports it." See, e.g., *Pride* v. *Summit Apartments*, Docket No. 5:09-CV-0861 (GTS/ATB), 2012 WL 2912937, *8 (N.D.N.Y. July 16, 2012) (if plaintiff's replacement "was hired only after [the plaintiff] filed a complaint against [the defendant] . . . it is possible that a rational fact finder could conclude that, rather than rebut the inference of discrimination, the hiring of the . . . employee was merely a cover-up of the prior discrimination" (emphasis omitted)). The problem with the plaintiff's argument is that there is nothing in the record indicating when the defendant received notice of the plaintiff's CHRO complaint.[4] Once the defendant submitted undisputed evidence of its promotion of the plaintiff's replacement from the same protected class as the plaintiff, the plaintiff had the burden to present evidence raising a genuine issue of material fact as to whether the promotion of her replacement was in response to the defendant learning of the plaintiff's CHRO complaint. See *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 743, 196 A.3d 328 (2018) ("a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue" (internal quotation marks omitted)). By failing to present any evidence of when the defendant received notice of her CHRO complaint, the plaintiff has not demonstrated a genuine issue of material fact as to the inference of nondiscrimination arising from the defendant's promotion of a female to replace the plaintiff.

[4] We note that, on appeal, the defendant represents that it did not receive notice of the plaintiff's CHRO complaint until March 1, 2019, after Berube had hired the plaintiff's replacement.

Furthermore, we agree with the trial court that the only evidence the plaintiff offered to overcome the inference of nondiscrimination—that Berube went out for drinks with his male colleagues but did not invite the plaintiff—was insufficient to raise a genuine issue of material fact of an intent to discriminate. See, e.g., *Dorfman* v. *Doar Communications, Inc.*, 314 Fed. Appx. 389, 390–91 (2d Cir. 2009) (plaintiff's exclusion from company event attended by younger employees did not create inference of discrimination); *Chapin* v. *Nationwide Mutual Ins. Co.*, United States District Court, Docket No. 2:05-cv-734 (S.D. Ohio March 26, 2007) ("cronyism does not necessarily constitute illegal discrimination"). The plaintiff, accordingly, failed to raise a genuine issue of material fact as to the existence of circumstances surrounding her dismissal that gave rise to an inference of gender discrimination. Given our agreement with the trial court's conclusion that the plaintiff failed to present sufficient evidence to establish a prima facie case of discrimination, we need not address whether she presented sufficient evidence to raise a genuine issue of material fact that the defendant's stated reason for the termination of her employment was a pretext for gender discrimination.

II

The plaintiff next claims that the court improperly rendered summary judgment with respect to her pregnancy claim because it (1) incorrectly credited Berube's testimony over hers, (2) failed to find an inference of discrimination given that the plaintiff's replacement was not pregnant and, therefore, was not in her protected class, and (3) ignored or discounted substantial evidence of pretext. We are not persuaded.

We first address the plaintiff's argument that the court improperly credited Berube's statement in his affidavit that he did not know that the plaintiff was pregnant

when he terminated her employment and failed to credit the plaintiff's testimony that she told Berube that she was pregnant during their confrontation the day before he terminated her employment. The plaintiff's argument misunderstands both the factual record and the court's analysis. The record reflects that the plaintiff never stated that she told Berube that she was pregnant. To the contrary, she testified at her deposition that, after she asked whether her treatment was due to her being pregnant and Berube asked if she was pregnant, the plaintiff told Berube that it was none of his business. The plaintiff further testified that she never told her supervisor or any fellow employee that she was pregnant.[5] On the basis of this record, the court concluded that the plaintiff's evidence that Berube knew of her pregnancy when he terminated her employment was, "at best, unclear . . . ." Significantly, the court did not conclude whether the plaintiff had made a prima facie case of pregnancy discrimination but, instead, concluded that, even if she had, the defendant had "demonstrated through substantial, unrebutted evidence that there was a nondiscriminatory reason for the plaintiff's termination" and the plaintiff had failed to present sufficient evidence to raise a genuine issue of material fact that the defendant's reason was a pretext for pregnancy discrimination. Thus, we review the court's conclusion as to pretext, assuming that the plaintiff had presented

