IN RE AURORA H. ET AL.*
(AC 46330)

Moll, Suarez and Seeley, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her two minor children. The children had been committed to the custody of the petitioner, the Commissioner of Children and Families, since shortly after their births, and the children have resided with their foster mother during the entirety of the underlying proceedings. During the Department of Children and Families' involvement with the mother, she was arrested and charged with various crimes, including felonies, and the police report indicated that the mother had been arrested with a convicted felon who was described as her "boyfriend." The trial court had ordered specific steps that the mother should take to facilitate reunification with the children, including that she notify the department of any changes in the makeup of her household and that she refrain from involvement in the criminal justice system. Approximately eight months later, the mother called the police regarding an incident with a different, then live-in boyfriend. Despite the need for open communication with the department, the mother failed to disclose either incident involving the police to the department. Although services had been recommended to the mother one year earlier, the mother began mental health services at the recommended provider just one month prior to the hearing on the termination petitions. The court found by clear and convincing evidence that the mother had failed to fully comply with various court-ordered specific steps to facilitate reunification, including that she not get involved with the criminal justice system, and that termination was in the children's best interests. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erred in concluding that she had failed to achieve a sufficient degree of personal rehabilitation within the meaning of the statute (§ 17a-112) governing termination of parental rights: the evidence, when viewed in the manner most favorable to sustaining the judgments, sufficiently supported the court's conclusion that the mother had failed to achieve a sufficient degree of rehabilitation necessary to encourage a belief that now or within a reasonable time she could assume a responsible position

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

in the lives of the children; moreover, the trial court properly relied on the undisputed evidence of the mother's arrest in determining whether she had failed to rehabilitate, finding that the arrest violated her specific step that she not get involved with the criminal justice system and that it raised concerns about whom she was associating with and whether she would be able to provide a safe environment for her children; furthermore, although the court relied in part on the allegations of criminal behavior, it did not base its finding that the mother had failed to rehabilitate solely on the basis of the mother's arrest but, rather, cited multiple relevant factors that contributed to its findings, including the mother's mental health, her involvement in intimate partner violence, her failure to complete and benefit from counseling and services, and the circumstances surrounding the serious pending felony charges.

2. The respondent mother could not prevail on her unpreserved claim that the trial court erred in considering the specific step that she "not get involved with the criminal justice system" because § 17a-112 (j) (3) (B), as applied to her, was void for vagueness and violated federal due process principles: the mother's claim failed under the third prong of *State* v. *Golding* (213 Conn. 233) because the alleged constitutional violation did not exist, as the record reflected that the mother signed the court-ordered specific steps, including the provision ordering her to not get involved with the criminal justice system, and the mother failed to fully comply with many of her specific steps for either child, specifically, by being arrested for serious felony charges, and the specific steps issued to the mother provided adequate notice to her of what was needed to achieve such degree of rehabilitation as required by § 17a-112 (j) (3) (B); moreover, because a person of reasonable intelligence would have known that being arrested on serious felony charges could be properly considered in terminating her parental rights under these circumstances, the mother failed to prove beyond a reasonable doubt that § 17a-112 (j) (3) (B) was unconstitutionally vague as applied to her.

Argued September 14—officially released November 6, 2023**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child Jueliexa H., and petition by the Commissioner of Children and Families to terminate the respondent mother's parental rights with respect to her minor child Aurora H., brought to the Superior Court in the judicial district of New Britain, Juvenile

** November 6, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Matters, and tried to the court, *Daniels, J.*; judgments terminating the respondents' parental rights as to Jueliexa H. and the parental rights of the respondent mother as to Aurora H., from which the respondent mother appealed to this court. *Affirmed*.

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

Blake T. Sullivan, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Jammie L. Middleton* and *Evan M. O'Roark*, assistant attorneys general, for the appellee (petitioner).

Opinion

SUAREZ, J. The respondent mother, Alexandrea B., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights as to her children, Aurora H. (Aurora) and Jueliexa H. (Jueliexa).[1] On appeal, the respondent claims that (1) the court erred in concluding that she had failed to achieve a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112,[2] and (2) § 17a-112 (j) (3) (B), as applied to the respondent, is void for

[1] Elijah H. is the biological father of both Aurora and Jueliexa. In the underlying proceeding, the petitioner also sought to terminate Elijah H.'s parental rights as to Jueliexa, which the court granted after he was defaulted for failing to appear on August 3, 2022. On April 19, 2021, in a separate proceeding, the court terminated the parental rights of Elijah H. as to Aurora, with his consent. Elijah H. is not participating in this appeal. All references in this opinion to the respondent are to Alexandrea B. only.

[2] In this appeal, the respondent distinctly claims that the court, in concluding that she had failed to rehabilitate, improperly relied on the fact that the respondent had been arrested. We view this issue as being subsumed in the respondent's claim that the evidence was insufficient to demonstrate that she had failed to rehabilitate and, thus, in this opinion we will address these issues together in the context of the respondent's first claim.

We note that the petitioner argues that the respondent has waived her claim to challenge the court's reliance on her arrest because it was not raised below, and it is now being challenged for the first time on appeal. We are not persuaded that the respondent has waived this claim because

vagueness and, therefore, violates federal due process principles. We affirm the judgments of the trial court.

The following facts, as found by the court or otherwise undisputed, and procedural history are relevant to our resolution of the respondent's claims on appeal. Aurora was born in April, 2019. "On [the day of her birth], a hospital social worker contacted the [Department of Children and Families (department)], reporting that both the [respondent] and Aurora tested positive for marijuana and that [the respondent] had reported a history of being homeless. The [petitioner] invoked a ninety-six hour hold on behalf of Aurora on April 15, 2019." On April 18, 2019, the petitioner filed a motion for an order of temporary custody and a neglect petition as to Aurora. "On April 22, 2019, [Aurora] was placed with a fictive kin foster mother (the former wife of the father's uncle), with whom she still resides."

"On April 26, 2019, the court, *Abery-Wetstone*, *J.*, sustained the order of temporary custody by agreement of the parties." The court ordered specific steps for the respondent to take to facilitate reunification with Aurora, including "[n]ot [to] get involved with the criminal justice system." "On September 30, 2019, both parents entered nolo contendere pleas, and the court, *Hoffman*, *J.*, entered an adjudication of neglect. On January 16, 2020, when Aurora was nine months old, the [petitioner] filed a motion for review of [the] permanency plan, proposing a plan of termination of parental rights and adoption. On January 29, 2020, before a hearing could be held on the permanency plan, the [petitioner] filed its petition for termination of parental rights. The [respondent's] attorney filed an objection to the permanency plan on February 14, 2020, but withdrew it on

the court expressly relied on the respondent's arrest as one of several factors in support of its ultimate finding that she had not rehabilitated, and, therefore, the respondent properly may challenge the court's reliance on that finding.

February 26, 2020, at the initial plea hearing on the termination petition. The [respondent] entered a pro forma denial to the termination petition on that date and indicated her intention to contest the termination petition. The permanency plan of termination of parental rights and adoption was approved by the court, *Hoffman, J.*, on that date."

Jueliexa was born in May, 2020. "A referral was made to [the department] at the time of Jueliexa's birth due to concerns that Aurora remained in [the department's] care, that [the respondent] used marijuana during the pregnancy and had limited prenatal care. The [petitioner] invoked a ninety-six hour hold on behalf of Jueliexa on May 12, 2020." On the same day, Jueliexa was placed with the same foster parent as Aurora. On May 15, 2020, the petitioner filed a motion for an order of temporary custody and a neglect petition as to Jueliexa. "On June 22, 2020, the court, *Hoffman, J.*, sustained the order of temporary custody by agreement of the parties." The court also ordered specific steps for the respondent to take to facilitate reunification with Jueliexa, including an identical step not to get involved with the criminal justice system.

On June 16, 2021, a consolidated trial commenced on the petition to terminate the respondent's parental rights as to Aurora and on the neglect petition as to Jueliexa. After the trial concluded, the court, *Huddleston, J.*, entered an adjudication of neglect as to Jueliexa and the court reserved judgment on the petition to terminate the respondent's parental rights as to Aurora.

"On July 21, 2021, following the trial, but prior to the court's decision, the department became aware of the following post on [the respondent's] Facebook page: 'The fact that white privilege is still a thing disgusts me, [s]ince my [Baby Daddy] is white and I'm black he has more saying towards my children. . . . Yet [h]e

signed a TPR and hasn't been around in over a year. . . . Alyssa Jasunas[3] count your days cause I'm taking this to court. F*** you and your white privileges.' [The respondent] then made an additional post stating: 'Truthfully ready to give up and just kill myself . . . my opinion and my choice don't matter going MIA again.' Following the suicidal statement, the department went with the New Britain Police Department to conduct a well[ness] check on [the respondent]. [The respondent] opened her door and stated: 'What did I do now Alyssa? If you want me to sign the TPR, I'll just do it.' It was recommended that [the respondent] attend a mental health evaluation and medication assessment, which [the respondent] did not accept." (Footnote added.) On September 27, 2021, the [petitioner] filed a petition to terminate the parental rights of the respondent as to Jueliexa.

On October 13, 2021, the court, *Huddleston, J.*, denied the petitioner's petition to terminate the respondent's parental rights as to Aurora. The court reasoned that, "despite the mother's failure to comply fully with her specific steps, she had made substantial progress in addressing the causes of removal. She was employed and had an apartment of her own. She was reported to be in remission from substance abuse disorder and had successfully completed a relapse prevention program without recommendations for further treatment. She appeared to have freed herself from her relationship with the child's father."

Following the court's denial of the termination of parental rights petition as to Aurora, the petitioner withdrew the petition to terminate the respondent's parental rights as to Jueliexa. Thereafter, the department and

[3] The record reflects that Alyssa Jasunas was the social worker employed by the department to oversee the respondent's case. She also testified for the petitioner in the underlying proceeding.

the respondent met to discuss next steps toward reunification of the respondent with Aurora and Jueliexa. At the meeting, the department recommended that the respondent complete a mental health evaluation, and, if appropriate, the department would refer her to therapeutic family time. "[The respondent] indicated that she would attend the recommended mental health intake and medication assessment. . . . In addition, [the respondent] stated that she understood that she needed to notify the department if she entered into any romantic relationships and to inform the department if she was living with anyone. These disclosures were necessary so that the department could be sure that the children would be safe in [the respondent's] care."

On November 24, 2021, the respondent was arrested and charged with carrying a pistol without a permit in violation of General Statutes § 29-35 (a); interfering with an officer in violation of General Statutes § 53a-167a; conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4); and conspiracy to commit larceny in the sixth degree in violation of General Statutes §§ 53a-48 and 53a-125b. The department learned of the respondent's arrest because she missed a supervised visit with the children, prompting a review of the Department of Correction's public website. "The police report, which was entered into evidence at the trial, indicates that during contact with the police, [the respondent] provided the police with a false name. The report also indicates that the [respondent] was found to be in possession of an unregistered handgun. According to the police report, [the respondent] was arrested with Alex Vieira, who, at the time of the arrest, was a convicted felon. [Vieira] was described as [the respondent's] boyfriend."

On December 22, 2021, the court, *C. Taylor, J.*, entered an order suspending the respondent's reunification efforts until further order of the court. The court

stated that "[i]f any party wants to restart the reunification services, they may come before the court to petition to have them restarted." The court also ordered new specific steps for the respondent as to Aurora, including the provision "[n]ot [to] break the law, which could impact your ability to care for your child(ren)." On July 5, 2022, the petitioner filed the current termination of parental rights petitions for both Aurora and Jueliexa.[4]

"On July 31, 2022, the [respondent] called the police on her then live-in boyfriend [Cyquan Navarro]. Apparently, the boyfriend showed up at [the respondent's] apartment intoxicated with two friends that [the respondent] indicated were involved in the illegal sale of narcotics. The boyfriend entered the apartment though a window, and he got in a verbal argument with the [respondent]. Some shoving ensued, and, at one point, [the respondent] was pulled through the window to the outside [of the apartment] by one of her boyfriend's friends. The friends proceeded to shout threats at [the respondent], and [the respondent] believes they shot a pellet gun at her apartment. Again, despite the need for open communication with the department, the [respondent] did not disclose this incident to the department."

In October, 2022, the respondent began services at Community Mental Health Affiliates (CMHA). "The department was understandably concerned that one year had gone by since these services were recommended to [the respondent] in October, 2021." On November 14, 2022, the court, *Daniels, J.*, held a hearing on the petitioner's termination of parental rights petitions for both of the respondent's children. The court admitted four exhibits and heard testimony from five witnesses. The trial concluded on the same day, and,

[4] Elijah H., the biological father of both children, was listed only on the petition as to Jueliexa. The parental rights of Elijah H. as to Aurora had been terminated previously in a separate proceeding. See footnote 1 of this opinion.

on January 17, 2023, the court issued a memorandum of decision terminating the parental rights of the respondent as to both children.[5] In its memorandum of decision, the court found, by clear and convincing evidence, that Aurora and Jueliexa previously had been adjudicated neglected, that the department had provided reasonable efforts to locate the respondent and to reunify her with the children, and that it was in the best interests of the children to terminate the respondent's parental rights.[6]

In its memorandum of decision, the court reasoned that "the [respondent] has not been available to take part in her daughters' lives in a safe, nurturing, responsible and positive manner, and, based on her issues of mental health, parenting deficits, exposure to intimate partner violence, criminal activity including serious pending felony charges and her failure to complete and benefit from counseling and services, she will never be consistently available to Aurora and Jueliexa. . . . When one considers the high level of care, patience, and discipline that Aurora and Jueliexa's needs will require from their caregiver, it is patently clear that [the respondent] is not in a better position to parent her children than she was at the time of Aurora and Jueliexa's commitments and still remains without the qualities necessary to successfully parent Aurora and Jueliexa. . . . Even if the [respondent] was finally capable of realizing and correcting her problems, it would be exceedingly rash to expect her to be able to parent her daughters at any time in the near future, if ever. Unfortunately, the clear and convincing evidence

[5] The court also terminated the parental rights of Elijah H., the children's biological father, as to Jueliexa. See footnote 1 of this opinion.

[6] In this appeal, the respondent challenges only the court's finding that she failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i). She does not challenge the court's findings that the department made reasonable efforts to reunify her with the children or that the termination of her parental rights was in the best interests of the children.

shows that Aurora and Jueliexa's needs of permanence and stability do not allow for the time necessary for [the respondent] to further attempt rehabilitation." (Citations omitted.)

The court also found by clear and convincing evidence that the respondent failed to fully comply with the following specific steps: create and maintain a safe, stable, and nurturing home environment free from violence, substance abuse, and criminal activity; address trauma history and understand its impact on present functioning; address mental health needs in individual counseling in order to maintain emotional stability and be a stable resource for the child; immediately let the department know about any changes in the makeup of the household to make sure that the change does not hurt the health and safety of the child; attend and complete an appropriate domestic violence program; and not get involved with the criminal justice system. The court concluded that, "[h]aving balanced Aurora and Jueliexa's individual and intrinsic needs for stability and permanency against the benefits of maintaining a connection with the respondent parents, the clear and convincing evidence in this case establishes that the children's best interests cannot be served by continuing to maintain any legal relationship to the respondent parents." This appeal followed.[7] Additional facts and procedural history will be provided as necessary.

I

The respondent first claims that the court erred in determining that she failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i). Specifically, she asserts that the evidence on which the court based its decision was not sufficient to support a finding, by clear and

[7] The attorney for the children filed a statement in accordance with Practice Book § 67-13, adopting the brief filed by the petitioner and asking the court to affirm the judgments of the court.

convincing evidence, that she failed to rehabilitate. In particular, the respondent emphasizes that the court's reliance on her pending criminal charges was improper. We are not persuaded.

We begin by setting forth the following relevant legal principles and standard of review that govern the resolution of this claim. "A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [petitioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child. . . .

"Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . .

* * *

"In the adjudicatory phase of a termination of parental rights proceeding, the court must determine whether one of the six statutory grounds that may serve as a basis for termination of parental rights exists. . . .

Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . [I]n assessing rehabilitation, *the critical issue is not whether the parent has improved* [*her*] *ability to manage* [*her*] *own life, but rather whether* [*she*] *has gained the ability to care for the particular needs of the child at issue*. . . .

"Section 17a-112 (j) (3) (B) allows for the termination of parental rights due to a respondent's failure to achieve personal rehabilitation only after the respondent has been issued specific steps to facilitate rehabilitation. Specific steps provide notice . . . to a parent as to what should be done to facilitate reunification

and prevent termination of rights. . . . The specific steps are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B). . . . We acknowledge that the court need not base its determination purely on the respondent's compliance with the specific steps. . . . A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Marie J.*, 219 Conn. App. 792, 805–808, 296 A.3d 308 (2023). "[T]he relevant date for considering whether [a respondent] failed to rehabilitate is the date on which the termination of parental rights petition was filed . . . . Although a court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time . . . it is not required to do so." (Emphasis omitted; internal quotation marks omitted.) *In re Nevaeh G.-M.*, 217 Conn. App. 854, 880, 290 A.3d 867, cert. denied, 346 Conn. 925, 295 A.3d 418 (2023).

The respondent argues for the first time on appeal that the court's reliance on her criminal activity as evidence of her failure to rehabilitate was improper because an arrest is only proof that probable cause existed as to the respondent's criminal activity and does not establish that she failed to rehabilitate by clear and convincing evidence. The respondent further argues that there was insufficient evidence in the record from which the court could have concluded as it did, by clear

and convincing evidence, that the respondent failed to rehabilitate based on her mental health, parenting deficits, and exposure to interpersonal violence. We are not persuaded.

In its memorandum of decision, the court found that the respondent was arrested in November, 2021, and that the arrest violated her specific step that she not get involved with the criminal justice system. The court also stated that the respondent's arrest raised concerns about whom she was associating with and whether she would be able to provide a safe environment for her children. It is well settled that a court in a termination of parental rights matter may rely on a respondent's arrest in determining whether a respondent has failed to rehabilitate. This court has reasoned that, "[b]ecause one of the respondents' specific steps for reunification was to '[n]ot get involved with the criminal justice system,' we determine that the court *properly relied on the respondents' arrests*, among other factors, to find that they had failed to rehabilitate." (Emphasis added.) *In re Brian P.*, 195 Conn. App. 558, 572–73, 226 A.3d 159, cert. denied, 355 Conn. 907, 226 A.3d 151 (2020); see also *In re Anna Lee M.*, 104 Conn. App. 121, 130, 931 A.2d 949 ("[w]e have recognized that the court may consider the respondent's prior arrests, even if they did not result in convictions, when assessing the respondent's ability to provide a safe and secure home for the children and to provide the necessary care for them"), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). As in *In re Brian P.*, the respondent in the present case had been issued a similar specific step to "[n]ot get involved with the criminal justice system." Accordingly, we conclude that the court properly relied on the undisputed evidence of the respondent's arrest as a factor in determining that the respondent failed to rehabilitate.

We note that, although the court relied in part on the allegations of criminal behavior, the court did not base

its finding that the respondent failed to rehabilitate solely on the basis of the respondent's arrest. In its memorandum of decision, the court stated that it had considered all of the evidence introduced at trial in reaching its conclusion. The court cited multiple relevant factors that contributed to its findings, including the respondent's mental health, intimate partner violence, failure to complete and benefit from counseling and services, and serious pending felony charges. After careful review of the record, construing it in the manner most favorable to sustaining the judgments, as we are obligated to do, we conclude that the record contains sufficient evidence to support the court's conclusion.

We first reiterate that, in viewing the evidence, we must look at whether "*the cumulative effect of the evidence* was sufficient to justify" the trial court's ultimate conclusion that the respondent failed to rehabilitate. (Emphasis in original; internal quotation marks omitted.) *In re Anaishaly C.*, 190 Conn. App. 667, 687, 213 A.3d 12, cert. denied, 345 Conn. 914, 283 A.3d 505 (2019).

In the present case, the court heard testimony from Jasunas, the social worker employed by the department to oversee the respondent's case, who prepared the two social studies that were introduced as full exhibits. The first social study was prepared on June 15, 2022 (June 15 social study), and the second study was prepared on July 28, 2022 (July 28 social study). In the June 15 social study, Jasunas stated that the respondent had reported to the department that she was diagnosed with depression, anxiety, and post-traumatic stress disorder, had experienced postpartum depression, and had a history of suicidal ideation.[8] The department referred the respondent to the Center for Emotional Healing in May,

[8] In the June 15 social study, Jasunas reported that the respondent denied having any suicidal ideations since age seventeen, however, there was evidence that she made a statement reflecting a suicidal ideation on social media in July, 2021.

2020, for mental health treatment, but "[the respondent] was not consistent with her sessions with [the mental health] clinician . . . Mary McGowan. . . . [The respondent] did not attend counseling consistently and would not attend sessions for weeks and months at a time. [The respondent] reengaged with . . . McGowan in June, 2021, to resume sessions after not attending for months. . . . [The respondent] stopped attending [mental health treatment] after July, 2021 when the [d]epartment became concerned with suicidal statements [the respondent] made on social media. . . . McGowan recommended that [the respondent] attend a mental health evaluation and medication assessment, to which [she] did not accept. The [d]epartment has continually encouraged [the respondent] to engage in mental health services, but she has not returned to date."

The July 28 social study raised similar concerns regarding the respondent's mental health and judgment relating to her November 24, 2021 arrest. The report stated: "[The respondent's] mental stability and decision making continues to be a concern. . . . She has yet to attend [mental health treatment] despite several reminders by [the department] to [the respondent]. She continually states she will attend 'soon.' . . . The department expressed to her the [department's] continued concerns of her judgment, relationships and not addressing this [arrest] in therapy as court ordered and [department] recommended."

In addition to the written social studies prepared by Jasunas that were in evidence, the court also heard testimony from her. Jasunas testified that the department remained concerned with the respondent's mental health and decision making, stating that "[the respondent] reported that she went for [a mental health] intake last month. However, we had been recommending this for over a year since the girls had [come] into care

and those needs have not been met for her, and the department remains concerned that if the girls did return home that there would be ongoing concerns with her decision making. She would not be able to keep the girls safe." Jasunas also testified that "[the respondent] did not disclose that she was in a relationship with anyone" and that she was aware the respondent was in relationships with other people due to the November 24, 2021 arrest and the domestic incident in July, 2022. Jasunas noted that the respondent never disclosed the July, 2022 incident to the department, and the department only learned of the incident through a police report four months after the incident had occurred when conducting a call for a service check before trial.

The court also heard testimony from Jovaldo Mendes, a New Britain police officer, who responded to the July, 2022 incident. Officer Mendes described the incident as "a verbal domestic [dispute] between [the respondent] and a boyfriend at the time." Officer Mendes testified that, "[a]s far as [the respondent] reported on [the] scene, they were still dating, and she was going to allow him back to the apartment after the incident." Furthermore, Officer Mendes stated that he gave the respondent a victim services card, testifying that "when there's an issue of domestic violence or a possibility of domestic violence, we always issue the victim a victim services card which gives her opportunities to get in contact with the victim's advocate so that they may be able to conduct a safety plan and discuss how to move forward in case another issue should arise."

