# IN RE BLAKE P.*
## (AC 46465)

Cradle, Clark and Vertefeuille, Js.

*Syllabus*

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. The petitioner, the Commissioner of Children and Families, filed a petition to terminate the respondent's parental rights after the child had been adjudicated neglected and committed to the petitioner's custody. The removal of the child from the home was precipitated in part by the mother's involvement in various incidents of intimate partner violence with the child's father. The Department of Children and Families, in response to court-ordered specific steps, provided the mother with numerous resources and programs. After a trial, the court concluded that reasonable efforts had been made to reunify the mother with her child and that the mother was unable or unwilling to benefit from those efforts. The court further concluded that the mother failed to achieve an adequate degree of personal rehabilitation within the meaning of the applicable statute (§ 17a-112) and that clear and convincing evidence established that termination of the mother's parental rights was in the child's best interest. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erred in concluding that she had failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable

* 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

time, considering the age and needs of the child, she could assume a responsible position in her child's life:

a. The respondent mother's claim that the trial court's factual findings were clearly erroneous because its decision recited certain evidence as fact while disregarding other evidence was unavailing; in challenging the court's assessment of the evidence and contending that the court should have weighed the evidence differently, the mother was asking this court to reassess the evidence, or to second-guess the trial court's credibility determinations, which was not this court's role, and, although some evidence may have supported the mother's position, it was not this court's role to reexamine that evidence and substitute its judgment for that of the trial court.

b. The respondent mother could not prevail on her claim that the trial court's conclusion that she failed to rehabilitate was not supported by the evidence: although the mother listed several findings by the court that she contended supported her position that she had rehabilitated, specifically, findings related to programs that she purported to have completed or recommendations with which she claimed to have complied, the mother ignored the court's finding that she failed to fully comply with key portions of the specific steps, as well as its thorough review of those steps and the ways in which the mother failed to comply, and it was not this court's role to reassess the evidence and substitute its judgment for that of the trial court; moreover, even if the mother had fully complied with the specific steps, a determination with respect to rehabilitation is not solely dependent on a parent's technical compliance with specific steps but, rather, on the broader issue of whether the factors that led to the initial commitment had been corrected, which, in the present case, were incidents of intimate partner violence between the mother and the child's father, and, although the mother had engaged in intimate partner violence programs, she failed to gain insight into how intimate partner violence impacted her role as a mother to her child; furthermore, notwithstanding her argument that the court improperly relied on her history of intimate partner violence because she was no longer in a relationship with the father, the court credited the testimony of the mother's service providers, who testified that the mother minimized and made little progress with respect to her intimate partner violence issues, and found that, although the mother's relationship with the father had resulted in the issuance of numerous protective orders, the mother had maintained a relationship with the father, putting both herself and the child at risk.

2. The respondent mother could not prevail on her claim that the trial court incorrectly concluded that termination of her parental rights was in her child's best interest: contrary to the mother's assertion, the court did not find that the mother had made no progress in rehabilitating herself, but, to the contrary, the court found that the mother engaged, with mixed success, in many of the services recommended by the department,

the court thoroughly discussed the evidence as to the mother's compliance with the specific steps and the areas in which she had made progress, as well as those areas in which she did not, and, although the mother may have made progress, the court credited the testimony of those providers who opined that she had failed to gain insight into how her issues impacted her ability to parent her child, and, in the absence of such insight, the court, fearing that the child, who was four years old at the time it rendered judgment, would be subjected to continued violence through the mother's relationships, properly focused on the child's need for permanence and stability, rather than on the mother and her efforts to rehabilitate.

Argued October 2—officially released December 6, 2023**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *C. Taylor*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

*Joshua D. Michtom*, senior assistant public defender, for the appellant (respondent mother).

*Daniel M. Salton*, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

*Opinion*

CRADLE, J. The respondent mother, Brooke S.,[1] appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights as to her

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

[1] The parental rights of the respondent father also were terminated. He has not challenged that judgment. All references in this opinion to the respondent are to Brooke S. only.

daughter, Blake P.[2] On appeal, the respondent claims that the court erred in concluding that (1) she has failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in Blake's life and (2) the termination of her parental rights was in Blake's best interest. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the respondent's claims on appeal. Blake was born in May, 2018. In June, 2018, an incident of intimate partner violence (IPV) occurred between the respondent and Blake's father, Steven P., which resulted in the issuance of a no contact protective order that extended to Blake.[3]

In December, 2018, the respondent and Steven P. were involved in another IPV incident, after which the respondent placed a 911 call to the Farmington Police Department. As a result of that incident, the Farmington Police Department notified the Department of Children and Families (department). Thereafter, on December 21, 2018, the petitioner filed a neglect petition as to Blake. On that same date, the petitioner obtained an order of temporary custody for Blake and the court vested the temporary care and custody of Blake with her maternal grandmother. On December 28, 2018, the respondent appeared in court with counsel, where she entered pro forma denials as to the allegations of neglect but agreed to sustain the order of temporary custody. The court, *Lobo*, *J.*, ordered specific steps for both parents.[4]

[2] The attorney for the minor child filed a statement adopting the brief of the petitioner.

[3] Because of the continuing IPV between the respondent and Steven P., numerous protective orders were issued over the course of this action.

[4] In addition to the standard specific steps that are ordered to promote reunification, the court issued an addendum that required the respondent to, inter alia, engage in therapy focused on mental health, substance abuse and IPV, and to gain insight into how her issues in those areas impact her parenting of Blake. The court reissued specific steps to the respondent over

On June 28, 2019, the trial court, *Lobo*, *J.*, accepted pleas of nolo contendere by both parents and adjudicated Blake neglected. On July 25, 2019, the court vacated the order of temporary custody and, with the agreement of the petitioner, placed Blake with the respondent under six months of protective supervision. In August, 2019, while Blake was in her care, the respondent was involved in another IPV incident with Steven P. while he was staying in her home. As a result of another incident of IPV that occurred in January, 2020, the petitioner obtained another order for temporary custody of Blake. The respondent thereafter agreed to the commitment of the care and custody of Blake to the petitioner.

In addition to concerns about IPV, the department had concerns about the respondent's history of substance abuse. As a result of sports related injuries that occurred when the respondent was in high school and a car accident that occurred in 2005, the respondent developed a significant opiate dependency stemming from an attempt to manage her chronic pain. The respondent has struggled with addiction to heroin and other opiates. The respondent disclosed she has been involved in several relationships in which her partners used, and encouraged her use of, various narcotics. This eventually included Steven P., whom she met while receiving treatment at a substance abuse treatment facility in Rhode Island. By 2019, the respondent was being prescribed a significant medical regimen, including methadone, oxycodone, and dilaudid. Although the respondent was no longer using heroin, she tested positive for cocaine in June, 2020.

As part of its efforts to reunify the respondent with Blake, and in response to the court-ordered specific

the course of the pendency of this action that were essentially the same as the initial specific steps.

steps, the department provided the respondent with numerous resources and programs. Prior to the filing of the termination petition, the respondent was referred to, or engaged on her own initiative, the following service providers: Interval House, IPV-FAIR, Silver Linings Counseling and Hartford Behavioral Health's Project SAVE for IPV issues; Community Mental Health Affiliates, the Wheeler Clinic, and three different pain management specialists for mental health and substance abuse issues; and the Merveilles Group for supervised visitation. The respondent also completed a court-ordered psychological evaluation.

On October 6, 2021, the petitioner filed a petition seeking to terminate the respondent's parental rights on the ground that, pursuant to General Statutes § 17a-112 (j) (3) (B) (i), the respondent had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of Blake, she could assume a responsible position in the life of Blake.

Trial on the petition commenced on March 14, 2022, and continued over the course of eight days, ultimately concluding on November 1, 2022. On February 27, 2023, the court filed a memorandum of decision wherein it granted the termination petition. The court concluded that the petitioner made reasonable efforts to reunify the respondent with Blake and that the respondent was unable or unwilling to benefit from those efforts.[5] The court further concluded that the respondent failed to achieve an adequate degree of personal rehabilitation within the meaning of § 17a-112 (j) (3) (B). The court concluded that "[t]he clear and convincing evidence shows that [the respondent's] issues are those of mental health, substance abuse, IPV issues and a failure to

[5] The respondent has not challenged the court's reasonable efforts determination.

complete and benefit from counseling and services. The clear and convincing evidence also shows that [the respondent] has been placed on notice to address these issues in the past." The court found that, despite the issuance to the respondent of specific steps multiple times, "[t]he clear and convincing evidence shows that [the respondent] failed to fully comply with the key portions of those steps [that] . . . were intended to facilitate the return of Blake to [the respondent's] care . . . ." The court found that the respondent failed to fully comply with the required specific steps: engage in parenting, individual and family counseling and make progress toward the identified treatment goals; submit to substance abuse evaluation and follow the recommendations about treatment, including inpatient treatment if necessary, aftercare and relapse prevention; submit to random drug testing as required by the department; refrain from using illegal drugs or abusing alcohol or medications; cooperate with the service providers who are recommended for parenting, individual and family counseling, in-home support services and substance abuse assessment and treatment; cooperate with court-ordered evaluations and testing; sign releases allowing the department to communicate with service providers to monitor attendance, cooperation and progress toward identified goals; secure and maintain adequate housing and legal income;[6] immediately notify the department about any changes in the makeup of the household to ensure that the change does not hurt the health and safety of Blake;[7] obtain and cooperate with a restraining order or protective order and other appropriate safety plan approved by the department to avoid

[6] The court found that, although the respondent has a home that is "safe and appropriate," she has not been employed since November, 2019.

[7] As to this specific step, the court found by clear and convincing evidence that the respondent failed to disclose to the department that she was allowing Steven P. to come to her home and stay there.

more IPV incidents;[8] attend and complete an appropriate IPV program;[9] and not get involved with the criminal justice system.[10]

Generally speaking, the court found that the respondent failed to cooperate with department referrals and, even though she did substitute some of those referrals with service providers of her own, it appeared that she "was attempting to control her service providers, as well as the information that they had and the information [the department] received." The court noted that some of the respondent's service providers described her as manipulative in attempting to ensure that they did not communicate with each other or with the department. The court found that the respondent's "recalcitrant manipulation [has] been clearly documented." The court concluded that "[t]his conduct bodes ill for the

[8] The court found that the respondent "continued to maintain a relationship with and continued contact with Steven [P.] despite the existence of several protective orders forbidding Steven [P.] from having contact with [her]," and, "[a]lthough [the respondent] assured [the department] that she was not in a relationship with Steven [P.] and that she was not having contact with him, the clear and convincing evidence indicated that she was untruthful."

[9] The court found that, although the respondent attended the IPV-Fair program, which was recommended by the department, the provider concluded that she "made little progress in identifying what she learned from the IPV work done with her." The respondent also was unsuccessfully discharged from the Project SAVE program.

[10] The court found that the respondent complied with the specific steps requiring her to keep all appointments set by or with the department, to cooperate with department home visits and visits by the attorney for the minor child, and to advise the department, her attorney and the attorney for the minor child where she and Blake were at all times. She also complied with the step requiring her to sign releases for records pertaining to Blake. The court also found that the respondent generally complied with the requirement that she visit Blake as often as the department permitted but that she was frequently late for those visits. The court further found that the respondent complied with the steps requiring her to notify the department of any person or persons whom she would like the department to consider as a placement resource for Blake and to provide the department with the names and addresses of Blake's grandparents.

best interest of Blake. [The respondent's] refusal to be candid in her treatment means that she is not placing herself in a position where Blake can rely on her to be a safe, nurturing and responsible parent. It also means that [the respondent] cannot be relied upon to act in Blake's best interest."

The court concluded that the respondent "has been unable to correct the factors that led to the initial commitment of [Blake], insofar as she is concerned. The clear and convincing evidence reveals that from the date of commitment, through the date of the filing of the [termination] petition, and continuing through the time of trial, [the respondent] has not been available to take part in [Blake's] life in a safe, nurturing and positive manner, and, based on her issues of mental health, substance abuse, IPV and a failure to complete and benefit from counseling and services, [the respondent] will never be consistently available to Blake."

Finally, the court concluded that termination was in Blake's best interest. In so concluding, the court reasoned that "[the respondent's] refusal to properly address her IPV issues serves to doom any possibility that she will ever be a safe, responsible and nurturing parent for Blake. This is a long-standing issue, which has blighted her life since high school. To place Blake into [the respondent's] custody would expose Blake to the scourge of IPV and would certainly endanger her. [The respondent] cannot be trusted to put her desires and wants aside in order to make sure that Blake would remain safe." The court explained that "[the respondent's] various issues, especially her mental health issues and her IPV issues have made her ability to parent Blake in a safe, responsible and nurturing manner essentially null and void." The court concluded that Blake "can no longer wait for permanency, continuity and stability in her life. . . . [T]he clear and convincing evidence in this case establishes that Blake is entitled

to the benefit of ending, without further delay, the period of uncertainty she has lived with as to the unavailability of [the respondent] as [her caretaker]. . . . Having balanced Blake's individual and intrinsic needs for stability and permanency against the benefits of maintaining a connection with [the respondent], the clear and convincing evidence in this case establishes that [Blake's] best interest cannot be served by continuing to maintain any legal relationship [with] the [respondent]." This appeal followed.

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun. . . .

"Section 17a-112 (j) provides in relevant part: 'The Superior Court, upon notice and hearing . . . may grant a petition . . . if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that

the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the [petitioner] for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' (Citation omitted; internal quotation marks omitted.) *In re A'vion A.*, 217 Conn. App. 330, 336–37, 288 A.3d 231 (2023). With these principles in mind, we turn to the respondent's claims on appeal.

I

The respondent first claims that the trial court erred in concluding that she had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of Blake, she could assume a responsible position in her life.

We begin by setting forth the following relevant legal principles and standard of review. ''Failure to achieve a sufficient degree of personal rehabilitation is one of the seven statutory grounds on which parental rights may be terminated under § 17a-112 (j) (3). Section 17a-112 (j) permits a court to grant a petition to terminate

parental rights if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found by the Superior Court . . . to have been neglected . . . in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . . In making that determination, 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. . . .

"We review the trial court's subordinate factual findings for clear error, and review its finding that the respondent failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire 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]. . . . [I]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 347–48.

In challenging the court's determination that she failed to rehabilitate, the respondent challenges both its factual findings and the sufficiency of the evidence on which it relied in reaching its legal conclusion. We address each claim in turn.

A

The respondent first claims that the court's factual findings are clearly erroneous in that its "memorandum of decision recites certain evidence as fact while eliding other testimony and exhibits, always with the effect of minimizing [the respondent's] recovery and compliance with services." She argues that, although there is evidence in the record to support the court's findings, the court's view of the evidence, as a whole, leads to the conclusion that a mistake has been made. We disagree.

It is well settled that "[w]e will not disturb the court's subordinate factual findings unless they are clearly erroneous . . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Brian P.*, 195 Conn. App. 558, 569, 226 A.3d 159, cert. denied, 335 Conn. 907, 226 A.3d 151 (2020). "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any . . . testimony." (Internal quotation marks omitted.) *In re Serenity W.*, 220 Conn. App. 380, 401–402, 298 A.3d 276, cert. denied, 348 Conn. 902, 300 A.3d 1166 (2023).

In arguing that the court's factual findings are clearly erroneous,[11] the respondent argues that the court "has seized upon small scraps of evidence that support its legal conclusions and reported them as the only facts: ten hours of violent abuse by Blake's father is reduced to an occasion when [the respondent] appeared intoxicated; a medical provider's glowing, positive testimony about [the respondent's] dedication to and success in breaking her opioid addiction is somehow converted into a failure; a minor hiccup in [the respondent's] engagement with drug treatment, occasioned by the [COVID-19] pandemic and understood as no one's fault by all those involved, becomes evidence of noncompliance; withdrawal symptoms, although characterized by multiple clinical witnesses, including two subject matter experts as a brief and necessary side effect of the very process of getting clean that [the department] and the court had required, are left without context to create the impression that [the respondent] had not or could not rehabilitate."

More specifically, for example, the respondent argues that the court "dramatically minimize[d] [the] terrifying incident" of IPV that occurred between the respondent and Steven P. in January, 2020, in that it "mention[ed] it only briefly and without detail, enough to show that [the respondent] consumed alcohol and failed to protect herself from domestic violence, but not enough to give any context at all to the magnitude of the violence she suffered nor how it might have affected her presentation in the aftermath." She also takes issue with the court's findings as to the testimony of Rebecca Andrews, a physician and the director of the UConn Comprehensive Pain Center. The respondent argues, inter alia, that the

[11] The petitioner acknowledges that the trial court made a number of typographical errors in its memorandum of decision. We agree with the petitioner that none of those errors are relevant to the respondent's claims on appeal.

court "entirely disregards Andrews' testimony on [certain] points in favor of [the department's] version of events, [but] recites other facts from her testimony without question. . . . At no point does the court indicate that it questioned Andrews' credibility." (Citation omitted.) Similarly, she contends that, although the court correctly found that she refused to submit to a toxicology screening at Perspectives, she did submit to screenings at the Wheeler Clinic, and claims that the court failed to give appropriate weight to the screenings that she submitted to at the Wheeler Clinic. The respondent also takes issue with the court's reliance on the testimony of a department social worker versus that of certain service providers.

The examples cited by the respondent demonstrate that she is challenging the court's assessment of the evidence presented at trial and contends that the court should have weighed the evidence differently. In so arguing, the respondent is asking this court to reassess the evidence presented to the trial court or to second-guess its credibility determinations, which is not the role of this court. Although there may be evidence in the record that would support the respondent's position, it is not the role of this court to examine that evidence and substitute our judgment for that of the trial court. We are not convinced, based on the respondent's alleged claims of error, that a mistake has been made in this case. Accordingly, the respondent cannot prevail on her claim that the court's factual findings were clearly erroneous.

B

The respondent next claims that the court's conclusion that she failed to rehabilitate was not supported by the evidence. The respondent argues that the court's "own findings of fact" do not support its conclusion

that she failed to rehabilitate. In support of this contention, the respondent lists several findings by the court that she contends support her position that she did rehabilitate, specifically, findings related to programs that she purports to have successfully completed or recommendations with which she claims to have complied. Aside from listing these various findings, the respondent's argument that the evidence was insufficient consists of two paragraphs, in which she asserts that "the court's own fact-finding shows . . . that [the respondent] had fully rehabilitated before [the petitioner] filed the termination petition. [The respondent] was substantially compliant with the specific steps and fully compliant with [the] recommendations [of her court-appointed psychologist]." In so arguing, the respondent ignores the court's finding that "[t]he clear and convincing evidence shows that [the respondent] failed to fully comply with the key portions" of the court-ordered specific steps, and its thorough review of those steps and the ways in which the respondent failed to so comply. The respondent, again, is asking this court to construe the evidence presented at trial in favor of her position. As noted herein, in examining the sufficiency of the evidence, this court must view the evidence in the light most favorable to sustaining the court's conclusion. It is not the proper role of this court to reassess the evidence and substitute our judgment for that of the trial court.

Moreover, even if the respondent had fully complied with the court-ordered specific steps, it is well settled that "[a] determination with respect to rehabilitation is not solely dependent on a parent's technical compliance with specific steps but rather on the broader issue of whether the factors that led to the initial commitment have been corrected." *In re Aubrey K.*, 216 Conn. App. 632, 664, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023).

Here, the incidents of IPV between the respondent and Steven P. led to the initial commitment of Blake to the care and custody of the petitioner. The court specifically found that, although the respondent had engaged in certain IPV programs, she failed to adequately understand or gain insight into how IPV impacts her role as a mother to Blake. Although the respondent does not directly challenge this finding, she argues that the court improperly relied on her history of IPV because she has not been in a relationship with Steven P. since January, 2020. This argument misses the mark. Although the respondent has not been involved with Steven P. since January, 2020, and although she engaged in IPV services, completing some of them successfully, the court credited the testimony of the respondent's service providers, who testified that the respondent minimized her IPV issues, did not want to talk about IPV, and had "made little progress in identifying what she learned from the IPV work that she undertook." The court noted that one of the respondent's service providers reported to a department social worker that the respondent "refused to make IPV a goal to work towards because [the respondent] felt that she has worked on it in the past." The court also found that the court-appointed psychologist indicated that "[the respondent] does not seem to understand the circumstances of her past boyfriends, her difficulty perceiving significant behavioral and emotional symptoms that were indicative of potential abusive or controlling behavior and her difficulty extricating herself from these relationships are things that can be altered to reduce her risk. . . . [I]n terms of keeping Blake safe, there is a pattern of risk throughout the years which must be considered." (Internal quotation marks omitted.) The court noted that the respondent's relationship with Steven P. had resulted in numerous protective orders, but, despite those protective orders, the respondent maintained a relationship with Steven P., putting

both herself and Blake at risk and exposing Blake to the violence between her parents. The court concluded that "[t]he clear and convincing evidence shows that [the respondent] has a history of being involved in IPV relationships that dates back over twenty years. Additionally, she was aware of her need to address it, especially in the context of her child protection issues. Despite the importance of dealing with this issue and her awareness of its importance, [the respondent] refused to undertake the appropriate counseling for it. [The respondent's] refusal to address her IPV issues is also important in view of her refusal to comply with protective orders designed to safeguard her well-being and that of Blake. [The petitioner] has demonstrated by clear and convincing evidence that [the respondent] cannot exercise the judgment necessary to keep Blake safe and healthy . . . ."

On the basis of the foregoing, the respondent cannot prevail on her claim that the court's finding that she failed to rehabilitate was not supported by the evidence.

II

The respondent's final claim is that the court erred in concluding that the termination of her parental rights was in Blake's best interest. Specifically, the respondent argues that the court erred in so concluding because the court's findings pertaining to her "efforts at improving her ability to care for Blake are clearly erroneous." We disagree.

"[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial

court's ruling. . . . In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § 17a-112 [k]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered." (Footnote omitted; internal quotation marks omitted.) *In re Autumn O.*, 218 Conn. App. 424, 442, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023).

"In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Furthermore, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives. . . . [T]he court's inquiry in the dispositional phase of the proceeding was properly focused on whether termination of the respondent's parental rights was in the children's best interest[s]. . . . The respondent's efforts to rehabilitate, although commendable, speak to [her] own conduct, not the best interests of the child. . . . Further, whatever progress a parent arguably has made toward rehabilitation is insufficient to reverse an otherwise factually supported best interest finding. . . . Additionally, although the respondent may love her children and share a bond with them, the existence of a bond between a parent and a child, while relevant, is not

dispositive of a best interest determination." (Citations omitted; internal quotation marks omitted.) Id., 444.

The respondent argues that the court's finding that termination was in Blake's best interest is clearly erroneous because "[t]he court offer[ed] no explanation for why [the respondent's] lengthy compliance with counseling, medication management, and drug testing and her consistent visitation with Blake suggest that she made *no* progress." (Emphasis in original.) The respondent asserts that the court "disregard[ed] up-to-date evidence of compliance and progress in favor of earlier evidence of noncompliance." She argues that "the disparity between the trial court's broad assertion of *no* progress and the record's clear indication of considerable progress (and the court's own findings to that effect) strengthens the conclusion that the . . . court reached a legal conclusion without adequately weighing the facts before it." (Emphasis in original.) An examination of the court's thorough memorandum of decision belies the respondent's argument. Contrary to the respondent's assertion, the court did not find that the respondent has made no progress in rehabilitating herself. As the respondent has pointed out in her brief, the court found that she engaged in many of the services and programs recommended by the department, in addition to programs that she engaged in on her own initiative, "with mixed success." In its decision, the court thoroughly discussed the evidence as to the respondent's compliance with the specific steps and the areas in which she made progress and those in which she did not. Although the respondent may have made some progress in her personal rehabilitation, the court's decision was not based on outdated evidence of the respondent's noncompliance with the services and programs that were recommended to her. Rather, the court credited the testimony of those providers who opined that she has failed to gain insight into how her issues impact

her ability to parent Blake. That has not changed with the passage of time. In the absence of that insight, the court feared that Blake, who was four years old at the time the court rendered judgment, would be subjected to continued violence through the respondent's relationships. Moreover, in considering Blake's best interest, the court properly focused on Blake's need for permanence and stability, rather than the respondent and her efforts to rehabilitate. Accordingly, the respondent's challenge to the court's determination that termination was in Blake's best interest is unavailing.

