ERROL GODFREY-HILL *v.* COMMISSIONER OF CORRECTION (AC 45841)

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

Syllabus

The petitioner, who had been convicted of the crime of murder and other offenses in connection with a shooting, sought a writ of habeas corpus, claiming that his criminal trial counsel, C, had rendered ineffective assistance by failing to investigate and to call as a witness M, whose testimony, the petitioner contended, could have undermined that of T and R, witnesses to the shooting who identified the petitioner as the gunman. At the petitioner's habeas trial, M testified that she had been standing on the street outside a convenience store when she saw two masked men, whom she could not identify, running toward her, after which she heard gunshots and ran into the store for shelter. The petitioner claimed that he had told C before the criminal trial that M had described another person who committed the crimes at issue. C testified that he had reviewed portions of statements M had given to the police and vaguely remembered talking or meeting with her before the trial but could not recall having made a conscious decision not to call her to testify. The court rendered judgment denying the habeas petition, concluding that C had investigated M as a potential witness but determined that her testimony would not have been helpful to the petitioner. The court further concluded that the petitioner was not prejudiced by C's decision not to call M to testify. Thereafter, the court granted the petitioner certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly determined that the petitioner had failed to meet his burden of proving that C rendered deficient performance, the petitioner having failed to present evidence sufficient to overcome the presumption that C's decision not to call M as a witness was based on objectively reasonable strategic considerations: the court's determination that C had investigated M as a potential witness was not clearly erroneous, as C, an experienced criminal defense attorney, testified that he had reviewed a portion of M's statements to the police, had a vague recollection of having met with or spoken to her prior to the petitioner's criminal trial, which M's testimony confirmed, and would not have taken the petitioner's case to trial without having first spoken to anyone who could have been considered a witness or without having first evaluated how such potential witnesses could assist in the petitioner's defense; moreover, although C could not recall the exact reason he did not call M as a witness, C testified that he recalled being concerned that any positive value in calling M as a witness would have been outweighed by the negative effect her testimony may have had on the

petitioner's defense and referred to her potential testimony as a "double-edged sword," and C reasonably could have determined that M's testimony would not have supported a theory of third-party culpability and might have distracted the jury from the focus of C's defense, which was to discredit T and R and to show that they had intentionally misidentified the petitioner and fabricated their testimony to satisfy a grudge T held against the petitioner since childhood, all of which suggested that C had made a strategic decision not to call M to testify.

Argued May 11—officially released September 12, 2023

Procedural History

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

Matthew C. Eagen, assigned counsel, for the appellant (petitioner).

Rebecca R. Zeuschner and *Nicholas L. Scarlett*, certified legal interns, with whom were *Ronald G. Weller*, senior assistant state's attorney, and, on the brief, *John P. Doyle*, state's attorney, and *Stacey M. Miranda*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. Following the granting of his petition for certification to appeal, the petitioner, Errol Godfrey-Hill, appeals from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that (1) his trial counsel did not provide ineffective assistance by failing to investigate and to call a certain witness to testify during the petitioner's criminal trial and (2) he was not prejudiced

by counsel's alleged deficiencies.[1] We disagree and, accordingly, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. On August 1, 2014, Troy Mitchell and Tyrese Jones were standing outside a convenience store near the intersection of Kensington Street and Chapel Street in New Haven when a gunman appeared and shot them. Mitchell was injured but survived the shooting, and Jones was killed. Later that month, on August 25, 2014, the petitioner was arrested and charged with murder in violation of General Statutes (Rev. to 2013) § 53a-54a, assault in the first degree in violation of General Statutes § 53a-59 (a) (5), and criminal possession of a firearm in violation of General Statutes (Supp. 2014) § 53a-217. The petitioner elected a jury trial with respect to the murder and assault charges, and a bench trial as to the criminal possession of a firearm charge.[2] Throughout the proceedings, the petitioner was represented by Attorney Glenn Conway.

The sole issue at the petitioner's criminal trial was the gunman's identity. The surviving victim, Mitchell, testified that he did not see the shooter. Although there was a surveillance video that placed the petitioner in the area twenty minutes before the shooting, there was no forensic evidence, such as fingerprints or DNA, placing the petitioner at the scene or implicating him as the perpetrator. As a result, the state's case was primarily based on the testimony of two eyewitnesses: Teddy Cornelius and Richard Hayes.

Cornelius and Hayes were friends at the time of the shooting. Cornelius testified that, on the night in question, he and Hayes were on their way to have drinks

[1] See footnote 6 of this opinion.

[2] The petitioner also had been charged with violation of probation, which was tried to the court as well. The court found that the petitioner had violated his probation.

downtown when they encountered and began talking with friends on Kensington Street. Cornelius testified that, as he walked up Kensington Street, he saw a man he recognized as "Dino," whom he later identified as the petitioner, emerge from the end of a park off of Chapel Street. He explained that he had known the petitioner for many years and that they had fought when they were younger. Cornelius further testified that he saw the petitioner, with a silver-colored gun in his hand, pull a black ski mask over his face, run up to the victims, and fire four or five shots at them. Cornelius stated that, after the first shot, he closed his eyes and hid behind a building, and that, when he came out, one of the victims was lying on the ground.

Hayes similarly testified that the petitioner was the shooter. Although most of his testimony was consistent with that of Cornelius, there were a few discrepancies, namely, that Hayes testified that the petitioner's gun was black, not silver-colored; that the petitioner had grabbed Jones' arm before shooting him; and that there were "way more than five or six" shots fired. Unlike Cornelius, Hayes testified further that, after the petitioner fired the shots, he dropped the gun and that another man, "Uncle Ant," later identified as Antoine Paige, picked up the gun, wiped it off, and told Hayes to get back from Jones and let him die or else Paige would shoot Hayes. Hayes explained that Paige "put [the gun] in the front of his pants, and he put his shirt over it and he walked off," and that there was "no doubt in [his] mind" that it was the gun that the petitioner had used.

The state presented additional evidence, including a ski mask and Timberland boots consistent with those worn by the shooter that were recovered from the petitioner's bedroom, as well as a note that was found in the petitioner's sock by a correctional officer when the petitioner was incarcerated on the relevant charges.

The note stated: "Remember that box you gave me to put my money in? It has the same bullets from the gun are in there, they in Auntie Mara basement, get rid of them." As a result of this note, the police seized a small safe from the basement of the building where the petitioner's aunt lived, which contained a sock filled with bullets. Although the bullets were the same caliber as the bullet removed from one of the victims' bodies and the bullets located at the scene of the shooting, the bullets in the safe were "hollow points," whereas the ones recovered at the scene were "soft points." Other than this evidence, the state's case primarily relied on the testimony of Cornelius and Hayes.

Conway focused the petitioner's defense on discrediting Cornelius and Hayes. In his closing argument to the jury, Conway highlighted the fact that the state had not presented any suggested motive or scientific evidence in support of its case. He asserted: "The reality of this case, it comes down to two witnesses. It comes down to . . . Cornelius and . . . Hayes. It's that simple." Conway argued that the stories to which Hayes and Cornelius testified were inconsistent with each other and with the evidence, and that their "evasive and forgetful" demeanors undermined their credibility. He also emphasized that Cornelius and Hayes were close friends at the time of the shooting, and he suggested reasons for why they would be motivated to lie. Specifically, Conway argued that Cornelius was motivated to lie because he and the petitioner had fought when they were younger. With respect to Hayes, Conway reminded the jury of the testimony of Monice Glasper, who was friends with both Hayes and the petitioner, that Hayes had told her that he was nervous about testifying because he had lied about seeing the petitioner's face that night. She testified that, when she asked Hayes why he had lied, he said that it was because Cornelius had told the police that Hayes had information, and the

police had threatened Hayes with five years of incarceration if he did not cooperate. Conway pointed out that Hayes had to be subpoenaed to give a statement to the police. He argued, therefore, that Hayes had two reasons to inculpate the petitioner: his friendship with Cornelius and to stay out of jail. In closing, Conway argued to the jury that it should disregard the testimony of Cornelius and Hayes, and that, without such testimony, the evidence was insufficient to find the petitioner guilty.

Ultimately, on October 13, 2016, the jury found the petitioner guilty of murder and assault in the first degree, and that same day, the trial court, *Blue*, *J.*, found the petitioner guilty of criminal possession of a firearm and found that he had violated his probation. Thereafter, the petitioner was sentenced to a total effective term of eighty years of incarceration.[3] In November, 2021, the petitioner filed the operative second amended petition for a writ of habeas corpus, in which he alleged that Conway had provided ineffective assistance by, inter alia, failing to investigate and to call Anita Morales as a witness at the petitioner's criminal trial.[4] A trial was held before the habeas court, *M. Murphy*, *J.*, on

[3] The petitioner filed a direct appeal from his criminal conviction, after which his appointed appellate counsel filed a motion to withdraw as appellate counsel, which was granted by the trial court, on the ground that an appeal in the case would be wholly frivolous. Subsequently, our Supreme Court dismissed the petitioner's direct appeal as a result of his failure to file an appearance in lieu of counsel or an appellate brief. See *State* v. *Godfrey-Hill*, Docket No. SC 19939 (Conn. April 10, 2019).

[4] The petitioner also alleged that Conway was deficient because he (1) failed to investigate or interview, to call as witnesses, and to develop a defense utilizing the statements of four additional witnesses, (2) failed to raise a third-party culpability defense as to Paige, and (3) failed to preserve the petitioner's appellate rights, and/or failed to preserve the petitioner's right to a meaningful appeal. The habeas court deemed the first and third claims abandoned and rejected on the merits the petitioner's second claim. Because the petitioner has not challenged any of those decisions on appeal, any issues relating thereto are not before us in this appeal.

April 21, 2022, during which the petitioner was represented by Attorney Robert L. O'Brien. Conway, the petitioner, and Morales each testified at the habeas trial.

Conway's testimony at the habeas trial can be summarized as follows. Conway, an experienced criminal defense attorney, testified that, at the time of trial, the petitioner's case was one of six or seven murder cases that he was handling "almost back-to-back" at the time, and that he had tried more than sixty jury trials to verdict in his career. With respect to the petitioner's case, he testified that he would have discussed the theory of defense with the petitioner but could not recall the specifics of that discussion. He characterized the case as one focused on "eyewitness testimony," and he recalled that Cornelius was "kind of the primary witness for the state." He testified that Cornelius and the petitioner "had a history that went back to childhood," so "the idea was, you know, this is his chance to . . . get even." When asked about Morales, Conway testified that, from what he could recall, she was a community activist who went by the nickname "Tweet." He explained that, in preparation for the habeas trial, he had reviewed a small portion of the statements that Morales had given to the police and that he would have had those statements prior to the petitioner's criminal trial. He testified that, from what he could remember, Morales was at the scene on the night in question and was in a relationship and had a child with a man named "Ant," who was also at the scene of the shooting on the night in question. Conway stated that he had a vague recollection of meeting with Morales before trial, that he could not recall making the conscious decision not to call her as a witness, and that, "[i]f [he] had thought that she would have been helpful at the trial, [he] would have called her."

Conway also recollected that "Ant" was a reference to Paige, and that, on the night in question, Paige had

picked up a handgun and "told people to stay away." The petitioner's habeas counsel asked Conway whether he had considered using Morales' testimony to undermine the credibility of Cornelius, to which Conway stated: "I would [have] absolutely . . . looked at that . . . and for some reason I'm thinking that there may have been . . . something in her . . . statement or in . . . what she witnessed that may have done that. It's starting to come back to me a little bit. And I can't answer exactly what it was, but there was something about her testimony; I think that's why I believe I did speak to her, that was—it was a double-edged sword." On cross-examination by the attorney for the respondent, the Commissioner of Correction, Conway confirmed that he would not have taken the petitioner's case to trial without first speaking to anyone who could be considered an eyewitness to the crimes or without first evaluating each potential witness in terms of how he or she could assist in the defense.

The petitioner briefly testified after Conway. He testified that Morales was one of three additional witnesses to the shooting, and that, with respect to Morales, he told Conway that "[they] could possibly use her as a witness because she describes somebody else committing the crime." The petitioner explained that these additional witnesses, including Morales, did not show up to trial and, as a result, he assumed that Conway did not follow up with them.

Morales was the last witness to testify at the habeas trial. She explained that, on the night of the incident, she was outside of the convenience store on the corner of Kensington Street standing with Cornelius and some other people when she saw two men wearing masks and dark clothing running toward where she was standing. She testified that, after she saw the men, she heard gunshots and ran into the store for shelter. She explained that, less than five minutes after the shots

rang out, she exited the store and saw her daughter's father, Paige, whom she had not seen yet that day. Morales further testified that she could not identify the two men in the masks. She stated that she knew the petitioner, as did Paige, and that she had not seen the petitioner at all that day. Morales confirmed that she had spoken with the police on multiple occasions and that each time her statements were the same as her testimony before the habeas court. Finally, she testified that she had been contacted by Conway and that she spoke with him. When asked whether she told Conway the same information to which she had testified that day, she stated: "Exactly. Yes, I did. . . . Verbatim and I remember the dates." She explained that she was available to testify at the petitioner's criminal trial and that Conway told her it was a possibility that the prosecution may try to call on her beforehand.