[5] The plaintiff also testified that she told the spouse of one of the defendant's employees, Covalli, that she "might be" pregnant and she speculated that the spouse told Covalli, who told Berube prior to the confrontation on October 18, 2018. Covalli, as did Berube, stated under oath that he did not know the plaintiff was pregnant prior to her dismissal. Given that any conclusion that Covalli learned that the plaintiff was pregnant because the plaintiff told Covalli's wife that she might be pregnant and that Covalli then communicated to Berube that the plaintiff was pregnant is based on multiple layers of speculation, the trial court properly disregarded it as evidence that Berube knew of the plaintiff's pregnancy when he terminated her employment.

evidence sufficient to establish a prima facie case of pregnancy discrimination.[6]

The plaintiff does not seriously dispute that the defendant submitted unrebutted evidence of a nondiscriminatory reason for the plaintiff's dismissal in support of its motion for summary judgment. In particular, the defendant produced five of the performance reviews the plaintiff received during her time employed by the defendant, each of which documented ongoing concerns her supervisors had regarding her attitude and conduct. In addition, the defendant submitted the six warnings the plaintiff received regarding, inter alia, insubordination, conduct, and attitude. Last, the defendant introduced the deposition testimonies of the plaintiff and Berube describing the October 18, 2018 incident. Such evidence clearly amounts to a legitimate, nondiscriminatory reason for the plaintiff's dismissal. See, e.g., *Matima* v. *Celli*, 228 F.3d 68, 79 (2d Cir. 2000) ("insubordination and conduct that disrupts the workplace are 'legitimate reasons for firing an employee' "); *Duffy* v. *State Farm Mutual Automobile Ins. Co.*, 927 F. Supp. 587, 594 (E.D.N.Y. 1996) (employee's unsatisfactory job performance and bad attitude constituted legitimate, nondiscriminatory reasons for termination of employment). Notably, the plaintiff does not dispute that several supervisors took issue with her attitude throughout her tenure with the defendant, well before her pregnancy, or that the October 18, 2018 incident occurred. In fact, she testified that, during the incident, she criticized Berube's management and refused to leave his office for about one hour even after being asked to do so.

Consequently, the question before us is whether the plaintiff introduced evidence sufficient to raise a genuine issue of material fact as to whether the defendant's

[6] Given our assumption that the plaintiff has met her burden of establishing a prima facie case, we need not address her argument that she was entitled to an inference of discrimination because her replacement was not pregnant when she was hired.

stated reason was a pretext for unlawful discrimination. "To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] . . . . Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Citation omitted; internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28–29, 206 A.3d 194 (2019). The plaintiff argues that a reasonable fact finder could conclude that the defendant's stated reason for terminating her employment was a pretext for pregnancy discrimination on the basis of (1) the temporal proximity between Berube learning of the plaintiff's pregnancy and her dismissal shortly thereafter, (2) the existence of a similarly situated comparator in Covalli, who the plaintiff contends was treated differently under the same circumstances, and (3) the fact that "a mere one week . . . prior to the termination decision, the defendant's vice president told [her] that she was doing a great job."[7] We are not persuaded.

[7] The plaintiff also contends that the trial court did not apply the correct causation standard in evaluating her evidence. In advancing this argument, the plaintiff correctly states that the motivating factor test—pursuant to which a plaintiff need demonstrate only that the prohibited factor was at least one of the motivating factors in his or her dismissal rather than the but-for reason—is the correct causation standard. See *Wallace* v. *Caring Solutions, LLC*, 213 Conn. App. 605, 617, 278 A.3d 586 (2022). The plaintiff argues that, on the basis of the evidence she presented, "a jury could conclude [that the] plaintiff's pregnancy played a role in the defendant's decision to terminate [her employment]." We disagree that the court applied the wrong causation standard.