The court further heard testimony from the respondent's mental health therapist, Yobielania Santana. Santana testified that she had seen the respondent four times since the respondent began therapy in October,

2022, and had been prescribed medication.[9] Santana testified that the respondent had also attended one group therapy session to address trauma. Although Santana described the respondent as engaged and compliant in her therapy sessions, Santana testified that "[t]he recommendation for [the respondent] would be six months [of group therapy] and then we'll assess from there to see what the further needs are."

With regard to the respondent's mental health, the record reflects that the respondent made a suicidal statement on social media following the first trial on the petitioner's petition to terminate her parental rights as to Aurora and discontinued mental health services until one month before the second trial. Furthermore, the respondent's therapist testified that she would recommend that the respondent attend another six months of therapy to further assess her mental health needs. The respondent's engagement in mental health services just before the second trial, one year after the department recommended the service, combined with her suicidal ideation following the first trial supports the court's determination that the respondent failed to rehabilitate based on her mental health and failure to complete and benefit from counseling and services.

As to the court's reliance on the respondent's intimate partner violence and parenting deficits, the record adequately supports the court's finding that the respondent failed to rehabilitate with respect to these areas of concern. Not only did the respondent fail to inform the department of her romantic relationships as required, but her relationships raised concerns about her decision making and judgment. In November, 2021, the respondent was arrested together with a convicted felon,

[9] Santana is not the respondent's prescriber of her medication. Another treatment provider at CMHA prescribed the medication for the respondent.

Vieira, with whom she was in an undisclosed relationship at the time of her arrest. In July, 2022, the respondent was in another undisclosed relationship with a "live-in" boyfriend, a person who was associating with parties allegedly involved in the sale of illicit substances, and one who had a history of possessing firearms. As we have discussed, Officer Mendes also testified that he gave the respondent a victim services card in accordance with the police department's policy for incidents that involve, or potentially involve, intimate partner violence. Moreover, as mentioned previously in this opinion, the court noted that "[t]he July, 2022 incident at [the respondent's] apartment raises concerns about who [the respondent] is associating with and whether she would be able to provide a safe environment for her children. The November, 2021 arrest raises similar concerns."

We conclude that the evidence, viewed in the manner most favorable to sustaining the judgments, sufficiently supports the court's conclusion that the respondent failed to achieve a sufficient degree of rehabilitation necessary to encourage a belief that now, or within a reasonable time, she could assume a responsible position in Aurora's and Jueliexa's lives.

II

The respondent next claims that the court erred in considering the specific step that the respondent "[n]ot get involved with the criminal justice system" because § 17a-112 (j) (3) (B) as applied to the respondent is void for vagueness and, therefore, violates federal due process principles.[10] Specifically, the respondent argues

[10] Before this court, the respondent couches her claim as whether the specific step that the respondent "[n]ot get involved with the criminal justice system" is void for vagueness. As the respondent correctly recognizes, however, the void for vagueness doctrine applies only to statutes, and specific steps are not statutes. "The purpose of the vagueness doctrine is twofold. The doctrine requires *statutes* to provide fair notice of the conduct to which they pertain and to establish minimum guidelines to govern law

that, although the court-ordered specific steps are not statutes, they are statutorily mandated in rehabilitation cases and function as an elements test toward reunification. The petitioner argues that the respondent has waived any challenge to the validity of the specific steps because she did not adequately raise the claim below and before this court and has failed to distinctly brief her entitlement to review of the unpreserved claim. We agree that the respondent's constitutional claim is unpreserved, as it is being raised for the first time on appeal. We disagree that the respondent has waived her entitlement to have the claim considered on its merits in this appeal by means of an inadequate brief. We conclude that the claim is reviewable under *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), but that it nonetheless fails under *Golding*'s third prong because the alleged constitutional violation does not exist.

enforcement." (Emphasis added; internal quotation marks omitted.) *State* v. *Bloom*, 86 Conn. App. 463, 466, 861 A.2d 568 (2004), cert. denied, 273 Conn. 911, 870 A.2d 1081 (2005).

Having carefully reviewed the analysis of the claim in the respondent's brief, we are satisfied that, in substance, it presents a void for vagueness challenge with respect to the manner in which § 17a-112 (j) (3) (B) has been *applied* to her in terms of the specific step imposed by the court that she "[n]ot get involved with the criminal justice system." In our consideration of claims raised on appeal, this court is customarily mindful to evaluate their substance rather than to be bound by imprecise form. See, e.g., *State* v. *Jodi D.*, 340 Conn. 463, 475 n.6, 264 A.3d 509 (2021) ("failure [by the appellant] to label her argument using the correct technical rubric does not render the claim unreviewable"); *In re Stacy G.*, 94 Conn. App. 348, 352 n.5, 89 A.2d 1034 (2006) (analyzing substance of claim rather than adhering to imprecise statement of issues). Moreover, we do not conclude that reframing the claim will prejudice the petitioner. Beyond arguing that the present claim should not be reviewed, a contention that we address in the body of this opinion, the petitioner argues before this court that the respondent is unable to demonstrate that a *specific step* is void for vagueness and, in the alternative, cited authority in support of the proposition that this court should decline to conclude that § 17a-112 (j) (3) (B) is void for vagueness *as applied* to the respondent by virtue of the specific step at issue in this claim.

"Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 735, 209 A.3d 1 (2019). The respondent's brief with respect to this constitutional claim includes a standard of review, a discussion of relevant legal principles and authorities, and citations to the record. We recognize, as the petitioner observes, that the respondent has not provided this court with an analysis of the reviewability of the unpreserved claim, let alone an invocation of any extraordinary type of review such as an analysis under *Golding*; yet we recognize that our Supreme Court has held that "the defendant's failure in his main brief . . . to (1) identify or address any issues related to the reviewability of the claim, (2) state that any extraordinary level of review is requested, (3) refer to the *Golding* opinion either by name or in substance [or] address the issue of the adequacy of the record to review the claim, or (4) present an analysis that, if the claim was not preserved, it nevertheless should be reviewed, *did not preclude consideration of his federal constitutional claim*, which otherwise was properly briefed, identified relevant constitutional authorities, and was founded on an adequate record for review." (Emphasis added; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 755, 91 A.3d 862 (2014).

"Under *Golding*, a [respondent] can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of

a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The respondent must meet all four prongs of the *Golding* analysis to be successful. . . . We are free, however, to dispose of the claim by focusing on the condition that appears most relevant under the circumstances of the case. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 325, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). We are persuaded that the respondent's analysis of her void for vagueness claim satisfies the first two prongs of *Golding* because the record is sufficient for our review and a constitutional right is involved. We now turn to the third prong of *Golding* and consider whether the respondent's constitutional right has been violated.

"The void for vagueness doctrine is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution. . . . The doctrine [of void for vagueness] requires statutes to provide fair notice of the conduct to which they pertain and to establish minimum guidelines to govern law enforcement. . . . [T]he minimum guidelines prong is applicable only where a statute is being challenged as unconstitutional on its face . . . .[11]

"Legislative enactments carry with them a strong presumption of constitutionality, and a party challenging the constitutionality of a validly enacted statute bears

[11] In this appeal, the respondent is not challenging § 17a-112 (j) (3) (B) as unconstitutional on its face but, rather, she is challenging whether the statute *as applied* to her is void for vagueness. Therefore, our analysis of the respondent's claim will concentrate on the fair notice requirement of the void for vagueness doctrine. See footnote 10 of this opinion.

the weighty burden of proving unconstitutionality beyond a reasonable doubt. . . . A statute is not unconstitutional merely because a person must inquire further as to the precise reach of its prohibitions, nor is it necessary that a statute list the exact conduct prohibited. . . . The constitution requires no more than a reasonable degree of certainty. . . . [B]ecause we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [A] statute gives fair warning of what conduct it prohibits if it is reasonably specific and direct enough so that a person of ordinary intelligence has a reasonable opportunity to govern his or her behavior by reference to the words of the statute together with available judicial gloss." (Citations omitted; footnote added; footnote omitted; internal quotation marks omitted.) Id., 328–29.

As previously mentioned in part I of this opinion, "[§] 17a-112 (j) (3) (B) allows for the termination of parental rights due to a respondent's failure to achieve personal rehabilitation only after the respondent has been issued specific steps to facilitate rehabilitation. Specific steps provide notice . . . to a parent as to what should be done to facilitate reunification and prevent termination of rights. . . . The specific steps are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B). . . . We acknowledge that the court need not base its determination purely on the respondent's compliance with the specific steps. . . . It is well established judicial gloss, however, that a court may consider whether a parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the

department." (Citations omitted; internal quotation marks omitted.) Id., 329.

The record reflects, and there is no dispute, that on April 26, 2019, and June 22, 2020, the respondent signed the court-ordered specific steps for Aurora and Jueliexa, respectively, that included the provision ordering her to "[n]ot get involved with the criminal justice system." Moreover, the specific steps stated that "[the respondent] understand[s] that if [she] do[es] not follow these specific steps it will increase the chance that a petition may be filed to terminate [her] parental rights permanently so that [her] child may be placed in adoption." As noted in part I of this opinion, the respondent did not fully comply with many of her specific steps for either child. Specifically, the respondent was arrested for serious felony charges, as evidenced by the police report submitted by the petitioner as a full exhibit, in violation of her specific step that she was not to get involved with the criminal justice system. The specific steps issued to the respondent provided adequate notice with respect to what was needed to achieve such degree of rehabilitation as required by § 17a-112 (j) (3) (B). Furthermore, this court has previously determined that the trial court can properly rely on a parent's arrest in concluding that they have violated their specific step and failed to rehabilitate. See *In re Brian P.*, supra, 195 Conn. App. 572–73. We conclude that a person of reasonable intelligence would have known that being arrested on serious felony gun charges could be properly considered in terminating her parental rights under these circumstances. Thus, the respondent has failed to prove beyond a reasonable doubt that § 17a-112 (j) (3) (B) was unconstitutionally vague as applied to her. The respondent has failed to meet the third requirement of *Golding* that a constitutional violation exists and her claim must, therefore,

fail. Accordingly, the court did not err in terminating the respondent's parental rights.

The judgments are affirmed.

In this opinion the other judges concurred.

JOSEPH STEPHENSON *v.* COMMISSIONER OF CORRECTION
(AC 45482)

Elgo, Suarez and Bear, Js.

Syllabus

The petitioner, who had been convicted, on pleas of guilty, of two counts of larceny in the sixth degree, sought a writ of habeas corpus, claiming that his trial counsel, L, had provided ineffective assistance by failing to properly advise him about the immigration consequences of his pleas. The petitioner, who was a citizen of Jamaica and a lawful permanent resident of the United States, was sentenced to two concurrent 364 day terms of incarceration, which L negotiated in an effort to alleviate adverse immigration consequences to the petitioner. A federal immigration judge, however, charged the petitioner as removable and ordered that he be removed from the United States. The habeas court subsequently rendered judgment granting the habeas petition, concluding that L had provided ineffective assistance by failing to properly advise the petitioner about the mandatory deportation consequence of his guilty pleas to two crimes of moral turpitude, irrespective of the sentence imposed. The court further determined that, but for that deficient advice, the petitioner would not have pleaded guilty and that he would have proceeded to trial. On the granting of certification to appeal, the respondent, the Commissioner of Correction, appealed to this court, claiming, inter alia, that the court failed to make findings, pursuant to *Budziszewski* v. *Commissioner of Correction* (322 Conn. 504), as to what advice L actually provided, and then determine whether the petitioner met his burden to prove that counsel's advice failed to convey the information required under *Padilla* v. *Kentucky* (559 U.S. 356). *Held*:

1. The respondent could not prevail on his claim that the habeas court incorrectly determined that L had performed deficiently because the court did not determine what advice L actually provided, as required by *Budziszewski*: although the respondent emphasized the court's statement that the details of one conversation between the petitioner and L were unclear, the respondent ignored the court's numerous other findings, including that L inaccurately advised the petitioner that sentences

of less than one year would protect the petitioner from immigration consequences; moreover, R, an attorney specializing in immigration law, testified that the petitioner's convictions in two cases for crimes of moral turpitude that did not arise out of the same scheme of conduct rendered the petitioner deportable, and the court found that the automatic deportation consequences resulting from the petitioner's guilty pleas were readily apparent and that the applicable federal immigration law (8 U.S.C. § 1227 (a) (2) (A) (ii) (2012)) was succinct and straightforward, which was supported by R's testimony; furthermore, this court was not persuaded that the habeas court's decision failed to comply with *Budziszewski*, as the court discussed in its memorandum of decision its findings of fact as to the discussions between the petitioner and L and what transpired before the petitioner entered his guilty pleas, and its determination that L performed deficiently was based on its finding that L inaccurately advised the petitioner regarding the immigration consequences of his guilty pleas due to L's misunderstanding that the length of the petitioner's sentences would have impacted whether deportation proceedings would be instituted against him.

2. The respondent could not prevail on his claim that, as a consequence of the habeas court's failure to make the requisite findings under *Budziszewski*, it failed to hold the petitioner to his burden to rebut the presumption that L's advice fell within the wide range of reasonable professional assistance: the court specifically found that L had discussed with the petitioner the difference between one and two convictions for crimes involving moral turpitude, and, although it did not set forth the specific advice given, as it was unclear from the record, that court also determined that L had incorrectly advised the petitioner regarding the immigration consequences of his guilty pleas, thus necessarily determining that either the presumption of reasonable professional assistance had been rebutted or that it did not apply, and, even though it was unclear what L told the petitioner during that one conversation, the record reflected that L did not know and, therefore, failed to advise the petitioner that, by pleading guilty to two crimes of moral turpitude that did not arise out of a single scheme of criminal conduct, he was automatically subject to deportation; moreover, nothing in the record suggested that the court construed the lack of clarity in that one conversation against the respondent, rather, the court's determination that L performed deficiently was based on its finding, which was amply supported by the record, that L inaccurately advised the petitioner that a sentence of less than one year for each of his convictions could help protect the petitioner from deportation; furthermore, the fact that L had consulted with an expert on immigration law did not excuse L's failure to advise the petitioner accurately regarding the consequences of his guilty pleas, as required under *Padilla*, as this court was not aware of any exception to the requirement set forth in *Padilla* for such situations, and the petitioner was entitled under the sixth amendment to the United States

constitution to be informed accurately of the immigration consequences of his guilty pleas.

3. Contrary to the respondent's claim, the habeas court did not apply a higher standard than what the law required when it based its finding of deficient performance on L's failure to advise the petitioner that his pleas would automatically subject him to mandatory deportation: the immigration consequences under federal law clearly mandated deportation, and, this court, having reviewed the habeas court's memorandum of decision as a whole, was not persuaded that the habeas court deviated from the standard set forth in *Padilla* and *Budziszewski* by requiring the use of specific words or phrases, rather, the habeas court focused more broadly on whether L correctly conveyed to the petitioner the mandatory deportation consequences of the guilty pleas under federal law when he undercut the certainty of that result with clearly erroneous advice suggesting that deportation might be avoidable, and, to the extent that L gave advice casting doubt on the likelihood that federal authorities would actually apprehend and deport the petitioner despite the clarity of the law, it was incumbent on L to convey to the petitioner that, once apprehended, deportation would be practically inevitable under federal law, which he failed to do.

(*One judge concurring separately*)

Argued April 5—officially released November 14, 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, *Oliver*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Affirmed.*

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Michael Proto* and *Juliana Waltersdorff*, senior assistant state's attorneys, for the appellant (respondent).

Vishal K. Garg, assigned counsel, for the appellee (petitioner).

Opinion

BEAR, J. After the granting of certification to appeal, the respondent, the Commissioner of Correction, appeals

from the judgment of the habeas court granting the petition for a writ of habeas corpus filed by the petitioner, Joseph Stephenson. The habeas court found that the petitioner's criminal trial counsel, James Lamontagne, had provided ineffective assistance by failing to properly advise the petitioner about the mandatory deportation consequence of his guilty pleas to two charges of larceny in the sixth degree. On appeal, the respondent claims that the habeas court's determination that Lamontagne had performed deficiently was improper because the court (1) did not determine what advice Lamontagne actually provided, as required by *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 142 A.3d 243 (2016), (2) failed to hold the petitioner to his burden to rebut the presumption that Lamontagne's advice fell within the wide range of reasonable professional assistance, and (3) applied a higher standard than what the law requires when it based its finding of deficient performance on Lamontagne's failure to advise the petitioner that his pleas would " 'automatically subject him to mandatory deportation.' " (Emphasis omitted.) We affirm the judgment of the habeas court.

The following undisputed facts and procedural history were set forth by this court in a previous appeal in this matter. See *Stephenson* v. *Commissioner of Correction*, 197 Conn. App. 172, 174–77, 231 A.3d 210 (2020). "The petitioner is a citizen of Jamaica, which is his country of origin. On or about December 20, 1985, the petitioner was admitted to the United States under nonimmigrant B-2 status. On February 14, 2000, the petitioner's immigration status was changed to that of a lawful permanent resident.

"On March 5, 2013, the petitioner pleaded guilty to a charge of larceny in the sixth degree in violation of General Statutes § 53a-125b in each of two dockets

(larceny convictions).[1] On April 9, 2013, the petitioner was sentenced to two concurrent 364 day terms of imprisonment on the larceny convictions.[2] The concurrent 364 day sentences were negotiated by . . . Lamontagne . . . and the prosecutor in an effort by . . . Lamontagne to alleviate any adverse consequences that the petitioner might encounter under federal immigration law as a result of the larceny convictions.

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[1] "The petitioner further pleaded guilty to being a persistent larceny offender under General Statutes § 53a-40." *Stephenson* v. *Commissioner of Correction*, supra, 197 Conn. App. 174 n.2.

General Statutes (Rev. to 2013) § 53a-40 (e) provides that "[a] persistent larceny offender is a person who (1) stands convicted of larceny in the third degree in violation of the provisions of section 53a-124 in effect prior to October 1, 1982, or larceny in the fourth, fifth or sixth degree, and (2) has been, at separate times prior to the commission of the present larceny, twice convicted of the crime of larceny."

General Statutes (Rev. to 2013) § 53a-40 (*l*) provides that, "[w]hen any person has been found to be a persistent larceny offender, the court, in lieu of imposing the sentence authorized by section 53a-36 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment for a class D felony authorized by section 53a-35, if the crime of which such person presently stands convicted was committed prior to July 1, 1981, or authorized by section 53a-35a, if the crime of which such person presently stands convicted was committed on or after July 1, 1981."

[2] The petitioner's habeas counsel represented that, as of the date of the original trial on his habeas petition, the petitioner had completed serving his concurrent 364 day sentences. The petitioner's counsel further represented that the petitioner was currently serving sentences for a subsequent conviction of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree, all of which arose from events occurring in March, 2013. See *State* v. *Stephenson*, 187 Conn. App. 20, 22, 201 A.3d 427 (2019), rev'd, 337 Conn. 643, 255 A.3d 865 (2020). The petitioner received a total effective sentence of twelve years of incarceration followed by eight years of special parole on this conviction. Id., 29. On direct appeal, this court reversed the trial court's judgment of conviction rendered against the petitioner and remanded the case with direction to render a judgment of acquittal on all charges. Id., 22. The state petitioned for certification to appeal from this court's judgment, which our Supreme Court granted in part. *State* v. *Stephenson*, 331 Conn. 914, 204 A.3d 702 (2019). Our Supreme Court thereafter reversed the judgment of this court and remanded the case to this court for further proceedings. *State* v. *Stephenson*, 337 Conn. 643, 654, 255 A.3d 865 (2020). On remand,

"On July 9, 2013, the United States Department of Homeland Security (department) charged the petitioner 'as removable pursuant to [the Immigration and Nationality Act, 8 U.S.C. § 1227 (a) (2) (A) (ii) (2012)] based on [the] larceny convictions.' Subsequently, on January 21, 2014, the department further charged the petitioner 'as removable pursuant to [8 U.S.C. § 1227 (a) (2) (A) (iii) (2012)], as an aggravated felon' for a prior conviction of robbery in the third degree (robbery conviction).[3] In a decision dated July 22, 2014, the immigration judge concluded that the larceny convictions constituted crimes of moral turpitude under 8 U.S.C. § 1227

this court affirmed the judgment of conviction. *State* v. *Stephenson*, 207 Conn. App. 154, 192, 263 A.3d 101 (2021). The petitioner remains incarcerated.

[3] "In 2010, a judgment of conviction of, inter alia, robbery in the third degree was rendered against the petitioner, which judgment this court affirmed on appeal. *State* v. *Stephenson*, 131 Conn. App. 510, 512–13, 27 A.3d 41 (2011), cert. denied, 303 Conn. 929, 36 A.3d 240 (2012).

"Thereafter, the petitioner brought a habeas action in the United States District Court for the District of Connecticut challenging the robbery conviction. *Stephenson* v. *Connecticut*, United States District Court, Docket No. 3:12CV1233 (RNC) (D. Conn. March 31, 2014). The petitioner raised three claims in his original petition and, subsequently, filed two motions to amend his petition to allege additional claims. Id. The District Court denied the petitioner's motions to amend on the ground that the claims raised therein—ineffective assistance of counsel, improper dismissal of a juror, and actual innocence—were procedurally defaulted. Id. The District Court also denied the petition. Id.

"On appeal, the [United States Court of Appeals for the Second Circuit] 'remanded for a determination of whether the new claims, although procedurally defaulted, can be adjudicated on the merits based on [the] petitioner's claim that he is actually innocent of [the robbery conviction].' *Stephenson* v. *Connecticut*, United States District Court, Docket No. 3:12CV1233 (RNC) (D. Conn. January 8, 2018); see also *Stephenson* v. *Connecticut*, 639 Fed. Appx. 742, 746 (2d Cir. 2016). The District Court, on remand, 'conclude[d] that [the petitioner] ha[d] not met his burden of establishing a credible, compelling claim of actual innocence and therefore dismiss[ed] the petition.' *Stephenson* v. *Connecticut*, supra, United States District Court, Docket No. 3:12CV1233 (RNC). Neither the District Court nor the Second Circuit issued the petitioner a certificate of appealability, and, thus, his appeal from the District Court's judgment was dismissed. See *Stephenson* v. *Connecticut*, United States Court of Appeals, Docket No. 18-367 (2d Cir. February 8,

(a) (2) (A) (ii), and that the robbery conviction was an aggravated felony under 8 U.S.C. § 1227 (a) (2) (A) (iii). On the basis of these conclusions, the immigration judge ordered that the petitioner be removed from the United States to Jamaica. On December 15, 2014, the Board of Immigration Appeals (board) 'affirm[ed] that the [petitioner] ha[d] been convicted of an aggravated felony for the reasons given in the [i]mmigration [j]udge's decision' and, accordingly, dismissed his appeal. Because the board affirmed the immigration judge's determination that the robbery conviction was an aggravated felony, it concluded that it 'need not address whether the [petitioner] [w]as also . . . convicted of crimes involving moral turpitude.'

"On September 25, 2013, while in custody serving his concurrent 364 day sentences and shortly after the department charged him as removable, the petitioner filed a self-represented petition for a writ of habeas corpus seeking to vacate the larceny convictions.[4] On January 2, 2018, the petitioner, now represented by counsel, filed an amended petition for a writ of habeas corpus (operative petition). In the operative petition, the petitioner alleged that . . . Lamontagne rendered ineffective assistance of counsel. Specifically, the petitioner alleged that . . . Lamontagne's failure to accurately advise him that pleading guilty to the larceny charges against him would make him 'deportable, removable, and inadmissible for reentry under federal immigration law,' constituted deficient performance. The petitioner further alleged that, but for Lamontagne's deficient performance, '[t]here [was] a reasonable probability that . . . [he] would not have entered a guilty plea.'