The judgment is affirmed.

In this opinion the other judges concurred.

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## LEON MERCER *v.* COMMISSIONER OF CORRECTION (AC 45273)

Moll, Cradle and Suarez, Js.

*Syllabus*

The petitioner, who had been convicted of sexual assault in the first degree and unlawful restraint in the first degree, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, P, rendered ineffective assistance with respect to plea bargaining and during the criminal proceedings underlying his conviction. In addition to the sexual assault and unlawful restraint charges, the state initially charged the petitioner with risk of injury to a child because it mistakenly believed the victim to be under the age of sixteen at the time of the incident. It extended a plea offer to the petitioner on the basis of those three charges, which the petitioner rejected. On the first day of jury selection, the state filed a substitute information in which it additionally charged the petitioner with sexual assault in the fourth degree for subjecting a person under the age of sixteen to sexual contact without the person's consent. The following day, the state confirmed that the victim was sixteen at the time of the incident. Accordingly, on the second day of jury selection, the state filed a substitute amended information that, inter alia, charged the petitioner with sexual assault in the fourth degree on the basis that he had subjected another person to sexual contact without the person's consent and omitted the allegation that the victim was under the age of sixteen. Following these changes, P did not seek to reopen plea negotiations. During the trial, the state called the victim, her mother,

T, and the police officer who investigated the incident, B, as witnesses. The defense called the petitioner and his wife, M, as witnesses. After the conclusion of closing arguments, but before the trial court charged the jury, the state withdrew the amended charge of fourth degree sexual assault because it was time barred pursuant to the applicable statute of limitations. This court affirmed the judgment of conviction, and our Supreme Court denied the petitioner's petition for certification to appeal. Thereafter, the petitioner filed the underlying habeas petition. The habeas court rendered judgment for the respondent, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court properly rendered judgment for the respondent on count one of the habeas petition, which alleged that P rendered ineffective assistance in connection with plea bargaining: the petitioner did not satisfy the prejudice prong of the test articulated in *Strickland* v. *Washington* (466 U.S. 668) because, in light of the petitioner's testimony at the habeas trial that he was uncertain as to whether he would have considered additional plea offers presented to him, he failed to meet his burden of demonstrating a reasonable probability that he would have accepted a new plea offer.

2. The habeas court properly rendered judgment for the respondent on count four of the habeas petition, which alleged that P rendered ineffective assistance during the criminal proceedings:

a. The habeas court correctly determined that the petitioner failed to establish prejudice under *Strickland* with respect to his claim relating to P's failure to move to dismiss the amended charge of fourth degree sexual assault as time barred prior to the state's withdrawal of that charge: contrary to the petitioner's claim, the victim's testimony related to the charge, namely, that the petitioner had touched her breast and rubbed her legs, which the state referenced in its closing argument and rebuttal, was not irrelevant to the other pending charges against him, and, even if it were, there was not a reasonable probability that such testimony or remarks in closing argument and rebuttal would have affected the outcome of the proceedings in light of the victim's other testimony detailing her account of the incident.

b. The habeas court correctly determined that the petitioner did not satisfy the prejudice prong of *Strickland* with respect to his claims predicated on P's failure to challenge certain testimony elicited by the state as inadmissible: the victim's testimony regarding statements she made about the incident to T and to a forensic interviewer was isolated, brief, and did not describe the incident, and the victim provided lengthy and detailed testimony regarding her firsthand account of the incident; moreover, P did not act unreasonably in failing to challenge T's testimony regarding the petitioner's history of drunkenness and mistreatment of women, as P reasoned that T's presentation at the trial was poor, such that the jury would not view her as a credible witness, that highlighting seemingly damaging aspects of her testimony would not be beneficial,

and that it was prudent to limit her opportunity to provide testimony because she was unpredictable; furthermore, B's testimony that he had located a photograph of the petitioner in the police department's "mug shot database" could not have measurably influenced the jury, as he referenced the database only once, and the state did not mention it during its closing argument or rebuttal; accordingly, on the basis of the entire record, the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different without the challenged testimony.

c. The habeas court properly determined that the petitioner failed to satisfy either prong of *Strickland* with respect to his claim relating to P's failure to impeach the credibility of the victim and T on cross-examination: contrary to the petitioner's claim, P's trial strategy relating to his cross-examination of the victim was not unreasonable, as even though he failed to impeach the victim as to her inconsistent statements regarding the date of the incident, he sought to impeach the victim by challenging other aspects of her testimony, he wanted to limit her time on the witness stand, and he did not believe that the jury would discount the victim's testimony about the incident on the basis of such inconsistent statements; moreover, the petitioner failed to establish any prejudice stemming from P's failure to impeach the victim regarding this testimony, as there was not a reasonable probability that the outcome of the trial would have been different had P tested the victim's recollection of the date of the incident; furthermore, P's failure to impeach T as to her prior convictions, her testimony about the date of the incident, her failure to report the incident promptly, her conflicting testimony regarding the manner in which the petitioner left her home on the night of the incident, and her consumption of alcohol on the night of the incident was not unreasonable because, through the testimony of T and the victim, the jury already was aware that T had a criminal history that involved providing false information to the police and that she was imbibing alcohol on the night of the incident, and the inconsistencies regarding the manner in which the petitioner exited T's home on the night of the incident were plainly in the record for the jury to resolve as the fact finder; additionally, there was not a reasonable probability that additional testimony from T on those topics would have benefitted the petitioner's defense or influenced the jury's verdict.

d. The habeas court correctly determined that the petitioner failed to establish prejudice under *Strickland* with respect to his claim relating to P's failure to challenge testimony elicited from the petitioner on cross-examination as inadmissible: the petitioner denied all questions in the state's isolated line of inquiry relating to whether the petitioner inappropriately touched another female, and the state did not probe the topic further; moreover, the petitioner's testimony regarding a domestic dispute with M was brief and lacking in detail and was not pursued further by the state; accordingly, given the balance of the record, including the

victim's extensive testimony regarding her account of the incident, this court could not conclude that a reasonable probability existed that the jury's verdict was affected by the challenged testimony.

e. The habeas court correctly determined that the petitioner failed to establish that P's performance was deficient or prejudicial under *Strickland* with respect to his claim relating to P's failure to introduce purportedly exculpatory cell phone evidence: P's decision to refrain from offering the favorable cell phone evidence into the record was not unreasonable in light of his testimony at the habeas trial that the cell phone evidence also included unfavorable text messages that contradicted M's testimony at the criminal trial and that he did not want to give the state the opportunity to bring in those unfavorable messages, as doing so would risk diminishing M's credibility; moreover, on the basis of the entire record, the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different had P sought to offer the favorable text messages into evidence.

3. The habeas court's rejection of the application of the cumulative error rule to the petitioner's ineffective assistance of counsel claims was not improper: this court has previously stated that Connecticut law does not recognize the application of the cumulative error rule, and the court declined to revisit the issue in this appeal.

Argued September 11—officially released December 12, 2023

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Erica A. Barber*, assistant public defender, for the appellant (petitioner).

*Linda F. Rubertone*, senior assistant state's attorney, with whom, on the brief, were *Joseph Corradino*, state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (respondent).

*Opinion*

MOLL, J. The petitioner, Leon Mercer, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying

his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that his criminal defense counsel, Attorney Dean Popkin, did not render ineffective assistance during the criminal proceedings underlying his conviction. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts, procedural history, and information relating to the petitioner's criminal charges, as set forth by this court in the petitioner's direct appeal from his conviction or as undisputed in the record, are relevant to our resolution of this appeal. "On April 4, 2014, the [petitioner] and his wife, Andrea Mercer (Mercer) were with Tangela S. (Tangela),[1] Mercer's half-sister, and other guests, at Tangela's apartment. They all left the apartment to drink wine at the Ramada Inn, leaving Tangela's six children, including the sixteen year old victim, and the two children of one of the guests in the apartment. The adults returned from the Ramada Inn at approximately 1 a.m. on April 5, 2014. The victim awoke when they entered.

"The [petitioner] was drunk, behaving in an obnoxious manner, and insulting Mercer. One of the other guests told him to leave, and the [petitioner] stated that he was going to his car. Instead of leaving the apartment and going to his car, however, the [petitioner] entered the bedroom where the victim was located. He and the victim engaged in conversation before the [petitioner] pulled the covers off the victim's legs and started rubbing them. The victim repeatedly tucked the blankets back under her in an effort to stop the [petitioner] from rubbing her legs and told the [petitioner] to leave. The

[1] "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 may be ascertained. See General Statutes § 54-86e." *State* v. *Mercer*, 191 Conn. App. 288, 289 n.2, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

[petitioner] pulled the covers off her, turned her over, put his hand over her nose and mouth, unbuttoned her pants, and forcibly touched her clitoris. Not long after, Tangela and Mercer walked down the hallway toward the bedroom. The [petitioner] jumped up, rushed out of the bedroom, and quickly left the apartment. The victim told [Tangela] what the [petitioner] had done, and Tangela reported it to the police.

"On August 27, 2015, the [petitioner] was arrested. Because the state thought that the victim was under the age of sixteen at the time of the incident, the state's September 14, 2015 long form information charged the [petitioner] with sexual assault in the first degree in violation of [General Statutes] § 53a-70 (a) (1), unlawful restraint in the first degree in violation of [General Statutes] § 53a-95, and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The age of the victim [was] an important factor in determining the severity of the charges. Sexual assault in the first degree, in violation of § 53a-70 (a) (1), is a class A felony, rather than class B, if the victim is under the age of sixteen,[2] and a necessary element for the charge of risk of injury to a child in violation of § 53-21 (a) (2) is that the victim is under sixteen.[3]

[2] "General Statutes § 53a-70 (b) (2) provides in relevant part: 'Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age . . . .' See also General Statutes § 53a-70 (b) (1) ('[e]xcept as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony')." *State* v. *Mercer*, 191 Conn. App. 288, 290 n.3, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

[3] "General Statutes § 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 health or morals of such child . . . shall be guilty of . . . a class B felony . . . .' " *State* v. *Mercer*, 191 Conn. App. 288, 290–91 n.4, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

"On March 11, 2016, the [petitioner] rejected a plea offer of ten years [of] incarceration, execution suspended after four years, in connection with those three charges and proceeded to trial. On April 27, 2017, the first day of jury selection, the state filed a substitute long form information in which it additionally charged the [petitioner] with sexual assault in the fourth degree for 'subject[ing] another person, under sixteen (16) years of age, to sexual contact without such person's consent' in violation of General Statutes § 53a-73a (a) (2).[4] It was not until after court adjourned for the day on April 27, 2017, that the state confirmed that the victim was sixteen—not fourteen as it had previously erroneously believed—at the time of the incident.

"On April 28, 2017, the second day of jury selection, the state filed a substitute amended information that charged the [petitioner] with sexual assault in the first degree in violation of § 53a-70 (a) (1), sexual assault in the fourth degree in violation of § 53a-73a (a) (2),[5] and unlawful restraint in the first degree in violation of § 53a-95, correcting the charges as to the victim's age." (Footnotes in original; footnote omitted.) *State* v. *Mercer*, 191 Conn. App. 288, 289–91, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

During its case-in-chief, the state called four witnesses, including (1) the victim, (2) Tangela, and (3) Sergeant John Burke, who investigated the incident and prepared the petitioner's arrest warrant. During the petitioner's case-in-chief, Popkin called as witnesses

[4] "General Statutes § 53a-73a (b) provides: 'Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.' " *State* v. *Mercer*, 191 Conn. App. 288, 291 n.5, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

[5] "The state later withdrew the charge of sexual assault in the fourth degree because the statute of limitations had expired." *State* v. *Mercer*, 191 Conn. App. 288, 291 n.7, 214 A.3d 436, cert. denied, 333 Conn. 938, 218 A.3d 1048 (2019).

(1) Mercer and (2) the petitioner. In addition, the court admitted several exhibits in full into the record. During the habeas trial in the present action, Popkin testified that the defense strategy was (1) to discredit the victim and Tangela and to establish that they had submitted a false claim against the petitioner, and (2) to demonstrate that the police investigation of the incident was inadequate.

"Following a trial, the jury found the [petitioner] guilty of sexual assault in the first degree and unlawful restraint in the first degree. [On September 6, 2017] [t]he court sentenced the [petitioner] to a total effective term of twelve years of incarceration, execution suspended after five years, two years of which were mandatory, and ten years of probation." Id., 292. This court affirmed the judgment of conviction;[6] id., 293; and our Supreme Court denied the petitioner's ensuing petition for certification to appeal. *State* v. *Mercer*, 333 Conn. 938, 218 A.3d 1048 (2019).

In November, 2019, the petitioner filed the underlying five count petition for a writ of habeas corpus, of which only counts one and four are relevant to this appeal.[7] In count one, the petitioner alleged that Popkin rendered ineffective assistance with respect to plea bargaining stemming from his failures, inter alia, (1) to ascertain,

[6] On appeal from the judgment of conviction, the petitioner raised what this court construed to be an ineffective assistance of counsel claim. *State* v. *Mercer*, supra, 191 Conn. App. 289 n.1. This court declined to reach the merits of that claim for lack of an adequate record. Id., 293.

[7] In count two of the habeas petition, the petitioner alleged a violation of his right to due process during the plea bargaining stage of the criminal proceedings. The petitioner withdrew count two prior to trial. In counts three and five, the petitioner alleged that Popkin rendered ineffective assistance during jury selection and with respect to an application for sentence review, respectively. The habeas court, *Oliver*, *J.*, rendered judgment in favor of the respondent, the Commissioner of Correction, on counts three and five. The petitioner is not challenging on appeal those portions of the judgment.

prior to trial, that the victim was over the age of sixteen at the time of the incident, and (2) to take appropriate action upon learning, on the second day of jury selection, the victim's correct age at the time of the incident, including seeking to reopen plea negotiations. In count four, the petitioner alleged that Popkin rendered ineffective assistance in a myriad of ways during the criminal proceedings.

On August 27, 2020, the respondent, the Commissioner of Correction, filed a return denying the petitioner's material allegations. The respondent also asserted four special defenses.[8] On August 31, 2020, the petitioner filed a reply (1) noting his withdrawal of count two, to which the respondent's first special defense was directed, and (2) responding to the allegations of the respondent's remaining special defenses.

The matter was tried to the habeas court, *Oliver*, *J.*, over the course of four days between October 20, 2020, and March 31, 2021. The court admitted various exhibits in full into the record, including copies of the transcripts of the petitioner's criminal trial, and heard testimony from (1) the petitioner, (2) Mercer, (3) Popkin, (4) Kenneth Simon, the petitioner's legal expert, (5) Richard Emanuel, the petitioner's appellate counsel on his direct appeal from his conviction, and (6) James Oulundsen, a private investigator and a digital forensic examiner. Thereafter, the parties filed posttrial briefs. On October 25, 2021, the court issued a memorandum of decision rendering judgment in the respondent's favor on the four remaining counts of the habeas petition.[9] On October 29, 2021, the petitioner filed a petition for certification to appeal, which the court granted on the same day.

[8] The respondent's first three special defenses were directed to counts two or three of the habeas petition. See footnote 7 of this opinion. The respondent's fourth special defense asserted deliberate bypass directed to count four of the habeas petition.

[9] See footnote 7 of this opinion.

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

Before turning to the petitioner's claims, we set forth the well settled standard of review governing a habeas court's judgment on ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Citations omitted; internal quotation marks omitted.) *Nelson* v. *Commissioner of Correction*, 208 Conn. App. 878, 887–88, 265 A.3d 987 (2021), cert. denied, 341 Conn. 902, 268 A.3d 1186 (2022).

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel

was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 304–305, 298 A.3d 636, cert. denied, 348 Conn. 915, 303 A.3d 603 (2023).

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 120, 281 A.3d 1189 (2022).

On appeal, the petitioner raises three overarching claims. First, the petitioner asserts that the court improperly rendered judgment in the respondent's favor on count one of his habeas petition, which alleged that Popkin rendered ineffective assistance in connection with plea bargaining. Second, the petitioner asserts that the court improperly rendered judgment in the respondent's favor on count four of his habeas petition, which alleged that Popkin rendered ineffective assistance in a litany of ways during the criminal proceedings. Third, the petitioner asserts that the court improperly rejected the application of the cumulative error rule to his ineffective assistance of counsel claims. We address each claim, including any subclaims, in turn.

I

The petitioner first claims that the habeas court improperly rendered judgment in favor of the respondent on count one of his habeas petition, which alleged that Popkin rendered ineffective assistance vis-à-vis plea bargaining. The petitioner asserts that the court incorrectly concluded that he failed to satisfy either the performance prong or the prejudice prong under *Strickland* with respect to his ineffective assistance of counsel claim set forth in count one. We conclude that the court correctly determined that the petitioner did not satisfy the prejudice prong of *Strickland* and, therefore, properly rendered judgment in the respondent's favor on count one.

"Pretrial negotiations implicating the decision of whether to plead guilty is a critical stage in criminal proceedings . . . and plea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts. . . .

"[Ordinarily] [t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, [petitioners] must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [Petitioners] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

(Internal quotation marks omitted.) *Betts* v. *Commissioner of Correction*, 188 Conn. App. 397, 411–12, 204 A.3d 1221, cert. denied, 331 Conn. 919, 206 A.3d 186 (2019). This standard requires flexibility under the circumstances of the present case, where (1) there is no dispute that the plea offer rejected by the petitioner was negotiated under the mistaken belief that the victim was under the age of sixteen at the time of the incident[10] and (2) the petitioner claimed in part that he was prejudiced by Popkin's failure to seek to reopen plea negotiations in order to negotiate a new plea offer with the knowledge of the victim's correct age at the time of the incident. In this situation, the focus is not on the plea offer that was rejected, but on the potential presentation of a new plea offer.

The following additional procedural history is relevant to our resolution of this claim. In count one of his habeas petition, the petitioner alleged that Popkin's performance during the plea bargaining stage was deficient because he failed, inter alia, (1) to ascertain that the victim was over the age of sixteen at the time of the incident, thereby "allow[ing] the petitioner to formally reject a plea offer on [an] invalid charge in favor of the perils of a trial," and (2) to take appropriate action, including seeking to reopen plea negotiations, after discovering the victim's correct age. The petitioner further alleged that Popkin's deficient performance prejudiced him because "there is a reasonable probability that [he] would have forwent the trial and struck a plea bargain that was appropriately suited to the case and more

[10] The state's original information, which was operative at the time that the petitioner had rejected the plea offer, charged the petitioner with risk of injury to a child, which included an allegation that the victim was under the age of sixteen. See General Statutes § 53-21 (a) (2). During the habeas trial, Popkin testified that the plea negotiations that culminated in the rejected plea offer were based on the belief that the victim was under the age of sixteen.

favorable to him." The petitioner maintained these claims in his posttrial brief.

In its decision, the court stated that "Popkin testified credibly at the habeas trial that he had extensive discussions with the petitioner regarding the state's plea offer, but the petitioner rejected it because he maintained his innocence and was not interested in an offer that carried a period of incarceration. . . . Popkin also testified that he again approached the petitioner about reopening plea negotiations after the discovery of the victim's actual age and requisite amendment of the charges, but the petitioner remained insistent on moving forward with a trial. [Popkin] further testified that, although the petitioner was adamant in his decision to proceed to trial . . . Popkin may have been able to change the petitioner's opinion had [the petitioner] been presented with an offer that did not require jail time, but such an offer was not likely given the first degree sexual assault charge that remained in the substitute amended information and carried a two year mandatory minimum sentence. The petitioner testified at the habeas trial that he rejected the state's plea offer because he maintained his innocence, and he was not sure if he would have considered additional offers had they been extended during the remainder of the case.

"Based on the credible evidence adduced at the habeas trial, the court finds that . . . Popkin discussed and properly advised the petitioner as to reopening plea negotiations with the petitioner in light of the amended charges, and therefore his conduct did not constitute deficient performance. The petitioner also failed to present evidence that the state would have conveyed an alternative offer, or that the trial court would have accepted an alternative agreement had it been presented. Furthermore, pursuant to the petitioner's own testimony at the habeas trial, it is not reasonably probable that the petitioner would have accepted a different

plea offer had it existed. As a result, the petitioner failed to sustain his burden of establishing either deficient performance or prejudice as to these claims . . . .''

The petitioner asserts that the court incorrectly concluded that he failed to demonstrate either that Popkin's performance vis-à-vis plea bargaining was deficient or that he was prejudiced by Popkin's conduct. With regard to prejudice, the petitioner contends that the court committed error in determining that he could not establish prejudice because he maintained his innocence, arguing that ''[t]here are two problems with the court's conclusion: (1) the duty to investigate and the obligation to explore a plea disposition exists regardless of whether a client professes his innocence; and (2) whatever willingness to plead the petitioner exhibited before trial is not dispositive of what he would have done if he were properly advised about the charges against him and the available options.''[11] The petitioner does not, however, focus sufficient attention on the court's determination that it was ''not reasonably probable that [he] would have accepted a different plea offer had it existed,'' as supported by his own testimony that he was uncertain as to whether he would have considered additional plea offers presented to him.[12] In

[11] The petitioner also contends that he met his burden to show a reasonable probability that (1) the state would have been receptive to a new plea offer to lesser charges and (2) a new plea offer would have contained terms that were less onerous than the judgment and sentence imposed. In light of our conclusion that the court properly determined that there was not a reasonable probability that the petitioner would have accepted a new plea offer, we need not discuss the merits of these additional contentions.

[12] The petitioner does not raise a distinct claim that the habeas court's factual findings in connection with its adjudication of count one of the habeas petition were clearly erroneous; however, in his appellate briefs, the petitioner refers to a portion of his habeas trial testimony stating that he would have considered other plea offers had they been conveyed to him. Other portions of the petitioner's testimony, however, indicate that he was equivocal with regard to whether he would have considered other plea offers. ''[I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony.'' (Internal quotation

light of the petitioner's failure to meet his burden to demonstrate a reasonable probability that he would have accepted a new plea offer, we conclude that the court correctly determined that the petitioner did not demonstrate prejudice with respect to his ineffective assistance of counsel claim set forth in count one of the habeas petition and, therefore, properly rendered judgment in the respondent's favor on count one.

II

The petitioner next claims that the habeas court improperly rendered judgment in the respondent's favor on count four of his habeas petition, which alleged that Popkin rendered ineffective assistance in a multitude of ways during the criminal proceedings. Specifically, the petitioner contends that the court incorrectly rejected his claims that Popkin rendered ineffective assistance when he failed (1) to move to dismiss, as time barred, an amended charge of sexual assault in the fourth degree that the state presented on the second day of jury selection and withdrew following closing arguments, (2) to challenge, as inadmissible, testimony elicited by the state on direct examination from (a) the victim, (b) Tangela, and (c) Burke, (3) to impeach adequately, on cross-examination, the credibility of (a) the victim and (b) Tangela, (4) to challenge, as inadmissible, testimony elicited from the petitioner by the state on cross-examination, and (5) to introduce purportedly exculpatory cell phone evidence. For the reasons that follow, we conclude that the court properly rendered

marks omitted.) *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022). Thus, the court acted properly in crediting the portions of the petitioner's testimony evincing uncertainty as to his willingness to consider additional plea offers. Moreover, the court credited testimony by Popkin that the petitioner had conveyed to Popkin that he would not accept a plea offer that included a period of incarceration, and the record contains no evidence indicating that it was reasonably probable that a new plea offer *without* jail time would have been offered by the state and deemed acceptable by the trial court.

judgment in the respondent's favor on count four of the habeas petition.

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

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

inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Emphasis omitted; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 305–306.

"An evaluation of the prejudice prong involves a consideration of whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . We do not conduct this inquiry in a vacuum, rather, we must consider the totality of the evidence before the judge or jury. . . . Further, we are required to undertake an objective review of the nature and strength of the state's case. . . . [S]ome errors will have had pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . .

"In other words, [i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable. . . . Notably, the petitioner must meet this burden not by use of speculation but by demonstrable realities." (Citations omitted; internal quotation marks omitted.) *Madera* v. *Commissioner of Correction*, 221 Conn. App. 546, 555–56, 302 A.3d 910 (2023).