In a memorandum of decision dated August 8, 2022, the habeas court denied the operative habeas petition. In doing so, the court concluded, inter alia, that the petitioner had failed to meet his burden of demonstrating that Conway performed deficiently by failing to investigate and to call Morales as a defense witness.[5] The court stated: "The record demonstrates that . . . Conway did investigate Morales as a potential defense witness but ultimately determined [that] her testimony would not be helpful." The court also concluded that the petitioner was not prejudiced by Conway's failure to call Morales to testify at the petitioner's criminal trial. Thereafter, the court granted the petitioner's petition for certification to appeal, and the petitioner appealed to this court.

[5] The habeas court also concluded that the petitioner failed to sustain his burden of proving his claim that Conway was ineffective by failing to raise a third-party culpability defense concerning Paige. See footnote 4 of this opinion.

Before we address the merits of the claims raised by the petitioner, we first set forth our standard of review and general principles governing habeas matters and claims of ineffective assistance of counsel. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119, 281 A.3d 1189 (2022).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583, A.3d (2023), petition for cert. filed (Conn. July 26, 2023) (No. 230120).

With respect to the first prong of *Strickland*, "[t]he petitioner must . . . show that counsel's representation fell below an objective standard of reasonableness

considering all of the circumstances. . . . [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. . . . Furthermore, the right to counsel is not the right to perfect counsel." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 219 Conn. App. 389, 401–402, 295 A.3d 460, cert. denied, 347 Conn. 906, 297 A.3d 198 (2023).

"Regarding ineffectiveness claims relating to the failure to call witnesses, [w]hen faced with the question of whether counsel performed deficiently by failing to call a certain witness, the question is whether this omission was objectively reasonable because there was a strategic reason not to offer such . . . testimony . . . [and] whether reasonable counsel could have concluded that the benefit of presenting [the witness' testimony] . . . was outweighed by any damaging effect it might have. . . . Moreover, our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses . . . such as when . . . counsel learns the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." (Internal quotation marks omitted.) *Inglis* v. *Commissioner of Correction*, 213 Conn. App. 496, 513, 278 A.3d 518, cert. denied, 345 Conn. 917, 284 A.3d 300 (2022). Moreover, "[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that

the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 178 Conn. App. 266, 278–79, 174 A.3d 824 (2017), aff'd, 332 Conn. 615, 212 A.3d 678 (2019).

"It is axiomatic that decisions of trial strategy and tactics rest with the attorney." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019). Furthermore, "[t]he decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel . . . ." (Internal quotation marks omitted.) Id., 628. We are also mindful that "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . 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. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . . Accordingly, our review of the petitioner's claim requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported trial counsel's [decision not to have the witness testify] . . . and, second, to consider whether those reasons were objectively reasonable." (Citations omitted; internal quotation marks

omitted.) *Sease* v. *Commissioner of Correction*, 219 Conn. App. 504, 513–14, 295 A.3d 436 (2023), petition for cert. filed (Conn. June 12, 2023) (No. 220397); see also *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 279 ("[O]ur review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.)).

With respect to claims of ineffective assistance relating to counsel's failure to investigate, this court has stated previously that "[i]nasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . [C]ounsel 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.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 832, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

We now turn to the petitioner's claim on appeal challenging the habeas court's determination that he had failed to meet his burden of showing deficient performance by Conway.[6] The petitioner first argues that the

[6] On appeal, the petitioner also challenges the court's conclusion that he failed to demonstrate that he was prejudiced by Conway's alleged deficiencies. Because we agree with the habeas court that the petitioner failed to

habeas court's determination that Conway investigated Morales as a potential witness is not supported by the record. The basis for the petitioner's claim is that, when Conway testified at the habeas trial, he could not recall if he had made contact with Morales prior to the criminal trial, nor could Conway recall the reason why he did not call Morales as a witness or whether he made the conscious decision not to call her to testify. Thus, according to the petitioner, "there [was] no evidence from which the . . . court . . . reasonably [could have] conclude[d] that [Conway] investigated Morales as a potential witness." We disagree.

The petitioner's claim that there is *no* evidence from which the court could have concluded that Conway investigated Morales as a potential witness is simply belied by the record. Conway testified that he reviewed all available witness statements, including a portion of Morales' statements to the police, he was aware that she was at the scene on the night of the shooting, and he did have a vague recollection of either speaking with her over the phone or meeting with her prior to trial. When Morales testified at the habeas trial, she confirmed that she had spoken with Conway prior to the petitioner's criminal trial, and stated that she had provided him the same information she had provided to the police and that Conway had told her that the state might contact her and call her as a witness. Conway

meet his burden under the performance prong of *Strickland*, we need not address the petitioner's argument as to the prejudice prong. See *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 484 n.4, 264 A.3d 1080 (2021) (in light of petitioner's failure to demonstrate deficient performance by trial counsel, Appellate Court did not need to address prejudice prong of *Strickland* test), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022); see also *Lance W.* v. *Commissioner of Correction*, 204 Conn. App. 346, 355, 251 A.3d 619 ("[i]n its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)), cert. denied, 337 Conn. 902, 252 A.3d 363 (2021).

also testified that he would not have taken the petitioner's case to trial without first speaking to anyone who could be considered an eyewitness to the crime or without first evaluating each potential witness in terms of how he or she could assist in the defense. As we stated previously in this opinion, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 832. The "strong presumption of professional competence extends to counsel's investigative efforts . . . ." (Citation omitted.) Id., 834; see also *Shaheer* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-17-4009009-S (October 21, 2019) (reprinted at 207 Conn. App. 454, 472–73, 262 A.3d 158) (petitioner did not establish claim that trial counsel did not investigate witness when evidence showed that trial counsel did contact witness), aff'd, 207 Conn. App. 449, 262 A.3d 152, cert. denied, 340 Conn. 903, 263 A.3d 388 (2021). Accordingly, in light of the strong presumption of competence that we must afford to Conway and, given that the testimony at the habeas trial demonstrates that Conway had contacted Morales prior to the criminal trial and that he would not have gone to trial without first evaluating any potential witness who could assist the defense, we conclude that the court's finding that Conway had investigated Morales as a potential witness is not clearly erroneous and is supported by the record.

Next, the petitioner challenges the habeas court's determination that Conway was not deficient in failing to call Morales as a witness. Specifically, he argues that the record does not support the habeas court's determination that Conway decided not to call Morales to testify because her testimony would not have been helpful. In support of this claim, the petitioner, again,

points to the fact that Conway could not recall the reason why he failed to have Morales testify. He also argues that Morales' testimony "would have been extremely helpful to the petitioner in casting doubt on the testimony of Cornelius and Hayes."[7] We are not persuaded.

When Conway was asked at the habeas trial if he recalled making a decision not to call Morales to testify, he responded: "Well, she did not testify. She was available, no doubt about it. If I had thought that she would have been helpful at the trial, I would have called her." It reasonably can be inferred from his statements that, because Conway did not call Morales as a witness, he must have determined that her testimony would not have been helpful. Thus, there is a basis in the record for the court's finding in that regard, and the petitioner has not demonstrated otherwise. Moreover, when Conway was asked why he had decided not to use Morales' testimony at the criminal trial, he answered that, after he had reviewed a small portion of her statements to the police, he "didn't see what she added to the equation . . . ." He further testified: "I mean, she had a relationship with this guy, Ant, who was at the scene, had a

[7] We note that the petitioner also argues in his principal appellate brief that "Morales was a neutral witness whose testimony contradicted the testimony of the state's two chief witnesses on several key points and whose testimony [did] not interfere with counsel's planned defense." Those key points included "the number of assailants, their clothing and appearance, and the presence of the petitioner near the scene prior to the shooting." The petitioner cites *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009), for the proposition that, "in circumstances that largely involve a credibility contest . . . the testimony of neutral, disinterested witnesses is exceedingly important." (Internal quotation marks omitted.) Id., 518. We find this claim unavailing, as the record shows that Morales knew and was acquainted with the petitioner and had a child in common with Paige. See *Sanchez* v. *Commissioner of Correction*, 138 Conn. App. 594, 600, 53 A.3d 1031 (2012) (completely disinterested witness is one who does not know and is not in any way acquainted or associated with petitioner), aff'd, 314 Conn. 585, 103 A.3d 954 (2014).

child by him. He takes this gun that's there; it's a different caliber than the gun that was used in the case. It just . . . wasn't going to be a basis for, like, third-party culpability . . . . So, you know, I didn't want there to be a sideshow when the whole . . . issue here is . . . the lack of credibility of . . . Cornelius and . . . Hayes."

Furthermore, when Conway was asked specifically whether he had considered using Morales' testimony to undermine the credibility of Cornelius or any other state's witness, or whether he had any recollection of evaluating Morales for that purpose, he replied: "I would [have] absolutely . . . looked at that . . . and for some reason I'm thinking that there may have been . . . something in her . . . statement or in . . . what she witnessed that may have done that. It's starting to come back to me a little bit. And I can't answer exactly what it was, but there was something about her testimony; I think that's why I believe I did speak to her, that was—it was a double-edged sword. . . . I seem to remember that there was something, and it—it eludes me as I sit here today . . . but it could have [been something that] outweighed what she had to say, and that . . . may very well have been the reason why I didn't . . . bring her on." Thus, according to Conway, even though there might have been some positive value to calling Morales as a witness, that was outweighed by the negative effect her testimony may have had on the petitioner's case. Conway's testimony suggests that he made a strategic decision not to call Morales as a witness at the petitioner's criminal trial. Such strategic choices made by counsel are "virtually unchallengeable" when "made after thorough investigation of law and facts relevant to plausible options . . . ." (Emphasis omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 832.

The petitioner makes much of the fact that Conway could not recall the exact reason for not calling Morales as a witness. That alone, however, does not demonstrate deficient performance by Conway, nor is it sufficient to overcome the presumption of competence afforded to counsel. As this court previously has stated, "[t]ime inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance, inattention or ineptitude . . . *Strickland*'s strong presumption must stand. . . . *Williams* v. *Commissioner of Correction*, 177 Conn. App. 321, 333, 175 A.3d 565, cert. denied, 327 Conn. 990, 175 A.3d 563 (2017); see also *Rodriquez* v. *Commissioner of Correction*, 35 Conn. App. 527, 536–37, 646 A.2d 919 (fact that attorney could not recall specifically informing petitioner of right to testify did not establish that he never told petitioner of his right to testify and was not sufficient, by itself, to demonstrate deficient performance), cert. denied, 231 Conn. 935, 650 A.2d 172 (1994)." (Internal quotation marks omitted.) *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 483, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022); see also id. (petitioner failed to demonstrate deficient performance when, although trial counsel could not recall what specific advice he may have given petitioner regarding whether petitioner should testify, counsel did testify as to what he normally would do in advising criminal defendant about whether to testify, and habeas court found that testimony credible).

As a reviewing court, we must "properly apply the strong presumption of competence that *Strickland* mandates" and are "required not simply to give [trial counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons [that]

counsel may have had for proceeding as [he] did." (Emphasis omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 834. Moreover, "[w]hether to call a particular witness at trial . . . is a tactical decision for defense counsel, and, to the extent that the decision 'might be considered sound trial strategy,' it cannot be the basis of a finding of deficient performance." Id., 855; see also *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 278 ("failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense" (internal quotation marks omitted)). As Conway's testimony suggests, there were a number of possible reasons as to why Conway did not have Morales testify at the petitioner's criminal trial. First, he could have determined that her testimony would not have been helpful to the defense, as he referred to her potential testimony as a "double-edged sword" and stated that he did not think that "she added anything to the equation." He also recalled being concerned that there was something negative in her potential testimony that outweighed any value it may have brought to the case.

Specifically, although Morales claimed that she did not see the petitioner on the day of the shooting, another witness, McKenney Davis, told the police that the petitioner and Morales were together that day. Furthermore, Morales' physical description of the shooter as being "slim . . . maybe, like, five feet, nine inches, five feet, ten inches," matched the petitioner's physical characteristics. Morales also claimed that the shooting happened midday when it actually happened at 9:46 p.m. Additionally, Conway was able to bring out in his cross-examination of one of the New Haven detectives details

of Morales' police statements, including her description of the clothing she saw the two assailants wearing.

Second, Conway reasonably could have determined that Morales' testimony might have distracted the jury from the central issue of the case, namely, the credibility of Cornelius and Hayes, and the defense theory that they intentionally had misidentified the petitioner and fabricated their testimony to satisfy a grudge against him. Conway also reasonably could have determined that Morales' testimony would not have helped the defense because it was not sufficient to support a theory of third-party culpability.

We conclude that these possible strategic reasons that might have supported Conway's decision not to call Morales to testify were objectively reasonable, as Conway reasonably could have concluded that the benefit of presenting Morales' testimony "was outweighed by any damaging effect it might have." (Internal quotation marks omitted.) *Inglis* v. *Commissioner of Correction*, supra, 213 Conn. App. 513.

Accordingly, we conclude that the habeas court properly determined that the petitioner had failed to meet his burden of proving that Conway performed deficiently by failing to call Morales as a defense witness, as the petitioner failed to present evidence sufficient to overcome the presumption that Conway's decision not to call Morales as a defense witness was made on the basis of strategic reasons that were objectively reasonable.