2019)." *Stephenson* v. *Commissioner of Correction*, supra, 197 Conn. App. 175–76 n.4.

[4] "The petitioner did not file a direct appeal from the larceny convictions." *Stephenson* v. *Commissioner of Correction*, supra, 197 Conn. App. 176 n.5.

"On May 22, 2018, a trial on the operative petition was held before the court, *Sferrazza, J.* On May 29, 2018, Judge Sferrazza issued a memorandum of decision in which he held that the operative petition was moot."[5] (Footnotes added; footnotes in original; footnotes omitted.) *Stephenson* v. *Commissioner of Correction*, supra, 197 Conn. App. 174–77. After Judge Sferrazza granted the petition for certification to appeal; id., 177; the petitioner appealed to this court, which concluded that the operative habeas petition was not moot, reversed the habeas court's judgment, and remanded the case for a new habeas trial. Id., 195, 203.

Following remand, a trial date was set for August 4, 2021, but, prior thereto, the parties jointly filed notice that they were resting on the record evidence and represented that they would not be offering further testimony. After briefs were filed and the habeas court reviewed the exhibits, the transcript of the prior habeas trial that was held on May 22, 2018, and the newly filed briefs, the court ordered supplemental briefing. Specifically, the order stated: " 'This court, from its review, finds that the matter can be completed without prejudice to the parties. By resting on the existing record, the parties have indicated that they see no need to call new witnesses or recall previous witnesses for further testimony. This court does not conclude it necessary

[5] Specifically, "Judge Sferrazza found that the immigration judge had concluded that the robbery conviction constituted an aggravated felony and had ordered the petitioner's removal, in part, on that basis. Judge Sferrazza found that the petitioner did not challenge the robbery conviction in the operative petition. He further found that, on appeal, the board affirmed both the immigration judge's aggravated felony conclusion and order of removal. Accordingly, Judge Sferrazza concluded that his adjudication of the petitioner's claim 'can provide no practical benefit to [him] because the mandated removal order, affirmed on appeal, is premised on an entirely different conviction for an aggravated felony, apart from [the] larceny convictions' that were challenged in the operative petition. The petitioner filed a petition for certification to appeal, which Judge Sferrazza granted." (Footnote omitted.) *Stephenson* v. *Commissioner of Correction*, supra, 197 Conn. App. 177.

to recall any witness whose testimony is material and disputed. Nevertheless, the Appellate Court's decision ordered a new trial and highlighted the need for a habeas court to make "findings with respect to issues that the parties disputed." . . . Additionally, the Appellate Court noted that there were credibility determinations the habeas court needed to resolve on remand. . . . Accordingly . . . the parties [were ordered] to submit simultaneous briefs . . . [that] shall address any concerns the parties have based upon the foregoing, as well as indicate that each party affirmatively and explicitly assents to the court making all necessary findings and assessments from the May 22, 2018 transcript and evidentiary record, and render judgment thereon.' " (Citations omitted.) Subsequently, on February 18, 2022, both parties filed supplemental briefs setting forth their agreement with the remanded claims being adjudicated on the basis of the existing record.

In a memorandum of decision dated April 26, 2022, the habeas court rendered judgment granting the operative habeas petition. In making that decision, the court made a number of factual findings on the basis of the testimony and exhibits submitted at the May 22, 2018 habeas trial. Because the respondent's first claim challenges the sufficiency of those findings, we recount them in detail. Specifically, the court found: "Lamontagne began representing the petitioner in [a case involving a theft at a Costco store (Costco case)] on or about May 27, 2011. The matter was continued several times so the defense could conduct its investigation. On November 21, 2011, the petitioner applied for the psychiatric accelerated rehabilitation diversionary program, which was denied by the court, *Hudock, J.*, on February 6, 2012. After additional continuances, the petitioner appeared on June 26, 2012, in [a case involving a theft at a Stew Leonard's store (Stew Leonard's case)], and . . . Lamontagne was appointed in that

case in addition to the Costco case. On February 25, 2013, shortly before jury selection was scheduled to begin on March 5, the petitioner and . . . Lamontagne appeared in court to discuss various pretrial issues.

"On March 5, 2013, the petitioner appeared before the court, *Dennis, J.*, for a change of plea. The petitioner pleaded guilty, in [two separate dockets, to one count of] larceny in the sixth degree in [each] docket. . . . In each of the two dockets, the petitioner pleaded guilty as a persistent larceny offender. The petitioner also admitted in both cases to being previously convicted of larceny in the sixth degree on December 13, 2007, in Norwalk, as well as of larceny in the fifth degree on January 9, 2004, in Bridgeport. After the prosecutor detailed the supporting facts, the court canvassed the petitioner. The petitioner acknowledged that he had sufficient time to speak with . . . Lamontagne about entering his guilty pleas; he was satisfied with the advice he had received from counsel; no one had threatened or forced or promised him anything into pleading guilty; he was pleading guilty as a persistent larceny offender by acknowledging that he had at least two previous larceny convictions; he knew the maximum penalty for each of the two cases was five years of incarceration; he had discussed with counsel the evidence the state would have [to] present to prove all elements of the offenses; and . . . he understood that if he were not a citizen of the United States, that he could face consequences such as denial of naturalization, deportation or removal from the United States. The court accepted the guilty pleas after finding they were knowing, made with the advice of competent counsel, and factually supported. The court again asked the petitioner if he understood that his convictions could result in his deportation or denial of naturalization if he were not a citizen, and the petitioner answered, '[y]es.' The court stated the terms of the agreed upon sentence that the

petitioner would receive, namely, 364 days on each of the two dockets, to run concurrently, for a total effective sentence of 364 days. The matter was continued for sentencing. On April 9, 2013, the court sentenced the petitioner in accordance with the plea agreement. . . .

"Lamontagne, a public defender, testified at the habeas trial about the two criminal cases and his investigation into the charges. In the Costco case, the petitioner was alleged to have placed items inside his jacket and passed all points of sale. A loss prevention officer stopped the petitioner as he was leaving the store. Lamontagne and his investigator went to the Costco store to ascertain the layout of the store. The petitioner indicated that he was not a member of Costco and was going to the customer service desk to inquire about getting a membership when he was stopped by the loss prevention officer. According to the petitioner, he had been cradling the items in his arms and not placing them inside his jacket. There was no video surveillance footage of the petitioner putting any of the items inside his jacket.

"The other offense occurred at a Stew Leonard's convenience store. The petitioner was alleged to have taken several peaches, walked out to his car in the parking lot, and placed the peaches in the car. A customer reported the petitioner to a store employee before he made it to the parking lot. The petitioner told Lamontagne that the car was his brother's and that his brother was there that day. Thus, there was a potential issue of who put the peaches in the car. . . .

"Lamontagne investigated and considered the potential defenses in both cases. According to Lamontagne, the petitioner was adamant from the outset that he was not guilty in both cases and wanted to proceed to trial. Lamontagne viewed the facts of the Costco case as presenting a viable defense. However, the likelihood of

going to trial dropped when the petitioner was charged with the Stew Leonard's case, which Lamontagne assessed as having a weaker defense. The defense strategy then shifted from going to trial to resolving the two cases via a plea agreement. The state had made a plea offer when the petitioner only had the Costco case pending, but the petitioner rejected that first plea offer. The state made a second plea offer after the petitioner was charged in the Stew Leonard's case, which would have resolved both cases, but the petitioner rejected the second plea offer. At a subsequent pretrial, the state made a third plea offer that the petitioner accepted just prior to the beginning of jury selection. . . .

"Lamontagne and the petitioner were aware of the potential immigration consequences resulting from convictions in the two cases. Lamontagne had spoken with an immigration attorney who had indicated certain 'red flags' that the petitioner then sought to avoid. For example, one concern was avoiding a sentence greater than one year to minimize the risk that immigration officials would become aware of the petitioner. Another 'red flag' was having convictions for crimes of moral turpitude. Lamontagne's immigration expert also told him that immigration authorities will automatically look at certain things, such as sentences of one year or more, even if suspended, as well as crimes of moral turpitude. Given the charges in the two criminal cases, the petitioner could not avoid being convicted of larceny, a crime of moral turpitude, but he could attempt to negotiate a sentence of less than one year. . . . Lamontagne worked to try to minimize the potential damage to the petitioner.

"It was . . . Lamontagne's understanding that if a defendant receives a sentence of more than one year, then immigration authorities would automatically initiate deportation proceedings, although those proceedings would not necessarily result in actual deportation.

Conversely, it was Lamontagne's understanding that immigration authorities would not automatically initiate deportation proceedings if the sentence were less than one year. Lamontagne advised the petitioner accordingly, and they strove to negotiate a sentence of less than one year to minimize the risk of coming automatically to the attention of immigration authorities. . . .

"Lamontagne understood that the petitioner could be subjected to deportation if convicted of crimes of moral turpitude, but that he would have a 'fighting chance' because his negotiated sentence was less than one year. Lamontagne discussed with the petitioner the difference between one or two convictions for moral turpitude. The state, however, never gave the petitioner the opportunity to plead guilty in only one case. The plea deal would resolve both cases and automatically result in two separate convictions for larceny, thereby triggering negative immigration consequences. The petitioner's options were to go to trial on both cases or resolve them with guilty pleas to two larceny charges.

"Lamontagne advised the petitioner to speak to his immigration attorney about the difference between one or two convictions for crimes of moral turpitude and about his immigration and deportation issues. The petitioner not only faced immigration and deportation consequences from the Costco and Stew Leonard's cases, but also from the 2009 convictions for robbery in the third degree and two counts of larceny in the fifth degree. According to Lamontagne, who asked the petitioner if he had any prior issues with his immigration status, the petitioner was in the process of appealing [the] 2009 criminal conviction[s], which had independent immigration consequences, when he began representing the petitioner in the Costco case. Because the conviction in the prior case was not final, it was Lamontagne's understanding that the immigration authorities

had not commenced any proceedings. Lamontagne became aware that the appeal from the 2009 convictions was unsuccessful before the Costco and Stew Leonard's cases were resolved.

"On cross-examination . . . Lamontagne acknowledged that it was his understanding after speaking to an immigration attorney that the 2009 convictions on appeal would, if ultimately unsuccessful, weigh more heavily on immigration authority decisions than the Costco and Stew Leonard's convictions. The greater weight to be given to the prior convictions directed the focus of the Costco and Stew Leonard's cases onto reducing the sentence below the one year threshold. Lamontagne not only had discussions with the petitioner about the immigration consequences, but also with his family. Lamontagne advised the petitioner and his family that they should speak to an immigration attorney. According to Lamontagne, if he believed that the petitioner did not understand the immigration consequences, then he would not have allowed him to plead guilty unknowingly to such consequences.

"The petitioner testified that he [had] had an immigration proceeding prior to the Costco and Stew Leonard's cases that resulted in a cancellation of a removal order. According to the petitioner, he was not afraid of going to trial on the two new cases because he no longer faced deportation consequences from that prior immigration proceeding. The petitioner viewed a letter submitted by a Macy's department store detective, Donavon Sinclair, as helpful in future proceedings. Sinclair's letter, which is undated but apparently produced after his testimony that was critical to the state's case in the jury trial, purported to exonerate the petitioner of the 2006 larceny and robbery charges. See *State* v. *Stephenson*, 131 Conn. App. 510, 27 A.3d 41 (2011), cert. denied,

303 Conn. 92[9], 36 A.3d 240 (2012) . . . . The petitioner maintains to this day that the Sinclair letter demonstrates his innocence in the 2006 case.

"The petitioner was not concerned about immigration consequences at the beginning of the Costco and Stew Leonard's cases because he had recently won his immigration case in 2010. According to the petitioner, he did not become concerned about immigration consequences until the state threatened to call immigration authorities if he went to trial. The petitioner was concerned about the immigration consequences should he receive a sentence of a year or more, and that concern impacted his decision to accept the plea agreement resulting in a 364 day sentence for both cases. The petitioner maintained that Lamontagne never advised him that immigration consequences would be triggered by having two convictions for crimes of moral turpitude. However, the petitioner testified that 'from what we knew and we discussed at that time, if I only had one conviction, there would be no mandatory detention. I didn't know that at the time that if you have two convictions, it's a mandatory . . . detention in immigration.' . . .

"Consequently, the petitioner did not anticipate that he would face mandatory removal based on the dual larceny convictions since the sentences were under one year and, therefore, did not qualify as felonies. The court's plea canvass, however, specifically identified the two charges as felonies. The petitioner acknowledged explicitly during the canvass that he understood that he was pleading guilty to two felony charges. The petitioner indicated that he would not have pleaded guilty if he knew that he would be subjected to mandatory deportation. The petitioner's concern about deportation was corroborated by Tonya Warycha, who provided counseling services to him from 2011 until 2013,

[and] testified that he was consistently very worried and stressed about being deported during that time period.

"Attorney Renee Redman, who has extensive experience and specializes in immigration law, regularly consults with defense counsel about the immigration consequences of criminal convictions. Prior to testifying . . . Redman reviewed the petitioner's immigration files, including the 2009–2010 immigration proceeding; the decision and order by immigration Judge Straus on July 22, 2014, which found the petitioner was deportable and ordered his removal from the United States; the decision by the [b]oard . . . upholding the order of removal; and the plea transcript in the present underlying criminal cases. . . . Redman noted that the petitioner's convictions for the Costco and Stew Leonard's cases are for crimes of moral turpitude. Because there are two such convictions not arising out of the same scheme of conduct, and the petitioner was a lawful permanent resident at the time, he was deportable for these two convictions regardless of the sentence length. There are defenses that can be asserted in removal proceedings; however, because the petitioner had been granted cancellation of removal previously, he could not again be granted cancellation of removal because it can only be granted once.

"According to . . . Redman, receiving a sentence of less than one year has no effect on immigration officials becoming aware of a potential deportee. Immigration authorities, in Redman's experience, will become aware of anyone incarcerated [for] any term of incarceration through access to criminal databases. The petitioner could have avoided deportation consequences for the Costco and Stew Leonard's cases if he had pleaded guilty to one of the larcenies, received a sentence of 364 days, and the second larceny [was] nolled or dismissed. However, the state's plea offers never encompassed

less than the petitioner pleading guilty to two larcenies [that] did not arise from the same scheme of conduct.

"The respondent called . . . Lamontagne as a rebuttal witness. Lamontagne indicated that he did not tell the petitioner that he would be deported as a result of the two larceny convictions, but that he told him that he was exposed to deportation. The petitioner, therefore, knew that these convictions made him removable. Lamontagne reiterated that he told the petitioner that he should contact his immigration attorney for additional details." (Citations omitted; footnote omitted.)

On the basis of these findings, the court determined that Lamontagne performed deficiently "by failing to properly advise the petitioner about the automatic deportation consequences associated with two crimes of moral turpitude, irrespective of the sentence imposed." The court further determined that, "[b]ut for that deficient advice, the petitioner would not have pleaded guilty and [would have] proceeded to trial."[6] Accordingly, the court granted the operative petition and, thereafter, granted the respondent's petition for certification to appeal. Additional facts and procedural history will be set forth as necessary.

Before we address the merits of the respondent's claims on appeal, we first set forth our well settled standard of review governing habeas matters and claims of ineffective assistance of counsel, as well as relevant legal principles. "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.) *Ayuso* v. *Commissioner of*

[6] We note that the respondent has not challenged the habeas court's prejudice finding on appeal.

Correction, 215 Conn. App. 322, 348, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 885–86, 173 A.3d 525 (2017); see also *Heywood* v. *Commissioner of Correction*, 211 Conn. App. 102, 116, 271 A.3d 1086 ("The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . A pure credibility determination made by a habeas court is unassailable." (Citation omitted; internal quotation marks omitted.)), cert. denied, 343 Conn. 914, 274 A.3d 866 (2022).

"The sixth amendment to the United States constitution guarantees a criminal defendant the assistance of counsel for his defense. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, supra, 215 Conn. App. 349. "[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test annunciated by the United States Supreme Court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined

that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance . . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness . . . . To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 704–705, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018). "Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, supra, 349.

When a petitioner who faces mandatory deportation as a consequence of his guilty plea raises a claim of ineffective assistance of counsel, we analyze the claim more particularly under *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). See *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 10, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019). In *Padilla*, "the United States Supreme Court concluded that the federal constitution's guarantee of effective assistance of counsel requires defense counsel to accurately advise a noncitizen client of the immigration consequences of a guilty plea." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 511. Specifically, the court in *Padilla* explained: "Immigration law can be complex, and it is a legal

specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." (Footnote omitted.) *Padilla* v. *Kentucky*, supra, 369. In *Padilla*, "the terms of the relevant immigration statute [were] succinct, clear, and explicit in defining . . . removal," and the court concluded that "counsel could have easily determined that [the petitioner's] plea would make him eligible for deportation simply from reading the text of the statute . . . ." Id., 368. Instead, the petitioner's counsel in *Padilla* performed deficiently by "provid[ing] [the petitioner with] false assurance that his conviction would not result in his removal from this country." Id.

Our Supreme Court recently analyzed *Padilla* in *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 506. In determining "what advice criminal defense counsel must give to a noncitizen client who is considering pleading guilty to a crime when federal law prescribes deportation as the consequence for a conviction"; id.; the court in *Budziszewski* explained: "For crimes designated as aggravated felonies . . . [for which] federal law mandates deportation almost without exception . . . *Padilla* requires counsel to inform the client about the deportation consequences prescribed by federal law. . . . Because noncitizen clients will have different understandings of legal concepts and the English language, there are no precise

terms or one-size-fits-all phrases that counsel must use to convey this message. Rather, courts reviewing a claim that counsel did not comply with *Padilla* must carefully examine all of the advice given and the language actually used by counsel to ensure that counsel explained the consequences set out in federal law accurately and in terms the client could understand. In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, counsel must unequivocally convey to the client that federal law mandates deportation as the consequence of pleading guilty." (Citations omitted.) Id., 507.

The petitioner in *Budziszewski*, a Polish national who emigrated to the United States and later became a lawful permanent resident, filed a petition for a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance by failing to advise him of the immigration consequences of his guilty plea to an aggravated felony. Id., 508–509. The habeas court granted the habeas petition, concluding that, because "the legal consequences faced by the petitioner were clear, and federal law mandated deportation"; id., 512; the petitioner's trial counsel "was required to inform the petitioner that his plea of guilty to an aggravated felony made him 'subject to mandatory deportation . . . .' " Id., 510. The court in *Budziszewski* "emphasize[d] that there are no fixed words or phrases that counsel must use to convey [the] information, and courts reviewing *Padilla* claims must look to the totality of counsel's advice, and the language counsel actually used, to ensure that counsel accurately conveyed the severity of the consequences under federal law to the client in terms the client could understand. . . . [T]he focus of the court's inquiry must be on the essence of the information conveyed to the client to ensure that counsel

clearly and accurately informed the client of the immigration consequences under federal law . . . . This requires the court to consider the totality of the advice given by counsel, make findings about what counsel actually told the client, and then determine whether, based on those findings, the petitioner met his burden to prove that counsel's advice failed to convey the information required under *Padilla*." (Citations omitted.) Id., 512–14.

Moreover, there was evidence in *Budziszewski* that the advice given by the petitioner's counsel may have "[cast] doubt on the likelihood that federal authorities would actually apprehend and deport the petitioner despite the clarity of the law, and the parties disagree[d] whether giving [that] type of advice violates *Padilla*." Id., 514. The court in *Budziszewski*, thus, also considered "whether, in addition to advising the client what federal law *mandates*, *Padilla* requires counsel to also advise a client of the actual likelihood that immigration authorities will *enforce* that mandate"; (emphasis in original) id., 507; and "the impact of any advice about the likelihood of enforcement advice on counsel's duty under *Padilla*." Id., 514. In addressing those issues, the court stated: "Given the difficulty in predicting enforcement practices, counsel is not required to provide the client with predictions about whether or when federal authorities will apprehend the client and initiate deportation proceedings. Nevertheless, if counsel chooses to give advice or if the client inquires about federal enforcement practices, counsel must still impress upon the client that once federal authorities apprehend the client, deportation will be practically inevitable under federal law." Id., 515.

In summary, the conclusions of the court in *Budziszewski* resulted "in a two step inquiry for a court reviewing a claim that counsel's erroneous enforcement advice violated *Padilla*. First, the court must determine

whether counsel complied with *Padilla* by explaining to the client the deportation consequences set forth in federal law. The advice must be accurate, and it must be given in terms the client could comprehend. If the petitioner proves that counsel did not meet these standards, then counsel's advice may be deemed deficient under *Padilla*. If counsel gave the advice required under *Padilla*, but also expressed doubt about the likelihood of enforcement, the court must also look to the totality of the immigration advice given by counsel to determine whether counsel's enforcement advice effectively negated the import of counsel's advice required under *Padilla* about the meaning of federal law." Id., 515–16. Because the habeas court in *Budziszewski* made no findings of fact regarding the content of the advice given by the petitioner's trial counsel, and the court did not indicate which parts, if any, of the testimony given by the petitioner and his trial counsel the court credited, the matter was remanded for a new habeas trial. Id., 510, 518.

With these principles in mind, we turn to the respondent's claims on appeal.

I

The respondent's first claim is that the habeas court improperly found that Lamontagne performed deficiently and that it reached such a conclusion, without making findings, as required by *Budziszewski*, as to the specific advice provided by Lamontagne. We are not persuaded.

In support of this claim, the respondent directs our attention to the habeas court's memorandum of decision in which the court stated that "Lamontagne was aware that convictions for crimes of moral turpitude would subject the petitioner to deportation and even discussed with him the difference between one or two

convictions, *although the specifics of such a discussion are unclear from the testimony*." (Emphasis added.)

To reiterate, under the guidance set forth by our Supreme Court in *Budziszewski*, we, as a court reviewing a claim that counsel's advice violated *Padilla*, must engage in a two step inquiry: first, we must determine whether Lamontagne gave the petitioner accurate advice regarding the deportation consequences set forth in federal law, in terms that the petitioner could understand, and, second, if Lamontagne gave the advice required by *Padilla* but also expressed doubt about the likelihood of enforcement, we must look to the totality of the immigration advice given to determine whether Lamontagne's enforcement advice effectively negated the advice required under *Padilla* about the meaning of federal law. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515–16.

Lamontagne's testimony at the habeas trial sheds light on the court's statement that the record was unclear as to what Lamontagne specifically told the petitioner regarding the difference between one and two convictions of crimes of moral turpitude. In his testimony, Lamontagne acknowledged that larceny is considered a crime of moral turpitude and explained his reasoning for negotiating the 364 day sentences in the plea deal, namely, that he was trying to avoid having the petitioner come to the automatic attention of immigration authorities. As Lamontagne explained, he had consulted with an immigration expert,[7] who told him that immigration authorities automatically "look at" certain things, including, for example, a sentence of one year or more, as well as the commission of crimes of moral turpitude. On the basis of that advice, Lamontagne understood that, if the petitioner received a sentence of one year or more, immigration authorities

[7] Lamontagne could not recall the specific expert with whom he had consulted.

would initiate deportation proceedings, but that it was not automatic if the petitioner received a sentence of less than one year. When asked if he had given the petitioner "*any other advice* about immigration consequences . . . [i]n addition to the advice about the one year sentence," Lamontagne responded, "[*n*]*ot that I can recall*." (Emphasis added.)