In determining whether the plaintiff had established a disputed issue of material fact as to whether the defendant's proffered nondiscriminatory reason for terminating her employment simply was a pretext for discrimination, the trial court quoted from this court's decision in *Rossova* v. *Charter*

Although the plaintiff correctly observes that a close temporal proximity between Berube learning of her pregnancy and terminating her employment may give rise to an inference of discrimination, "[t]emporal proximity alone is insufficient to defeat summary judgment at the pretext stage." *Kwan* v. *Andalex Group, LLC*, 737 F.3d 834, 847 (2d Cir. 2013); see also *Fairchild* v. *All American Check Cashing, Inc.*, 815 F.3d 959, 968 (5th Cir. 2016) ("[a]lthough the temporal proximity between the employer learning of the plaintiff's pregnancy and her termination may support a plaintiff's claim of pretext, such evidence—without more—is insufficient"); *Govori* v. *Goat Fifty, LLC*, 519 Fed. Appx. 732, 734 (2d Cir. 2013) ("temporal proximity . . . does not by itself raise a genuine issue of pretext"). Further, as the trial court correctly noted, "[t]here is no evidence that [Covalli] had a similar history of complaints, coaching, and warnings about attitude and behavior." In order for comparator evidence to be probative it "must establish that the plaintiff and the individuals to whom she seeks to compare herself were similarly situated in all material respects . . . . [A]n employee offered for comparison will be deemed to be similarly situated in all material respects if (1) . . . the plaintiff and those [she] maintains were similarly situated were subject to the same workplace standards and (2) . . . the conduct for which the employer imposed discipline was of comparable seriousness." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 514, 43 A.3d 69 (2012). Because the plaintiff and Covalli had very different discipline histories, the fact that the plaintiff was dismissed

Communications, LLC, supra, 211 Conn. App. 690, and stated that "[t]he plaintiff must . . . 'persuade the trier of fact, by a preponderance of the evidence, that the defendant's justification for her dismissal is merely a pretext and that the decision actually *was motivated by* illegal discriminatory bias.' " (Emphasis added.) Thus, the court correctly applied the motivating factor test.

and Covalli was not is insufficient to demonstrate that the defendant's reason for terminating the plaintiff's employment was pretextual. Last, as the court correctly stated, "evidence that the plaintiff was a profitable producer does not contradict the substantial evidence of the plaintiff's history of poor attitude, confrontational personality, including with customers, and insubordination, nor does it render the defendant's reasons for terminating the plaintiff implausible." Put another way, performing some job duties well is not evidence that termination of employment for other job deficiencies was a pretext for discrimination.

The undisputed evidence shows that the plaintiff received multiple warnings regarding her attitude, conduct, and insubordination and, in April, 2018, received notice that, upon another incident of insubordination, her employment could be terminated. The plaintiff does not dispute that, on October 18, 2018, she criticized Berube's management of his department and refused to leave his office for more than one hour. Consistent with the April, 2018 warning, the defendant terminated the plaintiff's employment. In sum, we agree with the trial court that "there is a dearth of evidence, other than the plaintiff's speculation, that her pregnancy had anything to do with her termination."[8] Because the

[8] The plaintiff argues that the court improperly required her to show evidence of "pretext plus." In particular, the plaintiff argues that the court required her to present additional independent evidence of discrimination rather than evidence sufficient for a jury to find pretext. We disagree.

On the basis of our review of the trial court's memorandum of decision, we conclude that the trial court simply required the plaintiff to meet the requirements of the *McDonnell Douglas* burden shifting analysis. See *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802–804. Moreover, as previously discussed in this opinion, the plaintiff failed to introduce evidence sufficient to demonstrate a genuine issue of material fact regarding whether the defendant's asserted reason for terminating her employment was a pretext for discrimination. Consequently, the plaintiff failed to present any evidence as to the falsity of the defendant's proffered explanation for her dismissal that would allow the trier of fact to "infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves* v.

defendant presented uncontroverted evidence of a nondiscriminatory reason for its employment termination decision and the plaintiff failed to present sufficient evidence raising a genuine issue of material fact that that reason was pretextual, the court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

TLOA OF CT, LLC *v.* MARCELINO TAIPE ET AL.
(AC 45844)

Alvord, Prescott and Clark, Js.