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT MADERA *v.* COMMISSIONER OF CORRECTION (AC 45321)

Clark, Seeley and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit burglary in the first degree, burglary in the first degree as an accessory, robbery in the first degree as an accessory and home invasion as an accessory, sought a writ of habeas corpus, claiming that his trial counsel, K, had provided ineffective assistance by failing to seek to preclude or object to certain evidence. During the underlying home invasion, the petitioner waited outside in a vehicle while M and S entered the home, where they sexually assaulted one victim, D, and committed other crimes against two other victims. The petitioner was not charged in connection with the sexual assaults. At the petitioner's criminal trial, there were references to the sexual assaults and the fact that D had been pregnant at the time of the assaults. The petitioner claimed, inter alia, that K should have sought to preclude or objected to any evidence related to the sexual assaults. The habeas court denied the petition for a writ of habeas corpus, concluding that, although K's assistance was deficient for failing to seek to preclude or object to the sexual assault evidence, the petitioner had failed to establish that he was prejudiced by the deficient performance, as the jury had found the petitioner not guilty of two charges, there had been significant evidence from which the jury could conclude that the state had met its burden of proof, and there was no reasonable likelihood that the outcome of the criminal trial would have been different. On the granting of certification, the petitioner appealed to this court. *Held* that the habeas court properly determined that the petitioner failed to meet his burden of demonstrating that he was prejudiced by counsel's alleged deficient performance as required by *Strickland* v. *Washington* (466 U.S. 668): the petitioner could not prevail on his argument that he was prejudiced simply because the evidence introduced was prejudicial, as he did not demonstrate a reasonable probability that, but for K's errors, the result of his criminal trial would have been different; moreover, the admission of the sexual assault evidence did not alter the entire evidentiary picture, as the references to the assaults were not prevalent during the trial and were made in a conclusive and nonprovocative manner, and there was overwhelming evidence in support of the jury's verdict, including an inculpatory written statement by the petitioner, in which he admitted he was with M and S on the night of the home invasion, M and S had talked about robbing the victims, he saw the victims almost every day, M and S drove to the victims' home after asking him where they lived, he saw

M and S take two handguns into the victims' home, and he functionally admitted to being the getaway driver for M and S, and the petitioner's assertions in his statement were corroborated by other evidence presented at trial, including photos and a video, and the testimony of all three victims; furthermore, the petitioner's reliance on the fact that he was acquitted of two of the charged offenses and prevailed on an issue on direct appeal to support the argument that this was a "close case" was misguided, as the acquittal demonstrated that the jury was able to consider each charge separately and was not confused or prejudiced against the defendant and the issue that he prevailed on in his direct appeal did not relate to the merits of the state's case but, rather, to the application of a sentence enhancement; additionally, although the prosecutor mentioned the sexual assaults in his closing argument, the trial court did not reference the assaults in its jury instructions.

Argued February 1—officially released September 12, 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 the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Judie Lynn Marshall, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. On the granting of his petition for certification to appeal, the petitioner, Robert Madera, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus, which alleged a claim of ineffective assistance of trial counsel.[1] On

[1] The petitioner also alleged a due process claim, which was duplicative of his ineffective assistance of counsel claim. The habeas court concluded that the petitioner had failed to establish a violation of his due process rights, and the petitioner has not challenged the habeas court's ruling concerning his due process claim in his appellate briefs. Accordingly, we deem the claim abandoned. See, e.g., *Ross* v. *Commissioner of Correction*, 217 Conn.

appeal, the petitioner claims that the court improperly concluded that he failed to sustain his burden of establishing that he was prejudiced by counsel's alleged deficient performance. We agree with the habeas court's conclusion and, accordingly, affirm its judgment.

The following facts, as set forth by this court in the petitioner's direct criminal appeal, and procedural history are relevant to our resolution of the petitioner's claim. "In early June, 2011, brothers Shawn Kinnel [Shawn] and Marquis Kinnel [Marquis][2] decided to rob two Waterbury drug dealers, D.O. and his roommate, I.T. In order to ascertain where D.O. and I.T. resided at that time, the Kinnels approached the [petitioner], who was D.O.'s first cousin.

"On the night of June 13, 2011, the trio drove to D.O.'s and I.T.'s condominium complex [complex] and parked their [Nissan Altima (Nissan)] on a nearby side street. The Kinnel brothers got out of their car, retrieved two handguns from under the hood of the vehicle, and walked into the complex. The [petitioner] remained inside the vehicle, but moved to the driver's seat and waited for the Kinnels to return.

"Inside the complex, the Kinnels entered D.O.'s and I.T.'s condominium. At that time, D.O. and I.T. were out buying groceries. Once D.O. and I.T. returned, the Kinnels seized them at gunpoint and forced them to lie on the floor with their shirts pulled over their heads to block their vision.

"The Kinnels then searched D.O., I.T., and the condominium, taking currency, drugs, jewelry, cell phones,

App. 286, 289–90 n.1, 283 A.3d 1055 ("because the petitioner mentioned but did not otherwise address in his brief the habeas court's dismissal of the jury selection claim, we deem any claim related to that ruling abandoned"), cert. denied, 346 Conn. 915, 290 A.3d 374 (2023).

[2] Throughout this opinion, we will refer to Shawn and Marquis individually by name and collectively as the Kinnels as necessary.

and other valuables. During the search of the condominium, Marquis . . . encountered D.O.'s [pregnant] girlfriend, D.M., in her bedroom downstairs. [Marquis] ordered D.M. to take off her clothes at gunpoint and then sexually assaulted her. Thereafter, [Marquis] ordered D.M. to put on a bathrobe, brought her upstairs, and forced her to lie down on the floor next to D.O. and I.T. with her head covered to block her vision. While she was lying on the floor upstairs, D.M. was sexually assaulted again. Having collected all of the valuables, the Kinnels then fled the condominium in a [Jeep] they had stolen from D.O. The [petitioner] followed them, driving the [Nissan] . . . . After the perpetrators had left, D.O. called the police.

"On June 14, 2011, [the] police tracked one of the stolen cell phones to a Waterbury barbershop. When officers converged there, they found the [petitioner] and Marquis . . . inside. Thereafter, the [petitioner] was arrested on an unrelated outstanding warrant and transported to the Waterbury police station, where he eventually gave a voluntary, signed statement detailing his involvement in the crime. In the statement, the [petitioner] attempted to minimize his involvement, claiming that he did not know about the Kinnels' plan regarding D.O. and I.T." (Footnote added; footnote omitted.) *State* v. *Madera*, 160 Conn. App. 851, 853–55, 125 A.3d 1071 (2015).

After trial, on June 1, 2012, a jury found the petitioner guilty of conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-101 (a) (3), burglary in the first degree as an accessory[3] in violation of General Statutes §§ 53a-8 and

[3] "It is well established that there is no legal distinction between principal and accessorial liability. . . . [A]ccessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *White*, 215 Conn. App. 273, 290, 283 A.3d 542 (2022), cert. denied, 346 Conn. 918, 291 A.3d 108 (2023).

53a-101 (a) (3), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-134 (a) (4), and home invasion as an accessory in violation of General Statutes §§ 53a-8 and 53a-100aa (a) (1). Id., 855. The jury found the petitioner not guilty of conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53-134 (a) (4) and conspiracy to commit home invasion in violation of §§ 53a-48 (a) and 53a-100aa (a) (1). Id. He subsequently was sentenced to twenty-five years of incarceration, execution suspended after twenty years, followed by five years of probation. Id., 856. His sentence later was revised to a total effective sentence of nineteen years of incarceration as a result of this court's decision in his direct criminal appeal.[4]

In February, 2016, the petitioner filed a petition for a writ of habeas corpus. The petitioner, through counsel, filed an amended petition on February 25, 2019, which is the operative petition. He alleged that his criminal trial counsel, Raymond Kotulski, provided ineffective assistance. The petitioner, who had not been charged in connection with the sexual assaults of D.M.,[5] specifically alleged that Kotulski was ineffective because he

[4] The jury also found that the state had proved beyond a reasonable doubt that a firearm had been used in the commission of each of the four charges. The court, therefore, enhanced each of the petitioner's sentences pursuant to General Statutes § 53-202k. The petitioner appealed from the judgment of conviction to this court, specifically challenging the § 53-202k sentence enhancements. This court, relying on our decision in *State* v. *VanDeusen*, 160 Conn. App. 815, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015), agreed in part and reversed the judgment "only as to the sentence enhancement under § 53-202k of the sentence on the conviction of conspiracy to commit burglary in the first degree . . . ." *State* v. *Madera*, supra, 160 Conn. App. 862. We, therefore, remanded the case with direction to vacate that enhancement and to resentence the petitioner but otherwise affirmed the judgment of conviction. Id. On January 21, 2016, the petitioner was resentenced to a total effective sentence of nineteen years of incarceration.

[5] Although the petitioner was not charged in connection with the sexual assaults, it appears from the record, particularly from the prosecutor's closing statement, that the prosecutor had intended to use the sexual assaults

did not seek to preclude or object to all testimony and evidence relating to the sexual assaults that took place during the home invasion.[6]

The court, *Bhatt, J.*, held a trial on the habeas petition on February 4, 2020, and April 28, 2021, at which three witnesses testified: Frank Riccio, Jr., the petitioner's legal expert; Glenn Falk, his appellate counsel on direct appeal; and Kotulski. The petitioner's habeas counsel presented Riccio with a hypothetical situation in which Riccio represented a getaway driver accused of being a coconspirator in a home invasion and one of the coconspirators sexually assaulted someone inside, but the client himself was not charged with sexual assault. Riccio testified that, in his opinion, if an attorney did not object to the evidence in question, that attorney would not meet the standard of care expected of a reasonably competent defense attorney.

Falk testified that, in preparing for the petitioner's direct criminal appeal, he reviewed the transcripts and noticed that the sexual assaults were referred to numerous times and "became a drumbeat." He further testified that, although he would have liked to have raised a claim on appeal challenging the admission of the sexual assault evidence at trial, he was unable to do so because "there was no objection to any of [it]."

as possible predicate offenses for the home invasion charges. Ultimately, however, the court did not instruct the jury that it could consider the sexual assaults as predicate offenses.

[6] The petitioner specifically asserted as three separate claims that Kotulski was deficient because he did not seek to preclude or object to evidence relating to (1) the sexual assaults, (2) the fact that D.M. was pregnant at the time of the assaults and (3) her subsequent medical treatment, namely, a sexual assault kit that was performed on D.M. On appeal, he continues to assert these as three specific grounds for concluding that Kotulski rendered deficient performance. Upon our thorough review of the record, however, we conclude that these claims are indistinguishable and, as a result, we consider them as one. For purposes of ease of discussion, we refer to the sexual assault, pregnancy and medical treatment evidence collectively as the sexual assault evidence.

Kotulski testified that he recalled that he wanted to exclude the sexual assault evidence. He explained: "I mean, if someone hears a pregnant woman is raped in her home, they might not see the rest of the facts of the case and might just see that." Kotulski could not recall whether the sexual assault evidence ultimately was introduced at trial, but when asked whether he objected to it, he stated: "I'm pretty positive I did I would think. I know I didn't want it to end up with the jury . . . ." He later testified: "I know I objected to it in some way. What the record says, I don't know, but I know that . . . in some way I objected to it."[7]

The parties subsequently filed their posttrial briefs with the court. The petitioner argued, inter alia, that Kotulski was ineffective for failing to object to the sexual assault evidence at trial because the evidence was irrelevant and unduly prejudicial and, therefore, inadmissible. He further argued that Kotulski's deficiencies caused him prejudice because the sexual assault evidence "turned [the] jury against him" and, consequently, there existed a reasonable probability that, but for the admission of the evidence, there would have been a different outcome at trial.[8] The respondent, the Commissioner of Correction, argued that Kotulski was not

[7] We note that we thoroughly have reviewed the record and it does not reflect that Kotulski objected in any way to this evidence.

[8] The petitioner also maintained that (1) Kotulski was deficient because he "failed to request more specific facts as to the predicate felony underlying the petitioner's two home invasion charges" and (2) he was prejudiced because the sexual assault evidence confused the jury about what to consider as the predicate felony for the home invasion charges and there was "a reasonable probability that the jury improperly concluded that D.M.'s sexual assault was the predicate felony in convicting the petitioner [of the accessory to home invasion charge]." We conclude that we need not address these contentions. The petitioner has not asserted the first argument on appeal to this court, and we determine that, to the extent the petitioner has asserted the second argument, it is inadequately briefed. Although the petitioner mentions in his principal appellate brief that it is his position that the sexual assaults could not have served as the predicate felony, he has not otherwise addressed this argument in any meaningful way. See, e.g., *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 80–81, 256 A.3d 684 ("[W]e

ineffective because the evidence was highly probative, there was no sign that the evidence "[distracted] or aroused the jurors' emotions, hostilities, or sympathies," and "the jury proved its impartiality by finding the petitioner not guilty on two of the charged counts."