On direct examination of Lamontagne by the petitioner's habeas counsel, the following relevant colloquy took place:

"Q. Okay. And you mentioned something about moral turpitude and convictions for moral turpitude earlier. Can you explain that in a little bit more detail?

"A. My understanding—immigration looks at certain things and what they consider crimes of moral turpitude; what they believe crimes that tend to show a person would act—I guess, more likely to act in an immoral way was something that red-flagged them. Stuff like forgeries, identity theft, larcenies. Things that show people behaving in rather discrete criminal manners.

"Q. And what was your understanding of the specific immigration consequences about—or, actually, withdrawn. So, it was your understanding that larceny was a crime involving moral turpitude?

"A. That is my understanding. Yes.

"Q. And what was your understanding of the specific immigration consequences that [the petitioner] would face if he accepted the plea agreement in this case?

"A. Just—he would still be subject to deportation because of the crimes of moral turpitude but that he would at least have a fighting chance, so to speak, because that's sort of the only strike against him.

"Q. Okay.

"A. That was the best we were going to be able to get—work out on this particular deal.

"Q. All right. Did you ever talk to him about whether there was a difference between one conviction for a moral turpitude crime and two convictions for a moral turpitude crime?

"A. We did discuss that. Yes.

"Q. And what was your advice to him then?

"A. At that point, you know, we weren't given the opportunity to plead to just one. It was a package deal that the prosecutor was refusing to come off of both charges. So, it was either take the deal or go to trial on both of them.

"Q. Okay. And *did you ever tell . . . [the petitioner] about what the immigration consequences would be if he had only been convicted of one crime involving moral turpitude*?

"A. *I don't recall telling him that* because I'm not an immigration attorney . . . ." (Emphasis added.)

Thus, as the transcript shows, when asked what specific advice he had given to the petitioner regarding the difference between one and two convictions of crimes of moral turpitude, Lamontagne did not provide an answer that was responsive to the court's inquiry. He did, however, subsequently acknowledge that he could not recall telling the petitioner about the immigration consequences of having only one conviction of a crime of moral turpitude.[8] He also testified that he could not recall giving the petitioner advice about the immigration consequences of his plea deal beyond the advice given concerning the one year sentence. It is also apparent

[8] We note that the petitioner testified that Lamontagne never told him that, by entering guilty pleas to the two larceny charges, he would be deported, regardless of the length of the sentences.

from Lamontagne's testimony that he did not have a correct understanding of the immigration law governing the petitioner's situation. Despite acknowledging that the crimes for which the petitioner was pleading guilty were crimes of moral turpitude and suggesting that he did discuss with the petitioner the difference between having one or two convictions for such crimes, he nevertheless pursued the 364 day sentences because he was under the mistaken belief that they would give the petitioner a "fighting chance" of avoiding automatic deportation proceedings, and he so advised the petitioner.

Although the respondent places much weight on the court's statement that the specific details of one conversation between the petitioner and Lamontagne were unclear, the respondent, by narrowly focusing on that one statement of the court, ignores the numerous other findings set forth by the court in its memorandum of decision. For example, the court specifically found that "Lamontagne's assessment that sentences lower than one year would help protect the petitioner from immigration consequences was clearly erroneous."[9] In other

[9] In challenging this finding on appeal, the respondent argues that "Lamontagne did not testify that he believed that the 364 day sentences would render the petitioner not deportable. Rather, he testified that he understood that, by pleading guilty to the two larceny counts, the petitioner still would be subject to deportation for having convictions for crimes of moral turpitude, but he would still have a 'fighting chance.' . . . The habeas court apparently did not consider that efforts to avoid having a deportable client come to the attention of immigration authorities, such as by negotiating a sentence of less than one year, could 'help protect' the petitioner from being deported, though he would remain deportable." (Citation omitted.) The testimony before the habeas court from Redman, an immigration expert, however, demonstrates the inaccuracy in the respondent's assertion that Lamontagne's advice concerning the immigration consequences of the sentences of less than one year that were included in the petitioner's plea deal could have given the petitioner a "fighting chance" from being deported. According to Redman, immigration officials would become aware of the petitioner as a result of his incarceration, regardless of its length, through access to criminal databases. Redman also testified that she did not think it was accurate for counsel to advise a defendant pleading guilty to two unrelated crimes of moral turpitude that a sentence of less than one year

words, Lamontagne did not provide accurate advice. In making that finding, the court explained that "[i]t was . . . Lamontagne's understanding that if a defendant receives a sentence of more than one year, then immigration authorities would automatically initiate deportation proceedings, although those proceedings would not necessarily result in actual deportation. Conversely, it was Lamontagne's understanding that immigration authorities would not automatically initiate deportation proceedings if the sentence were less than one year. Lamontagne advised the petitioner accordingly and they strove to negotiate a sentence of less than one year

would have any effect on whether the defendant would come to the attention of immigration authorities. The court reasonably could have credited Redman's testimony in support of its finding that Lamontagne's assessment that two sentences of less than one year would give the petitioner a "fighting chance" to avoid deportation was substantively incorrect.

The respondent also asserts that, "if Lamontagne advised the petitioner that pleading guilty to the two larceny charges would render him deportable for being convicted of crimes of moral turpitude, but that receiving sentences of less than one year would preclude him from also having aggravated felonies on his record and could reduce the likelihood of his convictions coming to the attention of immigration authorities, such advice was reasonable and, indeed, correct." (Emphasis omitted.) This argument is grounded in the fact that, under federal immigration law, an aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year . . . ." 8 U.S.C. § 1101 (a) (43) (G) (2012). Moreover, federal law also provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227 (a) (2) (A) (iii) (2012). The problem, however, is that the respondent's claim is based on speculation, as there is nothing in the record, including Lamontagne's testimony, to suggest that he crafted the sentences in the plea deal to avoid the petitioner being convicted of aggravated felonies. Although we recognize that a sentence of less than one year may improve a person's chances of avoiding deportation under certain circumstances, those circumstances were not present here. In the present case, the petitioner entered guilty pleas to two crimes of moral turpitude, not arising out of a single scheme of criminal conduct, without knowing that doing so would automatically render him deportable, and with the belief that doing so would lessen the chance that his convictions would come to the attention of immigration authorities. As Redman testified, under these circumstances, the length of the petitioner's sentences had no impact whatsoever on whether immigration authorities would initiate deportation proceedings. The respondent's argument, therefore, is unavailing.

to minimize the risk of coming automatically to the attention of immigration authorities."

Redman's testimony demonstrates the inaccuracy of such advice. Specifically, Redman testified as to the immigration consequences to the petitioner, as a lawful permanent resident, resulting from his convictions in the Costco and Stew Leonard's cases, stating that the petitioner's two convictions for crimes of moral turpitude in those two cases, which did not arise out of the same scheme of conduct, rendered the petitioner deportable. Redman further testified that, when retail theft is involved, it is presumptively a crime of moral turpitude and that sentence length of less than one year would have "no effect at all" on whether the petitioner would come to the attention of immigration authorities. In Redman's experience, immigration officials will become aware of a potential deportee through their access to criminal databases.

Furthermore, the court found that "Lamontagne indicated that he did not tell the petitioner that he would be deported as a result of the two larceny convictions but, [rather] told him that he was *exposed* to deportation." (Emphasis added.) The court also found that "[t]he automatic deportation consequence[s]" resulting from the petitioner's guilty pleas were "readily apparent" and that "the law is succinct and straightforward." Again, this finding was supported by the testimony of Redman that the immigration consequences to which she testified were clear from the face of the immigration statutes.[10]

[10] Notably, on appeal, the respondent has not argued that federal law is unclear on the issue of whether an alien who is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal conduct, is deportable. Instead, in a footnote in his brief, the respondent suggests that it is unclear whether larceny in the sixth degree is a crime of moral turpitude. Specifically, the respondent argues: "Because Lamontagne operated under the belief that the larceny charges were crimes of moral turpitude, the respondent assumes arguendo that he was obligated to advise the petitioner in accordance with that belief. This court, however, has noted that 'the phrase "crime involving moral turpitude" is notoriously

Accordingly, under our two step analysis, we conclude that the habeas court properly determined that Lamontagne performed deficiently by failing to provide the petitioner with accurate advice regarding the immigration consequences of his guilty pleas to two unrelated crimes of moral turpitude. When, as here, "the deportation consequence is truly clear . . . the duty

baffling' and 'is perhaps the quintessential example of an ambiguous phrase.' *Georges* v. *Commissioner of Correction*, 203 Conn. App. 639, [648–49, 249 A.3d 355, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021)] . . . . The respondent submits that the habeas court's finding that it was 'uncontroverted' that the petitioner's larceny convictions would automatically subject him to mandatory deportation was wide of the mark, in that, absent precedent finding sixth degree larceny a crime of moral turpitude, an attorney reasonably could have found it uncertain whether a conviction therefor would render a client deportable." (Citation omitted.) This claim fails for two reasons. First, Redman testified at the habeas trial that, "when retail theft is involved, it is presumptively a crime involving moral turpitude." That testimony was never challenged through cross-examination, and it was not contradicted by the admission of any other testimony or evidence. Moreover, the evidence before the court also included the 2014 decision of the immigration judge who, after examining relevant immigration law on the subject, concluded that the petitioner had been convicted of two crimes of moral turpitude, not arising out of a single scheme of criminal conduct. Thus, the court's finding in the present case was reasonably based in the evidence and the plain language of the federal law. Moreover, Lamontagne testified that he understood that larceny is a crime of moral turpitude and he never suggested to the habeas court that the petitioner's conviction of larceny in the sixth degree did not constitute a crime of moral turpitude, such that the immigration consequences to the petitioner were unclear or that the petitioner's pleas to the two larceny charges did not render him automatically deportable. Because the claim that larceny in the sixth degree may not constitute a crime involving moral turpitude, thereby rendering the immigration consequences for the petitioner's convictions unclear, was never raised before, brought to the attention of, or addressed by, the habeas court, and because the claim has been raised for the first time on appeal, we decline to address it further. " 'We do not entertain claims not raised before the habeas court but raised for the first time on appeal.' . . . *Lopez* v. *Commissioner of Correction*, 142 Conn. App. 53, 57 n.2, 64 A.3d 334 (2013); see also *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (appellate review of claims not raised before habeas court would amount to ambuscade of habeas judge); *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 846 n.2, 171 A.3d 525 (2017) (Appellate Court is not compelled to consider issues neither alleged in habeas petition nor considered at habeas proceeding); *Sewell* v. *Commissioner of Correction*, 168 Conn. App. 735, 736–37 n.2, 147 A.3d 196 (2016) (Appellate Court did not consider issues not alleged in habeas petition or considered at trial

to give correct advice is equally clear"; *Padilla* v. *Kentucky*, supra, 559 U.S. 357; and "counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507. The plain language of the applicable federal law provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." 8 U.S.C. § 1227 (a) (2) (A) (ii) (2012). Lamontagne gave inaccurate advice when he told the petitioner that his guilty pleas would merely expose him to deportation and that immigration authorities would not automatically initiate deportation proceedings if each sentence under the plea agreement was for less than one year. See, e.g., *Miller* v. *Commissioner of Correction*, 176 Conn. App. 616, 635, 170 A.3d 736 (2017) (counsel's advice, which "inaccurately conveyed to the petitioner that he would have some chance of avoiding deportation after pleading guilty," did not meet standard set forth in *Padilla*). Moreover, that inaccurate advice was compounded by Lamontagne's suggestion to the petitioner that he had a "fighting chance" of not coming to the attention of immigration authorities by pleading guilty to the larceny charges in each case and receiving sentences in each matter of 364 days. See, e.g., *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 659, 157 A.3d 1169 (habeas court improperly found that counsel was not deficient when counsel merely warned petitioner of heightened risk of deportation and failed to tell petitioner that he was subject to mandatory deportation

during habeas proceeding), cert. denied, 324 Conn. 907, 152 A.3d 1245 (2017)." *Coleman* v. *Commissioner of Correction*, 202 Conn. App. 563, 577, 246 A.3d 54, cert. denied, 336 Conn. 922, 246 A.3d 2 (2021).

under federal law), cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

We also are not persuaded that the habeas court's decision fails to comply with the requirement of *Budziszewski* that the court "make findings about what counsel actually told the client, and then determine whether, based on those findings, the petitioner met his burden to prove that counsel's advice failed to convey the information required under *Padilla.*" *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 513–14. In *Budziszewski*, the habeas court did not make *any* findings of fact regarding what trial counsel actually said to the petitioner about the immigration consequences mandated by federal law, and it did not make any findings about whether trial counsel gave any advice about the likelihood of enforcement and, if so, whether such advice negated counsel's advice about the deportation consequences mandated by federal law. Id., 516. Conversely, in the present case, the habeas court discussed at length in its memorandum of decision its findings of fact as to the discussions between the petitioner and Lamontagne and what had transpired prior to the petitioner entering his guilty pleas. The court's determination that Lamontagne performed deficiently was based on its finding that Lamontagne did not advise the petitioner accurately regarding the immigration consequences of his guilty pleas due to his misunderstanding that the length of the petitioner's sentences for his two larceny convictions would have an impact on whether deportation proceedings would be instituted against the petitioner.[11]

[11] The respondent further takes issue with the habeas court's statement that "[t]he credible evidence shows that the petitioner did not receive accurate advice about [the immigration consequences of his guilty pleas]." Specifically, the respondent asserts that, because "[t]he court did not identify what credible evidence established that Lamontagne did not provide accurate advice," as a matter of law the court could not have found that the petitioner proved deficient performance under *Budziszewski*. The testimony provided by Lamontagne and Redman, which the court reasonably could

II

The respondent's second claim is that, as a consequence of the court's failure to make the requisite findings under *Budziszewski*, it failed to hold the petitioner to his burden to rebut the presumption that Lamontagne's advice fell within the wide range of reasonable professional assistance. The court, however, specifically found that Lamontagne "discussed with the petitioner the difference between one and two convictions for crimes involving moral turpitude," although the court did not set forth the specific advice given, as it was unclear from the record. Thus, according to the respondent, because we must "indulge a strong presumption" that Lamontagne's "conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Ayuso* v. *Commissioner of Correction*, supra, 215 Conn. App. 349; and, because the petitioner must overcome that presumption, which the respondent claims he failed to do, we must presume that the advice given by counsel regarding the differences between one and two convictions for crimes involving moral turpitude was correct. We are not persuaded.

"It is well established that when analyzing a claim of ineffective assistance, 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' *Strickland* v. *Washington*, supra, 466 U.S. 690." *Sanders* v. *Commissioner of Correction*, 83

have credited, amply supports the court's determination that the petitioner did not receive accurate advice about the automatic deportation consequences of his guilty pleas. Moreover, in its memorandum of decision, the court specifically "credit[ed] the petitioner's testimony that he sought to avoid deportation and that he understood his guilty pleas would not trigger automatic consequences." The petitioner also testified that Lamontagne never told him that, by pleading guilty to the two larceny charges, he would be deported, regardless of the length of his sentences.

Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004). As this court has stated previously, "[w]e . . . are mindful that [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. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Similarly, the United States Supreme Court has emphasized that a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he or she] did." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, supra, 215 Conn. App. 349–50. "Nowhere is it said, though, that such a presumption is irrebuttable. As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel." *Sanders* v. *Commissioner of Correction*, supra, 551; see also *White* v. *Commissioner of Correction*, 145 Conn. App. 834, 841, 77 A.3d 832, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013).

Our review of the record demonstrates that the habeas court was aware of the *Strickland* presumption, which it set forth in its memorandum of decision. The court, having determined that Lamontagne had provided incorrect advice to the petitioner regarding the

immigration consequences of his guilty pleas, necessarily determined that either the presumption had been rebutted or that it did not apply. The essence of the respondent's argument is that, because it is unclear exactly what was said to the petitioner in the one particular conversation highlighted by the court, the court should have presumed that Lamontagne gave correct advice.[12] Specifically, the respondent argues that "the habeas court erred when it construed against the respondent the lack of clarity attainable from the evidence regarding what advice Lamontagne actually provided." Under the circumstances of this case, we do not agree. Even though it was unclear from the record what Lamontagne told the petitioner during that one conversation, the record clearly reflects that Lamontagne did not know and failed to advise the petitioner that, as a result of his guilty pleas to two crimes of moral turpitude, which did not arise out of a single scheme of criminal conduct, he was automatically subject to deportation. Because of that lack of knowledge, Lamontagne arranged the plea deal under the mistaken belief that sentences of less than one year would give the petitioner a chance of not coming to the inevitable attention of immigration authorities. He also acknowledged that he did not advise the petitioner concerning the immigration consequences of being convicted of one crime involving moral turpitude, although he believed that the state did not have a strong case in the Costco case.

[12] Even if we assume that Lamontagne correctly advised the petitioner during that unclear conversation and construe Lamontagne's advice concerning the 364 day sentences as advice regarding enforcement, we conclude that the result would remain the same, as Lamontagne's suggestion to the petitioner that the plea deal gave him a "fighting chance" of avoiding the detection of immigration authorities effectively negated any correct advice he may have given regarding the requirements of federal law for a person convicted of two unrelated crimes of moral turpitude. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515–16.

Moreover, there is nothing in the record to suggest that the court construed the lack of clarity in that one conversation against the respondent. The court's determination that Lamontagne performed deficiently was based on its finding, which is amply supported by the record, that Lamontagne inaccurately advised the petitioner that sentences of less than one year for his two larceny convictions could help to protect the petitioner from deportation. Despite the clear language of the federal law concerning the immigration consequences for convictions of two crimes of moral turpitude not arising out of a single scheme of criminal conduct, Lamontagne did not so advise the petitioner and justified his failure to do so on the ground that he was not an immigration attorney. In light of the overwhelming evidence, the presumption that counsel did not deficiently perform his obligations to the petitioner clearly had been rebutted. See *Hinton* v. *Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*").

In connection with his argument that the court did not hold the petitioner to his burden of rebutting the presumption that Lamontagne did not perform deficiently, the respondent further asserts that Lamontagne cannot be faulted for giving inaccurate advice because Lamontagne received that advice by consulting with an expert on immigration law. Specifically, the respondent argues that, "if Lamontagne advised the petitioner consistently with the guidance that he had received from an immigration consultant . . . that receiving 364 day sentences could reduce the likelihood of the petitioner coming to the attention of immigration authorities, providing such advice was reasonable. An attorney reasonably may rely upon the opinion of an expert, and, after

having received an expert's opinion or advice, an attorney is not required to continue searching for other experts who may provide differing opinions." The cases on which the respondent relies for this proposition involve situations in which counsel consulted a medical expert, and it was determined that counsel was entitled to rely on the medical expert's opinion concerning, for example, whether the petitioner suffered from a mental defect or disease; see, e.g., *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 426, 876 A.2d 1277, cert. denied, 275 Conn. 930, 883 A.2d 1246 (2005), cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006); or in determining whether to present expert testimony. See, e.g., *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 543–44, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017). The present case involves a significantly different situation in which counsel himself, as an attorney, has a sixth amendment obligation to advise his client accurately regarding the immigration consequences of his guilty plea.

The fact that Lamontagne consulted with an immigration expert, who either gave him incorrect advice or whose advice Lamontagne simply misunderstood, cannot excuse Lamontagne's failure to advise the petitioner accurately regarding the immigration consequences of his guilty pleas, as required under *Padilla*. We are not aware of any exception to the requirement set forth in *Padilla* for such situations. The fact remains that the petitioner was entitled under the sixth amendment to be informed accurately of the immigration consequences of his guilty pleas. Indeed, the United States Supreme Court stated in *Padilla* that it is the responsibility of courts "under the [c]onstitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.' . . . To satisfy this responsibility, we now hold that counsel

must inform [his] client whether his plea carries a risk of deportation. Our longstanding [s]ixth [a]mendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." (Citation omitted.) *Padilla* v. *Kentucky*, supra, 559 U.S. 374. The court was equally clear that "[i]t is quintessentially the duty of counsel to provide [his] client with available advice about an issue like deportation, and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.' " Id., 371. Recognizing the complexities of immigration law, the court in *Padilla* imposed a limited duty on counsel when the deportation consequences of a particular plea are unclear or uncertain. Id., 369. When the deportation consequences are clear, however, as they are in the present case, counsel is obligated to give correct advice. To excuse counsel's failure to do so simply because counsel consulted with an expert in immigration law would undermine the clear requirement of *Padilla*.

The Court of Appeals of Oregon reached a similar decision in *Daramola* v. *State*, 294 Or. App. 455, 430 P.3d 201 (2018), review denied, 364 Or. 723, 440 P.3d 667 (2019), and we find its analysis therein instructive on this issue. *Daramola* involved a claim by a petitioner that his counsel had provided ineffective assistance by failing to give accurate advice regarding the immigration consequences of the petitioner's guilty plea. Id., 457. In rejecting the state's argument that "criminal defense counsel [could not] be found deficient because he referred [the] petitioner to immigration counsel, and 'was entitled to rely on the opinion of experts,' " the Court of Appeals of Oregon stated: "To the extent the state seems to argue that bringing in immigration counsel *per se* renders criminal defense counsel's performance constitutionally adequate, the state misunderstands *Padilla*. If criminal defense counsel relies on

outside consultation with immigration attorneys in educating herself or himself about immigration consequences, outside immigration counsel functions as a member of the defense team. Consultation with immigration counsel is a tool criminal defense counsel can use, but the involvement of immigration counsel does not obviate defense counsel's [s]ixth [a]mendment obligation to provide constitutionally adequate advice. As *Padilla* held, 'when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.' . . . The duty is *defense counsel's*." (Citation omitted; emphasis in original.) Id., 464. The court in *Daramola* further explained: "Of all the facets of the legal profession, only the criminal defense attorney is specifically enshrined in the constitution. The adequate and effective representation guaranteed by the [s]ixth and [f]ourteenth [a]mendments fall squarely on the shoulders of criminal defense counsel. As discussed, *Padilla* makes clear that advice of immigration consequences is part of—not collateral to—that [s]ixth [a]mendment guarantee. . . . For the immigrant defendant, immigration consequences are as central to the defense function as case investigation, pretrial suppression, evaluating defenses, and calculating sentence exposure." (Citation omitted.) Id.

For the foregoing reasons, the respondent's second claim fails.

III

The respondent's final claim is that the habeas court applied a higher standard than what the law requires. Specifically, the respondent argues that, "even if the habeas court's analysis comported with *Budziszewski*'s requirements, the court nevertheless erred by finding that Lamontagne performed deficiently by failing to advise that the petitioner's pleas would '*automatically* subject him to *mandatory* deportation.' . . . *Padilla*

and *Budziszewski* do not require an attorney to employ those specific words or language that absolute." (Citations omitted; emphasis in original.) According to the respondent, pursuant to *Padilla* and *Budziszewski*, "an attorney may perform reasonably by advising that a guilty plea will render a client legally deportable, but that other factors may reduce the likelihood that deportation proceedings will in fact occur. Here, the evidence shows that Lamontagne advised the petitioner that his guilty plea would render him deportable, but that there was a chance that immigration authorities would not pursue enforcement if the petitioner received a sentence of less than one year. Under *Padilla* and *Budziszewski*, that advice was reasonable under the petitioner's specific circumstances, and, therefore, the petitioner failed to prove deficient performance." We do not agree.