A

First, the petitioner asserts that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin's failure to move to dismiss, as time barred, the amended fourth degree sexual assault charge prior to the state's withdrawal of the amended charge. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On April 27, 2017, the first day of jury selection, the state filed a substitute information charging the petitioner, inter alia, with sexual assault in the fourth degree on the basis that he had "subjected another person, under sixteen (16) years of age, to sexual contact without such person's consent . . . ." The following day, the second day of jury selection, after the state had realized that the victim was over the age of sixteen at the time of the incident, the state filed a substitute amended information charging the petitioner, inter alia, with sexual assault in the fourth degree on the basis that he had "subjected another person to sexual contact without such person's consent," omitting the prior allegation that the victim was under the age of sixteen. Popkin did not oppose

the substitution of the amended fourth degree sexual assault charge. On May 22, 2017, after the conclusion of closing arguments but before the trial court, *Dennis*, *J.*, had charged the jury, the state withdrew the amended fourth degree sexual assault charge on the basis that the amended charge was a class A misdemeanor; see General Statutes § 53a-73a (b); and, therefore, was time barred pursuant to the applicable statute of limitations. During the ensuing jury charge, the court instructed the jury "that for legal reasons, that have absolutely nothing to do with the evidence in this case or your consideration of the charges, we have removed one of the charges, the [amended] sexual assault in the fourth degree [charge] . . . ."

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin's conduct was deficient in that he failed to object to or move to dismiss as untimely the amended charge of sexual assault in the fourth degree prior to the state's withdrawal of the amended charge, "thus resulting in the presentation of evidence and closing arguments on that charge." In his posttrial brief, the petitioner expounded on his prejudice claim, arguing that "[t]he existence of the [amended fourth degree sexual assault] charge enabled the state to present supporting evidence that would have been otherwise immaterial and to argue the petitioner's guilt. More particularly, the state elicited testimony from the victim that the petitioner touched her breast and rubbed her legs. . . . During summations, the state urged the jury to convict the petitioner [on the amended charge]. The state reviewed the elements it had to prove to obtain a conviction . . . [and made] graphic remarks [that] were clearly harmful.[13] Coupled

[13] The petitioner cited the following portion of the state's closing argument: "We also have to prove the [petitioner] had the specific intent to obtain sexual gratification or to—or to humiliate the [victim]. In this case, the state would submit that clearly happened here. [The petitioner] clearly did what he did because he wanted to be sexually gratified. He wanted to humiliate [the victim]."

with the evidence presented, the remarks quite reasonably could have influenced the jury's view of the petitioner and its verdict on the [other] charges . . . ." (Citations omitted; footnote added.)

In its decision, the court, *Oliver*, *J.*, stated that "Popkin testified at the habeas trial that he realized that the [amended fourth degree sexual assault] charge was outside the statute of limitations prior to jury deliberations, and that he viewed this as a benefit to the petitioner due to the decreased exposure he faced upon that discovery. The court finds that [Popkin's] discovery of the time barred charge after closing argument but prior to jury deliberations did not prejudice the petitioner by sufficiently undermining confidence in the outcome of the trial. . . . As a result, the petitioner failed to carry his burden of proving the prejudice prong [under *Strickland*] . . . ." (Citation omitted.)

The petitioner contends that the court incorrectly concluded that he failed to demonstrate prejudice resulting from Popkin's failure to move to dismiss the time barred amended fourth degree sexual assault charge prior to the state's withdrawal of the amended charge. The petitioner asserts that, while the amended charge remained operative, the state was able (1) to introduce evidence that was irrelevant to the other pending charges, namely, testimony elicited from the victim that the petitioner had touched her breast and rubbed her legs, and (2) to make harmful remarks during its closing argument and rebuttal. We are not convinced.

The petitioner also cited the following portion of the state's rebuttal argument: "Sexual assault in the fourth degree has different elements [than sexual assault in the first degree], that's why we charge[d] [sexual assault in the fourth degree] as well. [The petitioner] [g]rabbed [the victim's] boob, he grabbed her butt, stuck his hand in her pants. I mean, look at each and every element of the crimes charged and line it up with—with the [victim's] testimony . . . ."

Contrary to the petitioner's position, we construe the victim's testimony regarding the petitioner touching her breast and rubbing her legs as being connected to the other charges that had been filed against the petitioner, as such conduct was a part of the series of events leading up to the incident. Indeed, while addressing the first degree sexual assault charge during its closing argument, the state referenced the victim's testimony that the petitioner had touched her breast, arguing that the petitioner had "kind of groomed her to begin with." Even assuming that the victim's testimony at issue was immaterial, the jury heard additional testimony from the victim that the petitioner had (1) pulled her into the middle of the bed, (2) covered her nose and mouth with his hand, (3) held her leg down by putting his knee on it, and (4) unbuttoned her pants, put his hand down her pants, and touched her clitoris. In light of this additional testimony, we cannot discern a reasonable probability that the victim's testimony about the petitioner touching her breast and rubbing her legs affected the outcome of the proceedings. Likewise, during its closing argument and rebuttal, in addition to making the remarks recited by the petitioner in his posttrial brief; see footnote 13 of this opinion; the state also highlighted the victim's testimony regarding her account of the incident. Thus, we conclude that it is not reasonably probable that the state's remarks at issue affected the jury's verdict.

In sum, we conclude that the court correctly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

B

Second, the petitioner asserts that the court improperly rejected his ineffective assistance of counsel claims

predicated on Popkin's failure to challenge, as inadmissible, testimony elicited by the state on direct examination from (1) the victim, (2) Tangela, and (3) Burke. We are unpersuaded.

Preliminarily, we note that, in collectively addressing the petitioner's subclaims stemming from Popkin's failure to challenge certain testimony elicited by the state on direct examination, the court noted that "Popkin testified at the habeas trial as to his tactics in raising objections during a trial generally, indicating that he tries not to object too often because he believes frequent objecting can lead to a loss of credibility with the jurors as he attempts to build a rapport with them. He further testified that he tends to raise speaking objections when he does object for transparency purposes so that the jurors understand why he is raising the objection."

1

The petitioner claims that the court committed error in denying his ineffective assistance of counsel claim grounded on Popkin's failure to challenge the victim's testimony regarding statements that she made about the incident to Tangela and to a forensic interviewer. We disagree.

The following additional procedural history is relevant to our disposition of this claim. During the state's case-in-chief, on direct examination, the victim provided testimony detailing her account of the incident. The victim further testified, without objection from Popkin, that (1) immediately after the incident, she told Tangela that the petitioner had been "touching" her, and (2) following the incident, she was interviewed by a forensic interviewer, whom she told "pretty much what [she] told" the jury on direct examination. Subsequently, on direct examination, Tangela testified that the victim told her that the petitioner had "touched"

the victim. Immediately thereafter, the court issued a limiting instruction to the jury that Tangela's testimony regarding the victim's statement to her was offered "for the effect on [Tangela] and what she then did," not for the truth of the statement. Following the limiting instruction, Tangela testified that she "kind of like lost it" after hearing the victim's statement, and she ran to the front door only to discover that the petitioner and Mercer had driven away. The forensic interviewer did not testify at the trial, and neither the videotape of the forensic interview nor the interviewer's report was admitted into evidence; however, while cross-examining the victim, Popkin asked the victim questions regarding some of her statements made during the forensic interview.[14]

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to object to or move to strike the victim's testimony regarding what she told Tangela and the forensic interviewer about the incident. In his posttrial brief, the petitioner maintained that Popkin should have challenged the admissibility of the victim's testimony because the victim's credibility had not been impeached, rendering the testimony, which consisted of prior consistent statements, inadmissible pursuant to § 6-11 of the 2009 edition of the Connecticut Code of Evidence.[15] The petitioner further argued that

[14] Specifically, Popkin questioned the victim about her statements to the forensic interviewer detailing the manner in which the petitioner had touched her.

[15] Section 6-11 of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "**(a) General rule.** Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.

"**(b) Prior consistent statement of a witness.** If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment. . . ."

Popkin's conduct prejudiced him because the inadmissible testimony bolstered the victim's credibility, which, the petitioner posited, was paramount to the state's case against him. The petitioner additionally observed that (1) during its rebuttal, the state relied on the inadmissible testimony,[16] and (2) at the jury's request, the victim's testimony was replayed in its entirety for the jury.

In its decision, the court stated that, "[a]t the habeas trial . . . Popkin testified that he did not object to the victim's testimony on hearsay grounds because he did not wish to call additional attention to the detrimental statements. He made a decision not to maximize the negative information and instead let it pass and move on. 'Experienced litigators utilize the trial technique of not objecting to inadmissible evidence to avoid highlighting it in the minds of the jury.' . . . *State* v. *Davis*, 76 Conn. App. 653, 665, 820 A.2d 1122 (2003). . . . Popkin also indicated several times during his habeas trial testimony that he did not find the victim to be a credible witness and that it was a strategic decision to get her off the stand as quickly as possible. As a result, the court finds that . . . Popkin's tactical approach in deciding not to object to or move to strike the highlighted portions of the victim's testimony cannot be deemed an unreasonable decision that constituted deficient performance. Furthermore, the petitioner failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different had counsel objected to the testimony."

[16] During its rebuttal, the state argued in relevant part: "So, really, if you want to come down to it, it's what [the victim] says, right? It's what [the victim] says as it was relayed to Tangela, as it was relayed to [the forensic interviewer], as it—as it was relayed to you here in court. And I would venture the bet, a good bet, if [the victim's] story was different from the day it happened when she told [Tangela], if it was different from the day that she told [the forensic interviewer], and if anything in her story . . . from what she told us on—on the stand, that would have been grounds for an exploration on cross-examination, but it wasn't explored."

The petitioner claims error as to the court's determinations that he failed to demonstrate that Popkin's performance was deficient or that he suffered prejudice as a result of Popkin's conduct. With respect to prejudice, the petitioner maintains that (1) the victim's testimony regarding her prior consistent statements bolstered her credibility, which was critical to the state's case against him, (2) during its rebuttal, the state relied on the victim's testimony; see footnote 16 of this opinion; and (3) the jury heard a playback of the victim's entire testimony, thereby illustrating its importance.

After a careful review of the record, we conclude that the petitioner failed to demonstrate a reasonable probability that Popkin's failure to challenge the victim's testimony regarding her statements to Tangela and the forensic interviewer about the incident affected the outcome of the proceedings. The victim's testimony about the statements at issue was isolated, brief, and did not describe the incident. In contrast, the victim provided lengthy and detailed testimony regarding her firsthand account of the incident. Notwithstanding the state's remarks during its rebuttal or the playback of the victim's testimony to the jury, we are not convinced that there is a substantial likelihood that a different result would have been reached without the victim's testimony at issue. Accordingly, we conclude that the court properly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

2

The petitioner next contends that the court improperly denied his ineffective assistance of counsel claim stemming from Popkin's failure to challenge testimony by Tangela about the petitioner's history of drunkenness and his mistreatment of women. We are not persuaded.

The following additional procedural history is relevant to our disposition of this claim. During its case-in-chief, on Tangela's direct examination, the state asked Tangela what, if anything, happened with regard to the petitioner on the night of the incident. Tangela testified, without objection from Popkin, that the petitioner "became very drunk, which he's always drunk when we go out. . . . He's always with us women, drunk, obnoxious, rude, falling, bust[ing] his head, blood, disrespecting [Mercer], calling her B-I-T-C-H's, saying that we don't look like sisters, [Mercer is] Black and ugly, how do we look like this, just putting her down, hurting her. . . . [It happens] [a]ll the time. When he drinks he's a different person." Without objection from Popkin, Tangela further testified: (1) one of the guests at her home on the night of the incident asked the petitioner to leave, telling the petitioner, "come on, you're rude, you're obnoxious, you're a pig and disrespecting [Mercer], there's other women in here, I don't want to hear that, you need to leave, you need to go"; (2) Tangela and the other guests at her home "just let the situation [concerning the petitioner] go with [Mercer] because [Mercer is] used to it"; (3) after the victim had told her about the incident, Tangela "thought about [the petitioner's] actions and his ways of the last ten years of knowing who [the petitioner] is and his obnoxious behavior when we're out and how he has a tendency of disrespecting not only [Mercer] but all the women who are around him, touching other friends and family members," and "just began feeling guilty and hurt in [her] heart for entertaining a person such as [the petitioner] in [her] home when [she] knew better"; and (4) she had welcomed the petitioner into her home prior to the incident notwithstanding his behavior, "but it was just . . . different—night and day when he drank."

On May 19, 2017, the second day of trial, Popkin filed a motion requesting that the trial court strike Tangela's

testimony as improper character evidence and instruct the jury to disregard the testimony. The court, *Dennis*, *J.*, reserved its ruling on the motion. On May 22, 2017, the third day of trial, immediately before Popkin had rested the petitioner's case-in-chief, Popkin withdrew the motion to strike and for a curative instruction, explaining that, "[a]t this point, I think I would just be highlighting some of the comments if I ask the court to rule on that motion and instruct the jury . . . ."

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to object to or move to strike Tangela's testimony "concern[ing] the petitioner's purported bad character, specifically, a history of drunkenness and mistreatment of women." In his posttrial brief, the petitioner maintained that Popkin's conduct was deficient in that he failed to challenge Tangela's testimony on the basis that, among other things, it constituted (1) inadmissible character evidence pursuant to § 4-4 (a) of the 2009 edition of the Connecticut Code of Evidence[17] and (2) inadmissible prior misconduct evidence pursuant to § 4-5 (a) of the Connecticut Code

[17] Section 4-4 (a) of the 2009 edition of the Connecticut Code of Evidence provides: "**Character evidence generally.** Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

"(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

"(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

"(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness."

of Evidence.[18] The petitioner further maintained that Popkin's conduct prejudiced him because (1) Tangela's testimony reasonably could have inflamed the jury and (2) the jury reasonably could "have used [Tangela's] testimony to speculate that if the petitioner had a history of disrespecting women when he was intoxicated, it would not be a leap for him to engage in physical abuse and molestation."

In its decision, the court stated that "Popkin . . . testified that he did not object to [Tangela's] testimony concerning the petitioner's alleged history of drunkenness and mistreatment of women because, although he believed the testimony to be objectionable . . . [Tangela was] not [a] credible [witness], he believed that objecting would draw additional attention to damaging allegations rather than benefit his case, and part

[18] Section 4-5 of the Connecticut Code of Evidence provides: "**(a) General rule.** Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"**(b) When evidence of other sexual misconduct is admissible to prove propensity.** Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

"**(c) When evidence of other crimes, wrongs or acts is admissible.** Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

"**(d) Specific instances of conduct when character in issue.** In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct."

of his strategy was to have [Tangela] finish testifying as quickly as possible. He testified that he filed the motion to strike and for curative instruction because he was concerned about the testimony, but then made a strategic decision not to pursue it because he did not find [Tangela] to be credible and did not believe the testimony would be used by the jury to convict the petitioner. . . . Pursuant to the foregoing, the court finds that . . . Popkin's tactical approach in deciding not to object to or move to strike the highlighted portions of [Tangela's] testimony cannot be deemed an unreasonable decision that constituted deficient performance. Furthermore, the petitioner failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different had counsel objected to the testimony."

The petitioner contends that the court incorrectly concluded that he failed to satisfy either the performance prong or the prejudice prong under *Strickland* with respect to Popkin's failure to challenge Tangela's testimony. With respect to the performance prong, the petitioner maintains that it was not objectively reasonable for Popkin to forgo challenging Tangela's testimony given the nature of the crimes with which the petitioner was charged. Remaining 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," and that we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 305–306; we conclude that Popkin did not act unreasonably in failing to challenge Tangela's testimony on the basis of his reasoning that (1) Tangela's presentation

at the criminal trial was poor, such that the jury would not view her to be a credible witness, (2) highlighting seemingly damaging aspects of Tangela's testimony would not be beneficial, and (3) Tangela was unpredictable, such that limiting Tangela's opportunity to provide testimony was prudent.[19] Moreover, on the basis of the entire record, including the victim's extensive testimony regarding the incident, we conclude that the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different without Tangela's testimony. Accordingly, we conclude that the court correctly determined that the petitioner failed to satisfy either prong under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

3

The petitioner also contends that the court committed error in denying his ineffective assistance of counsel claim grounded on Popkin's failure to challenge testimony by Burke that he had located a photograph of the petitioner in the police department's " 'mug shot database.' " This claim is unavailing.

The following additional procedural history is relevant to our resolution of this claim. During its case-in-chief, on Burke's direct examination, the state asked

[19] Popkin testified that "[Tangela's] appearance before the jury, she was a piece of work to say the least. You never knew what was going to come out of her mouth. So—and she came across in my estimate and she was a very poor witness . . . ." Popkin further testified that "you had to have observed [Tangela] on the [witness] stand. She came across as not credible, and I did not think that offering an objection would gain me anything—an objection to this would gain me anything. She was just so out there. I didn't think . . . there's any need to draw more attention to it. Just [inaudible] she had a strange way of testifying, and I didn't think it was detrimental to [the petitioner]." In addition, Popkin testified that "[Tangela] did not come across, in my opinion, very well. She was all over the place, she was moving around oddly, she was—did not seem to be, as I recall, her demeanor was just inappropriate for a courtroom."

Burke what "investigatory steps" he took to identify the petitioner. Burke testified: "So, we had a database at the police department. I believe on the original police report it had [the petitioner's] name and address, but there wasn't a birthday. They just gave an age, I believe it was thirty-eight. So, I really didn't know who [the petitioner] was. *But we do have a database at the department, a mug shot database. So, I searched the database for* [*the petitioner*], *I found a Leon Mercer in the age range that it was, and I printed out the picture which would eventually be shown to* [*the victim*] . . . [*t*]*o verify that this is the correct Leon Mercer that we are investigating.*" (Emphasis added.) Popkin did not object to or move to strike this testimony.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to object to or move to strike Burke's testimony that he located the petitioner's photograph in a "mug shot database." In his posttrial brief, the petitioner argued that Popkin's conduct was deficient in that he failed to challenge, as inadmissible, Burke's testimony referring to the mug shot database on the basis that the testimony was (1) irrelevant to the state's case, as identity was not a contested issue, and (2) highly prejudicial because it suggested that the petitioner previously had been arrested, thereby undermining his credibility and enabling the jury to infer that he was more likely to have committed the crimes with which he was charged.[20] The petitioner further argued that, in light of the prejudicial effect of Burke's testimony, the prejudice prong of *Strickland* was satisfied.

[20] In support of his argument, the petitioner cited *State* v. *Bell*, 152 Conn. App. 570, 99 A.3d 1188 (2014), for the proposition that "our Supreme Court has cautioned against the use of police mug shots because, such photographs indicate prior arrests, not otherwise admissible, which present an accused person in an unfavorable light before the jury." (Internal quotation marks omitted.) Id., 578–79.

In its decision, the court acknowledged that, during the habeas trial, Popkin testified that he should have objected to Burke's testimony concerning the mug shot database. The court further stated that, "in light of the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the court grants deference to . . . Popkin's trial strategy of limiting the use of objections so as not to highlight certain pieces of detrimental testimony and to build credibility with the jurors. Even if the court determined that . . . Popkin's failure to object in the instances where he acknowledged during his habeas testimony that in hindsight he should have objected was deficient, the petitioner failed to sustain his burden of proving that there is a reasonable probability that, but for counsel's failure to object, the result of the petitioner's trial would have been different."

In addition to challenging the court's determination that Popkin's performance was not deficient with respect to his failure to challenge Burke's testimony regarding the mug shot database, the petitioner claims that the court committed error in determining that he failed to demonstrate prejudice resulting from Popkin's conduct. The petitioner contends that, "[i]n a close case such as this, which depended on a credibility contest between the petitioner and the victim, the jury's knowledge of the petitioner's criminal history clearly could have tipped the balance in favor of the state and altered the outcome of the trial." We are not convinced. Burke's testimony referenced the mug shot database only once, and the state did not mention the mug shot database during its closing argument or its rebuttal. Moreover, on the basis of the record as a whole, including the victim's extensive testimony concerning her account of the incident, we do not agree that a single reference to the petitioner's photograph in a mug shot database could have measurably influenced the jury. Because the

petitioner failed to establish a substantial likelihood that the outcome of the proceedings would have been different without Burke's testimony regarding the mug shot database, we conclude that the court correctly determined that the petitioner did not satisfy the prejudice prong as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

C

Third, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claims predicated on Popkin's failure, on cross-examination, to impeach the credibility of (1) the victim and (2) Tangela. We disagree.

As this court has explained, "[o]nce an attorney makes an informed, strategic decision regarding how to cross-examine a witness, that decision is virtually unchallengeable. . . . An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Citation omitted; internal quotation marks omitted.) *Chase* v. *Commissioner of Correction*, 210 Conn. App. 492, 501, 270 A.3d 199, cert. denied, 343 Conn. 903, 272 A.3d 199 (2022).

1

The petitioner contends that the court improperly denied his ineffective assistance of counsel claim stemming from Popkin's failure, on cross-examination, to impeach the victim as to her testimony identifying the date of the incident. We disagree.

The following additional procedural history is relevant to our adjudication of this claim. In the original and substitute informations filed by the state, the state alleged that the incident occurred on or about April 5, 2014. During the state's case-in-chief, on direct examination, the victim testified that the incident occurred in the early morning hours of April 5, 2014. Popkin did not cross-examine the victim about the date of the incident. The next day, the state filed a motion in limine in response to a request made by Popkin to introduce portions of the videotaped forensic interview of the victim, including a portion of the interview reflecting that the victim had told the forensic interviewer that the incident had transpired in March, 2014, rather than in April, 2014. Following argument, the trial court granted the state's motion in limine. During the petitioner's case-in-chief, on direct examination, the petitioner and Mercer testified that the gathering at Tangela's home, during which the incident occurred according to the state, had taken place at the end of March, 2014.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to impeach the credibility of the victim by confronting her with her prior inconsistent statement to the forensic interviewer about the date of the incident. In his posttrial brief, the petitioner argued that Popkin was deficient in failing to challenge the victim's testimony that the incident had occurred on April 5, 2014, with her prior inconsistent statement to the forensic interviewer. The petitioner further argued that prejudice resulted from Popkin's deficient conduct, as Popkin missed an opportunity, inter alia, to diminish the victim's credibility and to advance his defense theory that the victim had submitted a false claim.

In its decision, the court stated that, "[a]t the underlying criminal trial, the petitioner and . . . Mercer testified that the get-together occurred on Saturday evening,

March 29, 2014, into Sunday morning, March 30, 2014. However, every long form information filed by the state alleged that the incident occurred on or about April 5, 2014. During trial, the state repeatedly oriented the victim to the April 5, 2014 date absent objection by [Popkin]. That date did not conform, however, with the victim's videotaped forensic interview indicating that the incident occurred on a Friday in March [2014]. The state's discovery revealed that the complaint was made to the police on Monday, April 7, 2014. . . .

"Popkin did not inquire about the different dates during his cross-examination of the victim. He testified at the habeas trial that the goal at trial was to obtain an acquittal, and not a conviction on a lesser included offense. He also expected the trial to be a credibility contest between the petitioner and the victim, and indicated that the defense strategy was to discredit the victim and demonstrate that the police investigation was inadequate. When questioned as to how he attempted to discredit her testimony . . . Popkin testified that he pointed to inconsistencies in her description of how the physical act took place and the layout of the apartment. He further testified that he wanted to get her off the stand fairly quickly to minimize the sympathetic nature of her young age, and he did not believe that pointing out that she was incorrect about the date would lead the jury to disregard all of the allegations she made regarding the sexual assault, noting 'if somebody's a victim of a sexual assault, if they get the date wrong doesn't necessarily mean that they weren't sexually assaulted on a different date, they just got the date wrong.'

"Based on the foregoing, the court finds that . . . Popkin's questioning of the victim was an exercise of sound trial strategy and thus the petitioner failed to prove that counsel's cross-examination [of the victim] was deficient. The petitioner also failed to prove that

he was prejudiced thereby by demonstrating what evidence additional cross-examination would have elicited and how it would have changed the outcome of the trial."