Syllabus

The plaintiff assignee of a municipal tax lien on certain real property in the city of Bridgeport owned by the defendant sought to foreclose the lien. At the time the defendant purchased the property in January, 2016, there were unpaid taxes assessed on the property from 2015. In April, 2017, the city filed the certificate of lien on the land records for the 2015 taxes owed on the property and subsequently assigned the tax lien to the plaintiff's predecessor in interest, which assigned the lien to the plaintiff. The defendant paid his property taxes as he received bills from the city. The first property tax bill he received was sent by the city to the defendant in July, 2017, at which time the city had already recorded and assigned to the plaintiff's predecessor in interest the tax lien, which remained due and owing on the property. The defendant never made any payments to the plaintiff in connection with the assigned lien. In May, 2020, the plaintiff commenced this action seeking to foreclose on the tax lien. In his answer, the defendant asserted that, under the applicable statute (§ 12-144b), the city was required to apply the amounts that he had paid from 2017 to 2020 first to the oldest outstanding taxes owed on the property, which he claimed were the taxes owed on the 2015 tax lien, by transferring those amounts to the plaintiff before applying any such amounts to the taxes that were due and owing to the city. The parties each filed a motion for summary judgment. The trial court granted the plaintiff's motion for summary judgment as to liability only and denied the defendant's motion for summary judgment, concluding that

---

Sanderson Plumbing Products, Inc., 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). We therefore reject the plaintiff's argument.

the plaintiff had established its prima facie case for foreclosure of a tax lien and that the defendant's asserted special defense of setoff was not viable. On the defendant's appeal to this court from the trial court's judgment of foreclosure by sale, *held* that the trial court properly granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment: contrary to the defendant's argument, the tax lien in question, once assigned, was no longer a debt owed to the city and, under such circumstances, the city had no legal obligation to forward to the plaintiff any tax payments that it received from the defendant, as § 12-144b makes no reference to third-party assignees of tax liens, and, had the legislature intended to require municipalities to do so, it easily could have accomplished that goal by using language making it clear that municipalities must transfer payments they receive or recover to third-party holders of previously assigned tax liens; moreover, when § 12-144b is viewed in relation to the statute concerning third-party assignees (§ 12-195h), and in the absence of any language whatsoever within § 12-144b referencing third-party holders of assigned tax liens, it cannot reasonably be inferred, solely from the language in § 12-144b requiring municipalities to "apply" tax payments that they receive or recover to "outstanding secured taxes," that the legislature intended to require municipalities to act, in effect, as loan servicers for third-party holders of municipal tax liens.

Argued May 9—officially released July 25, 2023

Procedural History

Action to foreclose a tax lien on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability only and denied the named defendant's motion for summary judgment; thereafter, the court, *Cirello*, *J.*, rendered a judgment of foreclosure by sale, from which the named defendant appealed to this court. *Affirmed.*

Thomas L. Kanasky, Jr., for the appellant (named defendant).

Gary J. Greene, with whom, on the brief, was *Sean V. Patel*, for the appellee (plaintiff).

Opinion

CLARK, J. In this foreclosure action, the defendant Marcelino Taipe[1] appeals from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, TLOA of CT, LLC. On appeal, the defendant claims that the court erred in granting the plaintiff's motion for summary judgment as to liability only and denying his motion for summary judgment. In particular, the defendant contends that the court improperly concluded that the city of Bridgeport (city) complied with General Statutes § 12-144b when it applied the defendant's tax payments to his current taxes owed to the city, rather than to the tax lien at issue in this appeal, which the city had already assigned to the plaintiff's predecessor in interest prior to receiving the payments at issue. We affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. On January 21, 2016, the defendant purchased the property located at 85 Gem Avenue in Bridgeport (property). At the time of the purchase, there were unpaid taxes assessed on the property from 2015. The court found that the city likely sent the 2015 tax bill to one of the previous owners of the property and that the defendant likely never received a 2015 tax bill from the city.