"[T]he precise advice counsel must give depends on the clarity of the consequences specified by federal immigration law." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 511. Although the respondent is correct that, pursuant to *Budziszewski*, "there are no precise terms or one-size-fits-all phrases that counsel must use to convey" the deportation consequences prescribed by federal law, *Budziszewski* also makes clear that, "[i]n circumstances when federal law mandates deportation . . . counsel must *unequivocally convey to the client that federal law mandates deportation* as the consequence for pleading guilty." (Emphasis added.) *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507. As in *Budziszewski*, in the present case, the legal consequences faced by the petitioner were clear and federal law mandated deportation. Having reviewed the habeas court's memorandum of decision as a whole, we are not persuaded that the habeas court deviated from the standard set forth in *Padilla* and *Budziszewski* by requiring the use of specific words or phrases. Rather, it appears that

the habeas court focused more broadly on whether Lamontagne correctly conveyed to the petitioner the specific, mandatory deportation consequences of the guilty pleas under federal law when he undercut the certainty of that result with clearly erroneous advice suggesting that deportation might be avoidable. See id., 512–13. The essence of the information conveyed to the petitioner suggested that, given the structure of the sentencing under the plea deal, there was a chance that the petitioner would not be deported, which did not accurately depict the immigration consequences called for with respect to the petitioner's guilty pleas to two separate crimes of moral turpitude. See id., 513. Moreover, to the extent that Lamontagne gave advice "casting doubt on the likelihood that federal authorities would actually apprehend and deport the petitioner despite the clarity of the law"; id., 514; it was incumbent that he convey to the petitioner that, once apprehended, deportation would be "practically inevitable under federal law," which he failed to do.[13] Id., 515.

[13] The respondent argues in his principal appellate brief that "*Padilla* does not require an attorney to advise that deportation will be 'automatic' or 'mandatory' as a consequence of a plea. Rather, so long as counsel advises that the plea will make the client deportable but that the client may escape enforcement, counsel performs reasonably." The respondent further argues in his appellate reply brief that Lamontagne's "advice regarding the likelihood of enforcement did not negate advice that pleading guilty would render the petitioner deportable because, regardless of whether authorities pursued enforcement, the petitioner would remain deportable." We disagree with both arguments. As we stated previously in this opinion, our Supreme Court explained in *Budziszewski* that, although counsel is not required to provide advice regarding the likelihood of enforcement, when counsel chooses to do so, "counsel must still impress upon the client that once federal authorities apprehend the client, deportation will be practically inevitable under federal law." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515. Additionally, when counsel gives advice expressing doubt about the likelihood of enforcement, courts must "look to the totality of the immigration advice given by counsel to determine whether counsel's enforcement advice effectively negated the import of counsel's advice required by *Padilla* about the meaning of federal law." Id., 516. It necessarily follows that counsel cannot advise a client that a guilty plea will subject the client to mandatory deportation and then suggest to the client that there is nothing to worry

The judgment is affirmed.

In this opinion SUAREZ, J., concurred.

ELGO, J., concurring. United States immigration law has been "characterized as a labyrinth and Byzantine" and "second only to the Internal Revenue Code in complexity." (Internal quotation marks omitted.) *Ebu* v. *Commonwealth*, 661 S.W.3d 319, 329–30 (Ky. App. 2022). Questions about both its applicability and its enforcement often prove difficult for immigration law experts, let alone criminal defense attorneys tasked with providing effective assistance to noncitizens accused of crime. The challenge of providing proper legal guidance has only compounded since the landmark decision of *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), in which the United States Supreme Court held that counsel is required to apprise a defendant of the immigration consequences of a criminal conviction. Id., 374. As a result, public defenders and criminal defense attorneys are left in a precarious position, as the state of the law on this evolving issue frequently is confusing and conflicting.

In the present case, I agree with the majority that the petitioner, Joseph Stephenson, satisfied his burden of establishing that his criminal trial counsel, James Lamontagne, rendered ineffective assistance pursuant to the standard set forth in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 142 A.3d 243 (2016). In deciding this appeal, it is axiomatic that this court, as an intermediate appellate tribunal, is bound by that precedent. See *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 645, 224 A.3d 147 (2020); *State* v. *Siler*, 204 Conn. App. 171, 177–78, 253 A.3d 995, cert. denied, 343 Conn. 912, 273 A.3d 694 (2021). I write separately

about because enforcement will be unlikely. Such an advisement would run counter to the safeguards set in place by *Padilla* and *Budziszewski*

to express my disagreement with the habeas court that, pursuant to *Padilla* and its progeny, defense counsel was obligated to advise the petitioner that his guilty pleas "would automatically subject him to mandatory deportation." In addition, I respectfully submit that the standard articulated by our Supreme Court in *Budziszewski* does not fully comport with its fundamental teaching—that, "[b]ecause noncitizen clients will have different understandings of legal concepts and the English language," counsel must explain "the [plea] consequences set out in federal law accurately and in terms the client could understand." *Budziszewski* v. *Commissioner of Correction*, supra, 507. Accordingly, I respectfully concur.

I

Padilla v. *Kentucky*, supra, 559 U.S. 373–74, marked a sea change in effective assistance of counsel jurisprudence, as it expanded that sixth amendment right to encompassimmigration consequences during the negotiation and plea stages of criminal proceedings.[1] In *Padilla*, the United States Supreme Court recognized that, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[2] (Footnote omitted.) Id., 364; see also *Immigration & Naturalization Service* v. *St. Cyr*, 533 U.S. 289, 322, 121 S. Ct. 2271, 150

[1] As one commentator notes, "*Padilla* is the [United States Supreme Court's] first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms." S. Bibas, "Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection," 99 Cal. L. Rev. 1117, 1120 (2011).

[2] As the Supreme Court of Iowa observed in applying *Padilla*, "deportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country. In addition to removal from the country, the immigration statute also carries consequences associated with removal, such as exclusion, denial of citizenship, immigration detention, and bar to relief from removal." *Diaz* v. *State*, 896 N.W.2d 723, 729 (Iowa 2017).

L. Ed. 2d 347 (2001) ("[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (internal quotation marks omitted)). The court also noted that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Padilla* v. *Kentucky*, supra, 367. Accordingly, the court held that "counsel must inform her client whether his plea carries a risk of deportation." Id., 374.

In imposing that burden on counsel, the court acknowledged that "[i]mmigration law can be complex, and it is a legal specialty of its own." Id., 369. The court thus drew a critical distinction between federal immigration law that is "succinct and straightforward"; id.; as to whether a guilty plea will render a client "eligible for deportation"; id., 368; and federal immigration law that is "unclear or uncertain" as to that consequence. Id., 369. The court imposed a "more limited" duty on the part of counsel with regard to the latter. Id. As it explained: "When the law is *not* succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may carry a risk* of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." (Emphasis added; footnote omitted.) Id. Applying that standard to the facts on hand, the court concluded that Jose Padilla's counsel rendered ineffective assistance because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction" and "counsel could have easily determined that his plea would make him *eligible for deportation* simply from reading the text of the statute . . . ." (Emphasis added.) Id., 368.

Importantly, the court "did not discuss, let alone hold, that defense counsel must use specific magic words in advising of the risk of deportation, such as 'absolute deportation,' 'certain deportation,' or 'inevitable deportation' or the like." *State* v. *Sanmartin Prado*, 448 Md. 664, 711–12, 141 A.3d 99 (2016), cert. denied sub nom. *Prado* v. *Maryland*, 581 U.S. 918, 137 S. Ct. 1590, 197 L. Ed. 2d 707 (2017). As the Supreme Court of Colorado noted, the court in *Padilla* "used the phrase 'automatically deportable' only in the portion of its opinion describing historical developments in federal immigration law"; *Juarez* v. *People*, 457 P.3d 560, 564 (Colo. 2020), cert. denied sub nom. *Juarez* v. *Colorado*, U.S. , 141 S. Ct. 1370, 209 L. Ed. 2d 118 (2021); and did not "again use the term 'automatic deportation' or suggest in the body of the analysis any requirement for counsel to predict the likelihood that the law will actually be enforced and the defendant will actually be deported." Id., 565. The court in *Padilla* likewise observed, in the historical context section of its opinion, that deportation was "virtually inevitable for a vast number of noncitizens convicted of crimes"; *Padilla* v. *Kentucky*, supra, 559 U.S. 360; but did not again use that terminology at any point in its analysis of the petitioner's ineffective assistance of counsel claim.

In the wake of *Padilla*, courts throughout this country have split on the question of whether counsel must advise a client who pleads guilty to a deportable offense that deportation is mandatory, certain, inevitable or the like. Several have construed *Padilla* to include such a requirement.[3] Others have held that no such obligation

[3] See, e.g., *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015) ("where the law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty"); *United States* v. *Urias-Marrufo*, 744 F.3d 361, 366 (5th Cir. 2014) ("defense counsel has an obligation under the [s]ixth [a]mendment to inform his noncitizen client that the offense to which he was pleading guilty would result in his removal from this country" (internal quotation marks omitted)); *United States* v. *Akinsade*, 686 F.3d 248, 254 (4th Cir.

exists.[4] In this regard, I am concerned that many courts

2012) ("the admonishment did not 'properly inform' [the defendant] of the consequence he faced by pleading guilty: mandatory deportation"); *Encarnacion* v. *State*, 295 Ga. 660, 663, 763 S.E.2d 463 (2014) ("An attorney's advice as to the likelihood of deportation must be based on realistic probabilities, not fanciful possibilities. . . . [W]here . . . the law is clear that deportation is mandatory and statutory discretionary relief is unavailable, an attorney has a duty to accurately advise his client of that fact. . . . It is not enough to say 'maybe' when the correct advice is 'almost certainly will.' " (Citation omitted.)); *Araiza* v. *State*, 149 Haw. 7, 20, 481 P.3d 14 (2021) (concluding that defense counsel rendered ineffective assistance by advising client that guilty plea would result in " 'almost' certain" deportation and holding that "defense attorneys must advise their clients using language that conveys that deportation 'will be required' by applicable immigration law for an aggravated felony conviction"); *Commonwealth* v. *DeJesus*, 468 Mass. 174, 179, 9 N.E.3d 789 (2014) ("advising a defendant faced with circumstances similar to those in this case that he is 'eligible for deportation' does not adequately inform such a defendant that, if he were to plead guilty . . . his removal from the United States would be presumptively mandatory under [f]ederal law"); *Salazar* v. *State*, 361 S.W.3d 99, 103 (Tex. App. 2011) ("[T]he correct advice, which was that the plea of guilty would result in certain deportation, was not given. Both the terms 'likelihood' and 'possibility' leave open the hope that deportation might not occur. Consequently, these admonishments were inaccurate and did not convey to [the client] the certainty that the guilty plea would lead to his deportation.").

[4] See, e.g., *United States* v. *Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam) ("[The defendant] argues that trial counsel's performance was defective because [he] was not told that 'he was subject to mandatory deportation and ineligible for relief from removal.' But the argument misinterprets *Padilla* and is based on a false premise. In *Padilla*, the Supreme Court held that plea counsel's performance was deficient for failing to advise Padilla that his conviction would make him 'deportable' . . . if he pleaded guilty, not that deportation or removal was either mandatory or certain."); *State* v. *Sanmartin Prado*, supra, 448 Md. 713 (concluding that counsel's advice that "the offense [to which the defendant pleaded guilty] was a 'deportable offense,' that [the defendant] 'could be deported . . . if the federal government chose to initiate deportation proceedings,' and thus that it was 'possible' that [the defendant] would be deported" was "correct advice" pursuant to *Padilla*); *Chacon* v. *State*, 409 S.W.3d 529, 537 (Mo. App. 2013) (defense counsel's advice that defendant would "very likely be deported and wouldn't be able to come back" was constitutionally effective assistance (internal quotation marks omitted)); *Commonwealth* v. *Escobar*, 70 A.3d 838, 842 (Pa. Super. 2013) ("[w]e do not read [the federal immigration statute] or the [*Padilla*] court's words as announcing a guarantee that actual deportation proceedings are a certainty such that counsel must advise a defendant to that effect"), cert. denied, 624 Pa. 680, 86 A.3d 232 (2014);

are conflating the issue of whether a guilty plea renders a defendant *deportable* under federal immigration law with the issue of whether that defendant will, in fact, be deported or removed from this country.[5] The former is the subject of *Padilla* and pertains to the legal ramification of a plea, while the latter pertains to the practical result of the plea. In my view, defense counsel has no obligation to advise clients as to the probability or likelihood that they actually will be removed from this country, as our Supreme Court has held. See *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507 (*Padilla* "does not require counsel to predict

Neufville v. *State*, 13 A.3d 607, 614 (R.I. 2011) ("[c]ounsel is not required to inform their clients that they *will* be deported, but rather that a defendant's plea would make [the defendant] eligible for deportation" (emphasis in original; internal quotation marks omitted)); *Fuentes* v. *Clarke*, 290 Va. 432, 441, 777 S.E.2d 550 (2015) (concluding that trial counsel did not render deficient performance pursuant to *Padilla* when counsel "expressly informed [the defendant] that he was not a specialist in immigration, advised her that she would be deportable unless she found a remedy within the immigration system, and advised her to consult with an immigration attorney"); *State* v. *Shata*, 364 Wis. 2d 63, 97, 868 N.W.2d 93 (2015) ("[b]ecause deportation is not an absolutely certain consequence of a conviction for a deportable offense, *Padilla* does not require an attorney to advise [a noncitizen] client that deportation is an absolute certainty upon conviction of a deportable offense").

In *Juarez* v. *People*, supra, 457 P.3d 561–62, the defendant conceded that he was advised that his guilty plea would make him "deportable" and "that deportation was the probable outcome of accepting the plea." He nonetheless argued on appeal that "adequate advice required counsel's use of the terms 'automatic deportation' and 'presumptively mandatory deportation,' and that advising him he would probably be deported was in fact misleading." Id., 564. The Supreme Court of Colorado disagreed, stating: "The 'correct advice' that counsel has a duty to give [pursuant to *Padilla*] . . . necessarily refers to a correct explanation of 'the law.' . . . The 'correct advice' concerning the legal consequence of the defendant's plea required in the instant case, just as it was in *Padilla*, was that the alien defendant would, in the language of the statute, be 'deportable.' . . . That is precisely the advice the defendant in the instant case was given." (Citations omitted.) Id.

[5] As the court in *Padilla* observed, "changes to [federal] immigration law have also involved a change in nomenclature; the statutory text now uses the term 'removal' rather than 'deportation.' " *Padilla* v. *Kentucky*, supra, 559 U.S. 364 n.6; see also 8 U.S.C. § 1228 et seq. (2018).

whether or when federal authorities will pursue the client in order to carry out the deportation proceedings required by law"). Rather, to comply with *Padilla*, I believe counsel must advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government.

To go any further and delve into the probability or likelihood that a noncitizen client will, in fact, be removed from this country poses a serious risk of misleading the client. Significantly, the relevant statutory language from federal immigration law does not state that removal is automatic, mandatory, or certain for particular offenses. For example, 8 U.S.C. § 1227 (a) (2) (A) (ii) provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, *is deportable*." (Emphasis added.) Similarly, 8 U.S.C. § 1227 (a) (2) (A) (iii) provides: "Any alien who is convicted of an aggravated felony at any time after admission *is deportable*." (Emphasis added.) See also 8 U.S.C. § 1228 (c) (2018) ("[a]n alien convicted of an aggravated felony shall be conclusively presumed *to be deportable* from the United States" (emphasis added)).

As several courts across this country have recognized, "a conviction for a deportable offense will not necessarily result in deportation . . . ." *State* v. *Sanmartin Prado*, supra, 448 Md. 716. In *State* v. *Shata*, 364 Wis. 2d 63, 70, 868 N.W.2d 93 (2015), the Supreme Court of Wisconsin explained that, after pleading guilty to a deportable offense under federal law, the defendant's "deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens."

It continued: "[W]hether immigration personnel would necessarily take all the steps needed to institute and carry out [an alien's] actual deportation [i]s not an absolute certainty. . . . [P]rosecutorial discretion and the current administration's immigration policies provide possible avenues for deportable aliens to avoid deportation. In fact, the executive branch has essentially unreviewable prosecutorial discretion with respect to commencing deportation proceedings, adjudicating cases, and executing removal orders." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 95–96; see also *Padilla* v. *Kentucky*, supra, 559 U.S. 364 (noting "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (noting "the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders' " pursuant to federal law and explaining that, "[a]t each stage the [e]xecutive has discretion to abandon the endeavor"); *Ortiz* v. *Lynch*, 640 Fed. Appx. 42, 44–45 (2d Cir. 2016) (referencing memorandum from Department of Homeland Security that "directs the agency to exercise prosecutorial discretion [in pursuing removal] even in the case of noncitizens convicted of aggravated felonies").[6]

In a similar vein, our Supreme Court has observed that "immigration enforcement policies and practices

[6] Consider the case of Danelo Cavalcante, a citizen of Brazil who escaped from Chester County Prison in Pennsylvania this August, causing a statewide manhunt. Cavalcante had been convicted of murdering his girlfriend in Pennsylvania in front of her children in 2021 and sentenced to life in prison. Despite that murder conviction, Cavalcante was not deported but remained in the United States to serve his sentence. As one article on Cavalcante notes, "[f]or a variety of reasons, those [noncitizens convicted of] serious crimes are most often required to serve any sentences in the United States." M. Jordan, "In Major Crimes, Deportation Is Often Delayed," New York Times, September 11, 2023, p. A15.

often differ between executive administrations. . . . A period of either relaxed or strict enforcement may not last long, meaning that counsel's advice on current enforcement practices will have little meaning as policies change after the client accepts a plea deal." (Citation omitted.) *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 515; accord *United States* v. *Texas*, 599 U.S. 670, 673, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) ("[i]n 2021, after President Biden took office, the Department of Homeland Security issued new [g]uidelines for immigration enforcement"); *United States* v. *Hercules*, 947 F.3d 3, 8 (1st Cir. 2020) ("[D]espite the high likelihood of the appellant's eventual deportation under the current statutory scheme, we cannot say that the district court clearly erred by deeming the appellant's future deportation uncertain. In practice, enforcement of the immigration laws has not always been a model of consistency, and the district court plausibly noted that the immigration enforcement priorities of the Executive Branch 'seem to be in flux,' changing with the ebb and flow of political tides." (Footnote omitted.)); *State* v. *Shata*, supra, 364 Wis. 2d 95 n.16 ("[s]ince at least the 1960s, the federal executive branch has gone back and forth in adopting and rescinding policies regarding deferred action on deportation").[7]

It is well established that "all guilty pleas must be knowing and voluntary to comport with due process."

[7] In light of the foregoing authority, I respectfully submit that the majority in *Commonwealth* v. *DeJesus*, 468 Mass. 174, 182, 9 N.E.3d 789 (2014), mistakenly concluded that "all of the conditions necessary for removal would be met by the defendant's guilty plea, and that, under [f]ederal law, there would be virtually no avenue for discretionary relief once the defendant pleaded guilty and that fact came to the attention of [f]ederal authorities." As the dissenting justice in that opinion noted, "[D]eportation is not 'mandatory' or 'inevitable.' Indeed, the deportation proceeding is contingent on there being an 'order' of removal from the Attorney General of the United States, and there still remain discretionary avenues to avoid deportation . . . ." Id., 187 (Cordy, J., dissenting).

Dyous v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 176, 151 A.3d 1247 (2016); see also *Boykin* v. *Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (to be valid, guilty plea must be intelligently and understandingly made); *Sherbo* v. *Manson*, 21 Conn. App. 172, 178–79, 572 A.2d 378 ("A guilty plea, which is itself tantamount to conviction, may be accepted by the court only when it is made knowingly, intelligently, and voluntarily. . . . A guilty plea otherwise obtained is in violation of due process and voidable." (Citation omitted.)), cert. denied, 215 Conn. 808, 809, 576 A.2d 539, 540 (1990). A knowing and intelligent decision to plead guilty by a defendant, in turn, requires accurate advice from counsel.[8] Because a noncitizen's actual removal from this country following a guilty plea to a deportable offense is neither mandatory nor inevitable, it is near impossible for a criminal defense attorney lacking immigration law expertise to provide accurate advice on the probability that a client will in fact be removed by the federal government.

In *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507, our Supreme Court recognized that "noncitizen clients will have different understandings of

[8] See, e.g., *Gilbert* v. *United States*, 64 F.4th 763, 771 (6th Cir. 2023) (effective assistance at plea stage requires counsel to provide "accurate advice" to defendants); *United States* v. *Castro-Taveras*, 841 F.3d 34, 50 n.13 (1st Cir. 2016) ("[i]f an attorney takes it upon himself to advise a client about a material matter, thereby suggesting that he knows what he is talking about, but then provides incorrect advice, the client should be able to bring an ineffective assistance of counsel claim"); *United States* v. *Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (explaining that *Padilla* held that "a defense attorney's incorrect advice to his client about the risk of deportation constituted ineffective assistance of counsel in violation of the [s]ixth [a]mendment"); *Waugh* v. *Holder*, 642 F.3d 1279, 1283 (10th Cir. 2011) ("the right to effective assistance of counsel includes the right to accurate advice about the risk of deportation"); *State* v. *Shata*, supra, 364 Wis. 2d 107 ("[t]he bottom line is that an attorney's advice must be adequate to allow a defendant to knowingly, intelligently, and voluntarily decide whether to enter a guilty plea").

legal concepts and the English language . . . ." The burden on defense counsel, the court explained, is to accurately convey the immigration consequences of a guilty plea "to the client in terms the client [can] understand." Id., 513. In light of the foregoing, the court emphasized that "there are no fixed words or phrases that counsel must use to convey this information" to noncitizen clients. Id., 512. The court nevertheless held that, when counsel "chooses to give advice" as to the "actual likelihood" that the federal government will remove the client from the United States, counsel must "convey to the client that once federal authorities apprehend the client, *deportation will be practically inevitable* under federal law." (Emphasis added.) Id., 507.

Inevitable is synonymous with certain or definite; see *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 453, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003); and is defined as "incapable of being avoided or prevented." American Heritage Dictionary of the English Language (5th Ed. 2013) p. 658; see also Webster's Third New International Dictionary (2002) p. 1157 (defining inevitable as "incapable of being avoided or evaded" and "certain to occur"). Given that commonly understood meaning, I respectfully disagree that defense counsel should *ever* advise a client that a guilty plea to a deportable offense will render their removal "practically inevitable." Such advice is inaccurate; see, e.g., *United States* v. *Hercules*, supra, 947 F.3d 8 ("despite the high likelihood of the appellant's eventual deportation . . . we cannot say that the district court clearly erred by deeming the appellant's future deportation uncertain" (footnote omitted)); *United States* v. *Santelises*, 476 F.2d 787, 790 (2d Cir. 1973) ("[d]eportation . . . serious sanction though it may be, is not . . . an absolute consequence of conviction"); *State* v. *Shata*, supra, 364 Wis. 2d 105 ("a conviction for a deportable offense will not necessarily result in deportation"); and

poses a serious risk of misleading noncitizen clients, particularly ones with limited "ability to understand the English language . . . ." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 513. Put simply, counsel "does not control and cannot know with certainty whether the federal government will deport an alien upon conviction." *State* v. *Shata*, supra, 103; see also *United States* v. *Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam) ("immigration law complexities should caution any criminal defense attorney not to advise a defendant considering whether to plead guilty that the result of a post-conviction, contested removal proceeding is clear and certain"); *Budziszewski* v. *Commissioner of Correction*, supra, 515 (noting "the difficulty in predicting [immigration] enforcement practices"); *State* v. *Sanmartin Prado*, supra, 448 Md. 719 ("the process that must occur between a defendant's conviction for a deportable offense and actual deportation makes it less than certain or absolute that deportation will actually result even if the defendant is convicted of a deportable offense").