The petitioner maintains that the court erred in determining that he failed to satisfy the performance and prejudice prongs of *Strickland* with regard to Popkin's failure to impeach the victim's testimony regarding the date of the incident. With respect to the performance prong, the petitioner contends that (1) the record reveals that Popkin's trial strategy included discrediting the state's evidence that the incident occurred on April 5, 2014, yet Popkin failed to advance this strategy by challenging the victim's testimony about the date of the incident, and (2) it was "inexcusable" for Popkin to fail to impeach the victim "on a critical issue as basic as the date" of the incident. The court, however, credited Popkin's testimony that (1) he sought to impeach the victim by challenging other aspects of her testimony and (2) he opted against cross-examining the victim as to the date of the incident because (a) he wanted to limit her time on the witness stand and (b) he did not believe that the jury would discount the victim's testimony about the incident if it learned that the victim had made a prior inconsistent statement about the date of the incident. On the basis of the evidence credited by the court, we agree with the court that Popkin's trial strategy as to his cross-examination of the victim was not unreasonable. We further agree with the court that the petitioner failed to establish prejudice, as we are not convinced that there is a reasonable probability that the outcome of the trial would have been different had Popkin tested the victim's recollection of the date of the incident with the forensic interview, conducted when the victim was sixteen years old and which delved into the victim's account of a sexual assault, during which the victim indicated that the incident had

occurred on a Friday in March, 2014. Accordingly, we conclude that the court properly determined that the petitioner did not satisfy either prong under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

2

The petitioner also contends that the court committed error in denying his ineffective assistance of counsel claim grounded on Popkin's failure, on cross-examination, to impeach Tangela as to (1) two prior convictions, (2) her testimony about the date of the incident and her failure to report the incident to the police promptly, (3) her conflicting testimony about the manner in which the petitioner left her home on the night of the incident, and (4) her testimony about her consumption of alcohol on the night of the incident. This claim is unavailing.

The following additional procedural history is relevant to our adjudication of this claim. During the state's case-in-chief, on direct examination, Tangela testified in relevant part that (1) the incident occurred on April 5, 2014, but she did not report the incident to the police immediately because she was "very confused" and wanted to contact Mercer first,[21] (2) she was drinking wine throughout the night of the incident, and (3) in 2006, she was convicted for falsely reporting an incident in the second degree.[22] In addition, on direct examination, Tangela provided two different accounts regarding

[21] In her testimony, Tangela did not identify the precise date on which she reported the incident to the police. The victim testified that Tangela "gave it a day before she called the police." Burke testified that the police report relating to the incident was generated on April 7, 2014, and he was assigned to the case on April 8, 2014. The court found that, according to the state's discovery, the complaint was made on April 7, 2014.

[22] See General Statutes (Rev. to 2005) § 53a-180c (a) ("[a] person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, such person gratuitously reports to a law enforcement officer or agency (1) the alleged occurrence of an offense or incident which did not in fact occur, (2) an allegedly impending occurrence of an offense or incident which in

the petitioner's exit from her home on the night of the incident. In one account, Tangela testified that she saw the petitioner leave the kitchen approximately twenty minutes before she had escorted Mercer out of her home and that she had discovered that the petitioner and Mercer had driven away shortly after the victim had told her about the incident. In the other account, Tangela testified that, while accompanying Mercer out of the home, she observed the petitioner standing in her bedroom over her bed, and, when she approached the bedroom, she saw the petitioner "running out of [her] bedroom with his hands sort of in front of him and . . . stumbling and falling towards the front door." Popkin did not explore these topics while cross-examining Tangela.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin had rendered ineffective assistance in failing to impeach Tangela's credibility adequately. In his posttrial brief, the petitioner argued that Popkin's conduct was deficient in that he failed to undermine Tangela's credibility on cross-examination by (1) eliciting additional testimony about the background of her prior conviction for falsely reporting an incident in the second degree, (2) eliciting testimony with respect to a 2015 conviction for interfering with a police officer[23] in violation of General Statutes (Rev.

fact is not about to occur, or (3) false information relating to an actual offense or incident or to the alleged implication of some person therein").

[23] During the habeas trial, Emanuel testified that, while representing the petitioner in his direct appeal from his conviction, Emanuel acquired a copy of Tangela's criminal history from the Connecticut State Police, which was admitted as a full exhibit at the habeas trial, from which he learned of Tangela's 2015 conviction for interfering with a police officer. Upon discovering that conviction, Emanuel proceeded to order a transcript from the attendant criminal proceedings, which was admitted as a full exhibit at the habeas trial and which revealed that the basis of the interfering with a police officer charge, to which Tangela had pleaded guilty, was that Tangela had given false and misleading information to the police officer.

to 2009) § 53a-167a,[24] (3) questioning her as to the inconsistency in her testimony regarding the petitioner's exit from her home on the night of the incident, (4) questioning her as to her testimony about the date of the incident and her decision to wait to report the incident to the police, and (5) eliciting additional testimony about her consumption of alcohol on the night of the incident, as the victim had testified before Tangela had taken the stand that the party guests, including Tangela, appeared to be "a little tipsy" and "intoxicated" when they returned from the Ramada Inn on the night of the incident. The petitioner further argued that Popkin's deficient conduct prejudiced him because Popkin failed to seize an opportunity to undermine Tangela's credibility, whom the petitioner characterized as "an important prosecution witness."

In its decision, the court stated that "Popkin did not believe that [Tangela's] testimony appeared credible to the jurors and his strategy in questioning her was to limit her time on the witness stand. The court finds that . . . Popkin's questioning of [Tangela] was an exercise of sound trial strategy and thus the petitioner failed to prove that counsel's cross-examination was deficient. The petitioner also failed to prove that he was prejudiced thereby by demonstrating what evidence additional cross-examination would have elicited and how it would have changed the outcome of the trial."

The petitioner maintains that the court erred in determining that he failed to satisfy the performance

[24] General Statutes (Rev. to 2009) § 53a-167a (a), as amended by Public Acts 2010, Nos. 10-36, § 22, and 10-110, § 51, provides: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer, special policeman appointed under section 29-18b, Department of Motor Vehicles inspector appointed under section 14-8 and certified pursuant to section 7-294d, or firefighter in the performance of such peace officer's, special policeman's, motor vehicle inspector's or firefighter's duties."

and prejudice prongs of *Strickland* with regard to Popkin's failure to impeach Tangela adequately on cross-examination. With respect to the performance prong, applying the same reasoning set forth in part II B 2 of this opinion, we conclude that the petitioner failed to demonstrate that Popkin's failure to impeach Tangela as to the topics at issue constituted deficient performance. In addition, we agree with the court that the petitioner failed to establish prejudice. Through the testimony of Tangela and/or the victim, the jury already was aware that Tangela (1) had a criminal history that involved providing false information to the police and (2) was imbibing alcohol on the night of the incident. We cannot discern that there is a reasonable probability that additional testimony on cross-examination with respect to these topics would have influenced the jury's verdict. We also are not convinced that there is a reasonable probability that probing Tangela's inconsistent testimony as to the petitioner's exit from her home on the night of the incident would have affected the outcome of the trial, as the inconsistency plainly was in the record for the jury to resolve as the fact finder. Additionally, with regard to Tangela's testimony about the incident occurring on April 5, 2014, along with the short delay in her reporting of the incident, the petitioner did not demonstrate that any testimony beneficial to his defense would have resulted from additional questioning on these topics. Put simply, it is pure conjecture that Tangela would have altered her testimony regarding the date of the incident and the timing of her reporting of the incident, such that the petitioner failed to demonstrate a reasonable probability that challenging Tangela's testimony at issue would have resulted in a different outcome at trial.

In sum, we conclude that the court properly determined that the petitioner failed to satisfy either of the *Strickland* prongs as to this subclaim of his ineffective

assistance of counsel claim set forth in count four of the habeas petition.

D

Fourth, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin's failure to challenge, as inadmissible, testimony elicited from the petitioner by the state on cross-examination. We disagree.

The following additional procedural history is relevant to our resolution of this claim. During the petitioner's case-in-chief, the state elicited testimony from Mercer on cross-examination that she had filed for divorce from the petitioner on April 26, 2016, although she "never went through with it."[25] Subsequently, while cross-examining the petitioner, the state asked the petitioner whether (1) he was "swearing and argumentative" with Mercer on the night of the incident and (2) he had domestic disputes with Mercer in the past. The petitioner responded "[n]o" to both questions. The state then asked the petitioner whether, on April 25, 2016, the police were called to his home in response to a domestic dispute. The petitioner testified that the police responded to a domestic dispute call on that date, which stemmed from an argument between the petitioner and Mercer about the impending divorce action that Mercer filed the following day.[26] Popkin did not object to the state's questions or move to strike the petitioner's testimony. Shortly thereafter, the state asked the petitioner whether (1) it was true that the incident was not the first time that he had "touched another female," (2) he had a prior relationship with one of the guests at

[25] The petitioner does not claim that Popkin rendered ineffective assistance with regard to Mercer's testimony on cross-examination concerning the divorce filing.

[26] On cross-examination, the petitioner testified that the domestic dispute was not physical but, rather, limited to him and Mercer "just yelling at each other."

Tangela's home on the night of the incident, and (3) he had ever touched the guest in question "inappropriately." Popkin did not object to these questions. The petitioner responded "[n]o" to each inquiry.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing (1) to object to the state's questions or to move to strike the petitioner's ensuing testimony regarding the 2016 domestic dispute between the petitioner and Mercer, and (2) to object to the state's questions regarding the petitioner touching another female. In his posttrial brief, the petitioner contended that Popkin's performance was deficient in that he failed to challenge (1) the state's questions as improper and (2) the petitioner's testimony concerning the 2016 domestic dispute on the basis that the testimony constituted improper character evidence and uncharged misconduct evidence that had no probative value to the crimes with which the petitioner was charged and did not concern a lack of veracity. In addition, the petitioner argued that there was no basis in the record to accuse the petitioner of touching another female. The petitioner further argued that he was prejudiced by Popkin's deficient conduct, as (1) the testimony concerning the 2016 domestic dispute was highly damaging and (2) notwithstanding his testimony denying having touched another female, the jury could have been influenced by the state's questions on that topic.

In its decision, the court stated that, "[a]t the habeas trial . . . Popkin testified that the [state's] questions did not strike him as objectionable but he probably should have objected. He further testified that no objection would have foreclosed the questions about the domestic dispute. As to the questions that accused the petitioner of touching another female in the past, counsel testified that he believed the petitioner's answers were appropriate and his responses were neutral at

worst. Based on the credible evidence, the court finds that the petitioner failed to demonstrate that counsel's strategy fell outside the wide range of reasonable professional assistance, and therefore failed to prove deficient performance. The petitioner also failed to sustain his burden of proving that there is a reasonable probability that, but for counsel's failure to object, the result of the petitioner's trial would have been different."

The petitioner claims that the court committed error in determining that Popkin's performance was not deficient and that he was not prejudiced by Popkin's conduct. With respect to prejudice, the petitioner asserts that (1) the state's case was weak and (2) the state's questions and the petitioner's attendant testimony contributed to the state's improper "smear campaign" against him. We do not agree. With regard to the state's questions regarding the petitioner touching another female, the petitioner responded "[n]o" to each question, and, thereafter, the state did not probe the topic further. As such, we do not perceive any prejudice stemming from this isolated line of inquiry.[27] Additionally, we cannot conclude that prejudice resulted from the petitioner's testimony regarding the 2016 domestic dispute, which was brief, lacking in detail, other than describing that the domestic dispute related to the divorce action and was limited to "just yelling at each other," and not pursued further by the state. Moreover, given the balance of the record, including the victim's extensive testimony regarding her account of the incident, we cannot conclude that a reasonable probability

[27] Moreover, we cannot conclude that any prejudice resulted from the state's questions alone because, "[a]s we repeatedly have recognized, a question from counsel is not evidence of anything." (Internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 317, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). Indeed, during the jury charge, the trial court, *Dennis*, *J.*, instructed the jury that "[q]uestions and objections by the attorneys are not evidence."

exists that the jury's verdict was affected by the petitioner's testimony. Accordingly, we conclude that the court correctly determined that the petitioner failed to establish prejudice as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

E

Fifth, the petitioner claims that the court improperly rejected his ineffective assistance of counsel claim predicated on Popkin's failure to introduce purportedly exculpatory cell phone evidence. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On May 18, 2017, before the start of the evidentiary portion of trial, Popkin stated on the record that (1) Mercer recently informed him that she had discovered an old cell phone that she had used around the time of the incident and (2) a forensic evaluation of the cell phone was underway. On May 19, 2017, the second day of trial, Popkin called Mercer as a defense witness. Mercer testified in relevant part that she (1) had "been happily married for the majority of [her] marriage" to the petitioner and (2) had seen the petitioner drunk "a handful of times" during their marriage. On May 22, 2017, the third day of trial, Popkin conveyed to the trial court that he did not intend to offer the cell phone evidence into the record.

In count four of his habeas petition, the petitioner alleged in relevant part that Popkin rendered ineffective assistance in failing to introduce certain cell phone evidence, including text messages (1) reflecting that the gathering at Tangela's home during which the incident was alleged to have occurred was held in March, 2014, not April, 2014, as testified to by the victim and Tangela at trial, and (2) showing, by implication, that the incident did not occur. In his posttrial brief, the

petitioner contended that Popkin's performance was deficient in that he failed to introduce text messages from Mercer's cell phone that were favorable to his defense. Specifically, the petitioner cited text messages exchanged between Mercer and Tangela reflecting that (1) on March 29, 2014, (a) Mercer asked Tangela what her plans were that evening, and (b) Tangela replied that she was having food and drinks before going to the Ramada Inn and that Mercer was invited to join, and (2) on March 30, 2014, (a) at 3:26 a.m., Mercer told Tangela that she had "made it home," (b) approximately seventeen minutes later, Tangela replied, "[o]k love u," and (c) approximately three minutes later, Mercer replied, "[l]ove u too."[28] The petitioner maintained that the text messages revealed that (1) the gathering at which the incident was alleged to have occurred was held in March, 2014, corroborating the petitioner's and Mercer's testimony as to the same and undermining the victim's and Tangela's testimony that the incident had occurred on April 5, 2014, (2) Tangela waited approximately one week, rather than a matter of days, to contact the police to report the incident, which supported the defense's false claim theory, and (3) there was no animosity between Mercer and Tangela after Mercer had left Tangela's home following the gathering, thereby (a) contradicting Tangela's testimony that the victim immediately informed her of the incident and (b) suggesting that the incident did not occur. The petitioner further argued that he was prejudiced by Popkin's conduct, as "[t]he text messages could reasonably have shaken the credibility of the victim and [Tangela] and altered the entire evidentiary picture."

In its decision, the court stated that "Popkin testified at the habeas trial that he was made aware of the text messages and arranged for [a company] to download

[28] The text messages in Mercer's phone were downloaded onto a flash drive that was admitted as a full exhibit during the habeas trial.

the [contents of Mercer's phone]. He received the contents of the phone on the first day of trial, shared the contents with the state, and ultimately decided not to introduce the texts after his review of the contents. . . . Popkin testified that the text messages supported the contention of the petitioner and [Mercer] that the get-together occurred in March, [2014] not April, [2014] and the final text message from [Tangela] to [Mercer] on that night of the incident was '[o]k love u.' [Popkin] explained that the download also included text messages between the petitioner and [Mercer] that were unfavorable to the petitioner concerning his alcohol problem and resulting marriage problems and had the potential to diminish [Mercer's] credibility to the jury. . . . Popkin testified that he believed the harm in introducing the text messages outweighed the benefit.

"Pursuant to [Popkin's] credible testimony, the court finds that . . . Popkin's decision to not submit the cell phone evidence fell within the wide range of reasonable professional assistance and thus did not constitute deficient performance. Moreover, the petitioner failed to sustain his burden of proving that there is a reasonable probability that the result of the petitioner's trial would have been different had the cell phone evidence been presented."

The petitioner asserts that the court committed error in determining that Popkin's failure to introduce the cell phone evidence did not constitute deficient performance and that he was not prejudiced by Popkin's conduct. With respect to the performance prong, the petitioner maintains that it was not objectively reasonable for Popkin to forgo offering the favorable text messages in light of other, unfavorable text messages on Mercer's phone, particularly text messages concerning the petitioner's consumption of alcohol and marital problems with Mercer, arguing that Popkin could have sought to

exclude the admission of the unfavorable text messages. Again bearing in mind 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," and that we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 305–306; we conclude that Popkin's decision to refrain from offering the favorable cell phone evidence into the record was not unreasonable. The court credited Popkin's testimony at the habeas trial that (1) the unfavorable text messages contradicted Mercer's testimony at the criminal trial that (a) she generally was happy in her marriage with the petitioner and (b) she had observed the petitioner drunk only "a handful of times," and (2) Mercer "came across very strongly" at the criminal trial and he "did not want to do anything to diminish—risk diminishing her credibility by text messages and then opening the opportunity for the state to bring in the [text messages] that were not favorable to [the petitioner]." Under these circumstances, Popkin's representation with respect to his treatment of the cell phone evidence was reasonable.[29] Moreover, on the

[29] We further observe that Popkin testified at the habeas trial that "there were some [text] messages that would have also supported [what Tangela] had said had transpired. Even if it was on a different day, they still supported [Tangela's] story too that she made these text messages. [Tangela] tried to reach . . . Mercer and she was unable to reach [Mercer] . . . or . . . Mercer had to put her off. So, they cut both ways in terms of that as well." The text messages admitted into evidence at the habeas trial reflect that, on March 31, 2014, following Mercer's text message to Tangela the prior day reading "[l]ove u too," (1) Tangela reached out to Mercer stating, "[w]hen u get this message I need u to call me urgent matter," (2) Mercer replied that she was preparing to go to an airport and asked whether it was "[t]oo late/early now," and (3) Tangela then replied, "[n]o I'm fine when will u get back home I need to talk with u face to face." As the respondent argued

basis of the entire record, including the victim's detailed testimony regarding the incident, we conclude that the petitioner failed to demonstrate a substantial likelihood that the outcome of the trial would have been different had Popkin sought to offer the favorable text messages. Accordingly, we conclude that the court correctly determined that the petitioner failed to establish that Popkin's performance was deficient or prejudicial under *Strickland* as to this subclaim of his ineffective assistance of counsel claim set forth in count four of the habeas petition.

III

The petitioner's final claim is that the habeas court improperly declined to apply the cumulative error rule to his ineffective assistance of counsel claims. This claim is unavailing.

The following additional procedural history is relevant to our resolution of this claim. In his posttrial brief, the petitioner argued that the habeas court could conclude that prejudice resulted from the cumulative effect of Popkin's alleged errors. The habeas court rejected this argument, citing this court's opinion in *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021), which held in relevant part that "[o]ur appellate courts . . . have consistently declined to adopt this [cumulative error analysis]. When faced with the assertion that the claims of error, none of which individually constituted error, should be aggregated to form a separate basis for a claim of a constitutional violation of a right to a fair trial, our Supreme Court has repeatedly decline[d] to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts. . . . Because it

in his posttrial brief, these text messages also were unfavorable to the petitioner.

is not within the province of this court to reevaluate decisions of our Supreme Court . . . we lack authority under the current state of our case law to analyze the petitioner's ineffective assistance claims under the cumulative error rule." (Internal quotation marks omitted.) Id., 281.

The petitioner maintains that whether the cumulative error rule is cognizable in our state is an open question, citing our Supreme Court's decision in *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 159 A.3d 1112 (2017). In *Breton*, which was released in 2017, our Supreme Court stated that "[i]t appears to be an open question whether . . . claims [predicated on the cumulative error rule] are cognizable under Connecticut law." Id., 703. Our Supreme Court declined to resolve this question because it previously had concluded in the opinion "that any purported deficiencies caused no prejudice to the petitioner . . . . In other words, there is no prejudice to aggregate." Id. More recently, this court has iterated that Connecticut law does not recognize the application of the cumulative error rule. See *Zachs* v. *Commissioner of Correction*, supra, 205 Conn. App. 281; *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 819, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020). We decline to revisit this issue in this appeal.[30] See, e.g., *Aviles* v. *Barnhill*, 217 Conn. App. 435, 450, 289 A.3d 224 (2023) ("[I]t is well established that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we have often stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. [That] may be accomplished only if the appeal is heard en banc. . . . Prudence, then dictates that this panel

[30] During oral argument, the petitioner's counsel stated that she raised the cumulative error rule claim in this appeal to preserve it for review by our Supreme Court.

decline to revisit such requests." (Internal quotation marks omitted.)).

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* CHRISTOPHER R.* (AC 45869)

Moll, Suarez and Seeley, Js.

*Syllabus*

The defendant, who had been convicted, following a jury trial, of the crimes of sexual assault in the first degree, risk of injury to a child and attempt to commit sexual assault in the first degree, appealed to this court. He claimed that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary and by denying his request to open the evidence to allow him to testify. At trial, after the state rested, defense counsel informed the court that he did not plan to call any witnesses. The court thereafter canvassed the defendant on his election not to testify, during which the defendant confirmed repeatedly that no one had forced him or threatened him to waive his right to testify. Subsequently, the court found that the defendant had knowingly and voluntarily waived his right to testify. The following day, the defendant addressed the court and stated that he wanted to testify in his defense and that his attorney had forced him not to testify. The defendant indicated that he wanted to testify so that he could alert the jury that the victim, his stepgrandaughter, was his biological child, allegedly conceived when he sexually assaulted her mother when the mother was a teenager. Defense counsel informed the court that he was not filing a motion to open the evidence, and the court stated, inter alia, that, even if there were a motion, it would be denied, as the defendant would intend it only to effect a delay in the proceedings. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary: the defendant'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 indicated that the court had conducted a thorough canvass of the defendant on the issue

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

of whether he had been forced to waive his right to testify, inquiring four times as to whether the waiver was voluntary and asking the defendant whether he understood its questions and whether his answers were voluntary; moreover, the defendant had previously confirmed during the canvass that he understood that the choice of whether to testify was his to make, he made it knowingly and voluntarily, he had sufficient time to discuss the matter with his counsel, who had explained possible consequences of his decision to testify or not, and, when offered the opportunity to ask questions of the court, he did not indicate in any way that his counsel had forced him, pressured him, or otherwise exerted undue influence on him to waive his right to testify; furthermore, the defendant offered only a conclusory assertion and no evidence to support his contention that his counsel forced him not to testify.

2. The defendant could not prevail on his claim that the trial court abused its discretion in denying his request to open the evidence to allow him to testify: because defense counsel elected not to file a motion to open the evidence, and the defendant, represented by counsel, could not file such a motion on his own as Connecticut does not recognize a right to hybrid representation, there was no motion properly before the court upon which to rule; moreover, even if the trial court treated the defendant's comments as a valid motion to open, the defendant's proffered testimony relating to his alleged biological relationship with the victim would have been inadmissible pursuant to the Connecticut Code of Evidence (§§ 4-1 and 4-3), as his contention that the victim was his biological child would not have made any fact material to the determination of whether he sexually assaulted her more or less probable, and such a shocking and inflammatory proclamation posed a high danger of surprising the jury, confusing the issues and wasting time; furthermore, although the court remarked that it believed that the defendant's request to open the evidence was intended to effect a delay, its decision was based on the fact that the defendant had made a valid and voluntary waiver of his right to testify, and the comment, made after the court had ample opportunity to observe the defendant's behavior throughout the course of the trial, was not improper and did not violate the defendant's constitutional rights; additionally, contrary to the defendant's claim, although the court considered the timely progression of the proceedings, it did not give that factor undue weight or subordinate the defendant's right to testify to its desire to stay on schedule.

Argued September 14—officially released December 12, 2023

*Procedural History*

Substitute information charging the defendant with two counts of the crime of risk of injury to a child and with one count each of the crimes of sexual assault in the first degree and attempt to commit sexual assault

in the first degree, brought to the Superior Court in the judicial district of New Britain, and tried to the jury before *Baldini*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*Dina S. Fisher*, assigned counsel, for the appellant (defendant).

*Kathryn W. Bare*, executive assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *David N. Clifton*, senior assistant state's attorney, for the appellee (state).