On April 5, 2017, the city filed a certificate of lien on the land records for the 2015 taxes owed on the property (tax lien). The city subsequently assigned the tax lien to TLOA Acquisitions, LLC-Series 2 on May 17, 2017, and recorded the assignment on May 18, 2017. TLOA Acquisitions, LLC-Series 2 thereafter assigned the tax lien to the plaintiff on October 27, 2017. That assignment

[1] The complaint also named as defendants the Water Pollution Control Authority of the city of Bridgeport and the Aquarion Water Company. Neither of these additional defendants is participating in the present appeal, and, thus, all references to the defendant in this opinion are to Marcelino Taipe.

was recorded on the city's land records on December 11, 2017.

The defendant, after purchasing the property, paid his property taxes as he received bills from the city. The first property tax bill he received, which was for the 2016 grand list, was sent by the city to the defendant in July, 2017. As a result, by the time the defendant received his first tax bill in July, 2017, the city had already recorded and assigned to the plaintiff's predecessor in interest the tax lien, which remained due and owing on the property. The defendant has not made any payments to the plaintiff in connection with the assigned lien.

On May 13, 2020, the plaintiff commenced this action seeking to foreclose on the tax lien. On November 18, 2021, the defendant filed his answer and a special defense. The defendant asserted that he was entitled to a right of setoff pursuant to General Statutes § 52-139 for municipal real estate tax payments that he made to the city from 2017 to 2020.[2] Specifically, he argued that § 12-144b required the city to apply the amounts that he had paid for those tax years first to the oldest outstanding taxes owed on the property, which he claimed were the taxes owed on the tax lien. Even though the city had already assigned the tax lien to the plaintiff by the time the defendant made those payments, the defendant nonetheless claimed that § 12-144b required the city to "apply" his payments to the taxes owed under that lien by transferring those amounts to the plaintiff before applying any such amounts to the taxes that were due and owing to the city.

On December 2, 2021, the plaintiff filed a motion for summary judgment as to liability. On January 7, 2022,

[2] On December 15, 2021, the defendant filed a request for leave to amend his answer and special defense in order to add an additional special defense. That defense is not pertinent to this appeal.

the defendant filed an opposition to the plaintiff's motion for summary judgment and his own motion for summary judgment. In his motion for summary judgment, the defendant claimed that he was "entitled to summary judgment on his special defense of setoff for subsequent tax payments made to the [city's] tax collector, which should have been applied to and paid off the tax lien being foreclosed by the plaintiff" in accordance with § 12-144b.

On May 11, 2022, the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability only and denied the defendant's motion for summary judgment. The court concluded that the plaintiff had established its prima facie case for foreclosure of a tax lien and that neither of the defendant's asserted special defenses were viable. The court also denied the defendant's motion for summary judgment, stating that, although it "disagree[d] that payments ha[d] been misapplied by the city . . . the only way those payments could cause a setoff herein is if there was an overpayment being held by the city that should resolve this debt." (Emphasis omitted.) Having concluded that the defendant's special defense of setoff failed as a matter of law, and that no genuine issue of material fact existed with respect to the defendant's liability on the assigned tax lien, the court granted the plaintiff's motion for summary judgment as to liability only and denied the defendant's motion for summary judgment.

On May 13, 2022, the plaintiff filed a motion for judgment of strict foreclosure. On September 7, 2022, the court, *Cirello*, *J.*, rendered a judgment of foreclosure by sale and set the sale date for December 10, 2022.[3] The defendant timely appealed. Additional facts and procedural history will be set forth as necessary.

[3] The court found that the amount of debt was $15,498.63 and that the fair market value of the property was $310,000.