Moreover, imagine the scenario where counsel advises a noncitizen client that a guilty plea to a deportable offense will render their removal "practically inevitable" and the client, relying on that advice, proceeds to trial and is convicted but thereafter is *not* removed from this country. Can the client maintain an ineffective assistance of counsel claim predicated on counsel's advice that removal was practically inevitable and that, but for that advice, the client would have taken the plea offered by the state? Or, as another judge asked, "[W]ill a claim for ineffective assistance of counsel lie if a defendant proceeds to trial (and is convicted and sentenced) based on advice that fails to include a complete and accurate explanation of all possible exemptions [to removal] that might be available?" *Commonwealth* v. *DeJesus*, 468 Mass. 174, 187 n.2, 9 N.E.3d 789 (Cordy,

J., dissenting). There is no clearly marked path for the counsel who ventures into the thicket of federal immigration law, and landmines abound.[9]

As one court cautioned, "While we do not discourage trial counsel from conducting research on immigration law, we caution practitioners that any advice they give beyond the standard must still be accurate . . . ." *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 335; see also *Padilla* v. *Kentucky*, supra, 559 U.S. 369–70 ("counsel is required to provide accurate advice if she chooses to discuss" matters such as removal). Pursuant to rule 1.1 of the Rules of Professional Conduct, lawyers in this state are obligated to furnish competent representation to a client. "[A]n attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." (Internal quotation marks omitted.) *Celentano* v. *Grudberg*, 76 Conn. App. 119, 125, 818 A.2d 841, cert. denied, 264 Conn. 904, 823 A.2d 1220 (2003). I concur with Justice Alito's observation

[9] As Justice Alito observed in his concurring opinion in *Padilla*, "Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience. . . . [D]etermining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' . . . is not an easy task. . . . Many other terms of [federal immigration law] are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. . . . The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the 'length and type of sentence' and the determination 'whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen . . . .' " (Citations omitted.) *Padilla* v. *Kentucky*, supra, 559 U.S. 376–80.

that "thorough understanding of the intricacies of immigration law is not within the range of competence demanded of attorneys in criminal cases." (Emphasis omitted; internal quotation marks omitted.) *Padilla* v. *Kentucky*, supra, 559 U.S. 385 (Alito, J., concurring); see also *Ebu* v. *Commonwealth*, supra, 335 n.7 (noting "the very real difficulty of non-immigration attorneys attempting to understand the United States's convoluted immigration law without typically practicing in this area"); *State* v. *Sanmartin Prado*, supra, 448 Md. 719 ("from a practical standpoint, it would be unreasonable to require defense counsel . . . to essentially become an immigration law specialist").

Attorneys who represent noncitizen clients in this state should be mindful of our Supreme Court's explication that counsel is *not* required "to predict whether or when federal authorities will pursue the client in order to carry out the deportation proceedings required by law." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507. Their burden under *Padilla* is to advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government. To the extent that a client seeks advice on "the likelihood that [federal immigration] law will actually be enforced and the [client] will actually be deported"; *Juarez* v. *People*, supra, 457 P.3d 565; I believe that counsel should, consistent with their obligations under the Rules of Professional Conduct, advise the client to "consult an immigration specialist [for] advice on that subject." *Padilla* v. *Kentucky*, supra, 559 U.S. 387 (Alito, J., concurring); see also *Chhabra* v. *United States*, 720 F.3d 395, 407–408 (2d Cir. 2013) (concluding that defense counsel did not render ineffective assistance when he "referred [the noncitizen client] to expert immigration counsel, with the result that [the client] received, prior to the acceptance of his plea, correct legal advice as to the deportation effects that

a [guilty plea] would have"); *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 322 (concluding that defense counsel "was not acting ineffectively by advising [the noncitizen client] that there could be immigration consequences to his plea and that he should consult with an immigration attorney"); *Fuentes* v. *Clarke*, 290 Va. 432, 439, 777 S.E.2d 550 (2015) (concluding that defense counsel did not render ineffective assistance when he "informed [the noncitizen client] that deportation was the likely consequence of the plea, and advised her to consult with an immigration attorney because he did not specialize in immigration").

II

In the present case, Attorney Lamontagne served as defense counsel for the petitioner, a citizen of Jamaica, in two separate criminal proceedings involving larceny charges. See *Stephenson* v. *Commissioner of Correction*, 197 Conn. App. 172, 174–75, 231 A.3d 210 (2020). The petitioner ultimately entered guilty pleas in both cases. Id., 174. He thereafter commenced this habeas corpus action, alleging in relevant part that Lamontagne rendered ineffective assistance of counsel by failing "to accurately advise [him] . . . that pleading guilty to the larceny charges against him would make him deportable, removable, and inadmissible for reentry under federal immigration law" and by failing "to accurately advise [him] about the enforcement practices of federal immigration authorities and the probability that [they] would take action to have him deported or removed from the United States after [he] entered a guilty plea . . . ." A habeas trial followed, at which both the petitioner and Lamontagne testified.

As noted in part I of this concurring opinion, to comply with *Padilla*, defense counsel must advise clients when a guilty plea renders them deportable under federal law and subject to removal by the federal government. The uncontroverted factual findings made by the

habeas court demonstrate that Lamontagne complied with that obligation.[10] The court found that the petitioner "was familiar with deportation proceedings from prior convictions [and] knew of potential immigration and deportation consequences in the present cases." The court also found that Lamontagne "was aware that convictions for crimes of moral turpitude would subject the petitioner to deportation";[11] that he "discussed with the petitioner the difference between one and two convictions for crimes involving moral turpitude"; and that he "told [the petitioner] that he was exposed to deportation" as a result of the two larceny convictions. Most significantly, the court found that, in light of Lamontagne's advice, "[t]he petitioner, therefore, knew that these convictions *made him removable*." (Emphasis added.) In light of those uncontested findings, I would conclude that Lamontagne complied with the mandate of *Padilla*. See *Padilla* v. *Kentucky*, supra, 559 U.S. 374 ("we now hold that counsel must inform her client whether [a guilty] plea carries a risk of deportation"); see also id., 368 (concluding that "counsel could have easily determined that [Padilla's] plea *would make him eligible for deportation* simply from reading the text of the statute" (emphasis added)).

It is also noteworthy that the court found that Lamontagne "had discussions with the petitioner about the immigration consequences [of his guilty pleas and] also with his family. Lamontagne advised the petitioner and his family that they should speak to an immigration attorney." The court also found that Lamontagne "referred the petitioner to an immigration attorney to obtain advice about the different ramifications resulting

[10] In his appellate brief, the petitioner correctly notes that the respondent in this appeal "does not challenge" the factual findings made by the habeas court.

[11] At the habeas trial, Lamontagne testified that larceny is a crime of moral turpitude and that the petitioner, by pleading guilty, would "be subject to deportation because of the crimes of moral turpitude . . . ."

from one or two convictions from crimes of moral turpitude." Had Lamontagne done no more than advise the petitioner that his guilty pleas would render him removable and that he should consult with an immigration attorney for further guidance, I do not believe the petitioner could meet his burden of proof; see *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 516 n.2; on an ineffective assistance of counsel claim. See, e.g., *Ebu* v. *Commonwealth*, supra, 661 S.W.3d 322 (concluding that defense counsel "was not acting ineffectively by advising [the noncitizen client] that there could be immigration consequences to his plea and that he should consult with an immigration attorney"); *Fuentes* v. *Clarke*, supra, 290 Va. 439 (concluding that defense counsel did not render ineffective assistance when he "informed [the noncitizen client] that deportation was the likely consequence of the plea, and advised her to consult with an immigration attorney because he did not specialize in immigration").

Nevertheless, the court found, and the record confirms, that Lamontagne did more than just advise the petitioner that his guilty pleas would render him removable by the federal government and encourage him to consult an immigration expert. Lamontagne also provided advice to the petitioner on the likelihood of enforcement action by immigration authorities.[12] As the court found in its memorandum of decision: "It was Attorney Lamontagne's understanding that, if a defendant receives a sentence of more than one year, then immigration authorities would automatically initiate deportation proceedings, although those proceedings would not necessarily result in actual deportation. Conversely, it was Lamontagne's understanding that immigration authorities would not automatically initiate

[12] In his appellate reply brief, the respondent acknowledges that "Lamontagne provided advice [to the petitioner] on both deportability and the likelihood of enforcement" by immigration authorities.

deportation proceedings if the sentence were less than one year. Lamontagne advised the petitioner accordingly . . . . Attorney Lamontagne understood that the petitioner could be subjected to deportation if convicted of crimes of moral turpitude, but that he would have a 'fighting chance' because his negotiated sentence was less than one year." In so doing, Lamontagne's advice ran afoul of the stricture of *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 507, that, if counsel "chooses to give advice . . . about federal enforcement practices, counsel must . . . convey to the client that once federal authorities apprehend the client, *deportation will be practically inevitable* under federal law." (Emphasis added.) In informing the petitioner that his guilty pleas gave him a "fighting chance" of avoiding removal from this country by entering into his guilty pleas, Lamontagne provided improper advice to the petitioner.[13] Moreover, because the court credited the petitioner's testimony that he "sought to avoid deportation and . . . understood his guilty pleas would not trigger automatic consequences" and that he "would have proceeded to trial had he been correctly advised about the consequences" of his guilty pleas, I would conclude that the petitioner satisfied his burden of establishing the requisite prejudice resulting from that advice.

It is "axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Silano* v. *Cooney*,

[13] Lamontagne's advice on the likelihood of enforcement by immigration authorities not only contravened *Budziszewski* but also was factually inaccurate. As the majority notes, the habeas court was presented with testimony from Attorney Renee Redman, an immigration law specialist, who testified that the petitioner's retail theft crimes were presumptively crimes of moral turpitude and that a sentence length of less than one year would have "no effect at all" on whether the petitioner would come to the attention of immigration authorities. In its memorandum of decision, the court expressly credited Redman's testimony.

189 Conn. App. 235, 241 n.6, 207 A.3d 84 (2019); see also *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937) ("the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground"). In light of the foregoing, and bound by the precedent of our Supreme Court in *Budziszewski*, I would affirm the habeas court's determination that Lamontagne rendered ineffective assistance of counsel under the particular facts of this case. I, therefore, respectfully concur in the judgment of this court.

STEVEN K. STANLEY *v.* ANGEL QUIROS ET AL. (AC 45825)

Prescott, Clark and Lavine, Js.*

Syllabus

The incarcerated plaintiff appealed to this court from the judgment of the trial court dismissing his complaint against the defendants, in which he alleged that they had improperly removed funds from his inmate account to pay court filing fees. The trial court found that one of the defendants, an assistant attorney general, was entitled to absolute immunity and that the remaining defendants, the Commissioner of Correction and two employees of the Department of Correction, were entitled to qualified immunity. *Held* that this court declined to address the plaintiff's claims on appeal because they were inadequately briefed: although the plaintiff's appellate brief made cursory statements that the defendants violated a federal statute (28 U.S.C. § 1915) by taking certain funds out of his inmate trust account, his brief was confusing and disorganized, and it failed to provide any meaningful analysis; moreover, the plaintiff's appellate brief failed entirely to identify any claim of error he believed the trial court made and failed to detail, discuss, or analyze the doctrines of absolute and qualified immunity; furthermore, the plaintiff's entire appellate brief comprised less than four pages, and, although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed.

Argued October 4—officially released November 14, 2023

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, brought to the Superior Court in the judicial district of Tolland, where the court, *Gordon, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Steven K. Stanley, self-represented, the appellant (plaintiff).

James M. Belforti, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The incarcerated and self-represented plaintiff, Steven K. Stanley, appeals from the judgment of the trial court dismissing his action brought pursuant to 42 U.S.C. § 1983 against the defendants, Angel Quiros, James W. Donohue, Joyce Gosselin, and Anthony Corria.[1] On appeal, it appears that the plaintiff is claiming that the defendants violated 28 U.S.C. § 1915 by taking certain funds out of his prisoner trust account to pay for filing fees related to his in forma pauperis filings.[2]

[1] Angel Quiros is the Commissioner of Correction, James W. Donohue is an assistant attorney general, and Joyce Gosselin and Anthony Corria are employees of the Department of Correction.

[2] Title 28 of the United States Code, § 1915, establishes certain requirements that a prisoner must meet to proceed in forma pauperis. The statute provides in relevant part: "[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915 (a) (1) (2018).

Although a prisoner may be granted in forma pauperis status to proceed with his action, he is still required to pay the full amount of the filing fee associated with that action. 28 U.S.C. § 1915 (b) (1) (2018). The statute includes a payment scheme, including a monthly installment provision, setting forth how funds should be taken from the prisoner's inmate trust account to satisfy the filing fee. 28 U.S.C. § 1915 (b) (2018).

Because the plaintiff has failed to adequately brief any cognizable claim of error in relation to the court's dismissal of his action, we affirm the judgment of the trial court.

The following procedural history is relevant to our disposition of the plaintiff's appeal. On December 12, 2012, the plaintiff was convicted, after a jury trial, of 100 counts of criminal violation of a protective order in violation of General Statutes § 53a-223; one count of stalking in the first degree in violation of General Statutes § 53a-181c; and one count of threatening in the second degree in violation of General Statutes § 53a-62. See *State* v. *Stanley*, 161 Conn. App. 10, 12, 125 A.3d 1078 (2015), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). The plaintiff's conviction stemmed from evidence that approximately 1750 phone calls were made from the plaintiff's cell phone to the victim's cell phone between February 14 and March 24, 2012. Id., 14. The plaintiff was sentenced to eighteen years of imprisonment followed by twelve years of special parole. Id.

The plaintiff appealed his conviction to this court, but his appeal was ultimately unsuccessful. Id., 33. Thereafter, our Supreme Court denied the plaintiff's petition for certification to appeal. See *State* v. *Stanley*, 320 Conn. 918, 131 A.3d 1154 (2016).

In addition to his direct appeal, the plaintiff has filed dozens of civil actions and appeals in connection with his conviction and incarceration.[3] See, e.g., *Stanley* v. *Barone*, 210 Conn. App. 239, 269 A.3d 946 (2022); *Stanley* v. *East Hartford*, Superior Court, judicial district of Tolland, Docket No. CV-17-5007494-S (May 26, 2021),

[3] Connecticut state court dockets are publicly available at State of Connecticut Judicial Branch, Superior Court Case Look-up, available at https://civilinquiry.jud.ct.gov/PartySearch.aspx (last visited November 6, 2023). The Appellate Court, like the trial court, "may take judicial notice of files of the Superior Court in the same or other cases." *McCarthy* v. *Commissioner of Correction*, 217 Conn. 568, 580 n.15, 587 A.2d 116 (1991).

aff'd, 218 Conn. App. 903, 290 A.3d 928, cert. denied, 346 Conn. 1020, 292 A.3d 1254 (2023); *Stanley* v. *Macchiarulo*, Superior Court, judicial district of Tolland, Docket No. CV-21-5014889-S (December 15, 2021), aff'd, 218 Conn. App. 905, 291 A.3d 649, cert. denied, 346 Conn. 1024, 294 A.3d 1026 (2023).

The plaintiff commenced the present action on June 17, 2021. He alleged that the defendants improperly withdrew money from his inmate trust account to recover in forma pauperis filing fees, reducing the amount in his account to less than $10 in violation of 28 U.S.C. § 1915 (b) (2). On August 17, 2021, the defendants filed a motion to dismiss all claims against all defendants. The defendants argued that the claims against Donohue were barred by absolute immunity and that the claims against Quiros, Gosselin, and Corria were barred by qualified immunity.

On August 19, 2022, the court, *Gordon, J.*, issued a memorandum of decision dismissing the plaintiff's action. It agreed with the defendants that Donohue was entitled to absolute immunity and that the remaining defendants were entitled to qualified immunity. The plaintiff timely appealed.

Having thoroughly examined the record and the plaintiff's brief, we conclude that we cannot properly review the plaintiff's claims on appeal because they are inadequately briefed. Although the plaintiff's appellate brief makes a few cursory statements that the defendants violated 28 U.S.C. § 1915 by taking certain funds out of his inmate trust account, the brief is confusing and disorganized, and it fails to provide any meaningful analysis. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018) ("[a]nalysis, 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)); *State* v.

Buhl, 321 Conn. 688, 726, 138 A.3d 868 (2016) (concluding that Appellate Court properly declined to review claim where briefing was "not only short, but confusing, repetitive, and disorganized").

Perhaps more problematic, the plaintiff's appellate brief fails entirely to identify any claim of error he believes the trial court made, leaving the defendants and this court guessing as to the precise nature of his claims. See *Traylor* v. *State*, 332 Conn. 789, 805, 213 A.3d 467 (2019) ("the plaintiff's complete failure to challenge what the trial court actually decided in its memoranda of decision operates as an abandonment of his claims"). As previously explained, the trial court determined that dismissal of the plaintiff's action was appropriate on the basis of absolute and qualified immunity. The plaintiff's appellate brief, however, fails to detail, discuss, or analyze either of those doctrines. See *Paoletta* v. *Anchor Reef Club at Branford, LLC*, 123 Conn. App. 402, 406, 1 A.3d 1238 ("[f]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs" (internal quotation marks omitted)), cert. denied, 298 Conn. 931, 5 A.3d 491 (2010). Last, the plaintiff's entire appellate brief comprises less than four pages. "Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed." *State* v. *Buhl*, supra, 321 Conn. 726. For the foregoing reasons, we conclude that the plaintiff's claims are inadequately briefed and decline to address them.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* MARTIN G.*
(AC 45812)

Alvord, Prescott and Bishop, Js.

Syllabus

The defendant, who had been convicted of the crimes of sexual assault in the first degree and risk of injury to a child and sentenced to a total effective term of forty-four years of imprisonment, execution suspended after thirty-four years, appealed to this court from the trial court's denial of his motion for sentence modification. The defendant filed the motion for modification after serving seventeen years of his sentence. At the hearing on his motion for modification, he produced evidence that, while incarcerated, he had completed multiple rehabilitative and educational programs, had been free from disciplinary actions, and had received positive evaluations from his prison employment. He also expressed remorse for his actions and argued that, because he had received and rejected plea bargain offers, including one offer in which execution of his sentence would have been suspended after seven years, his sentence was unreasonable. The victim's mother, who opposed reducing the defendant's sentence, testified that the victim, who was impregnated by the defendant when she was twelve years old and gave birth to the baby, would never be the same, and neither would the rest of the family. *Held* that the trial court did not abuse its discretion in denying the defendant's motion for sentence modification: the court held a hearing pursuant to statute (§ 53a-39) to determine whether the defendant had established good cause to warrant a modification, during which it conducted an appropriate review of the information before it and determined that the gravity of the defendant's conduct and its continuing effect on the victim and her family outweighed the rehabilitative efforts he had undertaken since his incarceration; moreover, although the court improperly stated that it lacked subject matter jurisdiction to consider the defendant's rejected plea offers when reviewing the motion for modification, as the legislature has provided that a court may exercise its powers pursuant to § 53a-39 to modify a sentence for "good cause" shown and has not otherwise limited the scope of review, given the significance of the other factors properly discussed and relied on by the court in its good cause determination, and the strong policy considerations that counsel against consideration of the defendant's arguments regarding the disparity of the sentences he was offered during plea

* In accordance with our policy of protecting the privacy interests of victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

bargaining and the sentence that he received following trial, including that a sentence issued following a trial may be effected by the information learned at trial, which would be absent from plea bargain discussions, the outcome of the court's decision was unlikely to have been altered by its consideration of the plea terms that the defendant rejected.

Argued September 13—officially released November 14, 2023

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Licari, J.*; verdict and judgment of guilty; thereafter, the court, *Harmon, J.*, denied the defendant's motion for sentence modification, and the defendant appealed to this court. *Affirmed.*

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, *Michele C. Lukban*, senior assistant state's attorney, and *Stacey Miranda*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Martin G., appeals from the judgment of the trial court denying his motion for modification of his sentence pursuant to General Statutes § 53a-39 (a). On appeal, the defendant claims that the trial court abused its discretion in finding that he had failed to establish good cause to modify his sentence. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts underlying the defendant's conviction, as set forth by this court in his direct appeal, are relevant to our resolution of this appeal. "The defendant became a member of the victim's household when she

was six years old. Six years later, when the victim began to occupy a bedroom of her own, the defendant repeatedly engaged in sexual intercourse with her. His misconduct came to light when the victim became pregnant and had a baby. The state's DNA testing of the victim, the baby and the defendant showed a high statistical probability that the defendant was the baby's father." (Footnote omitted.) *State* v. *Gray*, 126 Conn. App. 512, 515, 12 A.3d 1008, cert. denied, 300 Conn. 928, 16 A.3d 703 (2011).

The following procedural history is also relevant to our resolution of this appeal. The state charged the defendant with sexual assault in the first degree in violation of General Statutes (Rev. to 2005) § 53a-70 (a) (2)[1] and risk of injury to a child in violation of General Statutes (Rev. to 2003) § 53-21 (a) (2).[2] The state extended a plea offer to the defendant, "which was if he entered a plea to the charge of sexual assault in the second degree, the court . . . would impose a sentence of fifteen years of incarceration, execution suspended after seven years, and twenty years of probation." *Gray* v. *Commissioner of Correction*, Superior

[1] General Statutes (Rev. to 2005) § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[2] General Statutes (Rev. to 2003) § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection."

Additionally, in deciding the defendant's direct appeal, this court recognized "that the conduct that gave rise to the risk of injury charge was alleged to have occurred between November 1, 2004, and August 2, 2005. In 2007, § 53-21 was amended. See Public Acts 2007, No. 07-143, § 4. Because the relevant 2003 and 2005 revisions of § 53-21 are identical, for convenience, we refer to the 2003 revision." *State* v. *Gray*, supra, 126 Conn. App. 515 n.2.

Court, judicial district of Tolland, Docket No. CV-16-4007870-S (December 16, 2019). The defendant rejected the plea offer. The state extended a second plea offer of "twenty years of incarceration, execution suspended after ten years to serve, and twenty years of probation, which would have been imposed consecutive to an existing sentence." Id. The defendant also rejected the second plea offer and, instead, proceeded to trial on the theory "that he often drank alcohol to excess and took illegal drugs and that, as a result, he often would fall into a deep sleep that resembled a blackout. Because he could not recall anything that had occurred while he had been asleep, he hypothesized that his intercourse with the victim must have resulted from her actions and not his own." *State* v. *Gray*, supra, 126 Conn. App. 520. The jury returned a guilty verdict on both counts. Id., 515. After accepting the jury's verdict, the trial court imposed a total effective sentence of forty-five years of incarceration, execution suspended after thirty-five years, followed by fifteen years of probation. Id. This court affirmed the defendant's conviction. Id., 522.