*Opinion*

SEELEY, J. The defendant, Christopher R., appeals from the judgment of conviction, rendered following a jury trial, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1). On appeal, he claims that the trial court violated his constitutional rights by finding that his waiver of his right to testify was voluntary and denying his request to open the evidence to allow him to testify following his assertion that the waiver of his right to testify was involuntary. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In October, 2018, the victim, N, was fifteen years old and lived with her mother and her two younger sisters. At that time, N's grandmother and the defendant, her grandmother's husband, were also residing in the apartment where N lived. On October 3, 2018, N was in the apartment with her two sisters, discussing a concert that she wanted to attend, when the defendant asked

her what she would be willing to do for the concert tickets. The defendant proceeded to grab her and kiss her. He then asked her to come talk with him in her mother's bedroom. When her sisters became scared and began to cry, N went into the bedroom with the defendant. Once N was in the bedroom with the defendant, he restrained her by grabbing her arm and locking the door. He proceeded to pin her to the bed and sexually assault her. When she cried, he hit her on the mouth. During the assault, he rubbed his genitals against her, penetrated her digitally, and attempted to penetrate her with his penis. The defendant also told N that if she did not stop screaming, he would "get one of" her sisters. Thereafter, the defendant suddenly stopped the assault, sat on the bed, and, while punching himself in the head, said that the "demons" in him had made him assault N.

After N's grandmother returned to the apartment, N communicated to her, using an application on her phone, that she had been assaulted. N's grandmother called N's mother, K, who returned to the apartment. N disclosed the assault to K, who called the police. N subsequently was taken to a hospital, where a sexual assault kit was administered. The defendant was subsequently arrested and taken into custody.

A trial commenced on May 2, 2022. The state presented evidence from multiple witnesses, including N, K, N's grandmother, multiple police officers, the nurse who performed N's sexual assault kit, and two forensic experts. Defense counsel cross-examined each of the state's witnesses. On May 3, 2022, after the state rested, defense counsel informed the court that he did not plan to call any witnesses. The court asked defense counsel if that meant that the defendant had elected not to testify. Defense counsel confirmed that that was his understanding. The court then canvassed the defendant to confirm that he was waiving his right to testify. The court first elicited certain information, including that

the defendant was fifty-seven years old, that he was not under the influence of any alcohol, drugs, or medication, and that he had completed the eleventh grade. The court then asked the defendant whether he had discussed the matter with his attorney, whether he had had enough time to discuss the matter with his attorney, whether his attorney had properly explained the risks and benefits of not testifying with him, whether he understood those risks and benefits, and whether he understood that the decision not to testify was his and only his to make. The defendant answered in the affirmative to each of the court's questions. The following exchange then took place:

"The Court: And is it your personal decision not to testify on your own behalf?

"The Defendant: Yes.

"The Court: Are you waiving your right to testify?

"The Defendant: Yes.

"The Court: Are you waiving your right to testify knowingly and voluntarily?

"The Defendant: Yes.

"The Court: Has anyone forced or threatened you to waive your right to testify?

"The Defendant: Sorry?

"The Court: Has anyone forced or threatened you to waive your right to testify?

"The Defendant: Do I have to answer that?

"The Court: Yes. Has anyone forced or threatened you to give up your right to testify?

"The Defendant: No.

"The Court: All right. So let me ask you the question again. Has anyone forced or threatened you to waive your right to testify?

"The Defendant: No.

"The Court: And is your response to that question a voluntary one? Have any promises been made to you to waive your right to testify? Have you understood all of my questions . . . ?

"The Defendant: Yes.

"The Court: Do you have any questions of the court?

"The Defendant: No."

After the canvass was complete, the court then stated that it had "evaluated and asked this defendant whether or not there [were] any impediments to his judgment or thought process that would affect this ability to make the decision that he just made to not testify in this case. This court has also asked questions to determine this defendant's age, his level of schooling. This court has advised the defendant that he does have a constitutional right to testify . . . which is his choice alone of whether or not he wishes to testify or not. I have canvassed this defendant and I find that the defendant has knowingly and voluntarily waived his right to testify in this case."

The following day, the defendant addressed the court and stated that he now wanted to testify in his defense, claiming that he had been forced not to testify by his attorney.[1] The defendant stated that, "when you asked

[1] Defense counsel denied on the record that the defendant had been forced not to testify, and the defendant provided no explanation as to how defense counsel had in fact forced him not to testify. The defendant had a history of dissatisfaction with his legal counsel, as the three previous attorneys who represented him in this matter all stated that the attorney-client relationship had broken down such that they were no longer able to work with the defendant.

me, [were] you forced or threatened, I said I don't want to answer that question because I was . . . it was not voluntary . . . [i]t was forced. I was forced to say yes. I was forced to do this. . . . I think the jury needs to know the truth. They need to know the truth. Okay. If we [are] going to do justice, let's do justice with the truth, not dishonesty, Your Honor."[2]

The court found that the defendant had knowingly and voluntarily waived his right to testify. The court addressed the defendant directly, stating that "you were aware that you had this choice. I canvassed you on it, I asked you specific questions, and then I asked you whether or not anybody threatened or forced you not to testify; you asked, do I have to answer that question and I said yes, and you paused and then you eventually answered no. The follow up question that the court asked after you responded to that was, is your response to that question truthful, and your response was yes. So, in looking at this situation, the court completed a full canvass because I wanted to make sure that I knew that your [waiver of the] constitutional right on whether you wanted to testify or not was knowing and voluntary, and I made findings that it was."

Defense counsel informed the court that he would not be filing a motion to open the evidence. The court acknowledged this, stating that "[t]he defense . . . is not making a motion to open the evidence. So, technically speaking, there is no motion before the court. I will indicate, however, if there was a motion before the court, [your] request would be denied. I believe that it

[2] The "truth" to which the defendant wanted to alert the jury appears to have been that he believes that N, his stepgranddaughter, is also genetically his daughter. He stated: "They [the jury] need to know; my DNA runs through her body." During trial, K testified, outside the presence of the jury, that the defendant had molested her, beginning when she was eight years old, and that, when she was fifteen years old, he sexually assaulted her, which she believed resulted in her pregnancy with N.

is an obstruction of the proceedings, and it is only intended to effect a delay. I also note that there was a full canvass done of [the defendant] relative to the issue of his decision to testify or not. This issue was raised multiple times. The defendant was advised of his choice early on in this case and during the trial."[3] The court then had counsel for both parties deliver their closing arguments as scheduled. The defendant was found guilty of all charges and sentenced to a term of incarceration of seventeen years, with ten years being mandatory, and twelve years of special parole.

On appeal, the defendant claims, for the first time, that his "constitutional rights were violated by the trial court's refusing his request to [open] [the] evidence to allow him to testify when he asserted that his prior waiver was involuntary." Specifically, he premises his claim of a constitutional violation on his assertions that (1) the court erroneously concluded that his waiver of his right to testify on May 3, 2022, was voluntary and (2) its decision denying his request to open the evidence on May 4, 2022, to allow him to testify was based on flawed reasoning. The defendant further argues that his unpreserved constitutional claim is reviewable pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and that the deprivation of his right to testify "constitutes structural error, requiring automatic reversal of [his] conviction and a new trial." We do not agree.

[3] At the beginning of the proceedings, the court informed the defendant that, although his attorney had the authority to make many strategic decisions, there were some decisions that were reserved solely for the defendant, including "whether you wish to testify . . . whether or not you wish to plead guilty, and whether or not you want to have a trial before a jury of your peers." There was no further discussion between the court and the defendant of his right to testify until the defendant waived his right on May 3, 2022.

Under *Golding*, a defendant can prevail on an unpreserved claim "only if *all* of the following conditions are met: (1) the record is adequate to review the alleged 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 defendant 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." (Emphasis in original; internal quotation marks omitted.) *State* v. *Morel-Vargas*, 343 Conn. 247, 253, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022). In the present case, although the defendant's claim that he was prevented from exercising his right to testify is one of constitutional magnitude, and the record on appeal is adequate to review the claim, we hold that the claim fails under the third prong *of Golding*, as the defendant has failed to show that the alleged constitutional violation exists.

We first set forth the legal principles that guide our analysis of the defendant's claim. A defendant has a constitutional right to testify in his own defense. See *Rock* v. *Arkansas*, 483 U.S. 44, 51–52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right has been found to have "sources in several provisions of the [federal] [c]onstitution." Id., 51. Our Supreme Court previously has discussed the constitutional roots of the right to testify in one's own defense, holding that "[a] criminal defendant also has a right to testify on his own behalf, secured by the fifth, sixth, and fourteenth amendments to the federal constitution. . . . The right to testify includes the right to testify fully, without perjury, to matters not precluded by a rule of evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Francis*, 317 Conn. 450, 460, 118 A.3d 529 (2015). "The [United States Supreme Court's] designation of the right

to testify in one's own defense as more fundamental than the right to self-representation—which the court deemed a personal constitutional right in *Faretta* v. *California*, 422 U.S. 806, 819–20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)—logically implies that the decision of whether to testify is also personal to the defendant. . . . [I]n *Rock*, the [United States] Supreme Court noted that a criminal defendant's right to testify is a necessary corollary to the [f]ifth [a]mendment's guarantee against compelled testimony. . . . Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." (Internal quotation marks omitted.) *State* v. *Morel-Vargas*, supra, 343 Conn. 256–57.

Our Supreme Court recently discussed what constitutes a proper waiver of the right to testify in *Morel-Vargas*, noting that, although it is not required, "an on-the-record canvass of a defendant is the best practice to ensure that the defendant's waiver of his constitutional right to testify is made knowingly, intelligently and voluntarily. Therefore, we exercise our supervisory authority to require, prospectively, that a trial court either canvass the defendant or, in certain circumstances, inquire of defense counsel directly to determine whether counsel properly advised the defendant regarding the waiver of his right to testify." Id., 250. In determining whether the waiver is voluntary, the court stated: "Our task . . . is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to [testify]. . . . Our inquiry is dependent [on] the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the [defendant]. . . . In examining the record, moreover, we will indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . [will] not presume acquiescence in the loss of fundamental rights." (Internal quotation marks omitted.) Id., 260.

In connection with his assertion that the court erroneously concluded that his waiver of his right to testify on May 3, 2022, was voluntary, the defendant argues that the court failed in its obligation to conduct a "probing inquiry to determine the validity" of his waiver of his right to testify. In that respect, he appears to challenge the court's May 3, 2022 canvass, claiming that, because he "plainly manifested hesitation during the canvass," the court was required to inquire further, and if it had done so, "it is reasonable to assume that [he] would have revealed the basis for the next day's revelation that he was 'forced' " to waive his right to testify.[4]

We disagree with the defendant's characterization of his exchange with the court during the canvass on May 3, 2022. The court, in fact, did inquire further when the defendant showed hesitation, as it asked the defendant four times whether he had been forced to waive his right to testify. At first, the defendant responded, "[s]orry," which prompted the court to repeat the question. After the court asked the question a second time, the defendant asked if he had to answer the question. The court

[4] The defendant, citing to *Morel-Vargas*, asserts that, in order for a waiver to be voluntary, the court must determine "at minimum, that (1) defense counsel informed the defendant that the defendant has the right to testify, as well as the right not to testify, and should the defendant choose not to testify, the fact finder may not draw any adverse inferences from the defendant's choice not to testify, (2) defense counsel explained to the defendant that the right to testify belongs to the defendant alone, and no one, including defense counsel, can prevent the defendant from testifying, (3) the defendant has consulted with counsel in making the decision not to testify, and counsel has discussed with the defendant the advantages and disadvantages of testifying, (4) the defendant has had enough time to discuss with counsel the right to testify and the strategic decision not to testify, and the defendant has understood the information counsel has provided, and (5) the defendant has personally waived the right to testify knowingly, intelligently and voluntarily." *State* v. *Morel-Vargas*, supra, 343 Conn. 271. The defendant's claim, however, fails because our Supreme Court decided *Morel-Vargas* after the defendant's trial, creating a prospective rule for how courts must properly canvass a defendant who waives his or her right to testify. Id., 250. The rule does not apply retroactively. Id.

informed the defendant that he did and asked the question for the third time, to which he responded by saying, "[n]o." The court then asked the question for a fourth and final time, and the defendant again reiterated that no one had forced him to waive his right to testify. The court further inquired if the defendant understood its questions and if his answers were voluntary, to which he replied, "[y]es." The defendant's argument that the court did not follow up with him to ensure that his waiver was voluntary is contradicted by the record in this case, which indicates that the court conducted a thorough canvass on the issue of whether the defendant had been forced to waive his right to testify.

Beyond the fact that the court followed up four times to ensure that the defendant had not been forced to waive his right to testify, the defendant already had confirmed on the record that he understood that it was his choice alone to make, that his choice not to testify was his "personal decision," and that he was making that choice "knowingly and voluntarily." The defendant's argument that his waiver was involuntary, and that he had been forced not to testify, is belied by the fact that he told the court, during his canvass on May 3, that he was aware that the choice not to testify belonged solely to him. Furthermore, the defendant confirmed that he had sufficient time to discuss whether to testify with his attorney, that his attorney explained "the pros and cons of not testifying versus testifying on [his] behalf," and that he fully understood them. Most significantly, on the basis of our review of the record on May 3, we conclude that the defendant, despite being offered the opportunity to ask questions of the court, did not indicate in any way that his counsel was pressuring him, forcing him, or otherwise exerting undue influence on him to waive his right to testify.

Moreover, as the state points out in its brief, the defendant offered no evidence to support his contention

that he was forced not to testify. Rather, the defendant stated on May 4: "I told [my attorney] that I wanted to take the stand, okay. Yesterday he looked at me, okay, he said God D, all right. Shut—shut up. All right. I mean, yes, and then he—I should [have] had the paper. He wrote in big capital—all capital letters, okay, control yourself, okay. Not to look, not to look at the jury or nothing. Okay. I—I mean, that's—that's what I was going by. I felt like a little kid sitting right next to him. You do what I tell you to do."[5] In the defendant's own words, his attorney had said "all right" when he expressed a desire to testify. The rest of the exchange suggests the defendant's dissatisfaction with the advice of his counsel about the wisdom of the defendant's potential testimony and counsel's efforts to provide direction on how the defendant should comport himself in the courtroom. Nothing in the defendant's statement suggests that defense counsel had forced the defendant not to testify or that the defendant's waiver was anything other than voluntary. As other courts have held, a mere conclusory assertion after the fact that counsel prevented the defendant from testifying is insufficient to invalidate a waiver. See *Taylor* v. *United States*, 287 F.3d 658, 662 (7th Cir. 2002) (finding no violation of rights in case where defendant's "affidavits show that he discussed [the possibility of testifying] with counsel

[5] Defense counsel addressed the defendant's claim, telling the court that, "[i]n regards to [the defendant's] claim that I somehow tried to threaten him or intimidate him . . . I did write down on the note—on the notepad that he had to control himself and the context of that was, it's that during a portion of the trial he was getting emotional and what I tried to explain from day one, is that there's a jury who is going to decide your fate and you want to put your best foot forward. You want to make the best representation of yourself that you can. So, if they look over at you and they see you getting angry, if they see you getting emotional, if they see you acting up, it is only going to have a negative impact on the end result. So, one of my jobs at times as defense counsel is to tell people, you better calm down, get control of yourself. . . . That was the extent of it. Nothing else was said beyond that."

and decided not to testify after counsel pointed out the risks"); *Underwood* v. *Clark*, 939 F.2d 473, 476 (7th Cir. 1991) ("[A] barebones assertion by a defendant [that his counsel forced him not to testify], albeit made under oath, is insufficient to require a hearing or other action on his claim that his right to testify in his own defense was denied him. It just is too facile a tactic to be allowed to succeed."); *Siciliano* v. *Vose*, 834 F.2d 29, 31 (1st Cir. 1987) (record "suggest[ing] that appellant knew that, legally speaking, he could testify if he chose . . . but [that] he chose not to testify as a matter of trial strategy, perhaps at the strong urging of counsel" is insufficient to "demonstrate that his constitutional right to testify was violated"); see also *State* v. *Crenshaw*, 210 Conn. 304, 311–12, 554 A.2d 1074 (1989) (in case in which defendant sought to withdraw guilty plea, claim that he pleaded guilty because his attorney had instructed him to do so was insufficient ground for withdrawal of plea); *State* v. *Spence*, 29 Conn. App. 359, 364–65, 614 A.2d 864 (1992) (trial court did not abuse its discretion in refusing to allow defendant to withdraw his guilty plea, despite defendant's claim that court had coerced him to enter plea). We conclude, therefore, that the court properly determined that the defendant's waiver on May 3 was voluntary.

We now turn to the defendant's claim that the court's decision not to open the evidence on May 4, 2022, was based on flawed reasoning. The defendant makes a number of arguments[6] in support of this claim, including, inter alia, that (1) the admissibility of the proffered

[6] The defendant also claims that the court's refusal to open the evidence was based on its erroneous conclusion that his waiver of his right to testify the previous day was voluntary and that the court erred in concluding that there was no motion before it to open the evidence and, thereby, essentially allowed defense counsel to waive the defendant's right to testify. In light of our conclusions that the defendant's waiver of his right to testify was voluntary, that there was no motion to open properly before the court, and that there is no right to hybrid representation, these claims necessarily fail, and we need not address them further.

evidence is not relevant to the decision to open the evidence given "the defendant's absolute right to testify," (2) "[t]here was no basis in the record for the court's conclusion that [his] request was 'an obstruction of the proceedings and . . . only intended to effect a delay,' " and (3) the court, in refusing to open the evidence, "subordinated the defendant's constitutional rights to its administrative concerns."[7]

[7] The defendant has also attempted to create new procedural requirements for a court following a waiver of the right to testify, arguing that, once he told the court the following day that he had been "forced not to testify," the court was required to make both a "thorough inquiry" and to conduct a "thorough evidentiary hearing" into his waiver. This claim fails for the following reasons. First, the defendant does not provide any authority that is on point to support his claim that a court is required to conduct a "thorough inquiry" or "an evidentiary hearing" upon being informed that a defendant was forced into waiving his right to testify after the court already had completed a successful canvass and made a determination that the waiver was voluntary. Instead, the cases on which the defendant relies require that a court properly canvass a defendant to make sure that his waiver is voluntary, intelligent, and knowing and that the defendant is aware of his rights, which, in this case, the court had done the day before. See, e.g., *State* v. *Cushard*, 328 Conn. 558, 568, 181 A.3d 74 (2018); see also *United States* v. *Calabro*, 467 F.2d 973, 985 (2d Cir. 1972) (holding that waiver of right to counsel must be "knowingly [and] intelligently made" and that defendant must be aware that he has choice and he makes that choice himself), cert. denied, 410 U.S. 926, 93 S. Ct. 1358, 35 L. Ed. 2d (1973), and cert. denied sub nom. *Tortorello* v. *United States*, 410 U.S. 926, 93 S. Ct. 1357, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Conforti* v. *United States*, 410 U.S. 926, 93 S. Ct. 1386, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Conforti* v. *United States*, 410 U.S. 926, 93 S. Ct. 1386, 35 L. Ed. 2d 587 (1973), and cert. denied sub nom. *Picciano* v. *United States*, 410 U.S. 926, 93 S. Ct. 1403, 35 L. Ed. 2d 587 (1973). As previously discussed in this opinion, the court had clarified for the defendant, prior to his waiver on May 3, that his decision not to testify was his alone, and that he was doing so voluntarily and after having ample time to consult with counsel about that decision.

Second, on May 4, upon hearing the defendant's claim that he had been forced not to testify, the court did inquire further. After being informed by defense counsel that the defendant now wanted to testify, the court provided the defendant with an opportunity to explain. The court followed up multiple times with the defendant to let him expand on his contention that his waiver had been involuntary. At no point in response to the court's prompting did the defendant provide a compelling explanation for how defense counsel had "forced" him not to testify. Instead, the defendant proclaimed his general dissatisfaction with counsel's strategic decisions. We conclude that the court adequately assessed the defendant's claims on May 4.

Before we consider the merits of these claims, we must address the proper standard of review applicable to a court's decision not to open the evidence after the defense has rested. The defendant acknowledges that an abuse of discretion standard typically applies to such a decision but, nonetheless, argues that our standard of review should be plenary, as the court's failure to open the evidence involved its conclusion that the defendant's waiver of his right to testify the previous day was voluntary, which presents a mixed question of law and fact. The state counters that "there was no motion to [open the] evidence properly before the court and, therefore, the trial court correctly declined to rule on any such motion. There is no preserved ruling on a motion to [open the] evidence to review." Specifically, the state argues that the choice to file a motion to open lies solely with trial counsel, not the defendant himself, and that, in this case, there was no motion to open before the court because defense counsel declined to file one. The defendant appears to argue in response that, because the right to testify belongs to the defendant and cannot be waived by trial counsel, the defendant had the authority to file a motion to open the evidence, and that, upon hearing his statement that his previous waiver was involuntary, the court should have treated that statement as a motion to open the evidence. We agree with the state.

Finally, as to the defendant's argument in his reply brief that the court was required to conduct an evidentiary hearing, such an argument may not be raised for the first time in a reply brief, and, accordingly, we decline to address it. See *State* v. *Richardson*, 291 Conn. 426, 431, 969 A.2d 166 (2009) ("[b]ecause the defendant failed to raise this issue in his main brief, it is abandoned . . . [as] [i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (citation omitted; internal quotation marks omitted)); see also *State* v. *Myers*, 178 Conn. App. 102, 106–107, 174 A.3d 197 (2017) ("Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer." (Citation omitted.)).

Connecticut does not recognize a right to hybrid representation. "[T]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them." (Internal quotation marks omitted.) *State* v. *Despres*, 220 Conn. App. 612, 622 n.8, 300 A.3d 637 (2023). Once a defendant elects to be represented by counsel, the ability to file a motion of this type has been found squarely to belong to counsel. See *State* v. *Joseph*, 174 Conn. App. 260, 275, 165 A.3d 241 (holding that defendant represented by counsel did not have right to file pro se motion to dismiss and for speedy trial), cert. denied, 327 Conn. 912, 170 A.3d 680 (2017); see also *State* v. *Gibbs*, 254 Conn. 578, 611, 758 A.2d 327 (2000) (holding that defendant represented by counsel could not file pro se motion to dismiss).

In the present case, defense counsel specifically stated that he was not making a motion to open the evidence. Furthermore, the defendant did not actually file a motion to open the evidence but, rather, stated that his previous waiver was involuntary and that he now wanted to testify. Because defense counsel elected not to file a motion to open the evidence and the defendant, represented by counsel, could not file such a motion on his own, there was no motion properly before the court on which to rule. The court acknowledged such, stating that, "technically speaking, there is no motion before the court."

We note, however, that the court further stated: "[I]f there was a motion before the court, [the defendant's] request would be denied. I believe that it is an obstruction of the proceedings, and it is only intended to effect a delay. I also note that there was a full canvass done of [the defendant] relative to the issue of his decision to testify or not. This issue was raised multiple times.

The defendant was advised of his choice early on in this case and during the trial."

Even if we construe the defendant's statement as a request or motion to open the evidence, we conclude that the court properly exercised its discretion in denying the request. It is well established in our case law that "[w]e review a trial court's decision to [open] evidence under the abuse of discretion standard." (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, 219 Conn. App. 276, 341, 295 A.3d 973, cert. denied, 348 Conn. 913, A.3d (2023). "The decision to reopen a criminal case to add further testimony lies within the sound discretion of the court, which should be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The purpose . . . is to preserve the fundamental integrity of the trial's truth-finding function." (Internal quotation marks omitted.) *State* v. *Orr*, 199 Conn. App. 427, 469, 237 A.3d 15 (2020). In determining "whether the trial court acted within its broad discretion in rejecting the defendant's request for permission to introduce [evidence] after the defendant had rested his case, we consider the admissibility of the proffered evidence, as well as the specific circumstances of the defendant's request, including the state's interest in an orderly trial process, the potential for jurors to have placed undue emphasis on the evidence had it been admitted, and the nature of the evidence." (Internal quotation marks omitted.) *State* v. *Komisarjevsky*, 338 Conn. 526, 612, 258 A.3d 1166, cert. denied, 303 U.S. 602, 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021).

The defendant's argument that the admissibility of the proffered evidence is irrelevant to the issue of whether the court should have opened the evidence is incorrect. A criminal defendant has a right to testify on his own behalf, but that right "is not without limitation."