On January 5, 2022, the court issued a memorandum of decision denying the petitioner's petition for a writ of habeas corpus. The court agreed with the petitioner that Kotulski was deficient for failing to seek to preclude or object to the sexual assault evidence. It reasoned: "The record does not reflect any efforts by Kotulski to preclude evidence of the sexual assault and pregnancy, nor did he make objections when they were mentioned during the entirety of the trial. Although Kotulski testified in the habeas trial that he somehow objected and was overruled, the record does not support that contention. The court concurs with Riccio's assessment that reasonably competent defense counsel would seek to preclude . . . or object to evidence of the sexual assault, which was not a charged offense, and pregnancy. There is no tactical or strategic basis that has been shown [for] why Kotulski, who viewed the sexual assault and pregnancy [evidence] as not relevant to the charges and potentially inflammatory, did not file a motion in limine or object during the trial. Consequently, the court concludes that [the petitioner] has satisfied the first [prong of] *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . by proving Kotulski rendered deficient performance."

Nevertheless, the court concluded that the petitioner had failed to establish that he was prejudiced by

are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 339 Conn. 909, 261 A.2d 744 (2021).

Kotulski's deficient performance. It noted that "[t]he jury had before it significant evidence from which it could conclude that the state had met its burden of proof . . . . This came through the testimony of the victims, D.O., D.M. and I.T., as well as through [the petitioner's] own statement to police and his testimony before the jury. Furthermore, the jury convicted [the petitioner] of four of the six charged offenses and acquitted him of the conspiracy to commit robbery and [the conspiracy to commit] home invasion charges. In light of the above, the court cannot view the references to the sexual assault[s] and pregnancy as being highly inflammatory and prejudicial. The court concludes that [the petitioner] has failed to show that he was prejudiced by Kotulski's deficient performance, i.e., there is no reasonable likelihood that the outcome of the trial would have been different. [The petitioner] has not undermined this court's confidence in the verdicts." Thereafter, the court granted the petition for certification to appeal, and this appeal followed.

Before considering the petitioner's claim that the court improperly concluded that he had not demonstrated prejudice, we first note the well settled principles that govern our analysis. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the]

conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119, 281 A.3d 1189 (2022).

An evaluation of the prejudice prong involves a consideration of "whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citation omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 38, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). We do "not conduct this inquiry in a vacuum," rather, we "must consider the totality of the evidence before the judge or jury." (Internal quotation marks omitted.) Id. Further, we "are required to undertake an objective review of the nature and strength of the state's case." Id., 39. As our Supreme Court explained in *Skakel*, "[s]ome errors will have had pervasive effect on the inferences to be 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." (Internal quotation marks omitted.) Id.

In other words,"[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (Internal quotation marks omitted.) Id., 40. Notably, the petitioner must meet this burden not by use of speculation but by "demonstrable realities." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 834, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

Having set forth those principles, we now turn to the petitioner's claim on appeal. He claims that, although the habeas court properly concluded that Kotulski was deficient for failing to seek to preclude or object to the sexual assault evidence, it improperly concluded that he failed to sustain his burden of establishing that he was prejudiced by Kotulski's error. For the reasons that follow, we are not persuaded.

The following additional facts are relevant to our resolution of the petitioner's claim. At the underlying criminal trial, the state presented substantial evidence in support of its case, including the petitioner's written statement[9] in which he admitted that he was aware that

[9] The petitioner's statement provided in relevant part: "Last night around 8 p.m. [Marquis] called me and told me Shawn was going to call me later about doing something. At that time I was at my girlfriend's house . . . . At about 8:45 Shawn called me and told me he was coming by to pick me up. He showed up ten minutes later and I told him to call [Marquis] and he did. [Marquis] said that he was on North Main Street, so we went there and met him. . . . [Marquis] and Shawn were asking me where this kid [I.T.] and my cousin [D.O.] lived. . . . I've known these guys for a long time. Right away when they asked where they lived I knew that these guys were

I.T. and D.O. were drug dealers and that the Kinnels had been talking about robbing I.T. and D.O. for several days prior to June 13, 2011. The petitioner also admitted that, on that night, Marquis called him and stated that he and Shawn would contact the petitioner later "about doing something." Around 8:45 p.m., the petitioner stated that he was with the Kinnels and they were asking him where I.T. and D.O. lived. As soon as they asked where I.T. and D.O. lived, the petitioner stated that he knew that the Kinnels were going to rob I.T. and D.O. He further stated that Shawn drove to a condominium complex, where both Kinnels exited the Nissan and retrieved two handguns from under the hood. The peti-

going to rob these guys. Both [D.O.] and [I.T.] sell drugs to make money. I told these guys last I knew [I.T.] lived in the Brooklyn area and [D.O.] lived with his mother . . . . [D.O.] lived with my aunt so I wasn't going to tell them to go up there. These guys have been talking about robbing [I.T.] and [D.O.] for a couple days. . . . Shawn drove up to [the] . . . condo complex and pulled in a lot. . . . Shawn and [Marquis] got out of the car, grabbed a bookbag. They then went under the hood of the car and grabbed two handguns. I asked them what was up and they said they were going to go take care of . . . something. They then walked into the complex. I then jumped in the driver's seat and waited for them to come out. The car we were in is a dark colored Nissan Altima that belongs to Shawn's girlfriend. I waited about ten or fifteen minutes and drove off. About an hour from then Shawn called my phone and told me that they were leaving the apartment and for me to meet them in front of the condo complex. I met them and saw that they were driving in a silver Jeep. They told me that they had just robbed [I.T.] and [D.O.'s] apartment there and they were heading to Naugatuck because they found a motel card in the car and thought that maybe [I.T.'s] and [D.O.'s] stash was there. By stash I mean drugs. I followed them to Naugatuck . . . . Shawn was driving the silver truck, which was a rental that [I.T.] and [D.O.] were using. After I waited for a few minutes [at the motel] I saw [Marquis and Shawn] come running towards me from behind the motel building. They got in the car and we drove off. . . . I asked them what had happened. These guys told me that they robbed—they robbed those guys of their money and cash. [Marquis] told me that he fucked [D.O.'s] girlfriend while they were inside the apartment. . . . They said that they had climbed through a window to get in and found a girl in the bedroom. [Marquis] said that they made her strip and that Shawn fingered her. He stated that he fucked her right after that. . . . I stayed at [Marquis'] place for the night. While we were in the car [Marquis] gave me $640 in cash for being with them. . . ."

tioner claimed that he then left the complex driving the Nissan, but he returned after Shawn called him and told him to come back. When he returned, the petitioner stated that the Kinnels were in a Jeep and he followed them to a Naugatuck motel. The petitioner also admitted that Marquis gave him $640 in cash that night "for being with them."

In addition to having the petitioner's written inculpatory statement read to the jury in its entirety, D.M., I.T. and D.O. all testified as witnesses for the state. All three testified that they were living together at that complex on the night of the incident. D.M. described the break-in that night and the series of events leading up to the sexual assaults. The prosecutor asked D.M. a few questions about the sexual assaults directly. He asked, "And at that point did that person sexually [assault] you?" She responded, "Yes." D.M. testified that, next, the man brought her upstairs. The prosecutor asked, "And at that point he sexually assaulted you again?" and D.M. responded, "Yes." The prosecutor's final question on direct examination was, "And I apologize, but when you were sexually assaulted upstairs when you were lying at the top of the stairs, by sexually assaulted, do you mean he put his penis in your vagina?" D.M. again responded, "Yes."

D.O. and I.T. also testified about the night of the incident. They explained that, when they arrived home from grocery shopping, there were masked and armed men inside who forced them to lie on the kitchen floor with their shirts over their heads while the men searched for valuables. They testified that the men stole between two and three thousand dollars from them, as well as the Jeep and other valuables. The prosecutor showed D.O. a black mask—later confirmed to have been found in the Nissan that the Kinnels and the petitioner were driving that night—which D.O. testified was the same as the ones he saw the men wearing that

evening. The state also presented considerable evidence, including, but not limited to, pictures of the crime scene that corroborated the petitioner's assertion in his written statement that the Kinnels broke into the bedroom window of the apartment, and a video of the Nissan, which the petitioner admitted he was driving, leaving the complex with its lights off, following behind the stolen Jeep.

The petitioner then testified in his defense. He explained that he was close with his cousin, D.O., and would "hang out" with him "like every day" and that he would see I.T. "[l]ike every day." He stated that he would never help someone rob D.O., and he maintained that he did not know that D.O. and I.T. lived at that complex and that he did not give the Kinnels their address. He further testified that, on the night in question, when he, Marquis and Shawn pulled up to the complex, he did not know why they were there and that when Marquis and Shawn went inside, he left and drove around and later returned to the complex when called back by Shawn. When he arrived back at the complex, he saw the Kinnels in the Jeep, and they told him to follow them, which he did, to a hotel in Naugatuck. When asked whether he questioned the Kinnels concerning where they got the new car, he said: "No, it's none of my business. . . . [It] never crossed my mind to ask." When asked why he drove the Nissan with its lights off when he followed the Jeep out of the complex, he testified that it was his "habit" to wait to turn the lights on until right before he pulled out onto the street. He testified that, after they left the hotel, the Kinnels told him that they had robbed D.O. and I.T., which made him feel "strange" because "that's [his] family." Nonetheless, he testified that he subsequently spent the night at Marquis' house. Contrary to his written statement, he testified that the Kinnels did not give him any money for his participation, that the money he

had on him when he was arrested—$832—was from selling drugs, that they did not tell him that they had sexually assaulted D.M., and that he did not see them grab two handguns from under the hood but, rather, saw that only Shawn had a gun with him.

The attorneys then presented their closing arguments, during which the prosecutor mentioned the sexual assaults on multiple occasions. He stated, inter alia: "[Marquis] sexually [assaulted] her"; "There was a sexual assault committed against her downstairs"; and "There [are] sexual assault felonies." After closing arguments, the court instructed the jury and did not, at any point of its instruction, reference the sexual assaults.

At the outset of our analysis of the petitioner's claim, we note that the majority of his principal appellate brief is devoted to his argument that Kotulski rendered deficient performance, with only a small portion of his brief being dedicated to the prejudice analysis. We further note that, within that short analysis, the petitioner conflates the *Strickland* prongs. Specifically, he argues that, "[i]n many ways, the evidence relating to deficient performance and to the irrelevant and prejudicial nature of the sexual assault evidence demonstrates prejudice on their own." He contends that "[i]t is almost paradoxical that it would be deficient for counsel not to exclude the evidence unless the evidence itself would harm the petitioner," and that, "[e]ven more perplexing is how evidence can be unduly prejudicial under an admissibility analysis, without necessarily being prejudicial to the outcome of the petitioner's case."

The petitioner's reasoning, however, is flawed. Even if we assumed that the sexual assault evidence was unduly prejudicial and that Kotulski's performance was deficient because he failed to object to it, that would not absolve the petitioner of his burden of also establishing the prejudice prong of *Strickland*. The standard

for whether evidence is unduly prejudicial in an admissibility context is not synonymous with the standard for prejudice in the context of an ineffective assistance of counsel claim. Compare *State* v. *James A.*, 345 Conn. 599, 619, 286 A.3d 855 (2022) ("[t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the jur[ors]" (internal quotation marks omitted)), cert. denied, U.S. , 143 S. Ct. 2473, 216 L. Ed. 2d 439 (2023), with *Carter* v. *Commissioner of Correction*, 219 Conn. App. 389, 402, 295 A.3d 460 ("[t]o satisfy the prejudice prong [of *Strickland*], 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" (internal quotation marks omitted)), cert. denied, 347 Conn. 906, 297 A.3d 198 (2023). In other words, proving that Kotulski was deficient because he failed to object to unduly prejudicial evidence does not, on its own, demonstrate a reasonable probability that, but for his error, the petitioner would not have been convicted. Thus, the petitioner's argument that he was prejudiced simply because the evidence was unduly prejudicial is not the proper standard for analyzing the prejudice prong under *Strickland*.

The petitioner next argues that he was prejudiced because the sexual assault evidence "became a significant issue in the case" and "altered the evidentiary picture" such that "[i]t created a reasonable probability sufficient to undermine the reliability of the verdict." We are not persuaded. We conclude, on the basis of our objective review of the totality of the evidence presented at the underlying criminal trial, that the admission of the sexual assault evidence did not alter the entire evidentiary picture. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39.

We agree with the habeas court that the sexual assault evidence was "not a focus of the trial and [was] referred to tangentially, often in a conclusory fashion." As already discussed in this opinion, the petitioner was not charged in connection with the sexual assaults, and, although the prosecutor suggested to the jury that it could consider the sexual assaults as one of numerous predicate felonies with respect to the home invasion charges, the court instructed the jury that it could consider only the charged offenses, burglary and robbery, and larceny as the crimes committed therein. See *State* v. *Carrillo*, 209 Conn. App. 213, 246, 267 A.3d 322 (2021) (noting well settled principle that "[w]e presume that the jury followed the court's instructions in the absence of any indication to the contrary" (internal quotation marks omitted)), cert. denied, 342 Conn. 909, 271 A.3d 663 (2022). In fact, the court did not at any point refer to the sexual assaults during its jury instructions.