The defendant then filed an application for sentence review with the sentence review division of the Superior Court. On August 5, 2011, the sentence review division affirmed the defendant's sentence. Next, the defendant filed a motion to correct an illegal sentence on the ground that his sentence with respect to his conviction of sexual assault in the first degree was illegal because it did not include a period of special parole.[3] The court granted the defendant's motion and resentenced him with respect to his conviction for sexual assault in the

[3] The defendant was convicted of sexual assault in the first degree pursuant to General Statutes (Rev. to 2005) § 53a-70 (a) (2). General Statutes (Rev. to 2005) § 53a-70 (b) (3) provides that "[a]ny person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years."

first degree.[4] It imposed a new, total effective sentence of forty-four years of incarceration, execution suspended after thirty-four years, with one year of special parole, and fifteen years of probation.

Thereafter, on January 31, 2022, the defendant, having served seventeen years of his sentence, filed a motion for sentence modification seeking "to reduce his period of incarceration from thirty-four years to nineteen years or any other reduction the court feels is appropriate." The trial court, *Harmon, J.*, held a hearing on the defendant's motion on June 17, 2022. During the hearing, the court heard a statement from the victim's mother, who opposed the sentence reduction. The victim's mother discussed how she recently explained to her youngest son "that he has a brother/nephew that we had to put up for adoption from his father touching his sister, because his father felt that he wanted to start trying to reach out to [him] now." She further recalled having to explain to the victim's school "that [the victim is] twelve years old and she's pregnant, and she would still be continuing in school . . . ." Additionally, the victim's mother detailed the difficulties she encountered trying to put the victim's child up for adoption, stating, "[I]t was a long process finding a good family for the child. I mean, we had families that [were] supposed to adopt him, but . . . when they found out how he was conceived . . . they literally signed the paperwork and then didn't do it . . . ." Significantly, the victim's mother recognized that, "even to this day, [the victim is] still not the same and she's never gonna be the same and neither are we." On the basis of the victim's position, as expressed through her mother, the state objected to the defendant's motion for sentence modification.

[4] The court left undisturbed the previous sentence the defendant received for risk of injury to a child.

Next, the court heard argument from the defendant's counsel, who represented that "we are not asking for release today . . . . What we are asking for is an opportunity for [the defendant] to seek parole." He argued that, since being incarcerated, the defendant has become "remorseful, a changed man," who "has held jobs while [incarcerated] and he's had glowing evaluations that are all excellent. . . . With regard to education, [the defendant] has availed himself of whatever certificates he . . . could find. . . . [H]e also engaged in domestic violence counseling with all goods or excellents . . . on his evaluation. He completed most of his [Offender Accountability Plan], including Voices, addiction services, and People Empowering People." The defendant's counsel stated that the defendant had made numerous attempts to enroll in sex offender treatment, however, he has been unsuccessful due the program prioritizing inmates with earlier release dates. He then reiterated that the defendant was requesting the court to reduce his sentence because he has completed all available rehabilitative programs except sex offender treatment and, ultimately, the opportunity to complete sex offender treatment would improve his possibility of receiving parole. Finally, the defendant's counsel stated "that [the defendant] was offered seven years of incarceration prior to going to trial . . . and received what I believe was thirty-seven years . . . . I did just want to highlight that . . . because although I will concede that after trial you are no longer able to avail yourself of the presumption of innocence, and while I understand that there can and perhaps should be an increase in the . . . time that [a defendant] actually [is] sentenced to . . . I don't think anyone believes that an extra thirty years . . . for that is reasonable."

The defendant then addressed the court and apologized for his actions. He admitted that he had failed

to take responsibility for his actions in 2005, and he "should've thought more of the victim and the pain that [he] put her through and [he] should've took responsibility." Additionally, the defendant stated: "I'm not [the] type of person I was in 2007. I'm nowhere near that. I've grown from this . . . I know I'm a better person. The things that I've done inside the [Department of Correction] to try to better myself taught me how to stay clean, stay out of trouble, do the right things in life. . . . I've been discipline free for seventeen years."

In its memorandum of decision dated June 30, 2022, the court denied the defendant's motion for sentence modification. The court determined that, "[i]n analyzing whether 'a legally sufficient reason' exists to warrant a modification of the defendant's sentence, the court has considered whether the defendant has demonstrated substantial rehabilitation since the date the crime was committed. Factors that have been examined include, but are not limited to (1) the gravity of his crime; (2) correctional record and length of time incarcerated; (3) his age and circumstances at the time of the commission of the crime; (4) whether he has demonstrated remorse and increased maturity since the date of the offense; (5) whether he has contributed to the welfare of other persons through service while incarcerated; and (6) the degree [to] which he has fully availed himself of the opportunities for growth, rehabilitation, and contribution within the correctional system considering the nature and circumstances of the crime he committed. . . . [And] the court must consider the gravity of the offense itself." (Footnote omitted.)

With respect to the rehabilitative efforts the defendant has undertaken since incarceration, the court determined that "[t]he defendant submitted written materials documenting his employment while incarcerated and his training, and efforts at rehabilitation, during incarceration. [The defendant's counsel] spoke on

[his] behalf and stressed the responsibility that [he] was taking regarding his past wrongdoings and his true remorse and desire to be a better individual. [The defendant] submitted an extensive package of recommendation letters, program certificates and work history for the past fourteen years. During his period of incarceration [the defendant] participated in a vocational education course where he repairs broken wheelchairs that are provided to the needy and those unable to afford wheelchairs. [The defendant] has also participated and completed Tier II, domestic violence, People Empowering People and Voices. In addition, [the defendant] has demonstrated a desire to attend sex offender classes; these classes are not available until a date closer to his release due to availability. In addition, [the defendant] has remained free of any disciplinary actions while he has been incarcerated. [The defendant] has the support of his family, who have promised him financial and mental support upon his release."

Moreover, "[t]he defendant personally addressed the court and apologized to the victim and her family and expressed his desire to be a better human being. [The defendant] expressed his remorse and indicated that he had learned his lesson and was ready to move forward in his life in a productive manner. [The defendant] also stressed his own rehabilitative efforts while incarcerated and the good he could perform for the community and his family if granted early release. The defendant's counsel also brought to the court's attention that his current sentence was over three times greater than the initial plea bargain offer in the matter." The court further stated that it "thoroughly reviewed the materials submitted by [the defendant's counsel] in support of the motion. In summary, [the defendant's] counsel emphasized [the defendant's] good behavior record while incarcerated, extensive program participation . . . and work history. [The defendant's] growth in

maturity, understanding and mental growth from a thirty-three year old to a fifty year old was also addressed."

With respect to the gravity of the offense, the court determined that "the [defendant's] conviction stems from multiple acts of illegal sexual activity . . . with his thirteen year old stepdaughter who was approximately twelve years old at the time of the offenses. The defendant also impregnated the victim, and the victim later gave birth to the child." Accordingly, the court determined that, "after a review and consideration of the information and material presented, and with contemplation of the proper standard, the court finds the defendant has not established 'good cause' . . . to modify the sentence when balanced against the facts and harm created by the serious crime he committed. The decision is not meant to lessen or nullify the positive steps the defendant has taken during his period of incarceration or his ability to succeed once he is released. However, the court felt that, although the defendant showed remorse, that the gravity of the crime and harm to the victim itself requires that the request for sentence modification be denied at this time."

We begin by setting forth the relevant legal principles and standard of review that govern our resolution of the defendant's appeal. Section § 53a-39 (a) provides: "Except as provided in subsection (b) of this section, at any time during an executed period of incarceration, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced."[5] "[I]n arriving at its

[5] We note that § 53a-39 has subsequently been amended by No. 23-47, § 1, of the 2023 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, we refer to the current revision of the statute.

sentencing determination, the sentencing court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider or the source from which it may come. . . . [T]his broad discretion applies with equal force to a sentencing court's decision regarding a sentence modification . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Dupas*, 291 Conn. 778, 783, 970 A.2d 102 (2009).[6] Accordingly, we review a court's judgment granting or denying a motion to modify a sentence for abuse of discretion. See id. An "abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Rivera*, 200 Conn. App. 487, 493, 240 A.3d 728 (2020), aff'd, 343 Conn. 745, 275 A.3d 1195 (2022). As such, "[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Generally speaking, under this deferential standard, [w]here the trial court has properly considered all of the offenses proved and imposed a sentence within the applicable statutory limitations, there is no abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Dupas*, supra, 783.

The defendant claims that the trial court abused its discretion in finding that he did not establish good cause to warrant a sentence modification. As discussed, a trial court has broad discretion in determining whether to modify a defendant's sentence. See id. Here, the court

[6] We recognize that *Dupas* involved § 53a-39 (b). Both subsections (a) and (b) of § 53a-39 require the sentencing court to conduct a hearing for good cause prior to determining whether to modify a defendant's sentence. Accordingly, the standard of review set forth in *Dupas* is applicable in the present case.

held a hearing to determine whether the defendant established good cause to warrant a sentence modification. During the hearing, the defendant stated that good cause existed to modify his sentence because, while incarcerated, he engaged in several rehabilitative programs, held numerous jobs, participated in vocational education, and did not receive any disciplinary tickets. The victim's mother, however, expressed to the court that the defendant's crimes have continued to negatively impact both the victim and her family. Significantly, the victim's mother stated, "[E]ven to this day, [the victim is] still not the same, and she's never gonna be the same and neither are we."

In its memorandum of decision, the court considered several factors in determining whether the defendant had established good cause. These factors included, but were not limited to: "(1) the gravity of his crime; (2) correctional record and length of time incarcerated; (3) his age and circumstances at the time of the commission of the crime; (4) whether he has demonstrated remorse and increased maturity since the date of the offense; (5) whether he has contributed to the welfare of other persons through service while incarcerated; and (6) the degree [to] which he has fully availed himself of opportunities for growth, rehabilitation, and contribution within the correctional system considering the nature and circumstances of the crime he committed." In denying the defendant's motion, the court found that "[t]he circumstances presented by the defendant do not establish 'good cause' . . . to modify the sentence when balanced against the facts and harm created by the serious crime he committed. The decision is not meant to lessen or nullify the positive steps the defendant has taken during his period of incarceration or his ability to succeed once he is released. However, the court felt that, although the defendant showed remorse that the gravity of the crime and harm to the victim

itself requires that the request for sentence modification be denied at this time." Accordingly, the court conducted an appropriate review of the information before it and determined that the gravity of the defendant's conduct, and its continuing effect on the victim and her family, outweighed the rehabilitative efforts he has undertaken since his incarceration. Such a weighing is consistent with the broad discretion courts are afforded in ruling on motions for sentence modification, and, therefore, the court did not abuse its discretion in determining that the defendant failed to establish good cause to warrant a sentence modification.

We next address the defendant's argument that the court abused its discretion by stating that it lacked jurisdiction to consider the defendant's rejected plea offers when reviewing his motion for sentence modification. We agree with the defendant that the court improperly stated that it lacked subject matter jurisdiction to consider his arguments regarding the difference between the sentences he was offered during plea bargaining and the sentence he later received after being convicted following a trial. Nevertheless, we are unconvinced that this misstatement warrants a reversal of the court's decision under the circumstances presented.

Typically, a court loses subject matter jurisdiction over a criminal prosecution following the imposition of a sentence or other final disposition of the case, unless the legislature has provided otherwise. See *State* v. *Butler*, 348 Conn. 51, 67, 70, 300 A.3d 1145 (2023).[7] Relevant to the present appeal, the legislature has granted criminal courts continuing statutory authority

[7] Trial courts also retain jurisdiction after sentencing under the common law, which recognized an exception allowing courts to correct an invalid or illegally imposed sentence. See *State* v. *Parker*, 295 Conn. 825, 835–36, 992 A.2d 1103 (2010); see also Practice Book § 43-22 (setting forth procedural mechanism for correcting illegal sentences or sentences imposed in illegal manner).

to make changes to a duly imposed sentence in two ways.[8] First, the legislature has authorized the courts to conduct sentence review pursuant to General Statutes § 51-196.[9] Second, a criminal defendant may seek sentence modification of or discharge from his sentence pursuant to § 53a-39.

In providing for sentence review and sentence modification, the legislature chose not to limit expressly the parameters of the court's review or the arguments that a defendant may raise in such proceedings. Our rules of practice do contain a provision setting forth the scope of review to be employed by the sentence review division. See Practice Book § 43-28. That rule, however, does not affect the jurisdiction of the sentence review division because our rules of practice cannot limit or modify the court's subject matter jurisdiction. See General Statutes § 51-14 (a) ("rules [of court] shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts"); *State* v. *Lawrence*, 281 Conn. 147, 155, 913 A.2d 428 (2007) ("judiciary cannot confer jurisdiction on itself through its own rule-making power").

The legislature has provided that a court exercising its powers pursuant to § 53a-39 may modify a sentence

[8] As our Supreme Court noted in *Butler*, the legislature also has authorized the court to modify the terms of probation after a sentence is imposed. See General Statutes §§ 53a-29 (c), 53a-30 (c) and 53a-32 (d); *State* v. *Butler*, supra, 348 Conn. 69.

[9] General Statutes § 51-194 provides in relevant part: "The Chief Justice shall appoint three judges of the Superior Court to act as a review division of the court . . . ."

General Statutes § 51-196 (a) provides: "The review division shall, in each case in which an application for review is filed in accordance with section 51-195, review the judgment so far as it relates to the sentence or commitment imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review, or may decide that the sentence or commitment under review should stand."

for "good cause" shown. See also Practice Book § 43-21. The legislature has not chosen to otherwise limit the scope of review or indicate that a trial court entertaining a sentence modification cannot consider certain types of claims regarding the underlying sentence. Because the legislature has not circumscribed the court's authority when considering sentence modification, we conclude that the court improperly stated that the defendant's "claim that his sentence is over three times the prior plea offer in this matter would be the subject matter of sentence review and is outside the jurisdiction of the current sentence modification."

Nevertheless, despite this misstatement, we are unpersuaded that a reversal of the court's decision is warranted under the circumstances presented. Although the court did not lack *jurisdiction* to consider the arguments of the defendant regarding a disparity between the sentences he was offered as a part of plea bargaining and the sentence that he later received following trial, as a matter of policy, inquiries into such disparities generally are not appropriately part of a court's "good cause" determination in reviewing a request for sentence modification.

First, although not expressly inadmissible under our rules of evidence; see Conn. Code Evid. § 4-8A;[10] see also Practice Book § 39-25; subsequent consideration of prior settlement negotiations and plea discussions between parties generally has been disfavored in both civil and criminal proceedings, in large part because

[10] Section 4-8A of the Connecticut Code of Evidence does not make evidence related to plea bargaining per se inadmissible. Rather, the rule provides in relevant part that evidence pertaining to guilty pleas that are later withdrawn and plea discussions "shall not be admissible in a civil or criminal case *against* a [criminal defendant] . . . ." Conn. Code Evid. § 4-8A (a); see *State* v. *Tony M.*, 332 Conn. 810, 833 n.14, 213 A.3d 1128 (2019) (noting that application of rule is "limited to situations in which evidence of the plea is offered against the defendant").

pretrial proceedings such as plea bargaining and other settlement negotiations quite often are not part of the record, and, therefore, sufficient context for proper consideration is likely missing. Second, in the context of sentence review, our Supreme Court has indicated that the sentence review division is not required to consider the disparity in sentences between similarly situated criminal defendants. *State* v. *Rupar*, 293 Conn. 489, 512–14, 978 A.2d 502 (2009) (no liberty interest in proportional sentences). Third, there may be a lengthy passage of time between when a plea discussion occurs and when sentence modification is ultimately made, making it difficult to ascertain why certain plea offers are made.

Finally, any disparity between a rejected plea offer and the sentence imposed following a conviction cannot be presumed to be the result of a so-called "trial tax," i.e., a penalty for a defendant's exercise of his right to a trial.[11] Unlike with a plea offer, which, as an inducement to plead guilty, often will include a proposed sentence that is less than what ordinarily would be warranted under the circumstances, a sentencing court imposes a sentence after "(1) hearing all the evidence;

[11] A defendant of course properly may raise on direct appeal a claim that the sentencing court improperly imposed a "penalty" on the basis of the defendant's choice to go to trial, although a defendant is unlikely to prevail on such a claim in the absence of some explicit remarks from the sentencing judge. See *State* v. *Elson*, 311 Conn. 726, 777, 784, 91 A.3d 862 (2014) (exercising court's supervisory authority to hold that "a trial judge should not comment negatively on the defendant's decision to elect a trial during sentencing, given the appearance of impropriety of that consideration" and ordering new sentencing hearing); *State* v. *Kelly*, 256 Conn. 23, 81, 82, 770 A.2d 908 (2001) (emphasizing that "[a]ugmentation of [a] sentence based on a defendant's decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty is clearly improper" but also acknowledging that, to successfully raise issue as claim of error, defendant ordinarily must point to "remarks by a trial judge to threaten explicitly a defendant with a lengthier sentence should the defendant opt for a trial, or indicate that a defendant's sentence was based on that choice" (internal quotation marks omitted)).

(2) observing the witnesses, the defendant, and the victim(s) during trial; (3) reading a presentence report; (4) hearing a victim's statement or reading victim impact statements; (5) listening to evidence in aggravation and mitigation; and (6) considering the defendant's statement in allocution." *People* v. *Walker*, 188 N.E.3d 1235, 1256 (Ill. App.), appeal denied, 183 N.E.3d 891 (Ill. 2021). "[D]uring a trial, a trial court will undoubtedly hear more about the facts of the case, details regarding the nature and circumstances of the offense, and testimony from witnesses and victims. [A] sentence greater than that offered before trial may be explained by the court's consideration of additional evidence regarding the circumstances of the crime admitted at trial. . . . The additional information learned at trial, as well as the appearance, demeanor, and reactions of witnesses and the defendant, are all missing from a dry recitation of a minimal factual basis provided at the time of [plea negotiations]." (Citation omitted; internal quotation marks omitted.) Id., 1256–57.[12]

Here, given the significance of the other factors properly discussed and relied on by the court in denying the defendant's motion and the strong policy considerations that counsel against consideration of the type of claim the defendant makes here, we are unconvinced

[12] We also note that not considering plea negotiations is consistent with the rule that the court that sentences the defendant neither be involved in nor aware of such negotiations. See *Safford* v. *Warden*, 223 Conn. 180, 194 n.16, 612 A.2d 1161 (1992). The rationale behind that rule is to ensure that a defendant does not feel pressured to accept a plea offer because of a fear that the sentencing judge, if aware of the offer the defendant rejected, will use the rejected offer as a floor for any sentence it might impose following trial. See id. Although that precise concern does not exist in connection with a motion to modify, there is a similar concern that cautions against consideration of plea negotiations. The knowledge of the state or the court that a defendant might one day rely on pretrial plea offers in connection with a motion to modify could have a deleterious effect on the state's or the court's willingness to engage in such plea negotiations or on the nature of the offers made.

that the outcome of the court's decision would have been altered by its consideration of the terms of the plea offers that the defendant rejected.

In short, the court issued a detailed memorandum of decision that appropriately considered the rehabilitative efforts the defendant has undertaken since incarceration, the severity of the defendant's crime, and its effect on the victim and her family. Therefore, although the court was not prohibited jurisdictionally from considering the defendant's rejected plea offers, the defendant has not shown that the court's decision instead to consider and rely on the full panoply of the previously mentioned factors in its good cause determination constituted an abuse of its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT v. JEFFREY G.*
(AC 45397)

Prescott, Moll and Clark, Js.**

Syllabus

The petitioner, who had previously been convicted, following a jury trial, of sexual assault in the first degree, appealed to this court from the judgment of the trial court denying his petition for postconviction DNA testing of certain evidence that had been collected during the criminal investigation into the assault. In his petition, which was filed pursuant to the applicable statute (§ 54-102kk), the petitioner claimed that additional DNA testing of fingernail scrapings and clippings collected from the victim, A, would reveal the presence of his DNA and would demonstrate that A instigated the assault, and DNA testing of bloodstain evidence collected from A's toe, her pants' cuff, and the deck near where the

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* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity might be ascertained. See General Statutes § 54-86e.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

incident occurred would demonstrate that A exerted force against the petitioner during the incident and would refute A's testimony regarding the timing and location of the assault. The petitioner also claimed that DNA testing of the clothes A wore on the night of the assault would reveal the absence of his DNA and refute her testimony that the petitioner forcefully removed her clothes. The trial court denied the petition, finding that the petitioner failed to establish that a reasonable probability existed that he would not have been convicted if the purportedly exculpatory results had been obtained through the requested DNA testing. *Held* that the trial court correctly determined that the petitioner failed to sustain his burden under § 54-102kk of demonstrating that the DNA evidence he sought to have tested created a reasonable probability that he would not have been prosecuted or convicted had such evidence been available at trial: the hypothetical presence of the petitioner's DNA in the fingernail scrapings and clippings obtained from A could have been explained by a host of reasons, which did not discredit A's testimony that she was assaulted or bolster the petitioner's assertion that he and A consensually engaged in intercourse; moreover, the hypothetical presence of the petitioner's DNA in the various bloodstain evidence did not discredit A's testimony because the jury reasonably could have inferred that the petitioner had injured his foot during the assault and that his foot then came into contact with A's foot and pant leg, A did not testify regarding the manner in which the petitioner was injured and any such testimony would not have been central to her overall testimony about the assault, and, when viewed in light of the totality of the evidence, A's possible impeachment regarding the injury was not enough to undermine this court's confidence in the fairness of the outcome of the trial, as the petitioner presented inconsistent and conflicting versions of the event, and the results of the medical examination performed on A following the incident, the DNA testing of A's vaginal swab, which revealed the presence of the petitioner's DNA, and the observations of the nurse who treated A all corroborated A's version of events; furthermore, the hypothetical absence of the petitioner's DNA on the clothing A wore on the night of the incident was not proof that he did not touch it because the amount of touch DNA left on the clothing could have been affected by a variety of factors, including the amount of skin cells left behind, the type and length of the contact, and the texture of the clothing's surface.

Argued September 12—officially released November 14, 2023

Procedural History

Petition for postconviction DNA testing of certain evidence collected in connection with the defendant's previous criminal trial, brought to the Superior Court in the judicial district of New Britain, where the court,

Keegan, *J.*, denied the petition, and the defendant appealed to this court. *Affirmed.*

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

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, was *Brian Preleski*, former state's attorney, for the appellee (state).

Opinion

CLARK, J. The defendant, Jeffrey G. (petitioner), appeals from the judgment of the trial court denying his petition for postconviction DNA testing pursuant to General Statutes § 54-102kk.[1] On appeal, the petitioner

[1] General Statutes § 54-102kk provides in relevant part: "(a) Notwithstanding any other provision of law governing postconviction relief, any person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such incarceration, file a petition with the sentencing court requesting the DNA testing of any evidence that is in the possession or control of the Division of Criminal Justice, any law enforcement agency, any laboratory or the Superior Court. The petitioner shall state under penalties of perjury that the requested testing is related to the investigation or prosecution that resulted in the petitioner's conviction and that the evidence sought to be tested contains biological evidence.