*Rock* v. *Arkansas*, supra, 483 U.S. 55. In determining whether the trial court acted within its discretion in denying the request to open the evidence made after the defense had rested, this court may consider a number of factors, including the admissibility and nature of the proffered evidence. See *State* v. *Komisarjevsky*, supra, 338 Conn. 612; *State* v. *Carter*, 228 Conn. 412, 425, 636 A.2d 821 (1994). In the present case, the defendant indicated that he wanted to testify to the fact that N, his stepgranddaughter, is actually his daughter, who allegedly was conceived when he sexually assaulted her mother when her mother was a teenager, and that this alleged biological relationship explained the presence of his DNA in the epithelial sample that was taken from the interior of N's vagina at the hospital after she reported the assault.

The defendant's proffered testimony would have been inadmissible. This proposed testimony, as noted by the state in its brief, "would not explain why the DNA found in a sample generated from the epithelial fraction of the vaginal swab taken from inside N's vagina was consistent with the defendant's DNA profile,"[8] and,

[8] Angela Przech, the forensic science examiner with the state laboratory who performed DNA testing on the swabs that had been obtained from the victim at the hospital within hours of the assault, testified regarding the procedures used to test the DNA evidence in this case. During her testimony, the state introduced a laboratory report signed by Przech and another forensic examiner dated October 3, 2019, that describes the results of the DNA testing. The report states that the laboratory tested vaginal, genital, and mouth swabs taken from N, as well as a buccal sample from the defendant for comparison. See *State* v. *Walker*, 332 Conn. 678, 683 n.2, 212 A.3d 1244 (2019) ("[a] buccal swab involves rubbing a Q-tip like instrument along the inside of the cheek to collect epithelial cells"). Przech testified that a genital swab comes from the outer regions of the genital area, while a vaginal swab is "taken internally from the vagina." The report states that the material that was extracted from the swabs was separated "into an epithelial-rich fraction . . . and a sperm-rich fraction." She explained that epithelial cells are those that "people shed . . . like from their body . . . . If you have dry skin, you tend to slough off a lot of your cells and leave them behind . . . . If you rub your hands together over something you may leave [epithelial cells] behind." The report concluded that the epithelial-rich fraction

therefore, it would not have been admissible under §§ 4-1 and 4-3 of the Connecticut Code of Evidence.

Under § 4-1 of the Connecticut Code of Evidence, " '[r]elevant evidence' means any evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." We conclude that the defendant's proffered testimony would have been inadmissible because his contention that the victim was his daughter would not have made any fact material to the determination of whether he sexually assaulted her more or less probable, including the presence of his DNA in the sample taken from her vagina. Moreover, under § 4-3 of the Connecticut Code of Evidence, "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Even if the potential parental relationship between the defendant and N were relevant to a determination of his guilt, such a shocking and inflammatory proclamation posed a high danger of surprising the jury, confusing the issues, and wasting time, as the prosecution would have had to respond by bringing back an expert to testify about how the defendant's potential paternal connection was unrelated to the DNA obtained from the vaginal swab. Therefore, we conclude that, due to the nature and admissibility of the proffered testimony, and assuming that the court treated the defendant's comments as a valid motion to open and denied the motion, it did not abuse its discretion in electing not to open the evidence.

extracted from one of the victim's vaginal swabs was consistent with the defendant (or another member of the same paternal lineage) being the source.

We now turn to the defendant's final two arguments: that there was no basis in the record for the court's observation that the defendant's request was meant to effect a delay and that the court improperly elevated administrative concerns in its decision not to open the evidence.

We begin by noting that, although the court remarked that it believed the request to open the evidence was "intended to effect a delay," its decision did not rest on that observation but, rather, was based on the fact that the defendant had made a valid and voluntary waiver of his right to testify on May 3, 2022. Moreover, the defendant's contention that there was no basis for the court's remark about his intent to delay the proceedings is unavailing, as the court had had ample opportunity to observe the defendant's behavior throughout the course of the trial.[9] The defendant and the court had multiple exchanges leading up to the canvass on May 3, 2022, all of which were of such a nature that they support an inference of an interest by the defendant to delay the proceedings. Therefore, we conclude that the court's comment that it believed that the defendant intended to cause a delay in the proceedings was not improper and did not violate the defendant's constitutional rights.

Finally, the record reflects that, although the court considered the timely progression of the proceedings, it did not give that factor undue weight, as claimed by the defendant. The court, in addressing the defendant, stated that "we closed evidence and as you heard, we talked about scheduling and we're already behind at

[9] Indeed, in light of the defendant's behavior that followed the court's denial of the defendant's request, which caused significant delays and disruptions, and eventually necessitated the defendant being moved to two other rooms within the courthouse so that he could not disrupt the proceedings, the court seems to have appropriately estimated the potential risk the defendant posed in disrupting the proceedings.

this point, but . . . this is important stuff. So, I want to make sure that we're really clear on it. We specifically scheduled what we were going to do today based upon what happened yesterday. . . . Now you're coming in and saying that you do want to testify after you were canvassed . . . [a]m I correct about that?" The court's brief reference to the schedule and to administrative concerns does not suggest that the court subordinated the defendant's right to testify to its desire to stay on schedule. Rather, in light of its determination that the defendant already had made a valid waiver of his right to testify the previous day, the court considered the other concerns within its purview before issuing its decision denying his request to open the evidence. See *State* v. *Komisarjevsky*, supra, 338 Conn. 612 ("interest in an orderly trial process" is proper consideration in determining whether court abused its discretion in denying request to introduce evidence after defendant had rested his case). Accordingly, even if we were to conclude that the court did, in fact, deny a motion to open, its ruling was not an abuse of its discretion.

We conclude, therefore, that the defendant's unpreserved claim that he was denied his constitutional right to testify fails to meet the third prong of *Golding*, as there was no constitutional violation.[10] The defendant

[10] In light of our determination that there was no error, constitutional or otherwise, the defendant's structural error claim necessarily fails. Structural errors are those which "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. . . . These are structural defects in the constitution of the trial mechanism, which defy analysis by [harmless error] standards. . . . Instead, structural errors require reversal of the defendant's conviction and a new trial. . . . Constitutional violations have been found to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (Internal quotation marks omitted.) *State* v. *Joseph A.*, 336 Conn. 247, 264–65, 245 A.3d 785 (2020). Because we find that there is no error, we need not decide whether the doctrine of structural error applies to the denial of the right to testify.

was not deprived of his right to testify but, rather, voluntarily relinquished it on May 3, 2022, which we have determined to be a valid waiver after a thorough canvass. The fact that the defendant did not testify does not mean that he was deprived of a fair trial, especially when he voluntarily waived his right to testify and the substance of his proffered testimony would have been inadmissible.

The judgment is affirmed.

In this opinion the other judges concurred.

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## SUSAN F. GAINTY *v.* MICHAEL INFANTINO
## (AC 45506)

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

*Syllabus*

Pursuant to statute (§ 46b-84 (c)), a trial court may make appropriate orders of support for any child with, inter alia, a mental disability who resides with a parent and is principally dependent upon such parent for maintenance until such child attains the age of twenty-one.

The defendant father appealed from the judgment of the trial court ordering him to pay support pursuant to § 46b-84 (c) for his daughter. The plaintiff mother filed motions requesting that the court enter an order extending child support, educational support, and medical and dependent care and modifying child support until the parties' daughter attained the age of twenty-one on the basis that the daughter has a qualifying disability. The defendant contested that their daughter had a mental disability and that she had resided with the plaintiff during the time period at issue, as required by § 46b-84 (c). After a hearing before the court, at which the plaintiff presented expert testimony about the daughter's mental disabilities and both parties testified, the court issued orders that required the defendant to comply with outstanding discovery requests and required both parties to submit updated financial affidavits within two weeks. The court also ordered counsel to prepare updated proposed orders, indicating that the plaintiff's proposed orders should include specific monetary amounts with regard to the expenses she had incurred on her daughter's behalf and the defendant's proposed orders should include an indication as to whether he agreed or disagreed with each amount listed in the plaintiff's proposed orders. The plaintiff submitted proposed orders in accordance with the court's order, requesting that

the defendant be ordered to pay a higher amount per week in child support retroactive for the period of time from when the daughter turned nineteen to when she turned twenty-one. The defendant did not comply with the court's directive to file proposed orders, and he failed to file any other posttrial document. The trial court found that the plaintiff had satisfied her burden under § 46b-84 (c) and adopted the plaintiff's proposed orders as orders of the court, finding that the daughter was mentally disabled as defined in the applicable statute (§ 46a-51), that she had lived with the plaintiff at all times, and that the defendant was capable of procuring the funds for the financial obligations warranted in the present matter. The court ordered that the defendant pay the plaintiff the retroactive child support in lump sum payments and to reimburse the plaintiff for one half of her expenditures made for their daughter's medical and school expenses up to her twenty-first birthday, including costs of attendance at a residential educational and treatment facility for children with disabilities that the daughter attended for most of her high school years and a postgraduate year and her attendance at a special education college. After the defendant filed his appeal to this court, the plaintiff filed a motion for appellate counsel fees, which the court granted after a hearing. The defendant thereafter amended his appeal to challenge the court's award of appellate attorney's fees. *Held*:

1. This court declined to review the defendant's unpreserved claim that the order requiring reimbursement for the daughter's educational expenses was barred by the principles of res judicata and collateral estoppel: although, on appeal, the defendant relied on two previous trial court rulings for his claim that the plaintiff's entitlement to reimbursement for educational expenses related to the daughter's high school and college had been addressed by two prior court orders, at no point in the present proceeding before the trial court did the defendant alert that court to any argument of collateral estoppel or res judicata with respect to the educational expenses related to the daughter, and, therefore, those claims were not properly before this court; moreover, contrary to the defendant's claim that the trial court in a previous ruling had determined that the costs for the daughter's college exceeded its authority pursuant to statute (§ 46b-56c), that court had never been asked to address a claim under § 46b-84 (c) and, in fact, the court's ruling denying the plaintiff's motion for postsecondary educational support made no mention of § 46b-84 (c), the college, or the disabilities of the parties' daughter.
2. The defendant could not prevail on his claim that the trial court abused its discretion by modifying the child support orders without considering the child support guidelines or other statutory criteria and that the court, under § 46b-84 (c), had the authority only to extend, not modify, the support order: because the defendant failed to raise before the trial court any claim regarding the court's statutory authority to issue a support order that exceeded his original weekly child support obligation

when the daughter was a minor, this court declined to review that claim; moreover, although the defendant claimed that the court failed to consider his other qualified dependents, namely, his three minor children, in making its support order, that contention was unsupported by the record, as the defendant failed to identify in his appellate brief any evidence that he presented to the trial court as to the needs of those children, and, despite his failure to file an updated financial affidavit as expressly ordered by the court, the court nevertheless considered the defendant's financial circumstances in making its support order and found that the defendant was more than capable of procuring funds for the financial obligations that were warranted in this matter.

3. The trial court did not abuse its discretion in awarding appellate attorney's fees to the plaintiff: the court expressly stated that it had considered the criteria set forth in the statute (§ 46b-82) governing the award of attorney's fees in family court proceedings, as required by statute (§ 46b-62), and the court's general reference to those criteria was all that was required; moreover, contrary to the defendant's argument that the court failed to consider the parties' financial affidavits and the assets listed therein, the court expressly found the defendant not credible with respect to the claimed decrease in earnings listed in his financial affidavit, a credibility determination that this court would not second-guess; furthermore, although the defendant claimed that the plaintiff had more cash assets than he did, the court found that the financial situations of the parties were not at all parallel and that the award of counsel fees was essential so as to not undermine the court's decision directing the defendant to contribute to the support of the parties' special needs child.

Argued October 17—officially released December 12, 2023

*Procedural History*

Action to establish paternity of the plaintiff's minor children, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Prestley, J.*; judgment declaring that the defendant is the father of the plaintiff's minor children and granting certain other relief; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the plaintiff's motions for extension of child support for a child with a qualified disability and for modification of child support, from which the defendant appealed to this court; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the plaintiff's

motion for appellate counsel fees, and the defendant filed an amended appeal. *Affirmed.*

*John F. Morris*, for the appellant (defendant).

*Steven R. Dembo*, with whom were *P. Jo Anne Burgh*, and, on the brief, *Seth J. Conant*, for the appellee (plaintiff).

*Opinion*

ALVORD, J. The defendant, Michael Infantino, appeals from the judgment of the trial court ordering support pursuant to General Statutes § 46b-84 (c),[1] which authorizes the court, inter alia, to issue orders of support for a child who has a mental disability until

[1] General Statutes § 46b-84 (c) provides: "The court may make appropriate orders of support of any child with intellectual disability, as defined in section 1-1g, or a mental disability or physical disability, as defined in subdivision (15) of section 46a-51, who resides with a parent and is principally dependent upon such parent for maintenance until such child attains the age of twenty-one. The child support guidelines established pursuant to section 46b-215a shall not apply to orders entered under this subsection. The provisions of this subsection shall apply only in cases where the decree of dissolution of marriage, legal separation or annulment is entered on or after October 1, 1997, or where the initial support orders in actions not claiming any such decree are entered on or after October 1, 1997."

We note that § 46b-84 (c) has been amended since the events underlying this appeal by No. 23-137, § 64, of the 2023 Public Acts, effective October 1, 2023. Public Act 23-137, § 64, defines mental disability by reference to General Statutes § 46a-51 (20), which provides: " 'Mental disability' refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders . . . .' " Public Act 23-137, § 64, also increased the age limit for orders of support for disabled children until the child attains the age of twenty-six, but those provisions "shall apply only in cases where the decree of dissolution of marriage, legal separation or annulment is entered on or after October 1, 2023, or where the initial support orders in actions not claiming any such decree are entered on or after October 1, 2023."

In the present case, because the initial support order was entered before October 1, 2023, the amendments to § 46b-84 (c) are not relevant to this appeal. All references to § 46b-84 (c) herein are to the current revision of the statute.

the child attains the age of twenty-one. On appeal, the defendant claims that the court (1) improperly ordered him to reimburse the plaintiff, Susan F. Gainty, for one half of the medical and special schooling expenditures the plaintiff had made on behalf of the parties' child, (2) exceeded its authority in issuing its support order, and (3) abused its discretion in awarding appellate attorney's fees to the plaintiff. We affirm the judgment of the court.

This matter originated in 2001 as an action to establish the paternity of the parties' two children, a son, born in 1998, and a daughter, born in 2001 (daughter). In May, 2001, the trial court, *Prestley, J.*, entered judgments of paternity as to the children and ordered the defendant to pay child support in the amount of $250 per week.[2]

[2] The transcript of the hearing in the action to establish paternity also reflects that the court intended to order the defendant to pay 50 percent of daycare and medical expenses and that the parties had agreed to these orders.

Specifically, the following exchange occurred:

"[The Plaintiff's Counsel]: According to [the child support guidelines worksheet], on the basis of [the defendant's] income, it would yield a child support order of $225 a week and 40 percent share of daycare and medical.

"The Court: Okay.

"[The Plaintiff's Counsel]: What we're asking the court to order is 50 percent as well as $250 a week to memorialize what's currently being done and what has been done.

"The Court: Okay. All right. I'll make that order."

Although the order regarding daycare and medical expenses appears to have been inadvertently omitted from the written order, the parties, at all relevant times in this litigation, have operated under the understanding that the daycare and medical expenses were ordered as stated in the transcript. For example, the file reflects that during the July 21, 2010 contempt proceeding, the parties agreed as to the amount of the daycare and medical arrearage, $3443.46, which was ordered to be paid directly to the plaintiff by the defendant.

In his appellate brief, the defendant makes passing reference to the omission, while acknowledging that "[t]he court file reflects that the court regularly assumed such an order existed and has entered orders as if [the medical expenses order had been issued] . . . ." The defendant neither directs this court to any instance in which he ever contested the award of medical

For the past fifteen years, the parties have been engaged in postjudgment litigation involving the defendant's failure to comply with the court's child support orders. Prior to the proceedings at issue in this appeal, the defendant had been found in contempt five times, two of which involved the court issuing a mittimus against the defendant with purge amounts of $15,000 and $3000. The court issued a capias on four occasions, following the defendant's failure to appear for court proceedings, and each capias contained a bond amount.

On December 11, 2019, the then self-represented plaintiff filed a motion captioned "motion for order for extension of child support order, education, medical, dependent care expenses through age twenty-one for a child with a qualified disability." In her handwritten motion, the plaintiff stated that she was requesting that the court enter an order extending "child support, education support, medical, dependent care" for their daughter until age twenty-one on the basis that the daughter has a qualifying disability. On December 17, 2019, the plaintiff, who continued as a self-represented litigant, filed a motion for modification of child support. Therein, she represented that the child has a qualifying disability and is eligible for support through age twenty-one. She further represented that there are "[s]ignificant expenses for care, support, needed services." She requested, inter alia, that the court "[o]rder current support," that the court order the defendant to "[c]ontribute to child care/support programs," and, under "[o]ther" orders, she handwrote "[e]xpenses pertaining to services, care, programs, education, [and] medical expenses."

The court, *Hon. Constance L. Epstein*, judge trial referee, held a hearing on the plaintiff's motions on

expenses as inconsistent with the original judgment, nor does he raise such a claim on appeal.

February 16, 2022. Although the defendant did not file an objection to the plaintiff's motion, the court understood his objection to be twofold: contesting that their daughter had a mental disability and that she had resided with the plaintiff during the time period at issue. The plaintiff presented the expert testimony of Julie Casertano, a clinical psychologist who had been treating the parties' daughter since 2006. Casertano testified that the parties' daughter had been diagnosed with several mental disabilities, including nonverbal learning disorder, disruptive mood dysregulation disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, and generalized anxiety disorder. Casertano testified that several of the daughter's diagnoses are classified as mental disorders in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). Casertano testified regarding the daughter's emotional and behavioral outbursts and inability to obtain a full-time job or live independently.

The plaintiff also presented the expert testimony of Christina Ciocca, who conducted two neuropsychological evaluations, one in 2016 and one in 2019, on the parties' daughter. Ciocca testified as to the daughter's diagnoses of nonverbal learning disorder, major depressive disorder, and generalized anxiety disorder. She testified that she opined in her report that, "[g]iven her complex profile, persistent difficulties, [and] recent relapse, [the parties' daughter] must remain eligible for services through age 22." Ciocca testified that she had recommended that the family seek a conservatorship over their daughter because Ciocca's test results revealed that "[their daughter] was not able to fully appreciate and make decisions on her behalf and in her best interest." Ciocca stated that, at the time of her report in 2019, she did not believe that the daughter could live independently.

The plaintiff and the defendant also testified at the hearing. The plaintiff testified that she was employed as a special education teacher, earning approximately $75,000 annually. The plaintiff testified as to the expenses she has incurred on behalf of the daughter, including medical expenses and expenses related to Franklin Academy, a residential educational and treatment facility for children with disabilities that the daughter attended for most of her high school years and a postgraduate year, and Landmark College, a special education college that the daughter attended. The defendant testified that he was self-employed in landscape construction, earning approximately $165,000 annually. The defendant testified that he did not deny that the daughter had experienced the issues to which the experts had testified or that the plaintiff had incurred costs for their daughter and, in fact, testified that his "eyes may have enlightened a little more today," but nevertheless maintained that he should not be obligated to assist in the support of their daughter until she reached the age of twenty-one.

During the February 16, 2022 hearing, the court also received documentary evidence, including the two neuropsychological evaluations performed by Ciocca and a document summarizing the plaintiff's expenses, all of which were admitted into evidence without objection. The court also considered the defendant's October 21, 2021 financial affidavit[3] and the plaintiff's February 11, 2022 financial affidavit.

[3] The defendant represents in his appellate brief that the court had before it at the time of the February, 2022 hearing his current financial affidavit. He provides, in his appendix, a financial affidavit dated February 12, 2022. The court file, however, does not reflect the filing by the defendant of a February 12, 2022 financial affidavit. Moreover, during the hearing, the court stated on the record that it had the defendant's October 21, 2021 financial affidavit, and the plaintiff's counsel questioned the defendant with respect to that October affidavit. The court noted in both of its memoranda of decision that the defendant had failed to file an updated financial affidavit. Although the plaintiff references the defendant's February, 2022 financial affidavit in her appellate brief, she also represents that "[t]he defendant failed to file a current financial affidavit at the time of trial in February, 2022."

At the conclusion of the hearing, the court specifically inquired of counsel whether the child support guidelines applied to this matter, and both counsel responded that the guidelines do not apply. The court orally issued orders to the parties and thereafter issued a written order that required the defendant to comply with outstanding discovery requests and both parties to submit updated financial affidavits within two weeks. The court also ordered the following: "Counsel are to prepare updated proposed orders. The plaintiff's proposed orders shall include specific monetary amounts. The defendant's proposed order[s] shall include an indication as to whether he agrees or disagrees with each amount listed in the plaintiff's proposed orders."

On March 1, 2022, the plaintiff submitted her posttrial memorandum in accordance with the court's February 16, 2022 order. In her proposed orders, she requested, inter alia, that the defendant be ordered to pay $300 per week in child support retroactive for the period of January, 2020, through January, 2022, when their daughter turned twenty-one. The defendant did not comply with the court's directive to file proposed orders, and he failed to file any other posttrial document.

As the court noted in its April 28, 2022 memorandum of decision, which was reissued as corrected to address typographical errors on August 25, 2022, "[a]t the time of the February 16, 2022 hearing in this matter, [the defendant] had still not complied with long overdue production requests on financial matters, and when questioned as to that significant delay, he replied that

Because there is no indication in the record that the defendant filed a February, 2022 financial affidavit and the parties and the court used the October, 2021 financial affidavit during the hearing, we also reference the defendant's October, 2021 financial affidavit.

he was 'too busy.' At the close of the hearing on February 16, 2022, the court ordered [the defendant's] compliance with the production requests and an updated financial affidavit within two weeks. As of the date of this memorandum of decision, the court file still does not reflect any notice of compliance by [the defendant] to the outstanding discovery, nor does it reflect the filing of an updated financial affidavit by [the defendant]."

The court made the following findings with respect to the parties' daughter. "Casertano describes [the daughter] as extremely limited in her cognitive abilities and in her ability to maintain any interpersonal relationships. [She] is anxious about almost all normal everyday activities and experiences and finds almost everything in her life to be not only challenging but very often overwhelming. Some of [her] difficulties include her inability to maintain regular sleep/awake patterns ([her] sleep is irregular in that she will be awake for days and then sleep for days); she has severe mood swings and subjects her family and others to violent emotional outbursts, some resulting in property destruction; she has alienated herself from her older brother and has made home life very turbulent for her mother and her two younger half brothers because of her frequent belligerent outbursts, temper tantrums, irritability, anger, constantly combative disruptive behavior, and general inability to interact well consistently with anyone. [She] cannot hold down employment or support herself. While she has been able to achieve some temporary gains, such as participating in certain activities for a while at the schools she has attended, she is, and has been, totally dependent upon her mother for food, shelter, compliance with necessary medication regimes and other basic needs. [Casertano] testified that [the daughter] has not been able to, and cannot now, live on her own." The court found that "Casertano has diagnosed

[the daughter] as suffering from several 'mental disorders' as described in the [DSM-5]: disruptive mood dysregulation disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, exaggerated startle response, and generalized anxiety disorder. [She] also suffers from a nonverbal learning disorder. [Casertano] has referred [her] many times to family therapy, individual therapy, consultations, and just about any other pragmatic approach one could imagine to assist this young woman, and [the plaintiff] has followed all of these recommendations. Casertano opined that, despite some temporarily experienced minor progress from time to time, [the daughter] has continued to suffer from these disabilities throughout the time at issue and does to this very day." (Footnote omitted.)

The court explained that Ciocca substantiated Casertano's opinion and noted that Ciocca, "[i]n her latest report . . . opined that [the daughter] could not live independently. lndeed, [Ciocca] made no less than thirty-two recommendations to assist in addressing the significant disabilities from which the child suffers, even including the possibility of application for a full legal conservatorship for the child."