Additionally, although the prosecutor did ask D.M. questions about the sexual assaults, the few questions he asked were all conclusory and elicited only "yes or no" answers. D.M. did not at any point describe the sexual assaults or discuss them in detail, nor did any other witness. Moreover, all of the references that D.M. and other witnesses made to the assaults, with the exception of the petitioner's written statement, were sanitized of graphic language and descriptive details. For instance, one of the references to the sexual assaults that the petitioner relies on was the testimony of a forensic technician who merely referred to the existence of a sexual assault kit in passing when he described his conduct on the day of the incident.[10] Thus, on the basis of our thorough review of the record, we

[10] The technician specifically testified that, on the day of the incident, "[a]fter processing of the primary scene [he] was dispatched to Waterbury Hospital to . . . collect clothing and a sexual assault kit."

disagree with the petitioner that the sexual assault evidence played a significant role at trial so as to alter the evidentiary picture. Although the sexual assaults were undoubtedly referred to throughout the proceeding, the references were not as prevalent as the petitioner suggests, and they were made in a conclusory and nonprovocative manner. We conclude, therefore, that the petitioner has not met his burden of showing that the decision reached would reasonably have been different in the absence of the admission of the sexual assault evidence.

The petitioner further argues that he was prejudiced because this was a "close case." In essence, he argues that the jury's verdict was only weakly supported by the record, and, therefore, it was more likely to have been affected by the error. We also are not persuaded by this argument.

First, although "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"; (internal quotation marks omitted) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39; merely stating in a conclusory fashion that the evidence was not overwhelming cannot, by itself, establish prejudice. As we stated previously in this opinion, the petitioner must prove by "demonstrable realities," not just mere speculation, that he was prejudiced. (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 834.

Second, we disagree with the petitioner that this was a "close case." We conclude, on the basis of our thorough and objective review of the record, that there was overwhelming evidence in support of the jury's decision to convict the petitioner of the offenses of conspiracy to commit burglary and accessory to burglary, robbery,

and home invasion. Included in this overwhelming evidence was the petitioner's inculpatory statement. The petitioner admitted that he was with the Kinnels on the night in question and that they had been talking about robbing two drug dealers, D.O. and I.T., "for a couple days." He further admitted that, on the night of the incident, Marquis told him that he and Shawn would contact him later "about doing something" and when they did get together, the Kinnels asked the petitioner where D.O. and I.T. lived. He admitted that, "[r]ight away when they asked where [D.O. and I.T.] lived, [the petitioner] knew that these guys were going to rob D.O. and I.T." Although he maintained in his statement and in his testimony that he did not know that D.O. and I.T. lived at that complex, he also admitted to seeing D.O. and I.T. nearly every day. Furthermore, he admitted that, after the Kinnels asked him where D.O. and I.T. lived, he and the Kinnels drove to the very condominium complex where D.O. and I.T. happened to live. Thus, the jury reasonably could have inferred that he did in fact know that D.O. and I.T. lived there and, moreover, that he aided the Kinnels by providing them with D.O. and I.T.'s address. Likewise, although the petitioner maintained that when the Kinnels got out of the Nissan and walked toward the condominium complex, he did not know what they were doing, he also admitted that the Kinnels had first retrieved two handguns that were stored under the hood of the Nissan. Thus, the jury reasonably could have concluded that the petitioner was well aware that the Kinnels were planning to break into D.O. and I.T.'s residence and to steal their money and drugs and, furthermore, that he aided them and entered into an agreement with them to do so.

Additionally, the petitioner consistently admitted to functionally being the Kinnels' getaway driver that night. He confessed that when the Kinnels called him and told him to return to the complex, he did, and that

he then followed them in the stolen Jeep out of the complex with the lights to the Nissan turned off. He continued to follow them to a hotel in Naugatuck where he waited for them while they tried to find D.O. and I.T.'s drug "stash," before driving them away from the Naugatuck hotel. Finally, the petitioner admitted in his written statement that the Kinnels paid him for his assistance that night, which money logically came from the stolen proceeds, and he admitted to spending the remainder of that night at Marquis' house despite the wrongdoings committed against his cousin that day, which supports his awareness of, and participation in, the crimes committed. Thus, in light of the foregoing, we conclude that there was overwhelming record support for the jury's verdict.

In support of his argument that this was a "close case," the petitioner specifically relies on the fact that he was acquitted of two of the charged offenses and "prevailed on an issue on direct appeal." His reliance, however, is misguided. The fact that the petitioner was acquitted of two of the offenses does not support his claim of prejudice; in fact, it does the opposite. See, e.g., *State* v. *Edwards*, 325 Conn. 97, 134, 156 A.3d 506 (2017) ("[t]he fact that the jury was able to acquit the defendant on some charges is strong evidence that the improperly admitted evidence did not substantially affect the verdict"); *State* v. *Rodriguez*, 91 Conn. App. 112, 120–21, 881 A.2d 371 ("Although the jury found the defendant guilty of all the counts of burglary, attempt to commit burglary, larceny and criminal trespass that it considered, it found the defendant not guilty of one count of breach of the peace in the second degree. That acquittal demonstrated that the jury was able to consider each count separately and, therefore, was not confused or prejudiced against the defendant."), cert. denied, 276 Conn. 909, 886 A.2d 423 (2005). Likewise, the fact that the petitioner prevailed on his direct appeal

also does not support his claim. The issue that the petitioner prevailed on in his direct appeal did not relate to the merits of the state's case, but, rather, to the application of a sentence enhancement under General Statutes § 53-202k. See *State* v. *Madera*, supra, 160 Conn. App. 862. More specifically, on appeal, we concluded that, because of our decision in a companion case, *State* v. *VanDeusen*, 160 Conn. App. 815, 842, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015), in which we held that § 53-202k does not apply to unarmed coconspirators, the petitioner's sentence should not have been enhanced with respect to his conspiracy conviction. Hence, his success in his criminal appeal was unrelated to the strength of the state's case and, therefore, has no bearing on the issue presented in this appeal.

Accordingly, we are not persuaded by the petitioner's argument that he was prejudiced because this "was a close case." On the basis of our objective review of the record, we determine that the jury's verdict was not one "weakly supported by the record," but, rather, was a verdict "with overwhelming record support." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 39.[11] As such, the admission of the sexual assault evidence did not alter "the

[11] The petitioner also argued that he was prejudiced because, at his sentencing hearing, "[d]espite the fact that he was not charged with sexual assault, the sentencing court nevertheless mentioned the sexual assault at sentencing, and it was clear that it became a part of its analysis in imposing the sentence." At the initial sentencing hearing, the petitioner provided the court with a letter from Marquis, which Kotulski claimed "essentially exonerate[d]" the petitioner. In response to the letter specifically, the court stated: "I think, a reasonable assumption is that the reference [in the letter] is to the sexual assaults that occurred inside of the house, and the [petitioner] was not charged with being an accessory to those sexual assaults." The court went on to state: "And as I indicate, I accept that in terms of the sexual assaults that occurred while in the residence appear to have been a crime of opportunity. . . . And so those are things that the court has taken into consideration."

The petitioner did not raise this particular argument about his sentencing hearing in his amended petition or in his posttrial brief to the habeas court,

entire evidentiary picture" and, therefore, we conclude the petitioner has not met his burden of showing that the jury's verdict "would reasonably likely have been different absent the errors." (Internal quotation marks omitted.) Id.

In sum, we conclude that the habeas court properly determined that the petitioner failed to meet his burden of demonstrating prejudice under *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

JASON COOLING *v.* CITY OF TORRINGTON (AC 45395)

Prescott, Elgo and Seeley, Js.

Syllabus

The plaintiff, a former member of the defendant city's police department, sought to recover damages for the defendant's alleged violations of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). In 2008, when the defendant hired the plaintiff, he was an active member of the United States Marine Corps Reserve. He had been deployed to Iraq prior to joining the department and was deployed to Afghanistan during his employment with the department. The plaintiff suffered from significant medical conditions as a result of his deployments, including a traumatic

---

and the court did not address it in its memorandum of decision. Moreover, the petitioner has not sought review of his unpreserved claim under the plain error doctrine or *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and the claim, which relates to the petitioner's criminal trial, does not challenge the actions of the habeas court. See *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 346–47, 297 A.3d 541 (2023). Accordingly, we decline to address this argument. See *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 787–88, 114 A.3d 925 (2015).

However, we note that, even if the petitioner had raised this argument to the habeas court, we nonetheless are not persuaded by it because the only reasonable interpretation of the trial court's statement at the sentencing hearing is that the court was clarifying that it was *not* taking into consideration the sexual assaults in imposing its sentence because they were crimes of opportunity.

brain injury, post-traumatic stress disorder, anxiety, depression, migraine headaches, and chronic back pain. The plaintiff worked as a patrol officer for the defendant. He was assigned to the evening shift on the basis of seniority and worked an alternating schedule that resulted in him having full weekends off only three times every sixteen weeks. In 2012, the plaintiff became the department's K-9 handler for the evening shift. In March, 2016, the defendant notified the plaintiff that he was being placed on sick leave probation for six months because he was in violation of the police union's collective bargaining agreement, as, in a twelve month period, he had called in sick in excess of four times in conjunction with his scheduled days off and/or days that he had switched his regularly scheduled shifts with that of another officer. In January, 2017, the plaintiff again was notified that he was being placed on sick leave probation and was told that the department was conducting an internal investigation into his use of sick leave. Thereafter, the plaintiff met with the then chief of police, M, and deputy chief of police, S, and informed them of ongoing stressors in his homelife. At this meeting, the plaintiff did not indicate that his sick time use was attributable to any injury, illness or disability related to his past military service. In February, 2017, the defendant formally notified the plaintiff that he was under investigation for excessive absenteeism. Thereafter, the plaintiff informed the defendant, for the first time, that he was suffering from a disability and indicated that he had used his sick time legitimately as a result of his disability. That same month, the plaintiff again was placed on sick leave probation in accordance with the terms of the collective bargaining agreement. In March, 2017, the plaintiff's psychiatrist sent a letter to the defendant recommending that it provide the plaintiff with a regular day shift schedule or with weekends off so that he could spend additional time with his family, which was important for his mental health and ongoing stability. Thereafter, the plaintiff and his attorney met with S, M, the defendant's personnel director, and its attorney, and the plaintiff asked to be assigned to a regular day shift schedule or to an evening shift position in narcotics with weekends off, in accordance with his psychiatrist's recommendation. In response, the defendant offered the plaintiff the option of either remaining in his then current assignment or moving to the day shift. It noted, however, that if he switched to the day shift, he would not be able to continue working as a K-9 handler because a K-9 officer with greater seniority was already assigned to the day shift. The defendant also indicated that it could not assign the plaintiff to the requested narcotics position because no such position existed. The plaintiff chose to remain on the evening shift as a K-9 handler. In May, 2017, the plaintiff initiated a complaint with the Commission on Human Rights and Opportunities, alleging workplace discrimination. In 2019, the plaintiff resigned from the department and received a release of jurisdiction from the commission. Thereafter, he

commenced this action, claiming, inter alia, that the defendant discriminated against him on the basis of his disability by failing to engage in good faith in an interactive process to provide him with a reasonable accommodation and by subjecting him to a hostile work environment. The defendant filed a motion for summary judgment, which the trial court granted, and the plaintiff appealed to this court. *Held*:

1. The trial court did not err in concluding that the plaintiff failed to raise a genuine issue of material fact that the defendant did not sufficiently engage in the interactive process and failed to present evidence from which a jury could conclude that the defendant had acted in bad faith: the defendant presented undisputed evidence that, once the plaintiff informed it of his disability and requested an accommodation, the defendant met with the plaintiff and his attorney and offered the exact accommodation that the plaintiff had requested and his doctor had recommended, the ability to work the day shift; moreover, although the plaintiff declined the accommodation, claiming that it was offered in bad faith because, if accepted, he would not be able to remain a K-9 handler, neither the plaintiff nor his doctor had included the need to remain a K-9 handler as part of the accommodation request or had indicated that continuing as a K-9 handler was an integral part of any reasonable accommodation, and there was no indication that, after he declined the accommodation, the plaintiff ever sought any additional dialogue with the defendant that was ignored or rejected; furthermore, the defendant's refusal to create the new narcotics position requested by the plaintiff was not unreasonable, as the defendant was not required to provide the plaintiff with a particular requested accommodation or to create a new position, but only to engage in the interactive process with the plaintiff; accordingly, the plaintiff's claim failed as a matter of law and the defendant was entitled to summary judgment.

2. The trial court did not err in determining that the plaintiff failed to meet his burden of demonstrating that a genuine issue of material fact existed regarding whether the defendant had subjected the plaintiff to a hostile work environment on the basis of his disability: the conduct that the plaintiff pointed to as support for his hostile work environment claim did not, as a matter of law, individually or in the aggregate, rise to the level of severity or pervasiveness needed to overcome summary judgment because the investigation into the plaintiff's use of his sick time and his subsequent discipline were the result of the plaintiff's violations of the collective bargaining agreement, rather than any discriminatory animus toward the plaintiff, and, as such, could not reasonably factor into this court's consideration of whether the plaintiff demonstrated the existence of a hostile work environment; moreover, the plaintiff failed to establish that the defendant had acted in a discriminatory manner in engaging in the interactive process to find a mutually agreed upon, reasonable accommodation, and, contrary to the plaintiff's claim, there was no evidentiary support for the proposition that the

defendant would have removed the plaintiff's canine from his possession if he had transferred to the day shift; furthermore, M's statement to the plaintiff that, in seeking an accommodation, he was not acting like a Marine was an isolated comment that did not have any real effect on the conditions of the plaintiff's employment, and the defendant's decision to send a uniformed officer to visit the plaintiff's workers' compensation doctor to obtain clarification regarding the plaintiff's ability to return to work following a work-related injury, even if undertaken with a discriminatory intent, was a onetime event that had no real impact on the plaintiff's working conditions or his ability to use his workers' compensation leave; additionally, with respect to an incident in which a photo of the plaintiff that was hanging in the department's locker room was defaced, the undisputed evidence showed that, once the matter was brought to the attention of the defendant, it removed the photo, disciplined an officer who had failed to timely report the incident, and took action to discourage such behavior in the future.