"(b) After notice to the prosecutorial official and a hearing, the court shall order DNA testing if it finds that:

"(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

"(c) After notice to the prosecutorial official and a hearing, the court may order DNA testing if it finds that:

"(1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction;

claims that the trial court erred in concluding that he failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results obtained through DNA testing had been available at his criminal trial. We affirm the judgment of the court.

The record reveals the following facts that the jury reasonably could have found, as well as the relevant procedural history. The petitioner's conviction stemmed from the May 11, 2011 sexual assault of his stepdaughter, A. On that date, A was twenty-five years old and living with her two children at her mother's and the petitioner's house. A's brother was also at the house that evening. A's mother had been working during the evening but arrived home at around 8:30 or 9:30 p.m. A testified that she knew the petitioner had been drinking throughout the night and could tell that he was intoxicated.

After A's mother arrived home from work and went to bed, the petitioner invited A out onto the back deck of the home so that they could drink vodka together. The petitioner then suggested that the pair go down the steps of the deck, toward the backyard, so that if A's mother came outside, they could throw the bottle of vodka into the bushes. A agreed and followed the petitioner down the steps to the backyard, where she took a drink from the bottle of vodka given to her by the petitioner. The petitioner then came up behind A, pushed her down onto the ground with his weight so

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice. . . ."

that she dropped to her knees, pulled down her capri pants, and put his penis in her vagina. After about one minute, A was able to roll over onto her back and get up. A ran back up the steps toward the house and, in the process, flung a glass off the railing of the deck in an attempt to deter the petitioner from following her. When A entered the house, she ran into her mother's room, where she "jumped on her bed and . . . screamed at her" and told her what had happened. Her mother left the room, and A subsequently locked herself in the bathroom, where she was crying and screaming for her mother. A's mother called the police, and when the police arrived at the home, they found A in the bathroom and the petitioner in the kitchen. The officers advised the petitioner that he was not under arrest, but they handcuffed him for safety purposes and removed him from the home so that they could evaluate the situation. The police arranged for A to be transported by ambulance to New Britain General Hospital, where she submitted to examinations and completed a rape kit. Subsequent DNA testing of A's vaginal swab revealed the presence of the petitioner's DNA.

That evening, the petitioner voluntarily went to the police station.[2] Lieutenant Eric Peterson conducted an interview of the petitioner at the station. After Peterson read the petitioner his *Miranda* rights,[3] the petitioner gave a voluntary statement, in which he stated that he did not have sexual intercourse with A and had never done so in the past. After this interview, the petitioner left the police station momentarily. He then came back into the police station and asked to speak with Peterson again. The petitioner proceeded to ask Peterson questions such as, "what if I was the victim?" When the

[2] Due to his level of intoxication, the petitioner was driven to the police station by police officers.

[3] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

petitioner was asked by Peterson to elaborate or clarify, the petitioner did not respond, but, according to Peterson, he "appeared to be getting nervous . . . ."

On May 12, 2011, Officer Dean Cyr took the petitioner to Bristol Hospital to execute a search warrant permitting him to obtain a sample of the petitioner's DNA. After the petitioner arrived at the hospital, he indicated to Cyr that he wanted to give an additional written statement about what had happened the previous evening. Subsequently, the petitioner gave a second sworn statement in which he claimed to have had a consensual sexual encounter with A on the night of May 11, 2011. The petitioner was later arrested and charged with sexual assault.

A jury trial was held over three days beginning on November 5, 2012. The jury heard testimony from various witnesses, including A; Nurse Kristin Loranger, who administered A's rape kit; and Officers Peterson and Cyr. Although the petitioner did not testify, his two sworn statements were read to the jury by Peterson and Cyr. In the petitioner's first statement, made to Peterson, he stated that he did not have sexual intercourse with A.[4] Peterson also testified as to his second encounter with the petitioner after the initial interview, during which the petitioner asked Peterson questions insinuating that the petitioner was the victim.[5] In the

[4] The petitioner stated in relevant part: "At some point during the evening I was with [A] on the deck. She knocked over a glass. I tried to catch the glass with my foot and got cut. I began to pick up the glass. [A] went into the bathroom and was screaming. [A's mother] came out and said something. I'm not sure what she said. She ran off and I followed after her but never caught up to her. I went back in the house and [A] was still screaming in the bathroom. [A] was screaming, 'mom, mom, mom.' I got a coat hanger and opened the door. [A] was sitting on the floor crying. I went to look for [A's mother]. I never found her. . . . I did not have sexual intercourse with [A]. I did not have intercourse with [A] tonight or have never in the past."

[5] Specifically, Peterson testified that "[the petitioner] asked me a question and said, 'what if I was the victim,' and I asked him to give me some more details. He would just say over and over that, 'what if I was the victim.' He wouldn't elaborate anything on there and I told him it doesn't make sense.

petitioner's second statement, made to Cyr, he stated that he had consensual intercourse with A.[6]

On November 7, 2012, following a jury trial, the petitioner was convicted of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). On January 10, 2013, the court, *Alander*, *J.*, imposed a sentence of twelve years of incarceration, followed by five years of special parole. The petitioner

You need to explain to me why you think you're the victim or what's going on but he wouldn't speak to much other than saying that.

* * *

"I asked him to explain himself and [he] really didn't give any other detail and just, you know, appeared to be getting nervous, but he just kept saying, 'what if I was the victim' . . . ."

[6] The petitioner stated in relevant part: "Last night, early this morning, I remember drinking outside on the rear deck with my step-daughter, [A]. I was drinking raspberry vodka and she was drinking vodka as well. While drinking [A] reached across the table and one of her boobs fell out of her shirt. I joked with [A] to put her boob back in her shirt. [A] then pulled out her other boob and started shaking her boobs in front of me. I remember [A] then took off her shirt and pants. [A] then started waving her pants over [her] head and she flung her pants into the yard. [A] does not wear a bra or panties.

"[A] then got on top of me. I pulled my shorts down to my ankles. My penis went into her vagina. We had sex for a short time and I may have ejaculated inside of her but I'm not sure. As we were finishing having sex [A] leaned on the table and flipped it over. A glass on the table fell and smashed on the deck.

"When the table flipped over and the glass broke it made a lot of noise. I panicked and I told [A] to get her clothes. [A] then went into the lawn area near the deck and started to dance in the yard naked. I started to pick up the broken glass near my feet. A few minutes later [A's mother] came outside and accused me of 'fucking [A] in the ass.' [A's mother] then went back into the house and I went inside after her. I had the broken glass in my hand. I couldn't find [A's mother] inside the house. [A] locked herself in the bathroom and she was yelling, 'mom, mom.' I then used a coat hanger to force the lock on the bathroom door. [A] was seated on the bathroom floor Indian style. A short time later the police arrived. I want to say that this sexual encounter between [A] and I was consensual. I did not force myself on [A]. I think [A] wanted for us to get caught.

"I was asked several times by police officers what happened last night. I did not remember much until this morning and I held back a little too because I was somewhat embarrassed by this incident because [A] is my step-daughter."

appealed from the judgment of conviction to this court, arguing that the trial court had improperly disqualified a prospective juror. See *State* v. *Gould*, 155 Conn. App. 392, 393, 109 A.3d 968 (2015), aff'd, 322 Conn. 519, 142 A.3d 253 (2016). His conviction was affirmed. Id., 409.

On January 30, 2013, the petitioner filed a petition for a writ of habeas corpus, which was subsequently amended two times. *Gould* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-13-4005276-S (January 10, 2019), appeal dismissed sub nom. *Gould* v. *Commissioner of Correction*, 202 Conn. App. 901, 242 A.3d 1083, cert. denied, 336 Conn. 921, 246 A.3d 2 (2021). The operative petition argued, inter alia, that his trial counsel had rendered ineffective assistance by failing to present a theory that the petitioner was the victim, not the perpetrator, of the sexual assault.[7] Id. The court, *Kwak, J.*, denied the habeas petition, finding "no basis to conclude that [defense counsel] was deficient for failing to present a defense theory that [A] sexually assaulted the petitioner." Id.

On January 13, 2022, the petitioner filed the underlying postconviction petition for DNA testing pursuant to § 54-102kk, requesting (1) "[a] differential DNA extraction and comparison on item '1N fingernail scrapings and clippings' of [A]," (2) DNA testing on the "[p]reviously untested, dried secretion swab of 1J-1 (3rd, 4th, and 5th toe) collected from [A]," (3) DNA testing on the "[p]reviously untested . . . Blood Stain (BLS) Scene Evidence on or near rear yard wood deck

[7] The petitioner changed his theory of what occurred multiple times throughout the course of his criminal trial and his postconviction proceedings. He also provided inconsistent versions of events to the police, first claiming that there had been no sexual contact at all, then suggesting that he might have been the victim of a sexual assault, and then claiming that any sexual contact had been consensual. At his habeas trial, the petitioner claimed that he had instructed his attorney to argue at his criminal trial that A had sexually assaulted him, but his counsel failed to do so.

of [the home where the assault occurred]: Items #1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 19, 18, 20, 22 (broken glass), 24, 42," and (4) "DNA testing on items contained in Trial Exhibit #13 'Victims Clothing,' to determine the presence of touch DNA," in particular, the right side of A's camisole, the waist of her capri pants, and "[a] brown substance, likely a blood substance, found on the inside on the right pant cuff of [A's] capri pants." In support of his petition, the petitioner alleged that the testing would reveal (1) the presence of a sperm rich fraction matching his DNA on the fingernail scraping and clippings, proving that A took hold of his genitalia and forced it into her vagina, (2) that the blood from A's toe, the bloodstain evidence on the deck, and the bloodstain evidence on A's pant cuff came from the petitioner, demonstrating that A exerted force against the petitioner and refuting her testimony regarding the timing and location of the assault, and (3) an absence of the petitioner's DNA on A's clothes, thus refuting her testimony that the petitioner forcefully removed her clothes.

On March 17, 2022,[8] the court, *Keegan, J.*, denied the petition on the basis that the petitioner failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results had been obtained through the DNA testing in accordance with § 54-102kk (b) (1). The court, "[b]ased upon the arguments made and the posture of the case . . . assume[d] that DNA testing of the fingernail samples and various bloodstain evidence would match the [petitioner's] profile, whereas testing of [A's] clothing would reveal the absence of his DNA." The court found that "these purportedly exculpatory results do not support a determination by this court that a reasonable probability exists that the [petitioner] would

[8] The court denied the petition orally on February 1, 2022, and issued a written memorandum of decision on March 17, 2022.

not have been convicted had they been presented to the jury."[9] The petitioner timely appealed.

On appeal, the petitioner claims that the court improperly concluded that he had failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results obtained through DNA testing had been available at his criminal trial. We are not persuaded.

We begin by setting forth our standard of review and the relevant legal standards. "[T]he determination of whether a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing pursuant to § 54-102kk (b) (1) is a question of law subject to plenary review, while any underlying historical facts found by the trial court are subject to review for clear error." (Internal quotation marks omitted.) *State* v. *Butler*, 129 Conn. App. 833, 839, 21 A.3d 583, cert. denied, 302 Conn. 923, 28 A.3d 340 (2011).

"[R]easonable probability within the context of § 54-102kk (b) (1) means a probability sufficient to undermine confidence in the outcome. . . . Under this standard, a showing of reasonable probability does not

[9] It is not clear from the court's memorandum of decision whether it reviewed the transcript of the petitioner's criminal trial before making its determination that he failed to demonstrate that he would not have been prosecuted or convicted if the items had been subject to DNA testing before his trial. The transcripts were not marked as an exhibit by the court, referenced in its memorandum of decision, or originally designated as part of the record on appeal. The petitioner did not seek an articulation from the court to ascertain whether it had reviewed the transcripts and does not raise this issue on appeal. The petitioner subsequently provided this court with a copy of the transcripts to facilitate our review of his claim.

Because our review of the petitioner's claim on appeal is plenary, and we now have a copy of the transcripts of the petitioner's criminal trial, it is not necessary for this court to resolve this ambiguity. We take this opportunity, however, to emphasize that a trial court should be provided with and should review such transcripts in making a proper determination of whether a petitioner is entitled to relief pursuant to § 54-102kk (b) (1).

require demonstration by a preponderance that disclosure of the [unavailable] evidence would have resulted ultimately in the defendant's acquittal. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. . . . A defendant need not demonstrate that after discounting the inculpatory evidence in light of the [unavailable] evidence, there would not have been enough left to convict. . . . Accordingly, the focus is not whether, based upon a threshold standard, the result of the trial would have been different if the evidence had been admitted. We instead concentrate on the overall fairness of the trial and whether [the unavailability] of the [exculpatory] evidence was so unfair as to undermine our confidence in the jury's verdict." (Internal quotation marks omitted.) Id., 839–40.

"In analyzing the effect of DNA evidence, § 54-102kk (b) (1) directs us to consider the effect of potential exculpatory results obtained through DNA testing. At this point, it is evident that the petitioner will not know with certainty what DNA testing will show. Thus, § 54-102kk (b) (1) requires the court to consider the effect of the most favorable result possible from DNA testing of the evidence . . . ." (Internal quotation marks omitted.) *State* v. *Cote*, 129 Conn. App. 842, 849, 21 A.3d 589, cert. denied, 302 Conn. 922, 28 A.3d 341 (2011). Accordingly, in the present case, we assume, as the trial court did, that DNA testing of the fingernail scrapings and clippings, and the various bloodstain evidence, would reveal the presence of the petitioner's DNA, whereas DNA testing of A's clothing would reveal the absence of the petitioner's DNA.

I

The petitioner first claims that the court erred in concluding that the presence of the petitioner's DNA,

specifically, the presence of a sperm rich fraction matching his DNA, in the fingernail scrapings and clippings, would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. DNA testing of the fingernail scrapings and clippings was completed prior to the petitioner's criminal trial, which revealed the presence of both the petitioner's and A's DNA. In his motion, the petitioner specifically requests "[a] differential DNA extraction and comparison on item '1N fingernail scrapings and clippings' of [A]" to determine the presence of a sperm rich fraction. The petitioner argues that the presence of this DNA in the fingernail scrapings and clippings would demonstrate that A instigated the assault, stating that "[s]aid testing will provide evidence to support [the petitioner's] claim that [A] grabbed his penis to consensually engage in intercourse, contradicting her claims of force."

The petitioner's DNA, however, could be present in the fingernail scrapings and clippings for a host of reasons. At best, a jury might infer that A's hand encountered the petitioner's semen, a scenario that neither discredits A's testimony that she was assaulted nor bolsters the petitioner's assertion that "[A] grabbed his penis to consensually engage in intercourse . . . ." Thus, we conclude that the hypothetical presence of the petitioner's DNA in the fingernail scrapings and clippings does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

II

Next, the petitioner claims that the court erred in concluding that the presence of the petitioner's DNA in the various bloodstain evidence, in particular, the blood found on A's toe, her pant cuff, and the deck,

would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. In support of his claim, the petitioner states that "[A] was clear that the [petitioner] was not injured prior to the assault and that she broke the glass running away from the [petitioner] and back into the house. Her clear implication, and the state's corresponding argument, was that the [petitioner] pursued [A] back onto the deck and into the house, running through the broken glass and cutting his feet." The petitioner argues that if we assume the DNA testing of the various bloodstain evidence would reveal the presence of his DNA, this finding would "sharply contradict [A's] testimony about the timing and location of the assault" and "would further support the version [of events] contained in the [petitioner's] statement that the jury heard." We consider the arguments regarding each of the three pieces of bloodstain evidence in turn.

In regard to the blood found on A's toe, the petitioner argues that the presence of his DNA would refute A's testimony that his foot was not injured prior to the assault and would demonstrate that there was a transfer of blood from the petitioner onto A's toe that was the result of "[A] forcefully getting on top of the [petitioner] . . . [and] forcing intercourse . . . ." Additionally, the petitioner argues that the presence of his blood on A's toe refutes A's testimony about the timing and the location of the assault. Specifically, the petitioner suggests that because A testified that the petitioner was not injured prior to the assault, it would be impossible for A to have gotten the petitioner's blood on her toe if her version of events were true, considering that the glass broke *behind* her as she was running away, and there was no evidence presented of physical contact between the petitioner and A after the assault. The petitioner further suggests that this would support his assertion that A instigated the assault on the deck and

that "his foot was injured in [A's] presence, not in the pursuit of her."[10]

In regard to the blood found on A's pant cuff, the petitioner makes a similar argument. He claims that his "blood could not get inside [A's] pants unless his foot was injured when her pants were off, and she put [her pants] back on after his blood was already on her body . . . ." (Emphasis omitted.) Additionally, the petitioner argues that this would prove that A did not merely pull her pants back up, as she suggested in her testimony, but that, instead, she had to have fully put her pants back on, which would allow the blood that was allegedly on her foot to come into contact with the cuff of her pants. The petitioner further argues that this would corroborate his version of events, in which he stated that A voluntarily and fully removed her clothes, and would contradict A's version of events, in which she stated that the petitioner forcibly pulled down her pants but did not fully remove them.

Last, the petitioner argues that, in regard to the blood on the deck, a finding that the blood is the petitioner's would further refute A's testimony regarding the timing and location of the assault. Specifically, the petitioner argues that such evidence would reinforce his theories regarding the bloodstain on A's toe and the bloodstain

[10] In both of the petitioner's sworn statements to the police, which were read to the jury, the petitioner stated that the glass broke on the deck while A and the petitioner were both present on the deck, suggesting that the petitioner cut his feet on the glass, bled onto the deck, and was able to transfer that blood onto A while she was also on the deck. In the petitioner's first sworn statement, made to Peterson, in which he asserted that he "did not have sexual intercourse with [A]," he stated, "[a]t some point during the evening I was with [A] on the deck. She knocked over a glass. I tried to catch the glass with my foot and got cut." In the petitioner's second sworn statement, made to Cyr, in which he asserted that he did in fact have intercourse with A, but that it was consensual, he stated that as he and A "finish[ed] having sex [A] leaned on the table and it flipped over. A glass on the table fell and smashed on the deck. . . . I started to pick up the broken glass near my feet."

on A's pant cuff. The petitioner suggests that if the blood on the deck were found to be his, and if the blood on A's toe and pant cuff were also found to be his, these findings together would support the petitioner's version of events and undermine A's testimony.

In reviewing the petitioner's arguments that the presence of his DNA in the various bloodstain evidence would refute A's testimony that his foot was not injured prior to the assault and would contradict her testimony regarding the timing and location of the assault, "we must consider this evidence within the context of the entire trial." *State* v. *Butler*, supra, 129 Conn. App. 841; see also *State* v. *Marra*, 295 Conn. 74, 90 n.10, 988 A.2d 865 (2010) (reasonable probability analysis requires court to take into account totality of evidence adduced at trial to determine whether absence of exculpatory DNA evidence undermines confidence in jury's verdict). On the basis of our review of the evidence presented at trial, we conclude that the absence of the bloodstain evidence at trial does not undermine confidence in the fairness of the outcome. We agree with the trial court that had this evidence been presented at trial, a jury, at best, might infer that the petitioner injured or cut his foot at some point during the assault and then came into contact with A, a finding that does not undermine A's testimony. A testified that the petitioner pushed her to the ground, forcibly pulled down her pants, and that after about one minute, she was able to roll over onto her back and run into the house. It is reasonable to infer that during the assault, and the subsequent struggle to escape, the petitioner might have injured his foot, and that contact would have been made between the petitioner's injured foot and A's foot and pant leg. Although A testified that the petitioner was not injured *prior to the assault*, she did not state whether the petitioner was injured at some point *during the assault*. In fact, she did not testify at all about how the petitioner came

to be injured.[11] Thus, the presence of the petitioner's DNA in the bloodstain evidence does not discredit A's testimony in the way that the petitioner claims.

Moreover, even if the petitioner could have successfully impeached A's testimony regarding the injury he sustained to his foot, that testimony was not central to her overall testimony about the assault, and, when viewed in light of the totality of the evidence, her possible impeachment regarding the injury is not enough to undermine our confidence in the fairness of the outcome. At trial, evidence was presented that A reported the assault immediately, was found crying and shaking in the bathroom of her home, and promptly submitted to vaginal testing, which revealed the presence of the petitioner's DNA. In addition, Loranger, the nurse who administered A's rape kit, testified that A was tearful when recalling the details of the assault. Loranger also testified that she noticed debris and dirt on A, including debris in her ponytail and dirt on her hands, feet, and knees, observations that corroborate A's version of events and refute the petitioner's various versions of events. Additionally, a jury reasonably could have found that the petitioner was not credible, particularly in light of his inconsistent and conflicting versions of events told to the police, beginning with his statement that there was no sexual contact at all, then his suggestion that he might instead have been the victim of the sexual assault, and, finally, his sworn statement to the police that there was sexual contact but that it was consensual. For these reasons, we conclude that the hypothetical

[11] The petitioner mischaracterizes A's testimony at the criminal trial. He states that "[A] was clear that the [petitioner] was not injured prior to the assault and that she broke the glass running away from the [petitioner] and back into the house. Her clear implication, and the state's corresponding argument, was that the [petitioner] pursued [A] back onto the deck and into the house, running through the broken glass and cutting his feet." Although A testified that she broke the glass, she did not testify that the petitioner cut his foot on the glass.

presence of the petitioner's DNA in the various bloodstain evidence does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

III

Last, the petitioner claims that the court erred in concluding that the absence of the petitioner's DNA on A's clothing would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. The petitioner argues that the absence of his DNA on A's clothing "contradicts a key portion of [A's] testimony and would be compelling proof that [A's] version [of events] was not credible . . . ." Specifically, the petitioner states that "[A's] clear testimony was that the [petitioner] forcibly removed her pants and held her down during the assault." He argues that, assuming the DNA testing would reveal the absence of the petitioner's DNA on the clothing items, this "would undermine the state's proof that the [petitioner] touched [A] to remove her pants and hold her down on the ground" and "creat[e] a reasonable doubt that [the petitioner] touched [A] in the manner she described."

A lack of touch DNA on an object, however, is not conclusive proof that a person did not touch a particular object. "DNA is not always detectable, meaning that it is possible to have someone touch an object but not leave behind detectable DNA because . . . some people leave more of their skin cells behind than others, i.e., some people are better 'shedders' of their DNA than others. There are also other factors that affect the amount of DNA left on an object, such as the length of contact, the roughness or smoothness of the surface, the type of contact, the existence or nonexistence of fluids, such as sweat, and degradation on the object." *State* v. *Dawson*, 340 Conn. 136, 154, 263 A.3d 779 (2021). Thus, the absence of the petitioner's DNA on

A's clothing is not in and of itself proof that the petitioner never touched A's clothing. Given the inconclusive nature of such evidence, and in light of the totality of the evidence presented at trial, we conclude that the hypothetical lack of DNA evidence on A's clothing does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

In sum, we agree with the trial court that the petitioner failed to sustain his burden under § 54-102kk that the DNA evidence he seeks to have tested creates a reasonable probability that the petitioner would not have been prosecuted or convicted had such evidence been available at trial.

The judgment is affirmed.

In this opinion the other judges concurred.