The court further found that "[the daughter] has always lived with [the plaintiff]. At age eleven or twelve, [the daughter] stopped visiting with [the defendant], and before that, the visitation was minimal. Outside of child support until the age of majority, which is still in arrears, [the plaintiff] has not been provided any financial or other assistance from [the defendant]. The only exception to this is that [the defendant] would very occasionally see [their daughter] when she was in one of her exceedingly negatively hyper moods and he would offer to calm her down. At the hearing in this matter, [the defendant] did not present any evidence regarding [their daughter's] diagnoses. lndeed, after hearing the other evidence presented at the hearing, [the defendant]

testified that he does not disagree that [their daughter] is a troubled young woman and that he had learned some things from the testimony that had been elicited."

The court found: "During the time at issue, [the daughter] attended Franklin Academy in East Haddam . . . and, for a short time thereafter, Landmark College in Putney, Vermont. Both of these schools are residential facilities for individuals with learning and other disabilities, and the schools provide special supervision and attention." The court found that the daughter always had resided with the plaintiff and continued to do so at the time of the hearing.

The court made findings with respect to each of the parties' financial situations. With respect to the plaintiff, the court found that she earns approximately $78,000 annually from her work at a technical high school and that she has lost time from work due to the daughter's needs. The court also found that the plaintiff has paid for all of their daughter's expenses and refinanced the mortgage on her home to manage payment of those expenses.

With respect to the defendant, the court found that he is "more than capable of making the financial obligations that are warranted in this matter and is capable of procuring the funds for same." Specifically, the court found that the defendant is self-employed in "landscape construction," and his financial affidavit reported income of approximately $163,000 annually. The court noted that the defendant's financial affidavit reported an excess of income over all expenses in the amount of $400 weekly. The court also made findings with respect to the defendant's home purchase in summer, 2021.[4] The court expressly did not credit the defendant's

[4] The court noted the defendant's testimony that he "averred to the mortgage company that he was seeking a waiver of his past due pre-majority child support arrears when he was applying for the mortgage."

entry on his financial affidavit of the value of his home in the amount of $409,000, on the basis of his testimony that he had paid $455,000 for his home a few months earlier.

The court found that the plaintiff had satisfied her burden under § 46b-84 (c) and adopted the plaintiff's proposed orders as orders of the court. The court ordered the defendant to pay $300 weekly for the period of January 24, 2020, to January 24, 2022, amounting to a total of $31,200 due for his share of their daughter's support. The court ordered that amount to be paid in four equal lump sum payments of $7800, with the first payment due on May 30, 2022, and the final payment due on November 28, 2022. In addition, the court ordered the defendant to pay the plaintiff immediately the "sum of $683.10, an amount to which he stipulated was past due pre-majority obligations on his part."

Finally, the court ordered the defendant to reimburse the plaintiff for one half of her expenditures made for their daughter's "medical and school expenses up to January 25, 2022 . . . ." The court ordered the plaintiff to submit, within one week, a listing of the expenditures "in chronological order and with identification because the court finds the list submitted to be confusing." On May 6, 2022, the plaintiff submitted a spreadsheet identifying expenditures she had made with respect to the daughter's medical and special schooling costs, together with documentation of the expenditures listed therein. The spreadsheet contained forty-seven entries, totaling $91,328.56. She identified, as the defendant's 50 percent share due, the amount of $44,651.78.

On May 6, 2022, the defendant filed a memorandum of law "requesting the court to deny legal fees and sanctions . . . ." He did not argue in his memorandum that the $300 weekly support order was improper. Indeed, the only reference in that memorandum to the

$300 weekly support order is contained in his argument that his failure to provide full compliance with the plaintiff's discovery requests "did not substantially prejudice the plaintiff as the court awarded her the full amount she requested in her proposed orders of $300/per week for the full retroactive period requested." The defendant did not file any response to the plaintiff's identification of her out-of-pocket medical and special schooling expenses, notwithstanding the court's order that he do so.

On May 11, 2022, the court issued a second part of its memorandum of decision, wherein it provided concluding orders after its review of the submissions. The court ordered: "In addition to the monthly support obligations for which orders have already been issued in the April 28, 2022 portion of this court's orders, the total amount of out-of-pocket medical and special schooling expenses for which [the defendant] remains responsible, up through January 25, 2022, is $44,651.78. [The defendant] is to pay that total amount to [the plaintiff] on or before January 25, 2023.

"[The defendant] has not complied with discovery requests as to his financials and has not provided an updated financial affidavit. The court will not penalize him with a fine for his failure to do so, but, based on the findings in the first portion of this decision, the court is confident that [the defendant] is more than capable of paying this award, or procuring a method to do so." The court denied the plaintiff's request for attorney's fees. This appeal followed.

On July 8, 2022, the plaintiff filed a motion for appellate counsel fees. After a hearing, the court granted the motion and ordered the defendant to pay $10,000 in appellate attorney's fees to the plaintiff. The defendant thereafter amended his appeal to challenge the court's

award of appellate attorney's fees. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that "[t]he trial court abused its discretion by ordering reimbursement of expenses twice denied by the court." Specifically, he contends that the order requiring reimbursement for Landmark College and Franklin Academy costs was barred by res judicata and collateral estoppel. As part of this claim, he argues that a prior court correctly had determined that the Landmark College costs "were outside the court's statutory jurisdiction under [General Statutes §] 46b-56c because the order in this case predated the October 1, 2002 effective date of the statute."[5] The plaintiff responds that the defendant's claim is unpreserved. We agree with the plaintiff and, thus, we decline to review the claim.

The following procedural history merits reiteration. At the conclusion of the February 16, 2022 hearing, the court stated that it wanted the plaintiff to provide "the specific amounts for each of [her] proposed orders"

[5] The defendant also argues that the court exceeded its authority under § 46b-84 (c) when it ordered the defendant to pay a portion of the Franklin Academy and Landmark College expenses. The defendant's argument in this regard is difficult to follow. First, the defendant appears to repeat his argument about the prior court orders. He then seems to fault the court for not considering the child support guidelines, even though § 46b-84 (c) explicitly states that the guidelines do not apply to orders issued thereunder and the defendant's counsel agreed before the trial court that the child support guidelines did not apply. See part II of this opinion. Finally, the defendant refers the court to brief portions of the legislative history of § 46b-84 (c) to suggest that the court's only authority under § 46b-84 (c) was to continue until age twenty-one a previously entered support order. He does so without any discussion of whether there is any ambiguity in the statute that would warrant our review of the legislative history. Furthermore, other than referring the court to the legislative history, the defendant's brief provides little argument or explanation as to its importance or relevance. We are not persuaded by any of these arguments, all of which are unpreserved because they were never raised in the trial court.

and wanted "from defendant's counsel the amounts on which [the] defendant agrees or disagrees." The court reiterated in its written order that "[t]he defendant's proposed order[s] shall include an indication as to whether he agrees or disagrees with each amount listed in the plaintiff's proposed orders." Moreover, in part one of its memorandum of decision, issued on April 28, 2022, the court stated that the defendant "is also to repay [the plaintiff] for one half of the expenditures she has made for the daughter's medical and school expenses up to January 25, 2022," and requested that the plaintiff resubmit the list in chronological order and with identification. Following the plaintiff's submission of the list, prepared as ordered by the court, which included the Landmark College and Franklin Academy expenses and identified the defendant's proposed 50 percent contribution, the defendant, in direct noncompliance with the court's order, did not file a response to the plaintiff's detailed identification of expenditures. After the issuance of part two of the court's memorandum of decision dated May 11, 2022, which ordered the defendant to reimburse the plaintiff for one half of the special schooling expenses, the defendant did not make any filings with the trial court suggesting that he disputed any of the expenses.

On appeal, the defendant contends in his brief that the plaintiff's entitlement to reimbursement for Franklin Academy and Landmark College expenses was addressed by two prior court orders. First, he notes that the court, *Nastri*, *J.*, on February 13, 2019, denied the plaintiff's motion for a postsecondary educational support order for both the parties' son and daughter. Second, he notes that the family support magistrate, Frederic Gilman, denied the plaintiff's motion for contempt, which motion included an allegation that the defendant failed to pay 50 percent of the costs of the

daughter attending Franklin Academy.[6] According to the defendant, because the plaintiff previously litigated and was unsuccessful with regard to her claims that the defendant should share in the Franklin Academy and Landmark College costs, her claims in the present motion are barred by res judicata and collateral estoppel. At no point in the present proceeding, however, did the defendant alert the court to any argument of collateral estoppel or res judicata with respect to the Franklin Academy or Landmark College expenses related to their daughter.[7] See *Cadle Co.* v. *Ogalin*, 175 Conn. App. 1, 13, 167 A.3d 402 (declining to consider res judicata argument raised for first time on appeal because "[r]es judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded" (internal quotation marks omitted)), cert. denied, 327 Conn. 930, 171 A.3d 454 (2017). As to the defendant's related contention that Judge Nastri correctly determined that the costs for Landmark College exceeded the court's statutory authority pursuant to § 46b-56c, Judge Nastri was never asked to address a claim under § 46b-84 (c). In fact, Judge Nastri's ruling denying the plaintiff's motion for postsecondary educational support made no mention of § 46b-84 (c), Landmark College, or the disabilities of the parties' daughter.

[6] The entirety of the portion of Magistrate Gilman's September 18, 2019 order regarding contempt states: "No Contempt Found. Contempt concluded; Regarding Franklin Academy."

[7] The defendant notes in his appellate brief that the plaintiff's counsel indicated during the hearing, in response to a question from the court, that she was not including a claim for amounts from Franklin Academy expenses. The defendant recognizes, however, that exhibit 5 specifically did include expenses for Franklin Academy and calculated the defendant's 50 percent share of those expenses. Moreover, the defendant recognizes that the plaintiff, following the court's order that she provide a more specific list of expenses, again included amounts paid to Franklin Academy and identified the defendant's 50 percent share due. The defendant failed to comply with the court's order that he respond to the list. Given this ambiguous record, we cannot conclude that counsel's single statement was intended to abandon the plaintiff's request for reimbursement.

"It is well known that this court is not bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. Practice Book § 60-5. The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Emphasis in original; internal quotation marks omitted.) *Ochoa* v. *Behling*, 221 Conn. App. 45, 50–51, 299 A.3d 1275 (2023); see also *Kennynick, LLC* v. *Standard Petroleum Co.*, 222 Conn. App. 234, 235 n.2, A.3d (2023) (declining to review claim of error with respect to compound prejudgment interest where defendant did not raise claim with trial court despite plaintiff expressly requesting that award in posttrial briefing).

Our examination of the record reveals that the defendant did not raise with the trial court any of the claims he now advances on appeal with respect to the Landmark College and Franklin Academy expenses. Consequently, those claims are not properly before this court, and we therefore decline to review them.

II

The defendant's second claim on appeal is that the court abused its discretion "by modifying the child support orders, without considering the child support guidelines . . . or any statutory criteria."[8] He contends

[8] The defendant also argues that the court abused its discretion, in both its reimbursement order and its weekly support order, by failing to consider his "other qualified dependents," namely, his three minor children. See footnote 10 and accompanying text of this opinion.

that the court, pursuant to § 46b-84 (c), had the authority only to extend, not modify, the support order. We decline to review this claim. To the extent that the defendant argues that the court abused its discretion generally in awarding support pursuant to § 46b-84 (c), we are not persuaded.

We begin with the language of § 46b-84 (c), which authorizes the court to make orders of support for disabled children until the child attains the age of twenty-one. Section 46b-84 (c) provides in relevant part that "[t]he court may make appropriate orders of support of any child with . . . a mental disability . . . who resides with a parent and is principally dependent upon such parent for maintenance until such child attains the age of twenty-one. The child support guidelines established pursuant to section 46b-215a shall not apply to orders entered under this subsection. . . ."

We first note that the defendant failed to raise at trial any claim regarding the court's statutory authority to issue a support order that exceeded his $250 weekly child support obligation when the child was a minor, and, thus, we decline to review that claim. As noted previously, "[o]ur rules of practice provide that we are not bound to consider a claim unless it was distinctly raised at trial or arose subsequent to the trial. Practice Book § 60-5. . . . A claim is distinctly raised if it is so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . A claim briefly suggested is not distinctly raised. . . . Our rules of procedure [also] do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Citation omitted; emphasis in original; internal quotation marks omitted.) *A & R Enterprises, LLC* v. *Sentinel Ins. Co., Ltd.*, 202 Conn. App. 224, 229,

244 A.3d 660, cert. denied, 336 Conn. 921, 246 A.3d 2 (2021).

Our review of the record reveals that the defendant had multiple opportunities before the trial court to raise his appellate claim that the court lacked the statutory authority to order support in an amount greater than the previous child support order but failed to do so. The first opportunity was presented when the plaintiff testified at trial that she was seeking the amount of $300 per week for the twenty-four month period from age nineteen until the daughter reached the age of twenty-one. At the hearing, the defendant did not raise any issue as to the dollar amount of support requested. Instead, he contested only whether their daughter had a mental disability and whether she resided with the plaintiff during the time period at issue. The second opportunity occurred when the plaintiff reiterated her request for the $300 weekly amount in her March 1, 2022 posttrial memorandum and specified that her request was made pursuant to § 46b-84 (c). The defendant did not file proposed orders or a posttrial memorandum addressing the plaintiff's request for support pursuant to § 46b-84 (c).[9] Accordingly, we decline to review the defendant's claim.

With respect to the defendant's remaining arguments that the court failed to consider his "other qualified dependents," we reject this contention as unsupported

[9] The defendant contends in his appellate brief that the plaintiff's motions, which she filed as a self-represented party, "asked only for an extension of the child support order, not a modification, and for an order regarding 'services, care programs, education, medical expenses,' most of which had previously been denied. To the extent the motion was treated as a modification, the court should have had testimony and evidence establishing the customary [General Statutes §] 46b-86 criteria before a modification could be granted." At the hearing, the defendant's counsel expressly stated that the child support guidelines do not apply, and he cannot now claim on appeal that they do. Furthermore, as previously noted, none of these issues were raised and preserved properly in the trial court.

by the record. First, the defendant fails to identify in his appellate brief any evidence that he presented to the trial court as to the needs of his other children. Second, despite the express order of the court that he file an updated financial affidavit, which could have reflected current expenses related to his other children, the defendant failed to do so. Despite this failure, the court nevertheless considered the defendant's financial circumstances in making its support order. In its memorandum of decision, the court expressly considered the defendant's October, 2021 financial affidavit, which reported $48 in weekly children's activities, and found that the financial affidavit reported income of approximately "$163,000 per year, with an excess of income over all expenses each week in the amount of more than $400."[10] The court also made findings as to the defendant's purchase of his home and expressed doubt as to the credibility of the defendant's representation

[10] Our review of the record reveals that the defendant offered no evidence as to the minor children beyond his testimony as follows:

"[The Plaintiff's Counsel]: And on the last page where there's a summary of your income versus your expenses, it shows your net weekly income . . . of $2170 and net weekly—total weekly expenses of $1754. If my math is correct, that's a $416 difference in the positive between your expenses and your income. Does that sound about right?

"[The Defendant]: Yes.

"[The Plaintiff's Counsel]: Where does that money go every week?

"[The Defendant]: Savings, it just goes. Got a big house to—you know, a house, a family, kids, things come up.

"[The Plaintiff's Counsel]: You only show on here that you have a savings account with $400 in it?

"[The Defendant]: That's correct.

"[The Plaintiff's Counsel]: So, 416—your testimony is that $416 per week goes into savings?

"[The Defendant]: For things that happen, my kids are destructive as young kids are. Things break, I've got to replace them, fuel's gone up, everything, food.

* * *

"[The Plaintiff's Counsel]: What children do those—is that $48 per week [in children's activities identified on the defendant's financial affidavit] benefit for?

"[The Defendant]: For the three boys that live with me at home."

that the value of the home had decreased from its purchase price of $455,000 in summer, 2021, to $409,000 as of October, 2021. The court noted the defendant's testimony that his wife's parents had paid the $50,000 down payment. Moreover, the court found that the defendant was "more than capable of making the financial obligations that are warranted in this matter and is capable of procuring the funds for same." The defendant does not challenge these factual findings, made in connection with the court's support order, as clearly erroneous.[11]

Consistent with § 46b-84 (c), the court expressly found that the daughter had a mental disability and resided with the plaintiff at all times. The defendant has not provided this court with any basis to conclude that the court abused its discretion in determining that the needs of the parties' daughter would be met by a $300 weekly contribution and that the defendant had the ability to make that contribution.

III

The defendant's final claim on appeal is that the court abused its discretion in awarding appellate attorney's fees to the plaintiff. We disagree.

The following additional procedural history is relevant to this claim. Following the defendant's appeal to this court, the plaintiff filed a motion for an order of appellate counsel fees. On August 3, 2022, the court held a hearing, during which both parties testified and submitted financial affidavits. The plaintiff testified that she was requesting that the court order the defendant to pay counsel fees in the amount of her counsel's initial retainer, which was $12,500, plus the cost of transcripts, which was estimated to be approximately $500.

[11] In the portion of his brief challenging the court's award of attorney's fees, the defendant does identify these factual findings as improperly supporting that award. See footnote 12 of this opinion.

In its August 25, 2022 memorandum of decision, the court granted the motion and ordered the defendant to pay $10,000 in attorney's fees to the plaintiff. The court stated that it had considered the parties' testimony at the hearing, thoroughly reviewed the parties' briefing, considered the applicable decisional law, and "thoroughly considered all of the criteria set forth in General Statutes § 46b-82, as directed by General Statutes § 46b-62 . . . ." The court stated: "At the hearing on this matter, the defendant contended that his earnings had declined; however, his credibility regarding that issue left much to be desired. Contrary to the defendant's assertions, the financial situations of the parties are not at all parallel, and the plaintiff has borne, and continues to bear, the entire financial responsibility for the parties' special needs child. Furthermore, the award of counsel fees is essential so as to not undermine the court's decision directing the defendant to contribute to the support for the parties' special needs child, for the limited period of time permitted by . . . § 46b-84—the decision that is the subject of the defendant's appeal."

We next set forth applicable legal principles and our standard of review. Section 46b-62 governs the award of attorney's fees in family court proceedings and provides in relevant part that "the court may order . . . any parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82," the alimony statute. These criteria include, inter alia, "the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ." General Statutes § 46b-82 (a). "Courts ordinarily award counsel fees . . . so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their

own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . . [A]n award of attorney's fees . . . is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." (Citation omitted; internal quotation marks omitted.) *Dolan* v. *Dolan*, 211 Conn. App. 390, 405, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

"Whether to allow [attorney's] fees, and if so in what amount, calls for the exercise of judicial discretion by the trial court. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016).

The defendant argues that the court improperly considered the burdens borne by the plaintiff with respect to the parties' daughter. Specifically, he contends that "the court's decision palpably demonstrates the court's sympathy for the plaintiff's situation, focusing its findings on her and on the burdens she bears and not on the statutory criteria." He also contends that the court failed to consider the defendant's ability to pay.[12]

[12] In his argument that the court improperly awarded attorney's fees, the defendant references the court's findings with respect to its award of support, made months prior to the plaintiff's motion for attorney's fees. Specifically, he argues that "[t]he court made no findings regarding the defendant's net income. Rather, the court somewhat dismissively cited his gross income as a basis, made reference to his recent purchase of a home, and with no other evidence found in its April 28th decision . . . the 'father is more than capable of making the financial obligations that are warranted in this matter and capable of procuring the funds for same.' The evidence before the court

Finally, the defendant argues that the court failed to consider the parties' financial affidavits, particularly the defendant's cash assets of only $3900 and the plaintiff's ownership of rental property and $115,000 in deferred compensation. We disagree.

First, we note that the court expressly stated that it had considered the statutory criteria set forth in § 46b-82, as required by § 46b-62. The court's general reference to those criteria is all that is required. See *Leonova* v. *Leonov*, 201 Conn. App. 285, 331, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021); see also *Jewett* v. *Jewett*, 265 Conn. 669, 693, 830 A.2d 193 (2003) ("[i]n making an award of attorney's fees under § 46b-82, [t]he court is not obligated to make express findings on each of these statutory criteria" (internal quotation marks omitted)).

Second, we reject the defendant's argument regarding the parties' financial affidavits.[13] The court expressly found the defendant not credible with respect to his claimed decrease in earnings.[14] We cannot second-guess the court's credibility determination. See *Giordano* v. *Giordano*, 203 Conn. App. 652, 662, 249 A.3d 363 (2021) (rejecting defendant's claim that his financial affidavit demonstrated lack of ability to pay where court, in

cannot support that finding and no claim of missing discovery can permit the court to leap to such unbased assumptions." (Citation omitted.) We are unpersuaded by the defendant's contentions. As discussed in part II of this opinion, notwithstanding the defendant's failure to comply with discovery and the court's order that he file an updated financial affidavit, the court expressly considered the earlier financial affidavit in rendering its orders.

[13] The defendant again argues that the court failed to consider "his obligations to his three . . . minor children and his family whom the court never mentioned at all in any of its decisions." We disagree. The court considered the defendant's financial affidavit, and the defendant did not offer any evidence during the hearing beyond testifying as to the ages of his minor children. See also footnote 10 and accompanying text of this opinion.

[14] When asked by his counsel how he figured that he earns $1975 per week, he responded: "I'm not sure." He later testified that he determines his revenue by looking to deposits in his business account.

finding defendant had ability to pay, expressly found defendant not credible with respect to purported inability to pay). As to the defendant's contention that the plaintiff had "far more cash assets" than he did, the court found that "the financial situations of the parties are not at all parallel . . . ." Moreover, "ample liquid funds [are] not an absolute litmus test for an award of counsel fees. . . . [To] award counsel fees to a [party] who had sufficient liquid assets would be justified, if the failure to do so would substantially undermine the other financial awards." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, supra, 662–63. In the present case, the court found that the award of counsel fees was "essential so as to not undermine the court's decision directing the defendant to contribute to the support for the parties' special needs child . . . ." On the basis of the record, we conclude that the foregoing findings justified the court's award of attorney's fees, and the award did not constitute an abuse of its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

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## FINANCE OF AMERICA REVERSE, LLC *v.* STEPHANIE HENRY ET AL.
## (AC 45836)

Elgo, Prescott and Keller, Js.

*Syllabus*

The substitute plaintiff, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant H. The trial court rendered judgment of foreclosure by sale and set a date for the sale. After the court extended the sale date to June 25, 2022, H, on May 10, 2022, filed a motion to open the foreclosure judgment and again extend the sale date. The court denied the motion to open on May 31, 2022, twenty-five days before the sale date. On June 22, 2022, three days before the sale date, the court denied a motion H had filed for reconsideration of the denial

of her motion to open. After the sale went forward on June 25, 2022, H filed a motion for an order seeking to nullify the sale. H claimed that the sale was in violation of the automatic appellate stay of execution that was in effect on June 25, 2022, under the applicable rule of practice (§ 61-11 (a)), following the court's denial of her motion for reconsideration on June 22, 2022. The trial court denied H's motion for order, reasoning that her motion for reconsideration was an "other similar motion" under § 61-11 (h) that had been filed fewer than twenty days before the sale date, thereby permitting the foreclosure sale to proceed without violating the automatic stay. The court thereafter approved the sale and deed. *Held* that the trial court abused its discretion when it denied H's motion for an order nullifying the foreclosure sale and thereafter approved the sale and deed: the court's May 31, 2022 denial of H's motion to open the foreclosure judgment and extend the sale date was an appealable final judgment that gave rise to both a twenty day period in which to appeal as well as an automatic appellate stay, pursuant to § 61-11 (a), of any action to enforce the judgment through June 22, 2022, when the extended appeal period would have expired, but, because H's motion for reconsideration of that denial was filed within that appeal period on June 7, 2022, a new appeal period arose, pursuant to the applicable rule of practice (§ 63-1 (c) (1)), that extended the automatic appellate stay to July 12, 2022, in accordance with § 61-11 (a), which thus rendered the foreclosure sale void ab initio; moreover, because the motion to open was denied more than twenty days before the June 25, 2022 sale date, the court improperly determined that the denial of that motion implicated § 61-11 (h), which, if applicable, would have permitted the sale to proceed despite the automatic stay; furthermore, contrary to the substitute plaintiff's assertion, the reconsideration motion's lack of a notation at the bottom of its first page identifying it as a motion filed pursuant to the applicable rule of practice (§ 11-11) was not a sufficient basis on which to render the reconsideration motion ineffective for the purpose of creating a new appeal period, as it is the content of the motion that is determinative of whether it creates a new appeal period and extends the appellate stay, this court having long considered the failure to adhere to such requirements as mere technical defects or clerical errors; accordingly, on remand, the trial court was directed to vacate the foreclosure sale and to set a new sale date.