Argued April 18—officially released September 12, 2023

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Hon. John W. Pickard*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Eric R. Brown, for the appellant (plaintiff).

Michael J. Rose, with whom, on the brief, was *Megan L. Nielsen*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Jason Cooling, appeals from the summary judgment rendered by the trial court in favor of the defendant, the city of Torrington, on the plaintiff's complaint alleging violations of the Connecticut Fair Employment Practices Act (CFEPA), General

Statutes § 46a-51 et seq.[1] The plaintiff alleged in his complaint that the defendant discriminated against him on the basis of disability by, inter alia, failing to engage in a good faith interactive process to provide him with a reasonable accommodation and by subjecting him to a hostile work environment.[2] On appeal, the plaintiff claims that the court improperly determined that he

[1] Most pertinent to the present appeal is General Statutes § 46a-60 (b), which provides in relevant part: "It shall be a discriminatory practice in violation of this section:

"(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need . . . to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence;

* * *

"(4) For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

Although § 46a-60 has been amended several times since the events at issue in this appeal; see, e.g., Public Acts 2022, No. 22-82, § 10; Public Acts 2022, No. 22-78, §§ 7 and 8; Public Acts 2021, No. 21-69, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-60.

[2] The trial court construed the allegations in the plaintiff's complaint, which was not divided into separate counts, as raising "five separate causes of action sounding in the following: (1) discrimination on the basis of disability in violation of General Statutes § 46a-60 (b) (1); (2) hostile work environment under . . . § 46a-60 (b) (1); (3) constructive discharge; (4) retaliation under . . . § 46a-60 (b) (4); and (5) failure to reasonably accommodate." The court granted summary judgment as to the entirety of the complaint. The plaintiff has not challenged the trial court's ruling with respect to his claims of discrimination on the basis of disability, constructive discharge, and retaliation in the present appeal, effectively abandoning those claims. See, e.g., *Traylor* v. *State*, 332 Conn. 789, 805, 213 A.3d 467 (2019) ("[a]n unmentioned claim is, by definition, inadequately briefed, and one that is generally . . . considered abandoned" (internal quotation marks omitted)). We therefore address only the aspects of the court's judgment that the plaintiff has distinctly raised and briefed.

failed to raise a genuine issue of material fact that the defendant (1) had not engaged in the requisite good faith interactive process to discover a reasonable accommodation for his disability and (2) had subjected him to a hostile work environment. We disagree with the plaintiff and, accordingly, affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following undisputed facts and procedural history. The defendant hired the plaintiff in February, 2008, as a police officer with the Torrington Police Department (department). He worked for the department until his resignation in April, 2019. When hired, the plaintiff was an active member of the United States Marine Corps Reserve. Prior to joining the department, the plaintiff had been deployed to combat duty in Iraq in 2006. In 2011, while employed by the defendant, he was deployed again, this time to Afghanistan. The plaintiff suffered significant injuries as a result of his multiple deployments, including a traumatic brain injury, post-traumatic stress disorder (PTSD), anxiety, depression, migraine headaches, and chronic back pain.[3]

During his employment with the department, the plaintiff worked as an evening shift patrol officer on a 5/2, 5/3 schedule, meaning that he worked an alternating schedule that consisted of five days on and two days

[3] The plaintiff's sacrifices in service to his country are unquestionably commendable. He was wounded in Iraq in June, 2006, when the vehicle he occupied hit an improvised explosive device (IED). As a result of that incident, he suffered shrapnel injuries and a traumatic brain injury. The physical injuries and chronic stress of the deployment contributed to a significant psychological impact on the plaintiff. During his subsequent deployment to Afghanistan, the plaintiff was again exposed to IEDs, and, although he suffered no "penetrating traumas" during that second deployment, he observed five members of his ten man team suffer serious physical injuries.

off followed by five days on and three days off.[4] As a result of his schedule, the plaintiff's assigned days off rotated forward one day every two weeks, meaning that he had full weekends off only three times every sixteen weeks.

In 2012, after returning to work from his Afghanistan deployment, the plaintiff was assigned as a K-9 handler. In that role, he was provided with a police dog named Remington. The plaintiff housed and cared for Remington at his home and worked with him until they retired together. Remington generally was trained as a patrol dog but also received additional training to track people and to detect narcotics. The plaintiff received special training with Remington regarding the dog's narcotic detection functions. In addition to his special assignment as a K-9 handler on the evening shift, the plaintiff also was assigned as a member of the department's Special Response Team.[5]

As a police officer with the department, the plaintiff was a member of the Torrington Police Union, Local 442, Council 4, AFSCME, AFL-CIO (police union). Under the terms of the operative collective bargaining agreement between the defendant and the police union, employees accrued sick leave on a monthly basis. Any employee that used accrued sick leave on either the day before or after a scheduled day off on more than three occasions in any twelve month period would be

[4] The department operated three shifts: a daytime shift, an evening shift, and a midnight shift. Shift assignments were made on the basis of seniority using a bidding process in accordance with the collective bargaining agreement of the Torrington Police Union, Local 442, Council 4, AFSCME, AFL-CIO, of which the plaintiff was a member.

[5] The Special Response Team was tasked with responding to special situations such as a barricaded suspect or serving certain search and arrest warrants. It functioned as what is commonly referred to as a Special Weapons and Tactics (SWAT) team. The plaintiff was chosen to be a member of the Special Response Team because of his military training as a sniper.

placed on "sick leave probation . . . ."[6] During the resulting six month probation period, if the employee wished to use accrued sick time, he or she was required to submit a form signed by a physician to qualify for additional sick leave pay.

In March, 2016, the department notified the plaintiff by letter that he was being placed on " 'sick [leave] probation' " because he had "called in sick in excess of four times in conjunction with [his] scheduled days off and/or a [change] day in a twelve month period."[7] The start date of his six month probation period was February 28, 2016. The plaintiff neither raised any objections at that time to being placed on sick leave probation nor filed a grievance with the police union.

In January, 2017, the plaintiff was again notified by letter that he was being placed on sick leave probation for a "second time in less than a twelve (12) month period . . . ." The letter further provided in relevant part: "Your excessive absenteeism is negatively impacting the operational requirements of the department, causing unnecessary operating expenses, and is requiring others to carry the extra load. In addition, your excessive absenteeism has impaired the efficiency

[6] Article V, § 15, of the collective bargaining agreement provides: "Any employee using sick leave immediately before or after his/her scheduled days off or immediately before or after a 'change day', more than **three (3)** times during any twelve (12) month period, will be placed on a sick leave probation for six (6) months, with the date of the last abuse of sick leave becoming the first day of the next twelve (12) month period. While on sick leave probation, to qualify for sick leave pay, the employees will be required to present a completed Department 'ABSENCE REPORT APPLICATION FOR SICK LEAVE' signed by a physician for each subsequent sick leave absence during the probation period. This is to be turned in upon the employee's return to work. EXCEPTIONS: extended illnesses or maternity or sick leave supported by a medical certificate in accordance with Section 8 and Section 14 of this ARTICLE."

[7] A "change day" was a day that an officer had switched his regularly scheduled work shift with that of another officer.

of the [d]epartment and the efficiency of you as a member of this [d]epartment." Finally, the letter informed the plaintiff that the department would conduct an internal investigation into the plaintiff's use of sick leave.

The plaintiff had an informal meeting on January 31, 2017, with the then chief of police, Michael Maniago, and the deputy chief of police, Christopher Smedick. At that meeting, the plaintiff advised them "of ongoing stressors in his homelife."[8] He did not mention at this meeting that his sick time use was attributable to any injury, illness, and/or disability related to his past military service.

On February 2, 2017, the defendant formally notified the plaintiff that he was under investigation for excessive absenteeism. In a memorandum dated February 8, 2017, the plaintiff notified the defendant that he was suffering from a disability and that he properly had utilized his contractually allowed sick time as a result of that disability.[9] Prior to the February 8, 2017 notice, the plaintiff had not raised his disability as an issue to the defendant nor had he sought any accommodation for it because, as alleged in his complaint, "he did not believe that he was in need of any accommodations in order to perform the essential functions of his position, apart from his *legitimate use* of contractually provided paid sick leave." (Emphasis added.)

On February 15, 2017, the defendant issued a written reprimand to the plaintiff. The reprimand provided that

[8] In his deposition, Maniago stated that the plaintiff had told them "about how he's having some issues at home and his wife was having problems coping with the kids after working in school all day and she needed help, and he was hoping to be able to change his shift to the day shift and have weekends off in addition to that. . . . He said he was using sick time to help with this."

[9] The notice provided in relevant part that the following conditions were relevant to the plaintiff's use of sick time: post-traumatic brain injury, chronic migraine headaches, chronic back pain, cervical strain, irritable bowel syndrome, and PTSD.

the plaintiff had engaged in conduct unbecoming a police officer because, on more than three occasions, he had used his sick time in close proximity to other paid time off, which violated the terms of the collective bargaining agreement. As a result, the defendant placed the plaintiff back on sick leave probation in accordance with the collective bargaining agreement. The plaintiff received no additional discipline.

On March 8, 2017, the plaintiff's psychiatrist, Pavle Joksovic, sent a letter to the defendant indicating that the plaintiff currently was receiving psychotropic medication and supportive therapy for anxiety and depression. Joksovic stated that the plaintiff was stable and capable of performing his duties as a police officer with the help and support of his family. Joksovic nevertheless also recommended that, to maintain "proper daily function," the department should provide the plaintiff with a "regular daily shift schedule and/or no weekends as increased time spen[t] with his family would go a long way for his [ongoing] stability."

In April, 2017, after Joksovic issued his letter, the plaintiff asked for a meeting with the defendant to discuss the accommodations recommended by Joksovic. On April 26, 2017, a meeting took place between the plaintiff, his attorney, Maniago, Smedick, the defendant's personnel director, and its attorney. At that meeting, the plaintiff, consistent with Joksovic's recommendations, asked to be assigned to a regular day shift schedule or, alternatively, to an evening shift position in narcotics, which would have allowed him to work a 5/2, 4/3 schedule, meaning he would have had weekends off.

In response, the defendant offered the plaintiff the option of either remaining in his current assignment or moving to the day shift on a 5/2, 5/3 schedule. The defendant, however, informed the plaintiff that if he

elected to switch to the day shift, he would no longer be able to continue as a K-9 handler. The department had three dog handlers, with one assigned to each of the three shifts. There already was a K-9 officer with more seniority assigned to the day shift who did not want to move to the evening shift. The defendant also indicated that it could not assign the plaintiff to a narcotics position because no such position existed. The plaintiff chose to continue to work the evening shift.

On May 10, 2017, the plaintiff filed a complaint with the Commission on Human Rights and Opportunities (CHRO) alleging workplace discrimination in that he had been denied a reasonable accommodation on the basis of a disability. The plaintiff eventually obtained a release of jurisdiction from the CHRO. See footnote 10 of this opinion.

On June 26, 2017, the plaintiff was injured at work during an altercation with a suspect whom the plaintiff was attempting to take into custody. The plaintiff was placed on leave pending a June 29, 2017 follow-up visit with the defendant's workers' compensation doctor. On June 29, 2017, the plaintiff provided the defendant with a note from the workers' compensation doctor that indicated that the plaintiff was fit to work his entire shift as of June 29, 2017, with limited restrictions. The plaintiff nonetheless informed the defendant that it was his understanding on the basis of his visit with the workers' compensation doctor that he should stay home. Because of the apparent contradiction between the doctor's written note and the plaintiff's understanding of the doctor's orders, the defendant asked the plaintiff to return to the doctor for further clarification. The plaintiff later returned with a note from a chiropractor who recommended that the plaintiff remain out of work until cleared by a concussion specialist. The defendant then asked the plaintiff to seek clarification from the initial workers' compensation approved doctor and not

from his personal chiropractor. The defendant also ordered another police officer, Louis Gonzalez, to join the plaintiff in seeking clarification. The workers' compensation doctor informed the plaintiff and Gonzalez that the plaintiff was cleared to return to work with certain limitations. The plaintiff nevertheless remained out of work until January, 2018, on the basis of his work-related injury.

During the time the plaintiff was on leave due to the June, 2017 injury, he learned that somebody in the department had defaced a photo of him that had been hanging in the department's locker room. The photo depicted the plaintiff with several fellow police officers around the time he had returned from his Afghanistan deployment. Someone had placed a thumb tack through the plaintiff's forehead. In December, 2017, the defendant had the photo removed. The defendant held a meeting with all officers about the photo and instructed them that the department would not tolerate such conduct and that it should not be repeated. In addition, the defendant ordered an internal affairs investigation that resulted in the discipline of an officer who had failed to timely report the incident to the department.