On appeal, the defendant claims that the court "erred in denying the defendant's motion for summary judgment on his claim of setoff in holding that" § 12-144b does not apply "to assigned tax liens." Although the defendant labeled his defense before the trial court as one of setoff, the substance of the allegations in his special defense sound in a defense of payment.[4] In asserting that the city misapplied his tax payments, the defendant argues that the payments he made to the city should have been applied to the tax lien held by the plaintiff, extinguishing it, and thereby precluding this foreclosure action. In disposing of the defendant's argument, the court determined that the city had properly applied his tax payments. On appeal, the defendant claims that the court misconstrued and misapplied § 12-144b.

The plaintiff contends in its appellee brief that the issue of payment was not properly presented to the trial court and preserved for appeal and that this court should therefore limit its analysis to whether the court properly concluded that there was no genuine issue of material fact with respect to the defendant's special defense of setoff. We conclude that the arguments the defendant asserts on appeal were sufficiently raised and addressed below and that limiting our review strictly to the defense of setoff would be to exalt form over substance.[5] See *Fitzsimons* v. *Fitzsimons*, 116 Conn.

[4] "Payment, such that a debt is no longer owed to a plaintiff, is a valid defense to liability in a foreclosure action." *JPMorgan Chase Bank, National Assn.* v. *Syed*, 197 Conn. App. 129, 143, 231 A.3d 286 (2020). "[W]hether payment was tendered is a question of fact appropriately decided by the trier of fact." *Homecomings Financial Network, Inc.* v. *Starbala*, 85 Conn. App. 284, 289, 857 A.2d 366 (2004); see also Practice Book § 10-50.

[5] Because we construe the defendant's sole claim on appeal to be one of payment, and not setoff, and because the defendant failed to brief the issue of setoff in his principal appellate brief, we deem any claim regarding setoff abandoned and decline to review it on appeal. "[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

App. 449, 455 n.5, 975 A.2d 729 (2009) ("[u]nder these circumstances and lacking any claim, much less analysis, of prejudice by the [plaintiff], we will not exalt form over substance"). Nevertheless, for the reasons that follow, we conclude that the court properly granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment.

We begin by setting forth our standard of review. "The scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . 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. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020).

Because the defendant's claim on appeal rests, in part, on the meaning and application of § 12-144b, a question of statutory interpretation is also presented. "When we are called upon to construe a statute that is implicated by a summary judgment motion, our review is plenary." *Doe* v. *West Hartford*, 328 Conn. 172, 181, 177 A.3d 1128 (2018). "When construing a statute, [o]ur

properly." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021); see also *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 527, 142 A.3d 363 ("appellate courts will treat as abandoned claims that are not briefed adequately"), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Cerame* v. *Lamont*, 346 Conn. 422, 426, 291 A.3d 601 (2023). "Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 142, 176 A.3d 1146 (2018).

We now turn to the merits of the defendant's claim on appeal. Our rules of practice clearly delineate what a plaintiff must prove when seeking to foreclose on a municipal tax lien. Practice Book § 10-70 (a) provides: "In any action to foreclose a municipal tax or assessment lien the plaintiff need only allege and prove: (1) the ownership of the liened premises on the date when the same went into the tax list, or when said assessment was made; (2) that thereafter a tax in the amount specified in the list, or such assessment in the amount made, was duly and properly assessed upon the property and became due and payable; (3) (to be used only in cases where the lien has been continued by certificate) that thereafter a certificate of lien for the amount thereof was duly and properly filed and recorded in the land

records of the said town on the date stated; (4) *that no part of the same has been paid*; and (5) other encumbrances as required by the preceding section." (Emphasis added).