Argued October 11—officially released December 12, 2023

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where Wilmington Savings Fund Society, FSB, as Trustee of Finance of America Structured Securities

Acquisition Trust 2019-HB1, was substituted as the plaintiff; thereafter, the court, *Robaina*, *J.*, rendered judgment of foreclosure by sale; subsequently, the court, *Budzik*, *J.*, denied the named defendant's motions to open the judgment and for reargument; thereafter, the court, *Baio*, *J.*, granted the substitute plaintiff's motion to approve the sale and committee deed and report, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

*John A. Sodipo*, for the appellant (named defendant).

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

*Opinion*

PRESCOTT, J. The present appeal concerns the proper application of Practice Book § 61-11 (h),[1] which limits the effect of the automatic appellate stay that arises following the denial of a motion to open a foreclosure judgment if that denial occurs fewer than twenty days before a scheduled foreclosure auction. In particular, we address the interplay between Practice Book §§ 61-11 (h) and 63-1 (c) (1),[2] the latter of which governs

[1] Practice Book § 61-11 (h) provides: "In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period."

[2] Practice Book § 63-1 (c) (1) provides in relevant part: "If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . .

"Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the

when and how a new appeal period is created that, by implication, also extends any existing appellate stay of execution. See Practice Book § 61-11 (a) (automatic appellate stay of action to enforce or carry out judgment exists until time to appeal judgment expires).[3]

The defendant Stephanie Henry[4] appeals, following the court's approval of a foreclosure sale, from the denial of her motion for an order "nullifying" that sale.[5] The defendant claims that the foreclosure sale was conducted in violation of the automatic appellate stay that arose as a result of the denial of her motion to open and extend the sale date, and that the court improperly relied on Practice Book § 61-11 (h) as a basis for refusing to set aside the sale. In response, the substitute plaintiff, Wilmington Savings Fund Society, FSB, as Trustee of Finance of America Structured Securities

judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment.

"Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous paragraph. . . ."

[3] Practice Book § 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. . . ."

[4] In addition to Henry, the complaint named the following parties as additional defendants on the basis of their potential interests in the subject property: The United States Secretary of Housing and Urban Development, the Department of Revenue Services, and the Office of the Probate Court Administrator. These additional defendants were defaulted by the trial court for failure to appear and have not participated in this appeal. Accordingly, we refer to Henry as the defendant throughout this opinion.

[5] Although captioned as a motion for order to nullify the sale, the defendant's motion effectively objects to the court's approval of the sale on the ground that the sale was invalid because it was conducted in violation of an appellate stay.

The defendant also nominally appeals from the denial of her subsequent motion to reconsider her motion for order but has raised no independent claims of error regarding that ruling.

Acquisition Trust 2019-HB1,[6] asserts that the sale was properly conducted as ordered by the court and that the court correctly denied the defendant's motion for order and, subsequently, approved the sale. For the reasons that follow, we agree with the defendant that the property was auctioned in violation of the automatic stay. Accordingly, we reverse the judgment of the court and remand with direction to vacate the foreclosure sale and set a new sale date.

The record reveals the following relevant facts and procedural history. The original plaintiff, Finance of America Reverse, LLC, commenced the present residential mortgage foreclosure action in April, 2017. The defendant appeared as a self-represented party and later filed an answer to the complaint. The court rendered judgment of foreclosure by sale on July 24, 2017, setting a sale date of November 4, 2017. The defendant did not file an appeal challenging the merits of the foreclosure judgment.

The defendant successfully moved to open the judgment to extend the sale date on three separate occasions, with the court eventually setting a new sale date of October 13, 2018. The sale did not go forward, however, because the defendant filed a bankruptcy petition on October 10, 2018, which stayed the foreclosure proceedings. The United States Bankruptcy Court dismissed the petition on October 29, 2018.

The plaintiff subsequently filed a motion asking the trial court to update the debt, award additional attorney's fees, and set a new sale date. The court granted the plaintiff's motion on July 22, 2019, updated the terms

[6] In 2019, Wilmington Savings Fund Society, FSB, as Trustee of Finance of America Structured Securities Acquisition Trust 2019-HB1 (Wilmington), was substituted as the plaintiff for the original named plaintiff, Finance of America Reverse, LLC. We therefore refer in this opinion to Wilmington as the plaintiff.

of the judgment, and set a new sale date of November 9, 2019. One day before the November sale date, however, the defendant filed a second bankruptcy petition. That petition was dismissed on May 29, 2020. Because the sale date once again had passed, the plaintiff filed a motion asking the court to update the debt, award additional attorney's fees, and set a new sale date. The court granted the motion on November 15, 2021, setting a new sale date of May 21, 2022.

On April 26, 2022, the defendant filed a motion to open asking the court to extend the sale date from May to October, 2022, because her daughters were graduating, one from high school and the other from college. The court granted the motion but extended the sale date only to June 25, 2022.

On May 10, 2022, the defendant filed the motion to open that is directly related to the issue raised in the present appeal. In that motion, the defendant stated, in relevant part, that "[m]y desire is to have [five] more months from the June [25, 2022] sale date. I still have equity left in the home and I have a buyer who is now willing and able to purchase the property who would let me and my children to continue living here." The plaintiff filed an objection to the motion to open. It argued in relevant part that the foreclosure action had been pending since 2017; that this was the defendant's fifth motion to extend the sale date; and that allowing the defendant an additional five months to pursue a private sale, during which time the plaintiff would continue to incur further financial losses, would be inequitable to the plaintiff. Twenty-five days prior to the scheduled sale date, the court, *Budzik*, *J.*, denied the motion to open, indicating in its order that the defendant had failed to appear for argument.

On June 7, 2022, the defendant filed a motion to reargue/reconsider the motion to open. Although she

did not address her failure to appear, she reasserted that she had a qualified buyer for the property and attached a copy of an executed real estate sale agreement dated June 6, 2022. The plaintiff filed an objection to the motion to reargue/reconsider arguing that the defendant had failed to state a proper basis for granting reargument. On June 22, 2022, three days before the sale date, the court denied the defendant's motion without comment. The foreclosure sale went forward as scheduled on June 25, 2022, with the plaintiff as the highest bidder.

On July 14, 2022, the committee filed its report and a motion seeking acceptance of the report and approval of the sale and deed.[7] That same day, the defendant, now represented by counsel,[8] filed a motion for order asking the court to exercise its "supervisory powers at law and in equity to nullify the foreclosure sale in this matter . . . ." In her motion, the defendant argued that an appellate stay was in effect on June 25, 2022, and therefore the sale violated Practice Book § 61-11 (a) and her right to due process under the state constitution. The defendant filed a memorandum of law in support of her motion for order. The plaintiff filed an objection to the defendant's motion for order, arguing that "[t]here was no automatic stay/appeal period in place [and therefore] execution of the sale was not improper as alleged by the defendant." The defendant filed a reply memorandum.

Judge Budzik issued an order on August 5, 2022, denying the defendant's motion for order without comment except for a citation to Practice Book § 61-11 (h) with the following parenthetical: "In any action for

[7] The defendant never filed an appeal challenging the denial of her motion to open, and thus any automatic appellate stay expired along with the appeal period on July 12, 2022.

[8] Counsel filed an appearance in lieu of the self-represented defendant on July 13, 2022.

foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled . . . .'' (Internal quotation marks omitted.) The defendant filed a motion to reargue her motion for order, which the court denied on September 2, 2022. In its order denying the motion to reargue, the court further explained its rationale for denying the motion for order. The court stated that it viewed the defendant's motion for reconsideration of the denial of the motion to open and extend the sale date as an ''other similar motion'' under Practice Book § 61-11 (h) because it sought the same relief as the motion to open—to delay the sale. Because the court's denial of the motion for reconsideration came three days prior to the sale date, it concluded that Practice Book § 61-11 (h) applied and that the sale could proceed without violating the automatic stay.

On September 19, 2022, the court, *Baio*, *J.*, accepted the committee's report, approved the sale and deed, and allowed the fees and expenses of the committee and appraiser. This appeal followed.[9]

The sole issue before us on appeal is whether the court improperly denied the motion for order and approved the sale because the sale was conducted in violation of an automatic appellate stay. The defendant argues that Practice Book § 61-11 (h) is inapplicable because her motion to open was denied more than twenty days before the foreclosure sale date and the

[9] After the appeal was filed, the plaintiff filed a motion asking the trial court ''to terminate the appellate stay on this appeal and all future appeals . . . .'' The defendant filed an objection to that motion. The trial court denied the motion, and the plaintiff did not seek review of that order by this court pursuant to Practice Book §§ 61-14 and 66-6. The plaintiff also filed a motion to dismiss the appeal as frivolous, which this court denied.

denial of her subsequent motion to reargue extended the existing appellate stay so as to bar the sale.

The plaintiff agrees that the denial of the motion to open did not trigger Practice Book § 61-11 (h) but argues that the motion to reargue the denial of the motion to open did not result in a new appeal period because it was defective in form and, regardless of its direct applicability, § 61-11 (h) should be broadly construed as providing that a foreclosure sale is not a proceeding to enforce or carry out a judgment and thus cannot violate the automatic stay. We agree with the defendant's argument and find the counterarguments advanced by the plaintiff unpersuasive. Accordingly, we reverse the judgment of the court approving the sale and remand the case with direction to set a new sale date.

We begin by setting forth our standard of review, followed by a discussion of the relevant rules of practice and other legal principles that guide our review in this matter. "A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 811, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005). Thus, ordinarily, we would review a court's order regarding whether to grant an extension of a foreclosure sale date or to approve a completed sale under our abuse of discretion standard. See, e.g., *U.S. Bank Trust, N.A.* v. *Giblen*, 190 Conn. App. 221, 229, 209 A.3d 1266, cert. denied, 333 Conn. 903, 215 A.3d 159 (2019); *Centerbank* v. *Connell*, 29 Conn. App. 508, 511, 616 A.2d 282 (1992). Here, however, the defendant claims that the sale was conducted in violation of an automatic appellate stay and our resolution of that claim requires us to construe our rules of practice. Accordingly, the present appeal raises questions of law over which our review is plenary.

See, e.g., *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 821, 191 A.3d 247 (2018); see also *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 766, 966 A.2d 239 (2009) ("[a]lthough the court in a foreclosure action exercises discretion, it must correctly apply the law").

"The interpretive construction of [our] rules of practice is . . . governed by the same principles as those regulating statutory interpretation. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . [If the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, *unless context dictates otherwise*. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Emphasis added; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Fraboni*, supra, 182 Conn. App. 818–22.

It is axiomatic that, with limited exceptions not relevant here; see Practice Book § 61-11 (b) and (c); in noncriminal actions, which include mortgage foreclosure proceedings, an automatic appellate stay of any action to enforce or carry out an appealable judgment

exists "until the time to file an appeal [from that judgment] has expired." Practice Book § 61-11 (a). "[T]here are [generally] three appealable determinations in a case involving a foreclosure by sale: the judgment ordering a foreclosure by sale, the approval of the sale by the court, and the supplemental judgment [in which proceeds from the sale are distributed]." (Internal quotation marks omitted.) *Toro Credit Co.* v. *Zeytoonjian*, 341 Conn. 316, 322, 267 A.3d 71 (2021); see id. (recognizing that foreclosure is area of our law "in which we have held that certain steps along that road, although not literally final, inasmuch as the case goes on, are considered final judgments for purposes of appellate jurisdiction").

In addition, this court has held that the denial of a motion to open a judgment of foreclosure by sale is also an appealable final judgment. See *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, supra, 112 Conn. App. 756 (recognizing that "appellate courts routinely afford review to appeals from the denial of a motion to open a judgment of foreclosure by sale" and collecting cases). This includes the denial of motions to open a foreclosure judgment solely for the purpose of extending the sale date.[10] See, e.g., *Milford* v. *Recycling, Inc.*, 213 Conn. App. 306, 307–309, 278 A.3d 1119 (considering appeal in municipal tax lien foreclosure action

[10] "In the context of an appeal from the denial of a motion to open judgment . . . [if] an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying [foreclosure] judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time for appeal." (Citation omitted; internal quotation marks omitted.) *USA Bank* v. *Schulz*, 143 Conn. App. 412, 416–17, 70 A.3d 164 (2013).

taken from denial of motion to open seeking to extend sale date because defendant trustee had ongoing contract negotiations with willing buyer), cert. denied, 345 Conn. 906, 282 A.3d 981 (2022).

Practice Book § 61-11 (h) is a relatively new provision that, for policy reasons, was added to provide a limited exception to the automatic appellate stay.[11] The commentary to the new provision provides that it was intended "to address the problem of the ' "perpetual motion machine' " recognized in *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, [supra, 112 Conn. App. 762], whereby a party could indefinitely delay conclusion of the foreclosure proceedings by filing repeated dilatory motions to open the foreclosure judgment." Practice Book (2014) § 61-11 (h), commentary. In other words, Practice Book § 61-11 (h) operates as a deterrent to a foreclosure defendant's dilatory motion practice by providing a limited exception to the automatic appellate stay provision that allows a scheduled sale of the property to proceed.

This court discussed Practice Book § 61-11 (h) in *Deutsche Bank National Trust Co.* v. *Fraboni*, supra, 182 Conn. App. 811, stating: "Section 61-11 (h) addresses only a last minute motion to open filed by a foreclosure defendant to disrupt a scheduled foreclosure sale. It does not expand a foreclosure defendant's rights to an automatic stay. To the contrary, it 'stays' only the filing of a motion to approve the sale 'until the

[11] Practice Book § 61-11 (g), addressing the filing of dilatory motions to open judgments of strict foreclosure, was added at the same time and both provisions took effect October 1, 2013. Practice Book § 61-11 (g) provides in relevant part: "In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. . . ."

expiration of the appeal period following the denial of the motion [to open] without an appeal having been filed.' . . . Consistent with our interpretation of § 61-11 (a), this language provides the defendant with relief [regarding the approval of the sale] only if he files a timely appeal." (Citation omitted.) Id., 828–29.

Our rules effecting the automatic appellate stay, however, are not limited to Practice Book § 61-11 et seq. Practice Book § 63-1 contains provisions that govern the time in which to file an appeal (appeal period), including circumstances in which a new appeal period is created, which also has an impact on the appellate stay. Parties ordinarily have twenty days from the date that notice of an appealable judgment is given within which to file an appeal. Practice Book § 63-1 (a). If, however, a party files a motion within that "original" appeal period that, if granted, would render the appealable judgment ineffective, "a new twenty day period . . . for filing the appeal shall begin on the day that notice of the ruling [on such motion] is given . . . ." Practice Book § 63-1 (c) (1). An appeal from the judgment "may be filed either in the original appeal period, which continues to run, or in the new appeal period." Practice Book § 63-1 (a).

To summarize, because it is well settled that the denial of a motion to open a judgment of foreclosure by sale is an appealable final judgment, a party may challenge the denial of a motion to open a foreclosure judgment either during the original appeal period or, *if a Practice Book § 63-1 (c) (1) motion is filed and denied*, during the resulting new appeal period. Moreover, any automatic appellate stay in effect as a result of the denial of a motion to open remains throughout the duration of the new appeal period. Except in the limited instances in which the exception provided for in Practice Book § 61-11 (h) is applicable, a foreclosure sale conducted while an appellate stay is in effect is

void ab initio. See *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, supra, 112 Conn. App. 760–66; see also *RAL Management, Inc.* v. *Valley View Associates*, 88 Conn. App. 430, 439, 872 A.2d 462 (2005) ("Practice Book § 61-11 serves to stay proceedings to enforce or carry out the judgment . . . until the time to take an appeal has expired, thereby forbidding . . . a sale in a foreclosure by sale" (internal quotation marks omitted)), rev'd on other grounds, 278 Conn. 672, 899 A.2d 586 (2006).

Applying the foregoing in the present case, we conclude that the foreclosure sale on June 25, 2022, was conducted in violation of an appellate stay. On May 10, 2022, the defendant filed a motion to open the judgment of foreclosure by sale for the purpose of extending the June 25, 2022 sale date. The motion to open, which was filed more than twenty days after the latest updated foreclosure judgment was rendered on November 15, 2021,[12] sought only to postpone the sale date. Under the circumstances of this case, the granting of the motion to open, therefore, would not have rendered the foreclosure judgment ineffective, and, accordingly, the motion to open cannot reasonably be construed as the type of motion contemplated by Practice Book § 63-1 (c) (1).

We recognize that, as previously indicated; see footnote 2 of this opinion; one paragraph of Practice Book § 63-1 (c) (1) contains a nonexhaustive list of the types of motions that lead to the creation of a new appeal period, including motions that seek "*the opening or setting aside of the judgment* . . . ." (Emphasis

[12] Although the court granted a motion to open and extend the sale date on May 2, 2022, it did not alter any of the financial terms of the foreclosure judgment rendered on November 15, 2021. Cf. *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 690, 899 A.2d 586 (2006) (noting "substantive distinction between opening a judgment to modify or to alter incidental terms of the judgment, leaving the essence of the original judgment intact, and opening a judgment to set it aside").

added.) The subsequent paragraph provides examples of motions that do not give rise to a new appeal period, which includes motions that seek "*reargument of a motion listed in the previous paragraph.*" (Emphasis added.) Practice Book § 63-1 (c) (1).

Reading the highlighted provisions out of context might lead to the conclusion that, although a new appeal period arises following the denial of a motion to open a judgment, the denial of a motion to reargue the denial of a motion to open can never give rise to another appeal period. That conclusion, however, would be incorrect, particularly under the circumstances of the present case. Stated simply, Practice Book § 63-1 (c) (1) was intended to limit parties to one opportunity for the creation of an additional appeal period in which to challenge any particular final judgment. Thus, motions seeking reargument of a motion that, if granted, would render the judgment at issue ineffective, cannot result in an additional appeal period. In the present case, the motion to open to extend the sale day was not filed within the twenty day appeal period challenging the judgment of foreclosure by sale and thus was not a § 63-1 (c) (1) motion. The denial of the motion to open to extend the sale day was itself an appealable final judgment. Accordingly, the motion to reargue the motion to open was the first § 63-1 (c) (1) motion filed, and its denial did create a new appeal period, thus extending both the time to appeal the denial of the motion to open and the attendant appellate stay of execution.

On May 31, 2022, which was twenty-five days prior to the sale date, the court issued notice denying the motion to open. Because the denial of a motion to open a judgment of foreclosure is an immediately appealable judgment, a twenty day period in which to appeal the judgment began to run. Simultaneously, an automatic appellate stay of any action to enforce the judgment

sprang into effect "until the time to file an appeal ha[d] expired." Practice Book § 61-11 (a). The original twenty day appeal period and its attendant appellate stay would have expired on June 22, 2022, three days before the sale date. Moreover, because the motion to open was denied more than twenty days prior to the scheduled sale date, the denial of the motion to open did not directly implicate Practice Book § 61-11 (h), which, if applicable, would have permitted the sale to proceed despite the automatic stay. In other words, had the defendant taken no additional action, the appellate stay would have expired prior to the sale date and the foreclosure auction could have proceeded as scheduled. If the defendant had filed an appeal, the automatic stay would have continued until the appeal was finally resolved, and the sale date would have passed. Practice Book § 61-11 (a).

The defendant, however, on June 7, 2022, which was within the initial appeal period from the denial of her motion to open, filed a motion to reconsider/reargue the denial of the motion to open. If granted, that motion would have rendered the denial of the motion to open, and thus the court's refusal to extend the sale date, ineffective. Thus, pursuant to Practice Book § 63-1 (c) (1), when the court denied the motion to reargue, a new appeal period in which to challenge the denial of the motion to open began to run and the automatic appellate stay that was then in effect was extended through the new appeal period in accordance with Practice Book § 61-11 (a). Consequently, the new appeal period and extended appellate stay of execution did not expire until July 12, 2022. The existence of the appellate stay and the inapplicability of Practice Book § 61-11 (h) should have precluded the committee from conducting the foreclosure sale on June 25, 2022. Accordingly, the court abused its discretion by failing

to grant the defendant's motion for order and, subsequently, approving the sale.

In its appellate brief, the plaintiff appears to acknowledge that, because the court denied the defendant's motion to open more than twenty days before the scheduled sale date, Practice Book § 61-11 (h), by its clear and express terms, did not apply and, therefore, provided no authority to conduct the sale in violation of the automatic stay.

The plaintiff also appears to concede that the denial of the motion to open resulted in an appellate stay of execution and that the denial of a motion to reconsider that judgment ordinarily would have extended that appellate stay for an additional twenty days, which, under our precedent, would have rendered the sale date inoperable. Nevertheless, the plaintiff argues that the defendant's motion to reargue failed to comply with a technical requirement in Practice Book § 11-11, which provides that a motion that would result in a new appeal period must include a notation on the bottom of the first page "that such motion is a [Practice Book §] 11-11 motion." The plaintiff argues, without providing any legal authority, that this procedural irregularity meant that the denial of the motion would not have resulted in a new appeal period and thus also could not have acted to extend the appellate stay. This court, however, has, as a matter of policy, long considered the failure to adhere to such requirements as a mere technical defect or clerical error. See, e.g., *Prioleau* v. *Agosta*, 220 Conn. App. 248, 253 and n.2, 297 A.3d 1012, 1017 (2023) (describing failure to include Practice Book § 11-11 notation on bottom of first page as a clerical error). Although failure to comply with the technical requirements of Practice Book § 11-11 may provide a proper ground for denying the motion, such failure is not a sufficient basis to render ineffective for the purpose of creating a new appeal period a motion that otherwise

adheres to the substance of Practice Book § 63-1 (c) (1). See *Malloy* v. *Colchester*, 85 Conn. App. 627, 635, 858 A.2d 813 (noting that "our appellate courts have repeatedly eschewed applying the law in such a hypertechnical manner so as to elevate form over substance" (internal quotation marks omitted)), cert. denied, 272 Conn. 907, 863 A.2d 698 (2004). It is the content of the motion to reargue that is determinative of whether the motion creates a new appeal period and extends the automatic appellate stay. Here, the defendant's motion clearly sought reconsideration of her motion to open and, thus, the denial of that motion created a new appeal period.[13]

The plaintiff further argues that, even if an appellate stay of execution was in place, this should not have barred the sale from proceeding because it is the approval of the sale, not the auction of the property, that cuts off a foreclosure defendant's right of redemption and thus truly effectuates the judgment of foreclosure by sale. The present appeal, however, does not challenge the judgment of foreclosure by sale but the court's judgment to not extend the sale date in light of the defendant's argument that she had secured a willing buyer. Conducting the sale during the pendency of an appeal from the denial of a motion to open to extend the sale date would effectuate that judgment. We are unpersuaded by the plaintiff's argument to the contrary.

Moreover, we reject the plaintiff's argument that, although Practice Book § 61-11 (h) is admittedly inapplicable under the facts of this case, we should construe

[13] The trial court indicated that, because the motion for reconsideration essentially sought the same relief as the motion to open, it was an "other similar motion," as that term is used in Practice Book § 61-11 (h). The plaintiff has not advanced this argument on appeal. Nevertheless, we reject the court's interpretation of "other similar motion" as encompassing a timely Practice Book § 63-1 (c) (1) motion. Rather, we construe this language as simply indicating that a foreclosure defendant cannot escape application of Practice Book § 61-11 (h) by captioning its motion as something other than a motion to open.

§ 61-11 (h) broadly to mean that conducting a foreclosure sale is no longer an action that ever would violate the automatic stay. As we have indicated, we view the rule as providing a limited exception to the scope of the automatic stay, no more. Nothing in its plain language suggests otherwise or that it was intended to overturn well settled precedent of this court.

The judgment is reversed and the case is remanded with direction to vacate the sale and to set a new sale date.

In this opinion the other judges concurred.