On April 16, 2019, the plaintiff sent the defendant a letter in which he resigned effective April 29, 2019. The resignation letter stated that the plaintiff had accepted a position with Yale New Haven Health System as an emergency management specialist.

On May 9, 2019, the plaintiff commenced this civil action against the defendant.[10] In his complaint, the

[10] A person alleging discriminatory work practices in violation of CFEPA must exhaust his or her administrative remedies by filing a complaint with the CHRO in accordance General Statutes § 46a-82. Only after obtaining a release of jurisdiction from the CHRO, may that person then pursue an action in Superior Court. See General Statutes § 46a-100. Any such civil action must be brought within ninety days of receipt of the CHRO release. General Statutes § 46a-101 (e). General Statutes § 46a-102 further provides that any such action be filed within two years from the date of the filing of the CHRO complaint.

plaintiff alleged that the defendant discriminated against him on the basis of his disability in violation of General Statutes § 46a-60 (b) (1) and (4). See footnote 1 of this opinion. Relevant to the present appeal are the plaintiff's allegations that the defendant failed to engage in good faith in an interactive process to provide him with a reasonable accommodation for his disability and subjected him to a hostile work environment. On January 12, 2021, the defendant filed a motion for summary judgment accompanied by a memorandum of law. Attached to its memorandum were affidavits, excerpts from depositions and other documentary evidence. On April 5, 2021, the plaintiff filed a memorandum in opposition to the defendant's motion for summary judgment that included additional documentary evidence. The court heard oral argument on January 18, 2022.

On March 23, 2022, the court issued a memorandum of decision concluding that the plaintiff failed to raise genuine issues of material fact with respect to his claims and that the defendant was entitled to judgment as a matter of law on the entirety of the plaintiff's complaint. The court first determined that the defendant's investigation of the plaintiff's use of sick time, which resulted only in a written reprimand and contractually mandated sick leave probation, neither of which significantly altered the plaintiff's working conditions, could not, as a matter of law, constitute "materially adverse employment actions to support the plaintiff's claim of discrimination on the basis of disability." Furthermore, the court concluded that, even if the investigation and reprimand were adverse employment actions, the plaintiff failed to point to any evidence that the defendant's actions give rise to a reasonable inference of discrimination.

Here, the plaintiff obtained a release of jurisdiction from the CHRO regarding his May 10, 2017 action on April 25, 2019. The plaintiff thus has exhausted his administrative remedies and complied with all applicable statutory limitation periods.

Rather, the evidence demonstrated that the defendant investigated and reprimanded the plaintiff because of his abuse of sick time in violation of the collective bargaining agreement, not due to any hostility toward his disability. Further, although the plaintiff argued to the court that the fact that he was the only police officer investigated and reprimanded for sick time abuse gives rise to a reasonable inference of discrimination, the plaintiff failed to provide the court with any evidence of "a similarly situated [officer who] was treated more favorably by the defendant than he was."

The court also determined that the defendant was entitled to judgment as a matter of law on the plaintiff's allegations of a hostile work environment. Specifically, the court explained that, even accepting as true the few isolated actions alleged by the plaintiff as constituting hostile acts, they were not sufficiently severe or pervasive as to be reasonably viewed by a jury as creating a hostile work environment.

The plaintiff had relied on the same conduct to support his claim of constructive discharge, which claim the court determined also failed as a matter of law because the record evidence did not demonstrate a work atmosphere that was so difficult or unpleasant that a reasonable person would have felt compelled to resign. Moreover, nearly one year and four months passed between the conduct alleged and the plaintiff's resignation, making it far less reasonable to link the resignation with the work environment.

The court also concluded that the defendant was entitled to summary judgment on the plaintiff's claim of retaliation. The court first noted that the plaintiff had not addressed the retaliation claim in his objection to summary judgment, including the defendant's argument that the claim should fail because the plaintiff presented no evidence that the defendant was aware

of his disability when it conducted its sick time investigation. The court then concluded: "The reprimand received by the plaintiff was not due to a protected activity, rather it was a result of a violation of the collective bargaining agreement regarding sick time use. Thus, the plaintiff's claim of retaliation fails as a matter of law."

Finally, the court rendered summary judgment with respect to the plaintiff's claim that the defendant had not engaged in good faith in the interactive process necessary to provide the plaintiff with a reasonable accommodation. The court determined that the undisputed record showed that "[t]he plaintiff provided the defendant with a doctor's note that it would be beneficial for his health to work day shifts, the plaintiff requested day shifts, and the defendant offered day shifts. This is undisputed evidence that the defendant engaged in an interactive process with the plaintiff in good faith and offered a reasonable accommodation. The plaintiff has not presented evidence to show otherwise."

In sum, the court concluded that "there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law on all counts." This appeal followed.

I

The plaintiff first claims that the court improperly determined that the defendant had engaged in a good faith interactive process with the plaintiff to reasonably accommodate his disability and, thus, that the defendant was entitled to judgment as a matter of law on his claim that the defendant violated § 46a-60 (b) (1) of CFEPA. According to the plaintiff, the court "made a factual finding that was not within its purview to make when it determined that the defendant engaged in the interactive process in good faith and offered a

reasonable accommodation that the plaintiff refused. . . . The trial court should have left to the fact finder the determination as to the defendant's participation in the interactive process, the reasonableness of any offered accommodation, and whether it was done in good faith." (Citation omitted.) The defendant counters that, "[w]here an employer grants the exact accommodation that an employee requests and a doctor recommends, there can be no genuine issue of material fact that the employer did not engage in the interactive process in good faith. Such a determination need not be reserved for the jury to decide." We agree with the defendant.

We begin our analysis by setting forth our standard of review and other generally applicable principles of law that guide our review. The standards governing our review of a court's decision to grant a defendant's motion for summary judgment are well settled. "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. . . . 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 . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to

determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut, LLC*, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015).

We turn to relevant state law regarding employment discrimination premised on a failure to reasonably accommodate a disability.[11] CFEPA prohibits discriminatory employment practices. Specifically, § 46a-60 (b)

[11] Generally, the framework that our courts employ "in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. . . . We look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both. . . . Under this analysis, the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the [employee] must show: (1) the [employee] is a member of a protected class; (2) the [employee] was qualified for the position; (3) the [employee] suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion; it can involve no credibility assessment. . . . 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." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73–74, 111 A.3d 453 (2015). "[I]n attempting to satisfy this burden, the [employee]—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." (Internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 507, 832 A.2d 660 (2003). "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation

provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer . . . except in the case of a bona fide occupational qualification or need . . . to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of mental disability, intellectual disability, learning disability, [or] physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence . . . ."

Our Supreme Court has interpreted CFEPA, consistent with analogous federal law; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 403–404, 415–16, 944 A.2d 925 (2008); to require an employer and an employee to "engage in an informal, interactive process . . . [to] identify the precise limitations resulting from [an employee's] disability and potential reasonable accommodations that could overcome those limitations. . . . The need for bilateral discussion arises because each party holds information the other does not have or cannot easily obtain. . . . The employee bears the burden of initiating the interactive process and must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion. . . . A plaintiff who fails to initiate or to participate in the interactive process in good faith cannot prevail on an employment discrimination claim under CFEPA. . . . Once the employee has initiated the informal interactive process, the employer has a duty of good faith compliance. . . . An employer's refusal to give [an employee his or her] specific requested accommodation does not necessarily amount to bad faith, so long as the employer makes an earnest attempt to discuss other potential reasonable

marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 523, 233 A.3d 1170 (2020).

accommodations. . . . Additionally, an employer's failure to participate in the interactive process in good faith does not give rise to per se liability but may be sufficient grounds for denying a defendant's motion for summary judgment, because it is, at least, some evidence of discrimination." (Citations omitted; internal quotation marks omitted.) *Kovachich* v. *Dept. of Mental Health & Addiction Services*, 344 Conn. 777, 802–803, 281 A.3d 1144 (2022); see also *Equal Employment Opportunity Commission* v. *Kohl's Dept. Stores, Inc.*, 774 F.3d 127, 132 (1st Cir. 2014) ("The interactive process involves an informal dialogue between the employee and the employer in which the two parties discuss the issues affecting the employee and potential reasonable accommodations that might address those issues. . . . It requires bilateral cooperation and communication." (Citation omitted.)).

"The interactive process required by law is ongoing, meaning that the provision of a temporary accommodation does not circumvent . . . the requirement to make a good faith effort to engage in [the] interactive process, if the employee so requests, to determine whether the employer might make some other reasonable accommodation on a more permanent basis. . . . The continuing obligation to engage in the interactive process in good faith fosters a cooperative dialogue between the employer and the employee and furthers their shared responsibility to fashion a reasonable accommodation. . . . If either party obstructs or delays the interactive process in bad faith by, for example, *failing to communicate, by way of initiation or response*, that party will be assign[ed] responsibility for the breakdown of the interactive process." (Citations omitted; emphasis added; internal quotation marks omitted.) *Kovachich* v. *Dept. of Mental Health & Addiction Services*, supra, 344 Conn. 804–805. "The employee must be candid and

responsive. If the employer needs additional information concerning the employee's mental and physical condition and resultant limitations, the employee must provide it. If the employer proposes an accommodation to which the employee has an objection or concern, *the employee must express that objection or concern during the interactive process*. If the employee does not state objections or concerns during the interactive process, the court will be reluctant to hear the employee testify to them in court." (Emphasis added; footnote omitted.) C. Sullivan, "The ADA's Interactive Process," 57 J. Mo. B. 116, 117 (2001), citing *Loulseged* v. *Akzo Nobel, Inc.*, 178 F.3d 731, 737 (5th Cir. 1999); see also *McBride* v. *BIC Consumer Products Mfg. Co.*, 583 F.3d 92, 97–98 (2d Cir. 2009) (plaintiff requesting reassignment as accommodation bears burden to "demonstrate the existence, at or around the time when accommodation was sought, of an existing vacant position to which [he or] she could have been reassigned").

Here, the record is simply devoid of any evidence that the defendant failed to engage in good faith in the interactive process with the plaintiff to provide him with a reasonable accommodation. The defendant presented undisputed evidence in support of summary judgment that once the plaintiff had informed it of his disability and requested an accommodation, a meeting was held between Maniago, Smedick, the plaintiff, the plaintiff's attorney, the defendant's personnel director, and its attorney. The record shows that the plaintiff proposed that he be permitted to work day shifts instead of evening shifts. The defendant obliged him by offering him to work day shifts but indicated that continuing as a K-9 handler during the day shift was not tenable because there was no need for an additional K-9 handler on that shift. Given a choice to move to the day shift without his canine or remain on his current schedule, the plaintiff elected to remain on his existing shift. Although the

parties failed to reach an agreement that fully satisfied the plaintiff regarding his request for a shift change, the record does not show that the plaintiff ever sought any additional dialogue with the defendant that was ignored or rejected. Additionally, although the plaintiff did not want to move to the day shift without his dog, neither the plaintiff nor his doctor had included the need to remain a dog handler as part of the accommodation request or indicated that continuing as a dog handler was an integral part of any reasonable accommodation. Nevertheless, even if the defendant had been made aware of that condition, an employer is not required to provide an employee with any particular requested accommodation. See *Ezikovich* v. *Commission on Human Rights & Opportunities*, 57 Conn. App. 767, 775, 750 A.2d 494, cert. denied, 253 Conn. 925, 754 A.2d 796 (2000). Rather, it must only engage in an interactive process with the employee, and the undisputed evidence in the present case does not show that the defendant failed to do so.