The defendant argues that the plaintiff was not entitled to summary judgment because, in his view, even though the city already had assigned the tax lien to a third-party assignee prior to the time he made any tax payments to the city, § 12-144b required the city to transfer his payments to the plaintiff, as the successor to the original assignee, in satisfaction of his obligations under the lien before applying any amounts to taxes owed to the city for subsequent tax years. The defendant notes that § 12-144b requires a municipality to apply all tax payments first to any "outstanding unsecured taxes . . . paying the oldest such tax first," and then to any "outstanding secured taxes . . . paying the oldest such tax first." The defendant contends that, because General Statutes § 12-172[6] creates a statutory lien over all municipal taxes owed for real property from the date of assessment, and there was no evidence that he owed personal property taxes, there were no "unsecured taxes" owed on the property at the time of his payments. He further contends that, because the 2015 tax was the oldest secured tax owed on the property when he made his payments and § 12-144b required

[6] General Statutes § 12-172 provides in relevant part: "The interest of each person in each item of real estate, which has been legally set in his assessment list, shall be subject to a lien for that part of his taxes laid upon the valuation of such interest, as found in such list when finally completed, as such part may be increased by interest, fees and charges, and a lien for any obligation to make a payment in lieu of any such taxes, as defined in section 12-171. Such lien, unless otherwise specially provided by law, shall exist from the first day of October or other assessment date of the municipality in the year previous to that in which such tax, or the first installment thereof, became due until two years after such tax or first installment thereof became due and, during its existence, shall take precedence of all transfers and encumbrances in any manner affecting such interest in such item, or any part of it. . . ."

the city to "apply" his tax payments first to the oldest outstanding secured tax, the city was required to apply his payments to the previously assigned tax lien before applying those amounts to real property taxes that he owed to the city for subsequent tax years by transferring to the plaintiff the amount owed on the tax lien.

The plaintiff counters that § 12-144b imposes no obligation on a municipality to transfer tax payments to a holder of an assigned tax lien before applying such payments to taxes that are due and owing to a municipality. The plaintiff also argues that the defendant's claim rests upon an incorrect construction of § 12-144b. Specifically, the plaintiff argues that the taxes that were due and owing to the city at the time the defendant made his payments constituted "unsecured taxes" and that § 12-144b required the city to apply those payments to such amounts before applying any amounts to "secured taxes," which it contends are limited to those taxes for which a lien has been recorded on the land records.

We need not decide whether, as the defendant contends, all real property taxes are "secured taxes" for purposes of § 12-144b or, instead, as the plaintiff contends, real property taxes are "secured taxes" for purposes of that statute only if a lien for such amount is recorded on the land records, because we agree with the plaintiff that the tax lien in question, once assigned, was no longer a debt owed to the city and that, under such circumstances, the city had no legal obligation to forward to the plaintiff any tax payments that it received from the defendant.

We begin with the language of § 12-144b. That statute provides in relevant part that, "[e]xcept as otherwise provided by the general statutes, all payments made to or recovered by the municipality shall be applied (1) first, for any outstanding unsecured taxes, to expenses

concerning such unsecured taxes, including attorney's fees, collection expenses, collector's fees and other expenses and charges related to all delinquencies owed by the party liable therefor before the interest accrued, then to the principal of such outstanding unsecured taxes, paying the oldest such tax first, and (2) for any outstanding secured taxes, first to expenses concerning such secured taxes, including attorney's fees, collection expenses, collector's fees and other expenses and charges related to all delinquencies owed by the party liable therefor before the interest accrued, then to the principal of such outstanding secured taxes, paying the oldest such tax first. . . ." General Statutes § 12-144b.

On the basis of the clear language of the statute, when a municipality receives or recovers a tax payment, it must first apply such payments to "outstanding unsecured taxes," beginning with the oldest such tax. Once a municipality has applied such payments to any outstanding unsecured taxes and fees associated with those taxes, in the order set out in the statute, a municipality must then apply payments to any outstanding secured taxes, beginning with the oldest such tax, again following the order set out in the statute.