The plaintiff concedes in his opposition to summary judgment that the defendant had engaged in interactive conversations with him and, in fact, offered him one of the accommodations he requested. Specifically, he noted that the defendant had "offered [him] to work the day shift *as requested*, but without his dog . . . ." (Emphasis added.) Moreover, the plaintiff acknowledged in his deposition that, although he had not received the precise accommodation he desired, he never formally pursued the subject further. Specifically, during his deposition, the plaintiff stated: "Days shift only, no dog. That was what was offered." He was then asked: "And you decided to turn it down based on your own feelings?" The plaintiff answered: "Correct." There was no indication in the summary judgment record that he explained to the defendant during negotiations that a move to the day shift, in his view, would not be

an acceptable or reasonable accommodation if he was unable to continue with his special assignment as a K-9 handler, or how remaining as a K-9 handler was related to his need for an accommodation moving forward. See *Kovachich* v. *Dept. of Mental Health & Addiction Services*, supra, 344 Conn. 804–805 (employee has duty to express concerns during interactive process). He was asked during his deposition, "And did you present them with any other options?" He responded, "No."[12]

The plaintiff also admitted in his deposition that, rather than seeking to be reassigned to an existing job opening, he actually sought to have the defendant place him in a new hybrid patrol/narcotics position, one that did not then exist within the department. The following question and response is illustrative: "Q. Then the second question is: When you refer to a vacant position, there really isn't a position that was consistent with what you were looking for. You were looking for a new position, right? A. Yes, as a hybrid of patrol narcotics." The fact that the defendant offered the plaintiff one of the accommodations suggested by his doctor, although perhaps not his ideal accommodation, does not render

[12] The plaintiff claims that the court ignored evidence in determining that the defendant had engaged in the interactive process in good faith. The plaintiff argues that he was seeking an accommodation to better connect with his family "so that he could maintain his mental and emotional wellness," and removing him from his K-9 unit was directly contrary to this purpose. According to the plaintiff, the defendant knew that its offer to move the plaintiff to the day shift without his dog was a " 'poison pill' " that the plaintiff would never accept and thus was nothing more than an empty gesture that was patently unreasonable or demonstrated that the defendant was acting in bad faith regarding its obligation to engage the plaintiff in an interactive dialogue regarding reasonable accommodations. Despite the plaintiff's contentions, the undisputed summary judgment record shows that the plaintiff made no attempt to negotiate further; he simply rejected the offer and agreed to remain in his existing position. The plaintiff presented no direct evidence of the defendant's alleged ulterior motives, nor could they be reasonably inferred from the record presented, even when viewing the evidence in the light most favorable to the plaintiff.

the accommodation offered unreasonable; see *Ezikovich* v. *Commission on Human Rights & Opportunities*, supra, 57 Conn. App. 775; nor does the defendant's refusal to create a new position for which it had no business need or budget. See, e.g., *Medlin* v. *Rome Strip Steel Co.*, 294 F. Supp. 2d 279, 291 (N.D.N.Y. 2003) ("[if] a proposed accommodation is reassignment or transfer to another position, a plaintiff has the obligation at summary judgment to come forward with evidence demonstrating that the position sought existed at the time it was requested"), citing *Jackan* v. *New York State Dept. of Labor*, 205 F.3d 562, 566 (2d Cir.), cert. denied, 531 U.S. 931, 121 S. Ct. 314, 148 L. Ed. 2d 251 (2000).

As the plaintiff correctly points out in his brief, courts have indicated that whether an accommodation is "reasonable" and whether a party acts in "good faith" are ordinarily questions of fact to be decided by a jury. See, e.g., *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 13 Conn. App. 712, 722, 539 A.2d 595 (plaintiff's "good faith" in accelerating debt was question of fact that court improperly resolved at summary judgment), cert. denied, 208 Conn. 803, 545 A.2d 1101 (1988). This does not mean, however, that a court cannot render summary judgment for a defendant if that defendant submits evidence that it engaged with the plaintiff in good faith or offered an accommodation that was per se reasonable because it was the very accommodation sought by the plaintiff, and the plaintiff fails to offer any contrary evidence in opposition to summary judgment.

On the record before us, the trial court properly concluded that the plaintiff failed to raise a genuine issue of material fact that the defendant did not sufficiently engage in the interactive process. The plaintiff also did not present any evidence in his opposition from which a jury reasonably could conclude that the defendant acted in bad faith. The plaintiff was presented with a reasonable accommodation of the day shift, albeit

without the use of a K-9. The plaintiff admitted in his deposition that the offered accommodation would have allowed him to perform the essential functions of the job. The defendant had no legal obligation to offer additional accommodations more preferable to the plaintiff or to create a new position. Here, there is no disputed issue of material fact that an informal, interactive process occurred or that a reasonable accommodation was made. The plaintiff's claim fails as a matter of law and the defendant was entitled to summary judgment.

II

The plaintiff also claims that the court improperly concluded that the defendant was entitled to judgment as a matter of law with respect to the plaintiff's claim that the defendant subjected him to a hostile work environment on the basis of his disability in violation of CFEPA. The defendant responds that the court correctly determined that the conduct the plaintiff pointed to as supporting his hostile work environment allegation did not, as a matter of law, rise to the level of severity or pervasiveness needed to overcome summary judgment. Again, we agree with the defendant.

Our Supreme Court has held that "hostile work environment claims may be brought under § 46a-60 [b] (1) pursuant to that provision's prohibition of discrimination in terms, conditions or privileges of employment . . . ." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 696, 41 A.3d 1013 (2012). "[T]o establish a hostile work environment claim, a plaintiff must produce evidence sufficient to show that the workplace is permeated with *discriminatory* intimidation, ridicule, and insult that is *sufficiently severe or pervasive* to alter the conditions of the victim's employment and create an abusive working environment . . . . [I]n order to be actionable . . . [an] objectionable environment must be both objectively

and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. . . . Whether an environment is objectively hostile is determined by looking at the record as a whole and at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (Emphasis added; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 85, 111 A.3d 453 (2015).

Accordingly, summary judgment is appropriate regarding a hostile work environment claim if no reasonable juror could conclude on the basis of the supporting and opposing documents submitted that the plaintiff was subjected to discriminatory working conditions that were both sufficiently severe and pervasive. See id., 88–89. Moreover, each incident relied on to support a claim of a hostile work environment must have some causal connection to discrimination. After all, like its federal analog, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2018), CFEPA "does not prohibit all verbal or physical harassment in the workplace; it is directed only at discriminat[ion] . . . ." (Emphasis omitted; internal quotation marks omitted.) *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see also *Alfano* v. *Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (noting that courts should exclude from consideration in hostile work environment cases incidents "that lack a linkage or correlation to the claimed ground of discrimination").

In support of his hostile work environment claim, the plaintiff directs our attention in his appellate brief to the following seven incidents that he viewed subjectively as offensive and argues "satisf[y] the objective

components of a hostile work environment claim: [1] The defendant disciplined the plaintiff for use of sick time by issuing him a written reprimand and finding that he had violated the code of conduct after he had presented evidence of a legitimate need for the leave, and evidence of disabling conditions including depression, anxiety, PTSD, and traumatic brain injury. This was the only time an officer in the [department] had ever been investigated for sick time usage during Chief Maniago's administration, and the only time an officer had been disciplined for it; [2] The defendant refused to accommodate the plaintiff's disabling condition by assigning him to open positions as either a narcotics investigator or special investigator—positions for which he was qualified; [3] [Maniago] began pressuring the plaintiff to stop seeking an accommodation for his disability and threatening him with a fitness for duty examination that would lead potentially to his termination from employment. In this regard [Maniago] also belittled the plaintiff by telling him that he was not acting 'like a Marine,' even though [Maniago] shamefully had no experience as a Marine and could not possibly know from firsthand experience how a 'Marine' would act when faced with PTSD, traumatic brain injury, depression, and anxiety resultant from two combat deployments in active war zones; [4] Challenging the plaintiff's need for leave after he was assaulted on duty, suffered a concussion, and was told to stay out of work by his own physician pending an exam with his own neurologist; [5] Sending a captain in uniform to visit the plaintiff's workers' compensation treating physician to intimidate him in person and force the doctor to return the plaintiff to work. This was the only time in the captain's career or [Maniago's] career that such an action was taken when an officer had been injured in the line of duty; [6] Offering the plaintiff an accommodation that demanded that the plaintiff turn over his K-9 partner back to the department for reassignment to another

officer and family in order to get his preferred assignment on the day shift. This proposed 'accommodation' was made after the [defendant] was aware that [the plaintiff] was suffering from depression; had been traumatically injured in combat; and was seeking to reconnect with his family, which included his K-9 partner as an important family member; [and (7)] Continual defacement of the photograph of the plaintiff upon his return from military combat action in Afghanistan without taking any timely action to cease the defacement or accompanying intimidation." (Emphasis omitted.)

As the trial court indicated, the actions cited by the plaintiff, either individually or in the aggregate, simply do not meet the standard of objective hostility required to survive summary judgment. More specifically, the undisputed facts in the summary judgment record do not demonstrate a workplace that was permeated with discriminatory conduct that was either sufficiently severe or pervasive to rise to the level of an actionable hostile workplace.

With respect to the plaintiff's first incident, which relates to the defendant's investigation of the plaintiff's use of sick time and the resulting discipline, the trial court concluded that the plaintiff had failed to produce evidence that raised a genuine issue of material fact regarding any discriminatory intent on the part of the defendant. The court concluded that the evidence tended to show that the investigation, which began prior to the defendant even learning of the plaintiff's disability, and the discipline that followed, were the result of the plaintiff's violations of the collective bargaining agreement, not any discriminatory animus toward the plaintiff. The plaintiff does not challenge that aspect of the court's summary judgment ruling. Said another way, without the requisite causal connection to discrimination on the basis of disability, the investigation and resulting discipline cannot reasonably factor into our

consideration of whether the plaintiff has demonstrated the existence of a hostile work environment.

Similarly, the second and sixth incidents are each related to the issue of reasonable accommodation. As we concluded in part I of this opinion, the plaintiff has failed to establish that the defendant acted in a discriminatory manner in engaging in the interactive process to find a mutually agreed upon, reasonable accommodation, and the plaintiff has either not challenged or failed to provide evidence demonstrating that the defendant failed to offer a reasonable accommodation when it agreed to honor his request to transfer to a patrol position on the day shift. The plaintiff's characterization of the accommodation as requiring him "to turn over his K-9 partner back to the department for reassignment to another officer and family" is not supported by any citations to the record. Although it is undisputed that the plaintiff would not have been able to continue his assignment as a dog handler if he moved to the day shift, there is no evidentiary support for the proposition that the defendant would have removed the dog from the plaintiff and his family. The only evidence regarding the future disposition of the dog is found in the deposition testimony of Maniago, who indicated that it was his intention to allow the dog to remain with the plaintiff. In short, these two incidents cannot be properly viewed as attributing to a hostile work environment.

This leaves four alleged incidents to consider in support of the plaintiff's claim of a hostile work environment: incidents three, four, five and seven. Even assuming for purposes of summary judgment that the plaintiff can establish the requisite discriminatory intent, these incidents, individually or in the aggregate, lack the severity and pervasiveness needed to avoid summary judgment as a matter of law.

Incident three involved the isolated comment made by Maniago during the interactive process, in which he allegedly opined that the plaintiff's conduct in seeking an accommodation was not how Marines behave. The plaintiff clearly was distressed and insulted by this comment because Maniago was not himself a Marine. Even if it is assumed that it was made with discriminatory animus, however, it was an isolated comment, and the plaintiff presented no evidence that the statement or anything similar was ever repeated by Maniago or anyone else in the department. As noted by the trial court, there is also nothing in the record from which to conclude that the offhanded comment to the plaintiff had any real effect on the conditions of employment. Unless extremely serious, a single comment, even a discriminatory one, cannot support a hostile work environment allegation. See *Holtz* v. *Rockefeller & Co.*, 258 F.3d 62, 75 (2d Cir. 2001) ("incidents of allegedly offensive conduct must also be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive" (internal quotation marks omitted)); *Fossesigurani* v. *Bridgeport Fire Dept.*, Docket No. 3:11-CV-752 (VLB), 2012 WL 4512772, *8 (D. Conn. October 1, 2012) ("A single comment is insufficient to constitute a hostile work environment regardless of the fact that [the] [p]laintiff felt harassed and abused by that comment. To demonstrate a hostile work environment, [the] [p]laintiff must show that there was a steady barrage of opprobrious comments reflective of disability enmity and not a single incident."). Although Maniago's comment reasonably could be viewed as offensive and perhaps even humiliating in the eyes of the plaintiff, the comment was isolated, not particularly severe, and certainly not physically threatening.

We next address incidents four and five, in which the plaintiff generally asserts that the defendant challenged his need for leave following his work-related injury,

despite the advisement from the plaintiff's personal chiropractor that he remain out of work until cleared by a neurologist and, more specifically, that the defendant sent a uniformed officer to visit the plaintiff's workers' compensation doctor for the purpose of intimidating him into ordering the plaintiff to return to work. The plaintiff suggests that discriminatory intent can be inferred from the fact that the defendant had not taken the same or similar action in the past. Even if a reasonable jury could conclude that these actions were taken because of the plaintiff's disability rather than, as advanced by the defendant, to resolve a conflict in doctors' opinions, it was a onetime event that, as a matter of law, does not meet the standard of a hostile work environment. This is particularly true because the defendant's actions had no real impact on the plaintiff's working conditions or his ability to use workers' compensation leave, which he did without further incident.

The remaining incident, which occurred while the plaintiff was on workers' compensation leave, involved someone in the department defacing a photo of the plaintiff that was displayed in a common area of the department by placing a thumb tack into the photo through the head of the plaintiff. The plaintiff presented no evidence identifying the individual that defaced the photo or establishing that the incident was in any way related to his disability as opposed to some other reason. Furthermore, the undisputed evidence shows that, once the incident was brought to the attention of the defendant, it took the incident seriously by promptly removing the photo and disciplining an officer who had failed to timely report the incident. Again, this was a onetime incident, and the defendant took action to discourage such behavior in the future.

In summary, the incidents relied on by the plaintiff, even accepting that they were motivated by some discriminatory or other improper intent, were not so

extreme or pervasive to reasonably conclude that they changed the terms and conditions of the plaintiff's employment. Moreover, the plaintiff continued to work for the department and acknowledged in his deposition that he "had no further examples of harassment since returning to work" in a period of "seventeen months." Viewing the evidence in the light most favorable to the plaintiff, including all reasonable inferences, we agree with the trial court that the plaintiff has failed to meet his burden of showing that a genuine issue of material fact exists regarding whether the actions complained of amounted to a hostile work environment.

The judgment is affirmed.

In this opinion the other judges concurred.