The defendant contends that § 12-144b imposes upon a municipality an obligation to "apply" tax payments it receives or recovers to a tax lien that a municipality previously assigned to a third party by transferring such amounts to the current holder of the tax lien. Section 12-144b, however, makes no reference to third-party assignees of tax liens. Had the legislature intended to require municipalities to undertake the burdensome and administratively difficult responsibilities that the defendant's interpretation would create,[7] it easily could

[7] Although we conclude that the language of § 12-144b is conclusive with respect to the defendant's claim, we note that the defendant's interpretation, if accepted, would require a municipality, upon receipt of a tax payment, (a) to determine whether it has assigned to a third party a tax lien that it once held with respect to a given property; (b) to identify and locate the

have accomplished that goal by using language making it clear that municipalities must transfer payments they receive or recover to third-party holders of previously assigned tax liens. See *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly"), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Indeed, the legislature has demonstrated that it is more than capable of using language directly addressing such liens. General Statutes § 12-195h broadly regulates the manner in which municipalities may assign tax liens, enumerates the rights, powers and duties of third-party assignees seeking to enforce or foreclose upon municipal tax liens, and establishes extensive notice requirements governing collection efforts by third-party assignees. See, e.g., General Statutes § 12-195h (d) and (e)[8]; see also *American Tax Funding, LLC* v. *First Eagle Corp.*, 196 Conn.

current holder of any such lien; (c) to determine the amounts currently owed on any such lien; and (d) to transfer to the current holder of the lien all or a portion of the tax payments the municipality has received. Such an interpretation would run afoul of the tenet of statutory construction requiring us to interpret statutes in a manner that avoids bizarre or unworkable results. See *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 723, 104 A.3d 671 (2014) ("[i]t is axiomatic that [w]e must interpret the statute so that it does not lead to absurd or unworkable results" (internal quotation marks omitted)).

[8] General Statutes § 12-195h provides in relevant part: "(d) The assignee, or any subsequent assignee, shall provide written notice of an assignment, not later than sixty days after the date of such assignment, to the owner and any holder of a mortgage, on the real property that is the subject of the assignment, provided such owner or holder is of record as of the date of such assignment. Such notice shall include information sufficient to identify (1) the property that is subject to the lien and in which the holder has an interest, (2) the name and addresses of the assignee, and (3) the amount of unpaid taxes, interest and fees being assigned relative to the subject property as of the date of the assignment.

"(e) Not less than sixty days prior to commencing an action to foreclose a lien under this section, the assignee shall provide a written notice, by first-class mail, to the holders of all first or second security interests on the property subject to the lien that were recorded before the date the assess-

App. 298, 300, 229 A.3d 1218 (§ 12-195h "permits a municipality to assign for consideration liens filed by the tax collector"), cert. denied, 335 Conn. 942, 237 A.3d 729 (2020). When viewed in relation to § 12-195h, and in the absence of any language whatsoever within § 12-144b referencing third-party holders of assigned tax liens, it cannot reasonably be inferred, solely from the language in § 12-144b requiring municipalities to "apply" tax payments that they receive or recover to "outstanding secured taxes," that the legislature intended to require municipalities to act, in effect, as loan servicers for third-party holders of municipal tax liens.

In this case, it is undisputed that, by the time the defendant made his first tax payment to the city, the city already had assigned the tax lien. At that point, the city was under no obligation to forward payments that it received from the defendant to the plaintiff or any subsequent assignee of the tax lien rather than applying the defendant's tax payments to taxes that the defendant owed to the city. Accordingly, we conclude that the court properly granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

ment the lien sought to be enforced became delinquent. Such notice shall set forth: (1) The amount of unpaid debt owed to the assignee as of the date of the notice; (2) the amount of any attorney's fees and costs incurred by the assignee in the enforcement of the lien as of the date of the notice; (3) a statement of the assignee's intention to foreclose the lien if the amounts set forth pursuant to subdivisions (1) and (2) of this subsection are not paid to the assignee on or before sixty days after the date the notice is provided; (4) the assignee's contact information, including, but not limited to, the assignee's name, mailing address, telephone number and electronic mail address, if any; and (5) instructions concerning the acceptable means of making a payment on the amounts owed to the assignee as set forth pursuant to subdivisions (1) and (2) of this subsection. Any notice required under this subsection shall be effective upon the date such notice is provided. . . ."